STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to York County

Honorable Alison Renee Lee, Circuit Court Judge

RECEIVED
JAN 20 2017
S.C. SUPREME COURT

ERIC ANTONIA SPRATT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001346

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

The PCR court erred in ruling that defense counsel was not ineffective where counsel failed to argue to the sentencing court on remand that, in 1998, South Carolina did not recognize the right of an accused to be represented by appointed counsel in misdemeanor cases that did not result in the immediate deprivation of a person's liberty and therefore, any *Farretta*[1] warnings regarding the disadvantages of self-representations given during Petitioner's 1998 guilty plea to misdemeanor possession of marijuana would not have informed Petitioner that he could have counsel appointed at the expense of the State.

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1 *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525 (1975).

STATEMENT

Procedural History

In May 2006, the York County Grand Jury indicted Eric Antonio Spratt on the charge of trafficking in more than ten grams of crack. App. 162 - 163. On June 9, 2006, Spratt was tried *in absentia* before the Honorable Derham Cole and a jury. App. 4, l. 3 - 7, l. 14. He was found guilty and Judge Cole sealed the sentence. On May 25, 2007, Spratt appeared before the Honorable Clifton Newman for sentencing. Spratt was represented by Melisa Inzerillo, and the State was represented Assistant Solicitor Erin Joyner. *Id.* The sealed sentence issued by Judge Cole was thirty years and a $50,000 fine. *Id.*

Judge Newman granted Spratt's motion to reconsider the sentence, and reduced the sentence to ten years for a trafficking less than 100 grams second offense. *Id.* Judge Newman ruled that Spratt had been incorrectly sentenced as a third offense. Specifically, Judge Newman found that Spratt's prior un-counseled 1998 guilty plea before Judge Hayes, which resulted in incarceration due to a subsequent violation of probation when he pled guilty to PWID crack in 1999, should not have been used to enhance his present trafficking in crack cocaine conviction to a third offense. *Id.*

The State appealed. The Court of Appeals reversed the trial court and remanded the case for a hearing for the trial court to re-evaluate Spratt's sentence after considering evidence regarding whether Spratt waived his right to counsel during his prior 1998 un-counseled guilty plea. *State v. Spratt*, 383 S.C. 212, 678 S.E.2d 266 (Ct. App. 2009).

Re-Sentencing Hearing on Remand

On June 6 -7, 2011, Spratt appeared before the Honorable Lee S. Alford for a remand hearing on the constitutionality of his un-counseled 1998 guilty plea regarding if he waived his right to counsel. App. 1 - 75. He was represented by Melissa Inzerillo, and the State was represented by

Assistant Solicitor Erin Joyner. Spratt and Assistant Solicitor E.B. Springs both testified at the hearing.

At the start of the hearing, defense counsel made a motion to the court for Spratt's sentence to remain at ten years as Spratt was challenging that the 1998 conviction was not effective and could not be used to enhance the sentence. Counsel also argued that the case be heard before Judge Newman. App. 6, ll. 5 – 23. Judge Alford ruled that the appellate court sent the case back to the trial court for any judge to hear as the court did not designate any specific judge. App. 10, ll. 20 – 25; App. 11, ll. 1 – 5.

Counsel continued to argue that Spratt received a five year sentence suspended to probation at the 1998 guilty plea. That probation was revoked for six months when he pled guilty in 1999. Therefore, Spratt was sentenced to incarceration for an un-counseled plea. App. 12, ll. 8 – 25; App. 13, ll. 1 – 25; App. 14, ll. 1 – 7.

Counsel then informed the court that there was no transcript available from the 1998 plea as Court Administration told her they kept the tapes only five years pursuant to Rule 607, SCACR. Counsel also explained that there was nothing on the sentencing sheet to indicate if any warnings were given to Spratt or if he waived his right to counsel. Spratt's testimony was the only recollection of the events from the 1998 plea. App. 14, ll. 4 – 25; App. 15, ll. 1 – 5.

Sentencing Hearing Testimony of Petitioner Eric Spratt

Spratt testified that he was seventeen at the time of the 1998 guilty plea before Judge John Hayes, and it was his first time in General Sessions Court. App. 18, ll. 8 – 12. He remembered standing before Judge Hayes, and remembered he did not have an attorney. App. 16, ll. 1 – 25; App. 17, ll. 1 -24. He told the court: "[m]y right hand to God, I never waived my rights to counsel.....I never waived my right for counsel." App. 17, ll. 15 – 16; App. 17, ll. 24.

