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**Jul 24 2024**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA

In the Supreme Court

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APPEAL FROM YORK COUNTY  
Court of Common Pleas  
J. Mark Hayes, II, Circuit Court Judge

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Case No.: 2020-001435

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Cassie Cunningham, #362287,

Petitioner,

vs.

State of South Carolina,

Respondent.

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PETITION FOR WRIT OF CERTIORARI  
PURSUANT TO AUSTIN V. STATE

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TOMMY A. THOMAS  
Bar No.: 005536  
Post Office Box 88  
Irmo, SC 29063  
(803) 732-5507

ATTORNEY FOR PETITIONER

Mr. Joshua Abraham Edwards, Esquire  
South Carolina Attorney General's Office  
Post Office Box 11549  
Columbia, South Carolina 29211  
ATTORNEY FOR RESPONDENT

## TABLE OF CASES

Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991)

Odom v. State, 337 S.C. 256, 262, 523 S.E. 2d 753, 756 (1999);

Wicker v. State, 310 S.C. 8, 425 S.E. 2d 25 (1992).

Rule 71.1 (g), SCRCP.

## QUESTION PRESENTED

**Did the Court properly find in the Petitioner's Post-Conviction Relief action that she was denied the opportunity to seek appellate review of the denial of her initial Post-Conviction Relief action?**

## STATEMENT OF THE CASE

Petitioner was indicted by the York County Grand Jury in June 2014 for felony driving under the influence resulting in death. She was represented by retained counsel, James Boyd, Esquire, and Solicitor Kevin Brackett prosecuted the case. Petitioner appeared before the Honorable Brian M. Gibbons and entered a plea of guilty without negotiations or recommendations on December 1, 2014. She was sentenced to 23 years' imprisonment and a \$15,000 fine.

Petitioner filed an application for post-conviction relief (PCR) on November 25, 2015. It proceeded to a merits hearing before the Honorable J. Mark Hayes on February 1, 2017 in York, South Carolina. Petitioner was represented by James P. Craig, Esquire, and the State was represented by Assistant Attorney General Justin Hunter, Esquire. The allegations before the court were:

1. Ineffective Assistance of Counsel
  - a. Failing to properly advise the Defendant of all options available to her prior to entry of plea of guilt.
  - b. Failing to enter plea negotiations with the solicitor prior to the Defendants plea of guilty.
  - c. Failing to fully investigate and challenge the Defendant's DUI conviction.
  - d. Failing to properly and fully explain the circumstances of the Defendant's DUI 1<sup>st</sup> conviction at the Defendant's sentencing hearing.
  - e. In developing and implementing a totally ineffective defense strategy of hiring and relying upon the testimony of psychologist Dr. Goldsmith, who was the brother of the sentencing judge's predecessor; that is to say that the Defendant's trial attorney based his defense on the anticipated leniency

of the trial judge because the trial judge's predecessor in office's brother as to testify on behalf of the Defendant.

- f. In making an ineffective presentation of the Defendant's medical condition and other mitigating factors at the Defendant's sentencing hearing.
- g. In advising the Defendant that she had no grounds for an appeal.

Judge Hayes denied relief on all grounds.

Petitioner filed a second application for PCR on March 31, 2021. The State filed a return and motion to dismiss on July 20, 2021, requesting a hearing only on whether Petitioner was entitled to a belated appeal of the denial of her first PCR action pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Petitioner was represented by Tommy A. Thomas, Esquire, and the State was represented by Lillian Meadows, Esquire. This issue was resolved via consent order between the parties and signed by the Honorable Edward W. Miller on September 1, 2022. This brief follows.

### STATEMENT OF FACTS

After review of the facts and circumstances surrounding the waiver of Applicant's right to appeal the denial of her Post-Conviction Relief Application, the Court found that Applicant did not knowingly and voluntarily waive her right to appeal her first PCR application and the applicant was denied an opportunity to seek appellate review. The Respondent consented to allow Applicant a belated review of the denial of her PCR application. Accordingly, the Lower Court granted Applicant a belated review of the denial of Post-Conviction Relief pursuant to Austin v. State.

