

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

CERTIORARI TO SPARTANBURG COUNTY  
Court of Common Pleas

RECEIVED

Honorable J. Derham Cole, Circuit Court Judge

OCT 26 2018

Appellate Case No. 2018-000328

---

S.C. SUPREME COURT

RICARDO GOMEZ HERNANDEZ,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

---

**RETURN TO PETITION FOR WRIT OF CERTIORARI  
PURSUANT TO AUSTIN V. STATE**

---

ALAN WILSON  
Attorney General

JORDAN A. COX  
Assistant Attorney General  
SC Bar No. 103157

Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734 – 3737

ATTORNEYS FOR RESPONDENT

**TABLE OF CONTENTS**

STATEMENT OF THE ISSUES.....ii

STATEMENT OF THE CASE.....1

STANDARD OF REVIEW.....3

ARGUMENT.....4

I. **Because Petitioner does not raise any issue challenging the denial of his prior post-conviction relief application, Austin v. State does not apply and certiorari should be denied.**

II. **Because Petitioner merely alleged ineffective assistance of prior PCR counsel, the PCR court properly denied relief and certiorari should be denied.**

CONCLUSION.....10

## STATEMENT OF THE ISSUE

- I. Is Petitioner entitled to a belated review of the denial of his original PCR application under Austin<sup>1</sup>, when Petitioner fails to raise an issue challenging the denial of his original PCR application on appeal?
  
- II. Did the PCR court properly dismiss Petitioner's allegation for ineffective assistance of PCR counsel, when Petitioner signed a consent order waiving and dismissing all other allegations?

---

<sup>1</sup> Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

## STATEMENT OF THE CASE

On September 14, 2010, Ricardo Gomez Hernandez (“Petitioner”) was involved in selling cocaine in Spartanburg County, South Carolina. (App. p. 20). A controlled purchase of the narcotics was orchestrated by the Spartanburg County Sheriff’s Department. (App. p. 20). Petitioner unknowingly sold a large amount of powder cocaine to a confidential informant, totaling 1,001.80 grams in weight. (App. p. 20). Petitioner was arrested immediately following the deal. (App. p. 20).<sup>2</sup>

During its February 2011 term, the Spartanburg County Grand Jury indicted Petitioner for trafficking in cocaine, more than 400 grams (2011-GS-42-0420). (App. p. 29). Petitioner was represented by Robert Newton, Esquire. (App. p. 1). Assistant Solicitor Ryan McCarty of the Seventh Circuit Solicitor’s Office represented the State of South Carolina. (App. p. 1). On November 7, 2011, Petitioner appeared before the Honorable Roger L. Couch at the Spartanburg County Courthouse. (App. p. 1). As a part of his negotiation with the State, Petitioner pleaded guilty to the lesser included offense of trafficking cocaine, 28 to 100 grams. (App. p. 4). Judge Couch accepted the negotiation and sentenced Petitioner to twelve years of incarceration. (App. p. 27). Petitioner did not appeal his conviction or sentence.

On January 6, 2012, Petitioner filed an application for post-conviction relief. (App. p. 35). In his request for relief, Petitioner alleged the following grounds:

- a. Ineffective Assistance of Counsel
- b. Involuntary Guilty Plea
  - [Petitioner] was told he was pleading guilty to conspiracy
- c. Violation of due process

Respondent made its Return on November 29, 2012, requesting an evidentiary hearing. (App. p. 47). An evidentiary hearing was convened on January 11, 2013, before the Honorable J. Derham

---

<sup>2</sup> Three other men were arrested and indicted as Petitioner’s co-defendants. (App. p. 1).

Cole in Spartanburg County, South Carolina. (App. p. 53). Petitioner was represented by John Kevin Owens.<sup>3</sup> (App. p. 53). Suzanne H. White, Esquire, of the South Carolina Attorney General's Office represented Respondent. (App. p. 53). Petitioner was the only witness to testify at the hearing. (App. p. 54). By order on July 10, 2013, Judge Cole denied and dismissed Petitioner's application for post-conviction relief, with prejudice. (App. p. 63).

On August 11, 2017, Petitioner filed a second application for post-conviction relief. (App. p. 89). In his new application, Petitioner alleged:

1. "Applicant would respectfully request a belated appeal from his post-conviction relief action heard on January 11, 2013."
  - a. "Applicant was represented by John Kevin Owens (PCR Counsel). The Applicant believed that counsel filed an appeal of his post-conviction relief action on his behalf."
  - b. "On July 25, 2014, Applicant received notification from the S.C. Supreme Court that his PCR Counsel had been suspended from the practice of law. During this period, Applicant believed that an appeal had been filed and that his rights were being protected by a trustee appointed by the South Carolina Bar."
  - c. "Applicant did not knowingly and voluntarily waive his right to appeal."
2. Ineffective Assistance of PCR Counsel
  - a. "Applicant is informed and believes that he did not receive any type of effective representation from [PCR] counsel."

By consent order filed on January 26, 2018, the Honorable R. Keith Kelly granted relief for Petitioner in the form of a belated appellate review of his original PCR case pursuant to Austin. (App. p. 87). The PCR court found Petitioner had not waived his right to appeal and was entitled to a discretionary review of the denial of his original post-conviction relief application. (App. p. 89). The consent order states "all other PCR allegations are waived and dismissed with prejudice." (App. p. 90). Petitioner and Respondent agreed to and signed the consent order. (App. p. 90). Petitioner filed his Notice of Appeal pursuant to Austin on February 23, 2018. (App. p. 92).

