The State of South Carolina

In the Court of Appeals



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Appeal from Georgetown County

General Sessions

Fifteenth Judicial Circuit, The Honorable Judge Roger Couch

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Case No. 2009-GS-22-00778

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State — Respondent

v.

Terron Dizzley — Appellants

**MOTION TO REINSTATE DIRECT APPEAL, PURSUANT to APPELLATE COURT LOSS OF JURISDICTION BY WITHDRAWING PETITIONER'S DIRECT APPEAL WITHOUT AN ANDERS BRIEF AND CONDITIONAL ORDER**

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## STATEMENT OF ISSUES. QUESTIONS PRESENTED

Whether The South Carolina Court of Appeals lost jurisdiction of Petitioner's direct appeal by accepting Appellate Counsel, Jeremy A. Thompson's withdrawal of Petitioner's direct appeal without filing an Anders Brief, without conducting their own judicial determination of appeal merit, nor conducting a competency hearing to determine if Petitioner was competent to waive his direct appeal was contrary to United States Supreme Court laws and South Carolina Supreme Court laws?

## JURISDICTIONAL STATEMENT

Petitioners contends that the jurisdiction of this motion is invoked by SCACR, Rule 260, and the fact that subject matter jurisdiction may be raised at any time, even on first time on appeal. See: State v Guthrie, 352, S. C. 103 (2002); State v Gentry, 363, S. C. 93 (2005).

Petitioner contends that the record shows that Appellate Counsel, Jeremy A. Thompson's, decision to withdraw Petitioner's direct appeal, as a right, without fully investigating his case as to the merits, without an Anders Brief, and without advising him of the dangers of withdrawing his direct appeal, and the South Carolina Court of Appeals accepting Appellant counsel's withdrawal of Petitioner's direct appeal without filing an Anders Brief, and without conducting their own determination of appeal merit pursuant to appellant counsel's request to withdraw, was contrary to clearly established federal law as determined by the United States Supreme Court, and denied Petitioner equal protection of laws and also violated his Sixth Amendment Right to Counsel and Fourteenth Amendment Right to Due Process. According to clearly established United States Supreme Court law, the withdrawal of Petitioner's direct appeal, under such circumstances, without filing an Anders Brief, resulted in the South Carolina Court of Appeals loss of jurisdiction over Petitioner's appeal, therefore, resulting in the South Carolina Court of Appeals judgment to withdraw Petitioner's direct appeal being void, and Petitioner's direct appeal must be reinstated. See: Johnson v. Zerbst, 304 U.S. 458 (1938); "The Sixth Amendment constitutionally entitles one charged with crime to be assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional perquisite to a federal court's authority deprive an accused of his life or liberty. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction. A court's jurisdiction at hearing of trial may be lost in the course of the proceedings due to the failure to complete the course – as The Sixth Amendments requires – by

providing counsel for the accused. If the accused is not represented by counsel and has not competently and intelligently waived his constitutional right, the jurisdiction of the court is lost, the judgment of conviction pronounced by the court is void, and release from imprisonment may be obtained by habeas corpus. One convicted and sentenced without assistance of counsel and who was ignorant of his right to counsel and ignorant of the proceedings to obtain a new trial "or appeal" and the time limits governing both, and who did not possess the requisite skill or knowledge properly to conduct an appeal, is entitled to relief by Habeas Corpus. Petitioner, he said that it was-as a practical matter-impossible for him 's to obtain relief by appeal. If these contentions be true, in fact, it necessarily follows that no legal procedural remedy is available to grant relief for a violation of constitutional rights, unless the courts protect Petitioner rights by Habeas Corpus of the contention that the law, provides no effective remedy for such a deprivation rights affecting life and liberty it may well be said-as in Mooney v Holohan, 294 U. S. 103 (1935) – that it "falls within the premise" To deprive a citizen of his only effective remedy would not only be contrary to the " rudimentary demands of justice", but destructive of a constitutional guarantee specifically designed to prevent injustice."

