

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

MAR 18 2016
SC SUPREME COURT

Certiorari to Anderson County
Edgar W. Dickson, Circuit Court Judge

STEVEN MCELRATH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001081

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge correctly find that Petitioner did not knowingly and voluntarily waive his right to appeal the denial of his first PCR application and is entitled to a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d.395 (1991)?

STATEMENT

In June of 2007 the Anderson County Grand Jury indicted Petitioner, Steven C. McElrath for kidnapping and criminal sexual conduct first degree, indictments #2007-GS-04-1896, 1897. On May 19, 2008, Petitioner appeared before the Honorable J.C. Nicholson, Jr. and pled guilty as charged. Scott Robinson represented Petitioner. Kristen W. Reeves prosecuted the case. Judge Nicholson sentenced Petitioner to thirty (30) years for kidnapping and ten (10) years consecutive for criminal sexual conduct first degree. A timely notice of intent to appeal was filed. On September 23, 2008, the South Carolina Court of Appeals dismissed the appeal pursuant Rule 203(d)(1)(B)(iv) for failure to provide a written explanation showing that there is an issue which can be reviewed on appeal. (App. p. 107).

On January 2, 2009, Petitioner filed an application for post conviction relief, 2009-CP-04-0012. The State filed a return on April 2, 2009. Petitioner filed an amended PCR application on January 29, 2010. On June 15, 2010, an evidentiary hearing was held before the Honorable R. Lawton McIntosh. George L. Sands represented Petitioner at the PCR hearing. West Lee represented the State. In an order signed August 13, 2010, Judge McIntosh denied relief and dismissed the application. (App. pp. 97-106). On July 2, 2010, prior to the judge signing the order of dismissal, Petitioner filed a *pro se* Rule 59(e) motion to alter or amend. (App. pp. 108-111).

On September 9, 2011, Petitioner filed a second application for post conviction relief. (App. pp. 112-145). On February 9, 2012, the State filed a return and partial motion to dismiss. (App. pp. 146-151). On July 30, 2014, Petitioner appeared before the Honorable Edgar W. Dickson. Carolyn E. Galloway represented Petitioner. John Walt Whitmire represented by the State. The State stipulated that Petitioner was entitled to a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). In an order signed April 30, 2015, Judge Dickson granted the belated

appeal but denied relief on all other grounds. A timely notice of intent to appeal was served on May 12, 2015. This petition for writ of certiorari and a separately filed Johnson petition for writ of certiorari follow.

ARGUMENT

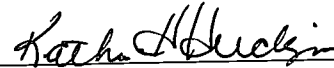
The PCR judge correctly found that Petitioner did not knowingly and voluntarily waive his right to appeal the denial of his first PCR application and is entitled to a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

During the evidentiary hearing the State conceded that Petitioner was entitled to a belated appeal pursuant to Austin. (App. p. 154, lines 5-21). In the order granting Austin relief the judge noted that prior PCR counsel was unable to locate his file and was unable to rebut the allegation that Petitioner did not knowingly and voluntarily waive his right to appeal the denial of his first PCR application. (App. p. 159). The PCR judge correctly found that Petitioner did not knowingly and intelligently waive his right to appeal the denial of his first PCR application and is entitled to a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

CONCLUSION

Based on the above argument, this court should allow the belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of March, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Anderson County
Edgar W. Dickson, Circuit Court Judge

STEVEN MCELRATH,

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V.

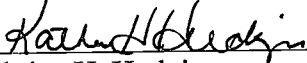
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001081


CERTIFICATE OF SERVICE

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 Patrick Schmeckpeper, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 18th day of March, 2016.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of March, 2016.


(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.