

November 6, 2012

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S.C. SUPREME COURT

Re: Carlos Miguel Gill v. State
Appellate Case No. 2012-213098

Dear Clerk:

The Petitioner respectfully provides this Honorable Court with the Written Explanation as required by Rule 243(c). The Petitioner respectfully informs this Court that the sufficient facts and arguments contained in the Written Explanation or supported by the Record of his first PCR action, 2005-CP-46-1958. The enclosures included herein also supports fact in the Written Explanation. Petitioner respectfully ask that once the Written Explanation is recieved by this Court, please forward a copy back to him. Thank You very much for your help in this matter.

Sincerely Yours,

Carlos M. Gill

[Enclosures]

Table of Authorities

Cases

Foretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975)

Gardner v. State, 351 S.C. 407, 570 S.E. 2d 184 (2002)

State v. Gill, 355 S.C. 234, 584 S.E. 2d 432 (Ct. App. 2003)

Prince v. State, 301 S.C. 422, 392 S.E. 2d 462 (1990)

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984)

Gray v. Greer, 800 F. 2d 644, 646 (7th Cir. 1986)

Pruitt v. State, 310 S.C. 254, 423 S.E. 2d 127 (1992)

McCray v. State, 305 S.C. 329, 408 S.E. 2d 241 (1991)

Lanier v. Lanier, 364 S.C. 211, 612 S.E. 2d 456 (S.C. App. 2005)

Austin v. State, 305 S.C. 453, 409 S.E. 2d 395 (1991)

Gamble v. State, 298 S.C. 176, 178, 379 S.E. 2d 118, 119 (1989)

State v. Thompson, 355 S.C. 255, 261-62, 584 S.E. 2d 131, 135 (Ct. App. 2003)

Plyler v. State, 309 S.C. 408, 424 S.E.2d 477 (1992)

Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983)

Lottin v. State, 278 S.C. 376, 296 S.E.2d 533 (1982)

Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991)

Statutes

S.C. Code Ann. § 17-27-80 (1976)

S.C. Code Ann. § 17-27-90 (1976)

S.C. Code Ann. § 17-27-100 (1976)

Constitutional Provisions

U.S. Const. Six Amend.

U.S. Const. Fourteenth Amend.

Written Explanation

In the present case there is probative evidence to support the fact Petitioner's first PCR action was not complete because the Order of Dismissal did not address all issues raised during his PCR hearing. Petitioner's current PCR action is not successive or untimely under the statute of limitations rule because the PCR Court never finally adjudicated Petitioner's issues raised in his original petition.

In the Final Order of Dismissal the Respondent quoted the following verbatim:

The Applicant argues the PCR court in his 2005 PCR action failed to address all of the issues presented at the evidentiary hearing in its Order of Dismissal; namely the ineffective assistance of appellate counsel claim. The Applicant specifically claims the Honorable Bruce Howe Hendricks Report and Recommendation confirms that the 2005 PCR court's Order of Dismissal neglects to include the ineffective assistance of appellate counsel claim. However, the Applicant's argument is in error. While the District Court's Report and Recommendation notes the PCR court did not address whether appellate counsel was ineffective for abandoning the issue of whether the Applicant was warned of the dangers of self-representation by the trial court, the District Court did acknowledge the PCR court addressed whether appellate counsel was ineffective for failing to raise an issue regarding an allegedly improper bench warrant. Additionally, this Court finds the PCR court in its

2005 Order of Dismissal specifically addressed the claim of ineffective assistance of appellate counsel claim. On pages 5 and 6 of the Order of Dismissal, the PCR court found the Applicant failed to prove any of the issues he wanted raised on appeal would have been more successful than the issues which were raised by appellate counsel. The PCR court also held the issue regarding the Applicants waiver of representation would have been stronger than the issue raised, but appellate counsel is not required to raise every issue. The PCR court further found no prejudice to Applicant's case. This Court has reviewed the Applicant's response to the States motion to dismiss in its entirety, in conjunction with the original pleadings and finds that a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final. See the Final Order of Dismissal enclosed.

The Petitioner respectfully ask this Honorable Court to please notice that the Final Order above makes no mention at all of the PCR Court directly addressing the issue of whether appellate counsel was ineffective when an constitutional argument was abandoned during the course of direct appeal. However the Final Order makes reference to an ineffective claim regarding an improper bench warrant that was totally irrelevant to the ineffective claim that was not addressed in the PCR courts Order of Dismissal.

The District Court's Report and Recommendation and the PCR court's Order of Dismissal serves as probative evidence and clearly supports the fact that the PCR court did not address whether appellate counsel

was ineffective for abandoning the issue of whether the Petitioner was warned of the dangers of self-representation by the trial court.

Petitioner submits that besides the examination of the assistant solicitor, Ms. Thomas, and himself, the entire PCR hearing was devoted to the ineffective assistance of appellate counsel claim based on the fact that counsel abandoned an constitutional argument during direct appeal.

During Petitioner's hearing, his attorney Mr. Martens presented an argument based on the established principles set forth in Gardner v. State, 351 S.C. 407, 570 S.E.2d 184 (2002). In Gardner the South Carolina Supreme Court held that in a post conviction relief (PCR) action, if the record fails to demonstrate the petitioner made an informed choice to proceed pro se, with "eyes open" then the petitioner did not make a knowing and voluntary waiver of counsel.

Mr. Martens explained to the PCR court that appellate counsel did in fact raise an argument to the South Carolina Court of Appeals based on established principles from Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed 562 (1975) relating to Gardner.

Applying principles set forth in Faretta and its progeny, this Court held

tion order to waive the right to counsel, the accused must be (1) advised of his right to counsel and (2) adequately warned of the dangers of self-representation. . . . If the trial judge fails to address the disadvantages of appearing pro se, as required by the second prong of Faretta "this Court will look to the record to determine whether petitioner had sufficient background or was appraised of his rights by some other source."

Gardner v. State, 351 S.C. 407, 570 S.E.2d 184 (2002) (quoting Prince v. State, 301 S.C. 422, 392 S.E.2d 462 (1990) and citing Faretta, 422 U.S. 806 (1975)).

While Mr. Martens was explaining that appellate counsel raised the Faretta issue to the Court of Appeals, and that the Court of Appeals neglected to address this issue, the PCR court questioned counsel in regard to the prejudice prong in the present case. Specifically the court stated the following verbatim:

The Court: Well if it was considered by the appellate court and ruled on by the appellate court and cert. was denied, where's the prejudice?

PCR transcript at 63.

Mr. Martens carefully explained to the Court that the Applicant was prejudiced by the fact that appellate counsel raised this important constitutional

argument to the South Carolina Court of Appeals based on established principles from Faretta, relating to Applicants waiver of counsel. The Court of Appeals clearly neglected to consider the Faretta argument and did not mention Faretta at all in the published opinion. See State v. Gill, 355 S.C. 234, 584 S.E.2d 432 (ct. App. 2003).

Counsel explained to the Court that after the Court of Appeals neglected to address this constitutional argument on appeal, appellate counsel simply abandoned the constitutional argument on Faretta. Appellate Counsel timely filed for Rehearing in the Court of Appeals, however counsel omitted the fact that a constitutional argument was not addressed by the Court of Appeals during Gill's appeal process.

Appellate counsel also timely filed a Petition for Writ of Certiorari to the South Carolina Supreme Court, however again counsel omitted the constitutional argument based on Faretta to the Supreme Court.

However, even though the PCR court asked Mr. Martens where's the prejudice and counsel clearly explained the prejudice that the applicant suffered, the PCR court still neglected to address this issue in the PCR Order of Dismissal. In the Final Order of Dismissal attached herein the Court stated verbatim:

"The PCR court further found no prejudice to Applicant's case."

The Petitioner contends that contrary to the Court's statement that no prejudice was found in Applicant's case, there is probative evidence that the prejudice was found and discussed during the fact finding process of the PCR hearing.

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court of the United States established a two prong test for determining whether a convicted person is entitled to relief on the ground that his counsel was ineffective, the Petitioner must prove that appellate counsel's performance: (1) fell below an objective standard of reasonableness and (2) that but for appellate counsel's error, the outcome of the appeal would have been different. Strickland, 466 U.S. at 688-94. The first prong of the test requires that the Petitioner demonstrate that trial counsel's performance was deficient and fell below an objective standard of reasonableness. The second prong requires that Petitioner show that the deficient performance prejudiced the defense.

In the present case the PCR court neglected to address any of the Petitioner's issues that clearly demonstrates that the two prong test was satisfied during his PCR proceedings.

Further, the Petitioner contends that the record of his direct appeal and PCR hearing makes it clear that appellate counsel's performance fell below an objective standard of reasonableness and that but for appellate counsel's error the outcome of the appeal would have most definitely been different.

During Petitioner's direct appeal, appellate counsel raised an important argument regarding the waiver of the right to counsel. Appellate counsel's argument to the Court of Appeals was based on established principles set forth in Faretta v. California, 422 U.S. 804 and informed the Court that clearly the Petitioner did not waive his right to counsel. Appellate Counsel's argument to the Court of Appeals stated verbatim:

Since appellant did not waive his counsel through his action, as the trial court found, the court was obliged to conduct a hearing to determine whether appellate desired to proceed without an attorney knowing "the risk of self-representation." A trial court must make a defendant "aware of the dangers and disadvantages of self-representation so that the record will establish he knows what he is doing and his choice is made with eyes open." Faretta v. California, 422 U.S. 804, 95 S.Ct. 2525, 45 L.E.2d 562 (1975); State v. Huckaby, 305 S.C. 331, 335, 408 S.E.2d 242, 244 (1991); Wooten v. State, 301 S.C. 293, 391 S.E.2d 575 (1990). What record there is on this issue indicates that appellant was not sufficiently aware of the dangers of self-representation to make an informed decision to proceed without counsel "because of his young age and limited experience with the court, having pleaded guilty to distribution in 1999." Wooten, 301 S.C. at 295, 391 S.E.2d at 577.

The effective assistance of counsel is a necessary requisite of due process of law. U.S. Const. Amend V, X, XIV; State v. Cowart, 251 S.C. 360, 162 S.E.2d 535 (1968). Since appellate did not waive his right to counsel as discussed above, the judge should have determined if appellant was entitled to appointed counsel based on his indigency.

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963); S.C. Code Ann. §17-3-10 (1985); Rule 602 SCACR. In any case, appellant should have been granted a continuance to retain counsel since he offered a valid explanation -- the lack of funds -- for why he had not retained counsel prior to trial.

The deprivation of counsel is a structural error, not subject to harmless error analysis. State v. Jefferies, 316 S.C. 13, 466 S.E.2d 427 (1994). Nonetheless, there can be little doubt that the failure to provide appellant with an attorney was not harmless. He was admittedly woefully equipped to represent himself and an attorney could have aided his defense in innumerable ways.

Final Brief of Appellant at 11-12.

The Petitioner contends that it's very clear that the Court of Appeals made an error of law in the decision that the Petitioner waived his right to counsel. The Court of Appeals did not address any of appellate counsel's argument above which informed the Court that Gill did not waive his right to counsel. The Court of Appeals did not consider or address any of the established principles of Faretta and did not mention Faretta at all in the published opinion.

Appellate counsel timely filed for Rehearing in the Court of Appeals and timely filed a Petition for Writ of Certiorari to the South Carolina Supreme Court. However, appellate counsel omitted the constitutional argument of Faretta argument had not been addressed.

8

Applicant failed to prove any of the issues in the case which would have been more successful than the issues which were raised by appellate counsel. The PCR court also held the issue regarding the Applicant's waiver of representation would have been stronger than the issue raised, but appellate counsel is not required to raise every issue.

9

Ms. M^e Mahan: In this matter?

The Court: Yes. Not an appeal on the whole case, an appeal on the -- with regard to the rehearing, petition for rehearing to the --

Ms. M^e Mahan: No, Your Honor. He's already had an appeal. This is not an issue where he was denied the right to an appeal initially for failure of an attorney to file a notice of appeal.

The Court: Failing to raise an issue on appeal, though.

Ms. M^e Mahan: That would have to be found in ineffective assistance of appellate counsel and ---

The Court: That's what I mean.

Ms. M^e Mahan: --- the whole thing would start over from day one.

The Court: You mean the whole trial?

Ms. M^e Mahan: Yeah, from the very beginning, from the charges, everything.

The Court: You mean the Court couldn't direct appellate counsel to -- well, I guess time has expired. I see what you're saying. Time has expired to reconsider any appeal and also petition for cert. All those times have expired, so you couldn't go back there. All right. Anything else?

PCR transcript at 73-74.

The Petitioner respectfully points out to this Honorable Court that the PCR record above serves as probative evidence that the PCR court and the Assistant Attorney General, Ms. M^e Mahan clearly admitted during the fact finding process that Petitioner's claims had to be found in ineffective assistance of appellate counsel. The PCR record also demonstrates that the Petitioner's ineffective assistance of appellate counsel claim clearly derives from the fact appellate counsel claim clearly derives from the fact appellate counsel abandoned an important constitutional argument during direct appeal.

However, even though the PCR record clearly demonstrates that the Petitioner properly raised all issues during his PCR hearing, the PCR order of dismissal shows that the PCR court neglected to address all issues raised.

