

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

RECEIVED

JUN 20 2018

Ralph K. Anderson, III, Special Circuit Court Judge S.C. SUPREME COURT

Appellate Case No. 2017-002102

Jermaine Mayweathers,

Petitioner,

v.

State of South Carolina,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Dayne C. Phillips, Esq.
Price Benowitz LLP
1614 Taylor Street, Suite D
Columbia, SC 29201
(803) 807-0234
Attorney for Petitioner

Other Counsel of Record:
Lindsey A. McCallister
Assistant Attorney General
1000 Assembly Street, Room 519
Columbia, SC 29201
(803) 734-3970
Attorney for Respondent

INDEX

Question Presented1

Statement of the Case2

Argument16

I. DID THE PCR COURT PROPERLY GRANT PETITIONER RELIEF
PURSUANT TO *AUSTIN v. STATE* WHEN RESPONDENT CONSENTED TO
BELATED APPELLATE REVIEW AFTER PETITIONER’S FIRST PCR
COUNSEL ADMITTED THAT PETITIONER DID NOT KNOWINGLY AND
VOLUNTARILY WAIVE HIS RIGHT TO APPELLATE REVIEW OF HIS
INITIAL PCR APPLICATION?16

Conclusion18

QUESTION PRESENTED

- I. Did the PCR Court properly grant Petitioner relief pursuant to *Austin v. State*¹ when Respondent consented to belated appellate review after Petitioner's first PCR Counsel admitted that Petitioner did not knowingly and voluntarily waive his right to appellate review of his initial PCR application?

¹ *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

STATEMENT OF THE CASE

Background

On July 25, 2008, Petitioner and his father, William Jerido, were living with his father's girlfriend, Deborah Williams, and her two sons. App. 75, ll. 5-25. Petitioner was fifteen years old, and Ms. Williams' sons were seven-years-old ("K.P.") and five-years-old ("Child"). The minors were regularly left in the home with Petitioner as the caretaker. App. 121, ll. 5-23. That day, however, Petitioner called 911 after the five-year-old Child vomited and became non-responsive. EMS brought the Child to the emergency room at McLeod Regional Medical Center in Florence. After having surgery, the five-year-old Child ultimately died because of a traumatic brain injury. App. 135, ll. 19-22; App. 258, l. 1 – 262, l. 15; App. 271, l. 2 – 273, l. 5.

Three days later, Petitioner provided a statement to Investigator Renae Lowder Jenco of the Florence County Sheriff's Department. App. 217, l. 19 – 218, l. 2; App. 226, l. 25 – 228, l. 21; App. 407, l. 1 – 414, l. 9. Petitioner admitted that he was alone with seven-year-old K.P. and the five-year-old Child but denied beating the Child. Dr. Susan Erin Presnell, a forensic pathologist, performed an autopsy on the Child and found the cause of death as "blunt force trauma to the head sustained in a beating." App. 135, ll. 20-22.

On July 30, 2008, the Twelfth Circuit Solicitor's Office filed a Juvenile Petition in the Florence County Family Court, charging Petitioner with Homicide by Child Abuse. App. 5, ll. 13-14. The Solicitor's Office then requested a waiver hearing to transfer jurisdiction of this charge from Family Court to General Sessions Court.

Juvenile Waiver Hearing (2008-JU-21-108)

On March 18–19, 2009, Petitioner proceeded to a juvenile waiver hearing before the Honorable Jerry D. Vinson in the Florence County Family Court. App. 1 – 342. Carrington

Wingard represented Petitioner, and Assistant Solicitors David A. Richardson, Jr. and John C. Jepertinger appeared on behalf of the State. The Family Court Judge ruled “that jurisdiction be waived in this matter; and that the juvenile [Petitioner] be presented [transferred] to the Court of General Sessions for prosecution.” App 341, lines 2-5.

Indictment

On July 16, 2009, the Florence County Grand Jury indicted Petitioner Jermaine Mayweathers for Homicide By Child Abuse. App. 935 – 937.

Trial

On September 21, 2009, Petitioner proceeded to trial before the Honorable Ralph King Anderson, Jr. and a jury. App. 344 – 789. Carrington Wingard represented Petitioner, and Assistant Solicitors David A. Richardson, Jr., and John C. Jepertinger prosecuted the case on behalf of the State. The jury found Petitioner guilty as charged. App. 779. The Trial Court sentenced Petitioner to thirty years (30) imprisonment, stating “[t]hankful is the word that I use from my heart in that this 5 year old occupies the position of an angel in heaven, and on behalf of this angel I pass the sentence today.” App. 788; App. 938.

