

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Union County  
John C. Hayes, III, Circuit Court Judge  
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**RECEIVED**

MAR 27 2014

**S.C. Supreme Court**

DONNIE M. MALPASS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001460

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PETITION FOR WRIT OF CERTIORARI  
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DAVID ALEXANDER  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court correctly granted petitioner a belated appeal of the denial of his prior post-conviction relief application because of his attorneys' failure to file his appeals, pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) and White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974) ?

## STATEMENT

On September 11, 2003, a Union County grand jury indicted petitioner for two counts of lewd act on a minor. App. 374. On March 9, 2004, petitioner was tried before the Honorable Lee S. Alford and a jury. App. 1. Lisa Collins and Dan Kinkard represented the State. App. 1. Bill Aul represented petitioner. App. 1. The jury convicted petitioner of one count, but acquitted him on the other count. App. 288, ll. 14 – 21. Petitioner did not file an appeal.

On August 7, 2008, petitioner filed a PCR application. App. 302. On February 4, 2010, a hearing was held before the Honorable Brooks P. Goldsmith. App. 322. Jennifer Kinzeler represented the State. App. 322. Melinda Butler represented petitioner. App. 322. On March 24, 2010, Judge Goldsmith denied petitioner's PCR application. App. 336. Petitioner did not file an appeal.

On August 2, 2012, petitioner filed a second PCR application. App. 343. On May 14, 2013, a hearing was held before the Honorable John C. Hayes, III. App. 355. J. Rutledge Johnson represented the State. App. 355. Caroline Horlbeck represented petitioner. App. 355. On June 13, 2013, Judge Hayes granted petitioner a belated appeal from the first PCR. App. 369. This petition follows.

## ARGUMENT

The PCR court correctly granted petitioner a belated appeal of the denial of his prior post-conviction relief application because of his attorneys' failure to file his appeals, pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) and White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974).

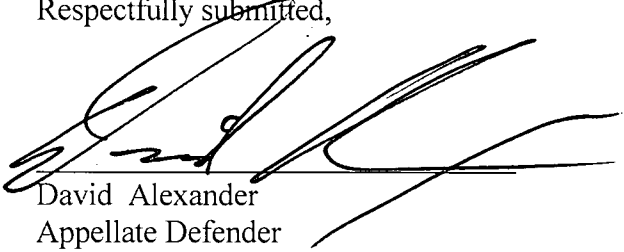
“An indigent defendant has the right to be informed of an appeal and the manner and method for taking the appeal.” Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The appropriate scope of review of the PCR court's holding is whether there is any evidence of probative value to uphold the PCR court's findings. Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984).

The PCR judge correctly found that petitioner “did not knowingly and voluntarily waive his right to appellate review.” App. 372. In his first PCR, the court denied petitioner the right to seek a belated appeal pursuant White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974). In this PCR, the court found that petitioner's attorney in his first PCR was unaware that an order dismissing a PCR application could be appealed. App. 371. This finding is supported by the testimony at the PCR hearing. PCR counsel stated, “We didn't discuss an appeal at all. I really didn't know that he even had the right to appeal a PCR, you know, just very frankly.... I didn't know that he had the right.” App. 363, ll. 11 – 21. If petitioner's attorney did not even know a PCR order could be appealed, then she could not have properly advised petitioner or filed an appeal. Because substantial evidence supports the PCR judge's finding, this court should grant certiorari and allow petitioner a belated appeal from his prior PCR application.

CONCLUSION

For the foregoing reasons, the Court should grant the petition and allow petitioner a belated appeal of his first PCR pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

Respectfully submitted,



David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of March, 2014.

STATE OF SOUTH CAROLINA

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John C. Hayes, III, Circuit Court Judge

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DONNIE M. MALPASS,

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RESPONDENT

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CERTIFICATE OF SERVICE

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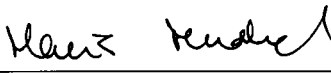
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Donnie M. Malpass, at 3685 Claypond Village Road, Apt. 2, Myrtle Beach, SC 29579, this 27th day of March, 2014.



David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 27th day  
of March, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.