Spratt testified that he did not recall Judge Hayes explaining to him he had the right to an attorney because he would have accepted it if he had been told. He would never turn down help from counsel. App. 17, ll. 25; App. 18, ll. 1 – 7.

Spratt said he did not know he could have someone argue things he did not know of and maybe get better than he could get. App. 18, ll. 16 – 25; App. 19, ll. 1. A lady came to the holding cell just before his 1998 guilty plea who he thought was the solicitor. App. 19, ll. 2 – 14. This lady told him she was recommending probation to Judge Hayes for Spratt. And he received probation. App. 26, ll. 18 – 25; App. 27, ll. 1 – 6.

On cross examination, he told that he had been in Family Court for criminal charges as a juvenile. App. 19, ll. 16 – 25. He was represented by an attorney, but his mother always handled that. He did not have to do anything. App. 20, ll. 1 – 25; App. 21, ll. 1 – 25. The last time he was in Family Court was in July 1998, just a few months before he was arrested for the 1998 possession of crack. App. 22, ll. 1 – 25.

Sentencing Hearing Testimony of Assistant Solicitor E.B. Springs

Assistant Solicitor E.B. Springs testified for the State. App. 50, ll. 1 – 11. Since 1998, he had handled guilty pleas before Judge Hayes, and had observed him conduct many pleas including *pro se* pleas. App. 50, ll. 12 – 25; App. 51, ll. 1 – 3. He said Judge Hayes had a routine that he followed in conducting *pro se* pleas.

He would go through the rights colloquy, as well as *Faretta* warnings regarding the dangers of self-representation. He discussed the right to a jury trial, and the companion rights. App. 51, ll. 4 – 22. He did not remember if he were present for Spratt's plea in 1998. On cross examination, he said he did not remember being at Spratt's plea. App. 51, ll. 23 – 25; App. 52, ll. 6 – 18.

At the close of the defense evidence, the judge asked who had the burden of proof in a sentence enhancement issue. Defense counsel said that the State had the burden to present prior convictions that might enhance the sentence. Then the burden shifted to the defendant to show by a preponderance of the evidence that one or more of these convictions was defective. App. 43, ll. 1 – 25; App. 44, ll. 13.

After the evidence was presented, defense counsel argued that Spratt had met his burden of proof by a preponderance of the evidence that he did not receive the rights normally given in a *pro se* plea, and did not give up his right to an attorney. **Spratt was the only person in the court who was present at the guilty plea.**

Mr. Springs could comment on Judge Hayes' pattern of conducting pleas, but he still did not know about Spratt's plea. Defense counsel asked that the 1998 conviction not be considered, and asked the court to find that the trafficking was a second offense. App. 54, ll. 1 – 25; App. 55, ll. 1 – 25; App. 56, ll. 1 – 22.

The State argued that Spratt had not met his burden of proof because he conveniently had no memory of some things. The State argued that he did know about attorneys as he had one in Family Court. The State argued that Spratt was not credible. App. 56, ll. 23 – 25; App. 57, ll. 1 – 25; App. 58, ll. 1 – 25; App. 59, ll. 1 – 25; App. 60, ll. 1 – 6.

The judge ruled that Spratt had not met his burden of proof by a preponderance of the evidence. App. 63, ll. 3 – 8; App. 68, ll. 20 – 23. The judge cited the basis of his ruling was the testimony from Mr. Springs of the regular practice of Judge Hayes to give the rights during a plea. App. 63, ll. 9 – 25. The judge said in his own experience of reviewing Judge Hayes' PCR records, he had never seen Judge Hayes not advise defendants of their rights. App. 64, ll. 1 – 25; App. 65, ll. 1 – 15.

The judge found that Spratt's testimony was not credible, and he had not proved by a preponderance of the evidence that he was not advised of his right to an attorney, and he chose to plead guilty on a *pro se* basis. The judge ruled that the trafficking was third offense, and sentenced Spratt to twenty- five years. App. 65, ll.16 – 24; App. 68, ll. 10 – 24; App. 74, ll. 22 – 25; App. 75, ll. 1 – 16.

