

State of South Carolina
County of Greenville

In The Supreme Court
of South Carolina

Marro Ramos Arroyos OR,
SCDC No. 301870,
Petitioner,
VS.
State of South Carolina,
Respondent.)

Explanation
243(c)
SCACK

Case No. 2012-CP-23-0708

Petitioner proceeding Pro Se explicates as follows:

On October 24, 2012, Petitioner filed an Application for Post Conviction Relief (PCR). (enclosed).

On December 7, 2012, Petitioner filed motion for discovery. Petitioner has wrote to many people seeking the evidence to prove my unlawful conviction. (enclosed)

On February 7, 2013, Petitioner filed motion to Amend Application. (enclosed)

On April 5, 2013, Petitioner filed Motion For Judgment By Default. (enclosed)

On April 16, 2013, Petitioner filed Motion To Amend Judgment By Default. (enclosed)

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On April 30, 2013, Respondent filed a Return and Motion TO DISMISS as well as a Conditional Order of Dismissal. (enclosed)

On May 7, 2013, the Honorable D. Garrison Hill ordered Petitioner to give "specific reasons, factual or legal, why it should not dismiss the matter."

On May 15, 2013, Petitioner filed a Reply. (enclosed)

On June 6, 2013, Petitioner explained to the court the denial of "access to the courts" here at Lee County Correctional. Petitioner currently has a pending law suit, Hinojos v. SCDC, Civil Action No. 2:13-cv-01900-dfA-1344. (proof enclosed)

On June 20, 2013, a hearing on default was held before the Honorable D. Garrison Hill who then determined the Petitioner is to be appointed counsel for purposes of the hearing.

On August 30, 2013, a second hearing was held, which initially was to be a hearing on summary judgment for the State, but was later converted to the hearing on default. This hearing was held before the Honorable Robin B. Stowell.

On February 21, 2014, a third hearing was held before the Honorable G. Edward Welmaker on a Motion to Vacate Disposition and Reopen Proceedings. (enclosed)

Discussion

The Federal Constitution imposes on the states no obligation to provide appellate review of Criminal Convictions, McKane v. Durston, 153 U.S. 684, 14 S.Ct. 913, 38 L.Ed. 2d 867 (1894). Having provided such an avenue, however, a state may not "bolt the door to equal justice" to indigent defendants, Griffin v. Illinois, 351 U.S. 12, 24, 76 S.Ct. 585, 100 L.Ed. 891 (1956), nor discriminate against criminal defendants whom have little education, learning disabilities, and mental impairments who are particularly handicapped as self-representatives, Kowalski v. Tesmer, 543 U.S. —, —, 125 S.Ct. 564, 160 L.Ed. 2d 811 (1963), relied on Griffin's reasoning to hold that, in first appeals as of right, states must appoint counsel to represent indigent defendants, 372 U.S., at 357, 83 S.Ct. 814. Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed. 2d 341, held, however, that a state need not appoint counsel to aid a poor person in discretionary appeals to the United States' highest Supreme Court, 417 U.S., at 610-612, 615-618, 94 S.Ct. 2437.

Later, this same United States Supreme Court stated in Martinez v. Ryan, 132 S.Ct. 1309, at 1318, that "By [the state] deliberately choosing to move trial ineffectiveness claims out side of the direct-appeal process, where counsel is constitutionally

~~is~~ guaranteed, the State significantly diminishes prisoner's ability to file such claims."

Although the Court recognized the extreme difficulties of a poor layperson bringing an ineffective-assistance-of-trial-counsel claim, it deviated from the reason why certiorari was granted, of, whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state-law right to raise such a claim in a first post-conviction proceeding, has a federal constitutional right to effective assistance of first post-conviction counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim. The Court likewise declined to address that question.

Beginning with Griffin v. Illinois, supra, where it was held that equal justice was not afforded an indigent appellant where the nature of the review depends on the amount of money he has' at 19, 76 S.Ct. at 591, and continuing through Douglas v. California, supra, the Court has consistently held invalid those procedures where the rich man, who appears as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshaling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is, without merit, is forced to shift for himself. At 338, 83 S.Ct. 817.

