

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO YORK COUNTY  
Court of Common Pleas

**S.C. Supreme Court**

The Honorable Edward G. Welmaker, Circuit Court Judge

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Appellate Case No.: 2013-02126

Hashin Allie Oneil.....Petitioner,

v.

State of South Carolina.....Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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ATTORNEYS FOR RESPONDENT

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## QUESTIONS PRESENTED

- I. Whether the PCR court was correct in ruling that Petitioner was entitled to a belated review of direct appeal issues pursuant to White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974) as trial counsel failed to file an appeal?
- II. Whether the issue of trial counsel's failure to object to the trial judge charging lesser included offenses in this case is preserved for appellate review; in the alternative, whether the PCR court properly found counsel was not ineffective for not objecting to the trial judge charging the jury on lesser included offenses when Counsel articulated a valid trial strategy for not doing so?

## STATEMENT OF THE CASE

Petitioner is incarcerated with the South Carolina Department of Corrections pursuant to the York County Clerk of Court's order of commitment. Petitioner was indicted by the April 2012 term of the York County Grand Jury for Attempted Murder (2012-GS-46-0977) and Possession of a Firearm during the Commission of a Violent Crime (2012-GS-46-0977A). Robert Muckenfuss, Esquire, represented him. On April 18, 2012, Petitioner proceeded to a jury trial pursuant to which he was found guilty of Assault and Battery, 1<sup>st</sup> degree as a lesser included offense of Attempted Murder. The Honorable John C. Hayes, III sentenced Petitioner to confinement for ten (10) years for Assault and Battery, 1<sup>st</sup> degree. Petitioner did not appeal his conviction or sentence.

Petitioner filed an Application for Post-Conviction relief on October 8, 2012. Respondent filed its return on or about April 25, 2013. An evidentiary hearing was convened on August 16, 2013, at the Moss Justice Center in York, SC. Petitioner was represented by Charles T. Brooks, III, Esquire. Respondent was represented by J. Rutledge Johnson, Esquire of the South Carolina Office of the Attorney General. The Honorable Edward G. Welmaker, granted Petitioner a belated review of direct appeal issues pursuant to White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974) and denied the rest of Petitioner's PCR claims. On June 12, 2014, Petitioner, through counsel, Laura M. Caudy, Esquire, filed a Petition for Writ of Certiorari. This Return to the Petition for Writ of Certiorari follows.

## ARGUMENTS

**I. The PCR court was correct in ruling that Petitioner was entitled to a belated review of direct appeal issues pursuant to White v. State.**

Counsel admitted that he failed to file an appeal Petitioner's trial, even though he testified Petitioner neither asked him to file an appeal nor affirmatively instructed Counsel not to file one (App. p. 682 lines 23-25; p. 684 lines 4-14). Respondent agrees that Petitioner should be allowed to petition this Court for belated review of direct appeal issues, since he did not knowingly and voluntarily waive his right to an appeal.

**II. The issue of Trial counsel's failure to object to the trial judge's charging lesser included offenses in this case is not preserved. Nonetheless, the PCR court correctly held Counsel was not ineffective for not objecting to the trial judge's charging the jury on lesser included offenses because Counsel articulated a valid trial strategy for not doing so, in that, had Petitioner been convicted of Attempted Murder, he would have been sentenced to Life without Parole.**

Petitioner claims trial counsel was ineffective for not objecting to the trial judge's jury charges on the lesser included offenses of attempted murder because the jury, given only the options between guilty of attempted murder and not guilty, would probably have acquitted Petitioner. This argument is not preserved for appeal.

"To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court. If the issue is raised but not ruled on, it is not preserved for appeal." State v. Watts, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996). Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974).

While Petitioner testified concerning Counsel's failure to object to the trial judge's charging of lesser included offenses during the PCR hearing, the PCR court did not rule upon the issue. Further, no motion to alter or amend pursuant to Rule 59(e), SCRCP was filed to preserve

this issue for appeal. Therefore, this Court should not review this issue as it was not ruled upon below nor preserved for appellate review.

Notwithstanding, Petitioner's argument is without merit and based entirely on speculation.

At the PCR hearing, Petitioner testified Counsel should have objected to the judge charging the lesser included offenses of Attempted Murder because he claims the jury should have only had the choice between Guilty of Attempted Murder and Not Guilty. (App. p. 676 lines 1-25). Petitioner also claimed his constitutional rights were violated because he received no notice of being charged with the lesser included offenses of Attempted Murder. (App. p. 677 line 12- p. 678 line 8).

