

STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable J. Cordell Maddox Jr., Circuit Court Judge

Appellate Case No. 2014-000308

Derrick Hollingsworth, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

JOSHUA L. THOMAS
Assistant Attorney General
S.C. Bar No. 100777

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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

Did the post-conviction relief judge err in granting Petitioner an appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), where Petitioner waited over four years to request such relief and where his delay prejudiced his and the State's ability to prosecute such an appeal?

STATEMENT OF THE CASE

Respondent agrees with Petitioner's statement of the case for the limited purpose of determining whether the post-conviction relief judge properly granted an Austin appeal.

ARGUMENT

I. The post-conviction relief judge erred in granting Petitioner an appeal pursuant to *Austin v. State*.

Petitioner asserts evidence of probative value supports the post-conviction relief judge's finding Petitioner is entitled to an *Austin* appeal because his initial attorney did not file an appeal from his first post-conviction relief denial. However, Respondent does not challenge the post-conviction relief judge's factual finding that the attorney did not file an appeal. Instead, Respondent contends Petitioner's delay for four years after discovering his attorney did not file an appeal precludes him from making such a request at this time. Because the post-conviction relief judge committed an error of law by concluding the doctrine of laches did not bar Petitioner from seeking an *Austin* appeal, this Court reviews this question *de novo*. *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013) (citing *Goins v. State*, 397 S.C. 568, 726 S.E.2d 1 (2012)).

The testimony at the evidentiary hearing overwhelmingly demonstrated Petitioner was aware his initial application was denied in 2007. His delay of over four years to request an appeal bars him from entitlement to an appeal at this time. To ensure finality of litigation, our courts require reasonable diligence in pursuing collateral relief. *See McElrath v. State*, 276 S.C. 282, 284, 277 S.E.2d 890, 891 (1981). Although the statute of limitations found in the Uniform Post-Convictions Procedure Act does not apply to *Austin* claims, the doctrine of laches may bar any such a claim where the applicant has failed to exercise his rights for an unreasonable period. *Whitehead v. State*, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002); *see also RWE NUKEM Corp. v. ENSR Corp.*, 373 S.C. 190, 199, 644 S.E.2d 730, 734-35 (2007) ("Laches connotes not only an undue lapse of time, but also negligence and opportunity to have acted sooner." (citing *Chambers of*

South Carolina, Inc. v. County Council for Lee County, 315 S.C. 418, 434 S.E.2d 279 (1993))).

Applicant testified he did not discover his application was denied until 2011. App. p. 611, lines 9-16). However, on cross-examination he admitted he corresponded with his attorney in 2006 and 2007. He admitted he requested a copy of his file, and his attorney actually sent him a copy of the file. (App. p. 614, lines 18-25). Applicant's attorney testified he received a letter from Applicant in January 2007 requesting a copy of his file. (App. p. 618, lines 5-24).¹ In response, his attorney sent Applicant a copy of the entire file on February 13, 2007. (App. p. 619, line 16-p. 621, line 11). Applicant's attorney sent a copy of the "Order of Dismissal dated May 24, 2006" to Applicant at that time. (App. p. 620, lines 1-4).²

The evidence adduced at the evidentiary hearing indicates Applicant should have known in February 2007 that his first application was dismissed, as that is the date he received a copy of the order of dismissal. Instead of requesting an appeal or filing an Austin claim at that time, he waited until March 2011 to file the current application. Applicant's delay of over four years to file his Austin claim prejudiced both Respondent and Applicant. As noted in Petitioner's accompanying Petition for Writ of Certiorari Pursuant to Austin v. State, the record in this case has been destroyed pursuant to Rule 607(i), SCACR.³ Had Petitioner timely filed a subsequent application in 2007 when he was on notice his application was denied, the doctrine of laches would not apply.

¹ Respondent notes this letter was entered into evidence at the evidentiary hearing, but not included in the Appendix. This same day, Respondent has filed a motion to compel Petitioner to supplement the appendix with all exhibits from the evidentiary hearing.

² See Fn. 1, supra

³ See Fn. 1, supra.

However, Petitioner's failure to assert his right to an appeal for over four years should preclude him from now asserting he has not waived his right to an appeal. See Bonnette v. State, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981) ("Acts inconsistent with the continued assertion of a right, such as a failure to insist upon the right, may constitute waiver. (citing 92 C.J.S. Waiver, p. 1063 (1955))); Provident Life & Acc. Ins. Co. v. Driver, 317 S.C. 471, 479, 451 S.E.2d 924, 929 (Ct. App. 1994) ("As with waiver, laches arises upon the failure to assert a known right under circumstances indicating that the lached party has abandoned or surrendered the right. The lached party must have had actual knowledge or inquiry notice of the facts forming the basis of its claim, and its failure to assert its right is irrelevant until there is a reason or situation that demands assertion." (citations omitted)). Furthermore, the post-conviction relief judge's balancing of the equities was inappropriate here because balancing of equities is not an element of a laches defense. See Robinson v. Estate of Harris, 389 S.C. 360, 372, 698 S.E.2d 801, 807 (2010) ("The party seeking to establish laches must show: (1) a delay, (2) that was unreasonable under the circumstances, and (3) prejudice." (citing Hallums v. Hallums, 296 S.C. 195, 371 S.E.2d 525 (1988))). Instead, all of the elements are present here where Petitioner knew his application was denied in 2007, waited until 2011 to file for relief, and the transcript was destroyed in the interim.

Petitioner was aware of his right to an appeal, but sat on that right for four years. His delay cannot now be rewarded with a chance to challenge the initial denial of relief. Therefore, the post-conviction relief judge erred in finding Petitioner is entitled to an appeal pursuant to Austin v. State.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari and find Petitioner is not entitled to an Austin appeal.

Respectfully submitted,

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By: 
ATTORNEYS FOR RESPONDENT

March 30, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County

The Honorable J. Cordell Maddox, Jr., Circuit Court Judge

DERRICK HOLLINGSWORTH,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

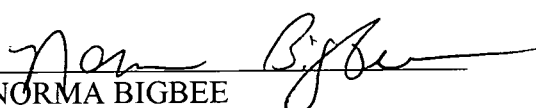
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari, Motion to Strike Petition For Writ of Certiorari Pursuant to Austin v. State and Motion to Compel Petitioner to Supplement the Appendix** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Chief Appellate Defender Robert M. Pachal
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 30th day of March, 2015


NORMA BIGBEE
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

March 30, 2015

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S.C. Supreme Court

VIA HAND DELIVERY

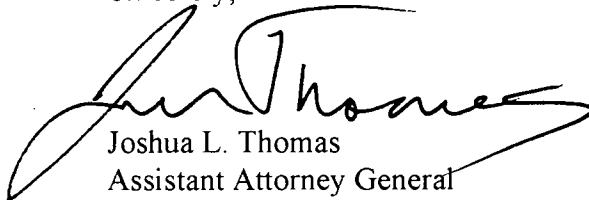
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Derrick Hollingsworth v. State of South Carolina
Appellate Case No: 2014-000308

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari, Motion to Strike Petition For Writ of Certiorari Pursuant to Austin v. State and Motion to Compel Petitioner to Supplement the Appendix** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,



Joshua L. Thomas
Assistant Attorney General
Bar No: 100777

JLT/nb
Enclosures

cc: Robert M. Pachak, Esquire (2 copies)