Thus Beason v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799, established the basic right to counsel. "Appoint of Counsel for an indigent is required at every stage of a criminal

proceeding where substantial right of a criminal may be affected. Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 257, 19 L.Ed. 2d 336 (1967). Such cases as Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. 2d 977 (1964), Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed. 2d 694 (1966), United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, L.Ed. 2d 1149 (1967) and Hilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed. 2d 1178 (1967), mark the beginning point when the right to counsel comes into being. Once the right has matured, the law is now certain that it continues through the conclusion of appellate review, Douglas v. California, *supra*. And where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request. Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 889, 8 L.Ed. 2d 70 (1962); Puckett v. North Carolina, 343 F.2d 462 (4th Cir 1965). Even if counsel appointed to conduct an appeal concludes that the appeal is frivolous and desires to withdraw he must, nevertheless, brief anything in the record which might arguably support the appeal; and if the court finds any legal point arguable on its merits, it must, prior to decision, provide another attorney, Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed. 2d 493 (1967).

In Strickland v. Washington, 406 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). The Court held that criminal defendants have a Sixth Amendment right to "reasonably effective" legal assistance, *id.*, at 687, 104 S.Ct. 2052, and announced a now-familiar test: A defendant claiming ineffective assistance of counsel must show (1) that counsel's representation "fell below an objective

Standard of reasonableness," *id.*, at 688, 104 S.Ct. 2052, and (2) that counsel's deficient performance prejudiced the defendant, *id.*, at 694, 104 S.Ct. 2052.

In most cases, a defendant's claim of ineffective assistance of counsel involves counsel's performance during the course of a legal proceeding, either at trial or on appeal. In such circumstances whether a court requires the defendant to show actual prejudice - "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different," Strickland, 466 U.S., at 694, 104 S.Ct. 2052 - or whether the court instead presume prejudice turns on the magnitude of the deprivation of the right to effective assistance of counsel. That is because "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial," United States v. Cronic, 466 U.S. 648, 649-650, 104 S.Ct. 2039, 80 L. Ed. 2d 657 (1984), or a fair ~~trial~~ appeal, see Person v. Ohio, 488 U.S. 75, 88-89, 109 S.Ct. 346, 102 L. Ed. 2d 300 (1988). "Absent some effect of challenged conduct on the reliability of the... process, the [effective counsel] guarantee is generally not implicated." Cronic, *supra*, at 658, 104 S.Ct. 2039.

In the present case, however, the defendant alleges not that counsel made specific errors in the course of representation, but rather that during the judicial proceeding he was - either actually or constructively - denied the assistance of counsel altogether. "The presumption that counsel's assistance is essential requires [the court] to conclude that a trial is unfair if the accused is

denied counsel at a critical stage." Cronic, supra, at 659, 104 S.Ct. 2039. The same is true on appeal. See Person, supra, at 88, 109 S.Ct. 346. Under such circumstances, "no specific showing of prejudice [is] required" because "the adversary process itself [is] presumptively unreliable" Cronic, supra, at 659, 104 S.Ct. 2039; Person, supra, at 88-89, 109 S.Ct. 346 (complete denial of counsel on appeal requires a presumption of prejudice).

The Applicant, in all actuality, was deprived of the effective assistance of counsel at the closing argument and jury instruction stages of his trial, when counsel failed to object to the prosecutor's closing argument which gave a mandatory presumption of malice, by telling the jury all that was needed to convict the defendant was the fact that he used a gun and automatically made it murder. The solicitor made the statement three times, which, nonetheless, bolstered the judge's jury instruction of malice, which trial counsel also failed to object to. Manslaughter, being an option for the jury was decimated by the mandatory presumption of murder deriving from the use of a pistol precluded manslaughter as a verdict rendering the proceeding unfair and a definite complete denial to have a jury come to their own determination impartially without the influence of the prosecutor or the trial judge.

