

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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S.C. SUPREME COURT

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Certiorari to Horry County

Honorable William H. Seals, Circuit Court Judge

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KRISTY MERRITT RICH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

APPELLATE CASE NO 2018-000524

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PETITION FOR WRIT OF CERTIORARI

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TAYLOR D GILLIAM  
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### **ISSUE PRESENTED**

Whether the circuit court erred in denying Petitioner's request for appellate review of her post-conviction relief application pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) where the evidence demonstrated that Petitioner's appeal had merit, that Petitioner requested an appeal within the applicable window for filing a notice of appeal, and where Petitioner never knowingly and intelligently waived her right to appellate review of the underlying Order of Dismissal?

## STATEMENT

Petitioner was indicted on the charges of kidnapping and burglary in the first degree by an Horry County grand jury on May 24, 2012. App. 141 – 144. On September 13, 2013, she pled guilty before the Honorable W. Jeffrey Young. App. 1. J. Stephen Grooms served as the assistant solicitor, and Laura Hiller represented Petitioner. Petitioner pled to both charges as indicted without recommendation or negotiations from the State. App. 4 ll. 7 – 14. Sentencing was held in abeyance until the alleged complainant could be available. Id.

The facts presented by the State at the plea were as follows: On July 22, 2011, Petitioner and three men broke into the home of Travis Williams. App. 7 ll. 3 – 23. Williams was tied up and a pillowcase was placed over his head. Id. A grand larceny charge and possession of a weapon during the commission of a violent crime charge were dismissed pursuant to the plea. Id.

Judge Young accepted Petitioner's guilty plea as knowingly, voluntarily, and intelligently made. App. 12 ll. 8 – 20. On October 12, 2012, he sentenced her to twenty-five years' incarceration concurrent. App. 25 l. 11 – App. 26 l. 4.

Petitioner filed an application for post-conviction relief on October 4, 2013. App. 28 – 35. It contained allegations of ineffective assistance of plea counsel, including claims that plea counsel failed to prepare for trial and file a direct appeal on her behalf. App. 30 – 32. The State made its Return on July 3, 2014. App. 36 – 41.

An evidentiary hearing took place before the Honorable G. Thomas Cooper, Jr. on February 3, 2015. App. 42. Joshua Thomas appeared on behalf of the State, and Kenneth Massey represented Petitioner.<sup>1</sup>

Petitioner and plea counsel testified at the hearing. At the conclusion of the hearing, Judge Cooper took the matter under advisement and requested proposed orders from the parties within thirty days. App. 84 ll. 23 – 24. On March 25, 2015, a signed Order of Dismissal was filed with the Horry County Clerk of Court. App. 86.

A second application for post-conviction relief was filed by Petitioner on or about November 3, 2015. App. 99. It contained a sworn, signed, and notarized statement from Petitioner that her attorney “stated they would file an appeal.” App. 100. She noted that she 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.” App. 105. The relief she was seeking in the application was “to be able to have a trial, for a chance to appeal my case.” App. 103 – 105. The State filed a Return and Partial Motion to Dismiss on May 19, 2017. App. 107.

An evidentiary hearing was held on November 29, 2017 before the Honorable William H. Seals, Jr. App. 114. Steven Fowler represented Petitioner, and Johnny James, Jr. appeared on behalf of the State. The court heard testimony from Petitioner and PCR counsel. Judge Seals took the matter under advisement and issued an Order of Dismissal on or about February 15, 2018. App. 131 – 138.

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<sup>1</sup> In 2004, this Court suspended Massey from the practice of law for two years. *In re Massey*, 357 S.C. 439, 594 S.E.2d 159 (2004). He was reinstated in 2012. *In re Massey*, 398 S.C. 592, 730 S.E.2d 855 (2012). In 2014, this Court publicly reprimanded Massey for violating Rule 407, SCACR: Rule 3.3 (lawyer shall not knowingly make false statement of fact to tribunal or fail to correct false statement of material fact previously made to tribunal by lawyer). *In re Massey*, 408 S.C. 483, 759 S.E.2d 433 (2014)

This petition for writ of certiorari pursuant to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) follows.

## ARGUMENT

The circuit court erred in denying Petitioner's request for appellate review of her post-conviction relief application pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) where the evidence demonstrated that Petitioner's appeal had merit, that Petitioner requested an appeal within the applicable window for filing a notice of appeal, and where Petitioner never knowingly and intelligently waived her right to appellate review of the underlying Order of Dismissal.

