

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Cherokee County

Honorable Roger L. Couch, Circuit Court Judge

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JONATHAN LEON SIMPSON,

**RECEIVED**

PETITIONER **DEC 20 2017**

V.

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001499

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PETITION FOR WRIT OF CERTIORARI

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LANELLE CANTEY DURANT  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Whether the PCR court was correct in ruling that Petitioner was entitled to a belated appeal from the denial of his first PCR as his first PCR attorney failed to file an appeal after Petitioner requested one?

## STATEMENT

Jonanthan Simpson and two co-defendants, Marcellus Knuckles and Laquinton Foster, were charged with robbing the Eastside Saveway convenience store in Cherokee County on January 18, 2006. All three were charged with armed robbery (AR). App. 29, ll. 15 – App. 32, ll. 1. On September 7, 2006, the Cherokee County Grand Jury indicted Petitioner Simpson for armed robbery. App. 353, - App. 354. On November 5, 2006, Co-defendant Foster pled guilty to armed robbery and was sentenced. App. 31, ll. 12 – 17.

On November 6-8, 2006, Simpson and Co-defendant Knuckles proceeded to trial before the Honorable J. Mark Hayes and a jury. Simpson was represented by Scott Robinson and Co-defendant Knuckles was represented by Bill Rhoden. The state was represented by Kim Leskanic. App. 1. The jury found both men guilty as indicted. App. 239, ll. 1 – 18. The judge sentenced Petitioner Simpson to twenty years and Co-defendant Knuckles to fifteen years. App. 247, ll. 18 – App. 248, ll. 2; App. 355.

Petitioner Simpson filed a notice of appeal which was perfected with the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967) by the Office of Appellate Defense. App. 357 – App. 368. The Court of Appeals dismissed the appeal. State v. Simpson, Op. No. 2009-UP-337 (Ct. App. filed September 10, 2009).

On October 21, 2009, Simpson filed an application for post-conviction (PCR) relief. (2009-CP-11-0992). App. 25- App. 258. The state filed a return on March 31, 2010. App. 259 – App. 263. An evidentiary hearing was held on September 16, 2010 before the Honorable Roger L. Couch. Simpson was represented by Thomas B. Outlaw, and the state was represented by Suzanne H. White. App. 264. At the hearing, the state told the court that in his application, Simpson made allegations of ineffective assistance of counsel “regarding an expert testifying

who was unqualified; someone testifying without a hearing; improper ruling by the trial court; and failure to make timely objections.”<sup>1</sup> App. 266, ll. 1 – 15. PCR counsel then told the court that they had reduced the issue to the “issues of ineffective assistance of counsel and wanted to proceed by calling Simpson.” App. 266, ll. 17 – 20. When the judge asked how counsel was alleging trial counsel was ineffective, PCR counsel responded:

In respect of, of lack of communication of what was going on with the trial, and failure to meet with the client prior to trial.

The judge then asked if those were the only two claims. PCR counsel responded: “Yes.” App. 267, ll. 1 – 2.

Simpson testified at this first PCR hearing that he saw his trial attorney only once before the trial when his trial attorney visited him the Saturday before the trial started on the following Monday. The only discovery he received before his trial was a couple of statements. He continued that there were two witnesses against him: Joseph Wilson and Laquintin Foster. His attorney questioned them outside the presence of the jury but did not question them before the jury. App. 267, ll. 17 – App. 270, ll. 25.

Trial counsel testified at the PCR hearing that he was appointed to represent Petitioner Simpson. App. 275, ll. 1 – 25. He admitted that as far as letters and communication with Petitioner Simpson, trial counsel “had no independent recollection” since it was four years earlier. App. 283, ll. 2 – 23. Counsel did say that the trial strategy for Simpson and his co-defendant was to “discredit” the witnesses to show that they were not credible. Counsel said that “when you have a witness who is a co-defendant in the matter, that it was kind of a difficult

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<sup>1</sup> In his PCR application, Simpson claimed: (1) trial counsel allowed expert to testify who was not qualified; (2) trial counsel allowed a person to testify without having a hearing under Massiah v. U.S., 377 U.S. 201 (1964); (3) trial court made improper ruling by allowing evidence of defendant’s admission of guilty. App. 264.

situation.” App. 279, ll. 4 –App. 280, ll. 21. Counsel testified that Simpson always denied that he participated in this robbery although one of the co-defendants testified against Simpson. App. 278, ll. 1 – 14.

The PCR judge issued an order on November 24, 2010 denying Petitioner Simpson’s PCR application and dismissing it with prejudice. App. 289 – App. 295. The judge found trial counsel’s testimony to be more credible than Simpson’s. App. 293. The PCR judge wrote that Petitioner Simpson failed to show that trial counsel was deficient in his representation regarding the lack of “consultation time.” The judge also found that Simpson failed to show that if a different cross-examination approach had been used by trial counsel, that it would have been beneficial to the defense. App. 294.

