

No.: \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

FRANTZ BRIFIL,  
*Petitioner,*

versus

ATTORNEY GENERAL OF FLORIDA, Ashley Moody,  
*Respondent(s).*

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**Appendix A:** Unpublished Decision of the Fourth District Court of Appeal of Florida.

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IN THE  
SUPREME COURT OF THE UNITED STATES

FRANTZ BRIFIL,  
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ATTORNEY GENERAL OF FLORIDA, Ashley Moody  
*Respondent(s)*.

# Appendix A

(Unpublished decision of the Fourth District Court of Appeal of Florida)

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT, 110 SOUTH TAMARIND AVENUE, WEST PALM BEACH, FL 33401

November 30, 2023

FRANTZ BRIFIL,  
Petitioner(s)

v.

STATE OF FLORIDA,  
Respondent(s).

CASE NO. - 4D2023-2640  
L.T. No. - 562018CF002443

**BY ORDER OF THE COURT:**

ORDERED that the October 20, 2023 petition alleging ineffective assistance of appellate counsel is denied.

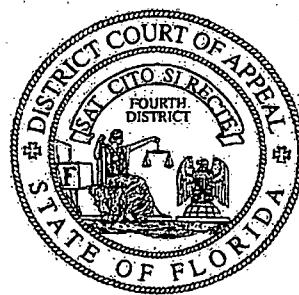
WARNER, GROSS and KUNTZ, JJ., concur.

Served:  
Crim App WPB Attorney General  
Frantz Brifil  
St. Lucie Clerk  
Hon. Michael Carlton Heisey  
St. Lucie State Attorney

KL

I HEREBY CERTIFY that the foregoing is a true copy of the court's order.

*Lonn Weissblum*  
LONN WEISSBLUM, Clerk  
Fourth District Court of Appeal  
4D2023-2640 November 30, 2023



No.: \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

FRANTZ BRIFIL,  
*Petitioner, Pro se*

versus

ATTORNEY GENERAL OF FLORIDA, Ashley Moody  
*Respondent(s).*

# Appendix B

(Petitioner's Petition for Writ of Habeas Corpus)

IN THE DISTRICT COURT OF APPEAL OF FLORIDA  
FOURTH DISTRICT

FRANTZ BRIFIL,  
Petitioner,

v.

STATE OF FLORIDA,  
Respondent. /

Case No.: 4D23-2640

Direct Appeal Case No.: 4D23-141

L.T. Case No.: 562018CF002443

**PETITION FOR WRIT OF HABEAS CORPUS**

Pursuant to Florida Rule of Appellate Procedure 9.141(d), Petitioner Frantz Brifil (Hereafter "Petitioner"), respectfully petition this Honorable Court for a new appeal based on ineffective assistance of his appellate counsel in his direct appeal. In support thereof, Petitioner states the following:

**JURISDICTION**

Article V, Section 4(b)(3) of the Florida Constitution confers original subject-matter jurisdiction upon the district courts to issue extraordinary writs, including a writ seeking a new appeal based on the ineffectiveness of appellate counsel during the direct appeal. This jurisdiction is governed by Rule 9.030(b)(3), while the form and procedure to petition for such a writ are set forth in Rules 9.100 and 9.141 of the Florida Rules of Appellate Procedure. A writ of habeas corpus pursuant to Florida Rules of Appellate Procedure, Rule 9.141 to this Court is the proper vehicle for seeking a new

appeal based on ineffective assistance of appellate counsel in direct appeal. *Rutherford v. Moore*, 774 So.2d 637, 643 (Fla. 2000).

Here, specifically, Petitioner is seeking a new appeal based on the ineffectiveness of his appellate counsel in his direct appeal for failing to raise the claim that the admission of the out-of-court statements of Petitioner's daughter –a non-testifying witness- violates his Sixth Amendment Confrontation Clause Rights, even though those out-of-court statements are admissible as excited utterance.

#### STATEMENT OF PERTINENT FACTS

Petitioner was arrested and charged with attempted first degree murder and aggravated assault. Petitioner pled not guilty and proceeded to a jury trial.