The supreme court of South Carolina held in Carter v. State, 301 S.C. 396, 392 S.E.2d 184 (1990), that the harmless error analysis is inappropriate where, as here, there is evidence from which the jury could find the defendant guilty of the

lesser offense of Voluntary Manslaughter. Voluntary manslaughter is expressly defined as "the unlawful killing of another without malice, S.C. Code Ann. § 16-3-50 (1985) (Emphasis supplied), so that a charge creating a mandatory presumption of malice precludes manslaughter, clearly prejudicing the Applicant.

The prosecutor's closing argument along with the Judge's jury charge are apparent on the face of the record and it being obvious trial counsel was ineffective for failing to object to trial errors that clearly obliterated his entire trial strategy. The defendant now convicted and the proceedings moved on to direct-review, appellate counsel has the express duty to research the record. Once realizing the record is devoid of any meritorious claims for review he should also have the duty to advise of Post-conviction Relief and assisting the defendant in securing appellate review of his trial counsel's deficient performance.

On October 21, 2011, in Applicant's original Application he submitted a document into evidence with this Court that was a letter from his appellate counsel where counsel clearly stated he did not advise Applicant of his trial counsel being ineffective because he would not know, but Applicant here today has shown a bona fide, per se, evident ineffective assistance of trial counsel claim. Appellate Counsel was therefore ineffective as well for not consulting with the Applicant and assisting him in securing his first appeal of ineffective assistance of trial counsel, rendering the entire judicial proceeding fundamentally unfair. Applicant's first PCR was dismissed without

the appointment of counsel, without a hearing and with prejudice.

In order for an indigent layperson to prosecute a Strickland violation the State of South Carolina has enacted a specific process entitled the Uniform Post-Conviction Procedure Act, S.C. Code Ann §§ 17-27-10 to 160, which, effectively is the first appeal, as of right, to argue the most essential Constitutional guaranty a criminal defendant can ever possess. For if counsel at trial is grossly ineffective for not preserving errors of the law for appellate review, which appellate counsel would be barred from raising, and appellate counsel has no constitutional obligation to research for trial ineffectiveness claims, advise of the possibility of PCR and assist their client in filing the application it will most often result in the forfeiture of an unknown right. To say a criminal defendant does not have a right to PCR would be no more than saying a prisoner has no right at all to the effective assistance at the trial which convicted him because in the State of South Carolina PCR is the only place a criminal whom convicted, can argue his Sixth Amendment United States Constitutional right.

In the United States of America a criminal defendant's right to the effective assistance of counsel is a structural guarantee, which foundation should never be cracked by a State's labyrinthine procedures that dismantles the appointment of counsel for an indigent layperson, see Alice v. State 303 S.C. 448, 409 S.E. 2d 392 (S.C. 1991) Relying on Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed. 2d 539, holding

prisoner has no equal protection or due process right to appointed counsel in post conviction proceedings, and therefore no right to the effective assistance of counsel.

The ruling in Aice, supra, and Finley, supra, are completely unconstitutional. The Uniform Post-Conviction Procedure Act is the first and only designated proceeding which will rule on the merits of an ineffective of trial or appeal counsel claim, no other court will entertain those claims without first being before the State court. The supreme Court of South Carolina, with the Chief Justice Jean Toal delivering the opinion of the Court, has deem the Act a right. See Wilson v. State, 348 S.C. 215, 559 S.E. 2d 581. "A defendant has the procedural right to one fair "bite at the apple." That is, every defendant has a right to file a direct appeal and one PCR application, inasmuch, that the State has elected to make Post-Conviction a "right", then Douglas v. California, supra, must be applied because it is the first appeal as of right to the ineffective assistance of trial counsel claims and the right to counsel on first appeal of right is a "meaningless ritual" if it does not amount to the effective assistance of counsel. See Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821; Coleman v. Thompson, — U.S. —, 111 S.Ct. 2546, 2568 (1991)

A defendant's right to counsel under the Sixth Amendment, as made applicable to the States by the Fourteenth Amendment, in terms of due process, standing alone, in terms of the equal protection clause of the Fourteenth Amendment, or in terms