Direct Appeal

On December 30, 2010, Appellate Defender Wanda H. Carter filed the Final Brief of Appellant, and Assistant Attorney General David Spencer filed the Final Brief of Respondent on December 21, 2010. App. 790 – 824. Petitioner argued only one issue on direct appeal: Whether the “Family Court Judge erred in transferring [Petitioner’s] case to General Sessions Court because although the crime charged against [Petitioner] (homicide by child abuse) involved a serious offense against another person; nonetheless, [Petitioner] had no prior serious criminal record, and he was an excellent rehabilitation candidate who was no threat to the public.” App. 793.

On December 9, 2011, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. *State v. Mayweathers*, Op. No. 2011-UP-549 (S.C. Ct. App. filed December 9, 2011). App. 825 – 826.

First PCR Application and Evidentiary Hearing (2012-CP-21-2999)

On November 9, 2012, Petitioner filed an application requesting Post-Conviction Relief (PCR), alleging ineffective assistance of trial counsel. App. 828 – 836. The State filed a Return to the PCR application on February 28, 2013. App. 837 – 842. Petitioner appeared before the Honorable William H. Seals on October 7, 2013, for an evidentiary hearing on the matter. App. 843 – 888. Henry M. Anderson, Jr., represented Petitioner, and Assistant Attorney General Joshua Thomas represented the Respondent. Petitioner, Diane Jerido (Petitioner's Grandmother), and Carrington Wingard (Trial Counsel) testified at the evidentiary hearing.

Petitioner Jermaine Mayweathers

At the evidentiary hearing, Petitioner testified that he met with Trial Counsel “a couple times” prior to the waiver hearing. App. 847, l. 25 – 848, l. 2. Specifically, Petitioner testified that he met with Trial Counsel “twice” prior to trial after the waiver hearing and only once told Trial Counsel his version of what occurred. App. 848, ll. 3-12. Petitioner also testified that he met with two expert witnesses prior to trial. One defense expert witness on the Friday before trial, presumably Dr. Elizabeth Baker, and one Court ordered expert witness, Dr. Joel Heffler, who is a licensed clinical psychologist for the Department of Juvenile Justice (DJJ) and performed a psychological examination on Petitioner for the waiver hearing. App. 848, l. 13 – 849, l. 5.

PCR Counsel then had Petitioner confirm the witnesses who testified at the juvenile waiver hearing: K.P. (Seven-year-old brother of the deceased); Deborah Williams (Mother of the deceased); Dr. Joel Heffler (Clinical psychologist at DJJ); Dr. Susan Erin Presnell (Forensic

Pathologist who performed the autopsy); Renae Lowder Jenco (Investigator at the Florence County Sheriff's Department who took Petitioner's Statement); Dr. Gerald Atwood (Pediatric Critical Care Specialist at McLeod Regional Children's Hospital); Andrea Foster (Intake Supervisor at DJJ); and Nancy Ingram (Ppetitioner's Aunt). App. 849, l. 16 – 850, l. 15. Petitioner reiterated that during the six-month period between the waiver hearing and his trial, he did not meet with Trial Counsel to prepare for trial until “[t]hat Friday before the trial” and that the only defense expert he met with was “[j]ust the doctor that I talked to that Friday.” App. 851, ll. 12-23.

Furthermore, Petitioner testified that Trial Counsel did not review all the evidence with him except for the autopsy photographs. App. 851, l. 24 – 852, l. 4. Petitioner also testified that Trial Counsel never discussed her strategy for suppressing prejudicial photographs. App. 852, ll. 5-7. Petitioner further testified that he did not speak with investigator Ron Smith but did speak “briefly” with investigator Frank White. App. 852, ll. 11-16.

Ppetitioner then testified that Trial Counsel advised against calling character witnesses to testify in his defense and against Petitioner testifying in his own defense. App. 852, ll. 17-25. Petitioner explained that Trial Counsel's rationale for advising him not to testify was because “she wanted the last word [in closing arguments].” App. 853, ll. 1-5. Notably, Petitioner testified that Trial Counsel never discussed a theme or theory of the case with him and that “[Trial Counsel] asked me that Friday [before trial] . . . how was she going to defend me, what was going to be my defense.” App. 852, ll. 6-10.

