

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Grace Gilchrist Knie, Circuit Court Judge

TERRY LEMORE MCCARRELL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-000415

PETITION FOR WRIT OF CERTIORARI

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The PCR court properly granted petitioner relief pursuant to *Austin v. State*, 305 S.C. 453, 246 S.E.2d 395 (1991), where petitioner’s PCR counsel failed to perfect an appeal on his behalf, petitioner did not knowingly and voluntarily waive his right to appellate review, and the state conceded petitioner was entitled to a belated appeal.5

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ISSUE PRESENTED

Whether the PCR court properly granted petitioner relief pursuant to *Austin v. State*, 305 S.C. 453, 246 S.E.2d 395 (1991), where petitioner's PCR counsel failed to perfect an appeal on his behalf, petitioner did not knowingly and voluntarily waive his right to appellate review, and the state conceded petitioner was entitled to a belated appeal?

STATEMENT

On February 19, 2013, a Greenville County grand jury indicted petitioner for criminal sexual conduct with a minor, second degree and lewd act. App. 570—571; 573—574. On June 24, 2014, a Greenville County grand jury indicted petitioner for contributing to the delinquency of a minor and grand larceny. App. 576—577; 579—580. On July 7, 2014, petitioner was tried in his absence before the Honorable Robin Stillwell and a jury. App. 1—314. Alex Stalvey represented petitioner. Assistant solicitors, Lisa Bentley and Andrew Culbreath, prosecuted for the state. App. 1.

The jury found petitioner guilty as indicted. App. 305, l. 14—306, l. 2. On July 10, 2014, Judge Stillwell published petitioner's sentence. Petitioner was sentenced to concurrent terms of three years' imprisonment for contributing to the delinquency of a minor, five years' imprisonment for grand larceny, fifteen years' imprisonment for lewd act, and twenty years' imprisonment for criminal sexual conduct (CSC) with a minor, second degree. App. 312, ll. 11-19.

An *Anders*¹ brief was filed on petitioner's behalf and the Court of Appeals dismissed his appeal after review. Thereafter, petitioner filed an application for post-conviction relief (PCR). App. 315—321. On February 23, 2017, an evidentiary hearing was held before the Honorable Brooks P. Goldsmith. App. 330—428. William Yarborough represented petitioner, and Julie Coleman represented the state. App. 330.

On April 20, 2017, Judge Goldsmith signed an order denying PCR. App. 485—495. The PCR court found trial counsel's purported strategy, attacking the credibility of the minor by suggesting the minor fabricated the story about her sexual relationship with petitioner to escape

¹ *Anders v. California*, 378 U.S. 738 (1967).

punishment for stealing, was valid. Thus, the court found counsel was not deficient for failing to move to sever charges and that regardless no prejudice was shown. App. 491—492.

PCR counsel, Mr. Yarborough, appealed the denial of PCR. App. 496—515. On April 10, 2019, The South Carolina Court of Appeals granted certiorari to address whether petitioner's argument that the PCR court erred in finding counsel was not ineffective for failure to sever the charges and that the PCR court erred in concluding that trial counsel had articulated an objectively reasonable strategic reason for failing to move for a severance. App. 497; 531. On July 17, 2019, the Court wrote to PCR counsel, Mr. Yarborough, and requested counsel serve and file the brief of petitioner and additional copies of the appendices within ten days. App. 532. On August 7, 2019, the Court dismissed the appeal because counsel failed to file the brief of petitioner and additional copies of the appendices. App. 533.

Petitioner filed a second application for PCR in 2021, requesting belated review of the 2017 denial of PCR. App. 535—541. On September 21, 2023, an evidentiary hearing was held before the Honorable Grace G. Knie. App. 554—565. Susannah Ross represented petitioner and Melody Brown appeared for the state. App. 554. At the conclusion of the hearing the PCR court granted petitioner's request for belated appeal of the denial of his PCR. App. 563, ll. 16-21.

On October 12, 2023, Judge Knie signed an order granting belated PCR review pursuant to *Austin v. State*, 305 S.C. 348, 409 S.E.2d 395 (1991). Judge Knie found petitioner did not waive his right to appellate review and was entitled to a belated review of the denial of his PCR. App. 566—569.

