STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Johnnie Walker Gaskins, 313590, Applicant, v. State of South Carolina, Respondent.	)	2022-CP-40-1854 ORDER ON APPLICATION FOR POST-CONVICTION RELIEF, GRANTING BELATED APPEAL PURSUANT TO *AUSTIN V. STATE*

This matter comes before the Court pursuant to an Application for Post-Conviction Relief filed on April 8, 2022. The State submitted a Return on August 19, 2022. On November 14, 2022, Applicant, through counsel, filed an Amendment, which stated the following:

> Applicant, through counsel, would move to amend his Application, as addressed below. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.
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> In addition to the information provided in response to question eleven on his Application, Applicant would add the following:
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> (a) Applicant's counsel failed to provide him notice of the entry of the Order of Dismissal, failed to file a Motion under Rule 59, SCRCP, due to the Order omitting the matter of the Court sustaining the State's objection to a late amendment and/or expert witness, and failed to timely file an appeal. PCR Transcript pp. 90-96, 138-145.
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> (b) Following the evidentiary hearing, Applicant was under the belief that further proceedings were going to take place regarding the matter of the late amendment and/or expert regarding video evidence. PCR Transcript pp. 90-96, 138-144.
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> In addition to the response provided to question nineteen on his Application, Applicant would add the following: A belated appeal of prior PCR Application or whatever relief the Court deems proper.

An evidentiary hearing was conducted on November 14, 2022, at the Richland County Courthouse in front of the Honorable D. Craig Brown. Applicant was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by D. Russell

Barlow, II, Assistant Attorney General. During the hearing, Applicant took the stand and called Aimee J. Zmroczek, Esquire. Applicant introduced two exhibits.

At the conclusion of the evidentiary hearing, this Court found that Applicant was entitled to a belated appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), and discussed the other relevant claims with counsel for both parties. Hearing pp. 45-52. This Court requested that Applicant's counsel submit an Order, and she obtained permission to obtain the hearing transcript. Hearing pp. 52-53. This Court granted such permission, and Applicant's counsel submitted a proposed Order, from which this Order follows.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Richland County Clerk of Court. Applicant was indicted during the July 2008 term of the Richland County Grand Jury for two counts of murder (2008-GS-40-1626; -3948), three counts of assault and battery with intent to kill (ABWIK) (2008-GS-40-1629; -1631; -1632), and use of a firearm during the commission of a violent crime (2008-GS-40-1627).

On April 15, 2015, Applicant proceeded to trial in front of the Honorable L. Casey Manning and a jury. Applicant was represented by Joseph M. McCulloch, Jr., Esquire, and Kathy R. Schillaci, Esquire. Applicant was found guilty as indicted. The Honorable L. Casey Manning sentenced Applicant to concurrent terms of life for the two counts of murder. Applicant was sentenced to consecutive terms of twenty years for each count of ABWIK, and a consecutive term of five years for use of a firearm during the commission of a violent crime.

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A timely direct appeal was filed and perfected by Tara D. Shurling, Esquire. On July 3, 2013, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences. *State v. Gaskins*, Op. No. 2013-UP-304 (S.C. Ct. App. filed July 3, 2013). A Petition for Rehearing was filed on January 18, 2013. An Order denying the Petition was issued by the South Carolina Court of Appeals on August 6, 2013.

On January 6, 2013, a Petition for Writ of Certiorari was filed in the South Carolina Supreme Court. An Order denying the Petition was issued on August 6, 2014, and the Remittitur was handed down on August 15, 2014.

An Application for Post-Conviction Relief was filed on May 27, 2015, with the Richland County Clerk of Court. On September 11, 2015, David K. Allen, Esquire, was appointed to represent Applicant. On October 1, 2015, a Return was filed, and Return and Motion for More Definite Statement was filed on June 27, 2015. An *Ex Parte* Order for Funding to obtain a private investigator was issued on January 29, 2016. An Order of Substitution, which appointed Aimee J. Zmroczek, Esquire, was entered on July 25, 2016.