Ppetitioner testified that Trial Counsel “tried to get [him] to take a plea” and that the plea offer was for twenty years imprisonment. App. 853, ll. 11-15. Petitioner rejected the plea offer and informed Trial Counsel that he wanted to go to trial. App. 854, ll. 2-3. Petitioner emphasized that Trial Counsel never told the jury during her opening statement or closing argument to find him “not

guilty” and that Trial Counsel did not call any witnesses on his behalf. App. 854, l. 15 – 855, l. 3. Petitioner further testified that Trial Counsel told him that her decision not to call witnesses “was part of her trial strategy” and that Trial Counsel could have objected to more evidence. App. 855, ll. 4-20.

Additionally, Petitioner testified that Trial Counsel never discussed trial strategy with him during the trial and that he had never spoken with Trial Counsel’s co-counsel, Michael Bell. App. 855, ll. 12-25. Petitioner also testified that Trial Counsel should have objected to the admissibility of the belt because the State “supposedly tied the belt into [sic] the bruising.” App. 856, ll. 1-11. Specifically, Petitioner testified that “[the belt] made it look like – even though [the State] didn’t have my fingerprints on [the belt or] my DNA,” Petitioner used the belt to injure the deceased child. App. 856, ll. 5-14.

Notably, Petitioner testified, “I really feel like [Trial Counsel] should have let some of my family testify . . . so the jury could have known what type of person I am instead of just going off the picture that the prosecution painted.” App. 856, l. 22 – 857, l. 2. Through questioning, PCR Counsel pointed out that Petitioner’s aunt, Nancy Ingram, testified at the waiver hearing and that Petitioner believed her testimony would have been helpful for the jury to understand him better as a person. App. 857, ll. 11-16. Petitioner explained in further detail, “So it wouldn’t look like . . . I was a monster . . . [the jury] didn’t know me . . . [t]here was nobody to testify on my behalf to tell [the jury] what type of person I am, what type of upbringing I had.” App. 857, ll. 17-24.

Petitioner reiterated that, “not one time during trial [did Trial Counsel] say[] that I was not guilty” and that, “any smart juror would read through that . . . my lawyer isn’t even saying that I’m not guilty . . . I believe any jury is going to see that.” App. 857, ll. 6-10.

On cross-examination, Petitioner acknowledged that Trial Counsel reviewed the autopsy photographs with him but maintained that Trial Counsel never reviewed the discovery or discussed possible defenses with him. App. 858, l. 19 – 859, l. 7. Petitioner also indicated that he provided Trial Counsel with the names of his family members as character witnesses but that she never contacted them about testifying at his trial. App. 859, ll. 11-17. Petitioner recognized on cross-examination that he rejected the plea offer and requested a trial. App. 859, ll. 18-22.

Diane Jerido (Petitioner's Grandmother)

Petitioner's Grandmother, Diane Jerido, testified that she was present for the waiver hearing and for when Trial Counsel met with Petitioner to prepare for trial. App. 860, l. 11 – 861, l. 15. Ms. Jerido also testified that Trial Counsel met with Petitioner twice before trial and that the second meeting occurred on “the Friday before [Petitioner] went to court [for the General Sessions trial].” App. 861, ll. 16-25. Notably, Ms. Jerido stated that, “[w]hen [Trial Counsel] said that they didn't have . . . any type of defense to raise, I raised the question, well, what's the evidence against him.” App. 862, ll. 10-14.

Ms. Jerido explained that Trial Counsel “said that she had testimony from the doctor . . . the pediatrician, not the actual doctor that did the surgery, but from the pediatrician[.]” App. 862, ll. 14-17. Ms. Jerido further testified, “my question was where is the doctor that did the surgery . . . because my concern was that it never came out in the trial about [the deceased child] falling off the bed and nobody made a big issue of that, that he – the [the deceased] child hit his head the night before and he had a knot on his head and he bled through the night.” App. 862, ll. 17-22.

Ms. Jerido noted later during her testimony that the neurosurgeon “Dr. [Andrew Rhea] should have known what actually happened, the shape the [the deceased child] was in when he came to the emergency room . . . but Dr. [Rhea] never testified [at Petitioner's trial].” App. 863, ll.

19-22. Ms. Jerido clarified that she believed the swelling depicted in the photographs of the deceased child were caused by the surgery performed by Dr. [Rhea] and not from “a beating”. App. 864, ll. 3-12. Ms. Jerido emphasized that the jury “thought [the swelling] was from a beating” and that Petitioner’s attorney did not attempt to challenge the causation of the injuries. App. 864, ll. 8-13.

