

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Orangeburg County  
Court of Common Pleas  
DeAndrea G. Benjamin, Circuit Court Judge

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2011-CP-38-0487  
Appellate Case No. 2012-213664

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**RECEIVED**

APR 28 2014

**S.C. Supreme Court**

JONATHAN JAMES,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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ALAN WILSON  
Attorney General

DANIEL GOURLEY  
Assistant Attorney General  
Bar No. 100934

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## **ISSUES PRESENTED**

Did the PCR judge err in dismissing the PCR application as successive, beyond the statute of limitations, and on the ground of laches without addressing Petitioner's claim that he is entitled to a belated appeal of his first post-conviction relief application?

## STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Orangeburg County. The Petitioner was true bill indicted at the October 15, 2011, term of the Orangeburg County Grand Jury for Criminal Sexual Conduct in the First Degree, Burglary in the First Degree, and Assault and Battery with Intent to Kill (2001-GS-38-1916/1917/1918). Petitioner was represented by Michael Culler, Esquire. On July 15, 2002, Petitioner pled guilty as indicted before the Honorable J. Ernest Kinard, Jr., and was sentenced to seventeen (17) years imprisonment on each charge, all to run concurrent.

A timely Notice of Appeal was filed and an appeal was perfected. The South Carolina Court of Appeals affirmed the decision of the trial court. Op. No. 2003-UP-600 (S.C. Ct. App. filed October 20, 2003). The remittitur was sent on November 21, 2003.

Petitioner filed a timely application for post-conviction relief on October 19, 2004. (2004-CP-38-1327). In that application, Petitioner alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel; and
2. Lack of Due Process.

The State made its return on July 21, 2005. He was represented by Evert Comer, Esq., in the action. The matter was called for evidentiary hearing on April 25, 2006, at the Orangeburg County Courthouse at which time the record was left open to allow Respondent the opportunity to locate and submit a plea sheet utilized by the guilty plea court and the Petitioner's attorney at the time of the plea. The plea sheet was subsequently made a part of the record in that case, and the Petitioner submitted a Position of Applicant on Plea Sheet in response to such. On June 16, 2006, the Respondent submitted a Response to Applicant's Position. By order dated June 7,

2006, and served on Respondent on July 10, 2006, the Honorable James C. Williams, Jr., granted the application based on Petitioner's failure to make "any statement that could be construed as an admission of guilt" during his plea. Respondent submitted a Motion to Reconsider or to Alter or Amend the Order pursuant to Rule 59(e), SCRPC, on July 17, 2006. The motion was denied by Judge Williams on August 15, 2006.

Thereafter, Respondent filed and served a timely Notice of Appeal on September 13, 2006. Due to the theft of the court reporter's notes from the evidentiary hearing, on November 8, 2006, Respondent requested the matter be remanded to reconstruct the record of the evidentiary hearing, or in the alternative for a new hearing, to be used on appeal. Petitioner submitted a Return to the Motion to Remand November 20, 2006, objecting to Motion to Remand stating "[i]t is the position of the [Petitioner] that a sufficient record exists due to the issues having been fully briefed in documents of written argument, which are readily apparent, presented to the PCR court for this Court to make a meaningful review and ruling in this case." By order dated December 6, 2006, the Supreme Court denied Respondent's motion, allowing the Petition for Certiorari to go forward without a copy of the PCR hearing transcript after finding there was sufficient information without the transcript to conduct an appeal.

Respondent submitted its Petition for Writ of Certiorari to the Supreme Court March 6, 2007, which was followed by Petitioner's Return to the Petition on June 11, 2007. By order dated August 9, 2007, the Court granted the Petition and proceeded to briefing. After the submission of briefs, the Supreme Court reversed the PCR court's grant of relief on the application, holding the PCR court erred in determining that Petitioner did not enter a guilty plea. State v. James, Op. No. 26449 (S.C. S.Ct. filed March 10, 2008). The Remittitur was sent March 26, 2008.

