

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

J. Cordell Maddox, Jr., Circuit Court Judge

RECEIVED

APR 17 2015

S.C. Supreme Court

DERRICK HOLLINGSWORTH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000308

SUPPLEMENTAL APPENDIX

ROBERT M. PACHAK
Appellate Defender

ALAN WILSON
Attorney General

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

JOSHUA L. THOMAS
Assistant Attorney General

P. O. Box 11549
Columbia, SC 29211

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA)
 COUNTY OF HORRY)
)
 Derrick M. Hollingsworth, # 265683,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 FIFTEENTH JUDICIAL CIRCUIT

2011-CP-26-2843

AMENDMENT TO RETURN

Respondent, making an Amendment to its original Return and Motion to Dismiss, would respectfully show this Court:

In his original Application, Mr. Hollingsworth raised only allegations relating to ineffective assistance of trial counsel and denial of his constitutional rights. In his response to the Conditional Order of Dismissal, Mr. Hollingsworth raised a new allegation that he was entitled to belated review of his first PCR application pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

In light of the Applicant's Austin v. State claim, and considering that he did not receive an appeal from the denial of his previous PCR, the State agrees that the Applicant should receive appointment of counsel and an evidentiary hearing on the sole issue of whether or not he is entitled to seek belated review from his first PCR application pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

However, the State also submits that the doctrine of laches should bar the Applicant's Austin v. State claim. Under Rule 607(i), SCACR, the court reporter was only required to keep the tapes necessary to prepare a transcript of the Applicant's PCR hearing¹ for five years. Therefore, the court reporter was permitted to destroy or re-use the tapes of the Applicant's PCR hearing in March 2010, one year before this Application was filed in March 2011. It is the State's understanding that the court

¹ The Return and Motion to Dismiss and the Conditional Order of Dismissal both state that the Applicant's first PCR hearing was held on January 20, 2005. However, it appears that, although the PCR hearing was originally scheduled for that date, it was re-scheduled and actually held on March 22, 2005.

reporter has indeed destroyed or re-used the tapes of the Applicant's March 2005 PCR hearing in accordance with Rule 607(i). (The State is in the process of obtaining a formal letter from the court reporter verifying that the transcript is no longer available.) Since the transcript is not available, the State submits that the doctrine of laches should bar the Applicant's requested relief. See McElrath v. State, 276 S.C. 282, 277 S.E.2d 890 (1981); Honeycutt v. Ward, 612 F.2d 36 (2nd Cir. 1979); Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002) (absent some persuasive explanation or justification for the delay in seeking post-conviction relief, laches will prevent an applicant from seeking collateral review of his conviction, where the delay affects the availability of evidence to refute the applicant's claims).

WHEREFORE, having made its Amendment to the Return and Motion to Dismiss, Respondent requests that counsel be appointed and an evidentiary hearing held on the Applicant's Austin v. State claim and on the State's affirmative defense of laches.

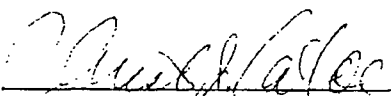
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

CHRISTINA J. CATOE
Assistant Attorney General


ATTORNEYS FOR RESPONDENT
 Office of the Attorney General
 Post Office Box 11549
 Columbia, South Carolina 29211
 (803) 734-3737

July 2, 2012

STATE OF SOUTH CAROLINA)
 COUNTY OF HORRY)
)
 Derrick M. Hollingsworth, # 265683,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FIFTEENTH JUDICIAL CIRCUIT

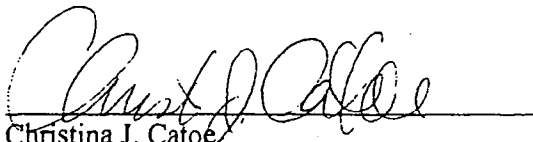
2011-CP-26-2843

CERTIFICATE 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 State's AMENDMENT TO RETURN in the above-captioned matter on the following person(s) by depositing in the United States mail, postage prepaid:

Derrick M. Hollingsworth, # 265683
Lieber Correctional Institution
P.O. Box 205
Ridgeville, SC 29472

DATED this 2ND day of July, 2012.