S.C. Code Ann. § 17-27-80 (1976) requires the PCR court to make specific findings of fact and state expressly its conclusions of law, relating to each issue presented.

An Order of Dismissal with Prejudice was filed by Judge Alford on March 7, 2008 dismissing the post-conviction relief application. The Order of Dismissal does not address the prejudice the Applicant suffered by appellate counsel abandoning an constitutional argument during his direct appeal or the fact that appellate counsel was indeed ineffective for failing to raise an important constitutional argument on the Rehearing and the Petition for

Writ of Certiorari. Petitioner contends that it is absolutely clear that these issues were properly raised during the PCR hearing.

Mr. Martens timely filed and served a notice of appeal on March 12, 2008. Upon filing and serving the Notice of Appeal, Mr. Martens asked the Court to be removed as counsel. Mr. Martens was removed from the Petitioner's case and Elizabeth A. Franklin-Best of the South Carolina Commission on Indigent Defense, Appellate Division was appointed.

In the South Carolina Supreme Court, on Petition for Writ of Certiorari Ms. Franklin-Best immediately filed a Motion For Appointment of Outside Counsel. Ms. Franklin-Best Motion For Appointment of Outside Counsel to the Supreme Court stated the following verbatim:

In his order, Judge Alford did make a finding that appellate counsel was not ineffective. Specifically, the issue of Petitioner's voluntary waiver of his right to counsel (his understanding of the dangers of self-representation) was addressed in his direct appeal but not ruled on by the Court of Appeals. In both the Petition for Rehearing and the Petition for Writ of Certiorari this issue was not raised. Petitioner asserts that it was ineffective for appellate counsel not to have raised this meritorious issue after the Court of Appeals overlooked it, and in light of this Court's holding in Gardner v. State, 351 S.C. 407, 507 S.E.2d 184 (2002). The undersigned submits that she believes this is a meritorious issue, and thus the conflict is real and not merely apparent.

For the above reasons, this motion is made to request outside counsel due to the conflict with one of her colleagues at the South Carolina Commission on Indigent Defense, Appellate Division. See the attached Motion For Appointment of Outside Counsel enclosed.

The South Carolina Supreme Court sent down an Order addressing the Motion For Appointment of Outside Counsel. The Supreme Court grant the Motion and W. Keith Martens was appointed to represent the Petitioner in his Petition for Writ of Certiorari. See the attached Supreme Court's Order enclosed.

Petitioner respectfully points out that in the Supreme Court's Order the following is stated verbatim:

The State takes no position on the motion, but submits it is a matter for this Court's discretion.

The Petitioner submits that there is probative evidence to support the fact Assistant Attorney General, Ms. Ashley M^E Mahan for the state, clearly admitted during the PCR hearing that appellate counsel's failure to raise an important issue in the present case had to be found in ineffective assistance of appellate counsel. There is also probative evidence to support that the

PCR court concurred by stating verbatim "That's what I mean." PCR transcript at 73-74. Also, Elizabeth A. Franklin-Best of the South Carolina Commission on Indigent Defense, Appellate Division came forward in the Motion For Appointment of Outside Counsel and informed the Court that appellate counsel was ineffective.

On October 1, 2008, Mr. Martens filed a Petition for Writ of Certiorari. The two questions presented in the Petition were stated as follows:

- I. Whether this Court should grant certiorari to determine an applicant for post conviction relief has received ineffective assistance of appellate counsel where applicant's appellate counsel abandoned an important constitutional argument during the course appeal.

- II. Whether this Court should grant certiorari to determine a criminal defendant was denied his constitutional rights when he was forced to trial without legal representation and without being warned of the dangers of self-representation.

The South Carolina Supreme Court filed an Order denying certiorari on October 21, 2009. The Remittitur was issued on November 6, 2009.

The Petitioner then filed a Petition for Writ of Habeas Corpus in the United States District Court. The Honorable Bruce Howe Hendricks issued the Report and Recommendation on August 13, 2010 recommending the Respondents Richard Mark Gergel adopted the Magistrates Report and Recommendation and summarily dismissed Petitioner's petition by written order dated October 22, 2010.

The Petitioner filed his second application for post-conviction relief on March 22, 2012. In his current application for post conviction relief the Petitioner alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Appellate Counsel"
2. "Ineffective Assistance of Post Conviction Counsel"
3. "Newly Discovered Evidence"

The Respondent made its Return and Motion to Dismiss on May 31, 2012. In the Conditional Order of Dismissal the following was quoted verbatim:

The Court finds that the application for post-conviction relief is summarily dismissed for being successive, for failure to file within the time mandated by statute, for the claim of ineffective assistance of PCR counsel, which is not a ground for relief, and for not providing proof of "newly discovered evidence."

The Honorable Lee S. Alford signed off on the Conditional Order of Dismissal on June 4, 2012. The Final Order of Dismissal was sent down on September 4, 2012.

The Petitioner respectfully points out to this Honorable Court that contrary to the Conditional Order of Dismissal, his application for post-conviction relief is not successive because his first PCR action was not complete.

Petitioner raised an ineffective claim based on the fact that his appellate counsel abandoned an constitutional argument during the course of direct appeal. The PCR record clearly demonstrates that the issue above was properly raised during the PCR hearing.

Please See the transcript of PCR at 60-76.

The Order of Dismissal from the PCR court does not address the above issue at all. The PCR record demonstrates that the PCR court made proper findings of fact, and even discussed these findings with the Assistant Attorney General, Ms. M^e Mahan on record. However, these findings of fact and conclusions of law or not addressed in the PCR Order of Dismissal.

The PCR court is required to "make specific findings of facts and state expressly its conclusions of law, relating to each issue presented. S.C. Code Ann § 17-27-80 (1976). In Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992); and M^e Cray v. State, 305 S.C. 329, 408 S.E.2d 241 (1992) the South Carolina Supreme Court expressed concern

with orders in PCR proceedings that do not address the merits of the issues raised.

Counsel preparing orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and the PCR judge should carefully review the order prior to signing it. Moreover, after an order is filed, counsel has an obligation to review the order and file a Rule 59(c), SCRPC, motion to alter or amend if the order fails to set forth the findings and the reason for those findings as required by § 17-27-80 and Rule 52(a) SCRPC.

Pruitt, 310 S.C. at 256, 423 S.E.2d at 128.

It is clear that after an order is filed, counsel has an obligation to review the order and file a Rule 59(c), SCRPC, motion to alter or amend if the order fails to set forth the findings and the reason for those findings as required by 17-27-80 and Rule 52(a) SCRPC. In the present case the Petitioner contends that PCR counsel's obligations set forth herein were surely not fulfilled. After the PCR court neglected to address issues properly raised during the PCR hearing in the Order of Dismissal, PCR counsel neglected to file a Rule 59(c) SCRPC.

The Petitioner's PCR counsel did file and serve a notice of appeal. In the Petition for Writ of Certiorari to the South Carolina Supreme Court PCR counsel presented the question of whether appellate counsel was ineffective when an constitutional argument was abandoned during the course of direct appeal. Petitioner respectfully points out that this is the exact same issue that the PCR court neglected to address in the PCR Order of Dismissal.

The Supreme Court denied the Petitioner's Petition for Writ of Certiorari. Issues are not properly before the Supreme Court unless they were raised to and ruled on by the circuit court. Plyler v. State, 309 S.C. 408, 424 S.E.2d 477 (1992); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Loftin v. State, 278 S.C. 376, 296 S.E.2d 533 (1982).

The Petitioner alleges that his PCR counsel is ineffective because surely he could not seek review of the denial of his PCR application pursuant to his state law rights set forth in S.C. Code Ann. § 17-27-100 due to the fact, counsel did not preserve review by failing to file a Rule 59(e) after the PCR court did not address all issues properly presented during the PCR hearing.

Further, in the Conditional Order of Dismissal the Court stated that the Applicant cannot satisfy the requirements of the Lanier test for newly discovered evidence. Lanier v. Lanier, 364 S.C. 211, 612 S.E.2d 456 (S.C. App. 2005) states that a party making a motion for a new trial or for relief from judgment

based on newly discovered evidence must show that the evidence: (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching.

The Petitioner submitted the United States District Court's Report and Recommendation of the Magistrate as newly discovered evidence. The Report and Recommendation is definitely material to the issue and serves as probative evidence to support the fact that the PCR court neglected to address all issues properly raised during the PCR hearing.

In the Magistrate's Report and Recommendation the following is quoted verbatim:

In his PCR proceedings the Petitioner alleged his appellate counsel was ineffective for abandoning the issue of whether he was warned of the dangers of self representation by the trial court. The undersigned notes that the PCR court did not address this issue in the context of ineffective assistance of appellate counsel. (See the PCR Order of Dismissal.)

The Report and Recommendation of the Magistrate at 11-12.

In addition the District Court held that appellate counsel may make a strategic decision to omit an issue on appeal. However, appellate

counsel was not subpoenaed to testify at the PCR hearing and has informed me that this was an error and not a strategic decision. Therefore, I should be given the opportunity to have a PCR hearing in which appellate counsel testifies and this issue is properly addressed.

My case deals with the denial of a fundamental right that resulted in a twenty-five (25) year sentence. The Sixth and Fourteenth Amendments to the United States Constitution ensure that an individual be afforded the right to assistance of counsel before he or she can be validly convicted and punished. State v. Thompson, 355 S.C. 255, 261-62, 584 S.E.2d 131, 134-35 (Ct. App. 2003). "The right to counsel is by far the most pervasive, for it affects a person's ability to assert any other rights he or she may have. The erroneous deprivation of this right constitutes per se reversible error." Ex parte Jackson, 381 S.C. 253, 259, 672 S.E.2d 585, 588 (Ct. App. 2009).

Since the issue relating to appellate counsel was not properly ruled upon at my first PCR hearing, I have been denied my right to a full and fair bite of the apple. The Supreme Court has held that the PCR rules "contemplate an adjudication on the merits of the original petition, one bite at the apple as it were." Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991); Gamble v. State, 298 S.C. 176, 178, 379, S.E.2d 118, 119 (1989). In my case, the issues was not fully adjudicated because appellate counsel did not testify and because the PCR Court did not address

whether counsel was ineffective for failing to raise the Fareta issue.

Furthermore the Petitioner respectfully points out to this Honorable Court that he has not had a full and fair hearing on the merits of the Fareta claim in any Court. The Magistrate's Report and Recommendation confirms this as well. The Report and Recommendation states the following verbatim:

The South Carolina Court of Appeals held that based upon the Petitioner's actions prior to trial, a waiver of his right to counsel could be inferred. In its opinion, the South Carolina Court of Appeals, however, did not address whether the trial court had adequately advised the Petitioner of the dangers of self-representation. Appellate counsel did not raise this specific issue in the petition for rehearing or in the petition for certiorari to the South Carolina Supreme Court.

In his PCR proceeding, the Petitioner alleged his appellate counsel was ineffective for abandoning the issue of whether he was warned of the dangers of self-representation by the trial court. The undersigned notes that the PCR court did not address this issue in the context of ineffective assistance of appellate counsel.

The Report and Recommendation of the Magistrate at 11-12.

The Court of Appeals clearly neglected to address an issue that demonstrates that the Petitioner did not waive his constitutional right to counsel. After the Court of Appeals neglected to address whether the trial court warned the Petitioner of the dangers of self-representation, appellate counsel failed to raise this issue in the petition for rehearing or in the petition for certiorari to the Supreme Court.

The Petitioner contends that this must certainly confirm that the entire direct appeal process was deficient for the above reasons. Also confirmed in the Report and Recommendation is the fact the PCR court neglected to address all issues presented during the PCR hearing.

In the United States District Court the Petitioner filed an Amendment objecting to errors of law made in the Report and Recommendations of the Magistrate. The Amended brief was very detailed in addressing many important facts involving issues that the State Court have neglected to address in the present case. The Amendment also directs the District Court to specific error in the Report and Recommendation.

Please view the Amendment to the Objections to the Report and Recommendation enclosed.

However in the Written Order enclosed also, this Honorable Court will notice that the Honorable Richard Gergel makes no mention at all of the

Amendment to the Objections. While the Amendment shows clearly that it was received and filed as Entry Number 34, the District Court's written order neglects to even state the Amendment was filed.

However, the exact same way that the State argued the merits of Faretta "out of abundance of caution" in the Return to Petition for Writ of Certiorari, so did the Honorable Richard Gergel in the written order.

See the Return to Petition for Writ of Certiorari at 6.

The following was stated verbatim in the Written Order:

Nonetheless, out of an abundance of caution and given Petitioner's pro se status, this Court reviewed the Record de novo and the Record reflects that Respondent's motion for summary judgment should be granted.

Written Order at 2 of 5.

However, in the District Court's document Entry Number 19 the following is stated verbatim:

Whenever one or more affidavits or other material outside the pleadings of a defendant (or respondent) or served on a pro se plaintiff (or a pro se petitioner),

he cannot rest upon the allegations or denials of his own pleadings. He has a right to file one or more opposing affidavits or other exhibits and indeed must do so if his action is to survive. If this is not done, the court may very well grant summary judgment against him.

See the enclosed Explanation of Summary Judgment Procedure at 2 of 3.

According to the document above the Petitioner had a right to file the Amendment to the Objections of the Magistrate's Report and Recommendation.

