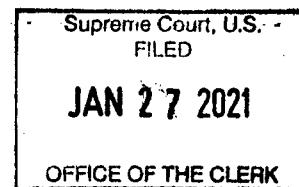


No. 20-1059



IN THE

# Supreme Court of the United States

ROY HOWARD MURRY

Petitioner

v.

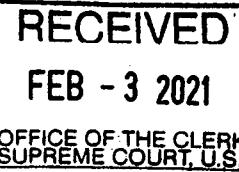
STATE OF WASHINGTON

Respondent

ON PETITION FOR WRIT OF CERTIORARI  
TO THE WASHINGTON COURT OF APPEALS, DIVISION III

PETITION FOR WRIT OF CERTIORARI

ROY HOWARD MURRY DOC#396387  
WA 215  
WASHINGTON STATE PENITENTIARY  
1313 NORTH 13TH AVENUE  
WALLA WALLA, WA 99362  
TELEPHONE NUMBER: NONE



QUESTIONS PRESENTED

The questions presented are:

Was Mr. Murry denied his Sixth Amendment Right to Counsel and Fourteenth Amendment Due Process? [When his pro se briefing brought to the Court of Appeals' attention "legal points" arguable on their merits and the Court ordered that these should be briefed by the State only; while simultaneously refusing to allow Petitioner's counsel to also file supplemental briefing on the pro se issues.]

When determining how a court of appeals is required to handle "legal points" which come to its attention by means other than an appellant's counsel; does it matter whether appointed counsel filed an Anders brief or a merits brief, prior to pro se issues arguable on their merits being raised by an appellant?

11/11/2014  
1008 - JEP

PARTIES TO THE PROCEEDINGS

Petitioner ROY MURRY was the Petitioner in the Washington Court of Appeals, Division Three and Washington Supreme Court below, and is the defendant of. Respondent LAWRENCE HASKELL is the prosecutor for the County of Spokane, on behalf of the State of Washington and was the Respondent in the Washington Court of Appeals, Division Three and Washington Supreme Court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner ROY MURRY, respectfully petitions this Court for writ of certiorari to review the judgment of the Court of Appeals, Division Three, State of Washington, in this case.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is reported. [However, Petitioner currently has no means of obtaining the exact citation.]

JURISDICTION

A timely petition for rehearing was thereafter denied on the following date: November 04, 2020, and a copy of the order denying rehearing by the Supreme Court of the State of Washington appears at Appendix C.

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

CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, Amendment VI:

"In all criminal prosecutions,  
the accused shall enjoy the  
right ... to have the Assistance  
of Counsel for his defense."

UNITED STATES CONSTITUTION, Amendment XIV,  
Section 1:

"... No State shall make or  
enforce any law which shall  
abridge the privileges or immuni-  
ties of citizens of the United  
States; nor shall any State deprive  
any person of life, liberty or  
property, without due process of  
law; nor deny to any person within  
its jurisdiction the equal protec-  
tion of the laws."

WASHINGTON STATE RULES FOR APPELLATE  
PROCEDURE (RAP) 10.10(a):

"Statement Permitted. In a crim-  
inal case on direct appeal, the  
defendant may file a pro se state-  
ment of additional grounds for re-  
view to identify and discuss those  
matters related to the decision  
under review that the defendant  
believes have not been adequately  
addressed by the brief filed by the  
defendant's counsel."

WASHINGTON STATE RULES FOR APPELLATE  
PROCEDURE (RAP) 10.10(f):

"Additional Briefing. The appellate court may, in the exercise of its discretion, request additional briefing from counsel to address issues raised in the defendant pro se statement."

INTRODUCTIONS

Mr. Murry filed an authorized pro se brief with the Washington Court of Appeals, Division Three. The Court found that the pro se issues raised were potentially meritorious and ordered that additional supplemental briefing was warranted. However, the Court ordered that only the State should be allowed to file a supplemental brief on the pro se issues. Mr. Murry filed a motion specifically asking that his counsel, or at least himself, be allowed to file an adversarial supplemental brief or reply. This motion was explicitly denied. The Court then proceeded to rule on the merits of the issues raised in pro se briefing without

the benefit of adversarial briefing file by appointed counsel. Based on this procedure, the pro se issues were then found to be "without merit."