At trial, the state sought to introduce the out-of-court statements of Petitioner's daughter into evidence as State's Exhibit 8 and 9. Defense counsel objected based on hearsay and confrontation clause violations under Crawford. T.T.<sup>1</sup>, Pg. 255. The court removed the jury and held a hearing. There, defense counsel fully argued the witness's out-of-court statements do not qualify as excited utterance. Additionally, defense

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<sup>1</sup> The symbol "T.T." denotes the Trial Transcripts.

counsel argued that the admission of those statements would violate Petitioner's right to confront the witness against him because the statements are testimonial in nature where there was no ongoing emergency at the time the statements were made and the police were gathering information for future prosecution purpose. (Id. 261-62, 264, 265). The state rebutted and argued that the witness's statement qualify as excited utterance and are admissible. Id 265-66.

The court inquired whether the witness is going to testify. The state responded they are not sure. Id. 266. The court then asked the state to discuss the Crawford issue and whether Crawford applies. Id. The state argued Crawford does not apply simply because the witness's statements qualify as excited utterance. Id. 266-67. Relying on the state's arguments and *Tucker v. State*, 884 So.2d 168 (Fla. 2<sup>nd</sup> DCA 2004), the trial court agreed with the state and concluded that the witness's statement are admissible as substantial evidence because they qualify as excited utterance. Id. 267. Defense counsel renewed objection, -before the non-testifying witness's statements were introduced into evidence-, was overruled. Id. 275, 288.

During trial, the state called detective Candace Kernan-Fullen who testified that while she was talking to the victim, Petitioner's daughter

started to make statement she thought was important. However, since she did not have a body camera, she borrowed another officer's body camera so she could record Petitioner's daughter's statements because she thought they were important facts. Id 304-305. Consistent to its previous ruling, over defense counsel's hearsay and confrontation clause objections, the court allowed the state to introduce and publish Petitioner's daughter's out-of-court statements. Id. 305- 320. Petitioner's daughter did not testify and Petitioner never had an opportunity to cross-examine his daughter.

The jury found the Petitioner guilty as charged in the information on Count 2, - with a special finding that Petitioner actually possessed, carried, displayed, used, threatened to use or attempted to use, discharged a firearm and as result thereof caused great bodily harm-, and on Count 3, -aggravated assault. Subsequently, a bifurcated trial was held on Count 1 -possession of firearm by a convicted felon. The jury returned a guilty verdict on this charge as well.

On direct appeal, appellate counsel raised the following claims:

- I. The trial court erred in admitting hearsay evidence as an excited utterance.
- II. The motion for judgment of acquittal for the count of aggravated assault should have been granted.

However, appellate counsel failed to raise the issue that that the admission of the out-of-court statements of Petitioner's daughter, a non-testifying witness, violates the confrontation clause, even though those out-of-court statements are admissible as excited utterance exception to the hearsay rule.

On July 27, 2023, this Court per curiam affirmed. This petition ensues.

## ARGUMENT

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE THAT THE ADMISSION OF THE OUT-OF-COURT STATEMENTS OF PETITIONER'S DAUGHTER, A NON-TESTIFYING WITNESS, VIOLATES THE CONFRONTATION CLAUSE.

It is well settled that the Sixth amendment to the United States Constitution as well as the corresponding provision in the Florida Constitution guarantees Petitioner the right to effective assistance of counsel in his direct appeal. See: Sims v. State, 998 So.2d 494, 498 (Fla. 2008) (holding "In Florida a criminal defendant is entitled to a direct appeal as matter of right"). A first appeal as of right therefore is not adjudicated in accord with due process of law if appellant does not have the effective assistance of an attorney. See: Evitts v. Lucey, 469 U.S. 387; 105 S.Ct. 830, 836; 83 L.Ed.2d 821 (1985).

Petitioner contends that his appellate counsel was ineffective for failing to raise the preserved and meritorious issue that the admission of the out-of-court statements of his daughter, a non-testifying witness, violates his Sixth and Fourteenth Amendments rights to be confronted with the witnesses against him.

The First District Court of Appeals concluded in Cupon, that appellate counsel's failure to raise a preserved and meritorious issue caused the representation to fall outside the range of professionally accepted performance, and thus granting Cupon's Petition vacating his conviction for escape, and remanded to the circuit court for resentencing of the remaining offense of grand theft. See: *Cupon v. State*, 833 So. 2d 302 (Fla. 1<sup>st</sup> DCA 2002).

