

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM BARNWELL COUNTY  
Court of Common Pleas  
Post Conviction Relief

S.C. SUPREME COURT

Honorable Courtney Clyburn Pope, Circuit Court Judge  
Honorable William P. Keesley, Circuit Court Judge

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App. Case No.: 2022-000920

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Dexter B. Brown, II, 330278,

Petitioner,

vs.

State of South Carolina,

Respondent.

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PETITION FOR WRIT  
OF CERTIORARI

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    THE LOWER COURT (HONORABLE COURTNEY CLYBURN POPE)  
    PROPERLY GRANTED A BELATED APPEAL PURSUANT TO *AUSTIN V.*  
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## ISSUE PRESENTED

1. Whether the lower court (Honorable Courtney Clyburn Pope) properly granted a belated appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

## I. STANDARD OF REVIEW

In a Post Conviction Relief Appeal, great deference is given to the lower court's findings of fact but deference is not given to conclusions of law. *Smalls v. State*, 810 S.E.2d 836 (2018). The existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling on findings of fact. *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984). Questions of law are reviewed *de novo*, and the appellate court "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).

## II. STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to order of commitment from the Barnwell County Clerk of Court. During the January 2011 term of the Barnwell County Grand Jury, Petitioner was indicted for two counts of attempted armed murder (2011-GS-06-00010 to 00011) and possession of a weapon during a violent crime (2011-GS-06-00120). App. p. 238. Nicholas R. McCarley, Assistant Public Defender, represented Petitioner, and Lauren Maurice, Assistant Solicitor, prosecuted the case.

On May 11, 2011, Petitioner proceeded to trial in Barnwell County in front of the Honorable Edgar W. Dickson and a jury. App. p. 1. After the jury found Petitioner guilty as indicted, Judge Dickson sentenced Petitioner to thirty years on each count of attempted murder and five years consecutive for the weapons charge.

Following the pronouncement of the sentences, Judge Dickson modified the sentences to be run consecutively due to circumstances that unfolded in the courtroom. App. pp. 219-221. After a hearing on a motion for reconsideration, Judge Dickson reinstated the original sentence via order filed November 15, 2011. App. pp. 222, 224, 237.

Thereafter, a timely direct appeal was filed and was perfected by Tommy A. Thomas, Esquire. App. pp. 246, 263. On July 30, 2011, the South Carolina Court of Appeals issued an unpublished opinion affirming Petitioner’s convictions and sentences. *State v. Dexter B. Brown, II*, Unpub. Op. No. 2014-UP-303 (S.C. Ct. App. filed July 30, 2011). The remittitur was issued on August 15, 2014. App. p. 280.

On October 2, 2014, Petitioner filed a Post Conviction Relief Application (2014-CP-06-0369). App. p. 285. Respondent submitted a Return and Motion for More Definite Statement on January 15, 2015. App. p. 292. Petitioner filed an Amended Application on June 17, 2015, alleging: 1) Counsel failed to object to improper jury instructions; and 2) Counsel failed to move to quash improper indictment. App. p. 290.

On January 25, 2018, an evidentiary hearing was convened in front of the Honorable William P. Keesley. App. p. 298. Petitioner was present and was represented by Thurmond Brooker, Esquire. Respondent was represented by Julie Coleman, Assistant Attorney General. At the start of the hearing, Petitioner, through counsel, orally amended his Application to include the following allegations:

1. Ineffective assistance of counsel for failure to impeach Roger Benjamin by the testimony of Officer Trottie and Alice Thompson.
2. Ineffective assistance of counsel for failure to request a charge on lesser included offenses.
3. Ineffective assistance of counsel for failure to investigate and interview potential witnesses of which “Appellant” had advised his counsel of their existence.

App. p. 301, ln. 16 – p. 302, ln. 5.<sup>1</sup> Following the hearing, Judge Keesley denied relief and issued an Order on June 1, 2018, which was filed on June 4, 2018. App. p. 454. An appeal was not filed.

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<sup>1</sup> The Order of Dismissal lists the claims made in an Amended Application filed on June 17, 2015 as listed herein. App. p. 457. Thereafter, the Order states: “At the evidentiary hearing, Applicant orally amended his application and

On June 5, 2019, Petitioner filed a Petition for Habeas Corpus in the United States District Court. App. p. 473. Respondent moved for summary judgment on July 31, 2019. App. p. 488. On January 31, 2020, United States District Judge Richard M. Gergel dismissed the petition without prejudice. App. pp. 556, 561.

