

THE LAW OFFICE OF JONATHAN WALLER, LLC
1720 MAIN STREET, SUITE 104
COLUMBIA, SC 29201

May 14, 2015

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


Re: Octavia Middleton vs. State of South Carolina
C/A No: 2010-CP-40-4866

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy of each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies to me in the enclosed envelope. I have enclosed a copy of both the Order of Dismissal and the Order Granting an Appeal Pursuant to Austin v. State.

If you have any questions, please do not hesitate to ask. My telephone number is 803-256-0011.

Sincerely,



Jonathan D. Waller

RECEIVED

MAY 18 2015

S.C. Supreme Court

Enclosures

Cc: PCR Division, South Carolina Office of Attorney General

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Ernest Kinard, Jr., Circuit Court Judge

2010-CP-40-4866

RECEIVED

MAY 18 2015

S.C. Supreme Court

Octavia Middleton, #253919,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Octavia Middleton, #253919, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed February 23, 2012. Mr. Middleton, subsequently filed a second Application for Post-Conviction Relief (2014-CP-40-03607) and by Order filed April 24, 2015, Judge Brooks P. Goldsmith ordered that Mr. Middleton be granted an appeal of his initial Post Conviction Relief Application pursuant to Austin v. State.



Jonathan D. Waller

The Law Office of Jonathan Waller, LLC
SC Bar No.: 76290
1720 Main Street, Suite 104
Columbia, SC 29201
803-256-0011 (phone)
866-213-8870 (fax)

jonathanwallerlaw@gmail.com
ATTORNEY FOR PETITIONER

This 14 day of May, 2015.

Other Counsel of Record:
J. Clayton Mitchell, Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3319

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

MAY 18 2015

APPEAL FROM RICHLAND COUNTY
Ernest Kinard, Jr., Circuit Court Judge

S.C. Supreme Court

2010-CP-40-4866

Octavia Middleton, #253919,

Appellant,

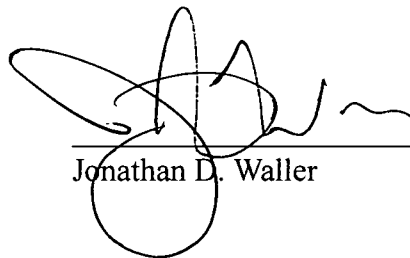
v.

STATE OF SOUTH CAROLINA,

Respondent.

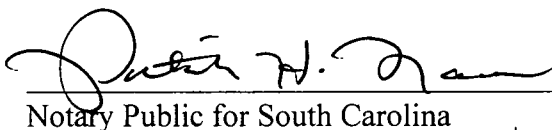
CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, J. Clayton Mitchell, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 15 day of May 2015.



Jonathan D. Waller

SWORN TO BEFORE me this 15th day
of May, 2015.



Notary Public for South Carolina

My Commission Expires: 08/17/2015

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2014CP4003607

Octavia #253919 Middleton

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

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.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Col. No.); 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

FILED
 APR 28 AM 9:56
 CLERK OF COURT
 RICHLAND COUNTY

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 : _____

INFORMATION FOR THE PUBLIC 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
		\$
		\$
		\$

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.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 24 April 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Octavia #253919 Middleton

Jonathan D Waller

Megan Harrigan Jameson

Octavia #253919 Middleton

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W McBride

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND.

Octavia Middleton, #253919,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2014-CP-40-03607

CONSENT ORDER GRANTING
AN APPEAL PURSUANT TO
AUSTIN V. STATE¹

2015 APR 22 AM 9:38
JEANNETTE W. MCBRIDE
C.C.P. & G.S.
RICHLAND COUNTY
FILED

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed June 4, 2014. Respondent made its Return on November 3, 2014, requesting an evidentiary hearing be convened solely on the issue of whether Applicant was entitled to an appellate review of his first post-conviction relief action pursuant to Austin. Jonathan D. Waller, Esquire was appointed by the Richland County Clerk of Court. An evidentiary hearing was held on April 2, 2015, at the Richland County Courthouse. Applicant was present and represented by Counsel Waller. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was indicted for three counts of assault and battery of a high and aggravated nature (ABHAN) (2005-GS-40-7884; -7938; -7941); one count of assault with intent to kill (AWIK) (2005-GS-40-7942); five counts of armed robbery (2005-GS-40-7885; -7891; -7892; -7931; -7939); two counts of

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

SCANNED

burglary, first degree (2005-GS-40-7942; -7894); and one count of murder (2005-GS-40-8121). Applicant was represented by Steven Hisker, Esquire. Applicant proceeded to a jury trial from August 27-31, 2007, before the Honorable G. Thomas Cooper, Jr. Applicant was convicted as indicted. Judge Cooper sentenced Applicant to ten (10) years imprisonment for each ABHAN and AWIK conviction; thirty (30) years for each armed robbery conviction; and fifty (50) years on each burglary and murder conviction. The sentences were to run concurrently.

A notice of appeal was filed and an appeal perfected by Robert C. Fitzsimons, Esquire. The appeal was denied. State v. Middleton, Op. No. 2010-UP-294 (S.C. Ct. App. filed May 27, 2010). The Remittitur was sent on June 14, 2010.

Applicant subsequently filed an application for post-conviction relief on July 23, 2010 (2010-CP-40-4866). In his first application, Applicant asserted claims of ineffective assistance of counsel, violation of U.S. Constitution, and prosecutorial misconduct. An evidentiary hearing was convened on January 10, 2012, at the Richland County Courthouse before the Honorable J. Ernest Kinard, Jr. Applicant was present at the hearing and was represented by Robert C. Fitzsimons, Esquire. By written Order filed February 23, 2012, Judge Kinard denied and dismissed Applicant's post-conviction relief action.

