

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM THE COUNTY OF Horry

Court of Common Pleas

The Honorable Circuit Court Judge, William H. Seals, Jr.

Case No. 2015-CP-26-07861

Kristy Merritt R.24, SCDC # 352864 Petitioner,

v.

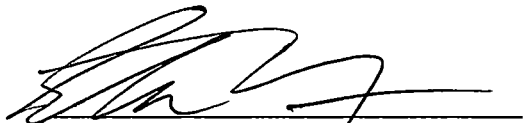
State of South Carolina, Respondent.

NOTICE OF APPEAL

The Petitioner appeal the Honorable William H. Seals Jr.'s Order filed on February 28, 2018, 2018, denying post conviction relief to the Petitioner.

The Order was received by the undersigned counsel on March 21, 2018. A copy of the said Order on appeal is attached to this Notice.

This is the 24th day of March, 2018.



Steven W. Fowler  
Fowler Law Firm  
730 Main Street, Unit 237  
North Myrtle Beach, SC 29582  
Telephone: 843-663-0006  
Fax: 843-280-0003  
myfowlerlaw@gmail.com  
SC Bar #69683

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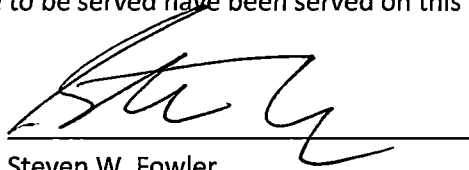
**PROOF OF SERVICE**

I, Steven W. Fowler, court- appointed attorney for Petitioner, certify that I have today served within Notice of Appeal and Copy of the Order signed by the presiding Judge upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to the following:

- 1) Assistant Attorney General, PO Box 11549, Columbia, SC 29211 and
- 2) Clerk of the South Carolina Supreme Court , 1231 Gervais St, Columbia, SC 29201

I further certify that all parties required by Rule to be served have been served on this below named date.

This is the 24th day of March, 2018.



Steven W. Fowler  
 Fowler Law Firm  
 730 Main Street, Unit 237  
 North Myrtle Beach, SC 29582  
 Telephone: 843-663-0006  
 Fax: 843-280-0003  
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STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF HORRY ) FOR THE FIFTEENTH JUDICIAL CIRCUIT  
) )  
Kristy Merritt Rich, ) Case No.: 2015-CP-26-07861  
S.C.D.C. No. 352864, ) )  
) )  
Applicant, ) )  
) ) **ORDER OF DISMISSAL**  
v. ) )  
) )  
State of South Carolina, ) )  
) )  
Respondent. ) )  
\_\_\_\_\_ ) )

HORRY COUNTY, SC  
2018 FEB 28 PM 12:45  
RECEIVED BY CLERK OF COURT  
HORRY COUNTY, SC

This matter comes before the Court by way of an application for post-conviction relief filed by Kristy Merritt Rich (“Applicant”) on November 3, 2015. Respondent made its return on or about May 16, 2017. The Court convened an evidentiary hearing into the matter on Wednesday, November 29, 2017, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and represented by Steven W. Fowler, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General’s Office, represented Respondent.

Applicant testified on her own behalf at the evidentiary hearing. Applicant’s prior PCR counsel, Kenneth B. Massey, Esq. (“Counsel”) also testified. The Court had before it Applicant’s records from the South Carolina Department of Corrections, a copy of the original plea and sentencing transcripts, the records of the Horry County Clerk of Court regarding the subject convictions, the Order of Dismissal of Applicant’s prior PCR action, and the pleadings.

The Court finds as follows:

**I. PROCEDURAL HISTORY**

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the May 2012

term of the Horry County Grand Jury for kidnapping (2012-GS-26-02215), and burglary, first degree (2012-GS-26-02217). Laura L. Hiller, Esq. represented Applicant, and J. Stephen Grooms, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On September 13, 2012,<sup>1</sup> Applicant pled guilty as indicted before the Honorable W. Jeffrey Young. On October 12, 2012, Judge Young sentenced Applicant to imprisonment for concurrent terms of 25 years on each charge. Applicant did not appeal her plea or sentence.

