

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM CALHOUN COUNTY  
Diane S. Goodstein, Circuit Court Judge

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2007-CP-09-00103

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Herman Lee Hughes, # 206816,

Appellant,

v.

STATE OF SOUTH CAROLINA,

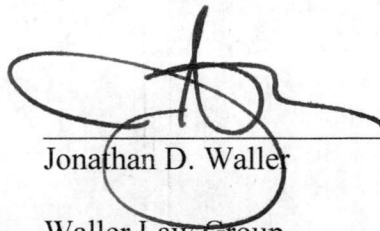
Respondent.

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NOTICE OF APPEAL

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Herman Lee Hughes, # 206816, appeals the Final Order of Dismissal denying his Application for Post-Conviction Relief filed January 10, 2008, issued by the Honorable Diane S. Goodstein, Presiding Judge, First Judicial Circuit as allowed by the November 4, 2021 Order Granting Right to Seek Belated Appellate Review Pursuant to Austin v. State issued by the Honorable Kristi F. Curtis, Presiding Judge, First Judicial Circuit.



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December 2, 2021

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S.C. SUPREME COURT

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STATE OF SOUTH CAROLINA  
CALHOUN COUNTY

**FILED**

IN THE COURT OF COMMON PLEAS  
FIRST JUDICIAL CIRCUIT

Herman Hughes, #206816 : 2021 NOV -4 A 10: 32

C/A No: 2007-CP-09-00108

Applicant )  
KENNETH HASTY )  
CLERK OF COURT )  
CALHOUN COUNTY )  
ST. MATHEWS, SC )

vs.

State of South Carolina, )

Respondent. )

**ORDER GRANTING RIGHT TO  
SEEK BELATED APPELLATE  
REVIEW PURSUANT TO  
AUSTIN V. STATE<sup>1</sup>**

This matter comes before the Court by way of an application for post-conviction relief filed on June 26, 2007, by Applicant Herman Hughes, seeking, amongst other things, belated appellate review of the denial of his initial 1998 post-conviction relief action. In response, Respondent made its Return and Motion to Dismiss as a Successive Application on August 27, 2007. On October 18, 2007, the Honorable Diane S. Goodstein issued a Conditional Order of Dismissal as a Successive Application. Applicant filed a pro se Reply on November 20, 2007. The court found "a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final" and issued its Final Order of Dismissal on January 10, 2008.

On July 16, 2010, Hughes filed a pro se notice of appeal, and offered an explanation— pursuant to Rule 243(c), SCACR— as to why the second PCR court erred in finding his application successive. Appointed counsel subsequently filed a petition for a writ of certiorari on Hughes' behalf, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), asserting the sole arguable ground was "[w]hether

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

[Hughes' case should be remanded to determine if he knowingly and intelligently waived his right to appeal the denial of his first [PCR] action." The Court of Appeals denied counsel's motion to be relieved and directed the parties to address the issue raised in the Johnson petition. Subsequently, the Court of Appeals granted Hughes' petition for a writ of certiorari to review the second PCR court's decision in an order dated December 12, 2014. By Unpublished Opinion filed April 13, 2016, the Court of Appeals reversed the second PCR court's decision to summarily dismiss Applicant's 2007 PCR Application.

This court conducted an evidentiary hearing on the matter via WebEx on May 5, 2021. The sole issue before the Court was whether Applicant was entitled to seek belated appellate review of the denial of his 1998 post-conviction relief action pursuant to Austin v. State. Applicant, John H. Blume, Esquire, and Sheri Johnson, Esquire (Counsel), testified at the hearing. Also before the Court were the Calhoun County Clerk of Court's records of the underlying charges, Applicant's records from the South Carolina Department of Corrections (SCDC), the transcript from Applicant's conviction, the records and transcript from the evidentiary hearing of Applicant's 1998 PCR, and the records of this PCR action.

This Court determines Applicant has established he is entitled to seek belated appellate review of the denial of his first post-conviction relief proceeding. Specific findings of fact and conclusions of law are set forth below as required pursuant to S.C. Code Ann. § 17-27-80.

## PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. Applicant was indicted at the May 1994 term of the Calhoun County Grand Jury for murder, assault and battery with intent to kill, armed robbery, and grand larceny of a vehicle (1994-GS-09-0154, 0155, 0156). Applicant was sixteen years old at the time of the crime. He was represented by Phillip F. Newsom, of the Richland County Bar. First Circuit Solicitor Walter M. Bailey, Jr. initially prosecuted the case.

The prosecution filed petitions in the Family Court of Calhoun County on March 21, 1994, and on March 24, 1994, requested the actions be transferred to the Court of General Sessions so that Applicant could be tried as an adult. A waiver hearing was held on April 8, 1994 before the Honorable Maxey G. Watson, Family Court Judge. On April 28, 1994 Judge Watson entered a written order waiving jurisdiction to the Court of General Sessions.

