

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

**RECEIVED**

**DEC 29 2021**

**S.C. SUPREME COURT**

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Case No. 2016-CP-40-04364

Aryee Henderson #237887.....Applicant/Appellant

v.

State of South Carolina.....Respondent/Respondent

**NOTICE OF APPEAL**

This is a post-conviction relief case. Appellant appeals from the Order of Dismissal entered in this case on March 22, 2018. The Order appealed from is attached. This appeal is timely because the lower court entered an Order on November 16, 2021,, granting Appellant the right to seek belated appellate review of the March 22, 2021, Order under Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Appellant’s trial counsel received written notice of the November 16, 2021, Order by mail on November 23, 2021. A copy of the November 16, 2021, Order is also attached

Columbia, SC  
December 22, 2021



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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Ayree Henderson (SCDC #237887),

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2016-CP-40-04364

ORDER OF DISMISSAL

This matter comes before the Court upon Application for Post-Conviction Relief filed by Applicant Ayree Henderson ("Applicant") on July 21, 2016. Respondent filed its Return on July 13, 2017. "Applicant's Amendment to Original PCR Application" was filed on August 22, 2017; and an "Amendment to Application for Post Conviction Relief," dated January 18, 2018, was also provided to the Court (although apparently not filed with the Clerk of Court). On January 24, 2018, an evidentiary hearing was conducted at the Richland County Judicial Center. Applicant was present along with his counsel, Jonathan D. Waller, Esquire. The State was represented by Jessica Kinard, Esquire, of the South Carolina Office of the Attorney General.

For the reasons set forth below, the Application for Post-Conviction Relief is DENIED, and this matter is DISMISSED WITH PREJUDICE.

#### FACTUAL AND PROCEDURAL HISTORY

At the November 2002 term of the Richland County Grand Jury, Applicant was indicted for murder. Beginning on September 21, 2004, Applicant was tried by a jury and was ultimately convicted of murder. He was sentenced to thirty years' imprisonment. Applicant filed for post-conviction relief ("PCR"), which was granted by Order filed July 14, 2010. That decision was affirmed by the appellate court.

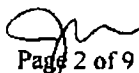


In January 2016, Applicant appeared in the Richland County Court of General Sessions *pro se* after having filed a "speedy trial motion." At that time, Applicant expressed his desire to enter a guilty plea, but he also accepted the Court's offer to appoint counsel to represent him. The Richland County Public Defender's Office was appointed, and J. Rhodes Bailey, Esquire ("plea counsel"), was assigned to Applicant's case.

The State ultimately extended a plea offer to Applicant, allowing him to plead guilty to the lesser charge of voluntary manslaughter without the State offering any negotiation or recommendation of what Applicant's sentence should be. Applicant accepted that offer and entered his guilty plea on June 20, 2016. He received a sentence of twenty-five years in the South Carolina Department of Corrections ("SCDC"). Approximately one month later, Applicant filed the instant action in which he alleges (1) that plea counsel coerced him to plead guilty, (2) that plea counsel failed to investigate the allegations of his case, (3) that plea counsel failed to object to the State's breach of the plea agreement, (4) that plea counsel failed to challenge the affidavit upon which his arrest warrant was premised, and (5) that plea counsel failed to contest the improper impaneling of the Richland County Grand Jury.

**A. Testimony of Applicant**

During the evidentiary hearing, Applicant testified that when he appeared in court in early January 2016 and was appointed counsel, he first spoke with Lucas Hawks, Esquire, of the Richland County Public Defender's Office. The conversation occurred in the courtroom, where Applicant told Hawks that he wanted to plead guilty and asked that Hawks seek a plea offer. Applicant also testified that the prosecutor instructed that he be returned to court on January 19, but that didn't occur.