In the present case the Petitioner was convicted of the offenses he challenges in this application on September 12, 2000. The Petitioner has not had a full and fair hearing on the merits of his claims in any of the proceedings in which the offenses have been challenged on appeal, and it's now almost 2013.

The Petitioner respectfully points out to this Honorable Court that during the PCR proceedings the PCR court clearly asked the Assistant Attorney General, Ms. M^e Mahan specifically, if the Petitioner was entitled to any remedy, wouldn't it be simply to direct an appeal under White. PCR transcript at 73. The PCR court and Ms. M^e Mahan at that time discussed whether appellate counsel was ineffectve for failing to raise an issue on appeal. Once it was in fact confirmed by the PCR court and Ms. M^e Mahan that this issue had

to be found in ineffective assistance of appellate counsel the following was quoted verbatim:

Ms. Mc Mahan: --- the whole thing would start over from day one.

The Court: You mean the whole trial?

Ms. Mc Mahan: Yeah from the very beginning, from the charges, everything.

PCR transcript at 73-74.

The Petitioner respectfully points out to this Honorable Court that even after the PCR court and the Assistant Attorney General discussed whether appellate counsel was ineffective for failing to raise an issue on appeal and the remedy he was entitled to, the PCR court still neglected to address its findings of fact.

The Petitioner respectfully admits that his PCR hearing was very detailed. The PCR record shows that the Court did address the ineffective assistance of appellate counsel claim based on the fact counsel abandoned a constitutional argument during the course of direct appeal. The PCR record further shows that the PCR court also discussed the remedy the Petitioner was in fact entitled to as well.

The Petitioner respectfully informs this Honorable Court that in his current post-conviction relief action he is only seeking a sentence reduction. The Petitioner respectfully points out to this Honorable Court that being that his first PCR hearing was so detailed the Court may not need to convene for a new PCR hearing. The PCR judge did make specific findings of fact on each allegation raised, however the specific findings of fact were not addressed in the PCR Order of Dismissal.

Unlike the South Carolina Supreme Court's decision in Alice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991), the Petitioner herein does not seek to have more than one procedural "bite" at the apple. However, the Petitioner does seek a full "bite" at the apple on the merits of the original petition. In the present case the Petitioner contends that his current application should not be barred under S.C. Code § 17-27-90 because the issues raised in his original petition have not been adjudicated on the merits.

Conclusion

Based on the forgoing arguments and the probative evidence presented herein it is absolutely clear that the Petitioner's first PCR action was not complete. The Petitioner has demonstrated that the PCR court did not address all issues properly presented during the PCR proceedings in the PCR Order of Dismissal. It is also clear that for the reason stated in the Explanation, the Petitioner most certainly did not receive a full bite of the apple during the PCR proceedings. For the reasons stated above and herein the Petitioner is entitled to a new PCR hearing.

Respectfully Submitted,

Carlos Miguel Gill

Carlos Miguel Gill / Pro Se Applicant

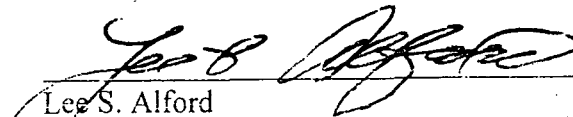
Honorable Bruce Howe Hendricks' Report and Recommendation confirms that the 2005 PCR court's Order of Dismissal neglects to include the ineffective assistance of appellate counsel claim. However, the Applicant's argument is in error. While the District Court's Report and Recommendation notes the PCR court did not address whether appellate counsel was ineffective for abandoning the issue of whether the Applicant was warned of the dangers of self-representation by the trial court, the District Court did acknowledge the PCR court addressed whether appellate counsel was ineffective for failing to raise an issue regarding an allegedly improper bench warrant. Additionally, this Court finds the PCR court in its 2005 Order of Dismissal specifically addressed the claim of ineffective assistance of appellate counsel claim. On pages 5 and 6 of the Order of Dismissal, the PCR court found the Applicant failed to prove any of the issues he wanted raised on appeal would have been more successful than the issues which were raised by appellate counsel. The PCR court also held the issue regarding the Applicant's waiver of representation would have been stronger than the issue raised, but appellate counsel is not required to raise every issue. The PCR court further found no prejudice to the Applicant's case. This Court has reviewed the Applicant's response to the State's motion to dismiss in its entirety, in conjunction with the original pleadings, and finds that a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final.

IT IS THEREFORE ORDERED that, for the reasons set forth in the Court's Conditional Order of Dismissal, the Application for PCR is hereby denied and dismissed with prejudice.

This Court hereby advises the Applicant that he must file and serve a Notice of Appeal within thirty (30) days of the service of this Order to secure appellate review. See Rule 203, SCACR. The

Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 4th day of September, 2012.



Lee S. Alford
Chief Administrative Judge
Sixteenth Judicial Circuit

Yell, South Carolina.

#3
2011

remain associated for the limited purpose of paying for any necessary transcript(s) and providing copies of the petition, appendix and briefs.

IT IS SO ORDERED.



FOR THE COURT C. J.

Columbia, South Carolina

June 26, 2008

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Petition for Writ of Certiorari

Honorable Lee S. Alford, Presiding Circuit Court Judge

CARLOS MIGUEL GILL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

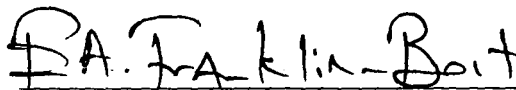
MOTION FOR APPOINTMENT
OF OUTSIDE COUNSEL

The undersigned respectfully shows the Court:

1. Petitioner filed an application for post conviction relief on July 29, 2005 alleging *inter alia* ineffective assistance of appellate counsel.
2. The state filed a return on March 1, 2006.
3. An evidentiary hearing was held before the Honorable Lee S. Alford on June 1, 2007.
4. An Order of Dismissal with Prejudice was filed by Judge Alford on March 7, 2008 dismissing the post-conviction relief application.

5. In his order, Judge Alford did make a finding that appellate counsel was not ineffective. Specifically, the issue of Petitioner's voluntary waiver of his right to counsel (his understanding of the dangers of self-representation) was addressed in his direct appeal but not ruled on by the Court of Appeals. In both the Petition for Rehearing and the Petition for Writ of Certiorari this issue was not raised. Petitioner asserts that it was ineffective for appellate counsel not to have raised this meritorious issue after the Court of Appeals overlooked it, and in light of this Court's holding in Gardner v. State, 351 S.C. 407, 507 S.E.2d 184 (2002). The undersigned submits that she believes this is a meritorious issue, and thus the conflict is real, and not merely apparent.
6. For the above reasons, this motion is made to request outside counsel due to the conflict with one of her colleagues at the South Carolina Commission on Indigent Defense, Appellate Division.

Respectfully submitted,



Elizabeth A. Franklin-Best
Appellate Defender

Attorney for Petitioner

This 19th day of June, 2008

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Petition for Writ of Certiorari

Honorable Lee S. Alford, Presiding Circuit Court Judge

CARLOS MIGUEL GILL,

PETITIONER,

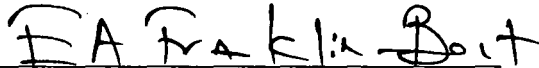
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

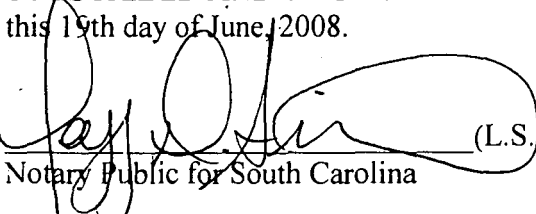
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Motion for Appointment of Outside Counsel in the above referenced case has been served upon opposing counsel, Dean Grigg, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201; and on Carlos Miquel Gill, #269682, McCormick Correctional Institution, 386 Redemption Way McCormick, SC 29899, this 29th day of June, 2008.


Elizabeth A. Franklin-Best
Appellate Defender

Attorney for Petitioner

SUBSCRIBED AND SWORN TO before me
this 19th day of June, 2008.


(L.S.)
Notary Public for South Carolina

My Commission Expires: December 4, 2017

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD

Carlos M. Gill,

Petitioner,

Civil Action No. 8:09-CV-03350-HFF-BHH

ORDER

vs.

Leroy Cartledge,

Respondent(s).

A motion to dismiss or for summary judgment has been filed in this case that was brought originally by an individual who is without counsel. Because the plaintiff does not have an attorney, the Clerk is directed to send him or her by mail a copy of this Order, an explanation of summary judgment procedure, and a copy of pertinent extracts from Rule 12 and Rule 56 of the Federal Rules of Civil Procedure.

The plaintiff shall have a period of **thirty-four (34) days** from the date of this Order to file any material (s)he wishes to file in opposition to the motion in accordance with the requirements explained in the Rules, and if (s)he fails to respond adequately, the motion may be granted, thereby ending this case.¹ Careful attention should be given to the requirements of Rule 56(e) concerning the necessity for affidavits filed in opposition to summary judgment to be based on personal knowledge, to contain facts admissible in evidence, and to be executed by a person who would be competent to testify as to matters contained in the affidavit if he or she were called to the witness stand. Affidavits or exhibits pertaining to matters that are not involved in this case will not be considered by the Court, nor will affidavits that contain only conclusory statements or argument of facts or law.

A person who is representing himself in federal court may submit a brief or memorandum containing argument if he or she desires to do so, but this is not required. However, submission of a brief, or even the filing of a reply to an answer or return, will not be sufficient alone to withstand a properly supported motion for summary judgment.

This order is entered at the direction of the Court.

April 12, 2010

s/Bruce H. Hendricks
United States Magistrate Judge

¹This is one (1) month plus four (4) days mail time, and the time will not be enlarged unless highly persuasive reasons are submitted under oath to support a motion to enlarge time.

EXPLANATION OF SUMMARY JUDGMENT PROCEDURE

(For plaintiffs or petitioners who do not have counsel)²

Most pro se litigants are prisoners who seek federal habeas corpus relief or relief available under civil rights statutes, 42 U.S.C. § 1983 et seq. Generally, the only issues federal courts entertain in such cases are alleged violations of rights secured by the Constitution. The Federal Rules of Civil Procedure apply in all civil rights cases, and the rules applicable to pleadings and motions apply for the most part in federal habeas cases started by state (or federal) prisoners.

When a defendant (or a respondent) moves or pleads for summary judgment under Rule 56, or sets up in a motion or pleading a defense that the plaintiff (or petitioner) has failed to state a claim upon which relief can be granted, he is arguing, in effect, that a constitutional claim has not been shown by the plaintiff's complaint (or the petitioner's petition). If affidavits or other material are submitted by a defendant (or respondent) to support that defense, and if the court accepts such matters outside the pleading, the court treats the submission as a request for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

Whenever one or more affidavits or other material outside the pleading of a defendant (or respondent) are served on a pro se plaintiff (or a pro se petitioner), he cannot rest upon the allegations or denials of his own pleadings. He has a right to file one or more opposing affidavits or other exhibits and indeed must do so if his action is to survive. If this is not done, the court may very well grant summary judgment against him. [This is true also if the parties are all represented by counsel.]

All affidavits submitted by pro se litigants must meet the standards required by Rule 56, which standards can be determined from the following quotation of a portion of Rule 56(e):

"(e)(1) A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated."

If a pro se litigant does not fully understand what facts would be admissible and who would be competent to testify, he should not withhold affidavits, for the court will determine whether these standards are met by his affidavit(s).

Under Rule 56(f), if a person served with affidavits cannot obtain opposing affidavits, he must submit to the court his own affidavit, stating why he cannot present by affidavit facts essential to justify his opposition to the facts set out in the affidavits served by the opposing party. Under Rule 56(g), all affidavits submitted to the court must be made in good faith (and, obviously, the facts sworn to must be true),³ and appropriate action will be taken by the court if it is satisfied that affidavits are presented in bad faith or solely for the purpose of delay.

²This explanation, or one of similar import, is required by Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), which was a civil rights case. The same procedure applies in federal habeas corpus cases under Webb v. Garrison, No. 77-1855 (4th Cir., decided July 6, 1977).

³All affidavits submitted in a federal case are submitted under penalties of perjury or subornation of perjury (18 U.S.C. §§ 1621 and 1622), and the federal statute which makes use of the mail to defraud a crime (18 U.S.C. § 1341) has been applied to convict a person who transmitted false averments by mail in a civil rights suit seeking damages. United States v. Murr, 681 F.2d 246 (4th Cir. 1982), cert. denied, 459 U.S. 973 (1982).

EXCERPTS FROM RULE 12 AND RULE 56

Federal Rules of Civil Procedure⁴

Rule 12(d) provides, in part:

"If, on a motion under Rule 12(b)(6) [this means a motion to dismiss the pleading, which includes a complaint, motion or petition, because it fails to state a claim upon which relief can be granted], ... matters outside the pleadings [here meaning the answer or return, as well as the complaint, motion, or petition] are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent [that is, having some connection with the matter or matters in dispute] to the motion."

Rule 56 provides, in part:

"(b) A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim."

"(e)(2) When a motion for summary judgment [and this includes a Rule 12(b) motion to dismiss] is properly made and supported, an opposing party [this is the plaintiff(s) or petitioner(s)] may not rely merely on allegations or denials in its own pleading [meaning the complaint, motion or the petition]; rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial. [Emphasis added to show that specific facts are required, not conclusory allegations or argument.] If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party."