Therefore, this court has jurisdiction to hear this motion whereas, Petitioner is challenging the Courts subject matter jurisdiction to withdraw Petitioner's direct appeal without an Anders Brief, whereas Petitioner did not knowingly and intelligently waive his direct appeal. See: State v Guthrie, 352, S.C. 103 (2002), "The lack of subject matter jurisdiction over a criminal case can be raised at any time, can be raised for the first time on appeal, and can be raised sua sponte by the Court. Lack of subject matter jurisdiction over a criminal case may not be waived, even by consent of all parties, and should be taken notice of by appellate court. The acts of court with respect to a matter as to which it had no jurisdiction are void." State v

Funderburk, 259 S.C. 256 (1972); State v Kastleman, 219, S.C. 136 (1951); State v Crosby, 108 S.C. 315, (2019); State v Jentry, 363 S.C. 93 (2005).

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## STATUTE AND RULES

**SCARC, Rule, 260**

## STATEMENT OF CASE

Petitioner was tried in Georgetown, SC in August 2012 for the charge of murder. The Honorable Judge Baxley abruptly stopped deliberations after only three to four hours and stated that the prosecution "that they are unable to meet their "burden of proof" to the extent that they can bring back a unanimous verdict", and discharged the jury, improvidently declaring a mistrial after giving a ruling that according to clearly established federal law as determined by the United States Supreme Court was an "acquittal".

Two years later in 2014, Petitioner was tried again for the same offense in violation of the Fifth Amendment's Double Jeopardy Clause and Petitioner was unlawfully convicted pursuant to the second trial of March 31, 2014.

Petitioner's trial counsel timely filed a Notice of Appeal, and he was appointed Susan B. Hacket on direct appeal. On April 16, 2015, Petitioner hired attorney Jeremy A. Thompson to investigate "juror misconduct" and file a motion for new trial. Attorney Thompson then mislead Petitioner, substituted himself as Appellate Counsel, and withdrew Petitioner's direct appeal without obtaining any transcripts, without fully investigating Petitioner's case or advising him of the merits of his appeal or dangers of withdrawing his direct appeal as of right, and without filing an Anders Brief. Attorney Thompson filed the request to withdraw petitioner's direct appeal as of right on July 9, 2015, and the South Carolina Court of Appeals granted the request to withdraw direct appeal on July 16, 2015 without an Anders Brief or an independent judicial determination of appeal merit. Attorney Thompson then filed a PCR, in which Petitioner paid Attorney Thompson a total of $15,000. Attorney Thompson then abandoned Petitioner's PCR. Petitioner has been diligently fighting for seven (8) years to have his direct appeal reinstated as of right.

## ARGUMENT 1

The South Carolina Court of Appeals lost jurisdiction of Petitioner's direct appeal by accepting Appellate Counsel, Jeremy A. Thompson's withdrawal of Petitioner's direct appeal without filing an Anders Brief, without conducting their own judicial determination of appeal merit, nor conducting a competency hearing to determine if Petitioner was competent to waive his direct appeal was contrary to United States Supreme Court laws and South Carolina Supreme Court laws.

Petitioner contends that the withdrawal of his direct appeal under such circumstances violated his Sixth Amendment Right to Counsel and 14th Amendment Right to Due Process. Penson v. Ohio, 488 U.S. 75 (1988) "The court ruled that it was error for Penson's attorney to file a certificate of his view of the appeal as meritless and withdrawing as Penson's counsel without filing an Anders Brief and it was error for the Appellate Court to accept Penson's attorney's certificate that he viewed the appeal as meritless and allowing counsel to withdraw without an Anders Brief or making its own determination whether Penson's attorney's evaluation of the case was sound. This requirement was plainly stated in Ellis v. U. S., 356 U.S. 674 (1958); it was repeated in Anders v. California, 386, U.S. 738 (1967); and it was reiterated last term in McCoy v Court of Appeals of Wisconsin, 486 U.S. 429 (1988). The courts held that Penson was left completely without representation during the appellate court's actual decisional process. The court analogized its ruling in this case to its holdings in critical stage cases where counsel was absent at trial. (Citing U.S v. Cronic, 466 U.S. 659 (1984).

The courts held that neither Strickland v. Washington, 466 U.S. 668 (1984), prejudicial review nor the harmless error analysis of Chapman v. California, 386 U.S. 18 (1967) was appropriate, prejudice was to be assumed. Anders v. California, 386 U.S. 738 (1967). Douglas v.

California, 372 U.S. 353 (1963); Evitts v. Lucey, 469 U.S. 387 (1985) "the Supreme Court, Justice Brennan, held that criminal defendant is entitled to effective assistance of counsel on first appeal as of right."