The judge wrote in his order that Simpson presented no evidence at the PCR hearing concerning the two issues that Simpson raised in his PCR application which were: the lack of a Massiah hearing regarding one of the witnesses, and trial counsel’s ineffectiveness for allowing an expert to testify who was not qualified to testify. Therefore, the judge wrote, Simpson failed to meet his burden of proof and those allegations were denied and dismissed. App. 294.

The Supreme Court issued an order on February 13, 2013, dismissing the notice of appeal from Simpson’s PCR hearing because trial counsel failed to provide the Court with a copy of the order to be challenged on appeal, and failed to provide a proof of service that the notice had been served on opposing counsel. App. 298. In a letter to PCR counsel on January 25, 2013, the Supreme Court wrote that Simpson had provided documents to the Court which had been “construed” as a notice of appeal. The Court provided a list of items that PCR counsel needed to provide to the Court for the appeal. App. 296 – App. 297. However, PCR counsel failed to provide those documents. App. 298.

On January 27, 2014, Simpson filed a second PCR application, (2014-CP-11-0053), alleging the same two issues he listed in his first PCR that were not addressed at his first PCR hearing. These were: trial counsel allowed a person to testify without having a hearing pursuant to Massiah v. United States., and trial counsel allowed an expert to testify who was not qualified. Simpson also included ineffective assistance for not filing a notice of appeal from the denial of his first PCR application. App. 348 – App. 349; App. 301 – App. 303.

The state filed a return on August 20, 2014. An evidentiary hearing was scheduled for September 3, 2015, but the state consented to a belated review of the dismissal of Simpson’s first PCR application. Judge R. Keith Kelly issued a Consent Order Granting an Appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 349; App. 318 – App. App. 322. However, Petitioner Simpson did not file a notice of appeal. App. 349.

On May 16, 2016, Simpson filed a third PCR. (2016-CP-11-0348) alleging the same two issues regarding ineffective assistance of counsel: counsel allowed the person to testify without a hearing under Massiah, and counsel allowed an expert to testify who was not qualified and counsel failed to file an appeal. App. 341. The state filed a return on May 16, 2017 moving to summarily dismiss Simpson’s application as successive and untimely. App. 332 – App. 337.

On May 24, 2017, Judge J. Derham Cole issued a Conditional Order of Dismissal allowing Simpson twenty days to provide a reason why the Conditional Order should not become final. App. 349 – App. 350; App. 339 – App. 344. On June 6, 2017, Simpson filed a Motion to Amend Post Conviction Relief providing that PCR counsel and the attorney general had consented to an Order granting an appeal pursuant to Austin v. State, id. Judge Cole issued a Consent Order Granting An Appeal Pursuant to Austin v. State, id. on June 20, 2017.

This petition follows accompanied by a Johnson petition for a writ of certiorari pursuant to Austin v. State.

## ARGUMENT

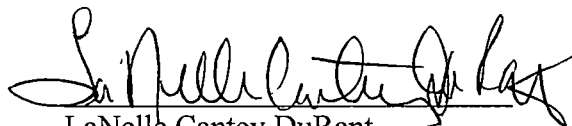
The PCR court was correct in ruling that Petitioner was entitled to a belated appeal from the denial of his first PCR as his first PCR attorney failed to file an appeal after Petitioner requested one.

A PCR applicant is entitled to an Austin appeal if the PCR judge affirmatively finds either: (1) the applicant requested and was denied an opportunity to seek appellate review; or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived. If the PCR court finds an applicant was denied his right to appeal, the applicant can petition for certiorari and the appellate court will review whether the petitioner was prejudiced by the failure to obtain appellate review. Odom v. State, 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999); Wicker v. State, 310 S.C. 8, 425 S.E.2d 25 (1992). An applicant has a right to counsel's assistance in seeking review of the denial of PCR. Austin, 305 S.C. at 454, 409 S.E.2d at 396; Rule 71.1(g), SCRPC.

Simpson was entitled to an appeal from his first PCR, and the state consented.

**CONCLUSION**

For the above reasons, the order of the PCR court granting a belated appeal from the denial of the first PCR should be affirmed.



LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of December, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

—————  
Certiorari to Cherokee County

Honorable Roger L. Couch, Circuit Court Judge  
—————

JONATHAN LEON SIMPSON,

PETITIONER

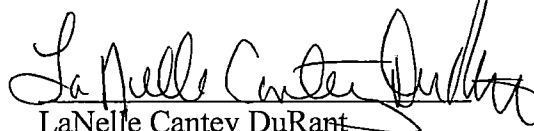
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STATE OF SOUTH CAROLINA,

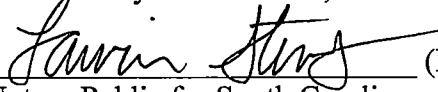
RESPONDENT

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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 Valerie Garcia Giovanoli, 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 Jonathan Leon Simpson, #318626, at Trenton Correctional Institution, 84 Greenhouse Road, Trenton, SC 29847, this 20th day of December, 2017.

  
LaNelle Cantey DuRant  
Appellate Defender

SUBSCRIBED AND SWORN TO before me    ATTORNEY FOR PETITIONER  
this 20th day of December, 2017.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 5, 2027.