

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO UNION COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III, Circuit Court Judge

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JUL 14 2014

S.C. Supreme Court

Appellate Case No. 2013-001460

Donnie M. Malpass, Petitioner,

v.

State of South Carolina, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
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ATTORNEYS FOR RESPONDENT

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 The PCR court properly granted a belated appeal of the denial of
 Petitioner’s prior PCR application because his prior counsel failed
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QUESTION PRESENTED

Whether the post-conviction relief court properly granted Petitioner a belated appeal of the denial of his first post-conviction relief action pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991)?

STATEMENT OF THE CASE

The Respondent adopts the statement of the case put forth by the Petitioner.

STANDARD OF REVIEW

The proper standard for reviewing a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

ARGUMENT

Evidence exists to show the post-conviction relief court properly granted Petitioner a belated appeal of the denial of his first post-conviction relief action pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

Petitioner alleged his first post-conviction relief (PCR) counsel failed to file an appeal from the denial of his first post-conviction relief action. (App. p. 345). Prior PCR counsel testified she did not advise Petitioner concerning his right to appeal the denial of his first PCR application because she was not aware of the right to appeal. (App. p. 363 lines 15-21). PCR counsel also testified she did not have a copy of confirmation that she sent Petitioner the Order of Dismissal from his first PCR hearing. (App. p. 364 lines 11-12). Therefore, evidence exists for the PCR court to rule that Petitioner did not knowingly and voluntarily waive his right to appeal the first PCR Order.

CONCLUSION

For all the foregoing reasons, Respondent respectfully submits to this Court the post-conviction relief court properly granted the Petitioner a belated review of his first post-conviction relief action pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

Respectfully submitted,
ALAN WILSON
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By:



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July 14, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Union County

The Honorable John C. Hayes, III, Circuit Court Judge

Donnie M. Malpass,

Petitioner,

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing party by mailing two (2) copies in the United States mail, postage prepaid:

**David Alexander, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211**

This 14th day of July, 2014


NORMA BIGBEE
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

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JUL 14 2014

S.C. Supreme Court

July 14, 2014

VIA HAND DELIVERY

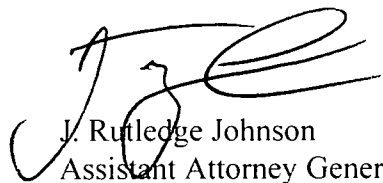
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Donnie M. Malpass v. State of South Carolina
Appellate Case No: 2013-001460

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,


J. Rutledge Johnson
Assistant Attorney General
Bar No: 78871

JRJ/nb
Enclosures

cc: David Alexander, Esquire (2 copies)