These errors not only violate Petitioner's right to due process, but also amount to fundamental defect which inherently results in a complete miscarriage of justice and is inconsistent with rudimentary demands of fair procedure. Reed v. Farley, 512 U.S. 339 (1994).

When a state court allows appellate counsel to withdraw direct appeal, as of right, without independent judicial determination of appeal merit the defendant is entitled to a fresh appeal without demonstrating that the initial appeal was non-frivolous. Penson v. Ohio, 488 U.S. 75 (1988).

Petitioner contends that the record shows that Appellate Counsel, Jeremy A. Thompson's, decision to withdraw Petitioner's direct appeal, as a right, without fully investigating his case as to the merits, without an Anders Brief, and without advising him of the dangers of withdrawing his direct appeal, and the South Carolina Court of Appeals accepting Appellant counsel's withdrawal of Petitioner's direct appeal without filing an Anders Brief, and without conducting their own determination of appeal merit pursuant to appellant counsel's request to withdraw, was contrary to clearly established federal law as determined by the United States Supreme Court, and denied Petitioner equal protection of laws and also violated his Sixth Amendment Right to Counsel and Fourteenth Amendment Right to Due Process. According to clearly established United States Supreme Court law, the withdrawal of Petitioner's direct appeal, under such circumstances, without filing an Anders Brief, resulted in the South Carolina Court of Appeals loss of jurisdiction over Petitioner's appeal, therefore, resulting in the South Carolina Court of Appeals judgment to withdraw Petitioner's direct appeal being void, and Petitioner's direct

appeal must be reinstated. See: Johnson v. Zerbst, 304 U.S. 458 (1938); "If the accused is not represented by counsel and has not competently and intelligently waived his constitutional right, the jurisdiction of the court is lost, the judgment of conviction pronounced by the court is void, and release from imprisonment may be obtained by habeas corpus. One convicted and sentenced without assistance of counsel and who was ignorant of his right to counsel and ignorant of the proceedings to obtain a new trial "or appeal" and the time limits governing both, and who did not possess the requisite skill or knowledge properly to conduct an appeal, is entitled to relief by Habeas Corpus. Petitioner, he said that it was-as a practical matter-impossible for him 's to obtain relief by appeal. If these contentions be true, in fact, it necessarily follows that no legal procedural remedy is available to grant relief for a violation of constitutional rights, unless the courts protect Petitioner rights by Habeas Corpus of the contention that the law, provides no effective remedy for such a deprivation rights affecting life and liberty it may well be said-as in Mooney v Holohan, 294 U. S. 103 (1935) – that it "falls within the premise" To deprive a citizen of his only effective remedy would not only be contrary to the " rudimentary demands of justice", but destructive of a constitutional guarantee specifically designed to prevent injustice."

Therefore, this court has jurisdiction to hear this motion whereas, Petitioner is challenging the Courts subject matter jurisdiction to withdraw Petitioner's direct appeal without an Anders Brief, whereas Petitioner did not knowingly and intelligently waive his direct appeal. See: State v Guthrie, 352, S.C. 103 (2002), "The lack of subject matter jurisdiction over a criminal case can be raised at any time, can be raised for the first time on appeal, and can be raised sua sponte by the Court. Lack of subject matter jurisdiction over a criminal case may not be waived, even by consent of all parties, and should be taken notice of by appellate court. The acts of court with respect to a matter as to which it had no jurisdiction are void." State v

Funderburk, 259 S.C. 256 (1972); State v Kastleman, 219, S.C. 136 (1951); State v Crosby, 108 S.C. 315, (2019); State v Jentry, 363 S.C. 93 (2005).