On January 28, 2021, Petitioner filed an Application for Post Conviction Relief. App. p. 562. Respondent submitted a Return on May 3, 2021. App. p. 568. On May 13, 2022, a Consent Order Granting Appeal Pursuant to *Austin v. State* was issued by the Honorable Courtney Clyburn Pope, from which this appeal follows. App. p. 578.

### III. ARGUMENT

A. The lower court (Honorable Courtney Clyburn Pope) properly granted a belated appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

By way of the Application filed on January 28, 2021, Petitioner alleged the following ground: “Pursuant to *Austin v. State*, 305 S.C. 453 (1991), Applicant is requesting a belated appeal of the Order of Dismissal issued on Case No. 2014-CP-06-00369.” App. p. 564. In support of this ground, the following factual statement was provided: “Applicant’s counsel failed

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informed this Court he was only proceeding on the following allegations: 1) Ineffective assistance of counsel for failure to impeach Roger Benjamin with his statement to Officer Trottie, 2) Ineffective assistance of counsel for failure to request the lesser included offense of Assault and Battery of a High and Aggravated Nature and First Degree Assault and Battery, 3) Ineffective assistance of counsel for failure to investigate witness Brandon Parker and other potential witnesses at trial.” App. pp. 457-458. In contrast to the Order, counsel stated that he was moving to “supplement the application and add a couple more issues of ineffective assistance of counsel.” App. p. 301, Ins. 16-18. Counsel also did not state the additional issues in the exact manner reflected in the Order. App. p. 301, In. 16 – p. 302, In. 4. Following the issuance of the Order, counsel did not file a Motion pursuant to Rule 59, SCRCP, or a timely appeal.

Upon review of the evidentiary hearing record, to include testimony, exhibits and argument, it appears that Petitioner, through counsel, only addressed the three issues listed by counsel as supplemental issues at the evidentiary hearing. App. p. 301, In. 16- p. 302, In. 4. Even though the Order incorrectly reflects that counsel stated that Petitioner was only proceeding on the three supplemental issues, the record demonstrates that the Petitioner only developed a record on the three supplemental issues and did not raise any additional issues, such as those in the Amendment Application, at the evidentiary hearing.

to file an appeal following the issuance of the Order of Dismissal, which was filed on June 4, 2018.” App. p. 564.

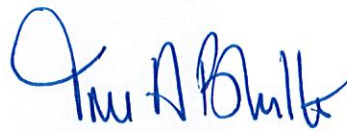
In *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), this Court provided for belated appellate review of an initial post-conviction relief action where prior post-conviction relief counsel fails to timely appeal the denial of the application. *Id.* at 454, 409 S.E.2d at 396; *see also* S.C. Code Ann. § 17-27-100 (right to appeal final judgment by post-conviction relief court). Pursuant to *Austin*, an evidentiary hearing may be conducted in regard to a successive post-conviction relief application “on the issue of whether in fact the petitioner requested and was denied an opportunity to seek appellate review.” *Id.* at 454, 409 S.E.2d at 396. “If the circuit court finds that the petitioner never in fact sought discretionary review, the petitioner may appeal the finding.” *Id.* at 455, 409 S.E.2d at 396. *Austin*, therefore, allows an applicant to petition the South Carolina Supreme Court for discretionary review of the dismissal of his initial post-conviction-relief application, and may do so outside the ordinary time limits for bringing such an appeal.

As is evidenced by the Consent Order, Respondent agreed that Petitioner requested and was denied an opportunity to seek appellate review of his initial post-conviction relief application. App. p. 582. As a result, the lower court found Petitioner is entitled to a belated appellate review of his initial post-conviction relief application pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). App. p. 582. Petitioner submits that Respondent’s agreement precludes an argument that an *Austin* appeal is improper, and this Court should uphold the finding by the Honorable Courtney Clyburn Pope.

IV. CONCLUSION

Based upon the above argument and record before this Court, Petitioner would respectfully ask that this Court uphold the Consent Order Granting Appeal Pursuant to *Austin v. State* that was issued by the Honorable Courtney Clyburn Pope and allow Petitioner to proceed with a belated appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991) under the procedure addressed in *King v. State*, 308 S.C. 348, 349, 417 S.E.2d 868, 868-69 (1992).

Respectfully submitted,



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October 7, 2022