Spratt appealed Judge Alford's ruling and sentence. The South Carolina Court of Appeals affirmed his conviction in an unpublished decision. *State v. Spratt*, 2013 WL8508295, (Ct. App. May 8, 2013).

Post-Conviction Relief Application

On March 19, 2014, Spratt filed an application for post-conviction relief alleging that defense counsel was ineffective and that his 1998 un-counseled guilty plea was involuntary. App. 76 - 83. On June 24, 2014, the State filed a Return. App. 84 - 89.

On November 20, 2014, an evidentiary hearing was held before the Honorable Alison R. Lee. App. 90 - 149. Tommy A. Thomas represented Spratt. Assistant Attorney General J. Rutledge Johnson represented the State. Spratt and defense counsel both testified.

Evidentiary Hearing Testimony of Petitioner Eric Spratt

Spratt testified that, at the time of his 1998 guilty plea and conviction, he did not possess the right to counsel. He stated that under the controlling precedent of that time, *Scott v. Illinois*, "[t]he only people possess the right of counsel were [when] actual imprisonment was being imposed." App. 101, l. 1 - 103, l. 7.

Since Spratt was only sentenced to probation during the 1998 guilty plea, he averred that he was never offered the chance to be represented by appointed counsel. *Id.* "I had no possession of the right to counsel in 1998. I plead guilty in the plea bargain in exchange for probation without the

knowledge of . . . the right to counsel and by law at that time the right to counsel wasn't required." App. 106, ll. 3-14.

Citing to *Alabama v. Shelton*[2] and *Talley v. State*[3], Spratt said that defense counsel was ineffective for failing to bring to the judge's attention that he did not have the right to counsel in 1998 when he pled guilty and received probation. Had defense counsel argued this to Judge Alford, it would have rebutted the presumption of regularity that the defense had to overcome when challenging the applicability of a prior sentence for enhancement purposes. App. 107, l. 2 - 109, l. 18.

According to Spratt, Judge Alford assumed, based on Assistant Solicitor Springs' testimony and his own knowledge of Judge Hayes' plea colloquy, that Judge Hayes would have given *Farretta* warnings and offered to have a public defender appointed to Spratt's case. App. 106, l. 3 - 107, l. 18. Defense counsel failed to argue that prior to *Alabama v. Shelton* the controlling case on an indigient defendant's right to appointed counsel were *Argersinger v. Hamlin*[4] and *Scott v. Illinois*[5].

Spratt testified that those cases limited an indigent defendant's right to appointed counsel to misdemeanor cases that "actually lead to imprisonment." *Id.* As Spratt had his probation revoked some months later, his un-counseled guilty plea had led to "actual imprisonment." App. 117, l. 1 - 118, l. 16. Spratt further stated that he had never been provided the option of representation by a public defender or appointed counsel at the 1998 guilty plea.

Spratt recalled that defense counsel failed to adequately argue this point. Instead, defense counsel erroneously argued to Judge Alford that Judge Hayes had not provided Spratt with *Farretta*

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2 535 U.S. 654, 122 S.Ct. 1764 (2002).
3 371 S.C. 535, 640 S.E.2d 878 (2007).
4 407 U.S. 25, 40, 92 S.Ct. 2006 (1972).
5 440 U.S. 367, 99 S.Ct. 1158, (1979).

warnings regarding the risk of self-representation. *Id.*; App. 55, l. 5 - 56, l. 21. Spratt stated that defense counsel never argued that any *Farretta* warnings that he received in 1998 would not have included informing him that he had the right to appointed counsel because, at that time, he did not have the right to appointed counsel for a misdemeanor conviction resulting in a suspended sentence and probation. App. 111, l. 3 - 117, l. 21.