Furthermore, Ms. Jerido testified that she was concerned about why the entire audio recording of the 911 call from Petitioner was not played for the jury and why Petitioner was alone when questioned by the police. App. 862, l. 23 – 863, l. 2. Ms. Jerido further testified that she had concerns with Trial Counsel not objecting to the admission of the belt “that was supposed to have been the weapon” used to injure the deceased child. App. 864, l. 20 – 865, l. 1. Notably, Ms. Jerido stressed that Trial Counsel “didn’t bring out that the child had several accidents prior [to that day], and maybe that last fall could have been what it was and not a beating from my grandson...[because] he had three prior accidents to the head.” App. 865, ll. 2-5.

Ms. Jerido testified that she told Trial Counsel about her desire to testify on Petitioner’s behalf and that Trial Counsel told her “[i]t wasn’t a good idea because she needed to have the last closing argument.” App. 865, ll. 11-16. Ms. Jerido explained that she would have informed the jury about “[t]he type of child that my grandson was, the way he grew up, and ... I felt like he wouldn’t have did anything like that, and the evidence was not there to show that ...he did this.” App. 865, ll. 17-22. Ms. Jerido also testified that several other members of Petitioner’s family were available and willing to testify as character witnesses. App. 865, l. 23 – 866, l. 1.

Notably, Ms. Jerido testified that her niece worked with one of the jurors and that the juror said “we didn’t know anything about the kid [Petitioner] . . . his lawyer [Trial Counsel] did not put anybody to say what type of kid he was... He could have been a street kid.” App. 866, ll. 4-11. Ms.

Jerido reiterated her belief that character witnesses were critical to Petitioner's defense: "I felt like that might have had a difference too in the way that [the jurors] see him...the way [Petitioner] called [911], he ran and he called [911]...[Petitioner] got the help [the deceased child] needed...[Petitioner] was at the hospital...[Petitioner] was concerned...None of that came out [at trial]." App. 866, ll. 13-17.

Carrington Wingard (Trial Counsel)

Trial Counsel admitted on direct examination that, after reviewing the evidence, she "viewed this as a circumstantial case since [Petitioner] had given law enforcement a statement before I was involved and had said he didn't know how the child had gotten injured." App. 869, ll. 16-18. Trial Counsel maintained that she sent the medical records "to [Dr. Elizabeth Baker] for the defense in Charleston" and later explained that Dr. Baker began as an expert on child sexual abuse and then she started developing into all areas of child abuse. App. 869, ll. 19-20; App. 886, ll. 17-21. Trial Counsel also maintained that Dr. Baker "reviewed those records and did not believe that she would be able to provide any helpful information for the defense[.]" App. 869, ll. 20-22.

Trial Counsel then explained that Dr. Baker met with Petitioner one time prior to trial: "I do know that we [Petitioner, Dr. Baker, Trial Counsel, and Petitioner's family] spent a long time with him as a group...[Dr. Baker] wanted to speak with [Petitioner] privately to see if she could develop anything that would be helpful to our defense, but ultimately, she could not." App. 870, ll. 14-7. Trial Counsel noted she informed Petitioner "that Dr. Baker could not come up with anything helpful for the defense." App. 870, ll. 20-22.

As to the defense investigation, Trial Counsel testified that she reviewed the transcript from the waiver hearing and spoke to Dr. Rhea who performed surgery on the deceased child. App. 871, ll. 21-25. Trial Counsel maintained that "Dr. [Rhea] could not provide anything helpful for the

State – for the Defense” and that “the State didn’t feel a need to call him . . . because of Dr. Atwood’s expertise.” App. 871, l. 25 – 872, l. 2.

When asked about the defense theory, Trial Counsel stated, “it really was a reasonable doubt [argument] . . . because it was a circumstantial [evidence] case.” App. 873, ll. 10-11. Trial Counsel also stated, “the other thing was the youth of this child and the situation that he had been put into.” App. 873, ll. 12-13. Trial Counsel maintained that she “went over all of the evidence that we [Petitioner and Trial Counsel] expected to have introduced” at trial. App. 873, l. 25 – 874, l. 1.

When asked why she never used the phrase “not guilty” during her opening statement or closing argument, Trial Counsel responded, “I just can’t remember whether I did or not...Normally, I would say, we ask you to return a verdict which speaks the truth...In this case, it would be not guilty...But again, I’ve not read the whole transcript.” App. 874, ll. 13-19. Trial Counsel also maintained that she reviewed Petitioner’s statement to police with Petitioner and challenged the admission of that statement at trial. App. 874, ll. 20-25.

