

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable George C. James, Circuit Court Judge

RECEIVED

MAY 26 2017

S.C. SUPREME COURT

VINCENT MISSOURI,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002037

JOHNSON PETITION FOR WRIT OF CERTIORARI

David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether this court, pursuant to Martinez v. Ryan, 566 U.S. 1 (2012), should remand this matter to the PCR court for consideration of whether petitioner's guilty plea was knowing and voluntary when plea counsel failed to advise petitioner that his *pro se* interlocutory appeal was a nullity and that, by pleading guilty, he would waive his right to contest the trial judge's error in denying his Sixth Amendment right to represent himself and present a novel defense?

STATEMENT

On November 26, 2013, petitioner was indicted in Greenville County for two counts of bank robbery. App. 173 – 80. On September 5, 2014, a hearing was held before the Honorable Letitia H. Verdin. App. 1. William McMaster represented the State. App. 1. Symmes Culbertson represented petitioner. App. 1. On October 31, 2014, petitioner pled guilty before the Honorable James R. Barber. App. 16. Judge Barber sentenced petitioner to concurrent terms of ten years' imprisonment which the court ordered consecutive to a twenty-year sentence of imprisonment for bank robbery in Pickens County. App. 33, ll. 6 – 14. Plea counsel did not file an appeal. App. 163.

On September 28, 2015, petitioner filed a PCR application. App. 35. On June 15, 2016, a hearing was held before the Honorable George C. James, Jr. App. 58. R. Mills Ariail, Jr. represented petitioner. App. 58. Patrick Schmeckpeper represented the State. App. 58. On September 6, 2016, the court denied petitioner's PCR. App. 162. This petition follows.

ARGUMENT

This court, pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012), should remand this matter to the PCR court for consideration of whether petitioner’s guilty plea was knowing and voluntary when plea counsel failed to advise petitioner that his *pro se* interlocutory appeal was a nullity and that, by pleading guilty, he would waive his right to contest the trial judge’s error in denying his Sixth Amendment right to represent himself and present a novel defense.

At the PCR hearing, the court succinctly summarized the legal theory petitioner was pursuing: “And he’s hinging all of this on an involuntary intoxication defense that he wanted to present *pro se*?” App. 102, ll. 17 – 20. Unfortunately, the legal theory upon which petitioner could have obtained relief—despite the PCR judge’s recognition of the theory at the hearing—did not appear in the PCR court’s final order and no Rule 59(e) motion was filed, precluding review by this Court absent a remand. *Marlar v. State*, 375 S.C. 407, 653 S.E.2d 266 (2007) (holding that failure to file a Rule 59(e) motion when issues are not addressed in the order of dismissal fails to preserve such issues for appellate review).

Petitioner faced bank robbery charges in both Pickens and Greenville County. App. 162-63. Petitioner wanted to pursue the defense of involuntary intoxication. App. 67, l. 20 – 73, l. 17. Petitioner’s desire was not based on a misunderstanding of the law. App. App. 67, l. 20 – 73, l. 17. He understood that his theory was novel and had researched the science regarding the effect of his crack addiction on his ability to control his behavior. App. 67, l. 20 – 73, l. 17.

Plea counsel told petitioner he did not believe involuntary intoxication was a viable defense. App. 106, ll. 16 – 23. Petitioner filed a motion to relieve plea counsel and to proceed *pro se*. App. 6, ll. 3 – 7. Petitioner’s motion to proceed *pro se* was heard before Judge Verdin, who refused to allow petitioner to represent himself. App. 11, l. 18 – 14, l. 9.

Petitioner attempted to file an interlocutory appeal regarding Judge Verdin's denial of his right of self-representation. App. 156 – 60. The clerk of the Supreme Court wrote petitioner explaining that South Carolina does not recognize hybrid representation. App. 133 – 34. Petitioner then pled guilty before Judge Barber and received two concurrent ten-year sentences. App. 27, ll. 7 – 28, l. 4. These sentences ran consecutive to a twenty-year sentence petitioner received after a trial in Pickens. App. 162-63. The PCR judge inquired at the PCR hearing about the status of that case and petitioner and PCR counsel correctly informed the court that the Pickens case was pending on direct appeal.¹ App. 91, ll. 1 – 11.

Here, Judge Verdin failed to conduct a colloquy regarding petitioner's request to represent himself. Faretta v. California, 422 U.S. 806 (1975). U.S. Const. amends. VI, XIV. The court only considered the seriousness of the offense and attempted to persuade petitioner to continue plea counsel's representation. App. 4, l. 2 – 6, l. 4. Judge Verdin remarked that she knew petitioner was intelligent and that he understood hybrid representation did not exist in South Carolina. App. 5, ll. 16 – 20. But instead of using the Faretta analysis and recognizing that a defendant has an absolute right to proceed pro se if he meets the Faretta standard, the trial court ignored that right and ordered that plea counsel would continue to represent petitioner. App. 11, l. 22 – 14, l. 9.