Hearing Testimony of Defense Counsel

Defense counsel testified that her main argument was that Spratt's 1998 conviction was un-counseled and led to his actual imprisonment following a probation violation. App. 126, l. 8 - 127, l. 18. Therefore the 1998 conviction could not be used to enhance the punishment on his 2007 trafficking conviction. She stated that Judge Newman agreed with her, but that the Court of Appeals remanded the case back to the trial court to determine if Spratt validly waived his right to counsel. *Id.*

She recalled emphasizing at the remand hearing in front of Judge Alford that Spratt was the only witness who was present at the guilty plea hearing in 1998. App. 128, ll. 16-25. Defense counsel then explained her understanding of *Shelton* and its role in Spratt's case:

> *Alabama versus Shelton* is a case that allows us in so many words and it is progeny allows us to access whether a prior conviction is enhanceable or not. It does not go back and undo any prior conviction.
>
> Essentially a defendant, anyone in this country has a right to counsel through the 6th and 14th Amendment. At any point that they are involved in criminal matters and substantial stages of criminal matters and then there has been a lot of cases that have been sort of figuring out what that means over the last two hundred years. . . .
>
> So *Alabama versus Shelton* and [*State v. Talley*] in those lines of cases gives us guidelines as to whether a person's prior conviction as it stands could be used to enhance and the parameters in which those cases can be used to enhance. The actual imprisonment sort

> of prong -- underlying component of those cases come in to play when as in Mr. Spratt's case he was sentenced to probation which normally without benefit of counsel that would be used to enhance. Because he was actually revoked on that and there was actual imprisonment component then because of those progeny of cases we can then go back and use that to argue that he did serve actual imprisonment and that should not be allowed to use to enhance the current charge that he has.
>
> So it's a way to use looking at the context of the charge he has now, which in Mr. Spratt's case a trafficking third, to see whether it should be a third offense based on his prior record. But it does not go back and undo anything the prior charge. That's where the *State v Payne* presumption of regularity phraseology comes in that the Court relies on in *State v Spratt* which is the idea that the prior convictions are essentially okay as they stand unless the defense can prove a problem with it and that is what we intended to do in this hearing. By putting Mr. Spratt on the stand he explained under oath he did not get his *Faretta* warnings and had he gotten those *Faretta* warnings he would have requested an attorney. That is why we put up that testimony because we had to show there was some sort of constitutional defect in that prior in that prior charge that he had on his record and in order to do that that's how we can only show that it shouldn't have been enhanced because he did serve -- he did serve the actual imprisonment and that's what *State v Spratt* and the Court of Appeals told us to do for the second prong.

App. 129, l. 16 - 131, l. 15. Defense counsel recollected that Judge Alford simply did not believe Spratt's claim that Judge Hayes failed to provide *Farretta* warnings. App. 131 l. 16 - 132, l. 23.

Defense counsel disagreed with Spratt's claim that he did not have the right to *Farretta* warnings in 1988. *Id.* She also disagreed with Spratt's contention that prior to *Alabama v. Shelton*, he would not have had the right to appointed counsel in South Carolina for his 1998 misdemeanor drug possession charge. "*Alabama versus Shelton* doesn't give you right to counsel. *Alabama v. Shelton* gives the ability to determine whether a prior uncounseled plea . . . can be used in your current case to enhance" the sentence. App. 133, ll. 20-23.

On cross-examination, defense counsel admitted that this Court's interpretation of *Shelton* "required counsel to be appointed when an indigent defendant received a sentence that. . . ***may end up in the actual deprivation*** of a person's liberty." App. 136, ll. 10-21 (*emphasis added*). Counsel reluctantly conceded that, under South Carolina's pre-*Shelton* case law, an indigent criminal defendant was only eligible for appointed counsel if his conviction resulted in the "**actual deprivation of a person's liberty**." App. 137, ll. 6-22. When pressed, counsel rejoined that Spratt had a right to counsel under the constitution. *Id.*

Order of Dismissal

On April 22, 2016, Judge Lee denied Spratt's application for post-conviction relief in a written order of dismissal. App. 150 - 157. The court found that Judge Alford made an "affirmative finding" that Judge Hayes advised Spratt of his right to counsel in the 1998 guilty plea and that Judge Alford's decision was not based on the "normal presumption of regularity" but on his specific knowledge of Judge Hayes' practices. App. 154 (*emphasis original*).

The PCR court held that Judge Hayes likely advised Spratt of his right to counsel and the dangers of self-representation under *Farretta*. "The fact that the law at the time may not have required such a warning is irrelevant to a finding that such a warning was, nonetheless, routinely given." *Id.* The Court also dismissed Spratt's argument that he would not have been advised of his right to appointed counsel because he did not the right under South Carolina in 1998:

> Applicant's assertion that he did not possess the right to counsel and therefore, could not waive a right he did not possess was erroneous. While appointed counsel may not have been required under the law at that time, there was no prohibition to appointing counsel for a defendant who could not afford one and desired to have the benefits of attorney representation.