See attached explanation of summary judgment procedure for a quotation of a part of Rule 56(e) as to the form and sufficiency of affidavits filed in support of or in opposition to a motion for summary judgment. Rule 56(e) also requires that copies of all papers referred to in an affidavit must be attached to the affidavit, and that such copies must be sworn to or certified.

⁴The material contained within brackets is inserted by way of explanation of terms used, and is not a part of the Rules quoted. These extracts are prepared for the use of state and federal prisoners who submit complaints, petitions or § 2255 motions to the United States District Court in their own behalf (pro se). The United States Court of Appeals for the Fourth Circuit has expressly or impliedly approved the application of Rules 12 and 56 to petitions for post-conviction relief in federal court pursuant to Title 28, United States Code, Sections 2254 and 2255, as well as to civil rights actions based on Title 42, United States Code, Sections 1983 and 1985.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

Carlos M. Gill,

Petitioner,

v.

Warden of McCormick
Correctional Institution,

Respondent.

Civil Action No.8:09-3350-RBH-BHH

REPORT AND RECOMMENDATION
OF MAGISTRATE JUDGE

The Petitioner, a state prisoner, seeks habeas relief pursuant to Title 28, United States Code, Section 2254. This matter is before the Court on the Respondent's Motion for Summary Judgment. (Dkt. # 17.)

Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Local Rule 73.02(B)(2)©, D.S.C., this magistrate judge is authorized to review posttrial petitions for relief and submit findings and recommendations to the District Court.

The Petitioner brought this habeas action on December 23, 2009.¹ On April 9, 2010, the Respondent moved for summary judgment. By order filed April 12, 2010, pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), the Petitioner was advised of the summary judgment dismissal procedure and the possible consequences if he failed to adequately respond to the motion. On May 17, 2010, the Petitioner filed a response opposing the Respondent's Summary Judgment Motion.

¹This filing date reflects that the envelope containing the petition was stamped as having been received on December 23, 2009, at the McCormick Correctional Institution mailroom. (Pet. Attach.# 6.) *Houston v. Lack*, 487 U.S. 266 (1988)(holding prisoner's pleading is considered filed when filed with prison authorities for forwarding to the district court).

PROCEDURAL HISTORY

The Petitioner is currently incarcerated at the McCormick Correctional Institution ("MCI"). In June 2000, the Petitioner was indicted for distribution of crack cocaine, distribution of crack cocaine within the proximity of a school, and conspiracy to distribute crack cocaine.² The Petitioner did not have trial counsel and proceeded to a jury trial on September 12, 2000, with the Honorable John C. Hayes, III, presiding. The jury found the Petitioner guilty as charged, and Judge Hayes sentenced him to concurrent sentences of twenty-five years imprisonment and a \$50,000.00 fine for the distribution of crack cocaine; fifteen years imprisonment and a \$10,000.00 fine for the distribution of crack cocaine within proximity of a school; and five years imprisonment for the conspiracy to distribute crack cocaine. (App. 21-22; 24-28;32-185.)³

The Petitioner timely filed a notice of appeal. Assistant Appellate Defender Eleanor Duffy Cleary represented him on appeal. On March 18, 2002, the Petitioner filed his appellate brief raising the following issue on appeal, quoted verbatim:

Did the trial court err in finding appellant had waived his right to an attorney by his actions pursuant to State v. Jacobs, where the Court failed to inquire into his indigency status and appoint counsel after appellant explained to the court that he was unable to afford an attorney, and where the court failed to inquire into the knowing and voluntary nature of his waiver of counsel?

(App. 273.) The Petitioner also filed a Supplemental Final Brief raising the following issue, quoted verbatim: "The trial court lacked subject matter jurisdiction to try appellant for distribution of crack cocaine and distribution of crack cocaine within proximity of a school

²The Petitioner was arrested on these drug charges in April 2000. (App. 23.)

³The undersigned notes that because pages were missing in the record, on July 20, 2010, the Respondent filed a complete copy of the South Carolina Court of Appeal's opinion and the PCR Court's order. Apparently these pages of this copy of the opinion and order are not bated stamped so as not to effect the numbering of the remaining pages in Attachment # 1. The references in this report to the record are to the bates numbers.

because the indictments failed to allege the essential elements of the offenses." (App. 292.)

On June 23, 2003, the South Carolina Court of Appeals affirmed the Petitioner's conviction in a published opinion, *State v. Carlos Miguel Gill*, 584 S.E.2d 432 (S.C. Ct. App. 2003). (App. 3.) On July 8, 2003, the Petitioner filed a petition for rehearing. (App. 345-48.) On August 22, 2003, the South Carolina Court of Appeals denied the petition for rehearing. (App. 9.)

On November 21, 2003, the Petitioner filed a petition for a writ of certiorari in the South Carolina Supreme Court raising the following two issues, quoted verbatim:

1. Whether the Court of Appeals erred in finding petitioner waived by implication his right to an attorney by his actions pursuant to *State v. Jacobs*, *infra*, where petitioner presented a valid excuse for not retaining counsel - a lack of funds -- and where the trial court failed to inquire into his indigency status and appoint counsel after petitioner explained to the court that he was unable to afford an attorney?
2. Whether the Court of Appeals erred in finding the trial court had subject matter jurisdiction to try petitioner for distribution of crack cocaine and distribution of crack cocaine within proximity of a school where the indictments failed to allege the essential elements of the offenses?

(App. 351.) On September 23, 2004, the South Carolina Supreme Court denied certiorari and on September 29, 2004, the South Carolina Court of Appeals sent the remittitur back down. (App. 20.)

On July 29, 2005, the Petitioner filed a pro se application for post-conviction relief ("PCR") raising the following grounds for relief:

1. Waiver of counsel not voluntary nor knowing.
2. Trial judge erred in failing to address the dangers and disadvantages of self-representation.
3. Prosecutorial misconduct and vindictive prosecution.
4. Ineffective assistance of appellate counsel.

5. Trial court lacked subject matter jurisdiction to try applicant for second offense.

(App. 388-421.) On June 1, 2007, an evidentiary hearing was held before the Honorable Lee S. Alford. The Petitioner was present at the hearing and represented by W. Keith Martens, Esquire. On March 7, 2008, Judge Alford denied the Petitioner PCR and dismissed the PCR application with prejudice. (Return Attach. # 1- PCR Order of Dismissal.) The Petitioner timely filed a notice of appeal and was represented by Martens to represent him on certiorari.⁴ (App. 1-2.) On October 1, 2008, the Petitioner filed a petition for writ of certiorari, raising the following issues:

1. Whether this Court should grant certiorari to determine an applicant for post conviction relief has received ineffective assistance of appellate counsel where applicant's appellate counsel abandoned an important constitutional argument during the course of appeal.

2. Whether this Court should grant certiorari to determine a criminal defendant was denied his constitutional rights when he was forced to trial without legal representation and without being warned of the dangers of self-representation.

On October 21, 2009, the South Carolina Supreme Court denied the petition for certiorari and sent the remittitur down on November 6, 2009.

In this habeas petitioner, the Petitioner raises the following grounds for relief, quoted verbatim:

GROUND ONE: Whether this Court should grant Habeas Corpus relief to determine that Gill received ineffective assistance of appellate counsel because Gills' appellate counsel abandoned a constitutional argument during the course of appeal.

⁴Assistant Appellate Defender Elizabeth A. Franklin-Best initially represented the Petitioner in his PCR appeal. However, on June 26, 2008, the South Carolina Supreme Court relieved Franklin-Best, based upon a conflict of interest as a result of the Petitioner's allegations of ineffective assistance of appellate counsel. (App. 1.)

GROUND TWO: Whether Gill was denied his constitutional rights when he was forced to trial without legal representation and without being warned of danger of self-representation.

(Habeas Pet.)

APPLICABLE LAW

Summary Judgment Standard

Rule 56 of the Federal Rule of Civil Procedure states as to a party who has moved for summary judgment:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Accordingly, to prevail on a motion for summary judgment, the movant must demonstrate that (1) there is no genuine issue as to any material fact; and (2) that he is entitled to summary judgment as a matter of law. As to the first of these determinations, a fact is deemed "material" if proof of its existence or nonexistence would affect the disposition of the case under the applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence offered is such that a reasonable jury might return a verdict for the non-movant. *Id.* at 257. In determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating to the court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings. Rather, the non-moving party must demonstrate that

specific, material facts exist which give rise to a genuine issue. *Id.* at 324. Under this standard, the existence of a mere scintilla of evidence in support of the petitioner's position is insufficient to withstand the summary judgment motion. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or denials, without more, are insufficient to preclude the granting of the summary judgment motion. *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985).

HABEAS STANDARD OF REVIEW

Since the petitioner filed his petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), review of his claims is governed by 28 U.S.C. § 2254(d), as amended. *Lindh v. Murphy*, 521 U.S. 320 (1997); *Breard v. Pruett*, 134 F.3d 615 (4th Cir.1998). Under the AEDPA, federal courts may not grant habeas corpus relief unless the underlying state adjudication:

1. resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States; or
2. resulted in a decision that was based on an unreasonable application of the facts in light of the evidence presented at the state court proceeding. 28 U.S.C. § 2254(d)(1)(2).

Federal habeas corpus relief may not be granted unless the relevant state-court adjudication "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings," 28 U.S.C.A. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 398 (2000). "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 410.

EXHAUSTION AND PROCEDURAL BAR

Exhaustion and procedural bypass are separate theories which operate in a similar manner to require a habeas petitioner to first submit his claims for relief to the state courts. The two theories rely on the same rationale. The general rule is that a petitioner must present his claim to the highest state court with authority to decide the issue before the federal court will consider the claim.

A. Exhaustion

The theory of exhaustion is based on the statute giving the federal court jurisdiction of habeas petitions. Applications for writs of habeas corpus are governed by 28 U.S.C. § 2254 , which allows relief when a person "is in custody in violation of the Constitution or laws or treaties of the United States." The statute states in part:

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court, shall not be granted unless it appears that

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (I) there is either an absence of available State corrective process; or

(ii) circumstances exist that render such process, ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

This statute clearly requires that an applicant pursue any and all opportunities in the state courts before seeking relief in the federal court. When subsections (b) and (c) are read in conjunction, it is clear that § 2254 requires a petitioner to present any claim he has to the state courts before he can proceed on the claim in this court. The United States Supreme Court has consistently enforced the exhaustion requirement.

In South Carolina, a person in custody has two primary means of attacking the validity of his conviction. The first avenue is through a direct appeal and, pursuant to state law, he is required to state all his grounds in that appeal. SCAR 207; *Blakeley v. Rabon*, 221 S.E.2d 767 (S.C. 1976). The second avenue of relief is by filing an application for PCR. S.C. Code Ann. § 17-27-10 et seq. A PCR applicant is also required to state all of his grounds for relief in his application. S.C. Code Ann. § 17-27-90. Strict time deadlines govern direct appeal and the filing of a PCR in the South Carolina Courts. A PCR must be filed within one year of judgment, or if there is an appeal, within one year of the appellate court decision. S.C. Code Ann. § 17-27-45.

When the petition for habeas relief is filed in the federal court, a petitioner may present only those issues which were presented to the South Carolina Supreme Court through direct appeal or through an appeal from the denial of the PCR application, whether or not the Supreme Court actually reached the merits of the claim. If any avenue of state relief is still available, the petitioner must proceed through the state courts before requesting a writ of habeas corpus in the federal courts. *Patterson v. Leeke*, 556 F.2d 1168 (4th Cir. 1977); *Richardson v. Turner*, 716 F.2d 1059 (4th Cir. 1983).

B. Procedural bypass

Procedural bypass is the doctrine applied when the person seeking relief failed to raise the claim at the appropriate time in state court and has no further means of bringing that issue before the state courts. If this occurs, the person is procedurally barred from

raising the issue in his federal habeas petition. The United States Supreme Court has clearly stated that the procedural bypass of a constitutional claim in earlier state proceedings forecloses consideration by the federal courts, *Smith v. Murray*, 477 U.S. 527, 533 (1986). Bypass can occur at any level of the state proceedings, if a state has procedural rules which bar its courts from considering claims not raised in a timely fashion. The two routes of appeal in South Carolina are described above, (i.e., direct appeal, appeal from PCR denial) and the South Carolina Supreme Court will refuse to consider claims raised in a second appeal which could have been raised at an earlier time. Further, if a prisoner has failed to file a direct appeal or a PCR and the deadlines for filing have passed, he is barred from proceeding in state court.

If the state courts have applied a procedural bar to a claim because of an earlier default in the state courts, the federal court honors that bar. State procedural rules promote . . . not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case. *Reed v. Ross*, 468 U.S. 1, 10-11 (1984).

