

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

The Honorable D. Craig Brown, Circuit Court Judge

Appellate Case No. 2020-000654

State of South Carolina.....Respondent,

v.

Fonnelze T. Delane.....Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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Petitioner did not knowingly and intelligently waive his right to
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QUESTION PRESENTED

Whether Petitioner knowingly and intelligently waived his right to appellate review of the order of dismissal signed by the Honorable Michael G. Nettles in Petitioner's first PCR action.

STATEMENT OF THE CASE

Petitioner was indicted by the Florence County grand jury in July 2012 for two counts of murder, two counts of accessory before the fact to murder, two counts of solicitation to commit murder, and one count of conspiracy. 2012-GS-21-0897.

The State served Petitioner and his attorneys with a notice of intent to seek the death penalty on March 5, 2010. On October 8, 2013, after qualifying the jury, the State withdrew its intent to seek the death penalty. Petitioner then pleaded guilty to two counts of accessory before the fact to murder and two counts of distribution of cocaine base. The State dismissed the remaining charges. Petitioner was then sentenced to concurrent terms of life without the possibility of parole for each count of accessory before the fact to murder and 30 years for each count of distribution of cocaine base. Petitioner did not appeal his conviction or sentence.

Petitioner then filed an application for post-conviction relief on February 10 2014. The State filed its return on June 30 2014. An evidentiary hearing was held on January 30, 2018 before the Honorable Michael G. Nettles. Petitioner was represented by Justin Kata, Esquire. On October 4, 2018, Judge Nettles denied post-conviction relief. Petitioner did not appeal his application for post-conviction relief.

Petitioner then filed an application for post-conviction relief on February 8, 2019 asking for belated review of the order of dismissal pursuant to *Austin v. State*,

305 S.C. 453, 409 S.E.2d 395 (1991). An evidentiary hearing was held on December 19, 2019 before the Honorable D. Craig Brown. Judge Brown, with consent of the Attorney General's Office, granted the application on April 1, 2020.

Petitioner now submits this petition for writ of certiorari for the Court's consideration.

ARGUMENT

I. Petitioner did not knowingly and intelligently waive his right to appellate review of the order of dismissal signed by Judge Nettles in his first PCR action.

At the evidentiary hearing held before the Honorable D. Craig Brown on January 30, 2018, PCR counsel Jonathan Waller submitted an affidavit from previous PCR counsel, Justin Kata, acknowledging that Petitioner wished to appeal the denial of his order of dismissal but that, through no fault of Petitioner's, counsel failed to timely file a notice of intent to appeal that order. The Attorney General's Office agreed with PCR counsel that Petitioner is entitled to *Austin* review of the order of dismissal. Additionally, at the evidentiary hearing, Petitioner testified that he wanted to appeal that order of dismissal. Tr. 6. Respectfully, the record indicates that Petitioner did not knowingly and intelligently waive his right to appellate review of his initial order of dismissal.

The right to seek appellate review of the denial of PCR is expressly authorized by state law. *S.C. Code Ann.* §17-27-100 (1985); Supreme court Rule 50(9). Whether such review is granted is discretionary with the South Carolina Supreme Court. *Knight v. State*, 284 S.C. 138, 325 S.E.2d 535 (1985).

CONCLUSION

This Court should grant Petitioner appellate review of the order of dismissal signed by the Honorable Michael G. Nettles on October 4, 2018.

Respectfully submitted,

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