

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Spartanburg County  
J. Mark Hayes, II, Circuit Court Judge  
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RECEIVED

JAN 28 2015

S.C. Supreme Court

PAUL LESLIE COX,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001211  
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JOHNSON PETITION FOR WRIT OF CERTIORARI  
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ATTORNEY FOR PETITIONER

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QUESTION PRESENTED

Did the post-conviction court err by dismissing petitioner's PCR application for failure to prosecute based on petitioner's behavior at the PCR hearing where Petitioner left the witness stand and attempted to leave the courtroom after testifying, since the proper remedy was to hold him in contempt if he was deemed disruptive, rather than dismiss his PCR claims which had been fully presented otherwise?

## STATEMENT OF FACTS

Petitioner was indicted at the March 2, 1987 term of the Spartanburg County Grand Jury for the offenses of kidnapping and assault and battery of a high and aggravated nature. (ABHAN). Both crimes involved the same victim. App. 292 – 293.

Petitioner appeared on April 16, 1987 before the Honorable Luke N. Brown. Petitioner represented himself. John Bowden was the assistant solicitor. App. 1.

The solicitor told Judge Brown that petitioner did not want an attorney and that petitioner was pleading guilty in return for “all other charges against him being dropped.” App. 2, ll. 4-14. Petitioner was serving a ten year sentence for “a stolen vehicle” at the time he entered his guilty plea. The solicitor asked the judge to back date these convictions to 1983. App. 2, l. 4 – 3, l. 23.

Petitioner told the judge that he did not need “the Public Defender. I know what I’m doing. I plead guilty on my own free will. I would deny a Public Defender. I will deny being represented by any kind of counsel.” App. 3, l. 20 – 4, l. 6.

The assistant solicitor told the judge that petitioner was employed on a work detail in prison when he stole the prison van and went to his grandmother’s house. The assistant solicitor told the judge that petitioner then assaulted his grandmother, tied her up, and stole her car. App. 7, l. 3 – 8, l. 20.

Judge Brown asked then petitioner whether he had been evaluated at the state hospital. Petitioner took exception to that suggestion, and he again asked the judge to “accept my guilty plea for a life sentence.” Petitioner said otherwise he was going to have a jury trial. App. 9, ll. 5-16.

Judge Brown inquired if petitioner thought he ought to be sentenced to life imprisonment without the assistance of an attorney. Petitioner responded that “the last attorney he had” did not do a good job for him, and he again said that he did not want an attorney. App. 12, l. 9 – 15, l. 19.

The judge asked petitioner if he would cooperate if he was sent for an evaluation at “the State Hospital.” Petitioner answered that he would not cooperate, and he stated he would refuse to go to the State Hospital under any circumstances. App. 15, l. 20 – 18, l. 16.

There was not anything approaching adequate Faretta<sup>1</sup> warnings given to petitioner in this case regarding the dangers and disadvantageous of self-representation. Judge Brown sentenced petitioner to life imprisonment. App. 17, ll. 8-12; App. 293.

Petitioner was subsequently tried on August 3-4, 1987 before the Honorable William B. Traxler, Jr. and a jury for the offenses of assault and battery with intent to kill, and possession of contraband. Petitioner was represented by Robert C. Ray. Robert Childs, III was the assistant solicitor. App. 23. At the conclusion of the trial the jury found petitioner guilty of assault and battery with intent to kill (ABIK), and possession of contraband. App. 250, ll. 17-22.

Judge Traxler sentenced petitioner for “twenty years consecutive to all other sentences now existing” for ABIK. The judge also imposed a ten years consecutive sentence on the contraband charge. App. 251, l. 21 – 252, l. 3.

Petitioner filed an application for post-conviction relief on August 7, 2007. App. 253 - 259. The state filed a return and motion to dismiss dated October 3, 2007. The state asserted petitioner first filed a PCR action on September 23, 1988. The state alleged petitioner filed his fifth application for PCR on September 8, 2000. App. 260 – 261. The state requested that this PCR action be dismissed as successive, and barred by the Statute of Limitations. App. 263.

An order of dismissal was issued by the Honorable J. Mark Hayes, II on May 22, 2008. Supp. App. 1–6. Judge Hayes ruled the application was barred by the Statute of Limitations and because it was successive. Supp. App. 3–4.

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<sup>1</sup> Faretta v. California, 422 U.S. 806 (1975).

On June 18, 2008 petitioner's PCR attorney, William S. F. Freeman, filed a motion to reconsider. Supp. App. 7-13. This motion to reconsider argued that the court should order petitioner eligible for parole after twenty years. Supp. App. 7-11. Freeman also argued that petitioner's kidnapping conviction should be backdated to June 16, 1983 as promised. Supp. App. 12-13. Counsel also filed a Rule 59(e), SCRCR, motion to alter or amend dated October 14, 2008. Supp. App. 17-19.