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Instead, according to Applicant, plea counsel appeared at the county jail on January 20 for his first of three visits with him. During that meeting, they discussed the transcript and exhibits from Applicant's previous trial. Applicant also asked plea counsel to retrieve certain documents from the jail's property room and to photocopy them. According to Applicant, plea counsel did as instructed and ultimately discussed the documents with Applicant; however, counsel never gave Applicant a copy of the documents. Applicant also testified that during this meeting, plea counsel informed him that he had rejected the State's initial plea offer on his behalf without having conveyed the offer to Applicant.

Applicant also testified that he pled guilty based on plea counsel's advice that a plea would be better than a trial. Plea counsel told Applicant that even if prosecution witnesses wouldn't appear for a new trial, that their previous trial testimony would be used. Applicant stated that he had also filed a *pro se* motion challenging probable cause to have arrested him, but plea counsel told him that the motion was meritless and that a hearing on the motion would be futile. Applicant also testified that he believed that if he went to trial, plea counsel would restrict Applicant's testimony and not allow him to say what he wanted to say. (Applicant later contradicted this, testifying that plea counsel told him that he wouldn't be able to testify at all during trial.) According to Applicant, he repeatedly asked plea counsel to seek a plea offer for him. He ultimately pled guilty as a choice of "the lesser of two evils."

Applicant contends that immediately prior to the plea, plea counsel told him that the prosecutor would discuss his criminal record, but that it wouldn't hurt his case. However, Applicant was unaware that the prosecutor would apprise the court of his disciplinary history while at the South Carolina Department of Corrections. Applicant was also surprised when the family of the victim of the crime was able to address the court during his guilty plea. Applicant had

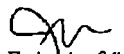
understood that his "straight up" plea to voluntary manslaughter meant that no one connected with the prosecution would make any comment on the sentence that he should receive. Therefore, when both the victim's family and the prosecutor did so, Applicant was surprised and believes that plea counsel should have objected. He contends that if he had known that those statements would be made, that would've impacted his decision to plead guilty.

## II. Testimony of Plea Counsel

Plea counsel, J. Rhodes Bailey, also testified at the evidentiary hearing and corroborated many of Applicant's allegations. Specifically, plea counsel admits that he visited Applicant at the county jail on January 20, 2016 and discussed the previous trial of Applicant's case. Plea counsel also agrees that he retrieved certain documents from the jail's property room, photocopied them and reviewed them without providing a copy to Applicant. According to plea counsel, the documents were ultimately the basis of a grievance which Applicant filed against him, but the grievance was deemed unfounded and dismissed.

Plea counsel stated that Applicant asked him about a guilty plea repeatedly and that, therefore, there was never any plan to try his case. He had begun preliminary trial preparation, but he never hired an investigator or took any other steps to prepare because Applicant was adamant that he wanted to plead guilty. No trial was ever even scheduled for Applicant's case. Plea counsel also denied that he ever rejected any plea offer from the State without first discussing it with Applicant.

Finally, plea counsel testified that, like Applicant, he didn't believe that the discussion of Applicant's disciplinary history during the guilty plea was relevant; however, based on his experience, he didn't think that it was objectionable or that objecting to the information would make any difference. Plea counsel denies that he told Applicant that neither the prosecutor nor the

  
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victim's family would comment on sentencing during the plea. Rather, plea counsel knows that victims' families routinely make statements during guilty pleas. He testified that the subject simply never arose in his conversations with Applicant.

### CONCLUSIONS OF LAW

In a PCR action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence." Rule 71.1(e), SCRPC. Specifically, "[a] defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty." *Johnson v. Catoe*, 336 S.C. 354, 358, 520 S.E.2d 617, 619 (1999) (citing *Wolfe v. State*, 326 S.C. 158, 485 S.E.2d 367 (1997) and *Satterwhite v. State*, 325 S.C. 254, 481 S.E.2d 709 (1997)).

#### **I. Involuntary Plea**

Applicant alleges that his guilty plea was involuntary because it was coerced by plea counsel, who failed to properly investigate his case, failed to challenge the arrest warrant affidavit, and failed to contest the impaneling of the Richland County Grand Jury. These allegations are without merit.

