

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

On Petition for Writ of Certiorari
to Richland County
Clifton Newman, Plea Judge
Jocelyn Newman, First PCR Judge
Roger E. Henderson, Second PCR Judge

Appellate Case No. 2021-001521

ARYEE HENDERSON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

**RETURN TO PETITION
FOR A WRIT OF CERTIORARI**

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QUESTION PRESENTED

Did the PCR court properly grant Petitioner relief pursuant to Austin v. State, 305 S.C. 453, 246 S.E.2d 395 (1991), when Petitioner's PCR counsel failed to file a Notice of Appeal and the State agreed Petitioner was entitled to a belated review of his prior PRC action?

STATEMENT OF THE CASE

Petitioner Aryee Henderson is presently confined in the South Carolina Department of Corrections serving a twenty-five-year sentence. In November 2002, the Richland County Grand Jury indicted him for murder. On September 21, 2004, Petitioner proceeded to a jury trial before the Honorable Alison Renee Lee. At trial, Petitioner claimed self-defense. The jury convicted Petitioner of murder, and the trial court sentenced him to thirty years' imprisonment. Petitioner filed a direct appeal, which was dismissed by the Court of Appeals pursuant to Anders v. California, 386 U.S. 738 (1967). The remittitur was sent February 28, 2008.

On March 3, 2008, Petitioner filed an application for post-conviction relief (PCR). On August 12, 2009, an evidentiary hearing convened before the Honorable G. Thomas Cooper, Jr. On July 15, 2010, Judge Cooper granted Petitioner relief, vacated his prior conviction, and granted him a new trial. The State appealed, and the Court of Appeals affirmed. See Henderson v. State, 2014-UP-122 (Ct. App. Filed 3/19/2014). The State filed a Petition for Writ of Certiorari, which was granted. On October 28, 2015, the Supreme Court of South Carolina dismissed the writ of certiorari as improvidently granted. The remittitur was sent October 28, 2015.

On June 20, 2016, Applicant pled guilty to voluntary manslaughter. Assistant Public Defender Rhodes Bailey represented Petitioner and Assistant Solicitor Luck Campbell represented the State. The plea court sentenced Applicant to twenty-five years' imprisonment. On December 1, 2016, Petitioner filed a pro se Notice of Appeal. On January 6, 2017, the Court of Appeals dismissed the appeal. The remittitur was sent March 28, 2017.

On July 21, 2016, Petitioner filed an application for PCR. The State filed its Return on July 13, 2017. On January 24, 2018, an evidentiary hearing convened before the Honorable Jocelyn Newman. Jonathan Waller, Esquire, represented Petitioner and Assistant Attorney

General Jessica Kinard represented the State. On March 22, 2018, Judge Newman issued an order denying relief and dismissing the application. On June 22, 2018, Petitioner filed a pro se Notice of Appeal from that order. On June 29, 2018, the Supreme Court of South Carolina issued an order dismissing the appeal for failure to serve opposing counsel and failure to timely appeal. The remittitur was sent July 17, 2018.

On June 28, 2018, Petitioner filed a Motion to Set Aside the Judgment pursuant to Rule 60(b), SCRPC. In the motion, PCR counsel contended he overlooked an email from the Clerk of Court providing him notice of the Order of Dismissal, and his failure to file any post-trial motion or a Notice of Appeal was due to mistake, inadvertence, surprise, or excusable neglect. On July 31, 2018, the court issued an order denying Petitioner's motion. Petitioner appealed the denial of his Rule 60(b) motion but subsequently moved to dismiss his appeal. The remittitur was sent January 22, 2019.

On September 20, 2018, Petitioner filed this current PCR application seeking *inter alia* a belated review of the denial of his 2016 PCR application. An evidentiary hearing convened before the Honorable Roger E. Henderson. Arthur K. Aiken, Esquire, represented Applicant and Assistant Attorney General Lindsey A. McCallister represented the State. On November 16, 2021, Judge Henderson issued a Consent Order granting Petitioner a belated appeal of his 2016 PCR action pursuant to Austin v. State, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991).

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. However, pure questions of law will be reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The State has conceded Petitioner is entitled to a belated review of the order denying Petitioner's prior PCR application.

Petitioner asserts he was denied the opportunity to appeal the denial of his first PCR application through no fault of his own. (Pet. 6). Specifically, he contends PCR counsel testified he overlooked the email that contained the Order of Dismissal and thus failed to timely file the Notice of Appeal. Petitioner further contends that, based on the testimony of PCR counsel, Petitioner intended to appeal the order dismissing his first PCR action. (Pet. 6).

The consent order issued by the second PCR court found both Petitioner and the State agreed that Applicant did not voluntarily waive his right to appeal the order dismissing Petitioner's first PCR application. Should this Court find that evidence shows Petitioner did not knowingly and voluntarily waive his right to appeal the denial of his first PCR application, Respondent respectfully requests this Court consider the question presented in the Austin Petition for Writ of Certiorari and Return to the Austin Petition for Writ of Certiorari in conjunction with the issue raised herein. See Austin v. State, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991) (finding "allegation that counsel failed to seek review [of denial of PCR] sufficiently states a claim of ineffective assistance" and "remand[ing] for an evidentiary hearing on the issue of whether in fact the petitioner requested and was denied an opportunity to seek appellate review").

CONCLUSION

Based on the foregoing, this Court should consider the question presented in the Austin Petition for Writ of Certiorari and Return to the Austin Petition for Writ of Certiorari in conjunction with the issue raised herein.

Respectfully Submitted,

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ATTORNEYS FOR THE RESPONDENT

This 14th day of September, 2022