Petitioner contends that according to clearly established South Carolina Supreme Court laws, when Jeremy A. Thompson filed a request to withdraw Petitioner's direct appeal, as of right, there should have been a competency hearing held to determine if Petitioner was competent to waive his direct appeal. See: State v Motts, 391 S.C. 635 (2011), citing Singleton v State, 313 S. C. 75 (1993), " The standard for determining whether an appellant or PCR applicant is mentally competent to waive the right to an appeal or PCR is set forth in Singleton v. State, 313, S. C. 75 (1993). Singleton provides a relevant part: The first prong is a cognitive prong which can be defined as, whether a convicted defendant can understand the nature of the proceedings, what he or she was tried for, the reason the punishment, or the nature of the punishment. The second prong is the assistance prong, which can be defined as: whether the convicted defendant possesses sufficient capacity or ability to rationally communicate with counsel. Id. at 84, 437 S.E. 2d at 58. "This standard of competency is the same standard required before a convicted defendant may be executed." Hughes, 367 S. C. at 397 – 98. "The failure of either prong is sufficient to warrant a stay of execution "and" a denial of the convicted defendant's motion to waive his right to appeal or pursue PCR." Id. at 398, 626 S.E. 2d at 809."

Petitioner contends that according to clearly established United States Supreme laws, the withdrawal of his direct appeal, under such circumstances, without an Anders Brief.

Therefore, according to clearly established United States Supreme Court laws, The South Carolina Court of Appeals lost jurisdiction of Petitioner's direct appeal by accepting Appellate Counsel, Jeremy A. Thompson', withdrawal of Petitioner's direct appeal without filing an Anders Brief, without conducting their own judicial determination of appeal merit, nor

conducting a competency hearing to determine if Petitioner was competent to waive his direct appeal was contrary to United States Supreme Court laws and South Carolina Supreme Court laws. Therefore, The South Carolina Court of Appeals must reinstate Petitioner's direct appeal.

**REQUEST FOR CONDITIONAL ORDER TO REINSTATE DIRECT APPEAL**

Petitioner contends that for 8 years, he has been deprived of his direct, as of right, which results in an unjustifiable inordinate delay, violating Petitioner's rights to due process. See: Harris v Champion, 15 F. 3d. 1538 ( 10th Cir. 1994), "Inexcusable or inordinate delay by state in processing claims for relief may make state process ineffective to protect habeas petitioner's rights and may excuse exhaustion of state remedies. Although habeas petitioner is required to exhaust underlying claims before coming to federal court, federal habeas statue does not require petitioner to exhaust issue of exhaustion itself; because exhaustion function as federal court gatekeeper, federal, not state, courts decide when state process has been exhausted or should be deemed effective because of delay." Gardner v. Plumley, 2013 WL5999041 (4th Circuit)." As the Fourth Circuit has noted, "the rule of exhaustion is not the one defining power but one which relates to the appropriate exercise of power." Patterson v. Leeke, 556 F. 2d 1168, 1170 (4th circuit 1977). Quoting Fay v. Noia, 372 U.S 391 (1963): "Because the rule of exhaustion is one of comity and not of jurisdiction, it is to be applied with flexibility." Id. "When the state's procedural machinery is rendered ineffective… the federal courts should not feel compelled to abstain." Id. (Quoting Hunt v. Warden, Maryland Penitentiary, 353 F. 2d 936, 940-41 (4th Circuit 1964). Ward v. Freeman, No. 1995 WL 48002; See other Circuits; Turner v. Bagley, 401 F. 3d 718, 726-27 (6th Cir. 2004), "excusing exhaustion where Petitioner's state direct appeal had been pending for 11 years." Jackson v. Duckworth, 112 F. 3d 878, 881 (7th Cir. 1997); "Inordinate, unjustifiable delay in a state court collateral proceeding excuses the requirement of

Petitioners to exhaust their state court remedies before seeking federal habeas corpus relief." Story v. Kindt, 26 F. 3d 402, 405-06 (3rd Cir. 1994), "excusing exhaustion where Petitioner had encountered an eleven-year delay in deciding his state collateral proceedings." Hankins v. Fulcomer, 941 F. 2d 246, 252 (3rd Cir. 1991); Cody v. Henderson, 936 F. 2d 715, 718 (2nd Cir. 1991) "finding substantial delay in the state criminal appeal process is a sufficient ground to justify the exercise of federal habeas jurisdiction"; Simmons v. Reynolds, 898 F. 2d 865, 868 (2nd Cir. 1990),"finding the Petitioner who made frequent but unavailing requests to have his appeal processed... was not required to take further futile steps in state court in order to be heard in federal court and excusing exhaustion where the petitioner's direct appeal had been pending for six years." Mathis v. Hood, 851 F. 2d 612 (2nd Cir. 1988); Brooks v Jones, 875 F. 2d. 30 (2nd Cir. 1989).