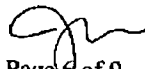
"Entering a guilty plea results in a waiver of several constitutional rights, therefore the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently by defendants." *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citing *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)). "A defendant who pleads guilty upon the advice of counsel may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the range of competence demanded of attorneys in criminal cases." *Richardson v. State*, 310 S.C. 360, 363, 426 S.E.2d 795,

797 (1993) (citing *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S.Ct. 366, 369, 88 L.Ed.2d 203, 209 (1985)).

“[A] guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not ‘a reasonably competent attorney’ and the advice was not ‘within the range of competence demanded of attorneys in criminal cases.’” *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 770 (1970)). “When a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 687-88.

“Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Id.* at 689 (citation omitted). Applicant has not done that here.

Having weighed the credibility of the testifying witnesses and having considered the admissions and explanations offered, the Court cannot find that plea counsel was not “a reasonably competent attorney” or that his advice was not “within the range of competence demanded of attorneys in criminal cases.” The Court finds no professional errors on the part of plea counsel; therefore, no prejudice could have resulted from plea counsel’s representation. Further, while Applicant contends that he would have gone to trial but for counsel’s advice, this is not supported by the evidence. Rather, the credible testimony in this case is that Applicant always wanted to plead guilty and repeatedly requested a plea offer. Applicant is in the unique position of having previously elected a trial on the same criminal charges. Thus, he was well aware of his alternatives,



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including the logistics of how a jury trial would occur. He testified that he simply chose "the lesser of two evils." Therefore, the PCR application is denied as to these allegations.

## II. Plea Bargain

Similarly, Applicant's contention that counsel was ineffective for failing to act when the "Solicitor's office breached the plea agreement" is meritless.

Although Applicant was charged with murder, the State ultimately extended a plea offer by which Applicant could enter a "straight up" plea to the lesser-included offense of voluntary manslaughter. He did so on June 20, 2016. During the plea the victim's mother, in response to the court's inquiry, requested that Applicant be given a thirty-year sentence. The prosecutor echoed the request of the victim's mother but also apprised the court of Applicant's disciplinary history while he was in SCDC and in the Richland County Detention Center. Applicant complains that those actions amounted to the State breaching the plea agreement, as he interpreted "straight up" to mean that no one would comment on sentencing.

Specifically, Applicant complains that plea counsel should have objected when the prosecutor introduced evidence of his disciplinary history while at SCDC and when the court permitted both the prosecutor and the victim's family to comment on Applicant's potential sentence. Neither amounts to a breach of the "plea agreement" in Applicant's case.

Applicant is correct that, typically, a defendant must be permitted to withdraw their guilty plea when it was induced by a broken promise made by the prosecutor that they wouldn't comment on sentencing, *see, e.g., Santobello v. New York*, 404 U.S. 257 (1971); however, this is not a typical case. Here, Applicant has not proven that the assistant solicitor promised not to comment on sentencing. Even assuming that the promise was made, there has been no real breach of that agreement or negative effect to Applicant. Instead, the victim's mother made a sentencing

  
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recommendation. While that recommendation was repeated by the prosecutor, she also subsequently said, "Whatever sentence you feel like would be appropriate, Your Honor," which is not a sentencing recommendation at all. Further, all of this discussion occurred *before* the court accepted Applicant's guilty plea. It is clear that, subsequent to those comments, Applicant had a number of opportunities to withdraw his guilty plea. In fact, the court asked several times whether Applicant wished to plead guilty; and each time, Applicant said that he did. Therefore, the PCR application is denied as to these allegations as well.

### III. Investigation and Evidence Considered

Finally, Applicant contends that plea counsel failed to investigate the allegations against him or "conduct any pretrial investigation," to challenge the arrest warrant affidavit and to challenge the impanelment of the grand jury. These allegations are also without merit, and Applicant has failed to provide any evidence that would entitle him to relief.