On July 18, 2017, an evidentiary hearing was conducted at the Richland County Courthouse in front of the Honorable G. Thomas Cooper, Jr. Applicant was present and represented by Aimee J. Zmroczek, Esquire. Respondent was represented by Jessica E. Kinard, Esquire. Applicant, through counsel, made a verbal Amendment of his PCR Application and called Joseph M. McCulloch, Jr., Esquire, and Tara D. Shurling, Esquire, to the stand. Applicant introduced four exhibits.

At the conclusion of the hearing, the court gave both parties thirty days to submit proposed Orders. On October 6, 2017, an Order of Dismissal was issued, which was filed

and mailed to counsel on October 10, 2017. No appeal was filed in the South Carolina Supreme Court.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

I. Summary of the Relevant Portions of the July 2017 Hearing

At the beginning of the evidentiary hearing on July 18, 2017, Applicant's counsel informed the court that she had amendments to make to the original application. PCR p. 5. Respondent stated that she had received a copy of the amendments that morning and objected due to timeliness. PCR pp. 6-7. Judge Cooper found that the amendments were general in nature and allowed Applicant to proceed with the amendments that were handwritten as follows:

Trial Attorney

Fail to properly prepare / call witnesses / utilize evidence
Fail to preserve obvious issues for appeal

1) Did not move to suppress search of vehicle
   – illegally obtained
2) Did not move to suppress video
   – issues with completeness
   – editing
3) Did not move to suppress phone
   – never reviewed calls
   – never examined
4) Did not object to Judge's behavior / chilling effect on defense
5) Did not object to Judge going into jury room
6) Did not object to premature deliberations
7) Did not argue jury charges / *Belcher*
   -fail to request charges
8) Did not object to bolstering
9) Never received / reviewed 911 calls

Appellate Attorney

1) Did not argue *Biggers*
2) Did not argue search warrants
   -validity of tipster

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-hearsay
3) Did not argue closing argument preservations
4) Did not argue *Brady* / Rule 5 violations

After the court allowed the amendments, Joseph M. McCulloch, Jr., Esquire, was called to the stand and questioned by both parties about his role as Applicant's trial counsel. When Applicant's counsel asked about Applicant's investigator reviewing the discovery, Mr. McCulloch responded that he had put all the boxes on his conference room table for the investigator to review in the prior few days. PCR p. 16. Counsel also questioned Mr. McCulloch about the video obtained by law enforcement. PCR pp. 30-31. Later, she also asked counsel extensive questions about the video evidence. PCR pp. 43-50.

After Mr. McCulloch's testimony, Ms. Zmroczek informed the court that she intended to call Christopher Watkins who was hired by one of the prior attorneys to work on the "video aspect of it." PCR p. 89, lns. 8-15. She explained that she had just informed Respondent about his testimony and proposed leaving the record open to allow the State adequate time to prepare for his testimony. PCR p. 89. Respondent objected due to the timing. PCR pp. 90-91. In response, the court questioned what Applicant intended to offer through Mr. Watkins testimony, and counsel responded: "[W]hat he will testify to is that the video was altered; that the video was not presented to the defense in the way that it was received." PCR p. 91, lns. 18-25. She informed the court that she had received Mr. Watkins final report the night before. PCR p. 94, ln. 21. After continued discussion, the court held: "Well, I'm going to sustain the State's objection at this time. At the conclusion of this presentation and your other witnesses, I will review it in-camera and

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see if I can understand what you're trying to say. And I'll view it with attorneys, let's put it that way." PCR p. 95, ln. 15-20.

Applicant's next witness was Tara Dawn Shurling, Esquire, and she was questioned by both parties regarding her handling of Applicant's appeal. PCR pp. 96-137. Regarding the video, she did not have an independent recollection of reviewing it, but she noted that she did not recall any objections or motions made in the record she reviewed while preparing the appellate brief. PCR pp. 122-23.

