STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Greenville County
Hon. Larry R. Patterson, Circuit Court Judge
Appellate Case Tracking No. 2011-195272

The State, Petitioner,

v.

Robert Watkins, Respondent.

Opinion No. 2011-UP-091 (S.C. Ct. App. filed March 8, 2011)

MOTION OUT OF TIME
TO ARGUE AGAINST PRECEDENT

Respondent, through its undersigned counsel, would respectfully show unto this Court as follows:

I.

The Motion to Argue Against Precedent was due to be served and filed October 1, 2013, based on oral argument being scheduled for October 16, 2013. The undersigned, however, was out of the office sick with the stomach flu and was unable to timely file the motion. The undersigned asks the Court to accept this Motion out of time.

II.

The undersigned seeks to argue against this Court's precedent in Floyd v. State, 303 S.C. 298, 400 S.E.2d 145 (1991). The underlying issue is the Court of Appeals'

extension of the Floyd doctrine to prohibit the Post-conviction Relief judge from also sitting as the trial judge on a retrial after Post-Conviction relief is granted by this Court. The State, as explained in its brief, believes this is an improper extension of the Floyd doctrine, but believes it is necessary to argue against the precedent of Floyd.

The State contends, as it did in its brief, that Floyd is an improper and unnecessary departure from the traditional standard of recusal in South Carolina jurisprudence. Numerous cases have indicated the need for actual bias existing from extra-judicial sources in order to require the recusal of a judge. The same policy should apply no matter the situation.

Additionally, as many other states have concluded and as detailed below, the use of the trial judge as the post-conviction judge furthers judicial economy and improves the use of the already strained judicial resources. The Court of Appeals' decision in this case further strains those resources which were unnecessary hampered initially in Floyd. A continuation of the policy in Floyd, and allowing the policy of the Court of Appeals in this case to continue, will have a detrimental effect of judicial resources because circuits will be forced to bring in judges to hear PCR or retrials when no actual bias exists merely because of the judge's previous exercise of their judicial function.

Further, as also detailed in the State's brief, the judicial decision to hear a case is well regulated by the Code of Judicial Conduct. Specifically, Canon 3(C)(1) of the Code of Judicial Conduct, Rule 501, SCACR, states: "A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business."

Finally, this Court should join the overwhelming majority of states, as well as the Federal courts, and allow the trial judge to sit as the post-conviction relief judge. See Panico v. U.S., 412 F.2d 1151 (2nd Cir. 1969) ("One of the purposes for which Congress passed Section 2255 was to make use of the personal observations of the trial judge of trial occurrences in ruling upon attacks on convictions because of such occurrences."); State v. Hamlet, 913 So.2d 493, 496 -497 (Ala. Crim.App. 2005) ("Particular deference is accorded the decision of a circuit judge who presided over the original trial and the subsequent postconviction proceeding, because that judge is in a better position than is an appellate court to evaluate claims that are based on personal observations of, and a familiarity with the circumstances surrounding, the postconviction claims."); Fajeriak v. State, 520 P.2d 795 (Ak. 1974) (acknowledging post-conviction matters are handled by original trial court); Echols v. State, 42 S.W.3d 467, 471 (Ark. 2001) ("This court has consistently held that the judge who presides over a defendant's trial may also preside over that defendant's postconviction proceeding."); Mansfield v. State, 911 So.2d 1160 (Fla. 2005) (trial judge sitting as post-conviction judge not error when no legally sufficient bias or prejudice demonstrated); Martinez v. State, 892 P.2d 488, 490 (Idaho App. 1995) (Idaho statute requires appointment of trial judge in post-conviction matters and only disqualification based on showing of actual bias); Stevens v. State, 770 N.E.2d 739, 762 (Ind. 2002) (acknowledging trial judge can sit as post-conviction judge absent partiality or cause); Schoonover v. State, 582 P.2d 292 (Kan. App. 1978) (finding disqualification only based on proven prejudice or bias and "**prejudice will not be assumed** from the fact that the judge presided over other hearings involving the same litigants"); Bowling v. Com., 80 S.W.3d 405 (Ky. 2002) (acknowledging trial judge can

