

STATE OF SOUTH CAROLINA

 ORIGINAL

IN THE SUPREME COURT

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Certiorari to Greenville County

APR 24 2017

Honorable R. Knox McMahon, Circuit Court Judge

S.C. SUPREME COURT

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STANLEY L. BUTLER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001721

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PETITION FOR WRIT OF CERTIORARI

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WANDA H. CARTER  
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<sup>1</sup> Austin v. State, 305 S.C. 453 409 S.E.2d 395 (1991).

### ISSUE PRESENTED

The remand PCR hearing judge erred in applying laches as a defense to deny petitioner's second PCR action request for an Austin<sup>2</sup> appeal of his first PCR action without conducting a reconstruction hearing of the first PCR hearing in order to test the memories of all parties who participated then, which would have been a more thorough evaluation than questioning his first PCR attorney only, because without such a reconstruction PCR hearing it would have been impossible to properly assess whether the delay in the filing of the second PCR action resulted in prejudice to the respondent.

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<sup>2</sup> Austin v. State, 305 S.C. 453 409 S.E.2d 395 (1991).

## STATEMENT

Petitioner Stanley Lewis Butler was found guilty of armed robbery, possession of a weapon during the commission of a violent crime, and four counts of kidnapping during the May 1996 term of the Greenville County General Sessions Court before Judge C. Victor Pyle. John Rollins, Jr. represented petitioner at trial and Assistant Solicitor Judy M. Munson appeared on behalf of the state. Petitioner was sentenced to imprisonment for an aggregate term of fifty years. App. 1-374. Petitioner appealed, but his convictions and sentences were affirmed. See State v. Butler, Op. No. 97-UP-640 (S.C. Ct. App. filed Dec. 10, 1997). App. 376-378. Robert M. Dudek, Esquire, of the South Carolina Office of Appellate Defense, represented petitioner on direct appeal.

On June 26, 1988, petitioner filed his first PCR application with the Greenville County Office of the Clerk of Court. App. 379-385. The first PCR hearing was convened on April 12, 2000, at the Greenville County Courthouse before Judge James E. Brogdon. William G. Yarborough represented petitioner at this first PCR hearing held in the case. On July 16, 2001, Judge Brogdon issued an Order of Dismissal denying petitioner's first PCR action. Petitioner did not enjoy the benefit of an appeal of his first PCR action.

On June 29, 2012, petitioner filed a second PCR application regarding his case. App. 379-385. The respondent filed a return and motion to dismiss on the grounds that the second PCR action was successive and untimely filed. App. 386-390.

A Conditional Order of Dismissal was signed by Judge G. Edward Welmaker on September 19, 2012, echoing the respondent's reasons for the dismissal of the second PCR action. App. 386-395. A response in the form of a motion to amend was filed by petitioner on

September 25, 2012. App. 396-400. On January 3, 2013, a Final Order of Dismissal was filed by Judge Welmaker dismissing petitioner's second PCR action without a hearing. App. 401-403.

Pursuant to the PCR appeal of Judge Welmaker Final Order dismissing petitioner's second PCR action, a petition for writ of certiorari was filed on appeal on May 30, 2013, and a return was filed on July 5, 2013. App. 404-423. The issue addressed on PCR appeal was "whether petitioner was entitled to a belated PCR appeal of the denial of his first application for post-conviction relief." App. 406. Note that in the Final Order of Dismissal, the doctrine of laches was cited to as justification for the dismissal of petitioner's second PCR action despite the fact that laches was not raised and argued in the respondent's return and motion to dismiss petitioner's second PCR action. See App. 402-403. In light of the introduction of the laches argument raised in the Final Order issued in the case, the South Carolina Court of Appeals issued an Order dated January 22, 2015, directing the parties to brief the following issue:

Did the PCR court commit an error of law when it denied and dismissed petitioner's PCR application based on the doctrine of laches when the State did not plead laches as an affirmative defense [in its return and motion to dismiss in response to petitioner's second PCR action]? See App. 424.

After briefs were filed, the South Carolina Court of Appeals issued an Order dated September 1, 2015, remanding the PCR case as follows:

With the consent of the parties, we vacate the PCR court's order of dismissal (which was the Final Order in response to the second PCR actions) and remand the case...for an evidentiary hearing on the allegation contained in [petitioner's second] PCR application and motion to amend. App. 439.