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of a combination of these, the recent trend of decisions makes clear that every defendant has the unqualified right, whether or not indigent, to be represented by counsel at all critical stages of any prosecution against him. The right begins when the accusatorial process begins as to him. And where the States which are not under the obligation to provide for appellate review, do provide for appellate review, his right to counsel continues through that stage of the proceedings and he must be afforded full resort to that review and to the documents and tools of appellate review, the same as if he were not indigent. Where counsel is clearly required at trial and in certain instances even before the formalities leading to trial have begun and where counsel is clearly required on appeal when provisions for an appeal have been enacted, the Court thinks that counsel is also required in the hiatus between the termination of trial and the beginning of an appeal in order that a defendant know that he has the right to appeal, how to initiate an appeal and whether, in the opinion of counsel, an appeal is indicated. Likewise the interim between direct-appeal and post-conviction is a critical, crucial stage for defendant's whom wish to enforce their Sixth Amendment right to counsel and therefore the Sixth Amendment right to counsel should apply, because it is the only place to enforce the Federal right to counsel, and poor laymen must make decisions which may make the difference between freedom and incarceration.

The South Carolina Supreme Court Rules 50 (5) and

71.1(d) Makes mandatory, that post conviction attorney's make sure that all available grounds are raised in post conviction proceedings. After filing a pro se post conviction application, and after being given court appointed counsel, a pro se litigant cannot thereafter file any further pleadings, and any amendments to his application must be made by Counsel State v. Sanders, 269 S.C. 215, 237 S.E. 2d 63 (1977); Foster v. State, 298 S.C. 306, 379 S.E. 2d 907 (1989).

Thus, if post conviction counsel does not amend the pro se application, the Applicant has no way to have all supporting grounds heard and open the gates for the State, who appoint counsel, effectively deny Applicant Counsel through the court. Creating an unfair process.

Since State v. Carpenter, 277 S.C. 309, 286 S.E. 2d 384 (1982) and State v. Kornahrens, 290 S.C. 281, 350 S.E. 2d 180 (1986), prohibits South Carolina litigants from claims of ineffective assistance of trial counsel during their initial direct appeals as of right on that particular claim. The South Carolina Supreme Court's decision in Aice v. State — S.C. —, 409 S.E. 2d 392 (1991), holding that there is no constitutional right to counsel in state post proceedings is based on a far stretched reading of the Supreme Court decision in Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 951 L.Ed. 2d 539 (1987). The decision in Finley, literally held that there is no constitutional right to counsel in state court discretionary appeals after the appellate stage has been exhausted. Id. 107 S.Ct. at

1993, 1994

Because the claim of ineffective assistance of counsel cannot be exhausted until an application for post conviction relief is filed, South Carolina litigants clearly have a right to effective assistance of trial counsel. Cf. *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); *Coleman v. Thompson*, ___ U.S. ___, 111 S.Ct. 2546, 2568 (1991). As a result, when an applicant is not assisted by a post conviction attorney in setting forth all grounds to support his claim of ineffective assistance of trial counsel to support his claim of ineffective assistance of trial counsel in his initial application, he or she should not be barred thereafter from submitting a second application to include additional grounds for a court's review.

In *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987) and again in *Aice*, supra, the South Carolina Supreme Court cited *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981); *Land v. State*, 274 S.C. 243, 262 S.E.2d 415 (1981); and S.C. Code Ann. § 17-27-90 for the general proposition, that the applicant has the burden of showing that a new ground for relief could not have been raised in a previous application. However, *Aice*, supra, does not give attention to the Court's decision in *Case v. State*, 277 S.C. 474, 289 S.E.2d 413 (1982), which held that if the applicant meets the burden a hearing must be afforded despite the successiveness of the application. The facts in *Case*, established that

Case had no attorney in his first application, and that it was highly doubtful whether, in point of fact, that he could have raised the appropriate arguments, Aice, Supra, Id. 409 S.E. 2d at 394.