Additionally, Trial Counsel admitted that she did not remember the admission of the belt when asked whether she objected to that piece of evidence. App. 875, ll. 1-6. Trial Counsel also explained that she “fully discussed the trial strategy of having the last argument” and not calling character witnesses with Petitioner. App. 876, ll. 16-24. Trial Counsel ultimately maintained that it was Petitioner’s decision not to present a defense at trial. App. 876, l. 25 – 877, l. 2.

Trial Counsel reiterated on cross-examination, “I did talk to Dr. [Rhea]”, that “Dr. [Rhea] was not helpful, and that “[h]e did not want to get involved.” App. 877, ll. 10-12. Trial Counsel testified that she “discussed all manner of how these injuries could happen” with Dr. Baker and that “we [Trial Counsel and Dr. Baker] really had started developing some – some pretty good scenarios at the time of the detention hearings, but then as we got all of the medicals (sic) [hospital records], it

[the defenses] just evaporated.” App. 878, ll. 10-24.

When asked whether she cross-examined Dr. Presnell or Dr. Atwood if swelling could have been caused during the surgery performed by Dr. Rhea, Trial Counsel testified “I can’t recall asking that specifically, but I am certain that I would have asked some distinction between the injury and the medical treatment.” App. 878, l. 25 – 879, l. 7.

PCR Counsel then asked Trial Counsel if she recalled specifically what she argued to the jury in support of reasonable doubt. In response, Trial Counsel asserted that it was a circumstantial evidence case and that “[she] was really kind of hoping that [the jury] would feel sorry for [Petitioner] because...the medical evidence was so overwhelming.” App. 882, ll. 2-8.

PCR Counsel also asked if Trial Counsel remembered whether she objected to the admissibility of the belt. Trial counsel replied that she could not remember. App. 882, ll. 14-22. PCR Counsel informed Trial Counsel that she never told the jury to find Petitioner not guilty. App. 883, l. 6 – 884, l. 9. PCR Counsel then questioned Trial Counsel about whether she sent Dr. Atwood’s testimony to Dr. Baker. Trial Counsel responded, “I think I sent the whole - - everything, the whole waiver [transcript], and then all the medical records, but I may have just sent the doctor’s testimony.” App. 885, ll. 15-19.

Notably, Trial Counsel admitted that Ms. Ingram’s testimony as a character witness at the waiver hearing was helpful to Petitioner and that she told the jury in closing arguments to not make a second tragedy by convicting Petitioner. App. 885, ll. 20-22; App. 887, ll. 8-11.

Order of Dismissal

On December 10, 2013, the PCR Court ruled in the Order of Dismissal that Petitioner failed to prove Trial Counsel provided ineffective assistance of counsel and denied Petitioner’s PCR application. App. 889 – 898. Specifically, the PCR Court ruled against Petitioner on the following

allegations regarding ineffective assistance of trial counsel: (1) Failure to prepare for trial; (2) Failure to conduct a reasonable investigation; (3) Failure to properly object and argue against the admission of critical evidence; (4) Failure to adequately cross-examine witnesses; (5) Failure to subject the State's case to a thorough and meaningful adversarial testing; (6) Failure to ask the jury in opening statement or closing arguments to find Petitioner not guilty; (7) Failure to object to the admission of the belt into evidence; and (8) Failure to call witnesses on Petitioner's behalf or present a defense. App. 895 – 897.

The PCR Court found that Petitioner “failed to meet his burden of proof regarding his allegation that trial counsel did not properly prepare for trial.” App. 895. The PCR Court also found Petitioner's testimony not credible and Trial Counsel's testimony credible. The PCR Court noted Trial Counsel testified that “she thought this was an important case and she devoted a substantial amount of time to it.” App. 895. The PCR Court also noted that Trial Counsel “met with [Petitioner] and thoroughly discussed with him the evidence and trial strategy”. App. 895.

The PCR Court further noted Trial Counsel “engaged in plea negotiations until directed by [Petitioner] and his family to prepare for trial” and that “trial counsel's investigation involved contacting two doctors to attempt to discredit the State's theory of the case.” App. 895. As to these allegations, the PCR Court ruled that “[Petitioner's] allegations trial counsel did not meet with him and prepare for trial are without merit.” App. 895.

Additionally, the PCR Court found “that trial counsel raised objections to the introduction of [Petitioner's] statement, the autopsy photographs, and the expert testimony of the EMT.” App. 895. The PCR Court also found that Trial Counsel “thoroughly cross-examined each witness and attempted to discredit the medical testimony as best she could.” App. 895. The PCR Court further held that “[t]he record reflects . . . trial counsel subjected the State's case to a thorough and

‘meaningful adversarial testing.’” App. 895.