STATEMENT OF THE CASE

Petitioner appealed his December 14, 2016 conviction by jury trial to the Washington Court of Appeals, Division Three. His appointed counsel filed a Brief of Appellant (not an Anders brief) on July 30, 2018. Mr. Murry later filed a pro se Statement of Additional Grounds (SAG), as is permitted under the WA State Rules for Appellate Procedure (RAP) 10.10(a), on or about November 06, 2018. The State responded to counsel's merits brief on March 05, 2019 and a reply brief was filed in early April 2019. Neither addressed any of the issues raised in the pro se SAG.

On July 23, 2019, the Court of Appeals

"panel determined that a supplemental respondent's brief responding to the [SAG] is warranted. RAP 10.10(f)" (emphasis supplied).

Appendix B, 1. In the Opinion later issued by the Court, this rule is ostensibly interpreted to mean, "In the event that issues of possible merit have been identified, the court may require both counsel to address the SAG issues. RAP 10.10(f)." (emphasis supplied) Appendix A, 28. [The exact text of the rule is above and differs slightly, but not materially.]

On September 10, 2019, Mr. Murry filed a Motion to the Court of Appeals specifically requesting that either his counsel, or he personally, be allowed to file adversarial supplemental or reply briefing on the merits of the pro se issues the Court had ordered the State to address. On September 16, 2019, the State filed a "Supplemental Brief of

Respondent to the Statement of Additional Grounds" (SBOR to SAG) on the merits of the pro se issues. On September 18, 2019, the Court ruled that Mr. Murry's "request to file a supplemental brief is denied unless or until the panel ... calls for supplemental briefing from the appellant. ... Pursuant to RAP 10.10(f) the court may request additional briefing from counsel to address issues raised in the [SAG] which has occurred in the instant case. Therefore, no further action will be taken."

(emphasis supplied) Appendix B, 2.

The Court then proceeded to issue the Opinion which stated, "The SAG is without merit." Appendix A, 28-31. This was done completely without the benefit of adversarial briefing by counsel appointed to represent Petitioner.

This Denial of Counsel was presented to the Washington Supreme Court for discretionary

review in the "Supplemental Petition for Discretionary Review" (SPDR) which Mr. Murry filed on August 26, 2020; after having motioned that Court and being authorized to do so. Appendix D, 1-3. Review was denied. Appendix C.

#### ARGUMENT

If, after being presented with an Anders brief , pro se briefing, or briefing on the merits by counsel for a codefendant, an appellate court "finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." Anders v. California, 386 US 738, 739-741, 744; (1967); Penson v. Ohio, 488 US 75, 76, 80, 83-84 (1988). "The Court of Appeals' determination that arguable issues were presented by the record, therefore, created a constitutional imperative that counsel be appointed." Penson, 84. The "[a]ctual

or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." Strickland v. Washington, 466 US 668, 691-692 (1984). Once "the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." United States v. Cronic, 466 US 648, 656-657 (1984)(footnote omitted). There is no federally established right to prose representation on direct appeal; this does not however, "preclude the States from recognizing such a right under their own constitutions." Martinez v. Court of Appeals, 528 US 152, 120 S.Ct. 684, 692 (2000). States are free to adopt procedures which "are superior to, or at least as good as" the Anders method for "satisfying the requirements of the Constitution for indigent criminal appeals." Smith v. Robbins, 528 US 259, 120 S.Ct. 746, 759 (2000).

The WA Rules for Appellate Procedure (RAP) 10.10(a) allows for pro se briefing of additional issues by an appellant regardless of whether the appellant's counsel files an Anders brief or a brief on the merits. Martinez, 692; Smith, 759. It is the handling of the pro se brief (SAG) and the application of RAP 10.10 (f) in this case which is the issue for which relief is sought. The handling of the SAG in this case appears to be not only an unconstitutional denial of counsel, but also a drastic departure from both the Court of Appeals' own nominal interpretation of RAP 10.10(f) and precedent. [Footnote 1]

Petitioner contends that: 1) he was faced with an appellate panel which followed an unconstitutional review procedure even more biased and prejudicial than those faced by Mr. Anders or Mr. Penson; and 2) the factual divergences between Anders, Penson and Mr. Murry's cases are irrelevant. Regardless of whether an [Footnote 1 can be found at page 22.]