App. 155. Siding with defense counsel, the court reasoned that Spratt would have had the right to counsel at the time of the 1998 guilty plea. *Id.* Accordingly, the PCR court found that defense

counsel was not ineffective for failing to argue that Spratt's 1998 guilty plea was defective because Spratt had no constitutional right to appointed counsel.

ARGUMENT

The PCR court erred in ruling that defense counsel was not ineffective where counsel failed to argue to the sentencing court on remand that, in 1998, South Carolina did not recognize the right of an accused to be represented by appointed counsel in misdemeanor cases that did not result in the immediate deprivation of a person's liberty and therefore, any *Farretta* warnings regarding the disadvantages of self-representations given during Petitioner's 1998 guilty plea to misdemeanor possession of marijuana would not have informed Petitioner that he could have counsel appointed at the expense of the State.

Whether Petitioner's uncounseled 1998 guilty plea to misdemeanor possession of marijuana could be used to enhance the sentence for his 2007 conviction for trafficking turned on whether Petitioner knowingly waived his right to appointed counsel during the 1998 guilty plea. Defense counsel argued that, based on Petitioner's testimony at the sentencing hearing, there was no evidence that Petitioner's was given *Farretta* warnings during the 1998 guilty plea.

The State countered that Judge Hayes' usual practice was to provide *Farretta* warnings to pro-se defendants prior to accepting a guilty plea. The sentencing court agreed with the State and ruled that Petitioner had been given *Farretta* warnings prior to pleading guilty.

Defense counsel failed to argue that, even if Petitioner was given *Farretta* warnings, he could not have waived his right to appointed counsel because under then-existing South Carolina law he did not have the right to appointed counsel because he received a suspended sentence upon pleading guilty and South Carolina only required state-sponsored representation on misdemeanors that resulted in an active sentence of incarceration upon conviction.

Indigent Defendant's Right to Appointed Counsel in Misdemeanor Cases.

In *Gideon v. Wainwright,* 372 U.S. 335, 344-345, 83 S.Ct. 792 (1963), the Supreme Court held that the Sixth Amendment's guarantee of the right to state-appointed counsel through the Fourteenth Amendment. The Supreme Court clarified the scope of the right to state-appointed

counsel in *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006 (1972), holding that an indigent defendant must be offered counsel in any misdemeanor case "that actually leads to imprisonment."

In *Scott v. Illinois*, 440 U.S. 367, 99 S.Ct. 1158 the Court confirmed *Argersinger's* limitation on the mandate for States to provide appointed representation in misdemeanor cases. The governing statute in *Scott* authorized a jail sentence of up to one year. *Id.*, at 368, 99 S.Ct. 1158. Nevertheless, the **court held that the defendant had no right to state-appointed counsel because the sole sentence actually imposed on him was a $50 fine.** *Id.*, at 373, 99 S.Ct. 1158.

Finally, in *Alabama v. Shelton*, 535 U.S. 654 (2002), the Supreme Court held that there can be no activation of a suspended sentence upon the violation of probation if no attorney was present during the offense for which he could be imprisoned. Shelton was convicted of third-degree assault following a bench trial where he represented himself. *Id.* at 658, 122 S.Ct. at 1767. Third degree assault is a misdemeanor carrying up a year imprisonment and a $2,000 fine. *Id.* Shelton was sentenced to thirty-days imprisonment suspended on the service of two years of probation.

Shelton exercised his right under Alabama law to a new jury trial. He again appeared without counsel and was convicted. **"The court repeatedly warned Shelton about the problems self-representation entailed, but at no time offered him assistance of counsel at state expense."** *Id.* at 658, 122 S.Ct. at 1768 (*emphasis added*). Ultimately, the Supreme Court concluded that that the Sixth and Fourteenth amendments prohibited a prior un-counseled conviction that resulted in a sentence of imprisonment from being used to enhance punishment of a subsequent conviction. *Id.*

At the time *Alabama v. Shelton* was decided South Carolina was one of only sixteen states that did not provide counsel to indigent defendants in Shelton's circumstances. *Id.* at 669, 122 S.Ct. at 1774. Under our case law at the time, an indigent defendant in South Carolina only had the right

to appointed representation if he was sentenced to a term of actual imprisonment. *Talley v. State*, 371 S.C. 535, 543, 640 S.E.2d 878, 881-82 (2007).