The same as in Petitioner's case where he was not appointed counsel in his first PCR application. Petitioner explained to the court in his first application that he should not be time barred due to the fact that his trial nor Appellate counsel never advised nor explained to him about PCR remedies. The Respondent then argued Sutton v. State, 361 S.C. 644, 606 S.E. 2d 779 (2005), holding neither trial nor the appellate counsel had obligation to inform defendants of post-conviction remedies or of one year limitations period. Had Petitioner been appointed counsel it is highly likely counsel would have discovered Sutton was abrogated by Bray v. State, 366 S.C. 137, 620 S.E. 2d 743 (2005) and recognized in Lawrence v. Brutt, 2007 WL 1238660 where the Fourth Circuit rejected the states argument of Sutton, supra, and Petitioner was unable to research these case because they were all on an automated computer which he did not become accessible to until 2013.

Furthermore, because PCR counsel's unwillingness to present particular arguments that have been laid out

before him at the appellant's request functions not only to abridge Petitioner's right to counsel on appeal, but also to deprive the Petitioner of his constitutional right of equal access to the appellate process. Thus, the attorney on PCR, by refusing to carry out his client's express wishes cannot forever foreclose review of non-frivolous constitutional claims.

The Court as well as counsel was aware of the Respondent's waiver of the defenses of statute of limitations and successiveness for failing to assert them in a timely fashion. Petitioner has been requesting for a Rule 59(e) so that the Final Order will reflect a complete record as to each issue presented.

Petitioner only seeks an evidentiary hearing to receive a proper adjudication on the merits of his claims.

Petitioner claims at the least he is entitled to an Austin v. State, 409 S.E. 2d 395, review in accord with King v. State, 417 S.E. 2d 868, to determine if he truly relinquished his right to appeal his first PCR voluntarily.

Petitioner ask for the assistance of counsel to help me get all the transcripts and copies of documents.

Finally Petitioner has asked for counsel to file a

Rule 60 (b)(3) motion which authorizes the circuit court to relieve a party from a final judgment where the party demonstrates "fraud, misrepresentation, or other misconduct of an adverse party".

At a default hearing on August 30, 2013, the Respondent claimed that the Petitioner had to show prejudice for the states delay. Citing Breece v. State, 209 S.C. 177, 236 S.E. 2d 746. This case is in complete conflict with the legislature's intentions in Rule 55(e) SCBCP and amounts to "extrinsic fraud".

In South Carolina, in order for a party to be entitled to relief based on fraud, the moving party must demonstrate extrinsic fraud. Baby Constr., L.P. v. Orr, 358 S.C. 10, 20-21, 594 S.E. 2d 478, 484 (2004); Hagy v. Pruitt, 339 S.C. 425, 431, 529 S.E. 2d 714, 717 (2000).

Fraud is extrinsic when it is collateral to the issues tried in a ~~case~~ case and effectively deprives the litigant of a fair hearing or the opportunity to present its case. Id. Citing Hilton Head Ctr. of S.C., Inc., vs. Pub. Serv., Comm'n of S.C., 294 S.C. 9, 362 S.E. 2d 176 (1987); Mr. G. vs. Mrs. G., 320 S.C. 305, 465 S.E. 2d 101 (Ct. App. 1995), "relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never

been a real contest before the court on the subject matter of the action." Chewing v. Ford Motor Co., 354 S. L. 72, 81, 579 S.E. 2d 605, 610 (2003)

The fact that the states assertion of the Kneece case is in complete conflict with the legislature's intentions in Rule 55(e) SCRPC which states "NO judgment by default shall be entered against the state of South Carolina..., unless the claimant establishes his claim to relief by evidence satisfactory to the court." The Petitioner filed a lengthy brief in detail in his Motion For judgment By Default and at the hearing was prohibited from "fully litigating" his case due to the Kneece case

Whereby Petitioner request this Court to please allow Petitioner to proceed with the writ requested or to remand to the lower court for an evidentiary hearing.

Respectfully
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May 8, 2014.