

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Aiken County

R. Ferrell Cothran, Jr., Circuit Court Judge **S.C. Supreme Court**

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TRAVIS MCKIE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2013-001490

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PETITION FOR WRIT OF CERTIORARI  
PURSUANT TO AUSTIN V. STATE  
\_\_\_\_\_

CARMEN V. GANJEHSANI  
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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 prior PCR counsel conceded that she should have appealed the previous Order of Dismissal dismissing Petitioner’s first PCR application and where the State consents to Petitioner’s pursuit of a belated review of the denial of his first PCR application.

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**ISSUE PRESENTED**

Did the PCR court properly grant Petitioner relief pursuant to Austin v. State, 305 S.C. 453, 246 S.E.2d 395 (1991) where Petitioner's prior PCR counsel conceded that she should have appealed the previous Order of Dismissal dismissing Petitioner's first PCR application and where the State consents to Petitioner's pursuit of a belated review of the denial of his first PCR application?

## STATEMENT

### **Indictments**

On July 23, 2007, Petitioner Travis McKie was indicted by the Aiken County Grand Jury for two counts of assault and battery with intent to kill ("ABWIK"). App. 104-105; 109-110.

### **Guilty Plea**

Petitioner appeared before the Honorable Doyet A. Early, III on June 15, 2009 to plead guilty to the above-referenced charges. App. 1-19. Petitioner entered into a negotiated sentence with the State which provided for a maximum of fifteen years on the first indictment for ABWIK and a twenty year sentence on the second indictment suspended to five years probation. App. 3, ll. 4-12.

The State presented the factual basis for the plea and stated that on October 3, 2006 at approximately 3:00 p.m., there was a report of shots fired in an area of Aiken, South Carolina known as Hahn Village. Two back seat passengers in a car had been shot – one was shot in his right arm, the other passenger shot in his left arm. A witness to the shooting apparently identified Petitioner as the shooter. App. 4, l. 22 – 5, l. 15.

The State alleged that Petitioner shot at the vehicle when he was driving his own vehicle away from the scene. The State posited that there may have been some confrontation between Petitioner and the driver of the other vehicle. The driver of the other vehicle was not shot, and he was uncooperative with law enforcement. The two victims who were shot, Stephen Pope and Wallace Smith, allegedly informed law enforcement that they did not know Petitioner and had never met him. According to the State, they identified Petitioner from a photo lineup the day after the shooting. App. 4, l. 22 – 7, l. 3.

Following Petitioner's guilty plea, Judge Early sentenced Petitioner to fifteen years imprisonment for one count of ABWIK and twenty years on the second count suspended to five years probation. The sentences were to run consecutive to each other. App. 19, ll. 8-22. Petitioner did not appeal his guilty plea.

#### **First PCR Application and Evidentiary Hearing (2010-CP-02-01256)**

Petitioner filed an application for post-conviction relief ("PCR") on May 27, 2010 asserting, among other things, that his plea counsel was ineffective for failing to interview victim Stephen Pope where Mr. Pope would have testified that he did not believe Petitioner was the person who shot him. App. 21-39. The State filed its Return on November 17, 2010. App. 40-44.

On July 11, 2011, Petitioner filed an amendment to his PCR application asserting that he "would not have entered the plea agreement if his counsel had interviewed his witness, namely Stephen Pope." Petitioner alleged that "Mr. Pope had crucial information concerning the allegations against" Petitioner. Petitioner believed Mr. Pope had information that would have bolstered his case. Petitioner asserted that he requested his plea counsel to interview Mr. Pope but that counsel refused to do so. App. 45-46.

An evidentiary hearing was held before the Honorable James R. Barber, II on July 14, 2011. App. 53-79. Petitioner was represented by Joan E. Smith, and the State was represented by Assistant Attorney Generals Robert D. Corney and Brian Petrano. App. 53. Stephen Pope, plea counsel, and Petitioner testified at the hearing. App. 59-77.

Mr. Pope testified that he did not see who shot him and did not believe that it was Petitioner who shot him on October 3, 2006. App. 60, l. 9 – 61, l. 4. Mr. Pope also testified that he did in fact know Petitioner because their fathers were good friends. Mr.

Pope did not believe Petitioner would have ever done anything like shooting him. App. 61, ll. 7-12. Mr. Pope said he never told investigating officers that he had never met Petitioner before the shooting. App. 62, l. 25 – 63, l. 8. Mr. Pope also testified that he never picked Petitioner out of a photo lineup and that law enforcement merely showed him a picture of Petitioner and told Mr. Pope that Petitioner was the one who shot him. App. 63, ll. 14-24.

Plea counsel for Petitioner acknowledged never interviewing Mr. Pope. App. 67, l. 22 – 68, l. 2. He further agreed that information from Mr. Pope that he did not know if it was Petitioner who shot him would have been important information. App. 68, ll. 3-7. He further agreed that information from Mr. Pope that law enforcement showed him a picture of Petitioner and told Mr. Pope that the person in the picture had shot him would have also been important. App. 68, ll. 8-12. Finally, plea counsel concurred that had the information about Mr. Pope been conveyed to Petitioner, Petitioner may not have accepted the plea agreement. App. 68, ll. 13-17.

On cross-examination by the Assistant Attorney General, plea counsel testified that based on his discussions with Petitioner, he believed Petitioner was the shooter in the case. App. 68, l. 24 – 69, l. 4. Plea counsel testified that after he and Petitioner decided they were going to accept the plea bargain with a cap of fifteen years, plea counsel suggested to Petitioner that they should go out and try to recover the firearm in an effort to get a sentence under the fifteen year cap. Officers, Petitioner, and plea counsel went out to an area in the woods to try to find the firearm, but no firearm was ever recovered. App. 69, l. 20 – 70, l. 15.

