

# FALK LAW FIRM, LLC.

James K. Falk

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April 18, 2018

Clerk of Court  
Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211

RECEIVED

APR 20 2018

S.C. SUPREME COURT

Re: Moses Frasier 317940, 2016-CP-10-0359

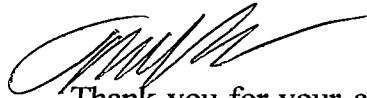
Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal and Grant of Appeal pursuant to Austin v State, in the above Charleston County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,

James K Falk



Thank you for your assistance.

CC:

Megan Harrigan Jameson  
Moses Frasier 317940

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APR 20 2018

APPEAL FROM CHARLESTON COUNTY

S.C. SUPREME COURT

Court of Common Pleas

Honorable Maite Murphy, Circuit Court Judge

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Case No.: 2016-CP-10-00359

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Moses Frasier 317940.....Petitioner

v.

State of South Carolina.....Respondent

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NOTICE OF APPEAL

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The Petitioner Moses Frasier appeals the Honorable Maite Murphy's April 10, 2018 Order Granting Austin Appeal. Undersigned counsel received notice of entry of the order on April 18, 2018. A copy of the order on appeal is attached to this notice.

Respectfully submitted



James Falk  
Falk Law Firm  
PO Box 1058  
Charleston, SC 29402  
Attorney for Petitioner

April 18, 2018

Jessica Kinard, Esq  
PO Box 11549  
S.C. Attorney General's Office  
Columbia, SC 29211

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APR 20 2018

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas  
Honorable Maite Murphy., Circuit Judge

S.C. SUPREME COURT

Case No.: 2016-CP-10-0359

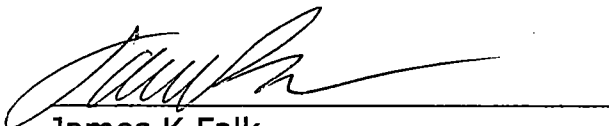
Moses Frasier 317940.....PETITIONER

V.

State of South Carolina.....RESPONDENT

CERTIFICATE OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Megan Harrigan Jameson Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this April 18, 2018.



James K Falk  
Falk Law Firm  
PO Box 1058  
Charleston, SC 29402

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AG-mail  
AF  
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STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )  
 )  
Moses Frasier, SCDC # 317940 )  
 )  
Applicant )  
 )  
v. )  
 )  
State of South Carolina )  
 )  
Respondent )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT

Case No.: 2016-CP-10-0359

**ORDER GRANTING AUSTIN APPEAL**

FILED  
2018 APR 18 AM 11:21  
JULIE ARMSTRONG  
CLERK OF COURT

This matter is before the Court by way of an application for post-conviction relief (“PCR”) filed on January 25, 2016 by Moses Fraiser (“Applicant”). Respondent submitted its Return on June 23, 2017, requesting an evidentiary hearing be held solely on the issue of whether or not Applicant was entitled to a belated appellate review of his first PCR action pursuant to Austin v. State, 305 S.C. 453 (1991). On February 1, 2018, an evidentiary hearing was convened at the Charleston County Courthouse. Applicant was present and represented by James Falk, Esquire. Rasheeda Cleveland, Esquire of the South Carolina Attorney General’s Office, represented the State.

Before the Court were the records the Charleston County Clerk of Court, Applicant’s records from the South Carolina Department of Corrections, the records from Applicant’s prior post-conviction relief action, Applicant’s appellate records, and the records from this post-conviction relief action.

**I. PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. In June 2006, the Charleston County Grand Jury indicted Applicant for murder (2006-GS-10-4259). Beattie Butler, Esquire,

and Jason Mikell, Esquire, represented Applicant. Assistant Solicitors Nathan Williams and Kim Steele prosecuted the case. On October 2, <sup>2006 MM.</sup>~~20106~~, Applicant proceeded to a jury trial the Charleston County Court of General Sessions before the Honorable James C. Williams, Jr. On October 5, 2006, Applicant elected to forego his jury trial and pled guilty to the lesser included offense of voluntary manslaughter. Judge Williams sentenced Applicant to imprisonment for a term of thirty years.

Applicant appealed and Jeffrey P. Bloom, Esquire, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction in an unpublished opinion on January 15, 2009. State v. Frasier, Op. No. 2009-UP-052 (S.C. Ct. App. filed January 15, 2009). The remittitur was returned to the circuit court on November 16, 2012.

Applicant filed his first application for PCR on February 27, 2009. Respondent made its return on July 7, 2009. An evidentiary hearing into the matter was convened on January 27, 2011, at the Charleston County Courthouse before the Honorable R. Markley Dennis, Jr. Applicant was present and was represented by Jeffrey J. Yungman, Esquire. Respondent was represented by Assistant Attorney General Matthew J. Friedman of the South Carolina Attorney General's Office. Judge Dennis issued an order of dismissal filed February 22, 2012.

Thereafter, on December 14, 2015, Applicant filed a *pro se* notice of appeal with the South Carolina Supreme Court challenging Judge Dennis's ruling. The Court issued an order dismissing the appeal for failure to timely serve the notice of appeal under Rules 243(a) and 203(b)(1) of the South Carolina Appellate Court Rules. The Remittitur was sent January 22, 2016.

