

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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OCT 28 2017

Certiorari to York County
Lee S. Alford, Circuit Court Judge

S.C. SUPREME COURT

ISAIAS DIAZ GUTIERREZ,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001080

PETITION FOR WRIT OF CERTIORARI

SUSAN B. HACKETT
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Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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The PCR court properly granted Petitioner a belated PCR appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991) where Petitioner did not knowingly and intelligently waive the right to appellate review of his previous PCR application and order denying relief and the state consented to the request for belated appellate review.4

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ISSUE PRESENTED

Did the PCR court properly grant Petitioner a belated PCR appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), where Petitioner did not knowingly and intelligently waive the right to appellate review of his previous PCR application and order denying relief and the state consented to the request for belated appellate review?

STATEMENT

On April 12, 2007, a York County grand jury indicated Petitioner for three counts of forgery (2007-GS-46-1261; -1264; -1265), armed robbery (2007-GS-46-1262), murder (2007-GS-46-1263), and burglary in the first degree (2007-GS-46-1266). App. 937-938; App. 940-941; App. 943-944; App. 946-947; App. 949-950; App. 952-953. The state, represented by Walter W. Thompson and Lisa J. Collins, called the case for trial before the Honorable J. Derham Cole and a jury on December 10-13, 2007. App. 1. Derek Chiarenza represented Petitioner. App. 1. The jury found Petitioner guilty as charged. App. 717, l. 18 – App. 718, l. 12. Judge Cole sentenced Petitioner to life imprisonment without the possibility of parole for murder and burglary in the first degree, thirty years' imprisonment for armed robbery, and to five years' imprisonment for each count of forgery. App. 729, l. 19 – App. 731, l. 2; App. 939; App. 942; App. 945; App. 948; App. 951; App. 954. All sentences were to be served concurrently. App. 942; App. 945; App. 948; App. 951; App. 954.

Following his trial, Petitioner filed a notice of appeal. He was represented by Robert M. Pachak, who filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). App. 735-745. On appeal, Petitioner challenged the introduction of knife because it was irrelevant and unfairly prejudicial. App. 735-745. On October 21, 2009, the Court of Appeals dismissed the appeal. App. 746; State v. Gutierrez, 2009-UP-495 (S.C. Ct. App. filed Oct. 21, 2009). Remittitur issued on November 6, 2009.

On June 23, 2010, Petitioner filed an application for post-conviction relief (PCR), which was assigned case number 2010-CP-46-2611. App. 748-753. The matter proceeded to a hearing on June 1, 2001, before the Honorable Lee S. Alford. App. 760. David Clayton Cook

represented Petitioner, and Harrison David Brant represented the state. App. 760. By an order filed September 16, 2011, Judge Alford denied Petitioner relief. App. 819-832.

On October 21, 2015, Petitioner filed a second application for PCR, which was assigned case number 2015-CP-46-3199. App. 833-919. The matter proceeded to a hearing on April 17, 2017, before the Honorable G. Thomas Cooper. App. 926. Nathan James Sheldon represented Petitioner, and Justin James Hunter represented the state. App. 926. By an order filed on April 19, 2017, Judge Cooper granted Petitioner belated review of his PCR proceeding pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).¹

Petitioner received written notice of entry of the order on April 19, 2017. On April 20, 2017, Petitioner served his notice of appeal. This petition for writ of certiorari follows.

¹ Along with this petition for writ of certiorari, Petitioner is filing a petition pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). See King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992).

ARGUMENT

The PCR court properly granted Petitioner a belated PCR appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991) where Petitioner did not knowingly and intelligently waive the right to appellate review of his previous PCR application and order denying relief and the state consented to the request for belated appellate review.