A PCR applicant is not entitled to relief where there is no evidence presented at his PCR hearing to demonstrate how the outcome of his case might've been different if counsel were more prepared. *Skeen v. State of South Carolina*, 325 S.C. 210, 213-15, 481, S.E.2d 129, 131-32 (1997). This is particularly true here, where Applicant pled guilty and always wanted to plead guilty.

Similarly, Applicant has failed to offer evidence of his claims of defects in the arrest warrant and the grand jury. Further, any such claims are obviated by Applicant's guilty plea. Challenges regarding the arrest and indictment are, in essence, claims that Applicant's constitutional rights were violated. However, any related constitutional rights were waived when Applicant pled guilty to the charge. Without evidence that Applicant's waiver of those rights was not knowing, voluntary and intelligent (which Applicant doesn't even allege), Applicant cannot prevail on this claim, and the PCR application is denied as to these allegations as well. *See. e.g.*

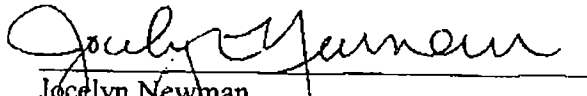
  
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*Pittman v. State of South Carolina*, 337 S.C. 597, 524 S.E.2d 623 (1999) (discussing guilty pleas and waiver of constitutional rights).

IT IS THEREFORE ORDERED that the Application for Post-Conviction relief is DENIED and DISMISSED with prejudice.

IT IS FURTHER ORDERED that Applicant Ayree Henderson be REMANDED to the custody of the State of South Carolina.

AND IT IS SO ORDERED.

  
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Jocelyn Newman  
Presiding Judge

March 20, 2018  
Columbia, South Carolina.

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF RICHLAND )  
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 Aryee Henderson, #237887, )  
 )  
 Applicant, )  
 )  
 vs. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 FOR THE FIFTH JUDICIAL CIRCUIT

Case No. 2018-CP-40-04964

**CONSENT ORDER GRANTING  
 BELATED APPELLATE REVIEW  
 PURSUANT TO AUSTIN V. STATE**

RICHLAND COUNTY  
 FILED  
 2021 NOV 16 AM 10:02  
 CLERK OF COURT  
 C.C.P., G.S.

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed September 20, 2018. Respondent made its return on July 19, 2019. An evidentiary hearing on the matter convened on August 21, 2019, at the Richland County Courthouse. Applicant was present at the hearing and represented by Arthur K. Aiken, Esquire. Lindsey A. McCallister of the South Carolina Office of the Attorney General represented Respondent.

The Court had before it the plea transcript, the records of the Richland County Clerk of Court regarding the subject conviction, appellate records, and the records from Applicant's previous post-conviction relief actions. Respondent also presented testimony from Applicant's previous PCR counsel, Jonathan D. Waller.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections. In November 2002, the Richland County Grand Jury indicted Applicant for murder (2002-GS-40-7277). Charles E. Johnson, Esquire, represented Applicant. Assistant Solicitors Kathryn Luck Campbell, Esquire, and Bryan S. Jeffries, Esquire, prosecuted the case. On September 21, 2004, Applicant proceeded to trial before the Honorable Alison Renee Lee. The jury found

Applicant guilty as indicted. Judge Lee sentenced Applicant to imprisonment for thirty years.

Applicant filed a timely notice of appeal. Joseph L. Savitz, III, Esquire, of the Office of Appellate Defense perfected the appeal with the filing of an Anders<sup>1</sup> brief on August 31, 2006. Applicant filed his own ground for appellate review on or about October 12, 2006. The South Carolina Court of Appeals dismissed Applicant's appeal on February 12, 2008. State v. Henderson, Op. No. 2008-UP-107 (S.C. Ct. App. filed February 12, 2008). The remittitur was returned to the circuit court on February 28, 2008.

