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August 10, 2018

RECEIVED

AUG 10 2018

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: The State v. Tawana Yvette Gadsden - Appellate Case No. 2018-000036

Dear Ms. Kitchings:

Please accept this letter as a return to Judge Short's order that we screen Ms. Gadsden for indigency for her appeal from Goose Creek City Court that was affirmed on appeal by the Circuit Court. We have determined that she is indigent pursuant to Rule 602(b)(3), SCACR.

However, as evidenced in what follows, the United States Supreme Court has held that an individual is entitled to the right to counsel in only the first appeal as of right. From a General Sessions conviction that one appeal as of right would be to the Court of Appeals. An indigent person would not have the right to counsel in a discretionary appeal to the Supreme Court. An individual, such as Ms. Gadsden, would have the right to counsel, if indigent, to an appeal from Goose Creek City Court to the Circuit Court. She would not have the right to counsel from Circuit Court to the Court of Appeals or to the Supreme Court. Please consider the memorandum that follows:

In Douglas v. California, 372 U.S. 353 (1963), the United States Supreme Court held states must provide counsel for the indigent on his first appeal as of right. Over a decade later in Ross v. Moffitt, 417 U.S. 600 (1974), the United States Supreme Court held the rule established in Douglas requiring the appointment of counsel for indigent state defendants on their first appeal as of right would *not* be extended to require counsel for discretionary state appeals and for

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application for review in the United States Supreme Court, such appointment not being required by the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

While the Court emphasized the Fourteenth Amendment requires “indigents have an adequate opportunity to present their claims fairly within the adversary system,” it concluded this requirement was satisfied by the mandate of Douglas providing for the appointment of counsel for the indigent on his first appeal as of right. Id. at 612 (citing Griffin v. Illinois, 351 U.S. 12 (1956)). In refusing to extend Douglas, the Court emphasized that a defendant seeking second tier review following a first-tier appeal as of right earlier had the assistance of appellate counsel, who would have reviewed the trial court record, researched the legal issues, and prepared a brief reflecting that review and research. Id. at 615. The Court also emphasized that error correction is not the reviewing court’s prime function in second tier appeals, unlike first tier review. Id.

Subsequently, in Wainwright v. Torna, 455 U.S. 586 (1982), the United States Supreme Court reaffirmed its holding in Ross that a criminal defendant does not have a constitutional right to counsel to pursue discretionary state appeals or applications for review by the United States Supreme Court. The petitioner in Torna argued he had been denied his right to the effective assistance of counsel by the failure of his retained counsel to timely file a petition for writ of certiorari to the Florida Supreme Court. Id. at 586-587. The United States Supreme Court held that since the petitioner had no constitutional right to counsel to pursue discretionary review by the Florida Supreme Court, he was not deprived of effective assistance of counsel by his counsel’s failure to timely file an application for writ of certiorari. Id. at 587-588.

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More recently, in Halbert v. Michigan, 545 U.S. 605 (2005), applying the holdings in Douglas and Ross, the United States Supreme Court held the Due Process and Equal Protection Clauses of the Fourteenth Amendment require the appointment of counsel for indigent defendants, convicted on pleas of guilty or *nolo contendere*, who seek access to *first tier review* in the Michigan Court of Appeals. While the Michigan Court of Appeals adjudicates appeals as of right from criminal convictions, a defendant convicted on a guilty or *nolo contendere* plea who seeks intermediate appellate review must apply for leave to appeal. Id. at 612. Under Michigan law, most indigent defendants convicted on a plea must proceed *pro se* in seeking leave to appeal to the Court of Appeals. Id. at 612-613. In holding this law unconstitutional, the Supreme Court noted the Michigan “Court of Appeals’ ruling on a plea-convicted defendant’s claims provides the first, and likely only, direct review the defendant’s conviction and sentence will receive.” Id. at 619.

Pursuant to S.C. Code Ann. § 18-3-10, “[e]very person convicted before a magistrate of any offense whatever and sentenced may appeal from the sentence to the Court of Common Pleas for the county.” From the Court of Common Pleas, the person may appeal to the Court of Appeals. See Rule 201, SCACR and Rule 203(b)(1), SCACR. The appeal before the Court of Common Pleas would be the first appeal as of right in which the appointment of counsel is required under Douglas.

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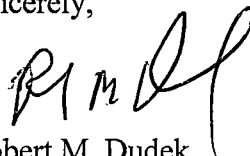
However, any subsequent appeal to the Court of Appeals would be a second-tier appeal in which the appointment of counsel is not required pursuant to the United States Supreme Court's holding in Ross.

Conversely, a person convicted by plea or trial in the Court of General Sessions may appeal to the Court of Appeals. See Rule 203(b)(2), SCACR. This would be the first appeal as of right in which the appointment of counsel is required under Douglas. However, in any subsequent appeal to the Supreme Court, which would be a second-tier appeal, the appointment of counsel would not be required pursuant to Ross.

The resources of the Appellate Division are limited, and the rules of error preservation in South Carolina are very strict. However, if this Court nonetheless determines that it should appoint the Appellate Division for reasons peculiar to this case we will honor that appointment in this case. I am prepared as always to discuss this matter by conference call or in person.

Please contact me if you should have any concerns questions concerning this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'R M Dudek', written in a cursive style.

Robert M. Dudek
Chief Appellate Defender

RMD/cnp

cc: J. Benjamin Aplin, Esquire
J. Hugh Ryan, Esquire
Ms. Twanda Gadsden