The PCR court properly granted Petitioner belated appellate review of his initial PCR application because Petitioner was denied his right to appeal the dismissal of his first PCR application. In fact, the state consented to the grant of relief. App. 930, ll. 2-4; App. 932-936; see *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). In South Carolina, “[a]ll applicants are entitled to a full and fair opportunity to present claims in one PCR application.” *Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). Pursuant to the rules and statutes governing PCR proceedings, an applicant is entitled to a full adjudication on the merits of the original petition. *Id.* This includes the right to seek appellate review of the denial of PCR and the right to assistance of counsel in that appeal. *Id.* at 261, 523 S.E.2d at 755-56. This Court held an individual can appeal a denial of a PCR application after the statute of limitations has expired if the individual either (1) requested and was denied an opportunity to seek appellate review or (2) did not knowingly and intelligently waive the right to appeal. *Austin*, 305 S.C. at 455, 409 S.E.2d at 396.

The South Carolina Supreme Court held that the procedures prescribed by *Anders v. California*, 386 U.S. 738 (1967) applied in PCR matters. *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1998). Thus, appellate counsel is required to engage in a conscientious investigation of the possible grounds of appeal and brief arguable issues before appellate counsel may ask to withdraw. *Anders*, 386 U.S. at 744. The United States Supreme Court held: “The constitutional requirement

of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae.” Id.

In his second PCR application, Petitioner explained that he was seeking an appeal from his first PCR application because “PCR counsel failed to file appeal from adverse dismissal.” App. 836; App. 838-843; App. 844; App. 845. Petitioner also provided a copy of a letter written to him on October 10, 2011, by his first PCR lawyer. App. 891. In the letter, PCR counsel refused to file a notice of appeal on Petitioner’s behalf. App. 891. Inexplicably, PCR counsel indicated he would not file a notice of appeal because his contract provided that he would not represent Petitioner on appeal and his belief that an appeal lacked merit. App. 891. PCR counsel, thereafter, provided incorrect advice concerning how Petitioner could file his own notice of appeal. App. 891 (advising Petitioner to file his notice of appeal with the Court of Appeals and failing to advise him to serve the opposing party). PCR counsel refused to acknowledge the Rules of Court requiring him to file a notice of appeal when an applicant so desires. See Rule 71.1(g), SCRCPP.

At the April 17, 2017, hearing concerning Petitioner’s request for a belated appeal of his PCR application and order, the state consented to the grant of the belated review. App. 930, ll. 2-4. According to the state, this consent was based on information that was shared with Petitioner’s counsel and the state. App. 930, ll. 2-4. As found by the PCR court, the state consented to allowing Petitioner a belated review of the denial of his initial PCR application. App. 934-935. The state was convinced that Petitioner was entitled to a belated appeal based upon letters submitted with his second PCR application. App. 934-935. The letters indicated that Petitioner requested his PCR counsel file a notice of appeal, but his counsel refused. App. 934-935. The PCR court reviewed the facts and circumstances surrounding the matter and found Petitioner “did not knowingly and voluntarily waive his right to appeal his first PCR application.” App. 935. Therefore, the PCR

court granted Petitioner a belated review of the denial of his first PCR action pursuant to Austin. App. 935.

Under these circumstances, the PCR court's decision granting Petitioner belated appellate review of his first PCR application should be upheld. See Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)("The appropriate scope of review of this Court is that 'any evidence' of probative value is sufficient to uphold the PCR judge's findings."). Simply stated, Petitioner is entitled to his one fair bite at the apple. See Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582 (2002).

CONCLUSION

Petitioner respectfully requests this Court affirm the PCR court's determination that he is entitled to belated review of his initial PCR application and order denying relief.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of October, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to York County

Lee S. Alford, Circuit Court Judge

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ISAIAS DIAZ GUTIERREZ,

PETITIONER

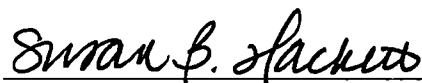
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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CERTIFICATE OF SERVICE
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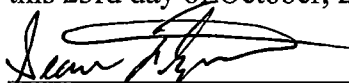
The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Justin J. Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Isaias Diaz Gutierrez, #325762, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 23rd day of October, 2017.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 23rd day of October, 2017.

 (L.S)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.