

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Richland County  
Alison Renee Lee, Circuit Court Judge  
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**S.C. Supreme Court**

JERENE HAYWARD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000633

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

LAURA R. BAER  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR PETITIONER

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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 never received a copy of the Judge’s Order of Dismissal and 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 granted Petitioner relief pursuant to Austin v. State, 305 S.C. 453, 246 S.E.2d 395 (1991) where Petitioner's prior PCR counsel never received a copy of the Judge's Order of Dismissal and the State consents to Petitioner's pursuit of a belated review of the denial of his first PCR application?

## STATEMENT

### **Procedural History**

On June 15, 2005, the Richland County Grand Jury indicted Petitioner for burglary in the first degree, petit larceny, kidnapping, assault and battery with intent to kill, pointing and presenting a firearm, and possession of marijuana. App. 983-84, 986-87, 990-91, 994-95, 998-99, 1000-01.

On March 13-17, 2006, Petitioner appeared before the Honorable James W. Johnson, Jr. and was tried by a jury for the offenses listed in the indictments. App. 1 – 824. Petitioner was represented by Jeanette Van Ginhoven and Lauren Mobley, and the State was represented by Assistant Solicitors Aaron Jophlin and Vanessa Cooper. App. 1. Judge Johnson granted Petitioner's Motion for Directed Verdict as to the indictment for pointing and presenting a firearm. App. 731, 15 - 732, 8. The jury found the Petitioner not guilty of kidnapping, but found Petitioner guilty of burglary in the first degree, petit larceny, the lesser included offense of assault and battery of a high and aggravated nature, and possession of marijuana. App. 817, 13 – 818, 2. Judge Johnson sentenced Petitioner to thirty years imprisonment for burglary in the first degree, ten years imprisonment for assault and battery of a high and aggravated nature, to be served consecutively, and two concurrent terms of thirty days for the larceny and possession charges. App. 823, 1-11; App. 988, 992, 996, 1002 (Sentencing Sheets).

On direct appeal, Appellate Defender Aileen Clare filed a brief on the merits on behalf of Petitioner. The State was represented by Salley W. Elliott. The Court of Appeals affirmed Petitioner's conviction and sentence. State v. Hayward, No, 2008-UP-088 (Ct. App. Feb. 8, 2008); App. 825. The Remittitur was issued on February 26, 2008. App. 985.

### **First PCR Application and Hearing (2008-CP-40-780)**

On February 1, 2008, Petitioner filed his application for post-conviction relief (“PCR”) alleging ineffective assistance of counsel. App. 830-840. The State filed its Return and Motion to Dismiss on February 7, 2008, citing the pendency of Petitioner’s direct appeal on the date the he filed. App. 841-43. Petitioner filed a second application for PCR on May 29, 2008. App. 844-49. The State filed its Return to the second petition and a Motion for Merger on March 25, 2009. App. 850-58; 859-60. The Court granted the Motion for Merger, retaining the docket number of the later petition, 2008-CP-40-03854, as the surviving file and dismissing the original docket number upon the merger.<sup>1</sup> App. 861-62.

On May 13, 2009, an evidentiary hearing was held before the Honorable Alison Renee Lee. App. 863. Petitioner was represented by Charlie J. Johnson, Jr., and the State was represented by Assistant Attorney General Brian Petrano. App. 863. The only witness at the hearing was Petitioner. App. 868-87. Neither of Petitioner’s original trial attorneys were available to testify at the hearing because they were both living outside of the United States. App. 866, 22 – 868, 1.

At the PCR hearing, Petitioner testified that his trial attorneys failed to object or move for a mistrial after a juror sent a note to the judge during the trial indicating that he was a member of the same country club as one of the alleged victims, Jeffrey Connell. App. 874, 2 – 876, 6. Petitioner also argued that defense counsel failed to effectively argue the insufficiency of the photo array shown to the alleged assault victim, in which he was the only individual in prison clothes and the

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<sup>1</sup> Despite the prior order of merger, in Judge Lee’s subsequent Order of Dismissal on March 9, 2010, she merged the second PCR Application into the original PCR Application and ordered that the surviving case number is 2008-CP-40-00780.

complexion of the individuals in the array differed. App. 876, 9-14. Petitioner also testified that that there was insufficient physical evidence to connect him to the crime scene. App. 877, 16 – 13. Finally, Petitioner alleged that defense counsel was unprepared. App. 870, 18 – 871, 6; 879, 17-25; 880, 16-18; 881, 20-23.