In determining whether the delay amounts to a due process violation, the four factor speedy trial analysis set forth in Barker v. Wingo, 407 U.S. 514 (1972) applies. Id: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his rights; and (4) prejudice to the defendant. Although Barker addresses only a defendant's Sixth Amendment Right to a Speedy Trial, the balancing test the Court enunciated provides an appropriate framework for evaluating whether a defendant's due process right to a timely direct appeal has been violated.

**Relief Requested Pursuant to Reinstatement of Direct Appeal**

Petitioner requests that this Court issues a Conditional Order to protect Petitioner's rights from any further inordinate delay, that his direct appeal is decided within 60 days or release him from prison.

Petitioner contends that several circuits have decided that such conditional orders are

appropriate under circumstances when an unjustifiable inordinate delay in adjudicating the person's direct appeal raises to the level of a due process violation. Brooks v. Jones, 875 F. 2d 30 (2nd Cir. 1989), "Federal habeas corpus petitioner was entitled to relief in form of order for release conditional on his appeal not being heard within 60 days in state court due to his having waited eight years for state court to consider his appeal." Cameron v. LeFevre, 887 F. Supp.425 (1995), "Prisoner filed petition for writ of habeas corpus, alleging that the state court's delays in furnishing him transcripts of his trial that he needed for perfection of his appeal violated his rights to due process. The District Court, Seybert, J., held that: (1) delay violated prisoner's rights but (2) delay warranted only a conditional writ that prisoner be released if appeal was not heard in reasonable time."

## CONCLUSION

Petitioner contends that for the foregoing reasons, in the interest of liberty and justice, Petitioner's direct appeal should be reinstated pursuant to request for conditional order. Petitioner contends that because the records shows that he has been falsely imprisoned, without any legal nor jurisdictional authority in violation of his Fifth Amendment Right under The Double Jeopardy Clause and his Fifth Amendment Right not be held for an infamous crime without presentment nor indictment by a grand jury. According to clearly established United States Supreme Court law, an unlawful conviction and sentence imposed, under such circumstances, exceeds the court's jurisdiction, and is void for want of power, and afford no authority to hold Petitioner in prison, and he must be immediately discharged. See: Exparte Lange, 85 U. S. 163 (1873); Exparte Wilson, 114 U. S. 417 (1885). Because these issues show that Petitioner is being deprived of his liberty, without any legal nor jurisdictional authority, and these issues are appealable pursuant to a direct appeal, under such extreme circumstances, this Court must not

wait 60 days before adjudicating these issues. See: " Exparte Motion for Emergency Petition for Immediate Release of Terron Dizzley Pursuant to Double Jeopardy, False Imprisonment, Lack of Trial Court's Jurisdiction to Impose Sentence."

For the foregoing reasons, this motion must be granted. See: Johnson v. Zerbst, 304 U.S. 458 (1938), citing, " Mooney v Holohan, 294 U. S. 103 (1935) – that it "falls within the premise" to deprive a citizen of his only effective remedy would not only be contrary to the " rudimentary demands of justice", but destructive of a constitutional guarantee specifically designed to prevent injustice."

Date: June 8, 2022

Respectfully submitted,

S/ Terron Dizzley

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Case No. 2009-GS-22-00778

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State — Respondent

v.

Terron Dizzley — Appellant

**Certificate of Service**

I, Terron Dizzley, certify that I have filed a "MOTION TO REINSTATE DIRECT APPEAL, PURSUANT to APPELLATE COURT LOSS OF JURISDICTION BY WITHDRAWING PETITIONER'S DIRECT APPEAL WITHOUT AN ANDERS BRIEF AND CONDITIONAL ORDER" by depositing in U. S. Mail, Postage Pre-paid, on June 8, 2022 addressed to the addresses below:

South Carolina Court of Appeals
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S/ Terron Dizzley

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**Notice**

Dear Clerk:

Enclosed, please find one original and one copy a "MOTION TO REINSTATE DIRECT APPEAL, PURSUANT to APPELLATE COURT LOSS OF JURISDICTION BY WITHDRAWING PETITIONER'S DIRECT APPEAL WITHOUT AN ANDERS BRIEF AND CONDITIONAL ORDER", Stamp filed please send copy to me.

Date: June 8, 2022

With kind regards,

S, Terron Dizzley

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