

19-7611

No. _____

FILED

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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

DVARLO LEVONNE JOHNSON — PETITIONER

VS.

STATE OF NORTH CAROLINA — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF NORTH CAROLINA

PETITION FOR DISCRETIONARY REVIEW

PETITION FOR WRIT OF SUPERSEDEAS

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QUESTIONS PRESENTED

- 1) Does the Sixth Amendment Right to Counsel extend to the Appellate Process?
- 2) Did it constitute ineffective assistance of counsel, when Petitioner's attorney of record, on appeal, M. Gordon Widenhouse, Jr., never contacted Petitioner, nor Petitioner's Mother (who acts as his Designee) for two years, and then filed an Appellate Brief without allowing either Petitioner, or his Designee, to preview the filing?
- 3) Did it constitute ineffective assistance of counsel, for M. Gordon Widenhouse, Jr., to wait two months to avail Petitioner that an Appellate Brief had been filed upon his behalf, and then, only after receiving a letter of inquiry from Petitioner, about the status of his case?
- 4) Did the North Carolina Court of Appeals commit an Abuse of Discretion, when it allowed M. Gordon Widenhouse, Jr. to withdraw from Petitioner's case, after Petitioner submitted a Motion for the Replacement of Appellate Counsel, on August 19, 2019, yet refused to grant a Petition for a Writ of Supersedeas / Motion For Appointment of Counsel, on September 4, 2019?
- 5) Did the Supreme Court of North Carolina commit an Abuse of Discretion when it failed to grant / denied the Petitions for a Writ of Supersedeas / Discretionary Review, filed by Petitioner pro se, on September 27, 2019?

QUESTIONS PRESENTED continued

6) Did the North Carolina Court of Appeals commit Abuses of Discretion when they docketed Petitioner's case, for Appellate Review on October 16, 2019, based upon the defective brief, filed by M. Gordon Widenhouse, Jr.; after he was removed as counsel; and without reappointing counsel; when Petitioner clearly prayed to have Mr. Widenhouse's brief annulled, and clearly motioned for replacement Counsel?

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the North Carolina Supreme Court appears at Appendix F, and is currently unpublished. File No. 377P19

The Opinions of the North Carolina Court of Appeals appear at Appendices B, C, and I. File No. 19-191

JURISDICTION

The North Carolina Supreme Court entered their decision 4 October 2019. This decision appears at Appendix F. File No. 377P19

The Jurisdiction of this Most Honorable Court is invoked pursuant to 28 U.S.C. § 1257 (a)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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STATEMENT OF THE CASE

On May 26, 2017, Appellate Counsel; M. Gordon Widenhouse, Jr., was appointed to represent Defendant's case on appeal. After 2 plus years of inactivity, inaccessibility, and ignoring the calls, letters, and other attempts by Defendant, and his mother, (who acts as Defendant's / Petitioner's Designee). Mr. Widenhouse then files an Appellate Brief upon Defendant's behalf, without allowing Defendant, nor Designee, to preview the completed brief, on April 29, 2019. In fact, Mr. Widenhouse did not notify Defendant of the brief until July 25, 2019. Three months after the actual filing! And the only reason Mr. Widenhouse responded at all, was due to Defendant having someone submit letters of inquiry on his behalf.

Based on M. Gordon Widenhouse, Jr.'s appalling performance and egregious actions, Petitioner / Defendant filed a prose Motion For The Replacement of Appellate Counsel; pursuant to N.C.G.S. §§ 7A-450 (b) and 7A-498.8 (b)(1). Within in the text of this Motion (P.6, Concluding paragraph) Defendant clearly prays: "... The Defendant moves this court to ... Order the Replacement of M. Gordon Widenhouse, Jr., and suspend / toll the appellate process, for Defendant, by Writ of Supersedeas, until such time as suitable counsel can be assigned to represent Defendant's appeal."

On August 28, 2019, the North Carolina Court of Appeals entered an order denying Petitioner's / Defendant's Motion For The Replacement of Appellate Counsel (Appendix B). On August 30, 2019, the NC COA entered another order (Appendix C), allowing M. Gordon Widenhouse, Jr., to withdraw as appellate counsel; and allowing

Defendant to proceed pro se. On September 4, 2019, Defendant filed another pro se Motion For Appointment of Counsel, with the NCCOA. On September 19, 2019, Defendant received the NCCOA "Court Calendar By Panel" signifying that his case will be reviewed October 16, 2019, based upon the defective brief filed by M. Gordon Widenhouse, Jr., (Appendix E). To date, Petitioner's/Defendant's Motion For Appointment of Counsel has not been honored (Appendix D).

