NO.: 19-8881

IN THE

SUPREME COURT OF THE UNITED STATES

George A Foote Jr. – Petitioner;

v.

State of Indiana – Respondent;

ON PETITION FOR WRIT OF CERTIORARI TO

THE INDIANA COURT OF APPEALS

ORIGINAL

George A. Foote Jr.
DOC# 192215
Pendleton Correctional Facility
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Pendleton, IN 46064-9001
Petitioner / *pro se*

Question Presented

After appellate counsel opted to utilize a Davis-Hatton procedure, but failed to reinstate the direct appeal, did the Indiana appellate court overstep its authority in supporting counsel depriving a direct appeal as of right, without following Anders or equal state procedure as required by the 14th Amendment due process clause, when the state provides no Anders withdraw, but mandates that all appeals as of right be fully briefed?

List of Parties

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at **Appendix A** to the petition and is the State Court of Appeals denying appeal and it is unpublished.

Supreme Court denying Transfer is **Appendix B** and Appeals Court denying rehearing is **Appendix C**

JURISDICTION

The date on which the highest state court (State Supreme Court) decided my case was April 23rd, 2020. A copy of the State Court of Appeals decision appears at **Appendix A** because the Supreme Court deferred to the Appeals Court when denying transfer.

The State Supreme Court does not allow a petition for rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S Constitution 14th Amendment

The due process clause of the 14th Amendment promises that first appeals as of right and the effective assistance of counsel to prosecute the appeal are provided to all.

STATEMENT OF THE CASE

After filing the notice of appeal of his criminal conviction, counsel dismissed the appeal through a state appellate procedure and when the time to reinstate the direct appeal came, counsel failed to do so. State courts claim it was a strategic decision, but Foote claims he was cheated out of his direct appeal. A successive PC was adjudicated and the state courts held to counsel strategy. A motion for belated notice of appeal was filed and state courts continue to hold that the appeal was not abandoned, but strategically by-passed. Foote has utilized every state level avenue to obtain his direct appeal and now seeks Certiorari in this Court.

The Davis-Hatton in Indiana is being used to circumvent the direct appeals of appellants and providing only collateral attacks when the first appeals as of right have been invoked. The Davis-Hatton is not a procedure that is Anders compliant for abandoning on grounds of frivolousness.

REASONS FOR GRANTING THE WRIT

Foote, by counsel preserved his 14th Amendment due process right to first appeal by timely filing a notice of appeal (Appendix **A**{*App. hereafter*} p. 2 par. [3]; p.7 par. [12]). This action invoked his right to the effective assistance of counsel on first appeal as mandated by *Evitts v. Lucey*, 469 U.S. 387, 83 L Ed 2d 821, 105 S Ct. 830 (1985). *Evitts v. Lucey* provided that the first appeal and the effective assistance of counsel to see it through adjudication is a fundamental constitutional right provided through due process and the 14th Amendment. The direct appeal of the case at hand did not find itself litigated nor was it adjudicated by any attorney or heard in any appellate court of the state. It was not withdrawn by way of an *Anders* compliant procedure either, in fact it was abandoned by a state appellate procedure, and a state appellate court ruling has held that counsel made a strategic decision in electing not to prosecute the appeal. This is not a unique case, but one of many that have found themselves filing a notice of appeal and not having obtained the direct appeal due to counsel utilizing the *Davis-Hatton* procedure.

Counsel motioned by way of state appellate rules to dismiss the appeal and pursue post-conviction remedies through a procedure call the *Davis-Hatton* procedure (App. **A** p.2 par. [3] *see also footnote* 3). This maneuver left Foote with no appellate counsel assistance thereafter. Once counsel motioned to dismiss the appeal he also dismissed himself from the appeal. (Post-conviction proceedings are a collateral attack and not constitutionally provided, therefore counsels assistance is that of collateral attack and not of the direct appeal any longer.) *Pa. v. Finley*, 481 U.S. 551 (1987). In the case at hand, counsel voluntarily motioned to dismiss the

appeal so that he could seek post-conviction relief remedies (App. **A** p.2 par. [9]). This maneuver was not direct appeal related nor was it a state requirement, instead it was counsel's way of performing his duties as he saw them (App. **E** p. 8 par. [2]). This avenue was not so the direct appeal could be more effectively prosecuted or better briefed, but as the state appellate court put it "post-conviction relief was Foote's best chance for relief because he did not see any 'just absolutely...powerful direct appeal issues.'" (App. **A** p.4 par. [6]). The state appellate court did not recite this conclusion from a motion, petition, or brief filed in the appellate court by appellate counsel for grounds to withdraw or claim the appeal was frivolous, but concluded them from the testimony of said counsel at a successive PC hearing when Foote questioned him. This testimony was not the testimony of an advocate for the appellant because counsel performed no duties as appellant counsel in carrying out the *Davis-Hatton* procedure. The *Davis-Hatton* procedure served more as a means of not having to brief the appeal or represent Foote under any *Strickland* standards. Post-conviction counsel means *Strickland* does not apply. Had Foote elected with counsel to forgo the appeal, as was in *Vinyard v. U.S.*, 804 F. 3d 1218 (2015), where (the district court denied relief concluding that the decision to forgo the direct appeal was strategic and not objectively unreasonable), so he would have no merit to continue, but Foote had not waived his first appeal as of right like *Vinyard* did and no state court has suggested such. The state appellate courts were stepping outside the boundaries allotted by federal standards when concluding the appeal was strategically abandoned.