Petitioner now files this petition for writ of certiorari concerning Judge Knie's finding

petitioner was entitled to a belated appeal of the denial of PCR.²

² Pursuant to *King v. State*, 308 S.C. 348, 417 S.E.2d 868 (1992), petitioner files this petition for writ of certiorari raising the issue of whether the PCR judge correctly held that petitioner had not knowingly and intelligently waived his right to appellate review of the previous PCR order. As required, petitioner is filing a separate petition addressing the questions from the previous post-conviction relief order that petitioner seeks to have reviewed.

ARGUMENT

The PCR court properly granted petitioner relief pursuant to *Austin v. State*, 305 S.C. 453, 246 S.E.2d 395 (1991), where petitioner’s PCR counsel failed to perfect an appeal on his behalf, petitioner did not knowingly and voluntarily waive his right to appellate review, and the state conceded petitioner was entitled to a belated appeal.

In *King v. State*, this Court set forth the procedure for cases where review is sought pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991):

(1) When the post-conviction relief judge has affirmatively found that the right to appellate review of a previous post-conviction relief order was not knowingly and intelligently waived, the petition shall raise this question along with all other questions petitioner seeks to have reviewed from that order. At the same time this petition is served, petitioner shall serve and file an *Austin* petition addressing the questions from the previous post-conviction relief order. The *Austin* petition shall comply with the requirements of Rule 227(d). The Appendix shall contain the entire records from both post-conviction relief proceedings. Respondent's return to the petition shall address the questions from the latest post-conviction relief order, including whether the right to appellate review of the previous post-conviction relief order was knowingly and intelligently waived. At the same time this return is served, respondent shall serve and file an *Austin* return addressing the questions from the previous post-conviction relief order.

(2) When the post-conviction relief judge has found that the applicant is **not** entitled to an *Austin v. State* review, the petition shall raise the question of waiver of the right to appellate review of the previous post-conviction relief order along with all other questions petitioner seeks to have reviewed from that order. The petition shall also contain a “Statement of *Austin* Questions” listing the questions to be raised if an *Austin v. State* review is granted. An *Austin* petition addressing the questions will not be allowed unless certiorari is granted on the *Austin v. State* question.

King v. State, 308 S.C. 348, 349, 417 S.E.2d 868, 868–69 (1992).

In petitioner’s case, the state consented to *Austin* review. PCR counsel admittedly failed to perfect petitioner’s appeal. Counsel testified petitioner requested an appeal and did not wish for the appeal to be dismissed but that through some error counsel missed correspondence from

the Court regarding the appeal. App. 561, l. 18—562, l. 24. The PCR court properly granted belated review.

In South Carolina, “[a]ll applicants are entitled to a full and fair opportunity to present claims in one PCR application.” *Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). Pursuant to the rules and statutes governing PCR proceedings, an applicant is entitled to a full adjudication on the merits of the original petition. *Id.* This includes the right to seek appellate review of the denial of PCR and the right to assistance of counsel in that appeal. *Id.* at 261, 523 S.E.2d at 755-56. This Court held an individual can appeal a denial of a PCR application after the statute of limitations has expired if the individual either (1) requested and was denied an opportunity to seek appellate review or (2) did not knowingly and intelligently waive the right to appeal. *Austin*, 305 S.C. at 455, 409 S.E.2d at 396.

This Court held the procedures prescribed by *Anders v. California*, 386 U.S. 738 (1967) applied in PCR matters. *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1998). Thus, appellate counsel is required to engage in a conscientious investigation of the possible grounds of appeal and brief arguable issues before appellate counsel may ask to withdraw. *Anders*, 386 U.S. at 744. The United States Supreme Court held: “The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae*.” *Id.*


In *Austin*, this Court framed the question as whether the PCR applicant “requested and was denied an opportunity to seek appellate review.” *Austin* at 454, 409 S.E.2d at 396. The appropriate scope of review of the PCR court’s holding is whether there is any evidence of probative value to uphold the PCR court’s findings. *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984).

Under *Austin*, the PCR court correctly ruled that petitioner was entitled to appeal the denial

of his PCR application because he did not voluntarily waive his right to appeal. Therefore, this Court should grant certiorari and grant petitioner a belated appeal from the 2017 denial of his application for PCR.

CONCLUSION

Petitioner respectfully requests this Court uphold the lower court's ruling that he is entitled to a belated appeal of his PCR application. Thus, petitioner asks this Court to grant the writ and review the companion petition in which he raises the pertinent issues for review.



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This 16th day of September, 2025.