**2008-CP-40-1696**

Applicant filed an application for post-conviction relief on March 4, 2008. The State filed its return on January 30, 2009. An evidentiary hearing was convened on August 12, 2009, at the Richland County Courthouse before the Honorable G. Thomas Cooper, Jr. Applicant was represented by Charles T. Brooks, III, Esquire. The State was represented by Assistant Attorney General Brian Petrano. On July 5, 2010, Judge Cooper signed an order granting post-conviction relief, which was filed July 14, 2010.

The State filed a petition for writ of certiorari on September 30, 2010. Applicant filed a return to petition for writ of certiorari on February 22, 2011. Applicant was represented by Tristan Shaffer, Esquire. On March 19, 2014, the South Carolina Court of Appeals affirmed the PCR court's grant of PCR. State v. Henderson, Op. No. 2014-UP-122 (S.C. Ct. App. filed March 19, 2014). The State filed a petition for rehearing on April 2, 2014 to the South Carolina Court of Appeals. The petition was denied on April 24, 2014. The State subsequently filed an appeal to the South Carolina Supreme Court on December 17, 2014. On October 28, 2015, the Supreme Court dismissed the appeal as improvidently granted. State v. Henderson, Op. No. 2015-MO-063

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<sup>1</sup> Anders v. California, 386 U.S. 738 (1967).

(filed October 28, 2015).

### **2016 Guilty Plea**

After being granted post-conviction relief, Applicant pleaded guilty to the lesser-included offense of voluntary manslaughter on June 20, 2016, before the Honorable Clifton Newman. Applicant was represented by Assistant Public Defender J. Rhodes Bailey, Esquire. Assistant Solicitor Kathryn Luck Campbell, Esquire, prosecuted the case. Judge Newman sentenced Applicant to twenty-five years.

Applicant filed a notice of appeal of his guilty plea on November 28, 2016. The South Carolina Court of Appeals dismissed Applicant's appeal on January 6, 2017. State v. Henderson, Appellate Case No.2016-002406 (S.C. Ct. App. filed January 6, 2017). On January 16, 2017, Applicant filed a subsequent notice of appeal to the South Carolina Court of Appeals. On February 16, 2017, the Court of Appeals dismissed Applicant's appeal, construing it to be a petition to rehear the dismissal of the appeal. State v. Henderson, Op. No. 2017-UP-088 (S.C. Ct. App. filed February 15, 2017). The remittitur was returned on March 28, 2017.

### **2016-CP-40-4364**

While Applicant's guilty plea appeal was pending, he also filed an action for post-conviction relief on July 21, 2016. Applicant alleged his plea counsel (1) coerced him to plead guilty; (2) failed to investigate the allegations of his case; (3) failed to object to the State's breach of the plea agreement; (4) failed to challenge the affidavit upon which his arrest was based; and (5) failed to contest the improper empaneling of the Richland County Grand Jury. An evidentiary hearing was convened on January 24, 2018, before the Honorable Jocelyn Newman. Jonathan Waller, Esquire, represented Applicant. Assistant Attorney General Jessica E. Kinard, Esquire, represented Respondent. By order filed March 22, 2018, Judge Newman denied all of Applicant's claims and dismissed the application with prejudice.

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On June 28, 2019, Applicant, through counsel, filed a motion pursuant to Rule 60(b), SCRCF, asking the PCR court to grant relief from its previous order of dismissal and allow Applicant to file appropriate post-trial motions, including a notice of appeal. In the motion, counsel for Applicant asserted he received notice of the entry of the Order of Dismissal via email from the Clerk's Office, and by mistake or inadvertence, failed to open the email until after the time post-trial filings had passed. The Court denied Applicant's motion on July 31, 2018.

