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THE SUPREME COURT OF SOUTH CAROLINA

Appeal From the South Carolina Court of Appeals

S.C. SUPREME COURT

Appellate Case No. 2022-000671

The State of South Carolina.....Respondent

v.

Terron Dizzley..... Appellant

**MEMORANDUM OF LAW IN SUPPORT OF IMMEDIATE APPEAL, AND REQUEST FOR HEARING PURSUANT TO STATE V. FULLER, 337 S.C. 236 (1999), AND FARETTA V. CALIFORNIA, 422 U.S. 806 (1975).**

Appellant Terron Gerhard Dizzley moves before this Honorable Court with a Memorandum of Law in Support of Immediate Appeal of the S.C. Court of Appeals order issued on July 7, 2023, denying Attorney Yarborough's Motion to Withdraw as Counsel. The jurisdiction of this immediate appeal is invoked by S.C. Code Ann. s 14-3-330 (1), (2),(a)(b)(c), (3), because, the S.C. Court of Appeals order affects substantial rights of Appellant. See: Hagwood v. Somerville, 362 S.C. 191 (2005), " In a matter of first impression, an order granting motion to disqualify party's attorney in civil case affects substantial right and may be immediately appealed; order granting motion to disqualify party's preferred attorney must be immediately appealed or any later objection in subsequent appeal will be waived. The right to be represented by an attorney of one's choosing is one of those rare orders which, in

effect, could determine the action and prevent a judgement from which an appeal might be taken, or could discontinue an action due to the potential impact on both the attorney-client relationship and the overall litigation and trial of case." Appellant request that a hearing is held pursuant to this appeal, pursuant State v. Fuller, 337 S.C 236 (1999) and Faretta v. California, 422 U.S. 806 (1975), on the grounds that:

1. The S. C. Court of Appeals order is erroneous pursuant to the facts and circumstances surrounding Attorney Yarborough's (unlawful) representation.
2. The S.C. Court of Appeals order is arbitrary, disproportionate, serves no legitimate interest, and is contrary to S.C. Supreme Court law, SCACR, clearly established U.S. Supreme Court law, and violates Appellant's Sixth Amendment right to conflict free counsel, counsel of choice, and self-representation. Whereas, the record proves that Appellant only hired Attorney Yarborough to represent him at the November 17, 2022 hearing, pursuant to an order from the S.C. Court of Appeals remanding Appellant's case back to the circuit court for a ruling pursuant to findings of facts and conclusions of law, pursuant to Appellant's Emergency Motion For Alteration, Modification, Reconsideration, and Recission of Order, pursuant to Appellant's Emergency Exparte and Proposed Motions for Immediate Release, Double Jeopardy, False Imprisonment, Lack of Trial Court's Jurisdiction to Impose Sentence.

Appellant contends that the record from the November 17, 2022 hearing proves that he made a request to fire Attorney Yarborough and proceed pro se, which was denied by the Honorable Judge Culbertson, which violated Appellant's Sixth Amendment rights to self-representation. See: November 17, 2022 hearing transcript P. 19, L11-23. See: State v. Samuel, 813 S.E. 2d 487 (2018), "A circuit judge's denial of a defendant's knowing voluntary request to proceed pro se is a structural error requiring automatic reversal and a new trial." Quoting State v. Riviera, 402 S.C. 225 (2013), and Farretta v. California, 422 U.S. 806 (1975).

Appellant contends that he never hired nor consented to Attorney Yarborough to represent him on Appeal. Appellant contends that he also has a complaint filed against

Attorney Yarborough in the Office of Disciplinary Counsel pursuant to this case and this matter. Therefore, allowing Attorney Yarborough to remain as Appellant's counsel would result in a "conflict of interest," which would violate his Sixth Amendment right to "conflict free" counsel. State v. Gregory, 364 S.C. 150 (2005), "Defense attorney had actual conflict of interest, and thus defendant was not required to demonstrate prejudice before court would grant motion to be relieved." Cuyler v. Sullivan, 446 U.S. 335 (1980).

The agreement between Appellant and Attorney Yarborough was that he would be paid \$7,500 to represent Appellant at the November 17, 2022, and that there would be an additional \$7,500 retainer fee which would be refunded if Appellant did not allow Attorney Yarborough to represent him on appeal, if an appeal was necessary. Appellant contends that at no time did he agree to waive his rights to be heard on any of his issues. See: Singleton v. State, 313 S.C. 75 (1993).

After the hearing, Appellant filed a timely Emergency Motion To Relieve Counsel And Proceed Pro on appeal, whereas, the record shows that Appellant's original appeal was also pro se. The result of Appellant's Emergency Motion to Relieve Counsel And Proceed Pro, and Attorney Yarborough's Motion to Withdraw as Counsel has resulted in rulings contrary to both S.C. and U.S. Supreme Court law. See: Samuel, supra, 813 S.E. 2d 487 (2018); State v. Barnes, 407 S.C. 27 (2014), "A South Carolina criminal defendant has the constitutional right to represent himself under both the federal and state constitutions. U.S.C.A Const. Amend. 6, Const. Art. 1 s 14." ; Faretta v. California, 422 U.S. 806 (1975), "forcing a lawyer upon an unwilling defendant is contrary to the basic right to defend himself if he truly wants to do so." State v. Richardson, 377 S.C. 103 (2008), " While an applicant seeking post-conviction relief may have a right to reject or discharge "court-appointed" counsel and proceed pro se or retain his own counsel, he does not have the right, without a showing of satisfactory cause, to refuse or dismiss the counsel "appointed" and have other counsel appointed."

