

ALAN WILSON
ATTORNEY GENERAL

November 22, 2012

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

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NOV 22 2013

S.C. Supreme Court

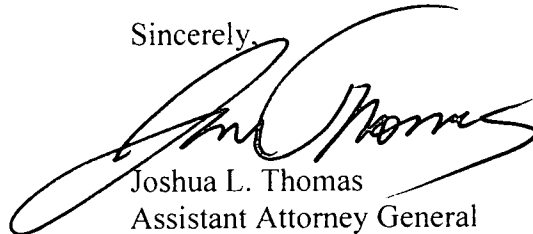
Re: Derrick M. Hollingsworth v. South Carolina
Civil Action No. 2011-CP-26-2843

Dear Mr. Shearouse:

The Applicant in the above captioned case filed a notice of appeal on November 19, 2013. The final order disposing of the case in the circuit court was filed on November 4, 2013, and the clocked copy was received by my office on November 18, 2013. As such, the State would have until December 2, 2013, to file a motion to alter or amend the order pursuant to Rule 59(e), SCRPC. Because the State believes the order does not address certain issues such that they are adequately preserved for review, Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007), I am filing this day the attached Rule 59(e) motion with the circuit court.

Pursuant to Hudson v. Hudson, 290 S.C. 215, 349 S.E.2d 341 (1986), the State respectfully requests this appeal be held in abeyance or dismissed without prejudice until such time as the circuit court has ruled on the State's Rule 59(e) motion. Thank you for your consideration in this matter, and please contact me should you have any questions or concerns.

Sincerely,



Joshua L. Thomas
Assistant Attorney General

JLT/jlt
Enclosures

CC: Daniel A. Hunnicutt, Esquire
Office of Appellate Defense
The Honorable J. Cordell Maddox, Jr.



ALAN WILSON
ATTORNEY GENERAL

November 22, 2013

The Honorable Melanie Huggins-Ward
Horry County Clerk of Court
P.O. Box 677
Conway, SC 29528-0677

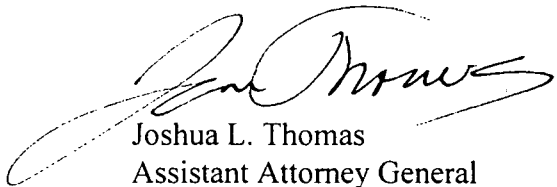
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NOV 22 2013
S.C. Supreme Court

Re: Derrick Hollingsworth, #265683 v. State of South Carolina
2011-CP-26-2843

Dear Ms. Huggins-Ward:

Enclosed please find the original **Motion To Alter Or Amend Judgment Pursuant To Rule 59(e), SCRPC** of the Respondent, in the above-captioned case, for filing in your office. By copy of this letter, I am serving Daniel A. Hunnicutt, Esquire with the motion.

Sincerely,



Joshua L. Thomas
Assistant Attorney General

JLT/nb

Enclosure

cc: Daniel A. Hunnicutt, Esquire

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Derrick Hollingsworth, #265683,)

Case No. 2011-CP-26-2843

Applicant,)

v.)

State of South Carolina,)

Respondent.)

**MOTION TO ALTER OR AMEND
JUDGMENT PURSUANT TO RULE
59(e), SCRPC**

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S.C. Supreme Court

Respondent, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, moves the court to amend the judgment on the grounds the Court erred in finding that PCR counsel was ineffective in failing to file an appeal from Applicant’s first PCR hearing and that the doctrine of laches did not bar Applicant’s Austin¹ claim. As a threshold matter, the Order granting relief was filed on November 4, 2013, and received by Respondent on November 18, 2013. In support of the motion, Respondent would show as follows:

To ensure finality of litigation, our courts require reasonable diligence in pursuing collateral relief. See McElrath v. State, 276 S.C. 282, 284, 277 S.E.2d 890, 891 (1981). Although the statute of limitations found in the Uniform Post-Convictions Procedure Act does not apply to Austin claims, the doctrine of laches may bar any such a claim where the applicant has failed to exercise his rights for an unreasonable period. Whitehead v. State, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002); see also RWE NUKEM Corp. v. ENSR Corp., 373 S.C. 190, 199, 644 S.E.2d 730, 734-35 (2007) (“Laches connotes not only an undue lapse of time, but also negligence and opportunity to have acted sooner.” (citing Chambers of South Carolina, Inc. v. County Council for Lee County, 315 S.C. 418, 434 S.E.2d 279 (1993))). Respondent contends

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

the evidence presented at the hearing on this application clearly demonstrates Applicant was advised of the right to appeal his first PCR and failed to request an appeal for an unreasonable period of time.