An evidentiary hearing was ultimately convened on March 10, 2014 before the Honorable J. Mark Hayes, II. William S. F. Freeman represented petitioner. James Clayton Mitchell, III, and Suzanne H. White represented the state. App. 265.

During the evidentiary hearing PCR counsel Freeman told the judge that the kidnapping offense occurred on January 13, 1987. Petitioner pled guilty before Judge Brown on April 16, 1987, and he was sentenced to life imprisonment. App. 1; App. 268, ll. 5-15; App. 292.

Freeman noted that Judge Brown told petitioner even with his life sentence he would be eligible for parole in ten years. App. 268, ll. 9-20. Freeman said the [subsequent] sentence for ABIK "took away Mr. Cox's right to parole eligibility." [The kidnapping sentenced imposed by Judge Brown, and the ABIK subsequent sentence given Judge Traxler]. App. 268, ll. 5-20. Counsel added: "I'm not sure that that's the case, Your Honor, we'd ask Mr. Cox to come on forward and give his testimony on those points." App. 268, ll. 9-20.

Petitioner testified that Officer Carl Mabry was fired from the Woodruff Police Department in 1981. Petitioner stated Officer Mabry therefore could not have issued a warrant for his arrest in 1987 [in the kidnapping case involving his grandmother]. Carl Mabry was the witness before the Grand Jury listed on the indictment. App. 270, l. 7 - 271, l. 8; App. 293. Petitioner said that he

wanted to make a telephone call for the person to put on the speakerphone where he would be able to prove that his allegation was correct. App. 270, l. 12 – 271, l. 18.

Petitioner also alleged the state had violated a plea agreement. His sentence was supposed to be backdated to 1983, apparently so the Omnibus Crime Bill of 1986 would not make him ineligible for parole. Petitioner asserted that he had been “railroaded” in this case. App. 272, l. 14 – 275, l. 20. Petitioner also continued to insist his indictment was defective because Officer Mabry was not a lawful officer of the law, and that a plea bargain had been violated. App. 280, l. 6 – 281, l. 16.

Petitioner again noted that he was eligible for parole within ten years after he pled guilty to kidnapping before Judge Brown in 1987. App. 281, l. 17 – 282, l. 4. PCR Freeman moved that the transcript of the guilty plea be conformed to the audiotape of the guilty plea proceeding to the extent they differed. The Assistant Attorney General opposed this motion stating he was not sure there was a transcript of the guilty plea from 1987. There is a transcript of that guilty plea proceeding that is cited to above. App. 282, l. 5 – 283, l. 21.

At this point in the PCR hearing, petitioner asserted: “I’m finished”, and he apparently left the witness stand. A security officer states” “One minute, Cox.” As petitioner then conferred with PCR Counsel Freeman the judge stepped off the bench, and a recess was taken.

When court was resumed, Freeman told the judge that he would rely on the arguments made, and the documents already filed in support of petitioner’s claim to PCR relief. Freeman also offered that petitioner did not wish to testify anymore, that petitioner had left the courtroom and he instructed counsel to withdraw “after I make these motions. . . .” App. 283, l. 19 – 284, l. 10

The Assistant Attorney General asked the court to treat this situation as a “voluntary dismissal of the case since Mr. Cox is not here, we’d also like to state for the record that this is Mr.

Cox's PCR filing." He also argued that petitioner had filed six PCR applications since August of 2000, and that petitioner filed eight PCR applications in 2013. App. 284, ll. 11-24.

The state also argued pursuant to S.C. Code §24-21-640 that petitioner was not eligible for parole because he had been convicted of separate violent crimes pursuant to S.C. Code § 16-1-60. App. 284, l. 25 – 286, l. 15. The state consented to PCR counsel being relieved based on petitioner "being uncooperative." App. 286, ll. 6-20.

The judge ruled that the "proper approach" would be to consider the events in the courtroom as "a termination or withdrawal of the application since the witness stopped testifying, did not remain in the courtroom." The judge noted that petitioner left the witness stand and started to leave the courtroom "until security was able to stop him . . ." The judge noted he left the bench at that point, and he concluded petitioner no longer wished to continue with the hearing. The judge ruled that he considered the application for PCR withdrawn, and he granted counsel's motion to be relieved." App. 287, ll. 2-24.