Stated simply, if a federal habeas petitioner can show (1) cause for his failure to raise the claim in the state courts, and (2) actual prejudice resulting from the failure, a procedural bar can be ignored and the federal court may consider the claim. Where a petitioner has failed to comply with state procedural requirements and cannot make the required showing of cause and prejudice, the federal courts generally decline to hear the claim. *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

C. Inter-relation of Exhaustion and Procedural Bypass

As a practical matter, if a petitioner before this court has failed to raise a claim in state court, and is precluded by state rules from returning to state court to raise the issue,

he has procedurally bypassed his opportunity for relief in the state courts and in federal court. A federal court is barred from considering the filed claim (absent a showing of cause and actual prejudice). In such an instance, the exhaustion requirement is technically met and the rules of procedural bar apply. *Matthews v. Evatt*, 105 F.3d 907 (4th Cir. 1997)(citing *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1 (1991); *Teague v. Lane*, 489 U.S. 288,297-98 (1989); and *George v. Angelone*, 100 F.3d 353,363 (4th Cir. 1996).

D. Cause and Actual Prejudice

The requirement of exhaustion is not jurisdictional and this court may consider claims which have not been presented to the South Carolina Supreme Court in limited circumstances. *Granberry v. Greer*, 481 U.S. 129, 131 (1987). In order to have such claims considered, a petitioner must show sufficient cause for failure to raise the claim and actual prejudice resulting from the failure, *Coleman*, 501 U.S. at 750, or that a "fundamental miscarriage of justice" has occurred. *Murray*, 477 U.S. 478. A petitioner may prove cause if he can demonstrate ineffective assistance of counsel relating to the default, show an external factor which hindered compliance with the state procedural rule, or demonstrate the novelty of a particular claim. *Id.*

Absent a showing of "cause," the court is not required to consider "actual prejudice." *Turner v. Jabe*, 58 F.3d 924 (4th Cir. 1995). However, if a petitioner demonstrates sufficient cause, he must also show actual prejudice in order to excuse a default. *Murray*, 477 U.S. at 492. To show actual prejudice, the petitioner must demonstrate more than plain error. He is required to prove that specific errors infected the trial and were of constitutional dimensions. *United States v. Frady*, 456 U.S. 152 (1982).

DISCUSSION

As the Petitioner raises two grounds for relief which are closely intertwined, the undersigned has chosen to discuss the two grounds together. In Ground One, the

Petitioner alleges his appellate counsel was ineffective for abandoning the issue on direct appeal of whether he was advised of the dangers of self-representation pursuant to *Faretta v. California*, 422 U.S. 806 (1975). Specifically, in Ground One, the Petitioner contends that, although appellate counsel raised this issue to the South Carolina Court of Appeals, appellate counsel later waived this issue by failing to raise it in a motion for rehearing or in his appeal to the South Carolina Supreme Court. In Ground Two, the Petitioner alleges he was denied his constitutional rights when he was forced to go to trial without legal representation and without being warned of the dangers of self-representation. The respondent contends these claims should be dismissed. The undersigned agrees.

On direct appeal, as set forth above, appellate counsel raised the following issue regarding the Petitioner's representation at trial, quoted verbatim:

Did the trial court err in finding appellant had waived his right to an attorney by his actions pursuant to *State v. Jacobs*, where the Court failed to inquire into his indigency status and appoint counsel after appellant explained to the court that he was unable to afford an attorney, and where the court failed to inquire into the knowing and voluntary nature of his waiver of counsel?

(App. 273.) The South Carolina Court of Appeals held that based upon the Petitioner's actions prior to trial, a waiver of his right to counsel could be inferred. In its opinion, the South Carolina Court of Appeals, however, did not address whether the trial court had adequately advised the Petitioner of the dangers of self-representation. Appellate counsel did not raise this specific issue in the petition for rehearing or in the petition for certiorari to the South Carolina Supreme Court.

In his PCR proceeding, the Petitioner alleged his appellate counsel was ineffective for abandoning the issue of whether he was warned of the dangers of self-representation by the trial court. The undersigned notes that the PCR court did not address this issue in

the context of ineffective assistance of appellate counsel.⁵ (Return Attach. # 1 - PCR Order of Dismissal at 17-18.) In any event, the PCR court held that the Petitioner had sufficient familiarity with criminal proceedings due to prior experiences and thus had a sufficient basic knowledge of the court system and the dangers of self-representation. *Id.* at 18.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court of the United States established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance. In order to establish that counsel was ineffective, the Petitioner must prove that appellate counsel's performance: (1) fell below an objective standard of reasonableness and (2) that, but for appellate counsel's error, the outcome of the appeal would have been different. *Strickland*, 466 U.S. at 688-94. The first prong of the test requires that the Petitioner demonstrate that trial counsel's performance was deficient and "fell below an objective standard of reasonableness." *Id.* at 688. The second prong requires the Petitioner to show that the deficient performance prejudiced the defense. *Id.* at 687.

In order to satisfy the prejudice requirement of the two-prong test set forth in *Strickland*, the Court must decide whether the Petitioner has established "a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." The focus is upon "the 'fundamental fairness of the proceeding.'" *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993) (prejudice prong focuses on "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair"). A "reasonable probability" is therefore "one 'sufficient to undermine the confidence in the outcome.'" *Strickland*, 466 U.S. at 694. The Petitioner must show

⁵The PCR Court addressed whether appellate counsel was ineffective for failing to raise an issue regarding an allegedly improper bench warrant. (Return Attach. # 1 - PCR Order of Dismissal at 19-20.)

"that counsel's errors were so serious as to deprive the [Petitioner] of a fair trial, a trial whose result is reliable." *Id.* at 687; see also *Lockhart*, 506 U.S. at 372 ("[u]nreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitled him").

Furthermore, while appellate counsel must be an "active advocate" for his client, he "need not advance every argument, regardless of merit, urged by appellant." *Evitts v. Lucey*, 469 U.S. 387, 394 (1985). The Supreme Court has recognized that it is good strategy to identify and present only the strongest issues and arguments on appeal. *Jones v. Barnes*, 463 U.S. 745, 751-53 (1983). Appellate counsel may "exercise judgment in identifying the arguments [to] be advanced on appeal." *McCoy v. Court of Appeals of Wis.*, 486 U.S. 429, 438 (1988).

→ start here The record shows that the Petitioner applied for the appointment of a public defender on April 17, 2000, while he was free on bond. However, because at that time the Petitioner was employed, he was deemed non-indigent and not eligible for a public defender. On August 11, 2000, during a hearing, the trial court informed the Petitioner that his case would be tried August 21, 2000, whether the petitioner had retained counsel or not. (App. 34.). The trial court asked the Petitioner whether he would like to apply for a public defender. *Id.* The Petitioner replied that he was "supposed to be getting Stacy Lewis" to represent him. The trial court then stated:

You're up for trial with or without an attorney the week of the twenty-first of this month. We're not going to put off the trial for you to get a lawyer. You've either got to get one or-you haven't applied for a public defender, so, we can't appoint you one. But we can't keep rocking along without a trial being disposed of. Do you understand that?

The Petitioner responded, "Yes sir." *Id.*

The Petitioner's case was not called the week of August 21, 2000. On August 24, 2000, however, the trial court held another hearing with the Petitioner regarding whether a bench warrant was properly issued and should be lifted. (App. 39-53.) During the hearing, the Petitioner told the trial court he had \$800 of the \$1,000 needed to retain Stacy Lewis as his attorney, but he could not earn the remaining money if he remained in jail. (App. 44-45.) He asked the trial court to release him on bond so he could return to work. (App. 45.) The trial court refused to lift the bench warrant. The trial court ended the hearing by telling the Petitioner, "You can go back in there and when you get your lawyer they will call your case but I've heard all I need to hear. Judge Floyd issued a bench warrant and I'm sure he had good reason to issue it." (App. 52.)

The Petitioner's case was called for trial on September 12, 2000. (App. 57.) The trial court asked the Petitioner if he had retained an attorney. *Id.* The Petitioner stated that he had "lawyers that [were] willing to take his case" and his family had the funds to retain attorney Stacy Lewis but the assistant solicitor had prevented him from getting an attorney because she told Lewis that the trial court would not grant a continuance. *Id.* The trial court called Lewis on the speaker telephone and Lewis stated that he did not represent the Petitioner. (App. 64.) Lewis stated that he had told the Petitioner's girlfriend to bring the retainer by 3:00 the previous afternoon, but she did not get to Lewis' office until 3:30. *Id.* By that time, Lewis stated he had left his office and he had "had it with them." *Id.* Lewis also confirmed that the assistant solicitor had informed him that the trial court would not likely grant a continuance in the case. (App. 65.)

The trial court stated that the Petitioner had been given plenty of time to retain an attorney and had been warned that the Petitioner's trial would begin without an attorney. (App. 67.) The Court found that the Petitioner had waived his right to counsel and the trial court proceeded with the trial. (App. 72.) The trial court stated that he was relying on *State*

v. Jacobs, 245 S.E.2d 606 (S.C. 1978), in finding the Petitioner had waived his right to counsel. (App. 67.) In *Jacobs*, the trial judge urged the defendant on several occasions to retain a lawyer and the case was continued at least once to enable him to hire an attorney. 245 S.E.2d at 607. Although the defendant never expressly waived his right to counsel, the court held the defendant had waived his right to counsel by his conduct because he was given reasonable time to secure counsel, he was financially capable of retaining counsel, and the court had done all it could to advise him to seek counsel. *Id.*

On direct appeal, the South Carolina Court of Appeals agreed and affirmed. The court held that the Petitioner had repeatedly told the trial court that either he or his family had the funds to retain counsel. Further, the court held that the trial court had done all it could to encourage the Petitioner to obtain counsel. The court concluded that the Petitioner through his actions, had waived his right to counsel.

A criminal defendant has the right pursuant to the Sixth Amendment of the United States Constitution to the assistance of counsel for his defense and the corollary right to waive counsel. *Faretta*, 422 U.S. at 818. A defendant who is waiving counsel, must do so "clearly and unequivocally." *Fields v. Murray*, 49 F.3d 1024, 1028-1029 (4th Cir. 1995) (citations omitted). Some courts have recognized three ways in which a defendant may relinquish his right to counsel: (1) waiver by an affirmative, verbal request; (2) waiver by conduct; and (3) forfeiture. See *State v. Boykin*, 324 S.C. 552, 556, 478 S.E.2d 689, 690 (Ct. App.1996).

The record is clear that the Petitioner did not waive counsel through an affirmative verbal request. However, the record shows that as found by the state courts, the Petitioner relinquished his right to counsel through waiver or forfeiture by his conduct.⁶

A "waiver is an intentional and voluntary relinquishment of a known right," and the Supreme Court has explicitly held that a defendant can voluntarily and intelligently waive the right to counsel. *Faretta*, 422 U.S. at 814-15. "At the other end of the spectrum is forfeiture . . . which results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right." *United States v. Goldberg*, 67 F.3d 1092, 1099-1101 (3d Cir. 1995). Some courts have held that "[f]orfeiture can result regardless of whether the defendant has been warned about engaging in misconduct, and regardless of whether the defendant has been advised of the risks of proceeding pro se." *United States v. Thomas*, 357 F.3d 357, 362 (3d Cir. 2004)(quoting *Goldberg*, supra at 1101)(holding where a defendant's course of conduct demonstrates his or her intention not to seek representation by private counsel, despite having the opportunity and financial wherewithal to do so, a determination that the defendant be required to proceed pro se is mandated because that defendant has forfeited the right to counsel). Forfeiture does not require that the defendant intend to relinquish a right, but rather may be the result of the defendant's "extremely serious misconduct" or "extremely dilatory conduct." *Thomas*, 357 F.3d at 362 (quoting *Goldberg*, supra at

⁶As stated above, the trial court ended the August 24th hearing by telling the Petitioner, "You can go back in there and when you get your lawyer they will call your case but I've heard all I need to hear. Judge Floyd issued a bench warrant and I'm sure he had good reason to issue it." (App. 52.) The Petitioner contends that he construed this statement from the trial court to mean that once he retained counsel, the case would be called for trial. (Pet.'s Mem. Opp. Summ. J. Mot. at 39.) Such an interpretation would require that this lone statement be taken entirely out of context. Furthermore, the Petitioner did not raise this argument to the trial court on September 12th. Rather he insisted that his family had the funds to retain counsel and that he had "lawyers that [were] willing to take [his] case . . ." (App. 61-62.)

1100-02). See also *State v. Thompson*, 584 S.E.2d 131 (S.C. App. 2003) (holding the right to counsel may be forfeited by a defendant's failure to retain counsel within a reasonable time, even if this forfeiture causes the defendant to proceed pro se); *Commonwealth v. Coleman*, 905 A.2d 1003, 1006-08 (Pa.Super. 2006) (affirming a finding of forfeiture where defendant, who had the means to retain counsel, appeared without counsel or engaged in behavior that forced counsel to withdraw).