On September 19, 2019, Petitioner/Defendant filed a Petition For Discretionary Review/Petition For Writ of Supersedeas, to the North Carolina Supreme Court (Appendix F). On October 9, 2019, the North Carolina Supreme Court denied both petitions. Still operating pro se, a jailhouse paralegal submitted a letter on Petitioner's behalf, to the North Carolina Prisoner Legal Services, Inc. October 7, 2019 (Appendix G). Also on October 7, 2019, the NCCOA submitted another order (Appendix I) reiterating the decision of the NCSC.

As of this filing, Petitioner/Defendant remains pro se, and his Motion For Appointment of Counsel remains unheard. Since Petitioner is functionally illiterate, and N.C. Dept. of Public Safety (Prisons) does not employ law libraries, nor provide legal research/assistance resources, Petitioner must rely upon the limited assistance of jailhouse paralegals to help him receive his fundamental rights to Access the Courts and to Appeal. His mother's tireless efforts to obtain assistance from the N.C. Appellate Defenders Office, has been unsuccessful.

REASONS FOR GRANTING THE PETITION

1) The Sixth Amendment right to counsel extends through the Appellate process;

(a) "Defendants have raised ineffective assistance claims concerning counsel's performance on appeal." See U.S. v. Reinhart, 357 F.3d 521, 530-31 (5th Cir. 2004) (counsel's failure on appeal to raise trial court's sentencing error was ineffective assistance because error increased defendant's sentence by 5 years); aff'd on other grounds, 442 F.3d 857 (5th Cir. 2006); Campbell v. U.S., 686 F.3d 353, 360 (6th Cir. 2012) (counsel's failure to file appeal in plea bargain was ineffective assistance, despite defendant's waiver of right); and Eagle v. Linahan, 279 F.3d 926, 943-44 (11th Cir. 2001) (appellate counsel's failure on appeal to argue that prosecutor violated Batson rule by exercising preemptory strike on basis of juror's race was ineffective assistance because claim would have succeeded on appeal).

(b) Concerning the instant offense, Appellate Defender, M. Gordon Widenhouse, Jr, established a pattern and practice of ignoring the repeated attempts to contact him by Appellant and/or his Designee. Mr. Widenhouse then files an Appellate Brief, on behalf of the Petitioner, without giving either him, or his Designee, the opportunity to preview the brief, before submitting it to the court. Mr. Widenhouse exacerbated this act, by waiting three months to avail Petitioner of the filed brief and only after being relentlessly prodded to do so. See Appendix F. Petition For Discretionary Review to the North Carolina Supreme Court. P-1.

2) Appellate Defender, M. Gordon Widenhouse, Jr., committed Ineffective Assistance of Counsel, a structural error that should have been corrected by the North Carolina Appellate Court Division, instead of condoned, and/or rewarded;

(a) If the court commits a constitutional error, it must be determined whether the error was "structural" error, looking "not only at the right violated, but also at the particular nature, context, and significance of the violation," U.S. v. Harbin, 250 F.3d 532, 544 (7th Cir. 2001) (error that falls between structural and trial error is presumptively prejudicial); also see U.S. v. Davila, 133 S. Ct. 2139, 2149 (2013) (Structural errors, as opposed to trial errors, involve defects in fundamental framework by which criminal trials assess guilt); Benitez v. U.S., 521 F.3d 625, 630, 636 (6th Cir. 2008) (court's failure to inquire into defendant's dissatisfaction with counsel, constituting denial of counsel, was structural error).

(b) Structural errors - defects that fundamentally undermine the reliability and fairness of the trial - are not subject to harmless error review and automatically require reversal. See Arizona v. Fulminante, 499 U.S. 279, 309-10 (1991); also see Salterwhite v. Tex., 486 U.S. 249, 256-57 (1988) (denial of counsel affects entire proceeding and is never harmless error.) Although Petitioner's counsel didn't affect a jury trial, it substantially affected his appellate process, which is at least as important as the jury trial, if not more-so.