According to federal law, before appellate counsel may abandon an appellant or his appeal he must follow procedures outlined in *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L Ed. 2d 493 (1967); and *Smith v. Robbins*, 528 U.S. 259, 276, 120 S. Ct. 746, 145 L Ed. 2d 756 (2000) which, by *Anders*, requires counsel to file a brief in the appellate court informing the

appeal would be a frivolous appeal and the appellate court is the final decider on the matter. *Smith*, asserts that states may draft their own procedures so long as they are equal to or superior to those in *Anders*, but Indiana has no procedure equivalent to *Anders*.

Anders requires an appellate counsel to represent the client as appellate counsel in the appellate court *while* counsel is claiming the appeal has no merits. It is the appellate court, not counsel, who determines if the appeal is ultimately without merit. This did not occur when counsel, as appellate counsel, made a motion to dismiss this appeal. The appellate courts have not made any remarks as to the cause for withdrawing the appeal on grounds of frivolousness nor have they made any determination on counsel withdrawing the appeal by counsel following the protocol of *Anders* and *Smith v. Robbins*. The state appellate courts here have accumulated testimony by counsel who never performed any appellate counsel duties other that filing a Notice of Appeal and then dismissing it to perform a collateral attack. Therefore, the state appellate courts have not excused the appeal on grounds of frivolousness that would meet *Anders* and *Smith v. Robbins* protocol. Because appellate counsel never acted as appellate counsel in the state appellate courts for direct appeal purposes, he abandoned his client and left him without his direct appeal and appellate representation as he had initiated at the beginning. Highlighting this matter is a dissenting opinion by Justice Manion in *Jones v. Zatecky*, 917, F. 3d 578 (2019) "Because of Indiana's 'file something' rule, it did not matter how successful appellate counsel thought the claim might be, he was legally bound to make the best argument he could, even if that argument was (ultimately) a loser." Therefore, any holding not in compliance with an appellate brief being filed on behalf of Foote is a conflicting order and not in line with state or federal law and renders a showing prejudice.

The *Davis-Hatton* procedure is not a procedure that is equal to or superior to that of *Anders* as required by *Smith v. Robbins*. This is because the state supreme court has issued a decision in Mosley v. State, 908 N.E. 2d 599 (2009) that held "We conclude that in any criminal appeal as a matter of right, counsel may neither withdraw on the basis that the appeal is frivolous nor submit an Anders brief to the appellate court." The *Mosley* court further advised that counsel has the ability to seek a sentence revision or a change of law as the minimum in an appellate brief. Because *Mosley* rejects *Anders* altogether, the state opted for the superior position and requires counsel to brief all appeals as of right regardless of frivolousness.

While the State Supreme Court holds a more superior position than *Anders*, the *Davis-Hatton* cannot be a superior to or equal to procedure as *Anders*. The *Davis-Hatton* is merely an appellate procedure that has its usefulness as simply stated in Brown v. Brown, 847 F. 3d 502 (2017) 7th Cir. Court of Appeals, "The *Davis-Hatton* procedure might be appropriate if the trial record itself supports an indisputable claim of ineffective assistance of trial counsel that will result in the immediate release of a person who is in prison improperly.", and; "If a trial court denies a *Davis-Hatton* petition, an appeal from that post-conviction denial and the original direct appeal will be consolidated but evaluated under separate standards of review." @ 847 F. 3d 511.

The 7th Circuit took the understanding that the direct appeal *would be* reinstated and not that it *might be* reinstated. State courts have maintained throughout this case that the direct appeal may be circumvented if counsel makes that decision as a strategy while also holding that all appeal as of right must be briefed. This is irreconcilable. Although counsel may not have

sought to abandon the direct appeal from the beginning, his actions none the less have rendered the same results as if he simply dismissed the appeal through the *Davis-Hatton* and left town and did nothing more.

Foote initiated his direct appeal; counsel withdrew the appeal, counsel never followed federal laws ensuring the appeal would be briefed in some form, never followed state law insuring the brief would not be filed as frivolous, and the state appellate courts have held he did so strategically. This avenue is inappropriate when all criminal appeals as of right must be briefed by state law and briefed in some form by federal law. The state courts have held conflicting position while also exercising authority that supersedes federal law.

By denying Foote his direct appeal belated or otherwise, the state appellate courts have erred in holding the same opinion in every attempt he has pursued in getting the appeal that was guaranteed him, but not provided. Foote maintains he has always had non frivolous direct appeal matter that must be raised in the context of the direct appeal and that is that when two state statutes charged the same underlying offence, the Government may prosecute under either as long as they don't discriminate against a class of defendants. This occurred when each statute classified the offender the same, but punished drastically different, for the same underlying offense, one as a class A felony and the other as a class B felony.

Conclusion

Because Foote has had no appellate counsel perfect the direct appeal he invoked, and because the state court of appeals did not adhere to constitutional mandates when rejecting his many manifold requests to obtain that appeal and lastly because Foote has been abandoned by counsel and left to navigate the legal system *pro se*, Foote prays this court grant the petition for writ of certiorari and provide him the relief he seeks which is his direct appeal.

Respectfully Submitted,

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6-8-2020