Following her testimony, the court revisited the matter of Mr. Watkins testimony. Applicant's counsel identified the issues from the amendment that his testimony related to, which included testimony regarding his review of counsel's entire file. Counsel stated that she needed to at least proffer his testimony since "you can't PCR a PCR attorney." PCR p. 138, lns. 2-15. After back and forth with Applicant's counsel, the court noted that Respondent was given no notice that Mr. Watkins analyzed the video and all he could consider as possible notice was issue two on the amendment. PCR pp. 139-140. Referencing trial counsel's questioning of the officer about the video at trial, the court asked if counsel was trying to make a prosecutorial misconduct argument, which seemed to go beyond the "pale of a PCR hearing." PCR pp. 139-141, p. 140, lns. 16-23. In response, counsel agreed with the court that Applicant was trying to show that trial counsel failed to take steps to analyze the video to ensure it was not altered. PCR p. 141. While acknowledging the notice issue, the court asked for the parties position on Mr. Watkins testifying about what he found in trial counsel's file that was divergent from his testimony. In response, Respondent objected due to notice.

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After the court stated that he would allow the proffer and rule on the objection after, Applicant's counsel admitted that the late notice was her fault, and the court noted that she could have requested a continuance and that she failed to notify Respondent when she became aware of the matter. PCR p. 143. During further discussion before conducting a proffer, the court sustained the State's objection. The court ruled:

> Well, I'm going to sustain the State's objection to the introduction of evidence that the videotape was altered. I sustain the State's objection based on the fact that insufficient evidence – insufficient notice was given to the State. The State hasn't even seen what we're talking about, and here we are.

PC Rp. 144, lns. 4-10. Applicant's counsel requested indulgence, after which the following took place:

> Counsel: And, your Honor, at this time, we'll withdraw that testimony. And, you Honor, given the fact that the late notice was, you know, my fault, what I would move to do at this time, Your Honor, is to withdraw that specific allegation with leave to present it as after-discovered evidence.
>
> Court: Yeah, I mean, that's what it is.
>
> Counsel: Right, under Rule 29(b), Your Honor.

PCR p. 144, lns. 11-20. Respondent informed the court that she did not object if the matter was being withdrawn and stated that counsel would have the right to present it in a post-trial motion. PCR p. 145, lns. 7-10.

At the conclusion of the hearing, the court requested proposed orders from both parties in thirty days. PCR pp. 145-146. On October 6, 2017, an Order of Dismissal was issued, which listed the issues raised in the handwritten amendment on the day of the evidentiary hearing. The Order of Dismissal made no mention of counsel's attempt to call Mr. Watkins or the discussions had regarding the same.

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II. Summary of the November 2022 Hearing

After Respondent provided the procedural history detailed above, Applicant's counsel was asked to clarify the allegations on which Applicant was moving forward. Counsel responded that based upon discussions with Respondent she filed an Amendment that morning, which was previously provided to Respondent, to clarify and further support the allegations made in the Application. Therefore, Applicant was going forward on the Application and the Amendment filed on November 14, 2022. Hearing p. 7. Respondent informed the court that the State objected to the amendment since it was a collateral attack on prior PCR counsel's performance and not appropriate under *Austin*[1]. Hearing p. 8. Before calling Applicant's first witness, counsel moved the orders providing for funding and substitution of counsel in the 2015 PCR Action into evidence as Applicant's Exhibit one and two, without objection. Hearing pp. 8-9.

When Aimee Zmroczek, Esquire, took the stand, she recalled taking over Applicant's PCR per the substitution order and that funding had been obtained for Mr. Watkins via the order issued prior to her representation. Hearing pp. 10-11. Referencing the prior evidentiary hearing transcript, counsel was asked if she could explain what was going on with the amendments the morning of the hearing. Hearing pp. 11-12. She explained that she had discussed the matter with Respondent prior to that morning, and she was led to believe the timing of the amendments were "no big deal." Hearing p. 12, lns. 7-13, p. 24. She recalled it turning into a big deal when Respondent "started to object to all of the things that, that we had previously talked about." Hearing p. 12, lns. 7-17. On

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

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cross-examination, she recalled multiple discussions about a continuance even if her requesting a continuance was not reflected in the record. Hearing p. 24.

Regarding her questioning of Mr. McCulloch about the video, she explained that she was attempting to lay the foundation to call the expert, Mr. Watkins, about his work in the case. Hearing p. 13. When asked about when she brought up the matter of Mr. Watkins and leaving the record open if needed, she explained again that she was caught off guard by Respondent claiming lack of notice and need for time to obtain an expert, so she proposed leaving the record open since testimony had already been taken. Hearing pp. 13-14. She agreed that at that point the matter of Mr. Watkins' testimony was left to be further discussed and/or proffered after Ms. Shurling's testimony. Hearing pp. 14-15. She agreed that she questioned Ms. Shurling about the video evidence. Hearing p. 15.

