

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Sumter County
George C. James, Jr., Circuit Court Judge

Appellate Case No. 2014-001661 (Supreme Court)
Appellate Case No. 2013-002735 (Court of Appeals)

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THE STATE,

Respondent, **S.C. Supreme Court**

v.

KEVIN CHOICE,

Petitioner

STATE'S RETURN TO *PRO SE* PETITION FOR
WRIT OF CERTIORARI AND MOTION TO DISMISS

The Petitioner, Kevin Choice, is before this Court upon a motion styled as a "Petition for Certiorari" in which he raises as the question presented:

Did the Court of S.C. Appeals erred when it denied Petitioner right to counsel when it applied *State v. Clinkscales*, 318 S.C. 513, 515, 458 S.E.2d 548, 549 (1995), and denied the Petitioner his request for an extension to attempt to find representation, with the court overlooking the fact that the Petitioner is in indigent status, etc.

Petition for Writ of Certiorari, p. 2.

As set forth below, certiorari to the Court of Appeals is inappropriate at this time because the matter is presently pending briefing before the Court of Appeals. The Court of Appeals acted reasonably within its jurisdiction on denying appointed counsel and extensions

to seek retained counsel. Certiorari is not warranted.

I.

A. Proceedings in the Court of Appeal

The Petitioner has pending in the South Carolina Court of Appeals at the time of this filing an appeal from the denial of a motion for new trial based on after-discovered evidence pursuant to Rule 29(b), SCRCrimP by the Honorable George C. James, Jr., filed December 6, 2013. The notice of appeal was timely filed by counsel Jeremy A. Thompson on December 20, 2013 and filed December 23, 2013.

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The Petitioner made a pro se Motion for Counsel that the court received on January 6, 2013. In the initial motion, he contended that he was incarcerated at Lee Correctional Institution and due to lockdown status was unable to use the law library to properly prepare his appeal in a timely manner. He asserted that he was not a participant in the issue that led to the lockdown and sought assistance of counsel.

Respondent submits that on January 13, 2014, counsel Thompson filed a “motion to be relieved as counsel” in the South Carolina Court of Appeals. In the motion, counsel Thompson stated that he had been appointed to represent Choice in the Circuit Court and had advised Petitioner in writing and in person that he would move to be relieved to handle the appeal or if alternate representation was not secured.” Motion, p. 2. Counsel Thompson offered to handle the appeal if appointed to do so under S.C. Code § 17-3-370. Motion, p. 2, n.1 Counsel Thompson stated that the Division of Appellate Defense had advised him that it was their practice to refuse representation of indigent appellants from Rule 29 denials. In addition to moving to be relieved, counsel requested the time limits for ordering the transcript of the Rule 29 Motion hearing be stayed. Motion, p. 2.

On February 24, 2014, the Court of Appeals granted counsel Thompson's motion to be relieved as counsel. The Court also denied Choice's motion to appoint counsel, citing State v. Clinkscales, 318 S.C. 513, 515, 458 S.E.2d 548, 549 (1995). The Court directed that if Petitioner did not obtain new counsel within thirty (30) days, the Court would presume Choice was proceeding pro se. State v. Choice, Appellate Case No. 2013-002735, Order (S.C.Ct.App. February 24, 2014).

On March 24, 2014, Choice, pro se, made a motion for enlargement of time to retain appellate counsel for representation. On May 16, 2014 the Court of Appeals entered an Order granting the motion. The Court gave Choice until June 2, 2014 to retain counsel, again noting that if the Court was not notified of new counsel by that date, it would presume he was proceeding pro se. The Court further stated that further extension requests must be based upon "good cause." Order, May 16, 2014.

On May 30, 2014, Choice, pro se, made another request to extend the time to secure counsel. In this motion, Choice claimed that on May 22, 2014 he had received the Court's earlier May 16, 2014 Order extending the time until June 2, 2014. He stated this gave him only six (6) days to obtain counsel and sought that 30 days to get representation. He further claimed that State v. Clinkscales was not properly applied because he was represented by (appointed) counsel at the hearing stage. Motion, dated May 30, 2014.