At the hearing on this matter, Applicant testified he did not discover his PCR had been denied until 2011. However, on cross-examination he admitted he corresponded with his prior PCR attorney in 2006 and 2007. Applicant's prior PCR attorney testified he discussed Applicant's appellate rights with him at the time of the first hearing. He admitted he did not recall serving a copy of the order of dismissal on Applicant. However, he further testified he only received one letter from Applicant in January 2007. In that letter, entered into evidence as Respondent's Exhibit # 1, Applicant requested a copy of his PCR file. In response, the prior PCR attorney sent Applicant a copy of his entire file on February 13, 2007. The cover letter for the mailing, entered into evidence as Respondent's Exhibit # 2, indicated the file included a copy of the "Order of Dismissal dated May 24, 2006." Applicant's prior PCR attorney testified he received no other correspondence from Applicant after that date. On cross-examination by Applicant, the prior PCR attorney testified Applicant never expressed a desire to file an appeal.

Based upon the testimony at the hearing, the State submits Applicant should have known his first PCR was dismissed no later than February 2007 when he received a copy of the Order of Dismissal. His delay of over four (4) years to file his Austin claim has prejudiced both Respondent and Applicant. Had the claim been filed by January 2010, within three (3) years of Applicant's discovery of the Order of Dismissal, a full record of the first PCR hearing would have been available. Applicant's failure to assert this right for over four (4) years should preclude him from now asserting he has not waived his right to an appeal. See Bonnette v. State, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981) ("Acts inconsistent with the continued assertion of

a right, such as a failure to insist upon the right, may constitute waiver. (citing 92 C.J.S. Waiver, p. 1063 (1955)); Provident Life & Acc. Ins. Co. v. Driver, 317 S.C. 471, 479, 451 S.E.2d 924, 929 (Ct. App. 1994) (“As with waiver, laches arises upon the failure to assert a known right under circumstances indicating that the lached party has abandoned or surrendered the right. The lached party must have had actual knowledge or inquiry notice of the facts forming the basis of its claim, and its failure to assert its right is irrelevant until there is a reason or situation that demands assertion.” (citations omitted)).

Furthermore, Austin does not hold that the failure of PCR counsel to seek appellate review is *per se* ineffective assistance of counsel. (Order p. 3). Rather, it requires “an evidentiary hearing on the issue of whether in fact the petitioner requested and was denied an opportunity to seek appellate review.” Austin, 305 S.C. at 454, 409 S.E.2d at 396. Thus, PCR counsel is under no duty to file an appeal unless the applicant has requested one. Here, the testimony is clear Applicant never indicated to his prior PCR attorney his desire for an appeal. The testimony also reflects Applicant was advised of his right to appeal the first PCR on the date of the first hearing. Respondent does not concede that Applicant’s prior PCR counsel did not advise Applicant of his right to appeal. (Order p. 3). Rather, Respondent contends Applicant was aware of his right to an appeal and waived it by not diligently seeking one when he became aware the PCR was dismissed in 2007.

WHEREFORE, Respondent respectfully requests the Court to amend the final judgment to reflect a finding that Applicant’s prior PCR attorney was not ineffective in failing to file an appeal from Applicant’s first PCR hearing and that the doctrine of laches bars Applicant’s Austin claim.

[signature page to follow]

Respectfully submitted,

ALAN WILSON
Attorney General

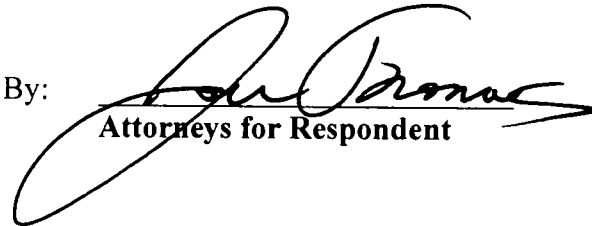
JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

JOSHUA L. THOMAS
Assistant Attorney General
Bar No. 100777

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

By:



Attorneys for Respondent

November 22 2013

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)
)
)
DERRICK HOLLINGSWORTH, #265683)
)
Applicant,)
)
vs)
)
STATE OF SOUTH CAROLINA,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS

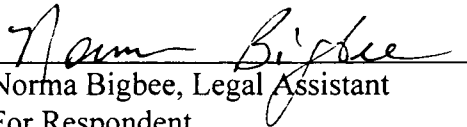
2011-CP-26-2843

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Motion To Alter Or Amend Judgment Pursuant To Rule 59(e), SCRCP** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Daniel A. Hunnicutt, Esquire
P.O. Box 1735
Conway, SC 29528

DATED this 22nd day of November , 2013.


Norma Bigbee, Legal Assistant
For Respondent