STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable Perry H. Gravely, Circuit Court Judge

JOSHUA LAMAR FORREST,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-001450

PETITION FOR WRIT OF CERTIORARI

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The PCR court erred in denying Petitioner Forrest's PCR on the basis of successiveness and the statute of limitations because Forrest never had an appeal on his *pro se* guilty plea where no Faretta warnings were provided; the judge did not explain his appeal rights; the plea judge did not explain that the attempted armed robbery was a most serious strike; and the state used the prior uncounseled conviction to enhance his subsequent murder conviction to life without parole which was a violation of Forrest's constitutional rights pursuant to the Sixth and Fourteenth Amendments. 8

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ISSUE PRESENTED

Did the PCR court err in denying Petitioner Forrest's PCR on the basis of successiveness and the statute of limitations because Forrest never had an appeal on his *pro se* guilty plea where no Faretta [1] warnings were provided; the judge did not explain his appeal rights; the plea judge did not explain that the attempted armed robbery was a most serious strike; and the state used the prior uncounseled conviction to enhance his subsequent murder conviction to life without parole which was a violation of Forrest's constitutional rights pursuant to the Sixth and Fourteenth Amendments?

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[1] Faretta v. California, 422 U.S. 806 (1975).

STATEMENT

In June 1998, Forrest was charged with robbing the R&B Video on Platt Springs Road in Lexington County. Forrest was arrested because he allegedly matched the description of one of the people involved in the robbery. Forrest was found shortly after in the area. App. 20, ll. 3 – 16.

On July 6, 1998, the Lexington County Grand Jury indicted Petitioner Forrest on the charges of armed robbery and attempted armed robbery and disorderly conduct. App. 61; App. 86. On November 17, 2005, Petitioner Forrest appeared before the Honorable Edward W. Miller and entered a guilty plea to the lesser charge of attempted armed robbery. Two other defendants also pled guilty on unrelated cases at the same time as Forrest. App. 3, ll. 16 – 19; App. 20, ll. 5 – 9. Forrest appeared *pro se,* and the state was represented by Angela G. Avinger. App. 1.

At the guilty plea, the judge provided no warnings concerning the dangers of *pro se* representation. The judge only told Forrest that he had a constitutional right to an attorney and one would be provided if he could not afford one. The judge then asked Forrest if he wanted a lawyer, and Forrest said no. App. 7, ll. 8 – 16.

The state told the judge that due to the age of the case and "some witness problems," the state reduced the charge to attempted armed robbery and offered a negotiated sentence for time served and a probationary sentence. App. 20, ll. 17 – App. 21, ll. 10; App. 88. The plea judge then sentenced Forrest to ten years suspended to time served and probation for three years, and $451 restitution. The judge made no mention that this was a most serious strike, nor anything about the consequences of pleading to a most serious strike. App. 21, ll. 11 – 23. Forrest did not appeal this conviction and sentence. App. 44, ll. 1 – 5.

Forrest was to be supervised in Aiken County while on probation. App. 44, ll. 6 -11. On December 5, 2005, Forrest was arrested and charged for the murder of Mario T. Radish which occurred on December 4, 2005. A probation arrest warrant was issued on December 22, 2005 for Forrest due to the charge of murder and for entering an establishment whose primary business was the sale of alcoholic beverages. The warrant was served on January 9, 2006. App. 44, ll. 6 – 24.

On February 13, 2006, Judge Doyet Early ordered that the probation violation hearing for Forrest be held during Forrest's trial for murder. Although the murder trial ended in a hung jury, the probation violation hearing proceeded on December 7, 2006. Sherry Stoney, trial counsel for Forrest on the murder charge, represented him at the probation hearing. Judge Early revoked the suspended sentence in full. App. 44, ll. 25 – App. 45, ll. 10; App. 62.

On August 17, 2007, Forrest filed an application for post-conviction relief (PCR) in Lexington County (2007-CP-32-2906) related to his guilty plea on the attempted armed robbery for which he had received the probationary sentence which was revoked in December 2006. He claimed a violation of due process under the Fourteenth Amendment. An order by Judge Roger Young filed May 22, 2009, transferred venue from Lexington County to Aiken County. A different case number of 2009-CP-02-1238 was then assigned to the case. App. 45, ll. 22 – App. 46, ll. 9; App. 62-63; Supp. App. 21.

