

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO ANDERSON COUNTY
Court of Common Pleas

The Honorable Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2015-001081

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MAY 2 2016

SC SUPREME COURT

STEVEN MCELRATH, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

PATRICK SCHMECKPEPER
Assistant Attorney General
S.C. Bar #102100

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ATTORNEYS FOR RESPONDENT

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The PCR court properly granted a belated appeal of the denial of Petitioner’s prior PCR application because his prior counsel failed to file his appeal, pursuant to <u>Austin v. State</u> , 305 S.C. 453, 409 S.E.2d 395 (1991)	5
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QUESTION PRESENTED

Whether the post-conviction relief court properly granted Petitioner a belated appeal of the denial of his first post-conviction relief action pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991)?

STATEMENT OF THE CASE

The Respondent adopts the statement of the case put forth by the Petitioner.

STANDARD OF REVIEW

The proper standard for reviewing a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

ARGUMENT

Evidence exists to show the post-conviction relief court properly granted Petitioner a belated appeal of the denial of his first post-conviction relief action pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

Petitioner alleged his first post-conviction relief (PCR) counsel failed to file an appeal from the denial of his first post-conviction relief action. The State conceded Petitioner would be able to meet his burden to prove that PCR counsel's failure to file a notice of appeal from denial of his first PCR constituted ineffective assistance. (App. p. 154, l. 5-21). Therefore, evidence exists for the PCR court to rule that Petitioner did not knowingly and voluntarily waive his right to appeal the first PCR Order.

CONCLUSION

For all the foregoing reasons, Respondent respectfully submits to this Court the post-conviction relief court properly granted the Petitioner a belated review of his first post-conviction relief action pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

Respectfully submitted,

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By: 

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STEVEN MCELRATH,

PETITIONER,

v.

THE 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, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Kathrine H. Hudgins, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
Columbia, SC 29201

This 2nd day of May, 2016



DEONNA ROGERS
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

May 2, 2016

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

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SC SUPREME COURT

Re: Steven Mcelrath v. State of South Carolina
Appellate Case No. 2015-001081
Lower Court Case No. 2011-CP-04-2710

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Patrick Schmeckpeper
Assistant Attorney General
SC Bar No. 102100

PS/dr
Enclosures

cc: Appellate Defender Kathrine H. Hudgins (2 copies)