Petitioner testified that he asked his plea counsel several times to interview Mr. Pope. App. 72, ll. 23-25. He said his plea counsel was adamant about not interviewing

either victim because they had picked Petitioner out of a photo lineup. App. 74, ll. 18-22. Petitioner asserted that he would have went to trial had he been aware of the information from Mr. Pope. App. 73, ll. 17-22.

Petitioner further testified that he never told his plea counsel that he was the shooter and only said that he was there at the incident scene but was not the shooter. App. 74, l. 23 – 75, l. 5. Petitioner testified the reason the firearm was never found when he, plea counsel, and officers tried to look for it was because he did not know where it was since he was not the shooter. App. 76, ll. 1-13.

At the close of the hearing, counsel for Petitioner argued that plea counsel provided ineffective assistance of counsel where he acknowledged not interviewing Mr. Pope and where Petitioner would not have pled guilty had he been privy to Mr. Pope's testimony. App. 77, l. 23 – 78, l. 5.

### **Order of Dismissal**

Judge Barber issued his Order of Dismissal denying Petitioner's PCR application on August 17, 2011. App. 80-86. Judge Barber found that the testimony offered by Mr. Pope was "vague and not sufficient to prove that [Petitioner] was not the shooter in this case." Judge Barber further ruled that "counsel's failure to interview [Mr. Pope] in no way affected his representation of [Petitioner], as [Mr. Pope] offered no testimony at the PCR hearing to show [Petitioner] was not the shooter and [Petitioner] had admitted his guilt to counsel early on in his representation. Counsel gave [Petitioner] all the information and advice to make an intelligent and voluntary decision on whether to enter this plea, and therefore his guilty plea was entered knowingly and voluntarily after being fully and adequately advised by

competent counsel acting within the range of competence demanded of attorneys in criminal cases.” App. 84-85. Petitioner’s PCR counsel did not appeal this Order of Dismissal.

**Second PCR Application and Consent Order Allowing Belated PCR Appeal (2012-CP-02-01881)**

On July 30, 2012, Petitioner filed a second PCR application asserting that he had wanted to appeal the Order of Dismissal in his first PCR action but his PCR counsel failed to file the notice of appeal. App. 87-93. The State filed its Return on October 8, 2012. App. 94-98.

Petitioner’s plea counsel submitted an affidavit averring:

[Petitioner] verbally requested that I appeal the Court’s decision to deny him relief. I missed the deadline for filing the Notice of Appeal. I notified [Petitioner] of his right to file a petition for Post-Conviction Relief alleging ineffective assistance of counsel against me for my failure to file a timely Notice of Appeal.

...

I believe my former client should be allowed to file a belated appeal of the Final Order entered on August 29, 2011, since I failed to file a Notice of Appeal on behalf of [Petitioner].

App. 99.

On July 9, 2013, the court, noting the consent of the State, ruled that Petitioner was entitled to a belated appeal from the Order of Dismissal in the first PCR action. App. 101.

This petition for a writ of certiorari follows.

## 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 prior PCR counsel conceded that she should have appealed the previous Order of Dismissal dismissing Petitioner's first PCR application and where the State consents to Petitioner's pursuit of a belated review of the denial of his first PCR application.

The PCR court properly granted Petitioner belated appellate review of his initial PCR application because Petitioner was denied his right to appeal the dismissal of his first PCR application. App. 99-101; See Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

The South Carolina Supreme Court has held that "[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). "Under the PCR rules, an appellant is entitled to a full adjudication on the merits of the original petition, or 'one bite of the apple.' This 'bite' includes an applicant's right to appeal the denial of a PCR application, and the right to assistance of counsel in that appeal." Id. at 261, 523 S.E.2d at 755-56 (internal citations omitted).

Furthermore, a petitioner is denied his right to appellate review when either: (1) he requested, yet was denied an opportunity to seek appellate review; or (2) his right to appellate review was not knowingly and intelligently waived. Id. (citing King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992)). Accordingly, when a petitioner is denied his right to appeal under either of the two circumstances, then he is entitled to belated appellate review of his initial PCR application. See, e.g., Austin, 305 S.C. at 454, 246 S.E.2d at 396.

In this case, Petitioner's first PCR counsel acknowledged that Petitioner asked her to file an appeal of the Order of Dismissal in the first PCR action but that she missed the deadline for doing so. The State consented to Petitioner's request for a belated appeal of

the Order of Dismissal. App. 99-101. The second PCR court properly found that Petitioner was entitled to file a belated Notice of Appeal from the Order of Dismissal in the first PCR action. App. 101.

Under these circumstances, the second PCR court's decision granting Petitioner belated appellate review of his first PCR application should be upheld. See Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) ("The appropriate scope of review of this Court is that 'any evidence' of probative value is sufficient to uphold the PCR judge's findings."). Simply stated, Petitioner is entitled to his one fair bite at the apple. See Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582 (2002).

**CONCLUSION**

For the foregoing reasons, Petitioner Travis McKie respectfully requests this Court to grant his petition for certiorari and affirm the PCR court's grant of belated review of Petitioner's original PCR application.

Respectfully submitted,



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Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of March, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Aiken County

R. Ferrell Cothran, Jr., Circuit Court Judge

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TRAVIS MCKIE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,


RESPONDENT:

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CERTIFICATE OF SERVICE

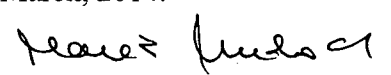
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I certify that a true copy of the petition for writ of certiorari pursuant to Austin v. State in this case have been served on Daniel Gourley, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Travis McKie, #296831, Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 7th day of March, 2014.

  
Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day  
of March, 2014.

  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires: July 3, 2023.