## ARGUMENT

**Did the Post-Conviction Relief Judge properly find that the Petitioner did not knowingly and intelligently waive her right to Appellate review of the denial of her first Application for Post-Conviction Relief?**

Applicant alleged that she was denied the right to appeal the dismissal of her previous post-conviction relief application because her prior PCR counsel, James P. Craig, Esquire, advised her that she had no grounds for an appeal. In fact, PCR counsel advised the Petitioner to seek clemency through a Petition to the Governor of South Carolina. An action which is not available, as the power of pardon rests with the South Carolina Parole Board. The Petitioner was advised that an appeal was not available. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of her prior application.

In this case the Petitioner did not knowingly or intelligently waive her right to Appellate review. In fact, she asserted her desire to seek review of the PCR Court's denial.

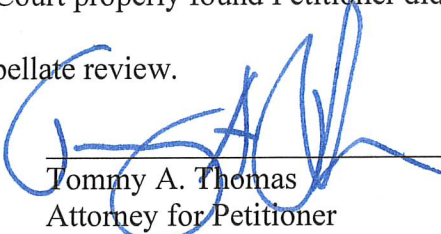
A PCR applicant is entitled to an Austin appeal if the PCR judge affirmatively finds either: (1) the applicant requested and was denied an opportunity to seek appellate review; or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived. If the PCR Court finds an Applicant was denied her right to appeal, the Applicant can Petition for Certiorari and the Appellate Court will review whether the Petitioner was prejudiced by the failure to obtain appellate review. Odom v. State, 337 S.C. 256, 262, 523 S.E. 2d 753, 756 (1999); Wicker v. State, 310 S.C. 8, 425 S.E. 2d 25 (1992). An Applicant has a right to counsel's assistance in seeking review of the denial of PCR. Austin; Rule 71.1 (g), SCRPC.

Here, both Applicant and the State agreed that Applicant was denied the opportunity to seek appellate review of the denial of her initial post-conviction relief action.

Petitioner is entitled to an appeal from her first PCR.

**CONCLUSION**

Therefore, based upon the foregoing the Court properly found Petitioner did not knowingly or intelligently waive her right to Appellate review.



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Tommy A. Thomas  
Attorney for Petitioner  
P.O. Box 88  
Irmo, SC 29063  
(803) 732-5507

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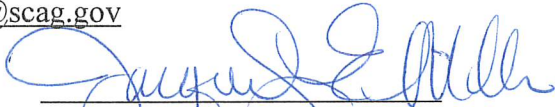
State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, Paralegal to Tommy A. Thomas, Attorney for the Petitioner, hereby certify that I emailed, a copy of a Petition for Writ of Certiorari to Joshua A. Edwards, Esq, with the Attorney General's Office, at:

Mr. Joshua Abraham Edwards, Esquire  
South Carolina Attorney General's Office  
Post Office Box 11549  
Columbia, South Carolina 29211  
[jedwards@scag.gov](mailto:jedwards@scag.gov)

  
Jacquelyn E. Miller  
Paralegal to Tommy A. Thomas  
Attorney for Petitioner  
P.O. Box 88  
Irmo, SC 29063  
(803) 732-5507

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The South Carolina Supreme Court  
Clerk, Daniel Shearouse  
P.O. Box 11330  
Columbia, SC 29211

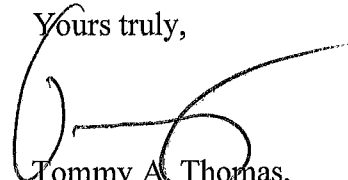
RE: Cassie Cunningham #362287 v. State  
Case No.: 2020-001435

Dear Mr. Shearouse:

Enclosed please find an original and a copy of the Petition for Writ of Certiorari Pursuant to Austin v. State in the above matter, along with a Certificate of Service by email.

Kindly return a clocked copy to me in the enclosed envelope. Please feel free to contact me should you have any questions. Thank you.

Yours truly,



Tommy A. Thomas,  
Attorney at Law

TAT/jem

cc: Joshua A. Edwards, Esq. - email  
Cassie Cunningham #362287

TOMMY A. THOMAS, P.C.

803 732 5507 | FAX 803 781 4226 | INMATE LINE 803 732 6542  
HARRINGTON BUILDING, 7588 WOODROW STREET, IRMO, SC 29063  
MAIL: P.O. BOX 88, IRMO, SC 29063