A Remand PCR hearing in the case was convened on April 20, 2016, at the Greenville County Courthouse before Judge R. Knox McMahon. App. 440-474. Petitioner was present at

the Remand PCR hearing and represented by Brian Johnson at that time, and Assistant Attorney General Patrick Schmeckpeper appeared on behalf of the state. App. 440-474.

On July 29, 2016, Judge McMahon's Order of Dismissal was issued after the Remand PCR hearing was held in the case. App. 476-488. Petitioner appealed Judge McMahon's Order of Dismissal. This petition for writ of certiorari follows.

### ARGUMENT

The remand PCR hearing judge erred in applying laches as a defense to deny petitioner's second PCR action where he requested an Austin<sup>3</sup> appeal of his first PCR action without first conducting a reconstruction hearing of the first PCR hearing in order to test the memories of all parties who participated then, which would have been a more thorough evaluation than questioning his first PCR attorney only, because without such a reconstruction PCR hearing it would have impossible to properly assess whether the delay in the filing of the second PCR action resulted in prejudice to the respondent.

The Fuddruckers Restaurant located on Woodruff Road in Greenville, South Carolina, was robbed shortly after midnight on March 10, 1996. Employee Tim Waiter, who was working at the time of the robbery, testified at trial and described the events that occurred during the robbery. Waiter stated that when he opened the door for what he thought were potential customers to come in on that night, a man wearing a white bandana and holding a gun pushed his way in and then another male came in also wearing a welder's mask. Waiter explained that the robbers made him and the other three employees who were there on that night get on the floor and then they (employees) were placed inside the restaurant cooler where they stayed for a while.

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<sup>3</sup> Austin v. State, 305 S.C. 453 409 S.E.2d 395 (1991).

Ultimately, police arrived on the scene. App. 52, l. 15 – p.61, l. 20. The suspects were Austin Perry, Shannon Todd, and petitioner. Perry testified as a state's witness at a joint trial held for petitioner and co-defendant Todd and admitted that he, Todd, and petitioner committed the robbery at Fuddruckers. App. 199, l. 1 – p. 219, l. 24. Todd was acquitted on all charges, but petitioner was convicted of armed robbery, four counts of kidnapping, and possession of a firearm during a violent crime.

The procedural history of the case follows:

- 1.) July 23, 1996-----Petitioner's Jury Trial Convictions
- 2.) December 10, 1997--Petitioner's Direct Appeal Affirmed
- 3.) June 26, 1998-----Petitioner's First PCR Application Filed
- 4.) April 12, 2000-----Petitioner's First PCR Hearing Held
- 5.) July 16, 2001-----First PCR Order of Dismissal Issued
- 6.) June 29, 2012-----Petitioner's Second PCR Application Filed
- 7.) September 11, 2012--Return and Motion to Dismiss
- 8.) September 19, 2012--Conditional Order of Dismissal
- 9.) September 25, 2012--Response to Conditional Order
- 10.) January 3, 2013--Final Order Dismissing Second PCR
- 11.) March 30, 2013---Petition for Writ of Certiorari Appeal
- 12.) January 22, 2015--Order issued by S.C. Court of Appeals directing the parties to brief the question of whether the second PCR judge erred in dismissing the second PCR action on the ground of laches when the State did not plead laches as an affirmative defense in its Return and Motion to Dismiss
- 13.) September 1, 2015---Order issued by S.C. Court of Appeals (after briefing) vacating the Final Order and remanding for a hearing on the second PCR action

- 14.) April 20, 2016-- Remand PCR Hearing was held
- 15.) July 29, 2016---Order of Dismissal on Remand PCR Hearing

During the Remand PCR hearing held in the case, petitioner testified that his first PCR attorney did not appeal his first PCR action because he (first PCR attorney) was allegedly arrested shortly after the hearing, and therefore did not file a PCR appeal for him. Petitioner added that he desired an appeal of his first PCR action and attempted to obtain an appeal by writing to the S.C. Bar Lawyer Referral Services regarding a PCR appeal. Petitioner stated that he tried to appeal on his own by "fil[ing] the paperwork," but that it came back. App. 457, l. 10 - p. 462, l. 24.

PCR counsel testified at the Remand PCR hearing and said his health and troubles started about four months after petitioner's hearing and that he remembered petitioner, but did not remember in what capacity he represented petitioner and added the following:

My practice would have been to file an appeal in a PCR within whatever the time frame for it. I cannot tell you if - that time frame is so close to that period, I just can't tell you the answer to it. I don't think that anywhere there's a file. If petitioner says he communicated to me and wanted a PCR filed, I can't say that that didn't happen. I also - if he did, I would have done it. Okay. So I don't know the answer. App. 466, lines 6-14.