The PCR Court “reviewed trial counsel’s opening statement and closing argument and [found] no error in failing to ask the jury to find [Petitioner] innocent.” App. 895. The PCR Court noted that Trial Counsel “implored the jury to not make a second tragedy of [Petitioner’s] life.” App. 895. The PCR Court found that, “[w]hen viewed in light of the whole record, the jury clearly understood trial counsel was arguing for a verdict of not guilty.” App. 896.

The PCR Court also found that “trial counsel was not deficient for failing to object to the introduction of the belt” based on the following reasons. App. 896. First, “Trial counsel testified the belt was seized as part of the State’s investigation, and the record reflects it was properly authenticated at trial.” App. 896. Second, “trial counsel would have had no grounds to exclude the belt at trial.” App. 896. Third, “[t]he record indicates trial counsel brought out on cross-examination that [Petitioner’s] prints were not on the belt” and that “[trial counsel] testified the belt was not related to the brain injuries sustained by victim.” App. 896. Ultimately, the PCR Court found that “the admission of the belt was not prejudicial to [Petitioner].” App. 896.

The PCR Court found “no deficiency from failing to call witnesses on [Petitioner’s] behalf.” App. 896. The PCR Court noted that “Trial counsel testified she reviewed the risks of calling family members as character witnesses” and that “[Petitioner] also understood the benefits of not presenting a defense and having last argument.” App. 896. Based on this testimony, the PCR Court further found that “trial counsel articulated a valid reason for not presenting a defense” and that “[Petitioner] made a knowing and voluntary decision to not present a defense.” App. 896.

Furthermore, the PCR Court held that “plea (sic) counsel provided competent representation in light of the overwhelming evidence against [Petitioner].” App. 896. In support of this finding, the PCR Court noted that “[Petitioner] gave a statement to police that the victim was awake and

functioning the morning before the 911 call” and that “[t]his statement was supported by the testimony of the victim’s brother at trial.” App. 896. The PCR Court also noted that the “[m]edical experts testified the victim would have been incapacitated once he sustained the injuries.” App. 896 – 897. The PCR Court further noted, “[c]oupled with the testimony that [Petitioner] was the only person in the house capable of inflicting such severe injuries, the jury was presented with a strong circumstantial case.” App. 897. The PCR Court further found that “[Petitioner] cannot show any errors by trial counsel that would have changed the result of his trial.” App. 897.

PCR Counsel did not provide Petitioner with a copy of the Order of Dismissal and failed to file a Notice of Appeal despite Petitioner’s request for appellate review of the PCR Court’s denial.

Second PCR Application and Evidentiary Hearing (2014-CP-21-3583)

On December 10, 2014, Petitioner filed a second application requesting Post-Conviction Relief (PCR), alleging ineffective assistance of PCR Counsel for failing to file a timely Notice of Appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 901 – 907. The State filed a Return and Partial Motion to Dismiss in response to the PCR application on July 20, 2015. App. 908 – 915. Petitioner then appeared before the Honorable Thomas A. Russo on August 28, 2017, for an evidentiary hearing on the matter. App. 916 – 923. Jonathan Waller represented Petitioner, and Assistant Attorney General Lindsay McCallister appeared on behalf of the Respondent.

The Respondent consented to Petitioner’s request for a belated PCR appeal and two exhibits were admitted into evidence at the hearing. Specifically, State’s exhibit number one is a handwritten letter from Petitioner to PCR Counsel, requesting to appeal the PCR Court’s Order of Dismissal. App. 925 – 926. State’s exhibit number two is a letter from PCR Counsel, acknowledging that he did not send Petitioner a formal copy of the Order of Dismissal and

admitting that this prevented Petitioner from seeking appellate review of his first PCR application. App. 927.

Consent Order Granting Belated Appeal

On September 27, 2017, Judge Russo issued a “Consent Order Granting Right to Seek Belated Appellate Review Pursuant to *Austin v. State*.” App. 928 – 934. Judge Russo noted in the Order, “[a]fter a review of the facts and circumstances surrounding the waiver of [Petitioner’s] right to appeal the denial of allegations in [Petitioner’s] post-conviction relief application, the parties below have consented to the granting of an appeal of [Petitioner’s] first post-conviction relief application (2012-CP-21-2999) pursuant to *Austin v. State*.” App. 930. Judge Russo found, “[b]ased on the documents submitted from the previous PCR file, it appears to the parties and this Court [Petitioner] did not freely and voluntarily waive the right to appeal his first application for post-conviction relief, and PCR Counsel failed to file a timely Notice of Appeal of the application.” App. 930. Judge Russo held that “this Court finds granting [Petitioner’s] request to seek belated appellate review of his first PCR (2012-CP-2999) pursuant to *Austin v. State* is warranted.” App. 930.