3) Appellate Defender, M. Gordon Widenhouse, Jr., committed Ineffective Assistance

of counsel by submitting filings upon Petitioner's behalf, without allowing Petitioner, nor his Designee, to preview the filings; make any suggestions; corrections; or otherwise participate in his own appellate process;

(a) Strickland v. Washington, 466 U.S. 668, 692 (1984) (actual or constructive denial of counsel presumed to result in prejudice). See Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (per curiam); see also Padilla v. Ky., 559 U.S. 356, 364 (2010) (6th Amendment right to counsel is right to effective counsel); McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) same.

(b) Petitioner's reason for seeking replacement counsel, in the first place, is that M. Gordon Widenhouse, Jr. waited two years to file an Appellate Brief on issues that would likely be deemed "Harmless Error" issues. Mr. Widenhouse completely overlooked the core issues of Petitioner's case, ignoring the prominent, viable, and most promising appellate issues. He attempted to hide his nefarious conduct by filing a weak brief and failing to advise his client that he had done so. This Honorable Supreme Court decided in Williams v. Taylor, 529 U.S. 362, 396-99 (2000) (counsel's failure to investigate and present substantial mitigating evidence... was prejudicial); also Winston v. Pearson, 683 F.3d 489, 505-06 (4th Cir. 2012) ("counsel's failure to thoroughly inquire into degree of defendant's mental deficiencies was prejudicial"); also stating: ("counsel's failure undermined likely successful Atkins death penalty defense.") Petitioner's case involves "State of Mind" issues that possess the most prominent appellate pursuits, but counsel ignored them.

Likewise, there were issues of Judicial indiscretion; ineffective assistance of counsel; and evidentiary snafus, that M. Gordon Widenhouse, Jr. never mentioned.

4) The North Carolina Court of Appeals committed an Abuse of Discretion by failing to honor Petitioner's Motion for Appointment of Counsel submitted on August 19, 2019, and September 4, 2019;

(a) The N.C. Court of Appeals found cause to allow M. Gordon Widenhouse, Jr. to withdraw from his case. See Appendix C.

(b) The N.C. Court of Appeals denied Petitioner's initial Motion For Replacement of Appellate Counsel and ignored his second Motion For Appointment of Counsel and Petition For a Writ of Supersedeas, to halt appellate proceedings until the issue involving counsel could be resolved. See Appendices B & D.

5) The North Carolina Supreme Court committed an Abuse of Discretion by denying Petitioner's Petitioner For Discretionary Review / Writ of Supersedeas; to correct the defective rulings and indiscretions of the N.C. Court of Appeals. See Appendix H.

(a) The NCSC's lack of Judicial oversight has allowed Petitioner's appellate brief, as erroneously filed by M. Gordon Widenhouse, Jr., to be docketed for appellate review, despite Petitioner's repeated Motions to annul this brief and toll the proceedings until suitable replacement counsel can be appointed. See Appendices E, F, and H.

(b) The NCSC failed to mandate that new appellate counsel be appointed to assist Petitioner, who is currently without counsel during a "critical stage of the proceedings". See Strickland, 466 U.S. at 690,

CONCLUSION

WHEREFORE, The Petitioner prays that this Most Honorable Supreme Court of the United States, intervene in the aforementioned matter, as it concerns the broad issue of the Appellate right to the "Effective Assistance of Counsel", and the Abuse of Discretion of North Carolina's Appellate Division Courts. These Courts have committed egregious abuse of discretion violating constitutional provisions of both U.S. and N.C. Constitutions, ultimately violating Petitioner's 14th Amendment rights.

Respectfully submitted this 25 day of October, 2019.

151P'Marlon Johnson

Dmarlon L. Johnson, Petitioner

P.O. Box 506

Mary, N.C. 28554

AFFIDAVIT

I, Dmarlo L. Johnson, the Petitioner, hereby affirms that the foregoing Petition For A Writ Of Certiorari is true and correct, to the best of my information and belief, and that, pursuant to 28 U.S.C. § 1746, I have mailed this instrument by 1st Class Mail on this very date. This affirmation is made under the penalty of perjury.

/s/ D'marlo Johnson

Dmarlo L. Johnson, Petitioner

Sworn to and subscribed this 25th day of October, 2019.

NOTARY PUBLIC

My Commission Expires: _____

DECLARATION

Due to the fact that the Notary (ies) of ~~Maury~~ Maury Com. Inst. # 8875 failed to Notarize this document, I substitute this Declaration.