On June 24, 2009, Forrest was found guilty of the murder charge. The trial judge sentenced him to life without parole (LWOP) based on the two strikes statute (Section 17-25-45) because he had pled guilty to the attempted armed robbery. App. 45, ll. 11 – 17.

On July 20, 2009, Forrest filed an amended PCR application listing claims related to the probation violation hearing. App. 46, ll. 4 – 9; App. 62 – 63. An evidentiary hearing on just the

probation violation revocation was held on July 14, 2010, before the Honorable W. Jeffrey Young in Aiken. Forrest was represented by Kenneth Hanson. On October 8, 2010, Judge Young issued an order denying Forrest's PCR application and dismissing it with prejudice based only on the probation revocation. No evidence regarding the guilty plea was included. App. 63; App. 46, ll. 10 – 16.

Petitioner Forrest filed an appeal which was denied by the Court of Appeals on January 28, 2015. Forrest v. State, 2015-UP-052 (Ct. App. filed January 28, 2015). App. 63 - App. 64.

On April 11, 2014, Forrest filed a PCR application (2014-CP-32-01397). The state filed a return and motion to dismiss on December 31, 2014, requesting that Petitioner Forrest's PCR application be dismissed as untimely and successive in nature. App. 61; App. 33 - App. 38. A hearing was held on April 21, 2016, before the Honorable Perry H. Gravely in Lexington County. Forrest was represented by David Allen, and the state was represented by Johnny James. App. 42.

At the hearing, the state attorney presented the convoluted history of Petitioner Forrest's case. App. 43, ll. 1 – App. 47, ll. 6. He argued that the current PCR application was filed April 11, 2014, which was 3,067 days after his *pro se* guilty plea. The state explained to the PCR court that Forrest was claiming in this latest application "that he was denied the right of assistance of counsel altogether," and that "his conviction be vacated and dismissed with prejudice." App. 47, ll. 7 – 16; App. 23 – App. 32.

The state then argued that Forrest's PCR should be dismissed based on two grounds. The first was that it was barred by the statute of limitations as it was filed "in excess" of the one year allowed for filing. App. 47, ll. 17 – 23.

The second reason was that this was his second PCR arising out of the attempted armed robbery conviction. Therefore, the attorney argued, it was barred due to successiveness under Section 17-27-90. The state argued that there was "no sufficient reason" stated in Forrest's application as to why his claims could not have been raised previously. App. 47, ll. 24 – App. 48, ll. 17.

Petitioner Forrest did not testify but his PCR attorney argued on behalf of Forrest. Forrest's PCR attorney, Mr. Allen, argued that the successive ground failed under the venue statute. The venue statute, section 17-27-40 counsel explained, required that the PCR be filed in the county court where the conviction occurred. Because his probation revocation had been transferred to Aiken County, Forrest could not raise the guilty plea because it occurred in Lexington County. App. 48, ll. 19 – App. 49, ll. 16.

On the statute of limitations, counsel argued the Wilson [2] case which provided that the statute of limitations could not "bar a PCR when the applicant did not have a full bite of the apple." PCR counsel continued to explain that he believed that Forrest would be successful if he could reach the merits of his case because he had no lawyer for his guilty plea. The Faretta warnings were not "properly" given and he was not advised of his right to appeal. Therefore, since he has not had an appeal on his *pro se* guilty plea, he did not receive his full bite of the apple. App. 49, ll. 17 – App. 50, ll. 14.

The state argued that Forrest could have asked for a belated appeal in his July 16, 2009, amended PCR application, and he could have raised these current claims at that time as well. App. 50, ll. 16 – App. 51, ll. 11.

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[2] Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002).

PCR counsel pointed out that when Forrest filed his first PCR application in Lexington County, he listed the indictment number for the attempted armed robbery and listed the attempted armed robbery by name. Counsel argued that Forrest was seeking relief from that conviction. When the case was transferred to Aiken, only the probation revocation was the issue. Counsel argued that Forrest had a Lexington County conviction form his guilty plea, and an Aiken County probation case. Counsel said that Aiken was not the proper venue to bring an application on the Lexington County guilty plea. App. 48, ll. 19 – App. 49, ll. 16; App. 53, ll. 21 – App. 57, ll. 6.