Anders or regular merits brief was filed by counsel; in each of the three cases, additional arguable "legal points" (not briefed by appellant's counsel) came to light through pro se briefing by appellant or that of a codefendant's counsel. In each case, the Court of Appeals was presented with issues "arguable on their merits" and yet refused to allow the appellant "access to counsel to argue the appeal." Anders, 739-741, 744; Penson, 75-76, 84; Appendices: A, 28-31; B, 1-2.

In Mr. Murry's case, he filed a pro se brief (SAG) which raised 17 additional points related to 3 classes of error: Brady [v. Maryland] violations, Ineffective Assistance of Trial Counsel [Footnote 2] and Prosecutorial Misconduct. None of the SAG issues were repetitive or parallel to those his counsel briefed. As outlined above, response and reply briefing [Footnote 2 can be found at page 24.]

on his counsel's issues proceeded as normal. None of this addressed any of the issues raised pro se, which the Court later decided to allow only the State to brief. Mr. Murry was explicitly prohibited from filing even a pro se reply brief; something which even Mr. Anders was permitted to do. Anders, 740. Appendix B, 2.

The Court of Appeals' Opinion (at 28) conspicuously omits the fact that the Court deliberately refused adversarial briefing on the pro se issues. Rather, by the wording, one would expect that "both counsel" had filed briefs on the "issues of possible merit" which the Court identified and based on this, only then was the SAG found to be "without merit." Anders 744; Penson, 80. Mr. Murry contends that, in lieu of allowing his readily available and already familiarized "counsel to argue the appeal"; the Court effectively appointed the

State to represent him regarding the pro se "issues of possible merit." Not surprisingly, the State proceeded to unequivocally assure the Court that all of the "issues of possible merit" which it had felt "warranted" a response initially were completely without merit. In ruling on the SAG claims, the Court's Opinion reads as nothing more than a summary of the State's (in several instances deceptive) assertions in the SBOR to SAG. Appendix A, 28-31; Appendix B, 1. [Footnote 3]

The unconstitutional handling of Mr. Murry's SAG was presented to the WA Supreme Court in his Supplemental Petition for Discretionary Review. (SPDR, 7-10.) Filing of the SPDR was authorized by motion. Appendix D, 1-3. The WA Supreme Court denied review of the SPDR as well as counsel's Petition for Discretionary Review (PDR). Appendix C.

Mr. Murry now petitions the Supreme [Footnote 3 can be found at page 25.]

Court of the United States for Writ of Certiorari to correct the denial of his Sixth Amendment Right to Counsel on direct review, which is incumbent upon the States under the Due Process Clause of the Fourteenth Amendment.

REASONS FOR GRANTING THE PETITION

The Right to Counsel was enshrined in the Bill of Rights and is a fundamental, structural requirement of any attempt to afford those accused of a crime with a fair, or at least adversarial, trial. SCOTUS has long held this Right applies to both trial and direct review, including review of arguably meritorious issues raised pro se.

It appears the legal principles here are analogous to cases previously decided. There are several in which appointed counsel filed an Anders brief, then issues "arguable on their merits" later came to the appellate court's attention by other means. However, the specific

situation presented in this case does not appear to have been addressed yet. Granting the writ would allow this Court to determine if the Sixth and Fourteenth Amendment protections it has previously held to exist apply in this slightly different situation.

Additionally, granting the writ as requested would protect not only Mr. Murry, but also all other persons whose case will come before this or any other appellate panel who may feel that prosecutors can offer an adequate substitute for effective "counsel to argue the appeal" that has been appointed to represent only the appellant whose case is before the court. This is an issue of national concern to any citizen or resident. Whether innocent or not, anyone may someday have to file a criminal appeal.

CONCLUSION

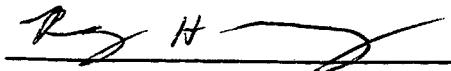
Mr. Murry seeks that the Supreme Court of the United States find that the refusal by an appellate court to allow adversarial briefing of arguably meritorious pro se issues by an appellant's counsel, while simultaneously allowing the State to brief the pro se issues is a denial of the right to counsel; which violates the rights protected under the Sixth and Fourteenth Amendments.