Subsequently, Petitioner filed his second application for post-conviction relief on April 21, 2011. The State made its Return and Motion to Dismiss on November 1, 2011. A hearing on the State's motion was convened at the Orangeburg County Courthouse on May 21, 2012, before the Honorable DeAndrea G. Benjamin. Petitioner was present in court and represented by Jeremy Thompson, Esquire. Respondent was represented by David Spencer of the South Carolina Attorney General's office. Judge Benjamin heard arguments from counsel but did not hear any testimony. In a written order signed July 24, 2012, Judge Benjamin dismissed the application for PCR. On October 25, 2012, Petitioner filed a motion to alter or amend pursuant to Rule 59(e), SCRCR. The motion was denied by written order signed November 8, 2012. On December 20, 2012, Petitioner filed a timely notice intent to appeal with an explanation pursuant to Rule 243(c), SCACR. Petitioner filed his Petition for Writ of Certiorari on December 9, 2013.

This Return Petition for Writ of Certiorari follows.

## ARGUMENT

**The PCR court did not err in dismissing Petitioner's second post-conviction relief application as successive, beyond the statute of limitations, and barred by the doctrine of laches, where Petitioner had his full procedural bite of the apple, had no viable issues for an Austin Appeal, and was estopped from requesting a reconstruction hearing.**

Petitioner alleges the PCR Court erred in dismissing his second PCR application as successive and beyond the statute of limitations because he is seeking a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). An Austin appeal is used when an applicant is prevented from seeking appellate review of a *denial* of his or her PCR application. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (emphasis added); Hope v. State, 328 S.C. 78, 492 S.E.2d 76 n. 1 (1997) (permitting an Austin appeal where original PCR counsel failed to appeal from the first denial of PCR). In Austin, the defendant never received a full procedural “bite at the apple” because he was prevented from seeking any review of the denial of his PCR application. Aice, 305 S.C. at 452, 409 S.E.2d at 395. Furthermore, the South Carolina Supreme Court allowed successive PCR applications where the applicant has been denied complete access to the appellate process. Id. Under the PCR rules, an applicant is entitled to a full adjudication on the merits of the original petition, or “one bite at the apple.” Id. 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 448.

Unlike Austin, the PCR court granted Petitioner's PCR application. (App. p. 117). The State filed a timely notice of appeal and a Petition for Writ of Certiorari was submitted on March 6, 2007. (App. p. 138-149). Petitioner filed an Amended Return to Petition for Certiorari on June 11, 2007. (App. p. 151-168). The South Carolina Supreme Court granted Certiorari on August 9, 2007. (App. p. 170). Following the submission of briefs, this Court reversed the PCR court's

findings. State v. James, Op. No 26449 (S.C.S.Ct. filed March 10, 2008) (holding that plea sheet and defendant's conduct at plea hearing expressed defendant's desire to plead guilty). (App. p. 205-210). As evidenced by the procedural history, Petitioner was afforded a full procedural "bite of the apple." Specifically, Petitioner had the assistance of appellate counsel and the appellate courts reviewed all issues properly preserved. Therefore, the PCR Court properly dismissed the application as successive and beyond the statute of limitations.

Petitioner further argues that the denial of other issues raised in his first post-conviction relief application, requires the PCR court to determine whether his right to appellate review was knowingly and intelligently waived. However, assuming *arguendo*, the PCR court granted an appeal pursuant to Austin, Petitioner had no issues preserved for appellate review. Jones v. State, 382 S.C. 589, 677 S.E.2d 20 (2009) (holding defendant was not entitled to a belated appeal because he failed to show evidence of meritorious or viable issues for appeal). In the instant case, the PCR Court granted Petitioner's first PCR application on the sole issue of whether Petitioner entered a guilty plea. (App. p. 117). No other issues were raised and ruled upon by the PCR court. Furthermore, Petitioner failed to file a Rule 59(e) motion properly preserving any additional issues for appellate review. Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007). Therefore, an Austin appeal would be meritless, as there were no additional issues preserved for appellate review.

