

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

---

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas  
Post-Conviction Relief

J. Derham Cole, Circuit Court Judge

---

CASE NO: 2018-000328

---

Ricardo Hernandez #348548,..... Petitioner,

vs.

State of South Carolina, .....Respondent.

---

PETITION FOR WRIT OF CERTIORARI  
PURSUANT TO AUSTIN V. STATE

---

Tommy A. Thomas  
S.C. Bar: 5536  
Attorney for Petitioner  
P.O. Box 88  
Irmo, SC 29063  
(803) 732-5507

Counsel for Respondent:  
Jordan A. Cox, Esq.  
Attorney General's Office  
P.O. Box 11549  
Columbia, SC 29211-1549

**RECEIVED**

JUN 29 2018

**S.C. SUPREME COURT**

INDEX

TABLE OF CASES..... 1

QUESTIONS PRESENTED ..... 2

STATEMENT OF THE CASE..... 3

STATEMENT OF THE FACTS..... 3

DISCUSSION OF LAW..... 5

ARGUMENT ..... 6

CONCLUSION ..... 9

## TABLE OF CASES

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

Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969).

Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Cherry v. State, 300 S.C. 115, 386 S.E. 2d 624 (1989)

Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985)

Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013).

Mangal v. State, Op. 27726 (S.C. Sup. Ct. filed October 4, 2017.

Martinez v. Ryan, 566 US 1, 132 S.Ct. 1309, 182 Led 272 (2012)

Odom v. State, 337 S.C. 261, 523 S.E. 2d 755

Robertson v. State, 418 S.C. at 513, 795 S.E. 2d 33

Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001)

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064 80 L.Ed.2d 674, 692 (1984)

**QUESTION PRESENTED**

**Did the PCR Court error in not addressing the Petitioner's concern over the effectiveness of his original PCR Counsel, John Kevin Owens?**

## **STATEMENT OF THE CASE**

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. In February, 2011, the Spartanburg County Grand Jury indicted Applicant for trafficking cocaine – over 400 grams (2011-GS-42-0420). The charge resulted from Applicant’s participation in a cocaine deal that was set up by a confidential police informant where a package of 1001.80 grams of powder cocaine was recovered. Robert Newton, Esq., represented Applicant. Assistant Solicitor Ryan McCarty represented the State.

On November 7, 2011, Petitioner plead guilty to the lesser included offense of trafficking cocaine – 28 to 100 grams before the Honorable Roger L. Couch. Janet Chavez served as Applicant’s interpreter at the guilty plea hearing. Pursuant to a negotiated sentence, Judge Couch sentenced Applicant to imprisonment for twelve years for trafficking cocaine – 28 to 100 grams. Applicant did not appeal his conviction or sentencing.

## **STATEMENT OF THE FACTS**

The Petitioner filed a post-conviction relief, on January 6, 2012, Petitioner alleged that he was being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
  - a. “My attorney failed to investigate my case and had lied [tatt] I would be sentenced under ten years.”
  - b. “He took my hard earned money, \$3000.00 as down payment and did not perform in my defense at getting the best possible results in violation of my Sixth Amendment right to effective assistance of counsel and my Fourteenth Amendment right to due process.”
  
2. “Plea not knowingly and voluntarily entered.”
  - a. “I believed I was pleading [guilty] to conspiracy.”

- b. “[Plea Counsel] informed [Applicant’s] that he would get very little time if convicted, since counsel acknowledged or knew [Applicant].”
- c. “This [Applicant’s] very first drug offense, to his second, third, etc.”

3. “Due Process violations” (App. p. 35-46)

Respondent filed a Return on November 29, 2012. An evidentiary hearing into the matter was convened on January 11, 2013, at the Spartanburg County Courthouse before the Honorable J. Derham Cole. Applicant was present at the hearing and represented by John Kevin Owens, Esq. Suzanne H. White, Esq. of the South Carolina Attorney General’s Office, represented Respondent. Marie Bustamante served as interpreter for Applicant. On July 10, 2013, Judge Cole issued the order of dismissal denying Applicant’s application for post-conviction relief.

Applicant did not appeal the denial of post-Conviction relief. On July 25, 2014, Applicant was notified that John Kevin Owens, Esq. had been suspended from the practice of law and that Applicant should seek other counsel. On August 3, 2014, Applicant petitioned for Appointment of substitute counsel.

The Petitioner filed an application for a second post-conviction relief, Applicant alleges that he was being held in custody unlawfully for the following reason:

- 1. “Applicant would respectfully request a belated appeal from his post-conviction relief action hearing on January 11, 2013.”
  - a. “Applicant was represented by John Kevin Owens (PCR Counsel).
    - i. The Applicant believed that counsel filed an appeal of his post-conviction relief action on his behalf.”
  - b. “On July 25, 2014, Applicant received notification from the S.C. Supreme Court that his PCR Counsel had been suspended from the practice of law. During this period, Applicant believed that an appeal had been filed and that his rights were being protected by a trustee appointed by the South Carolina Bar.”
  - c. “Applicant did not knowingly and voluntarily waive his right to appeal.”
- 2. Ineffective Assistance of PCR Counsel
  - a. “Applicant is informed and believes that he did not receive any type of effective representation from {PCR} counsel.” (App. p. 71-84)

The Petitioner's Appeal follows:

### **DISCUSSION OF LAW**

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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, 2064 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E. 2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E 2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. At 117, 386 S.E. 2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. At 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show there is a reasonable probability that but for counsel's alleged

errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

An Applicant who pled guilty on the advice of counsel may collaterally attack the plea by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the applicant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citations omitted). An Applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the range of competence demanded of attorneys in criminal case." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969).