Christina J. Catoe
 Office of the Attorney General
 Post Office Box 11549
 Columbia, South Carolina 29211
 (803) 734-3737

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,)

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

v.)

State of South Carolina,)

Respondent.)

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,

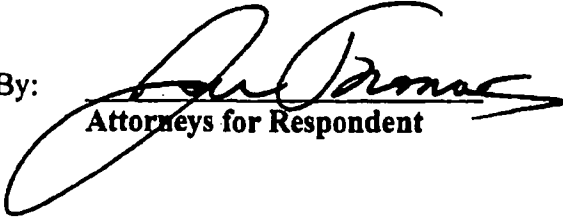
ALAN WILSON
Attorney General

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

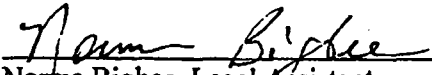
2011-CP-26-2843

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

STATE OF SOUTH CAROLINA
COUNTY OF Horry
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011 CP- 26 - 2843

Derrick M. Hollingsworth

South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Court

Attorney for : Plaintiff Defendant
or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON): Rule 40(j), SCRPC; Bankruptcy
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : State's 59(e) Motion is denied.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

[Signature]
Circuit Court Judge

2131.

Judge Code

Date

1/31/14

FILED
Horry County
2014 FEB -
PM 2:14
MELANIE JACOBSON-WARD
CLERK OF COURT

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1/25/07

January 25, 2007

Derrick Hollingsworth, #265683
Lieber C.I., EB-58
P.O. Box 205
Ridgeville, S.C. 29472

Robert H. Gwin, III
Attorney at Law
2105 Cromley Circle, Suite B
Myrtle Beach, S.C. 29577

Re: Derrick Hollingsworth v. State of South Carolina

Dear Mr. Gwin:

Please consider this letter as a formal request that you send me my complete and unabridged case file in the above referenced case in which you represented me. Please send all motions, briefs, court orders, all transcripts and any other letters as well as any other legal documents concerning the above referenced case.

If you cannot, or will not, fulfill this request, please send me the name and mailing address of whom I can appeal your decision to honor this request. If you can honor only part of this request, please send me the name and mailing address of whom I need to contact to obtain my complete and unabridged case file in the above referenced case.

If you choose to refuse to honor this request, please send me the legal authority which allows you that choice. See Matter of Haddock, 321 S.E.2d 601 (S.C. 1984). Client's file belongs to client and should be returned at client's request. Supreme Court Rules, Rule 32, Code of Professional Responsibility, DR6-101(A)(3); Rules of Disciplinary Procedure, §7, subdivision A(3). I see no reason why I should not receive my case file within ten (10) working days.

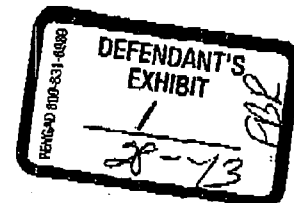
Please file this with your office and return a clocked in copy for my file. With kind regards, I am,

Sincerely,

Derrick Hollingsworth

cc: Henry B. Richardson, Jr.

file



CERTIFICATE OF SERVICE

I, Derrick Hollingsworth, #265683, HEREBY CERTIFY that a true and correct copy of this foregoing instrument (Request for Case File), has been mailed postage prepaid on this ___ day of January, 2007, to Henry B. Richardson, Jr., Disciplinary Counsel, South Carolina Supreme Court Office of the Disciplinary Counsel, P.O. Box 12159, Columbia, S.C. 29211, by depositing the same in the legal mail box at Lieber Correctional Institution.

Derrick Hollingsworth #265683
Derrick Hollingsworth, #265683
Lieber C.I., EB-58
P.O. Box 205
Ridgeville, S.C. 29472

cc: Robert H. Gwin, III
Attorney at Law
2105 Cromley Circle, Suite B
Myrtle Beach, S.C. 29577

SWORN to and subscribed before me
this 24 day of January, 2007.

