 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County  
D. Garrison Hill, Circuit Court Judge  
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**RECEIVED**

AUG 29 2014

**S.C. Supreme Court**

ALBERT SANTANIO KELLY ,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001864  
\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI  
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SUSAN B. HACKETT  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
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(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court properly grant Petitioner a belated PCR appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) where Petitioner did not knowingly and intelligently waive the right to appellate review of his previous PCR application and Order of Dismissal?

## STATEMENT OF THE CASE

A Greenville County grand jury indicted Petitioner for murder (2004-GS-23-5966), armed robbery, and possession of a weapon during the commission of a violent crime (2005-GS-23-2024). App. 831-832; App. 834-835. Petitioner was tried before the Honorable G. Edward Welmaker and a jury on October 10, 2005. L. Mark Moyer represented the state, and C. Timothy Sullivan represented Petitioner. App. 1. The jury found Petitioner guilty as charged. App. 590, lines 8-21. Judge Welmaker sentenced Petitioner to forty-five years' imprisonment for murder, fifteen years' imprisonment for armed robbery, and five years' imprisonment for possession of a weapon during the commission of a violent crime. He ordered all sentences to be served consecutively. Thus, Petitioner is serving sixty-five years in prison. App. 596, line 18 – App. 597, line 4; App. 833; App. 836; App. 837.

A timely notice of appeal was filed. Joseph L. Savitz, III perfected Petitioner's appeal by filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967). App. 599-609. The Court of Appeals dismissed the appeal in an unpublished opinion filed on September 11, 2008. State v. Kelly, 2008-UP-530 (S.C. Ct. filed Sept. 11, 2008); App. 610-611.

Petitioner filed an application for post-conviction relief (PCR) on September 25, 2008. This action was assigned case number 2008-CP-23-7212. App. 612-648. The state filed a return dated December 3, 2008. App. 650-654. Petitioner amended his application on December 11, 2008 and December 12, 2008. App. 655- 720. The matter proceeded to an evidentiary hearing on November 15, 2010 before the Honorable Robin B. Stilwell. Elizabeth Wiygul represented Petitioner, and Karen C. Ratigan represented the state. App. 721. Judge Stilwell denied Petitioner relief by an order filed on February 1, 2011. App. 747-753. A notice of appeal was not filed. However, it appears Petitioner attempted to file a pro se notice of appeal. On March

29, 2012, he wrote to the local clerk of court explaining that he received notice on March 27, 2012 that he had ten days to file a notice of appeal and that it was his understanding that his counsel was supposed to file such a notice. Additionally, Petitioner filed a notice with this Court on March 19, 2012, but failed to include proof of service. Subsequently, this Court dismissed the notice with leave to file for a belated appeal. App. 754-763.

Petitioner filed an application for post-conviction relief on July 10, 2012 alleging his prior PCR counsel was ineffective for failing to file a timely notice of appeal and allegations of newly-discovered evidence. This action was assigned case number 2012-CP-23-4466. App. 789-803. The matter proceeded to a hearing on June 19, 2012 before the Honorable D. Garrison Hill. Caroline Horlbeck represented Petitioner, and Karen C. Ratigan represented the state. App. 811. The state consented to a belated appeal from Petitioner's first PCR hearing. App. 814, lines 1-2. Judge Hill granted Petitioner a belated PCR appeal pursuant to Austin, supra. App. 826; App. 828.

Petitioner filed a timely notice of appeal. This petition for writ of certiorari follows.

## ARGUMENT

The PCR court properly granted Petitioner a belated PCR appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991) where Petitioner did not knowingly and intelligently waive the right to appellate review of his previous PCR application and Order of Dismissal.

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. 814, lines 1-11; App. 814, lines 23-24; App. 823-830; See *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). 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 that 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.*

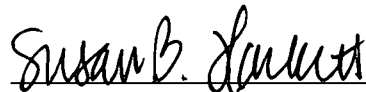
At the June 19, 2013 hearing concerning Petitioner's request for a belated appeal of his PCR application and order, the state consented to the granting of the belated review. Additionally, the state remarked that Petitioner's original PCR counsel "admitted ... she was deficient and did not file an appeal." App. 814, lines 2-8. Thus, the state consented to the belated review. App. 814, lines 1-11.

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

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 issue for review.

Respectfully submitted,



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Susan B. Hackett  
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of August, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County

D. Garrison Hill, Circuit Court Judge

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ALBERT SANTANIO KELLY ,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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CERTIFICATE OF SERVICE

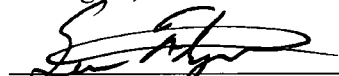
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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Albert Santanio Kelly #277334, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 29th day of August, 2014.

  
Susan B. Hackett  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 29th day  
of August, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.