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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County

Stephanie P. McDonald, Circuit Court Judge  
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**RECEIVED**

SEP 30 2014

**S.C. Supreme Court**

BERNARD O. GILLIARD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000193  
\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI  
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SUSAN B. HACKETT  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
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(803) 734-1343

ATTORNEY FOR PETITIONER

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The PCR court correctly granted Petitioner a belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974) where the state did not oppose the request and the undisputed evidence showed trial counsel failed to file a notice of appeal following Petitioner’s trial. ....5

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ISSUE PRESENTED

Did the PCR court correctly grant Petitioner a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) where the state did not oppose the request and the undisputed evidence showed trial counsel failed to file a notice of appeal following Petitioner's trial?

## STATEMENT

A Charleston County grand jury indicted Petitioner for murder (2010-GS-10-2061), armed robbery (2010-GS-10-2060), and possession of a firearm during the commission of a violent crime (2010-GS-10-2059). App. 774-775; App. 777-778; Supp. App. 1-2. During its April 2010 term, the Charleston County grand jury indicted Petitioner for unlawful carrying of a pistol in an unrelated incident. Supp. App. 4-5.

On May 24, 2010, the state, represented by Rutledge DuRant and Chad Simpson, called Petitioner to trial before the Honorable Roger M. Young, Sr., and a jury on the charges of murder, armed robbery, and possession of a firearm during the commission of a violent crime. App. 1. Michael Bosnak represented Petitioner. App. 1. The jury found Petitioner guilty of armed robbery, but was unable to reach a verdict on the murder charge and the firearm charge. App. 611, lines 11-24. Therefore, Judge Young declared a mistrial as to those two charges. App. 612, lines 20-23. Judge Young deferred sentencing on the armed robbery. App. 617, lines 8-23. No notice of appeal was filed on Petitioner's behalf following the sentencing.

On February 25, 2011, Petitioner was tried again on the murder and firearm charge before the Honorable J.C. Nicholson, Jr. App. 691. When the jury was unable to reach a verdict yet again, Judge Nicholson sentenced Petitioner to 25 years' imprisonment on the armed robbery conviction. App. 703, lines 10-13; App. 779. On April 21, 2011, Petitioner entered a guilty plea to voluntary manslaughter, possession of a firearm during the commission of a violent crime, and an unrelated charge of unlawful carrying of a pistol before the Honorable Thomas L. Hughston. App. 708. Judge Hughston sentenced Petitioner to twenty years' imprisonment for armed robbery, five years' imprisonment for

possession of a firearm during the commission of a violent crime, and one year imprisonment for unlawful carrying of a pistol. App. 717, line 24 – App. 718, line 4; App. 776; App. 779; Supp. App. 3; Supp. App. 6.

Petitioner filed an application for post-conviction relief (PCR) on November 15, 2012. App. 720-731. Petitioner filed an amended application on November 8, 2013. App. 737-738. The Honorable Stephanie P. McDonald presided over a hearing on the matter on November 20, 2013. T. Dylan Rankin represented Petitioner, and Ashleigh R. Wilson represented the state. App. 739. By an order filed on January 13, 2014, Judge McDonald granted Petitioner a belated direct appeal. App. 770-773.

Petitioner filed a timely notice of appeal. This brief follows.

## ARGUMENT

The PCR court correctly granted Petitioner a belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974) where the state did not oppose the request and the undisputed evidence showed trial counsel failed to file a notice of appeal following Petitioner's trial.

According to trial counsel, he and Petitioner were relieved that Petitioner was not convicted of murder during the first and second trials. After Petitioner was sentenced, the two discussed Petitioner's right to an appeal. Trial counsel made clear that Petitioner "never waived" his right to an appeal. App. 755, lines 15-20. Further, trial counsel stated that a lawyer should always file a notice of appeal following a trial. App. 755, line 24 – App. 756, line 5. Petitioner testified that he and trial counsel discussed an appeal. Further, Petitioner believed trial counsel was handling the filing of the notice of appeal based upon their discussions. App. 761, lines 5-23; App. 762, lines 13-19; App. 764, lines 19-24.

Without any objection from the state, Judge McDonald granted Petitioner a belated direct appeal. Judge McDonald found that Petitioner did not knowingly and intelligently waive his right to a direct appeal. App. 765, lines 15-18; App. 771-772.

"The appropriate scope of review of this Court is that 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). 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. *In re Anonymous Member of the Bar*, 303 S.C. 306, 400 S.E.2d 483 (1991); *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). "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).

The PCR judge’s ruling is supported by Petitioner’s testimony that he asked his attorney to file an appeal. Trial counsel admitted that he did not file an appeal. As Judge McDonald found there was no evidence of an intelligent and voluntary waiver of his right to an appeal. Therefore, this evidence supports the PCR judge’s conclusion that Petitioner is entitled to a belated appeal pursuant to White, supra.

CONCLUSION

Petitioner respectfully requests this Court affirm the PCR court's decision that he is entitled to a belated direct appeal.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett  
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of September, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County

Stephanie P. McDonald, Circuit Court Judge

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BERNARD O. GILLIARD,

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STATE OF SOUTH CAROLINA,

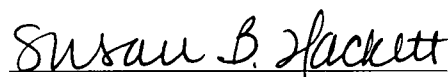
RESPONDENT

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CERTIFICATE OF SERVICE

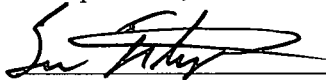
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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Ashleigh R. Wilson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Bernard O. Gilliard #314249, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 30th day of September, 2014.

  
Susan B. Hackett  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 30th day  
of September, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.