### *Relevant facts*

Petitioner plainly stated that after her PCR was denied, she was led to believe that PCR counsel had filed an appeal on her behalf. App. 121 ll. 16 – 25. He communicated with Petitioner's sister that he was "working on something, that he would take care of everything." Id. After Petitioner never heard anything "for a few months," her sister "called him and called him and called him." Id. Petitioner wrote PCR counsel but was unable to call him. App. 122 ll. 3 – 18. In her correspondence, she inquired if "he was working on anything," notified him "that [she] needed an appeal filed," and reiterated her understanding "that [her] sister said he was appealing everything, that he was working on something, and [she] need[ed] to know what it was." Id. Petitioner was unaware of the time limits for filing a PCR appeal; PCR counsel never discussed that with her. App. 125 ll. 2 – 6.

"After several months" PCR counsel told Petitioner's sister that he did not file an appeal. App. 122 ll. 19 – 23. He never advised Petitioner that he did not file a notice of appeal. App. 122 l. 24 – App. 123 l. 22. Notably, the following exchange took place at the second evidentiary hearing between Petitioner and new PCR counsel:

Q: ... Did you indicate to him in a timely fashion that you wanted a PCR appeal?

A: Yes, sir.

Q: Okay. Why do you feel like you needed to appeal that PCR?

A: Because there was several things with my case. I was pushed into a plea, I was scared, and my attorney told me that was what I needed to take, because if I didn't and went to trial, it would be bad. There were several issues with it. All of my codefendants were housed together. They all went against me because they got less sentences.

Q: So you felt like there were substantial issues that you could stand on for the appeal; correct?

A: Yes, sir.

Q: Okay. So okay, very good. And you notified him in a timely manner now that you look back at it?

A: Yes, sir.

App. 123 ll. 5 – 22. On cross-examination, Petitioner testified that she wrote PCR counsel a letter “maybe a month or so after we had been to court.” App. 124 ll. 2 – 8. The first evidentiary hearing was February 3, 2015. Judge Cooper requested proposed orders within thirty days. A “month or so” after the evidentiary hearing would have been early March. The Order of Dismissal was filed March 25, 2015.

Interestingly, the only correspondence Petitioner received in return was “a copy of where my PCR had been denied.” App. 124 ll. 9 – 14.

Contrary to Petitioner's unwavering testimony, PCR counsel indicated that Petitioner did “[n]ot at all” request that he file a notice of appeal on her behalf. App. 126 ll. 16 – 25. Seemingly unsure and perhaps therefore unreliable, PCR counsel first testified that Petitioner called him between one-and-a-half months and two months after the Order of Dismissal was sent to him. Id. Within seconds of making that assertion, he equivocated and wondered whether she instead wrote

him. App. 127 ll. 1 – 18. When asked if he informed Petitioner of her right to appeal the denial of post-conviction relief, PCR counsel admitted that he had no records to substantiate his contention that he advised her accordingly. App. 127 l. 22 – App. 128 l. 3.

### *Discussion*

“An indigent defendant has the right to be informed of an appeal and the manner and method for taking the appeal.” Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989); Austin v. State, 305 S.C. 453, 409 S.E.2d 395, 396 (1991). In Austin, this Court framed the question as whether the PCR applicant “requested and was denied an opportunity to seek appellate review.” Austin at 454, 409 S.E.2d at 396.

In South Carolina, “[a]ll applicants are entitled to a full and fair opportunity to present claims in one PCR application.” Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). Pursuant to the rules and statutes governing PCR proceedings, an applicant is entitled to a full adjudication on the merits of the original petition. Id. This includes the right to seek appellate review of the denial of PCR and the right to assistance of counsel in that appeal. Id., 337 S.C. at 261, 523 S.E.2d at 755-56. This Court held an individual can appeal a denial of a PCR application after the statute of limitations has expired if the individual either (1) requested and was denied an opportunity to seek appellate review or (2) did not knowingly and intelligently waive the right to appeal. Austin, 305 S.C. at 455, 409 S.E.2d at 396. In 2005, this Court held “that counsel is required to advise an applicant of the right to appellate review of the denial of PCR.” Bray v. State, 366 S.C. 137, 620 S.E.2d 743 (2005).

Thus, the question for the lower court was did Petitioner request an appeal and was denied an opportunity to seek appellate review or did Petitioner knowingly and intelligently waive the right to appellate review. The lower court determined Petitioner “simply failed to request Counsel seek

an appeal in a timely manner, thereby waiving her right.” App. 137. However, this determination was erroneous in light of the evidence presented and contrary to existing waiver law.