hear post-conviction motion absent evidence of bias); Hooper v. State, 680 N.W.2d 89, 92 (Minn. 2004) (finding removal of trial judge from presiding in post-conviction action only based on cause); Vance v. State, 799 So.2d 100 (Miss. App. 2001) (trial judge's prior participation in plea hearing did not create an appearance of impropriety requiring judge to disqualify himself from presiding over defendant's subsequent post-conviction relief motion); Logan v. State, 712 S.W.2d 9, 11 (Mo. App. W.D. 1986) ("Mere familiarity with the underlying proceedings does not disqualify a trial judge presiding over post-conviction relief proceedings . . . **In fact, absent a conflict, the original court is recognized as generally the better and most expeditious forum for the subsequent action.**"); Jordan v. State, 194 P.3d 657, 659 (Mont. 2008) (requiring judge that pronounced sentence and served as trial judge hear post-conviction claims); Coleman v. State, 633 P.2d 624, 628 (Mont. 1981) (one reason for the trial judge to handle post-conviction claims is to "allow the judge with the most familiarity of the facts and circumstances surrounding the case to review the post conviction claim so as to **promote efficiency in the administration of justice**"); State v. Sims, 725 N.W.2d 175 (Neb. 2006) ("There is no rule of law which automatically disqualifies a judge who has presided at trial from subsequently considering a postconviction action. To the contrary, it is generally encouraged that the postconviction petition be heard by the same judge that rendered the original judgment. **The judge's familiarity with the case is regarded as beneficial to all concerned because it furthers the goal of an efficient, expeditious, and fair decision on the motion.**"); In re Disqualification of Basinger, 674 N.E.2d 351 (Ohio 1996) ('a judge who presided at trial is not disqualified from ruling on a subsequent petition for post-conviction relief,' and 'a judge who presided in a criminal

trial is not precluded from considering the defendant's motion to vacate the sentence imposed'); Comm. v. Strader, 396 A.2d 697, 703 (Pa. Super. 1978) ("Usually, we find no error in allowing the same judge who presided at a trial or over a guilty plea colloquy to preside at a subsequent [post-conviction] hearing. **In fact, such a procedure is often of benefit to all concerned since the judge is already familiar with the case and may be better able to decide the issues presented.**"); Com. v. Lambert, 765 A.2d 306 (Pa. Super. 2000) ("Pennsylvania law makes clear that it is generally preferable for the same judge who presided at trial to preside over the post-conviction proceedings. **'[F]amiliarity with the case will likely assist the proper administration of justice.'** Only where it is adequately demonstrated that the interests of justice warrant recusal, should a matter be assigned to a different judge."); State v. Garrard, 693 S.W.2d 921 (Tenn. Cr.App. 1985) (acknowledging trial judge may hear post-conviction actions even when issue of competency of counsel not raised); Krueger v. State, 192 N.W.2d 880, 883 (Wis. 1972) ("Our judicial system is predicated upon the premise that trial judges will make their determinations on the basis of the facts before them and **will not be motivated by pride of prior decision**, to which they will adhere contrary to the facts and law as revealed in a subsequent proceeding."); State v. Davies, 621 N.W.2d 387 (Table) (Wis. App. 2000) ("It is a common and accepted practice for the trial court judge who handled a criminal case to handle subsequent postconviction motions. This practice provides no basis for determining that [the judge] was actually biased against Davies, nor does it give rise to the appearance of bias."). Accordingly, this Court should allow the State to argue against the precedent of Floyd and determine, consistent with the overwhelming majority of jurisdictions and judicial efficiency, that the policy of Henry v.

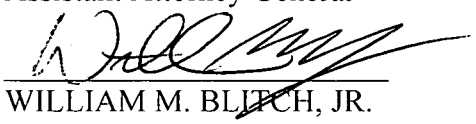
State, 275 S.C. 148, 268 S.E.2d 41 (1980), no requiring automatic recusal is the appropriate policy.

WHEREFORE, Respondent prays that the Court allow the State to argue against the precedent established in Floyd v. State, 303 S.C. 298, 400 S.E.2d 145 (1991); and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General



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October 4, 2013

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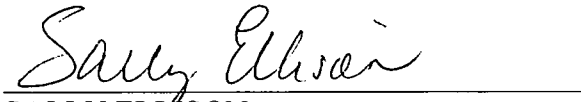
PROOF OF SERVICE

I, Sally Ellison, certify that I have served the Motion Out of Time to Argue Against Precedent on Appellant by depositing a copy of same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.

This 4th day of October, 2013.



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