

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO YORK COUNTY  
Court of Common Pleas

**RECEIVED**

MAR 09 2018

The Honorable Lee S. Alford, Circuit Court Judge

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S.C. SUPREME COURT

Appellate Case No. 2017-001080

Isaias Diaz Gutierrez,.....Petitioner,

v.

State of South Carolina,.....Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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    The PCR court properly granted Petitioner belated appellate review 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) .....6

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## ISSUE PRESENTED

Whether the post-conviction relief court properly granted Petitioner belated appellate review 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

For the limited purposes of determining whether Petitioner is entitled to a review of his first post-conviction relief action pursuant to Austin v. State, 288 S.C. 290, 342 S.E.2d 60 (1986), Respondent adopts Petitioner's statement of the case.

## 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 counsel failed to file an appeal from the denial of his first post-conviction relief action. Petitioner requested a belated PCR appeal in the case. On April 17, 2017, a PCR hearing was held regarding the Austin issue. During the hearing, the State consented to the grant of belated appellate review of Petitioner's first post-conviction relief action, because PCR counsel failed to appeal the PCR judge's Order of Dismissal issued in the case. App. 935. PCR counsel represented to Petitioner and Respondent that he neglected to file a notice of appeal in Petitioner's PCR action. App. 930. Presiding Judge G. Thomas Cooper, Jr., signed an Order dated April 19, 2017, consenting to the grant of Petitioner's right to belated appellate review in the case. App. 932-935. Therefore, evidence exists for the PCR court to rule that Petitioner did not knowingly and voluntarily waive his right to appeal the dismissal of his first PCR.

**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,  
ALAN WILSON  
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By: 

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Petitioner,

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Respondent.

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**CERTIFICATE OF SERVICE**

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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:

**Susan B. Hackett, Esquire**  
**S.C. Commission on Indigent Defense**  
**1330 Lady Street, Suite 401**  
**Columbia, South Carolina 29201**

This 9<sup>th</sup> day of March, 2018

  
\_\_\_\_\_  
CAROLINE COLLINS  
Administrative Coordinator