Notice of Appeal and Request for Appellate Review

On October 12, 2017, Petitioner’s second PCR Counsel timely filed a Notice of Appeal in this Court and enclosed copies of the Consent Order Granting Belated Appellate Review and the Order of Dismissal from the first PCR application. Petitioner seeks a writ of certiorari for this Court to review the PCR Court Orders. *See King v. State*, 308 S.C. 348, 417 S.E.2d 868 (1992) (establishing the procedure when seeking belated appellate review pursuant to *Austin v. State*).

ARGUMENT

THE PCR COURT PROPERLY GRANTED PETITIONER RELIEF PURSUANT TO *AUSTIN v. STATE* WHEN RESPONDENT CONSENTED TO BELATED APPELLATE REVIEW AFTER PETITIONER'S FIRST PCR COUNSEL ADMITTED THAT PETITIONER DID NOT KNOWINGLY AND VOLUNTARILY WAIVE HIS RIGHT TO APPELLATE REVIEW OF HIS INITIAL PCR APPLICATION.

This Court has held that “[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). This Court further held that “[u]nder the PCR rules, an appellant is entitled to a full adjudication on the merits of the original petition, or one bite of the apple.” *Id.* at 261, 523 S.E.2d at 755-56 (quoting *Aice v. State*, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991)). “This bite includes an applicant’s right to appeal the denial of a PCR application, and the right to assistance of counsel in that appeal.” *Id.* Therefore, this Court has allowed successive PCR applications where an applicant has been denied complete access to the appellate process. *See Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

“An *Austin* appeal is used when an applicant is prevented from seeking appellate review of a denial of his or her PCR application, such as when an attorney fails to seek timely review.” *Odom*, 337 S.C. at 262, 523 S.E.2d at 756 (citing *Aice*, 305 S.C. at 448, 409 S.E.2d at 392); *See Hope v. State*, 328 S.C. 78, 492 S.E.2d 76 n. 1 (1997) (permitting belated appellate review pursuant to *Austin* where original PCR counsel failed to appeal the denial of the PCR application). Specifically, “[i]n *Austin*, the defendant never received a full procedural ‘bite at the apple’ because he was prevented from seeking *any* review of the denial of his PCR application.” *Odom*, 337 S.C. at 262, 523 S.E.2d at 756 (citing *Aice*, 305 S.C. at 452, 409 S.E.2d at 395) (emphasis in original). Therefore, a petitioner is entitled to belated appellate review of the prior PCR application and Order of Dismissal when (1) the petitioner requested but was denied an

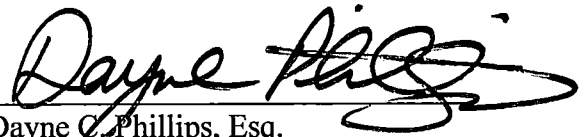
opportunity to seek appellate review, or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived by the petitioner. *Id.*, 337 S.C. at 262, 523 S.E.2d at 756 (citing *King v. State*, 308 S.C. 348, 417 S.E.2d 868 (1992) (establishing the procedure when seeking belated appellate review pursuant to *Austin v. State*)).

In this case, Petitioner “never received a full procedural ‘bite at the apple’ because he was prevented from seeking *any* review of the denial of his PCR application.” *Id.* (citing *Aice*, 305 S.C. at 452, 409 S.E.2d at 395) (emphasis in original). Notably, Respondent conceded that Petitioner was entitled to a belated appeal of his prior PCR application at the evidentiary hearing. App. 919 – 927. Therefore, the PCR court properly granted Petitioner relief pursuant to *Austin v. State* because Petitioner did not knowingly and intelligently waive the right to appellate review of his previous PCR application and Order of Dismissal and is entitled to his “one bite of the apple”. App. 928 – 932. *See Odom*, 337 S.C. at 262, 523 S.E.2d at 756 (citing *King v. State*, 308 S.C. 348, 417 S.E.2d 868 (1992)); *see also 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.”).