Turning to what occurred after Ms. Shurling's testimony, counsel explained that she more aggressively tried to make her argument that she needed to at least proffer Mr. Watkins' testimony because she was confused by the court's ruling that differed from his initial ruling. Hearing p. 15. She also explained "obviously it's not reflected in the transcript because it doesn't pick up movements and things like that I'm, I'm trying to make this argument to tell him that I need to proffer and he's shaking his head no." Hearing p. 15, lns. 19-23. When asked about the court's comments that the matter fell outside the purview of PCR, she responded that she did not agree, but she was trying to find a way to preserve the issue once she could tell he was not going to let it in. Hearing p. 16. She explained that she was prepared to proffer and was very confused when the court issued his final ruling before the proffer was conducted. Hearing pp. 17-18. She acknowledged that she tried to figure out a way to preserve the issue and mentioned filing

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under Rule 29, but she later determined that it did not fall under Rule 29, SCCrimP. Hearing pp. 18-19, 25. She concluded that she was boxed in and trying to find a way out, but she found the issue to be proper for PCR and attempted to raise it via her handwritten amendment. PCR p. 18, lns. 13-24, pp. 19-20.

On cross-examination when asked about her withdrawal of the issue, she explained that she was confused then and confused when reviewing the transcript now, but she did not intend to withdraw it. Hearing pp. 25-26. On redirect, she explained that her comments about not being able to PCR a PCR attorney demonstrated her attempts to preserve the matter for appellate review. Hearing pp. 28-29. She also agreed that the video issue was a primary issue in the PCR case. Hearing p. 30, lns. 8-10.

When asked about the court's instruction to submit a proposed order, she responded that she had checked her notes and did not have a record of submitting a proposed order. Hearing p. 20, lns. 6-10. She explained that she was trying a bunch of cases at the time and likely missed a deadline. Hearing p. 20, lns. 12-14. She also explained that her busy trial docket was the reason that "neither the 59 nor the eventual appeal was filed." Hearing p. 20, lns. 14-17.

Regarding the Order of Dismissal, she stated that she did not have independent knowledge of receiving it, and she should have checked the public index. Hearing pp. 21, 26. She concluded: "So, either way it's on me." Hearing p. 21, ln. 11. When asked about being contacted by Applicant or his family, she said it was "certainly possible" that she led them to believe it was still pending and likely discovered her error when she checked the public index following such contact. Hearing p. 21, lns. 12-21.

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As to the content of the Order of Dismissal, she agreed that the matter involving the video and Mr. Watkins was not addressed in the order and that she should have filed a Rule 59, SCRCP, motion to ensure the completeness of the order. Hearing p. 22. She also agreed that under *Marlar*[2] and its progeny, it was her duty as PCR counsel to file a Rule 59 Motion to ensure that all issues were addressed in the order and preserved correctly. Hearing p. 22. She agreed that it was her duty to timely file an appeal, which was a duty she did not fulfill. Hearing p. 22. She also testified that Applicant wanted an appeal and never instructed her not to file one on his behalf. Hearing p. 23.

When Applicant took the stand, he acknowledged his familiarity with the instant Application and subsequent Amendment. Hearing p. 31. He also agreed that he had reviewed the same with counsel and understood the relief he was requesting. Hearing p. 32.

Regarding his prior PCR Application, he recalled meeting with and talking on the phone with Mr. Watkins after Ms. Zmroczek took over his case. Hearing pp. 34-35. He further recalled Mr. Watkins informing him about the issue he was working on regarding the video evidence and the possibility of the video being edited. It was his understanding that the matter was going to be addressed at his PCR hearing as a primary issue. Hearing pp. 35, 37.

Turning to the day of his PCR hearing, he remembered seeing the handwritten amendment for the first time that morning and being unaware of any concern over Mr. Watkins testifying. Hearing p. 36. As it began being discussed, Applicant recalled thinking the hearing was gong to be continued to give the State time to prepare. Hearing

[2] *Marlar v. State*, 375 S.C. 407, 653 S.E.2d 266 (2007).