#### **Order of Dismissal (2008-CP-40-780)**

Judge Lee's Order of Dismissal denying Petitioner's prior PCR application was filed March 9, 2010. App. 893-99. Judge Lee ruled that trial counsel's representation was not deficient, finding that the note from the juror did not warrant an objection or motion for mistrial, that the photographic line-up was sufficiently challenged by trial counsel, and that trial counsel "thoroughly challenged" the blood evidence. Id.

Petitioner did not file a timely Notice of Appeal.

#### **Second PCR Application and Hearing (2013-CP-40-4135)**

Petitioner filed a subsequent PCR application on July 17, 2013, asserting that his PCR counsel, Charlie J. Johnson, Jr., was ineffective in failing to file a timely notice of appeal. App. 946-62. The State filed its Return on September 26, 2013. App. 963-70. An evidentiary hearing was held on November 20, 2013 before the Honorable Robert E. Hood. App. 971. Petitioner was represented by Kristi G. Goldberg and Tara D. Shurling, and the State was represented by Megan E. Harrigan. Id. The parties placed a consent agreement on the record in light of that fact that, through inadvertence, neglect, or mistake, Judge Lee's Order was not sent to PCR counsel, Charlie J. Johnson, Jr. and was never forwarded on to the Petitioner. App. 974, 9 – 976, 2. The parties agreed that based on the circumstances, Petitioner should be given an opportunity to appeal from Judge Lee's Order. Id.

**Consent Order Granting Belated PCR Appeal Pursuant to Austin (2013-CP-40-4135)**

On March 4, 2014, Judge Hood entered a Consent Order finding that Petitioner did not voluntarily waive his right to appeal PCR court's denial and dismissal of his application for PCR and granting Petitioner an appeal. App. 978-82.

Petitioner filed a Notice of Appeal of this Consent Order on March 21, 2014.

This petition follows pursuant to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) (establishing the procedure when seeking belated appellate review of an Austin PCR application). Additionally, Petitioner is filing his merits certiorari petition in the matter on today's date.

## 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 never received a copy of the Judge’s Order of Dismissal and 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. 978-981; 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, counsel proffered that Petitioner’s first PCR counsel never received the Order of Dismissal signed by Judge Lee almost a year after the hearing, and that the judgment filed with the Clerk of Court was not sent to Charlie Johnson. Ap. 974, 23 – 975, 4. Therefore,

Mr. Johnson never filed a Notice of Appeal. Id. Bryan Jeffries, who had taken over Mr. Johnson's cases was served, but had no involvement in the case and never filed a notice of Appeal. App. 975, 19 – 976, 2. Petitioner did not receive a copy of the Order of Dismissal until one of his many inquiries was responded to by Judge Lee's chambers on May 6, 2013. App. 975, 5-11; App. 955 (Letter from Judge Lee). The State consented to Petitioner's request for a belated appeal of the Order of Dismissal. App. 973-76. 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. 978-81.

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 reasons set forth herein, Petitioner Jerene Hayward respectfully request this Court grant his petition for certiorari and affirm the PCR court's grant of belated review of Petitioner's original PCR application.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Laura R. Baer", is written over a horizontal line.

Laura R. Baer  
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of January, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Richland County  
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JERENE HAYWARD,

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STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000633


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CERTIFICATE OF SERVICE  
\_\_\_\_\_

I certify that a true copy of the petition for writ of certiorari pursuant to Austin v. State and a copy of the appendix in this case have been served on J. Clayton Mitchell, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Jerene Hayward, #314451, at McCormick Correctional Institution this 7th day of January, 2015.



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Laura R. Baer  
Appellate Defender  
ATTORNEY FOR PETITIONER

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

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: October 24, 2021.