CONCLUSION

Based on the foregoing reasons, Petitioner Jermaine Mayweathers respectfully requests that this Court grant the Petition for Writ of Certiorari and affirm the PCR Court's ruling to grant Petitioner belated appellate review pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

Respectfully submitted,



Dayne C. Phillips, Esq.
Price Benowitz LLP
1614 Taylor Street, Suite D
Columbia, SC 29201
(803) 807-0234
Attorney for Petitioner

June 20, 2018

6/20/18

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

JUN 20 2018

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Ralph K. Anderson, III, Special Circuit Court Judge

Appellate Case No. 2017-002102

Jermaine Mayweathers,

Petitioner,

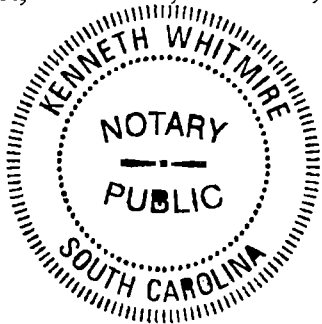
v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

The undersigned Counsel certifies that a true copy of the Petition for Writ of Certiorari, Petition for Writ of Certiorari Pursuant to *Austin v. State*, and Appendix (Volumes I and II) in this appeal have been served on Respondent, Assistant Attorney General Lindsey A. McCallister, at 1000 Assembly Street, Room 519, Columbia, SC 29201, on this 20th Day of June 2018.



June 20, 2018

A handwritten signature in black ink, appearing to read "Dayne C. Phillips".

Dayne C. Phillips, Esq.
Price Benowitz LLP
1614 Taylor Street, Suite D
Columbia, SC 29201
(803) 807-0234
Attorney for Petitioner

SWORN TO BEFORE ME this Twentieth Day of June 2018

A handwritten signature in black ink, appearing to read "Kenneth Whitmire".
_____(L.S.)
Notary Public for South Carolina

My Commission Expires: My Commission Expires June 12, 2027

PRICE BENOWITZ LLP

DAVID BENOWITZ
ADMITTED DC, MD & VA

KERRI CASTELLINI
ADMITTED DC & MD

KUSH ARORA
ADMITTED MD & DC

JOHN YANNONE
ADMITTED MD & DC

ADAM ROTH
ADMITTED NY, DC & MD

KAREN GUNDERMAN
ADMITTED MD

SHAWN SUKUMAR
ADMITTED DC

TONY MUNTER
ADMITTED DC & MA

*ROBERT M. SCHWARTZMAN
ADMITTED MD

FARRAL HABER
ADMITTED FL, VA & DC

MOHSEN ZARKESH
ADMITTED DC

MATTHEW WILSON
ADMITTED MD

ELIZABETH THOMPSON
ADMITTED MD

KELLY HITE
ADMITTED VA

MICHELLE KAMINSKY
ADMITTED VA

1614 TAYLOR STREET
SUITE D
COLUMBIA, SC 29201

OFFICE: (803) 272-4503
DIRECT: (803) 807-0234
FAX: (803) 380-8035

DAYNE PHILLIPS
ADMITTED SC

SETH PRICE
ADMITTED DC & NY

GLENN F. IVEY
ADMITTED DC & MD

KARIN RILEY PORTER
ADMITTED VA

STEVEN L. DUCKETT, JR
ADMITTED VA

JOEL NIED
ADMITTED VA, PA & GA

THOMAS C. SOLDAN
ADMITTED VA

SETH OKIN
ADMITTED MD

OLEG FASTOVSKY
ADMITTED MD

NATALIA SEGERMEISTER
ADMITTED NY

MARY NERINO
ADMITTED VA

NICHOLAS M. BRASWELL
ADMITTED VA

ROCCO COLUMBUS
ADMITTED VA

*ANGIE DIPIETRO
ADMITTED MD

*MEREDITH JIMMERSON
ADMITTED VA

*OF COUNSEL

RECEIVED

JUN 20 2018

S.C. SUPREME COURT

110 NORTH WASHINGTON STREET, SUITE 303
ROCKVILLE MD 20850

10505 JUDICIAL DRIVE, SUITE 101
FAIRFAX, VA 22030

June 20, 2018

The Honorable Daniel E. Shearhouse
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: **Jermaine Mayweathers v. State**
PETITION FOR WRIT OF CERTIORARI AND APPENDIX
Appellate Case No.: 2017-002102

Dear Ms. Shearhouse:

I have enclosed an original and six (6) copies of the Petition for Writ of Certiorari and Petition for Writ of Certiorari Pursuant to *Austin v. State*, and two (2) copies of the Appendix (one bound and one unbound), along with a Certificate of Service for filing.

If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,


Dayne C. Phillips, Esq.

Enclosures (noted)
cc: **Jermaine Mayweathers**
Lindsey McCallister

WWW.SCCRIMINALLAWS.COM

WWW.PRICEBENOWITZ.COM