

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO NEWBERRY COUNTY
Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

Appellate Case No.: 2013-001242

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S.C. Supreme Court

Milo E. Tudor.....Petitioner,

v.

State of South Carolina.....Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

QUESTION PRESENTED.....2
STATEMENT OF THE CASE.....3
ARGUMENT.....7
CONCLUSION.....13

QUESTIONS PRESENTED

- I. Whether the PCR court was correct in ruling that Petitioner was entitled to a belated review of direct appeal issues through PCR where previous courts have already ruled upon this issue?

STATEMENT OF THE CASE

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 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.

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.

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. 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.

Petitioner filed a second Petition for Writ of Federal Habeas Corpus in the Federal District Court for the District of South Carolina (2:06-0342-RBH-RS). 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.

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.

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 review of direct appeal issues pursuant to White v. State.

Petitioner then filed a “Petition 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 March 3, 2014. Respondent filed its “Return to Petition 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 March 7, 2014. Petitioner then filed its “Reply to the State’s Return Opposing the Petition 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 March 13, 2014. This Court issued an Order on May 7, 2014 denying Petitioner’s petition to reconstruct the record or grant him a new trial and ordered Petitioner to file a petition for writ of certiorari to determine whether Petitioner is entitled to a belated review of his direct appeal issues.

Petitioner filed a petition for writ of certiorari on September 8, 2014. This return to the petition follows.

ARGUMENT

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

Petitioner argues “[t]he PCR judge correctly found that Petitioner did not knowingly and voluntarily waive his right to direct appeal and correctly granted a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974.” Respondent submits the PCR judge erred by finding Petitioner was entitled to a belated review of direct appeal issues under White as Petitioner has previously raised this issue in prior PCR actions and because Petitioner filed a petition for habeas corpus in the circuit court and the PCR judge incorrectly construed the petition as an application for PCR.

“This Court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law.” Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). In reviewing the PCR judge's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006). This Court will uphold the findings of the PCR judge when there is any evidence of probative value to support them, and will reverse the decision of the PCR judge when it is controlled by an error of law. Suber v. State, 371 S.C. 554, 640 S.E.2d 884 (2007).

Res Judicata

Petitioner was barred from raising a belated review of direct appeal issues under White as he has already raised this allegation in two prior PCR cases.

“*Res judicata* bars subsequent suit by the same parties on the same issues.” Sub-Zero Freezer Co. v. R.J. Clarkson Co., 308 S.C. 188, 190, 417 S.E.2d 569, 571 (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.

All applicants are entitled to a full and fair opportunity to present claims in one PCR application. Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999). Successive PCR applications and appeals are generally disfavored because they allow an applicant to receive more than “one bite at the apple as it were.” Id. A successive PCR application is one that raises grounds not raised in a prior application, raises grounds previously heard and determined, or raises grounds waived in prior proceedings. Id. In order to be entitled to a successive PCR application, the applicant must establish that the grounds raised in the subsequent application could not have been raised in the previous application. Id.

In this case, 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. In his first PCR action, Petitioner specifically raised “denial of right to direct appeal.” (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's 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.

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. Additionally, because Petitioner has already had the opportunity to raise these issues in two previous applications, this "Petition for Habeas Corpus," is successive to Petitioner's two prior PCR actions. Thus, Judge Newman committed a reversible error of law in finding Petitioner was entitled to a belated review under White v. State because this issue has already been raised and ruled upon in two previous PCR actions.

Petition for Writ of Habeas Corpus

Additionally, Judge Newman committed reversible error in construing this "Petition for Writ of Habeas Corpus" as an application for PCR.

"A person is procedurally barred from petitioning the circuit court for a writ of habeas corpus where the matter alleged is one which could have been raised in a PCR application. Furthermore, if a person is procedurally barred, his only means of obtaining state habeas corpus

relief is to file a petition in the original jurisdiction of the Supreme Court. S.C. Const. Art. V, § 5.” Keeler v. Mauney, 330 S.C. 568, 571, 500 S.E.2d 123, 124 (Ct. App. 1998).

Petitioner filed this petition in Newberry County when he was required to file it in the original jurisdiction of the South Carolina Supreme Court. See Keeler, supra. Moreover, Petitioner was barred from filing the petition in Newberry County because this issue of a belated review of direct appeal issues under White is an issue which could have been and was raised in PCR. See Keeler, supra. Therefore, Judge Newman committed reversible error in construing the petition as a PCR application.

Statute of limitations and prejudice

Further, Judge Newman committed a reversible error in granting a belated review of direct appeal issues under White because it was Petitioner’s own actions which led to the lack of a transcript and thus, no direct appeal.

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.

The South Carolina Supreme 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 claims it was only because of erroneous legal advice to file a Petition for Federal Habeas Corpus before filing a PCR action. “We have long recognized the “common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.” Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573, 581, 130 S. Ct. 1605, 1611 (2010) (citing Barlow v. United States, 7 Pet. 404, 411, 8 L.Ed. 728

(1833)). It is no excuse that Petitioner filed a Petition for Federal Habeas Corpus before filing a PCR action. Nonetheless, he did not even timely file his Federal Habeas Corpus action before the May 22, 1999 deadline. Then, he waited until August 21, 2002 to file his first PCR action, more than five years after his August 7, 1997 conviction. Had Petitioner properly filed his PCR action, he might have been entitled to a belated review of direct appeal issues. However, because he waited until more than five years after his conviction and after a transcript would have been available, he knowingly and voluntarily waived his right to a direct appeal by filing so far beyond the statute of limitations.

Furthermore, Respondent would be greatly prejudiced should this Court grant Petitioner's petition for writ of certiorari as a trial transcript is no longer available due to Petitioner's own actions. First, the presiding judge, 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's own delay in filing his PCR claims. Had he timely filed his original PCR claims, a transcript would have been available and he could have raised the issue of a belated review of direct appeal issues in his first PCR action. However, as stated above, Petitioner waited until over five years after his conviction to

file his first PCR action. Thus, Judge Newman erred in finding Petitioner was entitled to a belated review under White v. State because Petitioner's actions are the only reason this claim was not timely raised and the only reason that a transcript is no longer available. Therefore, by Petitioner's actions, he knowingly and voluntarily waived his right to a direct appeal.

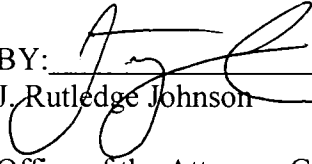
CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and reverse Judge Newman order granting a belated review of direct appeal issues pursuant to White v. State. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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October 27, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Newberry County

The Honorable James W. Johnson, Jr., Circuit Court Judge

MILO E. TUDOR,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Appellate Defender Katherine H. Hudgins
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 24th day of October, 2014


NORMA BIGBEE
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

October 24, 2014

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OCT 24 2014

S.C. Supreme Court

VIA HAND DELIVERY

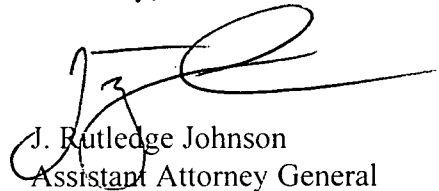
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Milo E. Tudor v. State of South Carolina
Appellate Case No: 2013-001242

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,


J. Rutledge Johnson
Assistant Attorney General
Bar No: 78871

JLT/nb
Enclosures

cc: Kathrine H. Hudgins, Esquire (2 copies)