Attorney Yarborough was not an "appointed" lawyer, but, a "retained" attorney, and was not retained for representation on appeal of this case.

**SCACR Rule 407, Rules of Professional Conduct, Rule 1.16, Comment {4}** "A client has a right to discharge a lawyer at any time, with or without cause, subject to liability of payment for lawyer's services. Where future dispute may be anticipated, it may be advisable to prepare a written statement reciting the circumstances."

Appellant contends that S.C. Court of Appeals supports its order denying Attorney Yarborough's Motion to Withdraw as Counsel, citing Morris v. Slappy, 462 U.S. 1 (1983), which has nothing to do with this case. Appellant contends that *Slappy*, deals with the trial court's denial of defendant's pro se motion for a continuance to allow better preparation for his "court appointed" attorney. Appellant contends that the record proves that the reason he filed his Motion to Relieve Attorney Yarborough had nothing to do with any claims that he has a Sixth Amendment right guaranteed to a "meaningful relationship" with Attorney Yarborough.

Appellant contends that the S.C. Court of Appeals also cites Tucker v. Catoe, 346 S.C. 483 (2001), in support of its order, that "appellant counsel has no duty to raise every non-frivolous issue, and must be allowed to exercise his reasonable professional judgment." Appellant also contends that *Tucker* does not apply to the circumstances of his case. *Tucker* deals a claim at PCR for ineffective assistance if appellate counsel for failing to raise an issue on direct appeal.

Appellant contends that his case is not a direct appeal, and he never hired Attorney Yarborough to represent him on the appeal of this case. The record proves that Appellant's Emergency Exparte and Proposed Motions for Immediate Release, Double Jeopardy, False Imprisonment, Lack of Trial Court's Jurisdiction to Impose Sentence, was filed on October 28, 2021, a year before he ever hired Attorney Yarborough. Appellant contends that Attorney Yarborough was hired after the S.C. Court of Appeals refused to adjudicate his case, and granted a request from the Attorney General to hold Appellant's case filed in the S.C. Court of

Appeals in abeyance, and issued an order remanding Appellant's case back to the circuit court, pursuant Appellant's Emergency Motion For Alteration..., in which the sole purpose of the order to remand was for the circuit court to provide a ruling on the merits of "all" Appellant's issues raised, of which Appellant still has not received.

Appellant contends that the S.C. Court of Appeals order granting the Attorney General's request to hold his case in abeyance in the appellate court, and the order remanding the case back to the circuit was an error of law, because: (1) According to clearly established federal law, a double jeopardy issue, or any issues pursuant deprivations of a person's life, liberty, or property cannot be held in abeyance because that person would suffered "irreparable harm" by such delay. See: Gilliam v. Foster, 63 F. 3d 287 (4th Cir. 1995), "Balance of harm with respect to state's request for stay pending appeal of order granting writ of habeas corpus precluding State from proceeding with retrial tipped decidedly in favor of petitioner, even though State claimed irreparable harm from delay in completing the trial, which had already started, as petitioners' loss of right not to be placed twice in jeopardy would be irreparable and, in view of likelihood of petitioners' success, as indicated by District Court's grant of the writ, stay would be denied." (2) Appellant contends that the record proves that he filed Exparte and Proposed Emergency Motions For Immediate Release, Double Jeopardy, False Imprisonment, Lack of Trial Court's Jurisdiction to Impose Sentence in the S.C. Court of Appeals, which were filed pursuant to the right to raise subject matter jurisdiction at any time, even for the first time on appeal. Appellant contends that each issue pursuant to his Emergency Motion raised issues challenging the trial court's subject matter jurisdiction to try, and sentence him for the crime of murder, and the South Carolina Dep't of Corrections jurisdiction to hold him in prison under such circumstances. Appellant contends that according to clearly established S.C. Supreme Court law, the issues Appellant raised on appeal may not be waived under any circumstances. See: State v. Guthrie, 358 S.C. 102 (2002), "The lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be

raised sua sponte by the court. Furthermore, lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court. State v. Funderburk, 259 S.C. 256 (1972), "It is elementary that lack of jurisdiction of the court or subject matter can be raised at any time, including for the first time on appeal in this Court. Accordingly, it is immaterial that the defendant failed to appeal from the earlier ruling of Judge Baker or the intermediate ruling of Judge Weatherford, even if it be assumed that he had the right to."