The PCR court addressed the issue of whether the circuit court had jurisdiction to accept petitioner's plea after he attempted to file a pro se interlocutory appeal. App. 170-71. The court noted that nothing in the record shows any dismissal of this appeal, but only shows that this

¹ Counsel for petitioner also represents petitioner in the Pickens direct appeal. The issue pending before the Court of Appeals is the denial of the right of self-representation. As of the writing of this petition, briefing before the Court of Appeals is complete and petitioner's case received a preliminary notice for an oral argument for the June term, but the case was ultimately not scheduled during that term.

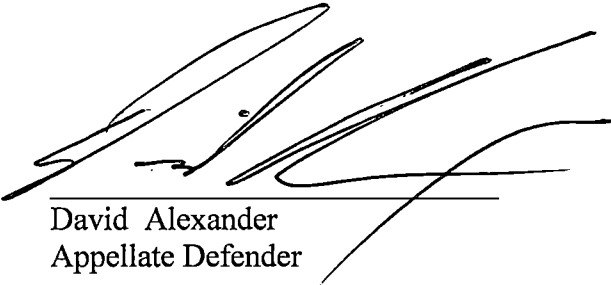
Court notified petitioner of the prohibition against hybrid representation. App. 170-71. The PCR court correctly dismissed this claim, but the existence of this claim shows that it is likely that petitioner pled guilty without fully understanding that he was waiving his right to appeal Judge Verdin's erroneous ruling that denied petitioner his Sixth Amendment right to represent himself. This appeal right is substantial, because a Sixth Amendment error is structural and not subject to a harmless error or prejudice analysis. State v. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545, 549-50 (2014); McKaskle v. Wiggins, 465 U.S. 168 (1984).

The PCR judge recognized petitioner's absolute right to represent himself and cited Barnes at the PCR hearing. App. 119, l. 24 – 121, l. 14. The PCR court stated, "And what we have here is a situation where he wanted to represent himself and pursue a defense that does not exist. But as he said, he said that's his right." App. 121, ll. 5 – 8. However, the legal theory of ineffective assistance—plea counsel's failure to explain that the guilty plea waived the Faretta issue—was not addressed in the PCR court's order despite the judge's recognition of the issue at the hearing. App. 162-72. Plea counsel testified that he would have filed an interlocutory appeal on the Faretta issue had petitioner asked. App. 118, l. 24 – 119, l. 2. This testimony indicates a strong likelihood that plea counsel did not understand that no right to such an interlocutory appeal exists and that petitioner would have needed to proceed to trial to preserve a Faretta issue.

The federal courts have recognized that where PCR counsel provides ineffective assistance, procedural bars will not prevent raising a valid Sixth Amendment claim in federal court. Martinez v. Ryan, 566 U.S. 1 (2012). This Court should adopt the reasoning of Martinez in this case and remand to the PCR court for consideration of whether petitioner knowingly and voluntarily pled guilty with the knowledge that doing so waived his appeal of the trial court's Sixth Amendment structural error.

CONCLUSION

For the foregoing reasons, this case should be remanded to the PCR court for further consideration.

A handwritten signature in black ink, appearing to read 'D. Alexander', is written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of May, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Honorable George C. James, Circuit Court Judge

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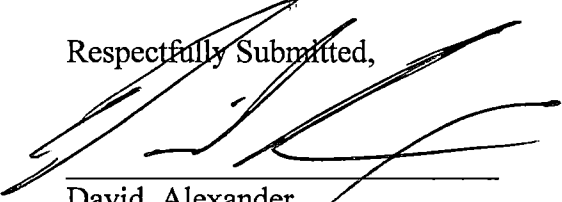
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Vincent Missouri states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's trial before Judge George C. James, which was held on June 15, 2016, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Vincent Missouri.

Respectfully Submitted,

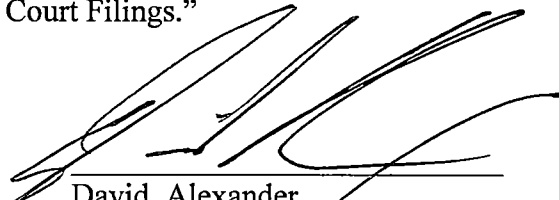


David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

This 26th day of May, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson 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."



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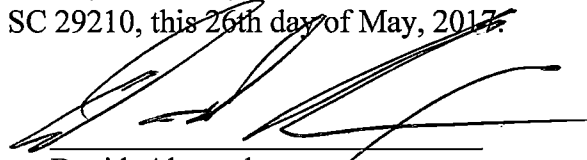
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Justin J. Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Vincent Missouri, #197996, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 26th day of May, 2017.



David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 26th day of May, 2017.

Courtney Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027