**First PCR Application: 2013-CP-26-06669**

Applicant filed her first application for post-conviction relief on October 4, 2013 (2013-CP-26-06669). She alleged the following grounds for relief in his application:

1. "I am not guilty of the crime charged and convicted of."
2. "I had ineffective assistance of counsel. I met with my attorney four times prior to my plea for a total of an hour of time."
3. "My attorney was not and is not a criminal attorney."
4. "All of the co-defendants are doing dramatically less time than I am."
5. "I had no prior criminal record. My attorney knew all of the above but yet failed to zealously represent me."
6. "There was no trial preparation done by the attorney, no going over all the criminal discovery with my attorney, so I had no preparation, no legal help except to get me to plea."
7. "She never told me if she had any meetings with the solicitor other than she had received the plea offer."
8. "I only met with her for my plea the day of my plea."

Respondent made its return on June 2, 2014, and an evidentiary hearing into the matter was convened on February 3, 2015, before the Honorable G. Thomas Cooper, Jr. Applicant was present at the hearing and represented by Kenneth Blaine Massey, Esq. Joshua L. Thomas, of the South Carolina Attorney General's Office, represented Respondent. At the evidentiary hearing, Applicant proceeded forward on the following grounds:

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<sup>1</sup> The Court notes what appears to be a scrivener's error on the face of the plea transcript, which indicates Applicant pled guilty on September 13, 2013. The sentencing sheets and sentencing transcript both indicate Applicant was sentenced October 12, 2012.

1. Ineffective assistance of counsel for failing to investigate.
2. Ineffective assistance of counsel for failing to adequately prepare for trial.
3. Ineffective assistance of counsel for failing to secure a plea offer in line with Applicant's co-defendants.
4. Ineffective assistance of counsel for failing to file a notice of appeal.

Applicant testified on her own behalf, and Laura L. Hiller, Esq., also testified. By written order dated March 17, 2015, and filed March 25, 2015, Judge Cooper denied and dismissed the application. Applicant did not appeal the final order of the Court.

### **Present Application**

In her second post-conviction relief application, Applicant alleges she is being held unlawfully for the following reasons:

1. "Ineffective assistance of counsel,"
  - a. "My 1<sup>st</sup> attorney Laura Hiller failed to file an appeal. She never explained that an appeal or a sentence reduction could be filed immediately. She only advised my family that I would have to file a PCR once I was at prison had I known about an appeal or a sentence reduction I would have filed for it. Had her performance been adequate the outcome of my situation would have been different."
  - b. "She failed to present character witnesses, expert testimony, failed to make mention of less capable involvement in the charged offense."
  - c. "She failed to prepare a plausible and viable defense. She failed to prepare and properly inform me of the strategic defense of accepting an open ended plea. This violates my constitutional rights of the 8<sup>th</sup> and 14<sup>th</sup> amendment."
2. Ineffective assistance of PCR counsel, in that:
  - a. "I also had a PCR hearing and when I was denied I was led to believe my attorney filed an appeal but at a later time was informed he did nothing but after months informed my family there was nothing he could do that I need to write the parole board and plead my case."

At the evidentiary hearing, Respondent renewed its motion to dismiss the claims of ineffective assistance of counsel and proceed only on the claim pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

### A. Respondent's Partial Motion to Dismiss

Respondent argues Applicant's allegations of ineffective assistance of plea counsel should be summarily dismissed as untimely and successive. The Act provides that:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A). Applicant pled guilty on September 13, 2012, and was sentenced October 12, 2012. Applicant did not appeal. Therefore, the statute of limitations ran on Monday, October 14, 2013. The present application was not filed until November 3, 2015. Excepting Applicant's White and Austin claims, the application is time-barred.

Furthermore, Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a

subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised ... in the previous application." Id. at 450, 409 S.E.2d at 394. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. Id. Applicant bears the burden of showing the allegations could not have been previously raised. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

Excepting only the Austin claim, Applicant's current allegations were or could have been raised in the proceedings based on Applicant's prior applications for post-conviction relief; thus, the current application is successive and barred under S.C. Code Ann. § 17-27-90. The arguments provided by Applicant at the evidentiary hearing were not compelling. Applicant has failed to establish any sufficient reason why she could not have raised her allegations of ineffective assistance of plea counsel in her previous application for post-conviction relief. Applicant's allegations are either identical to, or very closely overlap those allegations raised in her first application for post-conviction relief.