Q. Mr. Yarborough, were you incarcerated immediately following the applicant's hearing?

A. No, no. I was not. And we - if she would have contacted the office and I was not there, she would have been referred to Jeff Merriam who was the counsel who took over and handled all of my cases. I was in - I did go to a treatment center for alcohol addiction; and Mr. Merriam and I were [in] contact [with] each other on a weekly basis to discuss any of my cases that may have come up at that time. App. 472, lines 17-24.

The Attorney General made the following argument at the PCR hearing:

At this time, your Honor, the State moves for dismissal on all of applicant's claims in his entire application...Concerning the claim the applicant's PCR counsel was ineffective for failing to file an appeal, the State submits those claims are also barred by laches. Again, applicant's initial PCR was denied over 10 years ago. Laches is defined as, and I quote, delayed for unreasonable and unexplained length of time under circumstances affording opportunity for diligence to do what in law should have been done. In determining whether or not a PCR should be denied or barred under laches, it's a highly factual - analysis - fact - specific analysis taking into account whether or not the State has been prejudiced by applicant's unreasonable delay. In this case, I would submit that the State has been prejudiced. First off, we don't even know if witnesses remember anything about the case. We don't remember - we don't know if witnesses remember anything about the case or if they remember the case at all. In addition, I don't even know if the transcript's available. Under rule -- beg the Court's indulgence....five years after the actual date of recording. After that, they can be destroyed. We don't even know if there's a PCR transcript, so it would be very difficult for that State to respond to any allegations.

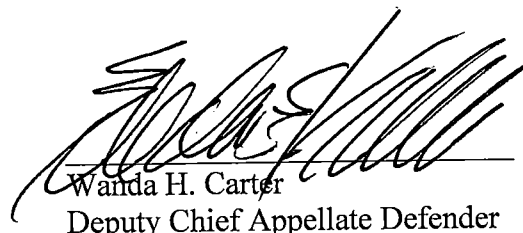
The Remand PCR hearing judge found that petitioner raised his Austin claim eleven years after the denial of his first PCR application and that the doctrine of laches barred petitioner from raising his PCR claims in this second PCR action absent some explanation or justification for the delay and because the delay greatly prejudiced the Respondent, (as a first PCR transcript is unavailable and the first PCR counsel has little memory of the first PCR case). App. 479-482.

As a rule, the doctrine of laches may be raised as a defense to an Austin claim, but "whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has resulted in injury, prejudice, or disadvantage to the other party [because] delay alone in assertion of a right does not constitute laches." Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002). In Whitehead, the Court remanded for a hearing to reconstruct the first PCR hearing, "in effect to determine if there was prejudice or a

disadvantage to the opposing parties ability to defend.” In the case at bar, the remand PCR judge erred in applying laches based on the first PCR counsel’s failed memory without holding a reconstruction hearing to test whether the memories of all of the parties who attended the first PCR hearing (Attorney General and trial counsel) before concluding that petitioner’s second PCR action was barred under the laches doctrine and in denying relief to petitioner on his Austin claim and the allegations raised in his second PCR action per laches. A PCR reconstruction hearing was necessary in the case at bar. See China v. Parott, 251 S.C. 329, 162 S.E.2d 276 (1968). The PCR judge erred in denying relief to petitioner on his second PCR actions due to laches without holding a reconstruction hearing to test the existence of prejudice to the opposing party via petitioner’s delay in filing a tardy second PCR action.

**CONCLUSION**

Based on the foregoing argument, petitioner requests that this Court allow full briefing on the above raised issue.



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of April, 2017.

**STATEMENT OF AUSTIN QUESTIONS  
UNAVAILABLE UNTIL  
RECONSTRUCTION HEARING IS HELD**

STATE OF SOUTH CAROLINA

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STANLEY L. BUTLER,

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V.

STATE OF SOUTH CAROLINA,

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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon DeShawn H. Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Stanley L. Butler, #233704, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 24th day of April, 2017.

  
Wanda H. Carter  
Deputy Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER  
this 24th day of April, 2017.

 (L.S)

Notary Public for South Carolina  
My Commission Expires: October 30, 2022.