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p. 37, lns. 16-19. When asked about the later discussion of the issue, he explained that he understood that the court was giving the State more time and a final ruling would not be made until that was done. Hearing p. 38, lns. 3-9, p. 40. He agreed that upon recently reviewing the evidentiary hearing transcript he now understood that he was not correct about the court's ruling. Hearing p. 41. On cross-examination, he responded that he did not understand at the hearing that Ms. Zmroczek withdrew the issue. Hearing p. 44.

He testified that he did not receive a copy of the Order of Dismissal from Ms. Zmroczek, and he was delayed in reaching out to her due to the passing of his father. Hearing pp. 38-39. He recalled it being difficult to reach her, and when he did it was his understanding his case was still pending, which he took to mean that they were still waiting on the State to address the video issue. Hearing p. 39. He explained that he found out that his PCR was denied by accessing the public index. Thereafter, he asked his mother to reach out to current counsel. Hearing pp. 39-40.

Regarding the filing of a Rule 29, SCRCrimP, he recalled that counsel mentioned it in the courtroom, but it was never discussed further. Hearing p. 39. He testified that he never heard from Ms. Zmroczek about filing an appeal on his behalf and he never informed her that he did not want an appeal filed. PCR pp. 41-43. He also testified that he would have wanted Ms. Zmroczek to ensure that all issues were properly addressed in the Order of Dismissal. Hearing p. 42. When asked what relief he was seeking, he said: "To, to let me get my appeal back and preserve this issue." Hearing p. 42, lns. 12-15, p. 43.

III. Discussion

In *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), the South Carolina Supreme Court provided for a belated appellate review of an initial post-conviction relief

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action where prior post-conviction relief counsel fails to timely appeal the denial of the application. *Id.* at 454, 409 S.E.2d at 396; *see also* S.C. Code Ann. § 17-27-100 (right to appeal final judgment by post-conviction relief court). Pursuant to *Austin*, an evidentiary hearing may be conducted in regard to a successive post-conviction relief application "on the issue of whether in fact the petitioner requested and was denied an opportunity to seek appellate review." *Id.* at 454, 409 S.E.2d at 396. "If the circuit court finds that the petitioner never in fact sought discretionary review, the petitioner may appeal the finding." *Id.* at 455, 409 S.E.2d at 396. *Austin*, therefore, allows an applicant to petition the South Carolina Supreme Court for discretionary review of the dismissal of his initial post-conviction relief application, and may do so outside the ordinary time limits for bringing such an appeal.

Here, an evidentiary hearing was held and this Court finds that Applicant requested and was denied an opportunity to seek appellate review of his initial post-conviction relief application due to the admitted failure of his counsel on his initial post-conviction relief application. This Court finds credible the testimony of Ms. Zmroczek and Applicant. This Court has also considered that Respondent did not object to and consented to the request for *Austin* relief. Hearing p. 49, lns. 19-20. After careful consideration of the record before this Court and the applicable case law, this Court finds that Applicant is entitled to a belated appellate review of his initial post-conviction relief application pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

This Court notes that Applicant, through counsel, must serve a notice of appeal within thirty days from receipt by counsel of written notice of entry of the judgment to secure the appropriate appellate review, and file such notice in the South Carolina

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Supreme Court within ten days of service. Rule 203 & 243, SCACR. Furthermore, Applicant and counsel are directed to Rule 203, 207, and 243, SCACR to ensure the proper filing and perfecting of an appeal.

This Court also agrees with counsel that Applicant's case is not simply a matter of whether Applicant is entitled to an *Austin* appeal. Hearing p. 45, lns, 22-24, pp. 45-51. Here, Ms. Zmroczek readily admitted that she did not have an independent recollection of receiving or reviewing the Order of Dismissal. She also stated that she would have filed a Rule 59, SCRCP, motion if she had reviewed the Order for the purposes of preserving the issue regarding the video evidence, expert, and ensuring the completeness of the Order. She acknowledged that it was her duty to file such a motion, but she did not in this case. Additionally, this Court finds credible Applicant's testimony that he was under the belief that further action was going to be taken regarding the issue with the video evidence, expert, and that he was led to believe that his PCR Action was still pending until he independently discovered otherwise.