In his PCR proceeding, the Petitioner alleged his trial counsel was ineffective for abandoning the issue of whether the trial court erred in failing to warn the petitioner of the dangers of self-representation. As noted above, the PCR Court held that the record established that the Petitioner "understood his right to counsel and the dangers of self-representation." (App. 15.) The PCR Court cited *Bridwell v. State*, 413 S.E.2d 30, 31 (S.C. 1992), in which the court held that in the absence of a specific inquiry by the trial judge addressing the disadvantages of proceeding pro se, the court will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source. This finding by the PCR court is one of fact, and thus entitled to a presumption of correctness. See *Fields*, 49 F.3d at 1032 (stating that question of whether a defendant invoked right to self-representation is one of fact entitled to the presumption of correctness). The Petitioner has the burden to rebut this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Here, the Petitioner fails to demonstrate that appellate counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

Even assuming that here the Petitioner did not forfeit his right to counsel, but rather waived it through his dilatory conduct, a colloquy explaining the dangers of self-representation is not required by the Constitution or any Supreme Court precedent. *Wilkerson v. Klem*, 412 F.3d 449, 453-454 (3d Cir. 2005). "A waiver colloquy is a

procedural device; it is not a constitutional end or a constitutional right . . . the colloquy does not share the same status as the right itself." *Commonwealth v. Mallory*, 596 Pa. 172, 941 A.2d 686, 697 (2008) (discussing absence of waiver colloquy in context of defendant's waiver of jury trial), cert. denied --- U.S. ---, 129 S.Ct. 257, 172 L.Ed.2d 146 (2008). Moreover, the absence of an on-the-record colloquy does not establish that a defendant failed to understand the right he waived. Defendants can waive their fundamental rights in the absence of a colloquy. Waivers can occur by conduct or by implication, as in the case of a criminal trial conducted in absentia after the defendant fails to appear. *Id.*

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Upon a review of the record, the undersigned finds that the Petitioner's waiver of counsel was knowing and voluntary and although the trial judge did not specifically address the disadvantages of self-representation directly with the Petitioner, based on the record the Petitioner made a valid and knowing waiver. Accordingly, the undersigned finds that the Petitioner cannot demonstrate that state courts erred in finding he had waived his right to counsel or that appellate counsel was ineffective. The state court's rejections of these claims were not contrary to clearly established principles, did not involve an objectively unreasonable application of federal law, nor were based on an unreasonable determination of the facts. Therefore, these claims should be dismissed.

CONCLUSION

Wherefore, it is **RECOMMENDED** that the Respondent's Motion for Summary Judgment (Dkt. # 17) be **GRANTED**; and the habeas petition **DISMISSED** with prejudice **IT IS SO RECOMMENDED.**

s/Bruce Howe Hendricks
United States Magistrate Judge

August 13, 2010
Greenville, South Carolina

The Petitioner's attention is directed to the important notice on the next page.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

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Carlos M. Gill,)
Petitioner,)
)
v.)
)
Leroy Cartledge,)
Warden of McCormick Correctional Institute,)
Respondent.)
)
)
)
)

Case No. 8:09-3350-RMG-BHH

ORDER

This is a *pro se* Petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. As a result, this case was automatically referred to the United States Magistrate Judge for all pretrial proceedings pursuant to the provisions of 28 U.S.C. § 636(b)(1)(A) and (B) and Local Rule 73.02(B)(2)(c), D.S.C. The Magistrate has issued a Report and Recommendation that Respondent's motion for summary judgment should be granted. (Dkt. No. 25). The Magistrate Judge advised Petitioner of the procedures and requirements for filing objections to the Report and the serious consequences if he failed to do so. Petitioner has filed objections to the R&R. (Dkt. No. 31). As explained herein, this Court agrees with the Report and Recommendation and grants Respondent's motion for summary judgment. Petitioner has failed to specifically object to the Report and Recommendation as he has simply restated the same arguments presented to the Magistrate in opposition to the motion for summary judgment.

LAW/ANALYSIS

The magistrate makes only a recommendation to this Court. The recommendation has no presumptive weight, and responsibility for making a final determination remains with this Court.

Mathews v. Weber, 423 U.S. 261, 270-71, 96 S.Ct. 549, 46 L.Ed.2d 483 (1976). This Court is charged with making a *de novo* determination of those portions of the Report and Recommendation to which specific objection is made, and this Court may “accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.” 28 U.S.C. § 636(b)(1). This Court may also “receive further evidence or recommit the matter to the magistrate with instructions.” *Id.* In the absence of specific objections to the Report and Recommendation, this Court is not required to give any explanation for adopting the recommendation. *Camby v. Davis*, 718 F.2d 198 (4th Cir. 1983). Petitioner filed his “objections” on August 31, 2010. (Dkt. No. 31).

As directed by the Fourth Circuit, this Court may only consider objections to the Report and Recommendation that direct this Court to a *specific* error. All of Petitioner’s “objections” merely restate word for word or rehash the same arguments presented in his response to Respondent’s motion for summary judgment. (See Dkt. No. 21 *compare with* Dkt. No. 31). Therefore, Petitioner has not really provided this Court with objections to address.

Nonetheless, out of an abundance of caution and given Petitioner’s *pro se* status, this Court reviewed the Record *de novo* and the Record reflects that Respondent’s motion for summary judgment should be granted. Petitioner contends that, although appellate counsel raised this issue to the South Carolina Court of Appeals, appellate counsel later waived this issue by failing to raise it in a motion for rehearing or in his appeal to the South Carolina Supreme Court. In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court of the United States established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance. In order to establish that counsel was ineffective, the Petitioner must prove that appellate counsel’s performance: (1) fell below an objective standard of reasonableness

and (2) that, but for appellate counsel's error, the outcome of the appeal would have been different. *Strickland*, 466 U.S. at 688-94. The first prong of the test requires that the Petitioner demonstrate that trial counsel's performance was deficient and "fell below an objective standard of reasonableness." *Id.* at 688. The second prong requires the Petitioner to show that the deficient performance prejudiced the defense. *Id.* at 687. The Record reflects that Petitioner cannot meet the requirements of *Strickland*.

Petitioner further argues he was denied his constitutional rights when he was forced to go to trial without legal representation and without being warned of the dangers of self-representation. Having reviewed the entire record, the undersigned finds that the Petitioner's waiver of counsel was knowing and voluntary and although the trial judge did not specifically address the disadvantages of self-representation directly with the Petitioner, based on the record, the Petitioner made a valid and knowing waiver. Accordingly, the undersigned finds that the Petitioner cannot demonstrate that state courts erred in finding he had waived his right to counsel or that appellate counsel was ineffective. The PCR Court held that the record established that the Petitioner "understood his right to counsel and the dangers of self representation." Thus, the state court's rejections of these claims were not contrary to clearly established principles, did not involve an objectively unreasonable application of federal law, nor were based on an unreasonable determination of the facts.

Based on the above authority and the Record in this matter, the Court finds no error of law made in the Magistrate's Report and Recommendation. Thus, this Court finds that the issues Petitioner has raised were correctly addressed by the magistrate. This Court will not address the same issues a second time.

contrary to clearly established principles, and in fact, did involve an objectively unreasonable application of federal law.

The Magistrate Judge stated the following in the Report and Recommendation quoting verbatim:

The record shows that the Petitioner applied for the appointment of a public defender on April 17, 2000, while he was free on bond. However, because at that time the Petitioner was employed, he was deemed non-indigent and not eligible for a public defender. On August 11, 2000, during a hearing, the trial court informed the Petitioner that his case would be tried August 21, 2000, whether the Petitioner had retained counsel or not. (App. 34). The trial court asked the Petitioner whether he would like to apply for a public defender. Id. The Petitioner replied that he was "supposed to be getting Stacy Lewis" to represent him. The trial court then stated:

You're up for trial with or without an attorney the week of the twenty-first of this month. We're not going to put off the trial for you to get a lawyer. You've got to get one or-you haven't applied for a public defender, so, we can't appoint you one. But we can't keep rocking along without a trial being disposed of. Do you understand that?

The Petitioner responded, "yes sir". Id.

The Petitioner's case was not called the week of August 21,

2000. On August 24, 2000, however, the trial court held another hearing with the Petitioner regarding whether a bench warrant was properly issued and should be lifted. (App. 39-53). During the hearing, the Petitioner told the trial court he had \$800.00 of the \$1,000.00 needed to retain Stacy Lewis as his attorney, but he could not earn the remaining money if he remained in jail. (App. 44-45). He asked the trial court to release him on bond so he could return to work. (App. 45). The trial court refused to lift the bench warrant. The trial court ended the hearing by telling the Petitioner, "you can go back in there and when you get your lawyer they will call your case but I've heard all I need to hear. Judge Floyd issued bench warrant and I'm sure he had good reason to issue it." (App. 52).

DISCUSSION

Petitioner contends that he did apply for appointment of a public defender on April 17, 2000, while he was free on bond. As stated by the Magistrate because at that time the Petitioner was employed, he was deemed non-indigent and not eligible for a public defender. Petitioner did in fact inform the court that he would let the court know whether he was going to be able to retain attorney Stacy Lewis when he talked to his girlfriend that day. (APP. 34). Petitioner was informed the trial would be held on August 21, 2000. However, the trial was not held at that date because of other cases. On August 24, 2000, Petitioner requested a hearing regarding whether a bench warrant was properly issued

and to express that unless the bench warrant was lifted he could not retain counsel due to the lack of funds. Petitioner was persistent in letting the court know he would not be able to retain counsel if he was not able to return to work to secure the remaining funds. (App. 44-45).

Petitioner contends that contrary to clearly established federal law, as determined by the Supreme Court of the United States in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 799, 93 A.L.R.2d 733, where person charged with crime in state court is financially unable to retain an attorney, court must appoint one to act in his behalf, in the absence of an effective waiver of accused. Determination of an accused indigency is a prerequisite to right of court appointed counsel. Since the decision in Gideon the right of the accused in a criminal prosecution to assistance of counsel under the Sixth Amendment to the Constitution of the United States is made obligatory upon the states by the Fourteenth Amendment.

Petitioner had been incarcerated from July 24, 2000, until September 12, 2000, pursuant to a bench warrant. He had been incarcerated for over a month and a half and it's an undisputed fact that Petitioner did inform the court that he would not be able to retain counsel unless released to return to work to secure the remaining funds to retain counsel. (App. 44-45). It's also an undisputed fact that the court neglected to make any determination as to whether Petitioner was in fact without means to procure counsel due to his incarceration.

In a long line of cases that includes Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); and Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 799 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The constitution guarantees a fair trial through the Due Process Clause, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment including the Counsel Clause. The established principles determined by the Supreme Court of the United States clearly states because of the vital importance of counsel's assistance, this Court has held that with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. See Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); Gideon v. Wainwright, supra; Johnson v. Zerbst, supra.

That person who happens to be a lawyer is present at the trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just result. An accused is entitled to be

1. The record of August 24, 200 is as follows: "Ms. Thomas: Your Honor, this is Mr. Carlos Miguel Gill. He's asked that I put him before your Honor and I'm not quite sure why". (App. 39)

assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

The Magistrate Judge continued as follows in the Report and Recommendation, quoting verbatim:

The Petitioner's case was called for trial on September 12, 2000. (App. 57). The trial court asked the Petitioner if he had retained an attorney. Id. The Petitioner stated that he had "lawyers that [were] willing to take his case" and his family had the funds to retain attorney Stacy Lewis but the assistant solicitor had preventing him from getting an attorney because she told Lewis that the trial court would not grant a continuance. Id. The trial court called Lewis on the speaker telephone and Lewis stated that he did not represent the Petitioner. (App. 64). Lewis stated that he had told the Petitioner's girlfriend to bring the retainer by 3:00 the previous afternoon, but she did not get to Lewis' office until 3:30. Id. By that time, Lewis stated he had left his office and he had "had it with them". Id. Lewis also confirmed that the assistant solicitor had informed him that the trial court would not likely grant a continuance in the case. (App. 65).

The trial court stated that the Petitioner had been given plenty of time to retain an attorney and had been warned that Petitioner's trial, would begin without an attorney. (App. 67).

The Court found that the Petitioner had waived his right to counsel and the trial court proceeded with the trial. (App. 72). The trial court stated that he was relying on State v. Jacobs, 245 S.E.2d 606 (S.C. 1978), in finding the Petitioner had waived his right to counsel. (App. 67). In Jacobs, the trial judge urged the defendant on several occasions to retain a lawyer and the case was continued at least once to enable him to hire an attorney, the court held the defendant had waived his right to counsel by his conduct because he was given reasonable time to secure counsel, he was financially capable of retaining counsel, and the court had done all it could to advise him to seek counsel. Id.

On direct appeal the South Carolina Court of Appeals agreed and affirmed. The Court held that the Petitioner had repeatedly told the trial court that either he or his family had the funds to retain counsel. Further, the Court held that the trial court had done all it could to encourage the Petitioner to obtain counsel. the Court concluded that the Petitioner through his actions, had waived his right to counsel.

A criminal defendant has the right pursuant to the Sixth Amendment of the United States Constitution to the assistance of counsel for his defense and the corollary right to waive counsel. Faretta, 422 U.S. at 818. A defendant who is waiving counsel, must do so "clearly and unequivocally". Fields v. Murray, 49 F.3d

1028-1029 (4th Cir. 1995)(citations omitted). Some courts have recognized three ways in which a defendant may relinquish his right to counsel: (1) waiver by an affirmative, verbal request; (2) waiver by conduct; and forfeiture. See State v. Boykins, 324 S.C. 552, 556, 478 S.E.2d 689, 690 (Ct. App. 1996).