An order of dismissal dated April 28, 2014 was then issued. App. 290 – 291. The order stated that "the applicant became upset while being examined by his attorney and chose not to continue the hearing." The order noted that "applicant became uncooperative and attempted to leave the courtroom. Applicant unequivocally stated that he wished to terminate counsel and withdraw his application. Due to applicant's actions at the hearing, the Respondent moved pursuant to Rule 41(b), SCRCPP, to dismiss this matter due to the Applicant's failure to prosecute and his multiple requests to withdraw his application." App. 290 – 291.

From this order, petitioner is seeking a writ of certiorari pursuant to Rule 243, SCACR.

## ARGUMENT

The post-conviction court err by dismissing petitioner's PCR application for failure to prosecute based on petitioner's behavior at the PCR hearing where Petitioner left the witness stand and attempted to leave the courtroom after testifying, since the proper remedy was to hold him in contempt if he was deemed disruptive, rather than dismiss his PCR claims which had been fully presented otherwise.

Petitioner's assertion is straightforward: If the PCR judge thought petitioner's behavior in leaving the witness stand and the courtroom without permission constituted misconduct, the remedy was to hold petitioner in contempt of court, not to dismiss his PCR action which had otherwise been heard and argued. See Rhoad v. State, 372 S.C. 100, 641 S.E.2d 35 (Ct.App. 2007) (Applicant properly held in contempt during the PCR hearing for his vulgar gesture towards his trial attorney).

In a case where dismissal is entertained as a sanction for contempt or misconduct it should appear that dismissal as a penalty is provided for by statute or court rule. See Davis v. Parkview Apartments, 409 S.C. 266, 762 S.E.2d 535 (2014)(discovery violations can be sanctioned *and* result in the dismissal of the underlying action). Cf State v. Brandt, 393 S.C. 526, 713 S.E.2d 591 92011); Brandt v. Gooding, 268 S.C. 618, 629, 630 S.E.2d 259, 264 (2006).

PCR counsel correctly argued that all the materials were before the court for it to make its findings on whether petitioner should be granted relief. The main issue involved the allegation that the court should rule petitioner was parole eligible. Dismissal, respectfully to the PCR judge, was not justified in this case.

To the extent the state can argue it was prejudiced by petitioner's behavior it would be on the grounds it never got to cross-examine petitioner. However, the state correctly did not argue, given this record, that it was prejudiced by its inability to cross-examine petitioner.

The Assistant Attorney General argued for dismissal based on petitioner abandoning or failing to prosecute his PCR action. This record respectfully does not show petitioner abandoned or did not prosecute the action as PCR counsel told the judge. The documents, exhibits, and petitioner's testimony provided the PCR judge with sufficient evidence upon which to rule on the PCR issues. These issue were the backdating his kidnapping sentence so a life sentence would not result under the Omnibus Crime Bill of 1986, petitioner's parole eligibility, and consideration of the 1987 guilty plea wherein petitioner was not represented by counsel, was not warned of the dangers and disadvantageous of self-representation, and the plea bargain he complained was not honored. App. 3, ll. 8-9; app. 5, l. 5- 21, l. 5; app. 272, l. 14 – 274, l. 10; Second Supp. App. 1-6.

This record indicates mental health problems, and the absence of the guiding hand of counsel has exacerbated this situation. Based on the above, petitioner most respectfully submits this Court should remand his case to the Spartanburg County Court of Common Pleas with instructions for the PCR judge to issue an order of dismissal addressing the merits of petitioner's PCR issues.

CONCLUSION

By reason of the foregoing arguments, a petition for writ of certiorari should be granted to allow full briefing on these issues. In the alternative, an order should respectfully be issued remanding petitioner's case to the Spartanburg County Court of Common Pleas so an order addressing petitioner's PCR grounds can be issued.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', is written above a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 28<sup>th</sup> day of January, 2015.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO SPARTANBURG COUNTY  
J. MARK HAYES, II, CIRCUIT COURT JUDGE

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PAUL LESLIE COX,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001211

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Paul Leslie Cox states:

1. He is an Chief Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on March 10, 2014. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Paul Leslie Cox.

Respectfully submitted,



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Robert M. Dudek  
Chief Appellate Defender  
ATTORNEY FOR PETITIONER

This 28th day of January, 2015

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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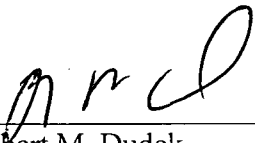
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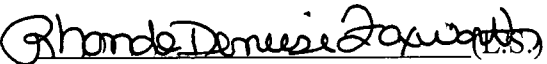
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CERTIFICATE OF SERVICE  
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I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix, the supplemental appendix and the second supplemental appendix in this case have been served on J. Clayton Mitchell, Esquire, Office of the Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and upon Paul Leslie Cox, # 00075206, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 28th day of January, 2015.

  
\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day  
of January, 2015.

  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires: October 17, 2021.