Robert H. Gwin, III
Notary Public for South Carolina
My Commission Expires: 8/2/16

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February 13, 2007

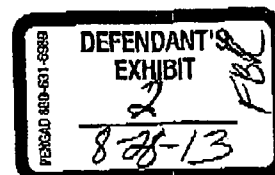
Derrick Hollingsworth, #265683
Lieber C.I., EB-58
P.O. Box 205
Ridgeville, SC 29472

RE: Derrick Hollingsworth v. State of South Carolina
Case No.: 2007-DE-L-0109

Dear Mr. Hollingsworth:

In response to your letter dated January 25, 2007, enclosed herewith please find the following documentation in reference to the above matter:

1. Record on Appeal
2. Supplemental Record on Appeal
3. Correspondence from the Office of Attorney General dated June 13, 2006
4. Order of Dismissal dated May 24, 2006
5. SCRCF Form 4
6. Motion Information Form (March 31, 2005)
7. Form 4 dated January 20, 2005
8. Order for Payment of Expenses form (blank)
9. Information Sheets (blank)
10. S.C. Office of Indigent Defense Affidavit (blank)
11. S.C. Office of Indigent Defendant Time Sheer (blank)
12. S.C. Office of Indigent Defense Voucher (blank)
13. Return
14. Correspondence from Office of the Attorney General dated August 26, 2004
15. Affidavit of Service by Mail (August 26, 2004)
16. Correspondence from Public Defender of Horry County dated June 17, 2004
17. Order Appointing Counsel
18. Order Vacating Appointment of Counsel
19. Order of Appointment
20. Copy of your letter to Jeanne Roberts, Clerk of Court, dated May 13, 2004
21. Copy of your letter dated September 16, 2004
22. Order of Appointment of Legal Counsel (David Miller, Esq. as Counsel)
23. Return Receipt Notice



Derrick Hollingsworth, #265683

February 13, 2007

Page 2

24. Correspondence from Jeanne Roberts, Clerk of Court, to Attorney Doug Leadbitter dated July 19, 2002
25. Correspondence from Jeanne Roberts, Clerk of Court, to you dated July 19, 2002
26. Order Appointing Counsel (David Miller, Esq. as Counsel)
27. Application for Post Conviction Relief
28. General Sessions Sentence Sheet
29. Arrest Warrant #F-475226
30. Indictment for Murder
31. Correspondence to you dated September 8, 2004
32. Correspondence to Judge Breeden dated September 16, 2004
33. Correspondence to you dated September 17, 2004
34. Response from Judge Breeden to September 16, 2004 correspondence
35. Correspondence to Christopher L. Newton, Assistant Attorney General dated March 11, 2005.

This constitutes a complete copy of your file. I trust I have fulfilled your request and hope the enclosures will be of assistance to you in the future.

With kind regards, I am

Sincerely,

GWIN LAW OFFICES, LLC

Robert H. Gwin, III

RHGIII/bjc

Enclosure: Complete copy of client file

cc: Henry B. Richardson, Jr.
Office of the Disciplinary Counsel

14

Brenda Babb
Circuit Court Reporter
South Carolina Court Administration
Post Office Box 4800
Calabash, North Carolina 28467

July 3, 2012

Christina J. Catoe, Esquire
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549

Dear Ms. Catoe:

I am in receipt of your request for a transcript of a PCR hearing in the matter of Derrick M. Hollinsworth v. State of South Carolina, 2002-CP-26-4025 heard March 22, 2005, before Judge Breeden.

I no longer have the tapes or my court notes from the year 2005. Those records were destroyed pursuant to Rule 607(i), SCACR, which provides for the retention of records for a period of five years.

Thank you for your request and I hope this letter has been of assistance.

With regards,



Brenda Babb
Circuit Court Repo
Fifteenth Judicial

.it





SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

April 17, 2015

RECEIVED

APR 17 2015

S.C. Supreme Court

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

Re: Derrick Hollingsworth v. State of South Carolina
Appellate case No. 2014-000308

Dear Mr. Shearouse:

Enclosed are two copies of the supplemental appendix, per your order dated April 15, 2015.

If you have any questions concerning this matter, please contact me.

Sincerely,

Robert M. Pachak
Appellate Defender

RMP/mpm
Cc: Joshua L. Thomas, Esquire
Derrick Hollingsworth, # 265683

Enclosures