For these reasons, the Court affirms its ruling at the evidentiary hearing, Respondent's motion to dismiss Applicant's claims of ineffective assistance of plea counsel is **GRANTED**, and Applicant's allegations of ineffective assistance of plea counsel are **DISMISSED**.

### **B. Austin Claim**

Applicant alleges that she was denied the right to appeal the dismissal of her previous post-conviction relief application. Where an Applicant is denied an opportunity to properly appeal an adverse final ruling of a court in a post-conviction relief action, he or she may seek limited relief in a subsequent action to correct the unfairness. Austin v. State, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991). "A PCR applicant is entitled to an Austin appeal if the PCR judge affirmatively finds either: (1) the applicant requested and was denied an opportunity to seek appellate review; or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived." Odom v. State, 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999) (citing King v. State, 308 S.C. 348, 348-49, 417 S.E.2d 868 (1992)). If the PCR court finds an applicant was denied his or her right to appeal, the applicant can petition for certiorari and the South Carolina Supreme Court will review whether he or she was prejudiced by the failure to obtain appellate review. Id. "The one-year statute of limitations for PCR applications is not applicable to appeals filed pursuant to Austin v. State." Id., 337 S.C. at 263, 523 S.E.2d at 756.

At the evidentiary hearing, Applicant testified Counsel told her he was working on something after her first application for relief was denied. Applicant testified she asked if she needed to file an appeal. On cross-examination, Applicant expanded on her answer, and explained she wrote a letter to Counsel about a month later. Applicant testified her sister was involved in assisting her in the matter and had stayed in contact with Counsel.

Counsel testified he talked to Applicant about her right to an appeal, but that she never asked for any appeal. Counsel indicated Applicant called him roughly a month-and-a-half after he sent the order denying relief. Counsel denied Applicant's sister ever prompted him to file an appeal from the prior PCR.

The Court finds Applicant is entitled to no relief pursuant to Austin v. State. The Court finds Applicant was fully apprised of her right to appeal from an adverse result in a PCR action by both Counsel and by the Order of Dismissal itself. The Court finds Applicant simply failed to request Counsel seek an appeal in a timely manner, thereby waiving her right. Accordingly, Applicant's request for Austin relief is **DENIED**.

### III. CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.


This Court notifies the Applicant that she must file and serve a notice of appeal **within thirty (30) days** from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

*[Order & Signature on following page]*

**IT IS THEREFORE ORDERED:**

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 15<sup>th</sup> day of Feb, 2018.

  
WILLIAM H. SEALS, JR.  
Presiding Judge  
Fifteenth Judicial Circuit

Mari, South Carolina





ALAN WILSON  
ATTORNEY GENERAL

February 26, 2018

The Honorable Renee N. Elvis  
Clerk of Court, Horry County  
Post Office Box 677  
Conway, SC 29528-0677

HORRY COUNTY  
2018 FEB 28 PM 12:45  
RENEE N. ELVIS  
CLERK OF COURT  
HORRY COUNTY, SC

Re: Kristy M. Rich, #352864 v. State of South Carolina  
2015-CP-26-7861

Dear Ms. Elvis:

Enclosed please find the original **Order of Dismissal** signed by the Honorable William H. Seals, Jr., in the above-captioned case, for filing in your office.

Pursuant to Rule 71.1(f), of the South Carolina Rules of Civil Procedure, please "provide notice of entry of judgment and serve a copy of the order or judgment to the parties as provided in Rule 77(d), SCRPC."

In addition, please forward proof of service and a time stamped copy back to our office for our file.

Should you have any questions, please do not hesitate to call me at (803) 734-3737.

Sincerely,

Johnny Ellis James Jr.  
Assistant Attorney General

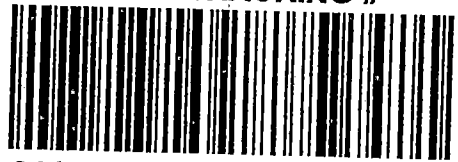
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Enclosure

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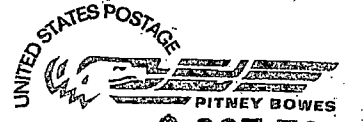
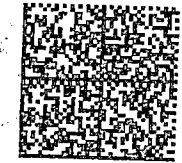


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Fowler Law Firm  
730 Main Street  
Unit 237  
NMB, SC 29582



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SC Supreme Court  
1231 Gervais Street  
Columbia, SC  
29201



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