On October 31, 1994, the Solicitor served his notice of intent to seek the death penalty, notice of aggravating circumstances, and written notice of evidence in aggravation of punishment.

The Honorable Edward B. Cottingham was the trial judge. The case was called for trial on September 5, 1995. After conducting a competency hearing, the court found Applicant competent to stand trial by a written order issued on September 7, 1995. Jury selection concluded on September 7, 1996. The guilt

phase began on September 7, 1996 where counsel for Applicant conceded his guilt. On September 11, 1995, the sentencing hearing began.

After deliberations, the jury found the existence of all three statutory aggravating circumstances and sentenced Hughes to death. After the jurors were polled, Judge Cottingham found as an affirmative fact the death sentence was appropriate. After providing Hughes the opportunity to express why the sentence should not be pronounced, Hughes was sentenced to death for murder, twenty-five (25) years consecutive for armed robbery, twenty-five (25) years consecutive for assault and battery with intent to kill, and five (5) years concurrent for grand larceny.

Applicant timely appealed his conviction to the South Carolina Supreme Court. The Court affirmed Applicant's conviction on October 27, 1997. Applicant's Petition for Rehearing was denied on November 20, 1997.

Applicant filed a Petition for Writ of Certiorari to the United States Supreme Court on February 24, 1998. On April 27, 1998, the United States Supreme Court denied the Petition for Writ of Certiorari. Hughes v. South Carolina, 523 U.S. 1097 (1998).

**FIRST PCR APPLICATION: 1998-CP-09-101**

Applicant, through Counsel, filed his initial PCR Application on June 22, 1998 alleging multiple reasons as to why he believed he was being held in custody unlawfully. The matter was assigned exclusively to the Honorable Paula Thomas

because it was a death penalty post-conviction relief action. The Respondents were represented in this matter by Donald J. Zelenka, Assistant Deputy Attorney General, and Jeffrey A. Jacobs, Assistant Attorney General. The Respondents made a return and motion to make more definite and certain dated July 21, 1998. Subsequently, other amended applications were filed. An evidentiary hearing was convened in Horry County from October 11-13, 1999.

On December 8, 2000, Judge Thomas entered a one-hundred and eighty-nine (189) page order denying post-conviction relief in its entirety. Subsequently, Applicant, through appointed counsel, filed various motions to alter or amend along with a motion to stay further proceedings pending the outcome in McCarver v. North Carolina, which was then pending before the United States Supreme Court. The court in McCarver granted cert to address the constitutionality of executing a defendant with mental disabilities. Judge Thomas stayed the proceedings by order dated May 4, 2001. On May 9, 2005, Judge Thomas granted Applicant a new sentencing hearing based on the U.S. Supreme Court's decision in Roper v. Simmons, 125 S.Ct. 1183 (2005), prohibiting the execution of offenders under the age of eighteen. Applicant, through counsel Blume, advised the court that this Order resolved all matters. Neither party appealed Judge Thomas' order.

On October 10, 2006, Applicant appeared before the Honorable Howard P. King. Applicant was represented by John Blume. Judge King sentenced Applicant to a life sentence on murder. No appeal was taken from the sentencing proceeding. Applicant subsequently filed the above-captioned Post Conviction Relief action.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court determines Applicant has established that he is entitled to seek belated appellate review of the denial of his first post-conviction relief proceeding. Specific findings of fact and conclusions of law are set forth below as required pursuant to S.C. Code Ann. § 17-27-80.

Applicant alleges he was denied the right to seek an appeal following the dismissal of his 1998 post-conviction relief application. Pursuant to section 17-27-100 of the South Carolina Code, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. See also Rule 243, SCACR ("A final decision entered under the Post-Conviction Relief Act shall be reviewed by the Supreme Court upon petition of either party for a writ of certiorari."). When an applicant is denied his right to seek such review of his initial PCR application due to ineffective assistance of PCR counsel, the Supreme Court has directed the circuit court to hold "an evidentiary hearing on the issue of whether in fact the petitioner requested and was denied an opportunity to seek appellate review." Austin V. State, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991). If the Court so finds, Applicant has the right to petition the Supreme Court for review of the denial of his initial application. Id.