Petitioner affirmatively asserts that the admission of the out-of-court statements of his daughter –a non-testifying witness- violated his Sixth Amendment Confrontation Clause Rights, where those out-of-court statements did not qualify as an excited utterance, where there was no ongoing emergency at the time his daughter made the statements and the police were gathering information for future prosecution purpose. Even though Petitioner's daughter's statements where regarding an event startling enough to cause nervous excitement, they were not made before

there was time to contrive or misrepresent or made while his daughter was under any stress or excitement caused by the event. See: Jones v. State, 321 So. 3d 790 (Fla. 4<sup>th</sup> DCA 2021). Also See: Squire v. State, 193 So. 3d 105 (Fla. 4DCA 2016) quoting; Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

#### **NATURE OF RELIEF SOUGHT**

Petitioner requests that this Court enter an order permitting the filing of a belated appeal of the order denying his Direct Appeal, pursuant to Rule 9.141, Florida Rules of Appellate Procedure.

#### **ARGUMENT**

It is well settled among all District Courts of Appeal of Florida that a Circuit Court's failure to include notification which informs the Defendant of his right to appeal within thirty (30) days of rendition of the order warrants the granting of a belated appeal. Pippen v. State, 616 So.2d 1182 (Fla. 1st DCA 1993); Collins v. Mitcham, 660 So.2d 347 (Fla. 2d DCA 1995); Viqueire v. Roth, 591 So.2d 1147 (Fla. 3d DCA 1992); Nava v. State, 652 So.2d 1264 (Fla. 4th DCA 1995); Lewis v. State, 678 So.2d 484 (Fla. 5th DCA 1996). Circumstances for granting a belated appeal may include the fact that, due to no fault on the part of the prison inmate, the inmate did not

receive a copy or notice of the order sought to be appealed until a time past the last day to timely file a notice of appeal. *Proctor v. State*, 845 So.2d 1007, 1008 (Fla. 5th DCA 2003).

### CONCLUSION

For the reasons set forth, and upon the authorities cited, the Petitioner petitions this Honorable Court for an order granting him permission to pursue a belated appeal in the above-entitled proceeding concerning the denial of his Motion for Post-Conviction Relief.

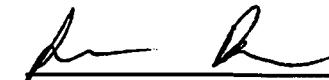
Respectfully submitted,

  
Frantz Brifil, DC# K64868  
Petitioner, pro se  
DeSoto C. I. Annex  
13617 S. E. Highway 70  
Arcadia, Florida 34266-7800

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this        day of OCTOBER 2023 I personally handed a true copy of this "Petition for Writ of Habeas Corpus" to an official at DeSoto Annex for the sole purpose of mailing, via first-class U.S. mail with prepaid postage, to:

- Office of the Attorney General; 1515 North Flagler Drive; West Palm Beach, Florida 33401.



Frantz Brifil, DC# K64868  
Petitioner, pro se

## CERTIFICATE OF COMPLIANCE

I hereby certify that this computer generated brief complies with the type font requirements of Florida Rule of Appellate Procedure 9.045(b) and is typed in Arial 14 point font and contains 5155 words in compliance with of Rule and 9.210(a)(2)(A).



Frantz Brifil, DC# K64868  
Petitioner, pro se

**Florida Appellate Case Information System****Case View Frantz Brifil v. State of Florida****FOURTH DISTRICT COURT OF APPEAL**

FRANTZ BRIFIL,  
Petitioner(s)

v.

CASE NUMBER  
4D2023-2640

STATE OF FLORIDA,  
Respondent(s).

**CLASSIFICATION** Original Proceedings - Circuit Criminal - Ineffective Assistance of Appellate Counsel

**DOCKET DATE** 10/20/2023

**OPEN / CLOSED** Closed

**PARTIES**

Shows the first few parties on the case.

Frantz Brifil  
PETITIONER

Self Represented  
REPRESENTATION

State of Florida  
RESPONDENT

**ORAL ARGUMENTS**

*No future oral arguments were found.*

**DOCKET ENTRIES**

Docket Date	Type	Subtype	Description	On Behalf Of	View
11/30/2023	Disposition by Order	Denied	ORDERED that the October 20, 2023 petition alleging ineffective assistance of appellate counsel is denied.		

Docket Date	Type	Subtype	Description	On Behalf Of	View
11/03/2023	Letter	Acknowledgment Letter	Acknowledgment Letter		
10/20/2023	Petition	Petition Ineffective Assistance of Counsel	Petition Ineffective Assistance of Counsel		

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## PARTIES

Role	Name	Status	Representation
Petitioner	Brifil, Frantz	Active	Self Represented
Respondent	State of Florida	Active	

1 to 2 of 2

## ORAL ARGUMENTS

Oral Argument Date	Location / Room	Type	Status	Video Streaming Link
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*No records were found*