Thereafter, Applicant filed a notice of appeal from the order denying the Rule 60(b) motion. Katherine Haggard Hudgins, Esquire, of the South Carolina Commission on Indigent Defense – Appellate Defense Division was appointed to represent Applicant. After consulting with his attorney, Applicant moved to withdraw his appeal, and his motion was granted by Order dated January 2, 2019. The remittitur was return on January 22, 2019. Applicant then filed this PCR action seeking relief pursuant to Austin v. State.<sup>2</sup>

### ALLEGATIONS

In his second and current application for post-conviction relief, Applicant raises the following allegations:

1. Ineffective assistance of PCR counsel, in that:

PCR Counsel sabotaged my PCR by failing to file an Amended PCR Applicant with the Court, failed to file a Rule 59(e) Motion to Alter or Amend, failed to subpoena Shea Thomas. . . , and failed to file an appeal from the Order of Dismissal of my PCR application. PCR Counsel failed to notify me once the PCR Order of Dismissal was issued, failed to follow up and keep track of my PCR case, failed to submit a Proposed Order to the PCR court, and failed to forward me copies of the PCR Court's Order, Proposed Orders submitted by him and the State, and any other documentation submitted to the Court pertaining to me.

At the call of the case, counsel for Applicant informed this Court Applicant wished to withdraw all allegations except for his request for relief pursuant to Austin v. State.

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<sup>2</sup> 305 S.C. 453, 409 S.E.2d 395 (1991).

Additionally, after the testimony of Applicant's previous PCR counsel, Respondent indicated it agreed Applicant's request for Austin relief was proper and should be granted in this case.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Applicant alleges he was denied the right to appeal the dismissal of his previous post-conviction relief application. Pursuant to section 17-27-100 of the South Carolina Code, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. See also Rule 243, SCACR ("A final decision entered under the Post-Conviction Relief Act shall be reviewed by the Supreme Court upon petition of either party for a writ of certiorari."). When an applicant is denied his right to seek such review of his initial PCR application due to ineffective assistance of PCR counsel, the Supreme Court has directed the circuit court to hold "an evidentiary hearing on the issue of whether in fact the petitioner requested and was denied an opportunity to seek appellate review." Austin v. State, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991). If this Court so finds, Applicant shall have the right to petition the Supreme Court for review of the denial of his initial application. Id.

After reviewing of the facts and circumstances surrounding Applicant's failure to appeal the denial of relief in the Applicant's first post-conviction relief action, both parties have indicated to this Court that they believe Applicant is entitled, pursuant to Austin, to seek belated appellate review of the decision denying relief and dismissing Applicant's first PCR application. The parties agree Applicant did not voluntarily waive his right to appeal the post-conviction relief court's denial and dismissal of the Applicant's application for post-conviction relief in 2016-CP-40-4364. Former PCR counsel for Applicant indicated via his testimony that Applicant wished to appeal the decision denying his first application for post-conviction relief, but, through

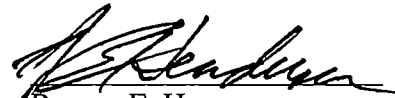
no fault of Applicant, Counsel failed to file a timely Notice of Appeal of that decision.

Based upon the foregoing, this Court finds granting Applicant the right to seek belated appellate review of the denial of Applicant's first PCR action (2016-CP-40-4364) pursuant to Austin is warranted. Both Applicant and Respondent consent to granting Applicant the right to seek belated appellate review in this matter.

**IT IS THEREFORE ORDERED:**

1. Applicant shall remain in the custody of the South Carolina Department of Corrections; and
2. Applicant is granted the right to seek belated appellate review of the denial of post-conviction relief in 2016-CP-40-4364, in accordance with Austin v. State. Counsel for Applicant is directed to file the appropriate notice of appeal within thirty days of receipt of written notice of the entry of this order.

AND IT IS SO ORDERED this 9<sup>th</sup> day of November, 2021.



ROGER E. HENDERSON  
Presiding Judge  
Fifth Judicial Circuit