

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SC SUPREME COURT

Certiorari to Richland County

Brooks P. Goldsmith, Circuit Court Judge

OCTAVIA MIDDLETON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001080

PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX1

ISSUE PRESENTED2

STATEMENT3

ARGUMENT4

CONCLUSION5

ISSUE PRESENTED

Did the PCR judge correctly find that Petitioner did not knowingly and voluntarily waive his right to appeal the denial of his first PCR application and is entitled to a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991)?

STATEMENT

In September of 2005, the Richland County Grand Jury indicted Petitioner Middleton for three counts of assault and battery of a high and aggravated nature, five counts of armed robbery, two counts of burglary first degree, one count of assault with intent to kill and one count of murder. On August 27, 2007, Petitioner proceeded to jury trial before the Honorable G. Thomas Cooper Jr. Steve Hisker represented Petitioner at trial. Kathryn Luck Campbell and Daniel Goldberg prosecuted the case. The jury returned verdicts of guilty as charged. Judge Cooper sentenced Petitioner to an aggregate sentence of fifty (50) years. A timely notice of intent to appeal was filed and the direct appeal perfected. Joseph L. Savitz represented Petitioner on appeal. The South Carolina Court of Appeals dismissed the appeal. State v. Middleton, Op. No. 2010-UP-294 (S.C.Ct.App. filed May 27, 2010).

On July 23, 2010, Petitioner filed an application for post conviction relief, 2010-CP-40-4866. The State filed a return on February 8, 2011. An evidentiary hearing was held before the Honorable J. Ernest Kinard, Jr. on January 10, 2012. Robert Fitzsimons represented Petitioner at the PCR hearing. Bryan T. Petrano represented the State. In a written order signed February 21, 2012, Judge Kinard denied relief and dismissed the application.

On June 4, 2014, Petitioner filed a second application for post conviction relief, 2014-CP-40-3607. The State filed a return and motion to dismiss all claims beyond Austin review on October 28, 2014. On April 2, 2015, a hearing was held before the Honorable Brooks P. Goldsmith. Jonathan Waller represented Petitioner. J. Clayton Mitchell, III represented the State. On April 12, 2015, Judge Goldsmith signed a consent order granting an appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). This petition for writ of certiorari and a separately filed Austin petition follow.

ARGUMENT

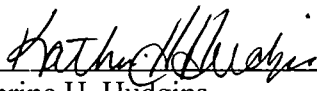
The PCR judge correctly found that Petitioner did not knowingly and voluntarily waive his right to appeal the denial of his first PCR application and is entitled to a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

During the second PCR hearing the attorney representing the State advised the judge that prior PCR counsel acknowledged that he intended to file a notice of appeal from the denial of the first PCR application but failed to do so. (App. p. 1036, lines 4-11). The state consented to the grant of a belated appeal. (App. p. 1036, lines 9-10). The PCR judge correctly found that Petitioner did not knowingly and intelligently waive his right to appeal the denial of his first PCR application and is entitled to a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

CONCLUSION

Based on the above argument, this Court should allow the belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of January, 2016.

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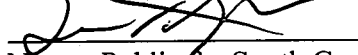
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Clay Mitchell, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 7th day of January, 2016.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day
of January, 2016.


_____(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.