Counsel testified there were discussions with the trial judge in chambers concerning the charging of lesser included offenses in this case. (App. p. 681 line 23- p. 682 line 3). Counsel then stated he discussed the judge's charging of the lesser included offenses with Petitioner. (App. p. 682 lines 3-13). On cross-examination, Counsel testified that he did not object to the trial judge's charging the lesser included offenses because in his opinion, it would have been ineffective for him not to have the lesser included offenses as an option for the jury. (App. p. 686 lines 16-24). The reason being is that the State had served Petitioner with Notice to seek Life without Parole based on Petitioner's prior criminal history; a conviction for Attempted Murder would have put Petitioner at risk for a sentence of Life without Parole. (App. p. 686 line 24- p. 687 line 2). Counsel then added it was the defense's objective to avoid a sentence of Life without Parole for Petitioner and that, in his opinion, having the options of the lesser included offenses benefitted Petitioner. (App. p. 687 lines 3-7).

In the case at bar, Counsel testified he did not object to the trial judge's charging the jury with the lesser included offense because it was in Petitioner's best interest.

Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003).

Counsel stated the State served Petitioner with Notice to Seek Life without Parole based on his prior record. Had Petitioner been convicted of Attempted Murder, which is a most serious offense, the trial judge would have had no discretion in sentencing Petitioner; he would have received a sentence of Life without Parole instead of the ten-year sentence he received. While Petitioner argues there is a reasonable probability that the jury would have found Petitioner not guilty had the jury only had the options of Attempted Murder or acquittal, this assumption is premised entirely on speculation. Had the jury only had the two, aforementioned options, the jury would have mostly likely found Petitioner guilty of Attempted Murder, considering the testimony at trial. See (App. pp. 145-149).

Victim testified Petitioner stepped into her bedroom with a gun in his hand, proceeded to threaten suicide and then point the gun at Victim. (App. p. 145 line 22-p. 146 line 20). Victim further testified she grabbed some clothes and shoes, the gun "went off," and she said, "[Petitioner], you shot me." (App. p. 147 lines 2-11).

At the PCR hearing, Petitioner admitted that the testimony at trial was that Petitioner and Victim were the only two people in the apartment. (App. p. 680 lines 14-17). Petitioner also admitted that the testimony at trial was that there was a gunshot, Victim sustained a gunshot

wound and that Victim was not the one that fired the gun. (App. p. 680 lines 18-25). Petitioner, lastly admitted that the testimony at trial was such that, by process of elimination, he was the person who fired the gun that injured Victim. (App. p. 681 lines 1-6).

Based on the testimony, Counsel certainly made a valid strategic choice to not object to the judge charging the jury with the lesser included offense of Attempted Murder as it gave the jury other options other than Attempted Murder; a conviction for which Petitioner would have received a sentence of Life without Parole. Therefore, Petitioner has not met his burden of proving Counsel was deficient in that choice of tactics.

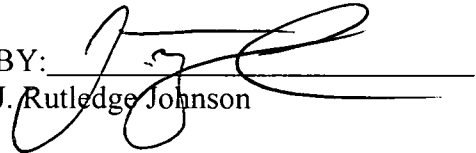
**CONCLUSION**

For all the foregoing reasons, Respondent respectfully submits that this Court grant the Petition for Writ of Certiorari only to allow a belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Further, Respondent respectfully submits that this Court deny the Petition for Writ of Certiorari. Should this Court grant Certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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Attorney General

J. RUTLEDGE JOHNSON  
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BY:   
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ATTORNEYS FOR RESPONDENT

October 9, 2014

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In The Supreme Court

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CERTIORARI TO YORK COUNTY  
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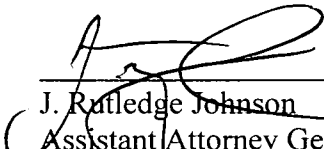
**PROOF OF SERVICE**

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I, J. Rutledge Johnson, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Laura M. Caudy, Esquire  
S.C. Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served, this 9<sup>th</sup> day of October, 2014.

  
\_\_\_\_\_  
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STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to York County

The Honorable John C. Hayes, III, Circuit Court Judge

HASHIN ALLI ONEIL, #350619

Petitioner,

STATE OF SOUTH CAROLINA

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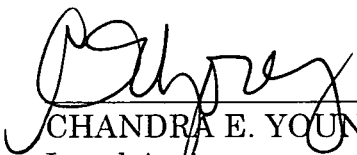
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**PROOF OF SERVICE**  
\_\_\_\_\_

I, CHANDRA E. YOUNG, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Lara M. Caudy, Esquire  
South Carolina Office of Indigent Defense  
Post Office Box 11589  
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 9<sup>th</sup> day of October 2014.

  
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