The PCR judge stated on the record that he was denying the PCR application based on the application being successive and the statute of limitations. App. 57, ll. 7 – 12. The judge issued an order on May 29, 2016, denying Forrest's PCR application and dismissing it with prejudice. App. 61 – App. 69. In his order, the judge found that Forrest's PCR application was successive in that he failed to establish any new ground that could not have been raised by him in the previous application. The judge wrote that Forrest could have raised his current claims in his original filing in Lexington County. He stated that the change of venue where his prior action attacked only the probation revocation did not "defeat the fact that Forrest could have raised his present claims then." App. 64 - App. 65.

On the statute of limitations, the judge found that Forrest's PCR application must be "summarily dismissed" because he did not comply with the Uniform Post-Conviction Procedure Act which required that the PCR application must be filed within one year after the remittitur from an appeal or the filing of the final decision upon an appeal. The judge wrote that although Forrest argued that his guilty plea was not knowing and voluntary, and he never received an appeal, and he was denied his right to appellate review, his "lack of a direct appeal was not due

to ineffective assistance of counsel, but due to his own inaction." The judge found: " Applicant has enjoyed a full evidentiary hearing on the merits of his first application for post-conviction relief and appeal therefrom." App. 66 – App. 68.

PCR counsel filed a motion to alter/amend the judgment on June 7, 2016. App. 72 - App. 73. The judge issued an order on June 17, 2016, denying the motion. App. 76.

Forrest's PCR attorney filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in denying Petitioner Forrest's PCR on the basis of successiveness and the statute of limitations because Forrest never had an appeal on his *pro se* guilty plea where no Faretta [3] warnings were provided; the judge did not explain his appeal rights; the plea judge did not explain that the attempted armed robbery was a most serious strike; and the state used the prior uncounseled conviction to enhance his subsequent murder conviction to life without parole which was a violation of Forrest's constitutional rights pursuant to the Sixth and Fourteenth Amendments.

In Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002), the Supreme Court wrote that "Austin appeals do not have to be filed within the one year statute of limitations because they are belated appeals intended to correct unjust procedural defects." The Court went on to hold:

> We extend our reasoning in Odom and Austin to the instant situation. A defendant has the procedural right to one fair bite at the apple. That is, every defendant has a right to file a direct appeal and one PCR application. In this case, Wilson has not had "one bite at the apple" since he has not received either a direct appeal from his conviction or a PCR hearing.

In Faretta v. California, 422 U.S. 806 (1975), the United States Supreme Court ruled that the defendant need not himself have the skills and experience of a lawyer in order to competently and intelligently choose self-representation, but he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and that his choice is made with his eyes open.

In State v. Spratt, 383 S.C. 212, 678 S.E.2d 266 (Ct. App. 2009), the Court of Appeals held that a prior uncounseled conviction resulting in a sentence of imprisonment was prohibited

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[3] Faretta v. California, 422 U.S. 806 (1975).

by the Sixth and Fourteenth Amendments to the Federal Constitution from being used to enhance the punishment for a subsequent conviction. The Supreme Court granted certiorari June 10, 2010, but then denied certiorari as improvidently granted. State v. Spratt, 2011 WL 11748261 (2011).

Spratt pled guilty to trafficking in crack cocaine and possession of marijuana. The state argued that the trial court erred in not permitting an uncounseled 1998 guilty plea to possession of cocaine to be used for sentence enhancement without first determining whether Spratt waived his right to counsel at that time. The Court of Appeals agreed and remanded Spratt's case to the trial court for the trial court "to reevaluate Spratt's sentence after considering evidence regarding whether Spratt waived his right to counsel during his prior uncounseled guilty plea hearing."

In Robinson v. State , 380 S.C. 201, 669 S.E.2d 588 (2008), the Supreme Court held that a defendant's prior uncounseled misdemeanor conviction could only be used to enhance his sentence for a subsequent conviction if the defendant was not actually imprisoned as a result of the prior conviction. Robinson was originally sentenced to public service following his uncounseled guilty plea to possession of marijuana. However, he failed to complete the public service. He was arrested, and served jail time. The possession of marijuana was later used to enhance his subsequent offense of trafficking in crack cocaine for which he received twenty years. His plea attorney did not object to the use of the marijuana conviction as a sentence enhancer. The Supreme Court found that the use of the prior uncounseled marijuana conviction to enhance his subsequent conviction was unconstitutional. The Court instructed the PCR court to remand the case for resentencing. The Court also found plea counsel ineffective for failing to challenge the use of the defendant's prior marijuana conviction as a sentence enhancer.