### **ARGUMENT**

**Did the PCR Court error in not addressing the Petitioner's concern over the effectiveness of his original PCR Counsel, John Kevin Owens?**

The Petitioner asserts that he is entitled to a second Post Conviction Relief evidentiary hearing. That the previous hearing where he was represented by John Kevin Owens, did not provide an adequate presentation of his issues.

The transcript from the PCR hearing consists of 8 pages, which includes testimony and argument. (App. p. 53-61) The Petitioner argued in his subsequent application that he was equitably entitled to a review of these issues regarding his plea and requested that an evidentiary hearing be granted. (App. p. 71-84)

This Affidavit supports his current position that he presented and asked the Court to address the allegation of ineffective assistance of counsel. (App. p. 82-83) The Petitioner asserts that his plea was not knowingly or voluntarily given and that he was unaware of the consequences of the plea. In addition, he alleged that counsel failed to conduct an adequate investigation of the relevant facts and laws of the Petitioner's defense. That Counsel failed to go over Rule 5 discovery with his client. That the Petitioner was told that he would receive a seven (7) year sentence and the Petitioner had instructed his Defense Attorney, that he wished to proceed to trial.

It is interesting to note that there was no testimony from the Petitioner's plea attorney, Robert Jay Newton, Jr. at the first PCR hearing. When current counsel discussed this matter with Mr. Newton, Mr. Newton stated that he had been instructed by John Kevin Owens that his testimony would not be needed and he could leave.

This Court has previously discussed the issue of ineffective PCR counsel and the federal case of Martinez v. Ryan, 566 US 1, 132 S. Ct. 1309, 182 Led 272 (2012). In Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013). The Court held Martinez "is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions." 404 S.C. 365, 745 S.E. 2d 377. The Court considered Martinez again in Robertson, 418 S.C. 505, 795 S.E. 2d 29 (2016). Reaffirming Kelly, and held "Martinez does not afford Petitioner a right to file a successive PCR application by merely alleging ineffective assistance of prior PCR counsel. In Robertson, however, the Court permitted the PCR applicant to pursue successive application the PCR court found was procedurally barred. 418 S.C. 516, 795 S.E.2d 34.

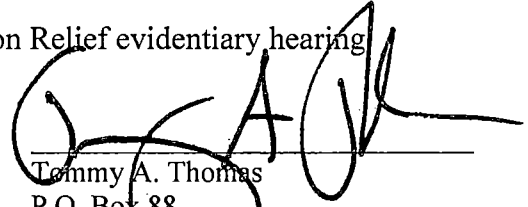
The Court states that the decision in Marinez reminds us that the Sixth Amendment guarantee of effective assistance of counsel is a “bedrock principle in our justice system.” Simmons and Marinez counsel us that there are situations where the interests of justice require PCR courts to be flexible with procedural requirements before PCR applicants suffer procedural default on substantial claims. Such flexibility is consistent with the purpose and spirit of our Rules of Civil Procedure. These considerations should guide PCR courts when struggling to balance procedural requirements against the importance of the issues at stake in PCR proceedings. We encourage trial courts in PCR cases to use the discretion we grant them on procedural matters to find reasonable ways – within the flexibility of our Rules – to reach the merits of substantial issues. Mangal v. State OP 27726 (S.C. Sup. Ct. filed October 4, 2017).

As we stated in Odom and repeated in Robertson, “All applicants are entitled to a full and fair opportunity to present claims in one PCR application.” Robertson, 418 S.C. at 513, 795 S.E. 2d 33; Odom, 337 S.C. 261, 523 S.E. 2d 755.

Clearly in this case, there are viable issues which the Petitioner was entitled to have been heard by the PCR Court. His lack of proficiency of the English Language compounds the problem. The lazy way the Post-Conviction was presented by Mr. Owens presents a total disregard of the rights of the Petitioner. He never was given or offered a full and fair opportunity to present his claims.

CONCLUSION

Therefore, based upon the foregoing arguments the Petitioner respectfully requests that the Court grant the Petitioner's request for Post-Conviction Relief evidentiary hearing

A handwritten signature in black ink, appearing to read 'T. A. Thomas', written over a horizontal line.

Tommy A. Thomas  
P.O. Box 88  
Irmo, SC 29063  
Phone: 803-732-5507  
SC Bar # 5536

June 28, 2018

Attorney for Petitioner

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

**RECEIVED**

JUN 29 2018

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas  
Post-Conviction Relief

**S.C. SUPREME COURT**

J. Derham Cole, Circuit Court Judge

Case No.: 2018-000328

Ricardo Hernandez #348548,..... Petitioner,

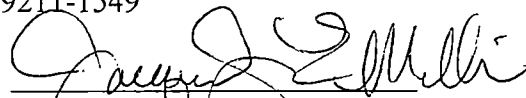
vs.

State of South Carolina, .....Respondent.

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for the Appellant hereby certify that I placed in the United States Mail, a copy of a Petition for Writ of Certiorari, Petition for Writ of Certiorari Pursuant to Austin v. State and Appendix with postage prepaid and the return address clearly shown on said envelope to Jordan A. Cox, Esq. of the Attorney General's Office, at:

Jordan A. Cox, Esq.  
Attorney General's Office  
P.O. Box 11549  
Columbia, SC 29211-1549



Jacquelyn E. Miller  
Secretary to Tommy A. Thomas  
Attorney for Appellant  
P.O. Box 88  
Irmo, SC 29063  
(803) 732-5507