This Court is constrained by the existing precedent to grant relief on counsel's failure regarding the first PCR Action beyond her failure to file an appeal, but this Court is highly concerned about these failures. Admittedly, counsel provided a handwritten Amendment on the day of the hearing, attempted to call an expert on Applicant's primary issue without providing adequate notice to the State, failed to request a continuance as noted by the PCR court, failed to submit a proposed order, and failed to ensure that the issue regarding the video evidence was properly ruled upon and preserved for appellate review.[3] Therefore, this Court wants to make it abundantly clear that the Applicant has

[3] Counsel also had confusion on whether she withdrew the issue and failed to file a timely Rule 29(b), SCRCrimP, motion as she indicated to the court she would do.

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raised these issues via Amendment and at the evidentiary hearing and it is being addressed herein to ensure that the additional admitted failures of counsel in representing Applicant on his first PCR Application are properly preserved for review by the appellate court and/or in a federal action in whatever way may be proper.

IT IS THEREFORE ORDERED:

1. That Applicant is granted a belated appeal of his initial post-conviction relief application pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

AND, IT IS SO ORDERED.

Honorable D. Craig Brown
Presiding Judge
Fifth Judicial Circuit

February 15, 2023

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Johnnie Walker Gaskins, 313590, Applicant, v. State of South Carolina, Respondent.	)	2022-CP-40-1854 ORDER DENYING MOTION PURSUANT TO RULE 59(e) AND 60(b), SCRCP

This matter comes before the Court pursuant to an Application for Post Conviction Relief filed on April 8, 2022. The State submitted a Return on August 19, 2022. On November 14, 2022, Applicant, through counsel, filed an Amendment, which stated the following:

> Applicant, through counsel, would move to amend his Application, as addressed below. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.
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> In addition to the information provided in response to question eleven on his Application, Applicant would add the following:
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> In addition to the response provided to question nineteen on his Application, Applicant would add the following: A belated appeal of prior PCR Application or whatever relief the Court deems proper.

An evidentiary hearing was conducted on November 14, 2022 at the Richland County Courthouse in front of the Honorable D. Craig Brown. Applicant was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by D. Russell

Barlow, II, Assistant Attorney General. During the hearing, Applicant took the stand and called Aimee J. Zmroczek, Esquire. Applicant introduced two exhibits.

At the conclusion of the evidentiary hearing, the Court found that Applicant was entitled to a belated appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). The Court requested that Applicant's counsel submit an Order, and she obtained permission to obtain the hearing transcript. Applicant's counsel submitted a proposed Order on February 9, 2023.

On February 15, 2023, the Honorable D. Craig Brown issued an Order on Application for Post-Conviction Relief Granting Belated Appeal Pursuant to *Austin v. State*, which was filed on February 28, 2023. On March 10, 2023, Respondent submitted a Motion Pursuant to Rule 59(e) and 60(b), SCRCP. On March 21, 2023, Applicant, through counsel, submitted a Response to Motion Pursuant to Rule 59(e) and 60 (b), SCRCP.

Pursuant to Rule 59(f), SCRCP, this Court finds that a hearing is not necessary on Respondent's motion and makes this ruling based upon the record before the Court. As a result of a thorough review of the record and filings before this Court, this Court finds that Respondent's motion is DENIED. This Court finds that the argument made under Rule 59(e), SCRCP, fails because the Order on Application for Post-Conviction Relief Granting Belated Appeal Pursuant to *Austin v. State* does not exceed the scope of *Austin*[1] and does not require amendment. This Court also finds that the argument made under Rule 60(b), SCRCP, fails as it does not meet the requirements of Rule 60(b) and is not

[1] 305 S.C. 453, 409 S.E.2d 395 (1991).

meritorious. Even if the argument was proper under Rule 60(b), SCRCP, this Court is not convinced that the standing Order should be amended.

IT IS THEREFORE ORDERED:

1. Respondent's Motion Pursuant to Rule 59(e) and 60 (b), SCRCP, is DENIED.

AND, IT IS SO ORDERED.

Honorable D. Craig Brown
Presiding Judge
Fifth Judicial Circuit

4-26-, 2023