

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

Grace Gilchrest Knie, Circuit Court Judge

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2018-CP-23-5662

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Terry McCarrell, ..... Appellant,  
v.  
The State, ..... Respondent.

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NOTICE OF APPEAL

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Pursuant to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) and Rule 243, SCACR, Terry McCarrell appeals the Honorable Perry H. Gravely's Order of Dismissal filed on May 10, 2017. Mr. Terry further appeals the ruling that issues other than those regarding his appeal rights were successive in Honorable Grace Gilchrest Knie's October 17, 2023, Order Granting Belated PCR Appeal. Counsel received notice of the order March 4, 2025.

This fourth day of March, 2025.

s/Susannah Ross  
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Attorney for Respondent

STATE OF SOUTH CAROLINA )  
COUNTY OF GREENVILLE )  
)  
)  
TERRY MCCARRELL, )  
APPLICANT. )  
)  
)  
STATE OF SOUTH CAROLINA, )  
RESPONDENT. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
THIRTEENTH JUDICIAL CIRCUIT

**ORDER GRANTING  
AUSTIN V. STATE  
BELATED PCR APPEAL**

CASE # 2021-CP-23-2559

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This matter comes before the Court by way of an application for post-conviction relief (PCR) filed May 17, 2021. An evidentiary hearing into the matter was convened September 21, 2023, in the Greenville County Courthouse. The Applicant was present represented by Susannah C. Ross, Esquire. Assistant Attorney General Melody Brown represented the Respondent.

**PROCEDURAL HISTORY**

The Applicant is presently confined in Perry Correctional Institution of the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted for second-degree criminal sexual conduct with a minor (2012-GS-23-0967), committing a lewd act on a child (2012-GS-23-968), contributing to the delinquency of a minor (2012-GS-23-0162), and grand larceny (2012-GS-23-2622). The Applicant was tried and found guilty as indicted. He was sentenced to concurrent terms of twenty years, fifteen years, five years, and three years.

The Applicant filed a PCR application (2016-CP-23-1089) February 22, 2016. An evidentiary hearing was convened on February 23, 2017, at the Greenville County Courthouse before the Honorable Perry H. Gravely. William G. Yarborough, III, Esquire represented the Applicant and Assistant Attorney General Julie A. Coleman represented the State. The PCR

court denied relief by Order filed May 10, 2017. The Applicant filed a timely notice of appeal which was later transferred to the Court of Appeals. After a July 27, 2019, letter to Mr. Yarborough warning of dismissal for failure to comply with Rule 243(j) of the South Carolina Appellate Court Rules, Appellate Case Number 2017-001177 was dismissed by Order filed August 7, 2019.

### **ALLEGATIONS**

In his current PCR application, the Applicant alleges ineffective assistance of PCR counsel for failure to assure an appeal from case number 2016-CP-23-1089's Order filed on May 10, 2017, denying post-conviction relief.

### **ARGUMENT AND TESTIMONY PRESENTED**

The Applicant alleged ineffective assistance of PCR counsel for failing to comply with Rule 243(j) of the South Carolina Appellate Court Rules resulting in the dismissal of the Applicant's PCR appeal. He said that he made it clear to his PCR council that he wanted an appeal.

William G. Yarborough, III, Esquire testified that he represented the Applicant and that the Applicant had requested but was denied an opportunity to seek appellate review due to the circumstances in this case. He stated he moved during this period and may not have seen the notices but admitted that he "had dropped the ball".

The Respondent conceded that the Applicant was entitled to a belated appeal due to his prior PCR attorney's failure to perfect his appeal.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court finds that the Applicant's allegation that he is entitled to a belated appeal due to his prior PCR attorney's failure to perfect an appeal on his behalf is not procedurally barred



and is meritorious. Where a post-conviction relief judge determines the applicant did not freely and voluntarily waive his appellate rights, the applicant may petition the South Carolina Supreme Court for review of post-conviction relief issues pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).<sup>1</sup> See also King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992).

This Court further finds the Applicant did not knowingly and voluntarily waive his right to appellate review and this therefore entitled to a belated review of the denial of his PCR application. See Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002). The Applicant never received a full “bite at the apple” because he expressed his desire to seek review of the denial of his PCR application pursuant to his state law rights set fourth in S.C. Code Ann. Sec. 17-27-100 and his appeal was never perfected. The Applicant’s denial of an appeal can be remedied by a petition for belated review by his current PCR attorney pursuant to Austin v. State. See id.

### CONCLUSION

All allegations except the belated appeal pursuant to Austin v. State are barred because they are successive. The Applicant has proven by a preponderance of the evidence that he did not knowingly and voluntarily waive the appeal of the denial of his first PCR application.

### **IT IS THEREFORE ORDERED:**

1. That the Austin claim is granted and the claim that PCR counsel failed to adequately preserve the record is denied;
2. Within thirty (30) days of service of this Order, counsel for the Applicant must file a Notice of Appeal to secure the appropriate appellate review of the Applicant’s first post-conviction relief

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<sup>1</sup> Even where the post-conviction relief judge makes this finding, he may not grant relief on this basis. Instead, the Applicant must petition the Supreme Court for a belated review. Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986).

action. Counsel and the Applicant are directed to King v. State,  
308 S.C. 348, 417 S.E.2d 868 (1992) and Rule 227, SCACR for  
the appropriate procedure for a belated appeal.

AND IT IS SO ORDERED this 12 day of October, 2023.



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Grace Gilchrist Knie  
Circuit Court Judge  
Thirteenth Judicial Circuit

*Sp Antonby*  
Greenville, South Carolina.

