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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Newberry County

James W. Johnson, Jr., Circuit Court Judge

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S.C. Supreme Court

MILO E. TUDOR,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2013-001242

**REPLY TO STATE'S RETURN TO
PETITION FOR WRIT OF CERTIORARI**

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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ARGUMENT IN REPLY

The PCR judge correctly found that Petitioner did not knowingly and intelligently waive the right to a direct appeal and correctly granted a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

Petitioner has been denied the right to a direct appeal through no fault of his own but rather through a series of mistakes and deficient performance by almost every attorney who represented him. Trial counsel was deficient in failing to perfect the direct appeal. In an attempt to obtain a belated appeal a second attorney was deficient in filing a habeas petition in federal court rather than a post conviction relief application in state court. When Petitioner sought a belated appeal in state post conviction relief, the PCR attorney was deficient in failing to argue that the belated appeal issue was not barred by the statute of limitations. The PCR judge found that that the Petitioner's PCR claim was barred by the statute of limitations. (App. pp. 95-98). The order of dismissal does not address the belated appeal claim although the belated appeal claim was specifically raised in the Petitioner's post conviction relief application. (App. p. 78). PCR counsel was again deficient by not filing a Rule 59(e) motion asking the PCR judge to rule on the belated appeal claim. See Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002)(one year statute of limitations for PCR claims does not apply to allegation applicant was denied the right to direct appeal due to the ineffective assistance of counsel).

Petitioner appealed the finding of the first PCR judge. Appellate counsel, however, filed a Johnson Petition for Writ of Certiorari only raising the issue of "Whether there was any evidence to support the PCR judge's findings that petitioner's PCR application was barred by the statute of limitations?" The petition made no reference to the

fact that Petitioner was seeking a belated direct appeal. Appellate counsel was deficient in failing to raise the belated direct appeal issue. Respectfully, this Court erred in denying the Johnson Petition for Writ of Certiorari in a written order dated August 26, 2005. (App . p. 100). Petitioner was entitled to a belated direct appeal. Pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), this Court should have denied appellate counsel's motion to be relieved as counsel and asked appellate counsel to address the belated appeal issue. While the trial transcript had been destroyed at the time of the first PCR hearing, if this Court had properly granted the belated appeal in 2005, this Court could have ordered a reconstruction hearing.

Petitioner filed a second application for post conviction relief, still attempting to obtain a belated direct appeal, his one bite of the, to date, elusive appellate apple. (App. pp. 103- 105). The application was dismissed as successive and beyond the statute of limitations. The second PCR counsel was deficient in failing to argue that the statute of limitations did not apply to a request for a belated appeal. The second request for a belated appeal was not successive as the belated appeal issue was not specifically addressed in the first order of dismissal.

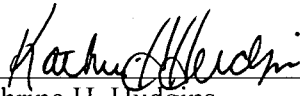
The first time the belated direct appeal issue was ruled upon by a judge was in May of 2013, when Judge Newman signed the order granting the belated direct appeal. *Res judicata*, as argued by the State, does not bar the belated direct appeal issue. The statute of limitations does not bar the belated direct appeal claim based on ineffective assistance of counsel. See Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002). Judge Newman correctly found that Petitioner did not voluntarily waive his right to direct appeal.

The State additionally argues that Judge Newman committed reversible error in construing the Petition for Writ of Habeas Corpus as an application for post conviction relief. The State failed to file a Rule 59(e) motion in regard to this issue and did not appeal from Judge Newman's order. The issue is not preserved for appellate review. See Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007).

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari and grant Petitioner's previously filed petition for order to reconstruct the record or, in the alternative, an order setting aside the convictions and ordering a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT.

This 6th day of November, 2014.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 6th day of November, 2014.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 6th day of November, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 24, 2021 .