The record is clear that the Petitioner did not waive counsel through an affirmative verbal request. However, the record shows that as found by the state courts, the Petitioner relinquished his right to counsel through waiver or forfeiture by conduct.²

A "waiver is an intentional and voluntary relinquishment of a known right," and the Supreme Court has explicitly held that a defendant can voluntarily and intelligently waive the right to counsel. Faretta, 422 U.S. at 814-15. "At the other end of the spectrum is forfeiture ... which results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right". United States v. Goldberg, 67 F.3d 1092, 1099-1101 (3rd Cir. 1995). Some courts have held that "[f]orfeiture can result regardless of whether the defendant has been warned about

² As stated above, the trial court ended the August 24th hearing by telling the Petitioner, "You can go back in there and when you get your lawyer they will call your case but I've heard all I need to hear. Judge Floyd issued a bench warrant and I'm sure he had good reason to issue it". (App. 52). The Petitioner contends that he construed this statement from the trial court to mean that once he retained counsel, the case would be called for trial. (Pet.s Mem. Opp. Summ. J. Mot. at 39). Such an interpretation would require that this lone statement be taken entirely out of context. Furthermore, the Petitioner did not raise this argument to the trial court on September 12th. Rather he insisted that his family had the funds to retain counsel and that he had "lawyer that [were] willing to take [his] case ..." (App. 61-62).

engaging in misconduct, and regardless of whether the defendant has been advised of the risks of proceeding pro se." United States v. Thomas, 357 F.3d 357, 362 (3rd Cir. 2004)(quoting Goldberg, supra, at 1101)(holding where a defendant's course of conduct demonstrates his or her intention not seek representation by private counsel, despite having the opportunity and financial wherewithal to do so, a determination that the defendant be required to proceed pro se is mandated because that defendant has forfeited the right to counsel). Forfeiture does not require that the defendant intend to relinquish a right, but rather may be the result of the defendant's "extremely serious misconduct" or "extremely dilatory conduct". Thomas, 357 F.3d at 362 (quoting Golberg, supra, at 1100-02). See also State v. Thompson, 584 S.E.2d 131 (S.C. App. 2003)(holding the right to counsel may be forfeited by a defendant's failure to retain counsel within a reasonable time, even if this forfeiture causes the defendant to proceed pro se); Commonwealth v. Coleman, 905 A.2d 1003, 1006-08 (Pa. Super. 2006)(affirming a finding of forfeiture where defendant, who had the means to retain counsel, appeared without counsel or engaged in behavior that forced counsel to withdraw).

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(App. 15). The PCR Court cited Bridwell v. State, 413 S.E.2d 30, 31 (S.C. 1992), in which the court held that in the absence of a specific inquiry by the trial judge addressing the disadvantages of proceeding pro se, the court will look to the record to determine whether Petitioner had sufficient background or was apprised of his rights by some other source. The finding by the PCR court is one of fact, and thus entitled to a presumption of correctness. See Fields 49 F.3d at 1032 (stating that question of whether a defendant invoked right to self-representation is one of fact entitled to presumption of correctness). The Petitioner has the burden to rebut this presumption by clear and convincing evidence. 28 U.S.C. §2254 (e)(1). Here, the Petitioner fails to demonstrate that appellate counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

Even assuming that here the Petitioner did not forfeit his right to counsel, but rather waived it through his dilatory conduct, a colloquy explaining the dangers of self-representation is not required by the Constitution or any Supreme Court precedent. Wilkerson v. Klem, 412 F.3d 449, 453-454 (3d Cir. 2005). "A waiver colloquy is a procedural device; it is not a constitutional right the colloquy does not share the same status as the right itself". Commonwealth v. Mallory, 596 Pa. 172, 941 A.2d 686, 697 (2008)(discussing absence of waiver colloquy in context of defendant's waiver of jury trial), cert.

denied --- U.S. ----, 129 S.Ct. 257, 172 L.Ed.2d 146 (2008). Moreover, the absence of an on-the-record colloquy does not establish that a defendant failed to understand the right he waived. Defendants can waive their fundamental rights in the absence of a colloquy. Waivers can occur by conduct or by implication, as in the case of criminal trial conducted in absentia after the defendant fails to appear. Id.

DISCUSSION

The South Carolina Court of Appeals has overlooked that Petitioner's problems with retaining an attorney were related to his lack of ability to raise funds for a retainer from jail. He explained this to the judge on August 24, 2000. However, after August 11, 2000, there is no evidence he was advised of his right to a public defender if he was indigent.

The Court also overlooked the vast differences between this case and State v. Jacobs, 271 S.C. 126, 245 S.E.2d 606 (1978). Jacobs is distinguishable in several crucial ways.

(1) In Jacobs, the Court made a specific finding that the defendant had made "no showing why he had not retained counsel within [a reasonable] time". Id. at 607. In contrast, Gill did explain that he had not the money to pay the attorney until the day of trial when his family had it.

(2) In jacobs, the defendant never expressed that he was having

difficulty raising money for a retainer. there is no evidence Jacobs was indigent.

(3) In Jacobs, the trial court asked an attorney from the public defenders' office to sit with the defendant and give him assistance. Here, no such opportunity was afforded Gill.

(4) In Jacobs, the defendant's case had been continued so that he could obtain a lawyer. the trial court had reduced bond and provided Jacobs with a telephone so that he could procure counsel. He continued the case to enable him to find a lawyer. In Petitioner's case Gill's trial was never continued on his motion and he remained in jail on a bond he could not make.

(5) In Jacobs, the defendant was charged with possession and sale of marijuana. In this case Gill was charged with distribution of crack cocaine, distribution of crack cocaine within the proximity of a school and conspiracy to distribute crack cocaine. the proximity charge is classified as "serious offense" pursuant to section §1725-45, S.C. Code Ann. (2000 Supp.).

(6) In Jacobs, the defendant was sentenced to five years in prison suspended upon the service of eighteen months and probation. Id. Here, Petitioner was sentenced to the maximum term of twenty-five years and the maximum fine of \$50,000.00 for distribution of crack cocaine, second offense. (App. 185.) §43-53-375(b)(2). Pursuant §43-53-375(d), Petitioner is not

eligible for parole, extended work release, or supervised furlough. S.C. Ann. (Supp. 2000). In Petitioner case a much greater liberty interest is at stake.

Because the Court overlooked that the trial court did not offer a public defender after August 11, 2000 when petitioner expressed his difficulty raising funds and because the Court overlooked the vast differences between the implied waiver found in Jacobs and Gill's case, Petitioner did respectfully request a rehearing in the South Carolina Court of appeals on the following issues and the state court neglected to address the vast differences in these two cases.

The Petitioner also respectfully ask this Honorable Court to view State v Jacobs, 245 S.E.2d 606 (S.C. 1978), for the undisputed fact that as soon as the trial court found Jacobs had waived his right to counsel the court appointed a public defender to assist Jacobs during trial. Contrary to clearly established federal law as determined by the Supreme Court of the United States in Maine v. Moulten, 106 S.Ct. 477 (1985), the Court held "whatever else it may mean, the right to counsel means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him". The Court went on to say that, "once the right to counsel has attached and been asserted, the state must honor it". Petitioner contends that the defendant in Jacobs was provided with the

constitutional guarantee and in the present case the Petitioner was clearly denied any assistance from counsel during trial. See Maine v. Moulten, surpa. In the Petitioner's case he repeatedly informed the trial court that he needed counsel and did not want to proceed without an attorney. (App. 77-83).

In the Report and Recommendation of the Magistrate it's stated that, "Petitioner fails to demonstrate that appellate counsel's performance was deficient or that there is a reasonable probability that but for counsel's alleged errors the results of the proceeding would have been different". Petitioner objects to the following because the Petitioner's PCR hearing record clearly disputes the following statement made by the Magistrate. The following that was discussed during Petitioner's PCR hearing clearly proves that appellate counsel's performance was deficient and that the results would have been different had the PCR court addressed whether appellate counsel was ineffective when an important constitutional argument was abandoned during the course of appeal. The PCR record demonstrates the contradiction of the Magistrate it self. The record is as follows, quoting verbatim:

The Court: I'll read this case and anything else we can find on point, but --- the Gardner case, but let me ask you if he was entitled to a remedy, if the Court found he was entitled to remedy, wouldn't it be simply a direct appeal under White, the --

Ms. McMahan: In this matter?

The Court: Yes. Not an appeal of the whole case, an appeal on the -- with regard to the rehearing, petition for rehearing to the --

Ms. McMahan: No, Your Honor. He's already had an appeal. This is not an issue where he was denied the right to an appeal initially for failure of an attorney to file a notice of appeal.

The Court: Failing to raise an issue on appeal though.

Ms. McMahan: That would have to be found in ineffective assistance of appellate counsel and --

The Court: That's what I mean.

Ms. McMahan: -- the whole thing would start over from day one.

The Court: You mean the whole trial?

Ms. McMahan: Yeah, from the very beginning from the charges, everything.

The Court: You mean the Court couldn't direct appellate counsel to -- well, I guess time has expired. I see what you're saying. Time has expired to reconsider any appeal and also petition for cert. All those times have expired, so you couldn't go back there. All right. Anything else?

App. 259-260. Petitioner contends that needless to say, the PCR hearing record itself demonstrate the results would have in fact been different had the PCR court not opposed justice and addressed Petitioner's claim in the context of appellate counsel being ineffective in failing to raise the constitutional argument on appeal, in which the PCR court openly admitted. The record is clear that the PCR court clearly neglected to grant Petitioner the presumption of correctness that he proved he was in fact entitled to.

The Magistrate went on to say that, "even assuming here the Petitioner did no forfeit his right to counsel, but rather waived it through his dilatory conduct, a colloquy explaining the dangers of self-representation is not required by the constitution or by any Supreme Court precedent". Clearly contrary to established federal law as determined by the Supreme Court of the United States in Iowa v. Tovar, 541 U.S. 77, 81, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004), this Court held that before a defendant may be allowed to proceed pro se, he must be warned specifically of the hazard ahead. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), is instructive.

Later in Patterson v. Illinois 487 U.S. 285, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988), this Court elaborated on "the danger and disadvantages of self-representation" to which Faretta inferred. The Supreme Court of the United States went on to say, [at] trial the court observed, counsel is required to help even the most

gifted layman adhere to the rules of procedure and evidence, comprehend the subtleties of voir dire, examine and cross-examine witnesses effectively, object to improper prosecution questions and much more". 487 U.S. at 299, n. 13, 108 S.Ct. 2389. Warning of the pit falls of proceeding to trial with counsel, the Court clarified, must be "rigorous[ly]" conveyed. The Court further noted however that at earlier stages of the criminal process, a less searching or formal colloquy may suffice. The Court requires less rigorous warnings pretrial, Patterson explained, not because pretrial proceedings are "less important" than trial, but at that stage "the full dangers and disadvantages of self representation are less substantial and more obvious to an accused than they are at trial.

Iowa v. Tovar, supra, goes on to say, "the information a defendant must possess in order to make a intelligent election, the Court's decision indicated, will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding". See Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Petitioner also submitted Gardner v. State, 570 S.E.2d 184, 351 S.C. 407 (2002), in which the following case addressed factors to be considered when determining if an accused has a sufficient background to understand the dangers of self-representation. Gardner goes on to say that, "in a PCR action, if the record fails to demonstrate the Petitioner made an informed choice to proceed pro se, with "eyes open", then the Petitioner did not

make a knowing and voluntary waiver of counsel, and the case should be remanded for a new trial.

At Petitioner's PCR hearing the assistant solicitor who had prosecuted Gill testified regarding two pre-trial hearings, both of which Gill attended without legal representation. The first hearing place on August 11, 2000, and the second on August 24, 2000. According to the solicitor's testimony, the focus of each hearing was "regarding Petitioner's representation". PCR transcript at 13.

With regards to the August 11, 2000, hearing, the solicitor testified:

Q. At [the August 11, 2000 pretrial] hearing did Judge Hayes warn Mr. Gill of the risk of proceeding to trial without representation?

A. I know that Judge Hayes went over a lot of things with him, but I cannot sit here right now and tell you whether or not he warned him of his - the dangers of representing himself. I don't believe he did....

PCR transcript at 13-14. In fact, the transcript from Gill's August 11, 2000 hearing confirms that the trial judge did not warn Petitioner of the dangers of self-representation that time. Transcript of August 11, 2000 hearing.

The solicitor testified that she requested the August 24, 2000 hearing "to give Petitioner notice that he was going-he was on the trial docket and that his case was coming to trial and,

emphasize to him that he needed to get an attorney". PCR transcript at 15. Even though the purpose of that hearing was to emphasize the need for Gill to retain an attorney, the solicitor testified unequivocally that the trial court "did not" warn Petitioner about the dangers of proceeding to trial without an attorney. Despite Petitioner's vigorous protestation that he "needed an attorney" the case proceeded to trial. (App. 74-79). Iowa v. Tovar, 541 U.S. 77, 81, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004), also discussed that the United States Supreme Court have established that the Court recognized that the Sixth Amendment secures to a defendant facing incarceration the right to counsel at all "critical stages" of the criminal process. The Court further noted in Iowa v. Tovar, supra, that even if the defendant lacked a full and complete appreciation of all the consequences flowing from his waiver, the state may nevertheless prevail if it shows that the information provided to the defendant satisfied the constitutional minimum. The Court also stated that even though the warning of dangers of self-representation is not mandated by the Sixth Amendment, however the constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of the right to be counseled regarding his plea, and the range of punishments attendant upon entry of his plea.