---

<sup>3</sup> By order of this Court, John Kevin Owens was suspended from the practice of law on March 5, 2014. In the Matter of John Kevin Owens, Appellate Case No. 2014-000412.

### STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## ARGUMENT

Petitioner is seeking certiorari pursuant to Austin v. State. Petitioner does not raise an issue from the denial of his first application of post-conviction relief. Petitioner only asserts the PCR court erred by denying relief for ineffective assistance of PCR counsel. Petitioner has failed to properly raise an issue under Austin and his only issue on appeal is not a ground in which he is entitled to relief.

**I. Because Petitioner has failed to address any issue from the denial of his prior post-conviction relief application, Petitioner has abandoned any possible issue and certiorari should be denied.**

In seeking certiorari, Petitioner raises the single issue of whether the second PCR court properly denied relief for ineffective assistance of PCR counsel. Petitioner was granted relief in the form of a belated review of the denial of his first PCR application, pursuant to Austin. Petitioner does not present a question before this Court arising from the denial of his first PCR application.

The right to seek appellate review of the denial of PCR is expressly authorized by state law. Austin v. State, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991) (citing S.C. Code Ann. § 17-27-100). When the post-conviction relief judge has affirmatively found that the right to appellate review of a previous post-conviction relief order was not knowingly and intelligently waived, the petition shall raise this question along with all other questions petitioner seek to have reviewed from that order. King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992). At the same time this petition is served, Petitioner shall serve and file an Austin petition **addressing the questions from the previous post-conviction relief order.** (emphasis added) King, 308 S.C. at 349, 417 S.E.2d at 868 (1992). A claim is deemed abandoned when the appellant fails to support it with arguments or citations to authority. First Sav. Bank v. Mclean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994).

Petitioner failed to address any question arising from the denial of his PCR application on July 10, 2013. Petitioner was required to raise these issues within the Austin petitioner filed on June 29, 2018.

The only issue raised in the Austin petition relates to the representation of Petitioner's prior PCR counsel. Because this is the sole issue presented before this Court, Petitioner abandoned all issues arising from the denial of his original post-conviction relief claim. Therefore, Petitioner has failed to properly raise an issue pursuant to Austin before this Court and certiorari should be denied.

**II. Because Petitioner merely alleged ineffective assistance of PCR counsel, the PCR court properly denied relief and certiorari should be denied.**

Petitioner asserts the PCR court erred in not addressing his "concern over the effectiveness of his original PCR counsel."

This Court held that, generally, PCR is available "only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence." Al-Shabazz v. State, 338 S.C. 354, 368, 527 S.E.2d 742, 749 (2000). The only exceptions are that a PCR action may be brought to assert a claim that the applicant's sentence has expired, or that his probation, parole, or conditional release has been unlawfully revoked. Id. (citing S.C. Code Ann § 17-27-20(a)(5)).

The United States Supreme Court has held that "[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a **federal habeas court** from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." Martinez v. Ryan, 566 U.S. 1 (2012). However, this Court recognizes that the holding in Martinez is limited to federal habeas corpus review and is not

applicable to state post-conviction relief actions. Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 mem. (2013).

Petitioner asserts the previous PCR hearing, where he was represented by PCR counsel, did not provide an adequate presentation of his issues. Petitioner goes on to list five new allegations that are presented by Petitioner for the first time in his petition for writ of certiorari. Petitioner has failed to point to a sufficient reason why these new allegations were not raised in the original PCR application. Petitioner only comments on the laziness of prior PCR counsel. This is insufficient to allow Petitioner's successive application to be considered and the second PCR court properly dismissed the allegation relating to ineffective assistance of PCR counsel. Therefore, certiorari should be denied.

### CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON  
Attorney General

JORDAN A. COX  
S.C. Bar No. 103157  
Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT  
Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737

October 23, 2018

STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

OCT 26 2018

CERTIORARI TO SPARTANBURG COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2018-000328

Ricardo Gomez Hernandez, ..... Petitioner,

v.

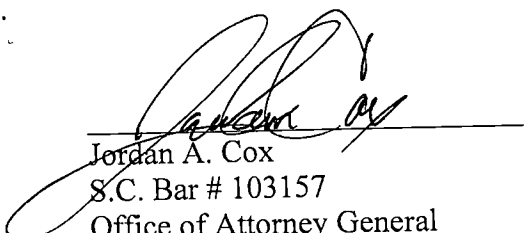
State of South Carolina, ..... Respondent.

**CERTIFICATE OF SERVICE**

I, Jordan A. Cox, certify that I have today served the within **Return to Petition for Writ of Certiorari Pursuant to Austin v. State** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

**Tommy Arthur Thomas**  
**Post Office Box 88**  
**Irmo, South Carolina 29063**

This 23<sup>rd</sup> day of October, 2018.

  
Jordan A. Cox  
S.C. Bar # 103157  
Office of Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737  
ATTORNEY FOR RESPONDENT

**Jordan A. Cox, AAG**

South Carolina Attorney General's Office  
Post Office Box 11549  
Columbia, South Carolina 29201-1549

---

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

neopost

10/23/2018

US POSTAGE



FIRST-CLASS MAIL

\$03.31<sup>0</sup>

ZIP 29201  
041L11237104