On July 2, 2014, the Court of Appeals denied the extension request for additional time to seek retained counsel:

Because Appellant has failed to show good cause, his request for an extension is denied. Within 30 days, Appellant shall file and serve his initial brief and designation of matter.

Order, July 2, 2014.

On July 17, 2014, Respondent received a pro se "Motion for Rehearing En Banc." He claimed he sought rehearing because he needed additional time "to generate funds to retain counsel." Alternately, he asserted again that Clinkscales was misapplied because he had appointed counsel at the Rule 29 hearing. Motion for Rehearing, rec'd July 17, 2014.

On July 23, 2014, Deputy Clerk Allen, on behalf of the Court of Appeals, responded that no action would be taken on the Motion for Rehearing Enbanc”, related to the July 2, 2014 Order. The Clerk’s Office referred to SCACR Rule 240(i), and “no action will be taken on your motion because the motion did not dismiss or finally decide the appeal.” Letter, July 23, 2014.

II.

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The Petitioner, Kevin L. Choice, #257223, is incarcerated with the South Carolina Department of Corrections at the Lee Correctional Institution pursuant to the Sumter County Clerk of Court’s orders of commitment. The Sumter County Grand Jury indicted the Petitioner at the September 1999 term of General Sessions for Murder, Possession of a Firearm During the Commission of a Violent Crime, and Possession of a Firearm on the Premises of an ABC Store (99-GS-43-756). The Petitioner was represented by Patrick Wright, Esquire. On March 5-7, 2001, the Petitioner went to trial by jury and was found guilty as charged. The Honorable Henry L. McKellar sentenced the Petitioner to imprisonment for life without parole, a concurrent term of five (5) years, and a concurrent term of three (3) years.

The South Carolina Court of Appeals dismissed Petitioner’s appeal and relieved counsel Dudek. State v. Choice, Op. No. 2002-UP-603 (S.C.Ct.App. filed October 2002). A petition for rehearing was made. The Court of Appeals denied the Petition on November 21, 2002. Certiorari to the South Carolina Supreme court was denied on May 14, 2003.

The Petitioner has sought other collateral review in state and federal court. Choice v. State of South Carolina, 2002-CP-43-1377; Choice v. Eagleton, et. Al, 8:03-1999-RBH-BHH.

III.

The Petition for Writ of Certiorari must be dismissed. First, this is not certiorari

pursuant to SCACR Rule 242 because it is not from a final decision that dismissed the appeal from the denial of the new trial, but rather is simply a request to grant appointment of appellate counsel to perfect his case. It should be noted that in his extension motions, he alternately had requested below an additional 30 days to seek retention of counsel, but as of yet has apparently failed to retain appellate counsel.¹

This is a procedural matter that does not rise to the extraordinary level of common law certiorari in this Court's original jurisdiction. The writ is an extraordinary writ and may be used to correct an unlawful procedure. In City of Columbia v. S.C. Public Service Commission, 242 S.C. 528, 131 S.E.2d 705 (1963), the Court explained the attributes of the common law writ of certiorari:

At common law the writ of certiorari is used for two purposes: (1) As an appellate proceeding for the re-examination of some action of an inferior tribunal. (2) As an auxiliary process to enable the Court to obtain further information with respect to some matter already before it for adjudication.

While certiorari has been said to be original in nature, it has also been said to be appellate. It may be said, indeed, to have characteristics of both. For example, to the extent that it involves the review of the proceedings of an inferior court, certiorari is an appellate proceeding, but to the extent that the subject matter of the proceeding brought before the appellate court will not be reinvestigated, tried, or determined on the merits as on appeal or writ of error, it is an original proceeding.