Additionally, Petitioner argues the PCR court erred in dismissing his second PCR application because the Order of Dismissal lacked specific findings of fact on the doctrine of Laches. Respondent asserts that the PCR court properly found that Petitioner was not entitled to an Austin appeal. Therefore, Petitioner's argument regarding the doctrine of Laches is

superfluous. Nevertheless, the PCR court properly dismissed the application based on the doctrine of Laches. Laches is defined as:

Neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of a right does not constitute laches.

Hallums v. Hallums, 296 S.C. 195, 198-199, 371 S.E.2d 525, 527 (1988). The South Carolina Supreme Court found Laches may be raised as a defense to an Austin PCR. Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002). Specifically, the South Carolina Supreme Court explained:

In cases where laches is properly raised as a defense to an Austin claim, the PCR court shall hear evidence on this defense at the same time it hears the applicant's Austin claim on the merits. In all such cases, the PCR judge shall make a specific finding on the laches issue as well as a specific finding on the Austin claim.

Id.

In the instant case, the PCR had before it a copy of both parties' pleadings, the records from Petitioner's prior PCR application, Petitioner's records from the South Carolina Department of Corrections, and the Clerk of Court records. Additionally, the PCR Court heard arguments from both PCR Counsel and counsel for the State. (App. p. 234-248). After hearing all arguments, the PCR Court granted the State's motion to dismiss based on the doctrine of Laches. (App. p. 249-253). Petitioner filed a motion to alter or amend pursuant to Rule 59(e), SCRCF. (App. p. 254-257). The PCR court denied the motion and found that "the State would be prejudice in its ability to ensure an accurate record" some six years later. (App. p. 260-261). The PCR court further found that the "uncontested facts establish laches without a hearing." (App. p. 261).

Additionally, the PCR court found Petitioner should be estopped from moving to reconstruct the record. (App. p. 260-261). The court noted Petitioner, through his counsel, opposed the motion to reconstruct the record during the State's appeal of the first PCR application.<sup>1</sup> (App. p. 260-261). Therefore, Respondent submits that Petitioner should be estopped from requesting that a reconstruction of the record, where he previously objected to such a motion.

### CONCLUSION

For the foregoing reasons, the State submits that the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON  
Attorney General

DANIEL GOURLEY  
Assistant Deputy Attorney General  
Bar No. 100934

By:   
ATTORNEYS FOR RESPONDENT

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April 28, 2014

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<sup>1</sup> The State filed a "Motion to Remand for a new trial" on November 8, 2006 requesting that a new PCR hearing be convened as the Court Reporter's tapes were stolen and she was unable to prepare a transcript of the PCR hearing. (App. p. 128-132). The Petitioner, through counsel, objected to the remand or, alternatively, for a hearing to reconstruct the PCR hearing. (App. p. 133-135).

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Certiorari to Orangeburg County  
The Honorable DeAndrea G. Benjamin, Circuit Court Judge  
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Appellate Case No. 2012-213664

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JONATHAN JAMES

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**PROOF OF SERVICE**


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I, Daniel Gourley, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 28 day of April, 2014.

  
\_\_\_\_\_  
DANIEL GOURLEY  
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ALAN WILSON  
ATTORNEY GENERAL

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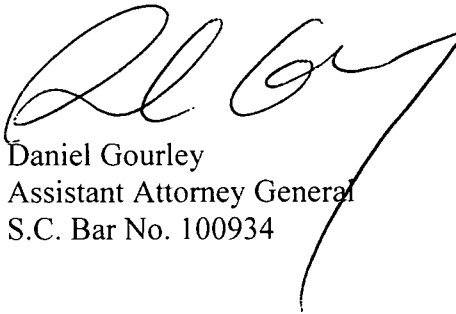
The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

Re: **Jonathan James v. The State of South Carolina**  
Appellate Case No. 2012-213664

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of Respondent's Return to Petition for Writ of Certiorari.

Sincerely,



Daniel Gourley  
Assistant Attorney General  
S.C. Bar No. 100934

DG/ko  
Enclosures

cc: Kathrine H. Hudgins, Esquire, Appellate Defense  
Trisha Allen, Victim's Services