

**ORIGINAL**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Clarendon County

S.C. Supreme Court

J. Cordell Maddox, Jr., Circuit Court Judge  
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BILLY LIENBY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000886  
\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

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South Carolina Commission on Indigent Defense  
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court properly grant Petitioner a belated appeal from the denial of his first application for post-conviction relief pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991)?

## STATEMENT

A Clarendon County Grand Jury indicted Petitioner at the October 7, 2010 term of General Sessions for assault on a correctional facility employee. App. 136-137. Petitioner pled guilty on July 11, 2011 before the Honorable Howard P. King. App. 1. Assistant Solicitor Amy Land represented the state, and Scott Robinson represented Petitioner. App. 1. Judge King sentenced Petitioner to six months imprisonment. App. 10, ll. 18-20.

By order filed March 6, 2012, the Court of Appeals dismissed Petitioner's direct appeal for failure to provide a sufficient explanation as required by Rule 203(d)(1)(B)(iv), SCACR . The remittitur was sent on March 22, 2012. App. 32.

On March 14, 2012, Petitioner filed an application for post-conviction relief (PCR). App. 13-30. The state filed a return to this application dated July 2, 2012. App. 31-36. The matter proceeded to an evidentiary hearing on March 20, 2013 before the Honorable W. Jeffrey Young. App. 37. Assistant Attorney General Megan Harrigan Jameson represented the state, and Shaun C. Kent represented Petitioner. App. 37. By order dated April 11, 2013, Judge Young denied Petitioner relief. App. 59-67. PCR counsel Kent did not file a Notice of Appeal.

On October 25, 2014, Petitioner filed a second application for post-conviction relief seeking the right to a belated appeal of the denial of his original application. App. 68-99. The state filed a return to this application and motion to dismiss dated April 14, 2014. App. 100-106. The matter proceeded to an evidentiary hearing on December 18, 2014 before the Honorable J. Cordell Maddox, Jr. App. 107. Assistant Attorney General Daniel Gourley represented the state, and Steven W. Fowler represented Petitioner. App. 107. By order dated March 12, 2015, Judge Maddox granted Petitioner a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 132-135.

This petition for writ of certiorari asking the Court to grant a belated appeal follows.

## ARGUMENT

The PCR court properly granted Petitioner a belated appeal from the denial of his first application for post-conviction relief pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

### **Relevant Facts**

Petitioner testified that before his first PCR hearing<sup>1</sup> he discussed with his counsel, Shaun Kent, over the telephone his desire to file a motion pursuant to Rule 59(e), SCRCP, and then eventually a notice of appeal if his application was denied. Petitioner said he also discussed this with counsel on the day of his PCR hearing. App. 122, ll. 5-21. Petitioner asserted that he was familiar with the PCR process and was aware that the assistant attorney general often drafts the order of dismissal and does not “put everything in there [the order].” Therefore, he wanted to file a Rule 59(e) motion before he appealed “to make sure that everything is in my order.” App. 122, ll. 9-14.

Petitioner explained that he received a letter from PCR counsel Kent dated June 23, 2013, which was a few months after his hearing. The body of this letter contained a single paragraph which read, “Enclosed please find a copy of your file. Should you have any questions please do not hesitate to contact me.” Enclosed within this letter was an unsigned, undated copy of the order of dismissal presumably drafted by the assistant attorney general. App. 115, l. 9 – 117, l. 21; App. 83. Petitioner testified that he was concerned after seeing this draft of the order of dismissal because he had not received a clocked, signed, and dated copy of the order and did not know if or when it had been filed. App. 117, ll. 22-25.

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<sup>1</sup> Petitioner’s PCR hearing was held on March 20, 2013. App. 37.

Shortly after seeing this unsigned and undated copy of the order, Petitioner wrote to his counsel, the assistant attorney general, and the Clerk of Court regarding the status of his case. He explained that the Department of Corrections (DOC) requires all outgoing mail from inmates to the Clerk of Court include a case number so he put the case number for his PCR action on the letter. He later received a “Response to Inmate Correspondence” from Chris Florian, general counsel for DOC. App. 78. In this letter dated August 21, 2013, Florian informed Petitioner that his PCR application was dismissed by order filed April 17, 2013. This was the first time Petitioner heard his application had been dismissed. App. 118, l. 5 – 119, l. 25. In the four months that had passed since the order of dismissal was filed, Counsel Kent never informed Petitioner that his application had been denied nor did he file a Rule 59(e) motion or a notice of appeal on Petitioner’s behalf.

Kent testified during the evidentiary hearing that he does not recall discussing with Petitioner his right to appeal from the order of dismissal and asserted that the two “never discussed his [Petitioner’s] appellate rights during the [PCR] hearing. That was definitely a conversation we did not have.” App. 124, l. 25 – 125, l. 7.

### **Discussion**

The PCR court properly granted Petitioner a belated appeal from the denial of his first application for post-conviction relief pursuant to Austin v. State.

“An indigent defendant has the right to be informed of an appeal and the manner and method for taking the appeal.” Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In Austin, this Court framed the question as whether the PCR applicant “requested and was denied an opportunity to seek appellate review.” Austin, 305 S.C. at 454, 409 S.E.2d at 396. The proper scope of review of the PCR court’s ruling is whether there is any evidence of probative value to uphold the PCR court’s findings. Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984).

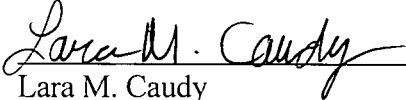
Here, there is ample evidence to support the PCR court's finding that Petitioner desired to appeal, told his counsel he wanted to appeal, and no appeal was filed. Petitioner testified that he asked counsel to file both a Rule 59(e) motion to ensure that all his claims were preserved for appellate review and ultimately a notice of appeal if his PCR application was denied. Petitioner said he discussed this with counsel over the telephone before his hearing and in person on the day of his hearing. However, not only did counsel fail to file a notice of appeal on Petitioner's behalf, he also failed to communicate with Petitioner about the status of his case and inform him that the PCR court had denied his application. Counsel did not dispute this evidence during his testimony at the evidentiary hearing.

Under Austin, the PCR court correctly ruled that Petitioner's desire for an appeal was communicated to PCR counsel and no appeal was filed. Respectfully, under the "any evidence" standard of review of Webb, this Court should hold that the PCR court's ruling was correct, grant certiorari, and grant Petitioner a belated appeal from the denial of his original application for post-conviction relief.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and grant  
Petitioner a belated appeal from the denial of his original application for post-conviction relief.

Respectfully submitted,

  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of December, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Clarendon County  
J. Cordell Maddox, Jr., Circuit Court Judge

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BILLY LISENBY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

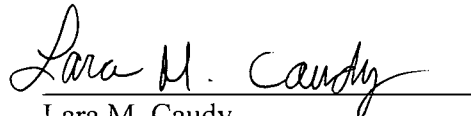
APPELLATE CASE NO. 2015-000886

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CERTIFICATE OF SERVICE

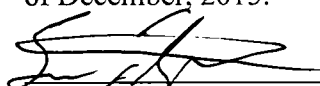
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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Daniel Gourley, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 8th day of December, 2015.

  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 8th day  
of December, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.