Where ineffective assistance of counsel is alleged as a ground for 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". Strickland v. Washington, 466 U.S.668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra.*

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989). A reasonable probability is one sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). The applicant must show that there is a reasonable probability that but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006); Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985).

The PCR judge erred in denying Forrest's PCR application. In his 2014-CP-32-01397 PCR application, Forrest stated plainly that his right to assistance of counsel was denied as he pled guilty without any assistance of counsel. App. 25. He further wrote in his PCR attachment that his uncounseled guilty plea was used to enhance his sentence for his murder conviction. He argued that the results of that guilty plea conviction still persist through his murder sentence although he served the sentence for the guilty plea. App. 31.

Forrest further explained that at his guilty plea, he was not advised of the dangers of proceeding *pro se*, and did not knowingly nor intelligently waive his right to counsel. He wrote that the record "was silent as to any specific inquiry by the trial court in his prior conviction" as to whether he had sufficient background or was appraised of his rights by some other source. App. 31.

The guilty plea transcript shows that the plea judge did not appraise Forrest of the dangers of proceeding *pro se*. The judge did not advise him that he was pleading to a most serious offense and that a second most serious would result in a life sentence. The plea judge did not advise Forrest that he had the right to an appeal which had to have been done within ten days. App. 20, ll. 4 – App. 21, ll. 24. The only question the judge asked Forrest once the judge learned Forrest did not have a lawyer, was if he wanted a lawyer, and Forrest said no. App. 6, ll. 11 – App. 7, ll. 16. However, Forrest was pleading guilty to a negotiated sentence for time served and probation. App. 20, ll. 17 – App. 21, ll. 19. Therefore, it even more important for him to understand the future consequences of a most serious offense.

Just as in the Robinson case, Forrest was originally sentenced to time served and probation. Forrest then violated probation and was sentenced to ten years in prison. Forrest also had three days of jail time before sentencing. Forrest received prison time as a result of the guilty plea.

In his first PCR application filed in Lexington County in 2007, Forrest had not been convicted of the murder offense. The guilty plea conviction had not been used to enhance his subsequent sentence for murder. He filed his first PCR in 2007. The murder conviction was June 24, 2009. His first PCR attorney filed an amended PCR application in July 2009 in Aiken County but dealt only with the probation violation which had become a moot issue since he was sentence to LWOP on the murder. There was no mention of the guilty plea nor the lack of appeal from that. Supp. App. 13 – Supp. App. 18.

The PCR judge from the first PCR hearing held July 14, 2010, in Aiken County, the Honorable Jeffrey Young, issued an order on October 8, 2010, denying Forrest's PCR application solely on the basis of the probation revocation hearing. There was no evidence presented about his guilty plea. Supp. App. 21 - Supp. App. 26.

The PCR judge in the present 2014 PCR case erred in denying Forrest's application on the grounds of successiveness and statute of limitations. The PCR judge erred in ruling that Forrest had had a full evidentiary hearing on the merits of his case. Forrest has never had a hearing on the merits of the guilty plea that was used unconstitutionally as it was uncounseled and was used as the basis for enhancing his later murder sentence to LWOP. It was prejudicial and unconstitutional because the plea was done without the assistance of counsel; there was no evidence that anyone had advised Forrest of the consequences of his guilty plea. The plea judge did not provide even the minimal information about the dangers of what Forrest was doing by pleading guilty. Forrest has been denied assistance of counsel all along the legal path on the guilty plea. His prejudice results from an unconstitutional lack of due process.

CONCLUSION

Based on the above, certiorari should be granted, and the case remanded for resentencing on the murder conviction, or in the alternative for a hearing on whether he knowingly waived his right to counsel at his guilty plea.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of May, 2017.

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JOSHUA LAMAR FORREST,

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 Jessica Kinard, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Joshua Lamar Forrest, #274525, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 11th day of May, 2017.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 11th day of May, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.