In the present case not even the constitutional minimum was satisfied by the pretrial or trial court. Petitioner had two pretrial hearings regarding Petitioner's representation before the trial was held, not once did the court inform the accused of

the nature of the charges against him, of the right to be counseled regarding his plea, or the range of punishment attendant upon entry of his plea.

Petitioner also objects to the Magistrate Judge stating that, "Petitioner's two ground for relief are intertwined that the Magistrate insisted upon discussing the two grounds together". In the present case, Petitioner contends that due to the state court repeatedly neglecting to address important issues that clearly supports the fact that Petitioner did not knowingly and intelligently waive his right to counsel and that appellate counsel was ineffective, this Court is respectfully asked to address the following:

(1) The South Carolina Court of Appeals neglected to address Petitioner's Faretta claim in the published opinion in State v. Gill, 584 S.E.2d 432 (S.C. Ct. App. 2003), in which the trial court neglected to warn the Petitioner of the dangers and disadvantages of self-representation.

(2) The South Carolina Court of Appeals neglected to readress the vast differences in Petitioner's case and State v. Jacobs, 245 S.E.2d 606 (S.C. 1978), in which the trial court found Petitioner had waived his right to counsel by his conduct. (Please view the facts in this amendment in support of the vast differences.

(3) The PCR court neglected to address whether Petitioner's appellate counsel was ineffective when counsel abandoned an important constitutional argument during the course of appeal.

The PCR court however did discuss that appellate counsel was ineffective and the remedy Petitioner was entitled to, but neglected to grant Petitioner the presumption of correctness that he clearly proved he was entitled to. (See App. 259).

(4) The PCR court neglected to address the prejudice that resulted by Petitioner's appellate counsel abandoning his constitutional argument during the course of appeal. Appellate counsel's failure to raise the "significant and obvious issues" of Faretta v. California, 422 U.S. 806 (1975), in Petitioner's petition for rehearing or to the South Carolina Supreme Court deprived Petitioner of effective assistance of appellate counsel at all levels of his direct appeal.

(5) The PCR court neglected to address the fact that Petitioner was not warned of the dangers and disadvantages of proceeding pro se even after the assistant solicitor that prosecuted the case testified that the trial court never warned Petitioner of the dangers and disadvantages of proceeding pro se.

(6) The PCR court neglected to conduct a detailed analysis pursuant to Faretta v. California, 422 U.S. 806, 835 (1975), and Gardner v. State, 351 S.C. 407, 570 S.E.2d 184 (2002) and did not even mention any of the considered factors in Gardner when faced with an accused to determine if Petitioner had a sufficient background to understand the dangers of self-representation. See

Order of Dismissal. App.#1.

Petitioner respectfully ask this Court to view the conduct of the state courts neglecting to address the facts that the pretrial and trial record supporting that Petitioner did not make a valid and knowing waiver of his right to counsel. the record clearly establishes that the state courts has continuously neglected to render a just decision on the merits in the present case.

Petitioner asserts that in reference to Summer v. Mata, 499 U.S. 539, 101 S.Ct. 764, 662 L.Ed. 722 (1981), that fact finding in state court hearing carry a presumption of correctness in federal habeas corpus proceedings Petitioner respectfully ask that this Court observe its authority specifically set forth in 28 U.S.C. §2254(d). This section provides that:

(d) In any proceeding instituted in a federal court by application for a writ of habeas corpus by a person in custody pursuant to the judgment in a state court, a determination after a hearing on the merits of a factual issue, made by a state court of competent jurisdiction in a proceeding to which the applicant for the writ and the state or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit - :

(1) that the merits of the factual dispute were not resolved in the State court;

(2) that the fact finding procedure employed by the State court was not adequate to a full and fair hearing;

(3) that the material facts were not adequately developed in the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair hearing and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the record of the State court proceeding in which the determination of the sufficiency of the evidence to support such factual determination, is produced

as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes such a factual determination is not fairly supported by the record:

"And in an evidentiary hearing in the proceeding in the Federal Court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstance respectively set forth in paragraphs numbered (2) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph number (8) that the record in the state court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous".

Petitioner contends that in accordance with (d)(1) of provision 2254(d) that the merits of the factual dispute were not resolved in state court because the state of South Carolina in the Court of Appeals published a written opinion, State v. Gill, 355 S.C. 234, 241, 584 S.E.2d 432, 436 (Ct. App. 2003), and neglected to address the issue of whether Petitioner was warned of the dangers and disadvantages of proceeding pro se. To this day the Court of Appeals, Supreme Court, and PCR court all have neglected to address this "significant and obvious issue" of Farettav. California, 422 U.S. 806, 835 (1975).

Petitioner contends that in accordance with (d)(5) of provision 2254(d) that the applicant was an indigent and the

state court in deprivation of his constitutional right, failed to appoint counsel to represent him during the course of trial even after the Petitioner requested a hearing prior to trial to inform the court that unless he was released on a bench warrant so he could return to work to secure the remaining funds, he would not be able to retain counsel. The pretrial court neglected to determine whether Petitioner was in fact without means to procure counsel and failed to appoint counsel for Petitioner during trial.

Petitioner contends that he did not receive a full, fair hearing and adequate hearing in state court in accordance with the provision (d)(6), 2254(d) because appellate counsel abandoned Petitioner's constitutional argument during the course of appeal. The South Carolina Court of Appeals neglected to address Petitioner's Faretta claim and appellate counsel; did not raise the "significant and obvious issue in the Court of Appeals in rehearing or in the South Carolina Supreme Court on writ of certiorari. This deprived Petitioner of effective assistance of appellate counsel at all levels of his direct appeal.

Petitioner presents facts herein that clearly support the fact that the state court or in violation of provision 2254 (d)(1), (d)(5), and (d)(7). Further, the Magistrate stated as follows in the Report and Recommendation, quoting verbatim:

"In PCR proceeding, the Petitioner alleged his trial counsel was ineffective for abandoning the issue of whether the trial court erred in failing to warn the Petitioner of the dangers of self-representation. As noted above, the PCR court held that the

record established that the Petitioner "understood his right to counsel and the dangers of self-representation". (App. 15). The PCR court cited Bridwell v. State, 413 S.E.2d 30, 31 (S.C. 1992), in which the court held that in the absence of a specific inquiry by the trial judge addressing the disadvantages of proceeding pro se, the court will look to the record to determine whether Petitioner had sufficient background or was appraised of his rights by some other source. This finding by the PCR court is one of fact, and thus entitled to a presumption of correctness. See Fields, 49 F.3d 1032 (stating that question of whether a defendant invoked right to self-representation is one of fact entitled to the presumption of correctness").

Petitioner contends that in Bridwell v. State, supra, that the record clearly indicted the trial judge gave Petitioner no warning of the dangers of self-representation. Further, there was no evidence Petitioner was aware of the hazards of proceeding pro se. The South Carolina Supreme Court found that the PCR judge erred in finding Petitioner's waiver of counsel was knowing and voluntary. this case was reversed and remanded for anew trial. The Supreme Court held that they would not uphold PCR judges finding if there is no evidence to support it. See High v. State, 300 S.C. 88, 386 S.E.2d 463 (1989).

Petitioner objects to the Magistrate stating that he made a valid and knowing waiver of his right to counsel in the Report and Recommendation. In United States v. Goldberg, 67 F.3d 1092, 1099-1101 (3rd Cir. 1995), the Court held that there can be no

valid waiver of the Sixth Amendment right to counsel unless the defendant also receives Faretta warnings. Goldberg goes on to say that, "recognizing the difference between "forfeiture" and "waiver by conduct" is important. First, because of the drastic nature of the sanction, forfeiture would appear to require extremely dilatory conduct". On the other hand, a "waiver by conduct" could be based on conduct less severe than that sufficient to warrant a forfeiture. This makes sense since a "waiver by conduct" requires that a defendant be warned about the consequences of his conduct, including the risks of proceeding pro se.

Petitioner contends that the Magistrate erred in alleging that Petitioner made a valid and knowing waiver of his right to counsel. In Goldberg, supra, the Court stated quoting verbatim:

A district court refers to "waiver by conduct" instead of "forfeiture" presumably would be on tenuous ground if it failed to follow the dictates of Faretta, even if the conduct in the case before it was sufficiently dilatory to constitute a forfeiture.

Contrary to clearly establishes Federal law, as determined by the Supreme Court of the United States in Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), requires trial courts to ensure that the defendant is aware of the risks of proceeding pro se as a constitutional prerequisite to a valid waiver of the right to counsel. See U.S. v. Goldberg,

7 F.3d 1092 (3rd Cir. 1995).

Petitioner clearly contends that trial court's failure to inform him of the risks of self-representation in accordance with Faretta precluded finding that his dilatory conduct constituted "waiver by conduct" of his Sixth Amendment right to counsel. Erroneous deprivation of criminal defendant's fundamental Sixth Amendment right to assistance of counsel is per se reversible error.

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defence". U.S. Const. Amend. VI. Because it is essential to fair adjudication, see Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55 L.Ed. 158 (1932), the right to counsel has long been considered" fundamental. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)(right to counsel so fundamental that it is binding on the states through the doctrine of incorporation; Johnson v. Zerbst, 304 U.S. 458, 462, 58 S.Ct. 1091, 1022, 82 L.Ed. 1461 (1938)("this is one of the safeguards ... deemed necessary to insure fundamental human rights of life and liberty."); see also, Chapman v. California, 386 U.S. 18, 23, n. 8, 87 S.Ct. 824, 827-28, 8, 17 L.Ed.2d 705 (1967)(right to counsel is so fundamental to our adversarial system that it's deprivation can never be deemed harmless

Clearly Petitioner did not make a valid and knowing waiver of his right to counsel because the Supreme Court of the United

States has established that there can be no waiver of the Sixth Amendment right to counsel unless the defendant also receives Faretta warning. Petitioner respectfully ask this Honorable Court to carefully view United States v. Goldberg, 67 F.3d 1092 (3rd Cir. 1995), in which this Court clearly explains that a waiver by conduct requires that a defendant be warned about the consequences of his conduct and risk of proceeding pro se.

Likewise in Goldberg, supra, Petitioner contends that the trial court did refer to waiver in the present case as a "waiver by conduct". However, the pretrial and trial record shows that the dictates of Faretta were not followed. The record clearly establishes that the trial court took no affirmative steps to ensure that Petitioner "truly appreciated the dangers and disadvantages of self-representation". Accordingly, there can no valid waiver by conduct in this case.

The Magistrate stated that, "a colloquy explaining the dangers of self-representation is not required by the Constitution or any Supreme Court precedent. Wilkerson v. Kelm, 412 F.3d 449, 453-454 (3rd Cir. 2005). "A waiver colloquy is a procedural device, it is not a constitutional end or a constitutional right the colloquy does not share the same status as the right itself". Petitioner objects to the following because contrary to clearly established Federal law as determined by the Supreme Court of the United States in McMahan v. Fulcomer, 821 F.2d 934 (3rd Cir. 1987) in which the Court held herein that

the Defendant had not made a knowing and voluntary waiver of right to counsel where the record reflected total absence of any searching inquiry as to Defendant's understanding of the dangers and disadvantages he faced proceeding pro se. The trial court did not explain the nature of the charges against Defendant and failed to inform him of range of allowable punishments and of the possible defenses to charges in mitigating circumstances.

In United States v. Salemo, 61 F.3d 214 (4th Cir. 1995), this Court held that, 'where the record contains no inquiry on the part of the court that defendant's waiver of counsel is understanding and voluntary, or it contains an inquiry that is inadequate, there can be no valid waiver of the right to counsel. The Court noted further that at a minimum a trial judge must make "a searching inquiry sufficient to satisfy him/[her] that the defendant's waiver was understanding and voluntary". The court's inquiry must be calculated to insure that the defendant is "made aware of the dangers and disadvantages of self-representation, so that the record will establish that [he/she] is doing and [the] choice is made with with eyes open". Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, L.Ed.2d 562 (1975); United States v. Welty, 674 F.2d 185 (3rd Cir. 1982); and United States v. Salemo, 61 F.3d 214.

Petitioner further contends that in United States v. Allen, 895 F.2d 1577; and United v. Meeks, 987 F.2d 575 (9th Cir.), thr Courts

recognize that to the extent that the defendant's actions are examined under the doctrine of "waiver", there can be no valid waiver of the Sixth Amendment right to counsel unless the defendant also receives Faretta warnings. See United States v. Goldberg, supra, at 67 F.3d 1092 (3rd Cir. 1995).

CONCLUSION

For the reasons set forth herein, Petitioner respectfully request this Court to grant habeas relief and vacate Petitioner's conviction. The record is very clear that Petitioner's appellate counsel abandoned a "significant and obvious" issue during the course of Petitioner's direct appeal. The records from Petitioner's pretrial, trial, and direct appeal makes clear that Petitioner was never warned of the "dangers and disadvantages" of self-representation. Petitioner's uncontroverted testimony at his PCR hearing makes clear that he did not have sufficient background independently "to understand the dangers of self-representation." The pretrial and trial record clearly support that Petitioner did not knowingly, voluntarily nor intelligently waive his constitutional right to counsel because

of the trial court's failure to inform defendant of risk of self-representation in accordance with Faretta and Welty precluded finding that his dilatory conduct constituted "waiver by conduct" of his Sixth Amendment right to counsel.

Date: 10-1-2010

Respectfully submitted,

Carlos M. Gill