The Court of Appeals addressed how to apply *Shelton's* mandate, limiting the use of prior uncounseled guilty pleas to enhance sentences, in *State v. Spratt*, Petitioner's first direct appeal. 383 S.C. 212, 678 S.E.2d 266. The Court ruled that a defendant must prove by a preponderance of the evidence that he did not validly waive his right to counsel before entering into the earlier uncounseled guilty plea that the State is seeking to use as a sentencing enhancement. *Id.* at 214, 678 S.E.2d at 267.

Ineffective Assistance of Counsel

To establish ineffective assistance of counsel, the Petitioner must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Cherry v. State,* 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted).

"The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the presumption that counsel was effective in order to receive relief." *Id.* at 118, 386 S.E.2d at 625 (internal citations omitted).

Thus, where ineffective assistance of counsel is alleged as a ground for PCR relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

Deficient Performance

Here, defense counsel's performance was deficient. However, as an initial matter, the PCR court's findings in the order of dismissal rest on two errors of law that caused the court to incorrectly evaluate defense counsel's performance.

First, the PCR court's determination that "there was no prohibition to appointing counsel for a defendant who could not afford one" was an error of law. At the time of Petitioner's 1998 guilty plea, South Carolina did provide indigent defendants appointed counsel in misdemeanors that did would not result in immediate, actual imprisonment, i.e. an active jail term upon being convicted. *Talley*, 371 S.C. at 545, 640 S.E.2d at 883; *see also Shelton*, 535 U.S. at 669, 122 S.Ct. at 1774.

Petitioner pled guilty in exchange for receiving probation only days after he was arrested. His 1998 misdemeanor possession of marijuana would not have triggered the appointment of state-sponsored counsel. *See Talley*, 371 S.C. at 544, 640 S.E.2d at 882 (holding that Talley's prior uncounseled conviction was valid as he did not have a constitutional right to counsel in prior conviction because his suspended sentence stemming from the conviction was never activated.). This explains why the advisement of rights form produced at the sentencing hearing only informed Petitioner of his right to an attorney, but did not offer to have one appointed to represent him if he could afford to retain a private attorney. App. 30, l. 2 - 33, l. 9.

Second, the PCR court also committed an error of law when ruling that "[t]he fact that the law at the time may not have required [a *Farretta*] warning is irrelevant to a finding that such a warning was, nonetheless, routinely given." App. 154. *Farretta* was decided in 1975 so warnings about the dangers of self-representation were already required by law.

Determining whether or not Petitioner's uncounseled 1998 guilty plea could be used to enhance his 2007 sentence for trafficking turned - not whether Judge Hayes gave *Farretta* warnings

- but on whether Judge Hayes' *Farretta* warning included **offering Petitioner "assistance of counsel at state expense."** *Shelton at 658, 122 S.Ct. at 1768 (emphasis added).*

This is where counsel's performance at the sentencing hearing fell below an objective standard of reasonableness. Counsel never argued to Judge Alford that any *Farretta* warnings given by Judge Hayes in 1998 would not include explaining to Petitioner that he had the right to have counsel appointed to represent him if he could not afford a private attorney. *Southerland v. State*, 337 S.C. 610, 616 524 S.E.2d 833, 836 (1999) (holding that appellate counsel was ineffective for failing to raise a meritorious issue).

Petitioner's case is on almost all fours with *Shelton.* Shelton was given *Farretta* warnings at both his bench and jury trial. Shelton was not told that he could have the assistance of counsel at state expense. *Shelton at 658, 122 S.Ct. at 1768.* The failure to inform Shelton that he could have the assistance of a public defender or appointed counsel is the heart of the Sixth Amendment violation that the Supreme Court found precluded the state from activating Shelton's suspended sentence. *Id.*

The major difference between *Shelton* and Petitioner's case is that defense counsel failed to argue that Petitioner did not have the right to representation by appointed counsel or public defender during the 1998 guilty plea at the sentencing hearing. She failed to raise this issue because, as her testimony at the PCR hearing revealed, she did not understand how the Supreme Court's ruling in *Shelton* impacted the Sixth Amendment rights of criminal defendants in South Carolina. *Talley*, 371 S.C. at 542, 640 S.E.2d at 880 (holding that "the new rule announced by *Shelton* is a watershed rule of criminal proceeding because the right to counsel undeniably implicates the fundamental fairness and accuracy of the proceeding.").