The Order of Dismissal contained a finding that “Applicant ... explained she wrote a letter to Counsel about a month later” seemingly obfuscating timelines. App. 136. As explained above, Petitioner testified that she wrote PCR counsel about a month after the evidentiary hearing, *not* after relief was denied. App. 124 ll. 2 – 8 (“I wrote a letter maybe a month or so after we had been to court.”). Two paragraphs after denoting that Petitioner “testified she asked if she needed to file an appeal,” the Order of Dismissal also found that Petitioner failed to request that PCR counsel seek an appeal. App. 136 – 137. Without evidence, the Order of Dismissal also concluded that Petitioner 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.” *Id.* Notably in that vein, the first Order of Dismissal signed by Judge Cooper contains the following conclusion:

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from his [sic] attorney’s receipt 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, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel’s assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that **if Applicant wishes to seek appellate review, her attorney must serve and file a notice of appeal on Applicant’s behalf.** Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

App. 97 (emphasis added).

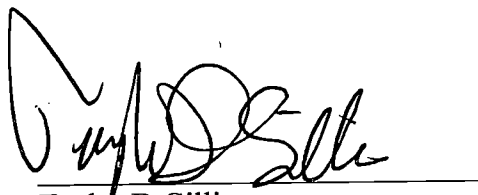
The second Order of Dismissal seemingly relied on the first which *ordered that Petitioner’s attorney serve and file a notice of appeal on her behalf.* As a result, the ruling that Petitioner is not entitled to belated appellate review cannot withstand review. PCR counsel did not obtain a written waiver. His testimony belies the reasonable conclusion that Petitioner wanted to appeal the denial of her original application for post-conviction relief. Neither Petitioner nor plea counsel were

prepared for trial. App. 57 ll. 20 – 25; App. 78 ll. 2 – 15. Plea counsel failed to correct a misunderstanding regarding plea negotiations on the record. App. 60 l. 22 – App. 61 l. 19. Plea counsel told Petitioner and her family to find a PCR attorney and believed Petitioner should have been given relief. App. 56 l. 22 – App. 57 l. 19; App. 79 l. 19 – App. 80 l. 5.

The Order of Dismissal contains multiple errors which served as the foundation for the erroneous conclusion that Petitioner both failed to request that PCR counsel file a notice of appeal and waived her appeal. The PCR court incorrectly ruled that Petitioner was not entitled to appeal the denial of her post-conviction relief application because she did not voluntarily waive her right to appeal. Petitioner did not sleep on her rights and filed a subsequent PCR application seeking a belated appeal after the time elapsed for the Notice of Appeal to be filed. Therefore, this Court should grant certiorari and grant Petitioner a belated appeal from the 2013 PCR application.

**CONCLUSION**

The lower court erred in denying Petitioner's request for appellate review pursuant to of her post-conviction relief application Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) where the testimony demonstrated that Petitioner requested an appeal before the window for filing a notice of appeal closed.

A handwritten signature in black ink, appearing to read "Taylor D Gilliam", written over a horizontal line.

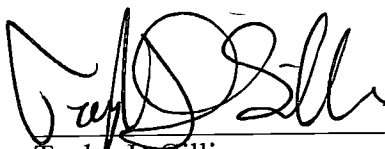
Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of November, 2018.

STATEMENT OF ISSUES FOR AUSTIN REVIEW

- I. Did the post-conviction relief judge err in denying relief where plea counsel provided ineffective assistance by failing to prepare for trial, where plea counsel typically handled work at the magistrate level, and where plea counsel admitted she was not prepared for trial?
- II. Did the post-conviction relief judge err in denying relief where plea counsel admitted that she failed to correct a misstatement from the State dealing with plea negotiations on the record, where the resulting plea left Petitioner with a significantly lengthier sentence than her codefendants?
- III. Did the post-conviction relief judge err in denying relief on the basis that plea counsel failed to file a notice of appeal, where plea counsel admitted she had a note in her file that Petitioner desired an appeal from the guilty plea?



Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of November, 2018.

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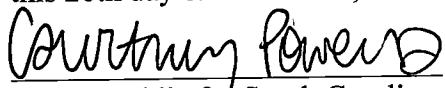
CERTIFICATE OF SERVICE

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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Kristy Merritt Rich, #352864, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 26th day of November, 2018.

  
\_\_\_\_\_  
Taylor D. Gilliam  
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER  
this 26th day of November, 2018.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: 5/2/2027