242 S.C. at 534, 131 S.E.2d at 708 (citations omitted). When reviewing the decision of an inferior tribunal "on certiorari" or "on appeal", the writ is said to be appellate in nature. *Id.* ("An appeal is a review by a superior court of some proceeding held in an inferior tribunal. The method of review may be called appeal or certiorari and be classified as

¹ Respondent's counsel has no record of the transcript of the November 21, 2013 new trial hearing being ordered by Appellant or someone on his behalf, consistent with the requirements of SCACR Rule 207. Counsel Thompson in his motion to dismiss him as counsel sought a delay to the Rule requiring ordering the transcript within the designated time period.

an appellate proceeding....”); Rowe v. City of W. Columbia, 334 S.C. 400, 404, 513 S.E.2d 379, 381 (Ct.App. 1999) (“[W]hen a court is reviewing some proceeding held in a lower tribunal, the proceeding is an appellate proceeding, regardless of the title given the proceedings by the reviewing court.”).

Here, the Petitioner’s basic complaint is that the Court of Appeals should have appointed him counsel from his appeal from the denial of a motion for new trial pursuant to Rule 29 because he had appointed counsel at the hearing.² In State v. Clinkscales 318 S.C. 513, 458 S.E.2d 548 (1995), this Court had held that there is no constitutional right to counsel on a motion for new trial on the ground of after discovered evidence. Further, the constitutional right to counsel under the Sixth Amendment extends only to the first right to appeal after a criminal conviction. Pennsylvania v. Finley, 481 U.S. 551 (1987). See Wainwright v. Torna, 455 U.S. 586 (1982) (no 6th Amendment right to counsel in pursuing discretionary appeal); Douglas v. State, 369 S.C. 213, 631 S.E.2d 542 (2006) (same).

Respondent’s counsel acknowledges that under S.C. Code § 17-3-370, the appellate courts have the authority to appoint counsel to represent “indigent persons when the division [of Appellate Defense] deems it advisable that it not provide representation to indigent persons”, or under § 17-3-360(3) the Division of Appellate Defense “shall represent indigents, other than at trial or commitment proceedings when appointed by the Court.” Thus, there are discretionary statutory provisions to allow appointment. However, these matters reasonably rest with the Court of Appeals in this instant. As noted above, the reason he initially set forth for counsel was because he was affected by the stated lockdown at Lee Correctional Institution.

² It is unclear why counsel was appointed at the hearing.

Certiorari is an extraordinary remedy. The Court of Appeals actions were reasonable and consistent with Clinkscales. While Respondent's counsel and the appellate court may benefit by acting through an appointed counsel rather than directly with an incarcerated person, the law does not require it. Absent the showing of any extraordinary reasons for appointment for an indigent, the Court of Appeals did not act beyond their jurisdiction. Certiorari is not warranted in this setting and should be denied.

Respectfully submitted,

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August 8, 2014

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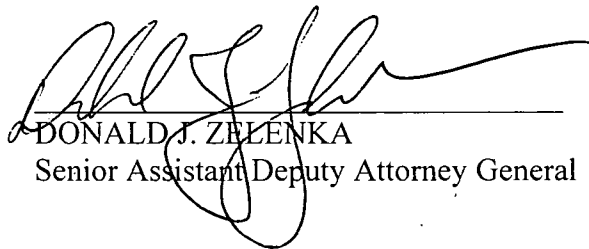
CERTIFICATE OF SERVICE

I, **Donald J. Zelenka**, hereby certify that I have served the State's Return to *Pro Se* **S.C. Supreme Court**

Petition for Writ of Certiorari and Motion to Dismiss in the foregoing action by depositing copies in the United States mail, postage prepaid to:

Kevin Choice, #257223
Lee Correctional Institution
990 Wisacky Highway
Bishopville, SC 29010

This 8th day of August, 2014.



DONALD J. ZELENKA
Senior Assistant Deputy Attorney General