

STATE OF SOUTH CAROLINA  
In the Supreme Court

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CERTIORARI TO DILLON COUNTY  
Court of Common Pleas  
Thomas A. Russo, Circuit Court Judge

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Appellate Case No. 2017-000849

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Johnny Jones,

Petitioner,

v.

State of South Carolina,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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ALAN WILSON  
Attorney General

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ATTORNEYS FOR RESPONDENT

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S.C. SUPREME COURT

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## **RESPONDENT'S ISSUES 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 the state consented to the request for belated appellate review?

## STATEMENT OF THE CASE

### Summary of Procedural History

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Dillon County Clerk of Court. Petitioner was indicted at the May 2006 term of the Dillon County Grand Jury for trafficking cocaine, more than 100 grams but less than 200 grams (2006-GS-17-00441). Lois McMillon, Esq. represented Petitioner. Mary Johnson-Lee, Esq., and Kernard Redmond, Esq., of the Fourth Circuit Solicitor's Office, prosecuted the case. On October 17, 2006, Petitioner proceeded to trial before the Honorable John L. Breeden, Jr. and a jury. The jury found Petitioner guilty as indicted on October 20, 2006. Judge Breeden sentenced Petitioner to imprisonment for a term of 25 years.

Petitioner filed a timely notice of appeal and a direct appeal was perfected by Robert M. Pachak, Esq., who raised the following issue:

Whether the trial court erred in refusing to grant a directed verdict to the charge of trafficking in cocaine when the State failed to present any substantial evidence beyond a reasonable doubt that appellant, as a passenger in the vehicle, was in constructive possession of the cocaine?

By opinion decided December 18, 2008, the South Carolina Court of Appeals affirmed Petitioner's convictions in an unpublished opinion. State v. Jones, Op. No. 2008-UP-715 (S.C. Ct. App. filed Dec. 18, 2008). The Remittitur was issued on January 5, 2009.

Petitioner filed his application for post-conviction relief on May 6, 2011 (2011-CP-17-00153). He alleged the following grounds for relief in his application:

1. "Ineffective assistance of counsel"
2. "Ineffective appellate counsel"

Respondent made its return on or about October 19, 2011. Petitioner amended his application by filing on July 15, 2013, to allege the following grounds for relief:

1. “Ineffective assistance of appellate counsel for failure to argue that the drugs should have been suppressed based on the termination of the stop.”
2. “Ineffective assistance of trial counsel for failure to argue that ‘suspicious’ behavior and presence alone are insufficient to prove constructive possession.”
3. “[I]neffective assistance of appellate counsel for failure to adequately argued that that ‘suspicious’ behavior and presence alone are insufficient to prove constructive possession.”
4. “Ineffective assistance of trial counsel for failure to object to the solicitor’s closing arguments concerning the war on drugs.”
5. “Ineffective assistance of counsel for failure to object to the ‘strong evidence’ language in the constructive possession charge.”

An evidentiary hearing into the matter was convened on July 21, 2014, before the Honorable Thomas A. Russo. Petitioner was present at the hearing and represented by Tristan M. Shaffer, Esq. Joshua L. Thomas, Esq., of the South Carolina Attorney General’s Office, represented Respondent. Petitioner testified on his own behalf; Lois E. McMillan, Esq., and Kernard E. Redmond, Esq., also testified. By written order dated November 24, 2014, and filed December 17, 2014, Judge Russo denied and dismissed the application.

Subject to the same common pleas docket number, the Honorable Roger E. Henderson issued an Order dated December 20, 2016, and filed February 13, 2017, finding Petitioner did not knowingly, intelligently, and voluntarily waive his right to an appeal, and thus was entitled to relief pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). This appeal follows.

## STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

## ARGUMENT

### **THE PCR COURT PROPERLY FOUND PETITIONER DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE THE RIGHT TO APPELLATE REVIEW OF HIS PREVIOUS PCR APPLICATION, AND RESPONDENT CONSENTS TO AUSTIN REVIEW**

Respondent does not contest that Petitioner is entitled to belated review of the Order of Dismissal in 2011-CP-17-00153. Accordingly, Respondent would only respectfully direct the Court's attention to the "Return to Petition for Writ of Certiorari Pursuant to Austin v. State" submitted concurrently with this return pursuant to procedures set forth in King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992).

**CONCLUSION**

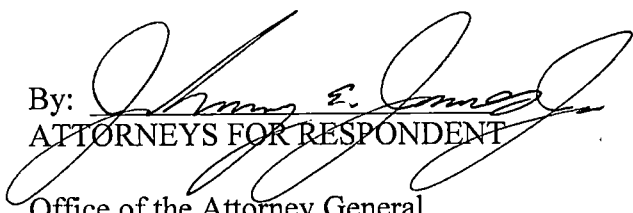
For the foregoing reasons, this Court should review the Order of Dismissal in 2011-CP-17-00153 pursuant to Austin v. State and King v. State.

Respectfully submitted,

ALAN WILSON  
Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.  
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By:   
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13 July, 2018

STATE OF SOUTH CAROLINA  
In the Supreme Court

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CERTIORARI TO DILLON COUNTY  
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Appellate Case No. 2017-000849

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JOHNNY JONES,

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 **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:

**LaNelle C. Durant, Esquire**  
**1330 Lady Street, Ste. 401**  
**Columbia, SC 29201**

This 13<sup>th</sup> day of July, 2018.

  
MALLORY MORRIS  
Legal Assistant for Respondent



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JUL 18 2018

S.C. SUPREME COURT

ALAN WILSON  
ATTORNEY GENERAL

July 13, 2018

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**RE: Johnny Jones v. State of South Carolina**  
**Appellate Case No. 2017-000849**  
**Lower Court Case No. 2011-CP-17-0153**

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Johnny E. James Jr.  
Assistant Attorney General  
S.C. Bar No. 101260

JEJ/mm  
Enclosures

cc: LaNelle C. DuRant, Esquire