At the hearing, Applicant testified that Counsel Blume was appointed to represent him in his initial PCR action. Applicant testified that the initial PCR case was quite some time ago and that his specific recollection of the events that took

place in the case were not as clear now as they would have been closer in time to the 1998 case. He testified that he was able to communicate with Mr. Blume over the telephone and by letter. Applicant further testified that he did not recall having communicated with, or meeting, any other counsel than Mr. Blume in connection with his 1998 PCR. Applicant testified that there was a significant gap between the evidentiary hearing of his PCR case and his resentencing. Applicant testified that he does not recall having any conversations with Mr. Blume regarding his right to appellate review of the denial of his 1998 PCR case nor does he recall signing any waiver of such rights.

Following Applicant's testimony, Sheri Johnson, Esquire, testified. Ms. Johnson testified that she had very limited involvement in Applicant's case and was only involved in a consulting capacity through her position as a professor of Constitutional law at Cornell University, and her prior general experience with death penalty cases. She testified that she never met with Applicant, appeared on his behalf, nor conducted any research on the specific issues of Applicant's case. Ms. Johnson testified that she had no conversations with Applicant regarding his right to appellate review of the denial of his PCR and that she was unaware of the status of Applicant's case when the time to file a notice of appeal ran.

Following Ms. Johnson's testimony, John H. Blume, Esquire, testified on behalf of Applicant. Mr. Blume testified that represented Applicant through his role with a pro bono death penalty defense foundation. He testified that during the course of his representation of Applicant, Mr. Blume relocated to Ithaca, New York,

as a faculty member of Cornell University. Mr. Blume testified that he continued to represent Applicant, and others, and was able to communicate with Applicant via telephone and by letter. Mr. Blume testified that after Judge Thomas issued the Order of Dismissal, further proceedings were stayed pending the outcome of Roper v. Simmons, 543 U.S. 551 (2005). Mr. Blume testified that this particular case was unique amongst his capital cases in that his client was a juvenile when the crime was committed and the fact that there was a lengthy delay in the matter's ultimate resolution, pending the outcome of a case pending before the United States Supreme Court, which ultimately led to the vacation of Applicant's death sentence.

Mr. Blume testified that it is his standard practice to file a notice of appeal following a negative outcome in a case, but he has since learned that he failed to file such a notice in Applicant's case. Mr. Blume testified that he has no specific recollection of speaking with Applicant regarding his right to appeal the Order of Dismissal. Mr. Blume further testified that while moving offices in the years following Applicant's PCR case, his old or closed files, including Applicant's, were destroyed as a space saving measure. Mr. Blume testified that he was therefore unable to review his file in advance of the evidentiary hearing or attempt to locate any notes or waiver of appellate rights, but that he does not have any recollection of discussing an appeal with Applicant.

After review of the facts and circumstances surrounding the waiver of Applicant's right to appeal the denial of allegations in Applicant's post-conviction relief application, both parties consented to this court's grant of a belated appeal of

Applicant's first post-conviction relief application (1998-CP-09-101) pursuant to Austin. The parties agree that there is no evidence in the record that Applicant voluntarily waived his right to seek an appeal of the post-conviction relief court's denial and dismissal of Applicant's first application for post-conviction relief. Based on the documents submitted from the previous PCR file, it appears to the parties and this Court that Applicant 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.

Based upon the foregoing, this Court grants Applicant's request to seek belated appellate review of his first PCR (1998-CP-09-101) pursuant to Austin. Applicant's current PCR counsel is instructed to file a Notice of Appeal with the South Carolina Supreme Court pursuant to Rule 243, SCACR.

This Court also finds that all allegations raised in the 1998 PCR matter's Motion Pursuant to Rule 59(e), SCRCP, have been waived, rendered moot, or previously ruled upon, and that there are no outstanding issues to be resolved in that motion which would hinder this Court's ability to issue a ruling in the 2007 PCR. Mr. Blume testified that Rule 59(e) motions, both generally and specific to this case, serve the mixed purpose of issue preservation and requesting reconsideration of the Court's ruling, the latter not influencing the finality of the 1998 PCR Court's ruling. Further, the State proceeded to appear and respond to the 2007 Application and its subsequent procedural and appellate stages, without raising concern that undecided issues remain from Applicant's 59(e) motion. Finally, the South Carolina

Court of Appeals, in its Unpublished Opinion reversing the second PCR Court and remanding the matter back to this court, held that the 59(e) motion was denied. For the foregoing reasons, this Court finds no impediment to rule on the issue at hand.

**IT IS THEREFORE ORDERED:**

1. Applicant remain in the custody of the South Carolina Department of Corrections; and
2. Applicant is granted the right to seek a belated appellate review of his initial post-conviction relief action (C/A No. 1998-CP-09-101) pursuant to Austin.

AND IT IS SO ORDERED this 25 day of October, 2021.

*Kristi Curtis*

Kristi F. Curtis  
Presiding Judge  
First Judicial Circuit

*Sunter*

South Carolina.

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S.C. SUPREME COURT