In this action, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of PCR Counsel in that Counsel failed to appeal the denial of Applicant's prior PCR application.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant alleges that he was denied the right to appeal the dismissal of his previous post-conviction relief application. Pursuant to Austin, a post-conviction relief applicant may petition



the South Carolina Supreme Court for discretionary review of the dismissal of his prior application. Prior to the start of the evidentiary hearing, the State indicated to this Court that they would be consenting to the grant of an Austin appeal. The State informed this Court that they were consenting based off of their discussion with prior PCR Counsel, who indicated that although he considered an appeal frivolous, he did acknowledge receiving a letter from Applicant which indicated Applicant's wishes to appeal the PCR Court's decision.

After review of the facts and circumstances surrounding the waiver of the Applicant's right to appeal the denial of his post-conviction relief application, this Court finds that the Applicant is entitled to appeal the denial of his first post-conviction relief application (2010-CP-40-4866). Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. This Court finds that Applicant did not voluntarily waive his right to appeal the post-conviction relief court's denial and dismissal of his prior post-conviction relief action.

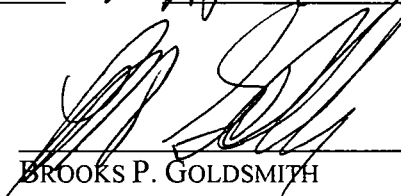
Based upon the foregoing, this Court finds that the granting of an appeal of the Applicant's first post-conviction relief action (2010-CP-40-4866) pursuant to Austin v. State is warranted.



IT IS THEREFORE ORDERED:

1. That the Applicant be granted an appeal of case 2010-CP-40-4866 pursuant to Austin v. State; this second application for post-conviction relief is hereby denied and dismissed with prejudice;
2. Within thirty (30) days of service of this Order, counsel for the Applicant must file a Notice of Appeal to secure the appropriate appellate review of the Applicant's first post-conviction relief action. Counsel and the Applicant are direct to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) and Rule 243, SCACR for the appropriate procedure for a belated appeal; and
3. That the Applicant remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 12 day of April, 2015.



BROOKS P. GOLDSMITH
Presiding Judge

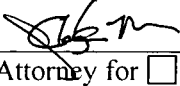
Edisto, South Carolina

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 OCTAVIA MIDDLETON, #253919)
 Plaintiff,)
 vs.)
 State of South Carolina)
 Defendant.)

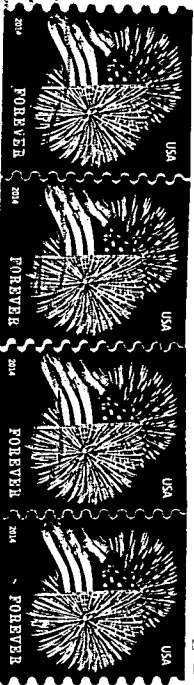
IN THE COURT OF COMMON PLEAS
 FIFTH JUDICIAL CIRCUIT

CASE NO.: 2014-CP-40-03607

**MOTION AND ORDER INFORMATION
 FORM AND COVERSHEET**

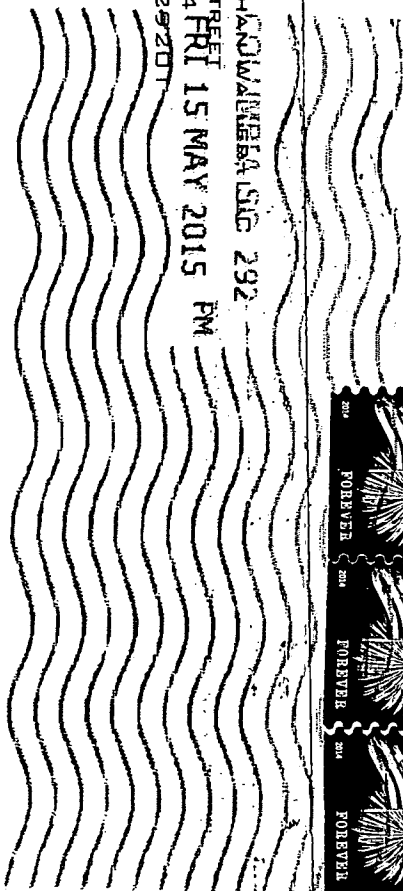
Plaintiff's Attorney: Jonathan D. Waller, Bar No. 76290 Address: 1720 Main St., Ste 104, Columbia SC 29201 Phone: _____ Fax _____ E-mail: _____ Other: _____	Defendant's Attorney: J. Clayton Mitchell, Bar No. 101443 Address: PO Box 11549, Columbia SC 29211 Phone: _____ Fax _____ E-mail: _____ Other: _____
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input checked="" type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: _____ Estimated Time Needed: _____ Court Reporter Needed: <input type="checkbox"/> YES / <input type="checkbox"/> NO	
SECTION II: Motion/Order Type	
<input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
 Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant	4/8/15 Date submitted
SECTION III: Motion Fee	
<input type="checkbox"/> PAID - AMOUNT: \$ _____ <input checked="" type="checkbox"/> EXEMPT: (check reason)	
<input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input checked="" type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ <input type="checkbox"/> Other: _____	
JUDGE'S SECTION	
<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	JUDGE CODE _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ Date Filed: _____ <input type="checkbox"/> MOTION FEE COLLECTED: \$ _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: \$ _____	

RICHLAND COUNTY
 FILED
 APR 22 AM 9:38
 KENNETH W. MCBRIDE
 C.C.P. & G.S.



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THE LAW OFFICE OF JONATHAN OLMAN
COLUMBIA, SC 29201
1720 MAIN STREET
SUITE 104
FRI 15 MAY 2015 PM
COLUMBIA, SC 29201



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