## II. ALLEGATIONS

In his application for post-conviction relief, Applicant alleges he is being held in custody

unlawfully for the following reasons:

1. Ineffective assistance of PCR Counsel.
  - a. "Counsel did not file the PCR appeal within thirty days."
  - b. "Applicant did not knowingly and intelligently waive his right to appellate review of the denial of his PCR."
  - c. "Counsel is solely responsible for the appeal notice being filed."
  - d. "This is only one of the steps that are shown that was violated by the PCR counsel in Applicant's case matters for the appeal."

### **III. SUMMARY OF RELEVANT TESTIMONY PRESENTED**

On direct examination, Applicant testified that prior to his first PCR hearing he had only spoken with former PCR Counsel, Jeff Yungman once. He recalled that Judge Dennis denied his application from the bench but he never received an official order until three years later. Applicant further testified that during the three year wait he thought that maybe the Court had a change of heart and would grant him post-conviction relief. Applicant then testified that he wanted an appeal but PCR Counsel did not file one.

Applicant asserted that he never got a written court order until his mother contacted PCR. Applicant recalled that PCR Counsel attempted to file the notice of appeal after being contacted by Applicant's mother but the Court of Appeals denied the request and said it was untimely. Applicant further testified that he believed PCR Counsel did not know what to do because he had no prior PCR experience. Applicant stated that it was fine with him that PCR Counsel did not have any prior PCR experience. He further recalled that he did not hear that his case was denied until the late 2015, and that is when he filed the current action.

On cross-examination by the State, Applicant testified that it was three years before he inquired about the results of the hearing because he thought courts were just slow.

Former PCR Counsel testified that he was appointed to the case from the civil list. He stated that he thought he did not need to do anything else after the conclusion of the PCR

hearing. Former PCR Counsel further testified that he thought the court would send notice of the decision to Applicant and he did not think that he needed to do anything else in the case.

In closing argument, the State argued that Applicant's current application was barred by the equitable doctrine of laches. Specifically, the State argued that Applicant waited nearly four years to file a pro se notice of appeal and then to file a subsequent post-conviction relief action, and that Applicant's delay in filing prejudiced the because the previous records have been destroyed.

#### **IV. APPLICABLE LAW**

State law expressly authorizes the right to seek appellate review of the denial of post-conviction relief. See S.C. Code Ann. § 17-27-100 (1985). In the absence of an intelligent waiver by the applicant, counsel must advise the applicant of his appellate rights or comply with the procedure required by Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967) and Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Where the post-conviction relief judge determines that the applicant did not freely and voluntarily waive his appellate rights, the applicant may petition the South Carolina Supreme Court for review of post-conviction relief issues pursuant to Austin v. State. See King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992).

#### **V. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (1985).

### **Ineffective Assistance of PCR Counsel**

The purpose of this hearing was to determine whether Applicant was denied the ability to appeal his PCR denial. The right to seek appellate review of a PCR denial is authorized by S.C. Code Ann. 17-27-100. Therefore, the issue here is whether Mr. Frasier was afforded the opportunity to appeal his first PCR. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), is the leading case on the matter. The Austin Court found that where the petitioner claims that his counsel failed to file an appeal, an evidentiary hearing must be held to determine whether the petitioner requested and was denied an opportunity to seek appellate review.

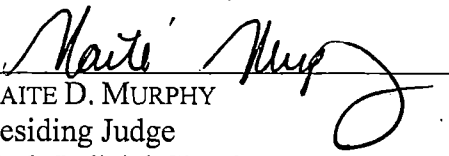
This Court finds that failure to seek review of the denial of PCR is a sufficient basis for a claim of ineffective assistance of counsel, unless there was a knowing and intelligent waiver. If the court finds that petitioner was denied his right of appeal, petitioner should be granted the ability to seek appellate review. Here, because Applicant was never notified of the order, and never spoke with former PCR Counsel about appealing the ruling, the Court finds that there was no knowing and intelligent waiver and therefore Applicant must be allowed to appeal that finding.

Based upon the foregoing, this Court finds that the granting of an appeal of Applicant's first post-conviction relief action (2009-CP-10-1183) pursuant to Austin v. State is warranted.

#### **IT IS THEREFORE ORDERED:**

1. That the Application for Post-Conviction Relief be granted pursuant to Austin v. State; and
2. Within thirty days of the service of this Order, counsel for Applicant must file a Notice of Appeal to secure the appropriate appellate review of Applicant's first post-conviction relief action.
3. That Applicant remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 10 day of April, 2018.

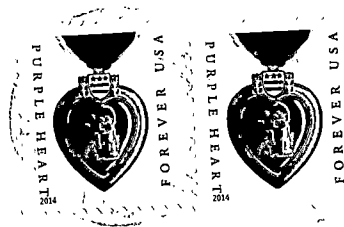
  
MAITE D. MURPHY  
Presiding Judge  
Ninth Judicial Circuit

S. Gray, South Carolina

**FALK LAW FIRM**

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Clerk of Court

Supreme Court of South Carolina

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