

STATE OF SOUTH CAROLINA
In The Supreme Court

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MAY 12 2015

CERTIORARI TO EDGEFIELD COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2014-00591

Fredy Deleon,.....Respondent-Petitioner

v.

STATE OF SOUTH CAROLINA,Petitioner-Respondent.

**RETURN TO THE CROSS-PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

WALT WHITMIRE
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ATTORNEYS FOR RESPONDENT

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The underlying action challenging White counsel’s performance is not cognizable in PCR. Regardless, any collateral attack on White counsel’s performance for failing to raise the purported issue, on discretionary appeal, that the Trial Judge erred in denying Deleon’s motion for directed verdict is wholly without merit in light of State v. Hernandez and cannot support any grant of PCR relief.
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QUESTION PRESENTED

1. The underlying action challenging White counsel's performance is not cognizable in PCR. Regardless, any collateral attack on White counsel's performance for failing to raise the purported issue, on discretionary appeal, that the Trial Judge erred in denying Deleon's motion for directed verdict is wholly without merit in light of State v. Hernandez and cannot support any grant of PCR relief.
2. The underlying action challenging White counsel's performance is not cognizable in PCR. Regardless, any collateral attack on White counsel's performance for failing to raise the issue, on discretionary appeal, that the Trial Judge erred in denying Deleon's motion to suppress the narcotics pursuant to a purported Fourth Amendment violation was without merit and would not support any grant of relief under the clear Southerland v. State standard of review.

STATEMENT OF THE CASE

The State adopts its Statement of the Case in the Petition its Petitioner-Respondent's Petition for Writ of Certiorari. **Petitioner-Respondent's PWC pp.3-7.**

STANDARD OF REVIEW

The State adopts its Standard of Review in the Petition its Petitioner-Respondent's Petition for Writ of Certiorari. **Petitioner-Respondent's PWC p.8.**

ARGUMENT

I.

The underlying action challenging White counsel's performance is not cognizable in PCR. Regardless, any collateral attack on White counsel's performance for failing to raise the purported issue, on discretionary appeal, that the Trial Judge erred in denying Deleon's motion for directed verdict is wholly without merit in light of State v. Hernandez and cannot support any grant of PCR relief.

The State submits that the PCR Judge erred as a matter of law in finding that allegation of ineffective assistance of White v. State counsel is per se cognizable in this jurisdiction constitutes an error of law in light of S.C. Code Ann. § 17-27-90; Kelly v. State. Code Section 17-27-90 stipulates "[a]ny ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application." Second, this Court in Kelly recently held that "we hereby recognize that the holding in Martinez is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions." Kelly v. State,

404 S.C. 365, 745 S.E.2d 377 (2013). See also **Petitioner-Respondent's PWC pp. 9-10.**

Addressing the merits, Deleon's allegation that White counsel's performance was defective for failure to raise the issue on the discretionary appeal of whether the Trial Judge erred in denying Deleon's motion for a directed verdict is incredible in light of this Court's prior holding in State v. Hernandez. See State v. Hernandez, 382 S.C. 620, 625, 677 S.E.2d 603, 605 (2009); see also **Petitioner-Respondent's PWC pp.15-16.** Therefore, this matter that was not addressed by the PCR Judge¹, does not provide additional support for the erroneous grant of PCR relief. Failure to raise an unmeritorious issue on appeal is per se non-prejudicial. See Petitioner-Respondent's PWC pp.10-12.

II.

The underlying action challenging White counsel's performance is not cognizable in PCR. Regardless, any collateral attack on White counsel's performance for failing to raise the issue, on discretionary appeal, that the Trial Judge erred in denying Deleon's motion to suppress the narcotics pursuant to a purported Fourth Amendment violation was without merit and would not support any grant of relief under the clear Southerland v. State standard of review.

The State submits that the PCR Judge erred as a matter of law in finding that allegation of ineffective assistance of White v. State counsel is per se cognizable in this jurisdiction constitutes an error of law in light of S.C. Code Ann. § 17-27-90; Kelly v. State. Code Section 17-27-90 stipulates "[a]ny ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the

¹ Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (2006) (allegation that attorney acted outside the scope of his professional responsibilities by soliciting dominant estate owners for lawsuit and filing lawsuit without their knowledge was raised at motion to alter or amend judgment and thus was preserved for review).

conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application.” Second, this Court in Kelly recently held that “we hereby recognize that the holding in Martinez is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions.” Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013). See also **Petitioner-Respondent’s PWC pp. 9-10.**

Addressing the merits, Deleon’s allegation that White counsel’s performance was defective for failing to raise the issue on appeal of whether the Trial Judge erred in denying Deleon’s motion to suppress the narcotics pursuant to a purported Fourth Amendment violation is wholly lacking in merit for the five reasons, any of which was dispositive standing alone, previously announced in the State’s Petition. **Petitioner-Respondent’s PWC pp. 13-16.** Failure to raise an unmeritorious issue on appeal is per se non-prejudicial on any grant of relief. See **Petitioner-Respondent’s PWC pp.10-12.**

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny Deleon's Respondent-Petitioner's Petition for Writ of Certiorari and grant the State's Petitioner-Respondent's Petition. However, if this Court grants certiorari here, the State requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

ALAN WILSON
Attorney General

WALT WHITMIRE
Assistant Attorney General
S.C. Bar # 100793

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By: 
ATTORNEYS FOR RESPONDENT

May 12th, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

Certiorari to Edgefield County
Court of Common Pleas

The Honorable Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2014-00591

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S.C. Supreme Court

FREDY DELEON,

RESPONDENT- PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

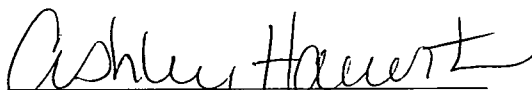
PETITIONER- RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of Return to the Cross-Petition for Writ of Certiorari, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Mr. Jeremy Adam Thompson, Esquire
Law Ofc. of Jeremy A. Thompson, LLC
PO Box 12891
Columbia, SC 29211

This 12th day of May, 2015.


ASHLEY HAWORTH
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

MAY 12 2015

May 12, 2015

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Fredy Deleon v. State of South Carolina
Lower Court Case No: 2012-CP-19-0304
Appellate Case No. 2014-000591

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to the Cross-Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

J. Walt Whitmire
Assistant Attorney General
SC Bar No. 100793

JWW/ah
Enclosures

cc: Jeremy A. Thompson, Esquire (2 copies)
Trisha Allen, Victim Services (1 copy)