Rather defense counsel erroneously believed that in 1998 Petitioner had the right to representation by state-sponsored counsel during his guilty plea and that Judge Hayes had simply failed to advise him; "*Alabama versus Shelton* doesn't give you right to counsel. *Alabama v. Shelton* gives the ability to determine whether a prior uncounseled plea . . . can be used in your current case to enhance" the sentence. App. 133, ll. 20-23.

Defense counsel improperly conflated the holding in *Talley*, addressing the retroactive application of *Shelton* to collateral review, with the "watershed" holding in *Shelton* that a suspended sentence that may end up in actual deprivation of person's liberty may not be imposed unless defendant was "accorded the guiding hand of counsel in the prosecution of the crime charged." *Talley*, 371 S.C. at 542, 640 S.E.2d at 880; *Shelton*, 535 U.S. at 654, 122 S. Ct. at 1765.

The PCR court committed errors of law in ruling that there was no prohibition to appointing counsel in Petitioner's 1998 case and that *Farretta* warnings were not required in 1998. Both the PCR court and defense counsel failed to recognize that prior to *Shelton* in 1998, Petitioner would not have had the right to state-sponsored counsel and so, any warnings or advisements of rights that Petitioner received from the Court would have produced a knowing waiver of his then non-existent right to counsel.

Defense counsel's failure to properly understand the scope of the Supreme Court's holding in *Shelton* and how it applied to criminal defendants in South Carolina rendered her performance at Petitioner's sentencing hearing constitutionally deficient. *See Strickland*, 466 U.S. at 687-88. *See Roseboro*, 317 S.C. at 294, 454 S.E.2d at 313.

Prejudice

Petitioner was prejudiced by defense counsel's failure to properly argue that, in 1998 South Carolina did not recognize the right of an accused to be represented by appointed counsel in

misdemeanors that did not result in the immediate deprivation of a person's liberty. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (holding that the test for prejudice in ineffective assistance of counsel cases is whether counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.") *quoting Strickland*, 466 U.S. at 692.

Had defense counsel properly understood the scope of Shelton's holding and its impact on South Carolina's jurisprudence there is a reasonable probability that Judge Alford would have concluded that Petitioner's 1998 uncounseled conviction could not have been used to enhance his trafficking sentence. *Talley*, 371 S.C. at 542, 640 S.E.2d at 880; *Shelton*, 535 U.S. at 654, 122 S. Ct. at 1765.

First, the presumption of regularity that attaches to court proceedings would have worked in favor of Petitioner. In the regular functioning of the court system in 1998 Petitioner would not have had the right to appointed counsel, and so was unlikely to be advised of it. *Pringle v. State*, 287 S.C. 409, 411, 339 S.E.2d 127, 128 (1986).

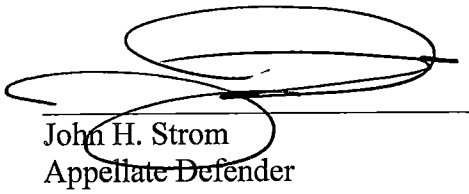
Second, defense counsel would have been able to effectively counter the State's claim that Judge Hayes' consistently provide *Farretta* warnings to *pro-se* defendants. App. 151 - 152. Rather than having to argue the existence of an negative - that Judge Hayes failed in Petitioner's case to give his standard warnings - the defense would have been able to argue that Judge Hayes' standard warnings in 1998 did not include offering Petitioner the "assistance of counsel at state expense."

Therefore, the PCR court erred in finding trial counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." App. 150 - 156; *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); *see Strickland*, 466 U.S. 668.

CONCLUSION

Based on the foregoing reason, Petitioner Eric Spratt respectfully requests that this Court grant his Petition for Writ of Certiorari to allow a full briefing on this issue.

Respectfully Submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of January, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

John H. Strom
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 20th day of January, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Honorable Alison Renee Lee, Circuit Court Judge

ERIC ANTONIA SPRATT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Justin Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201this 20th day of January, 2017.

John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 20th day of January, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2025