Therefore, as stated in *Funderburk*, a ruling from the circuit court was "immaterial" pursuant to Appellant's right to challenge subject matter jurisdiction in the Appellate Court, and, therefore, the S.C. Court of Appeals should have never remanded Appellant's case back to the circuit court under such circumstances, and should have taken notice of Appellants "Emergency Motions for Immediate Release....," and, according to the law, should have raised "all" of Appellant's issues challenging subject matter jurisdiction sua sponte, on the court's own motion to ensure the administration of justice, and to ensure that Appellant is not being unlawfully punished pursuant to a sentence imposed without jurisdiction. Tatnall v. Gardner, 350 S.C. 135 (2002), " An appellate court must, on its own motion, raise the issue of subject matter jurisdiction to ensure orderly administration of justice." State v. Castleman, 219 S.C. 136 (1951), " Where defendant, convicted of first offense of unlawful possession of intoxicating liquor, failed to question the court's jurisdiction either in the trial court or on appeal, the Supreme Court on its own motion, raised the question of jurisdiction to prevent the punishment of defendant under a sentence imposed by court without jurisdiction."

Therefore, the S.C. Court of Appeals attempt to use *Tucker* inappropriately to allege that Attorney Yarborough has the right to swindle Appellant and his family out of \$7,500, and unlawfully and fraudulently obtain representation of his appeal without Appellant's consent, and waive Appellant's rights, and that somehow, *Tucker* gives the S.C. Court of Appeals the right force Attorney Yarborough's unlawful, fraudulent representation on Appellant, and that

the S.C. Court of Appeals gets to choose what issues Appellant can raise, is contrary to any state or federal laws in this country, and denies Appellant of his right to due process, and equal protection of laws, of which he is entitled to under the Fourteenth Amendment of the United States Constitution.

### **REQUEST FOR FULLER, AND FARETTA HEARING**

3. The S.C. Court of Appeals failed to conduct an adequate hearing to fully assess the purpose behind Appellant's Emergency Motion to Relieve Counsel and Proceed Pro, which is according to S.C. Supreme Court law, a reversible error. Therefore, Appellant respectfully request a hearing pursuant to this appeal. See: State v. Fuller, 337 S.C. 236 (1999).

### **RIGHT TO COUNSEL OF CHOICE FRAUD UPON THE COURT**

Appellant contends that forcing Attorney Yarborough to represent him on appeal would be interfering with Appellant's fee agreement with Attorney Yarborough, which would amount to an unlawful seizure and deprivation of a liberty interest without due process; that liberty interest is Appellant's funds to retain another lawyer of choice if he chooses. Appellant contends that the Court's order would allow the courts to "unlawfully" seize Appellant's money and award it to Attorney Yarborough, and force Appellant to pay Attorney Yarborough for conflicting representation against Appellants wishes. According to clearly established U.S. Supreme Court law, the court's decision constitutes an unconstitutional restraint on Appellants assets which violates Appellants Sixth Amendment right to retain "counsel of choice." See: Louis v. U.S., 146 S. Ct. 1083 (2016), "The Supreme Court, Justice Breyer, held that pretrial restraints on defendant's assets needed to obtain counsel of choice violates the Sixth Amendment. The Sixth Amendment right to counsel grants a defendant "a fair opportunity to secure counsel of his own choice," Powell v. Alabama, 287 U.S. 45, 53 (1932), that he "can afford to hire," Caplin & Drysdal Chartered v. United States, 491 U.S. 617 (1989). "The Court has consistently referred to the right to counsel of choice as "fundamental." The right to select

counsel of choice" is just, "the root meaning" of the Sixth Amendment right to counsel." U.S. v. Gonzalez- Lopez, 548 U.S. 140, 147-148 (2006)."

Appellant contends that allowing Attorney Yarborough to remain as his attorney would deprived Appellant from being heard on constitutional issues which proves that Appellant is being held unlawfully pursuant to a sentence imposed without jurisdiction, which would amount to "fraud upon the court," and would deny Appellant a fair appeal required by due process.

United States v. Throckmorton, 98 U. S. 61 (1878). " Where unsuccessful party has been prevented from fully exhibiting his case, by fraud or deception, as by keeping him away from court, false promise of compromise, or keeping him ignorant of the suit; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where attorney regularly employed corruptly sells out his clients interest; and in similar cases where there has never been a real contest, new suit may be maintained to set aside and annual judgment or decree." See: Sanders v. Smith, 431 S.C. 605 (2020), "Fraud Upon the court, as a ground for relief from judgment, is a narrow and invidious species of fraud that subverts to the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner it's impartial task of adjudging cases that are presented for adjudication." See also: Chewing v. Ford Motor Co., 354 S.C 72 (2003).

Appellant contends that the circumstances surrounding his attorney is irrelevant to real "elephant in the room," which is the extensive amounts of evidence which proves that he is being held falsely imprisoned for nine years and counting, and no matter who his lawyer is, does not justify an unlawful restraint of Appellant's liberty.

For the forgoing reasons this appeal must be granted, and under such circumstances, expeditiously granted, or Appellant will suffer further "irreparable harm" by such delay.

Date: July 24, 2023

Respectfully submitted,

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