He asks that this Court also specifically mandate that he be afforded the opportunity to have his direct appeal heard after he has been afforded appointed counsel to brief the merits of the pro se issues raised in his Statement of Additional Grounds and previously briefed by the State. He further asks that the State be explicitly prohibited from filing any additional briefing or amending that which has already been filed.

The petition for a writ of certiorari  
should be granted.

DATED this 1<sup>st</sup> day of February, 2021.

Respectfully submitted:



Roy Howard Murry  
Petitioner, pro se

FOOTNOTES

[Footnote 1]

In its Opinion (Appendix A, 28) the Court of Appeals outlines thier nominal procedure for handling pro se SAG issue briefing:

"RAP 10.10(a) authorizes a pro se statement of grounds that "the defendant believes have not been adequately addressed by the brief filed by defendant's counsel." In the event

that issues of possible merit have been identified the court may require both counsel to address the SAG issues. RAP 10.10(f)"  
(emphasis supplied)

SCOTUS has reviewed State appellate procedures before. McCoy v. Court of Appeals, 488 US 429, 430-431, 445 (1988). However, Petitioner expects that the Rule in question (RAP 10.10(f)), as written, interpreted and applied in other WA cases would pass muster. Smith, 759. [See for example: State v Whitlock, 195 Wn. App. 745, 749; 381 P.3d 1250; 188 Wn. 2d. 511, 518; 396 P.3d 310 (2017) - esp. footnote 3; State v. Grier, 150 Wn.App. 619, 622-623, 632-633; 171 Wn.2d 17, 29 (2011).]

Conversely, in Petitioner's case, the appellate court inexplicably failed to follow its own nominal interpretation of the word "counsel" in the actual text of RAP 10.10(f), as well as that which it (and another division) had previously followed. Whitlock; Grier. Petitioner contends that the interpretation of "counsel" as "both counsel" or even as a singular referring to an appellant's counsel only, would satisfy "the requirements of the Constitution for indigent criminal

appeals" by providing adversarial briefing. Smith, 759; Anders, 744; Penson, 80. However, the interpretation applied here is contray to any sense of fairness and exhibited extreme bias in favor of the State.

[Footnote 2]

One example of IAC raised in the SAG (and better presented in the SPDR) appears to be a near certain ground for reversal under both WA State and 9th Circuit caselaw. (Broken Opening Statement Promises to the Jury; which unequivocally promised exculpatory, non-cumulative and more than merely impeaching testimony: by a defense expert witness, an alibi witness for the night the crime scene was breached and cell phone information which corroborates the alibi witness. All of which defense counsel could have produced, yet failed to do so.)

The disparity between how Mr. Murry was able to present this issue in his SAG and his SPDR, almost two years later, also clearly (yet uneccessarily) demonstrates the actual and substantial prejudice which resulted from the Court of Appeals' refusal to accept briefing by counsel for Mr. Murry.

Had Mr. Murry been afforded "assistance of counsel to argue the appeal" it is likely this issue could have been properly briefed in the Court of Appeals and possibly secured a reversal on direct appeal. Instead, the State was empowered to claim that the IAC failures to produce promised evidence were merely the result of a strategic choice "not to call or cross examine witnesses" without challenge. (Except for the ignored citations to the record in Mr. Murry's SAG.)

[Footnote 3]

The old adage comes to mind: "Two wolves and a sheep voting on what is for dinner."

CERTIFICATE OF SERVICE

The undersigned now certifies that a true copy of this PETITION FOR WRIT OF CERTIORARI was served on the following parties:

State of Washington  
Lawrence Haskell, Prosecutor  
Spokane County Prosecutor's Office  
1100 W. Mallon Ave.  
Spokane, WA 99260-2043

by first class, U.S. Mail, this 1<sup>st</sup> day of February, 2021.

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APPENDIX B	Documents establishing the appellate court's handling of the issues raised pro se; the rulings actually being challenged by Petitioner . . .	2 pgs
APPENDIX C	Decision of the Washington State Supreme Court Denying Review .	1 pg
APPENDIX D	Documents establishing the presentation of the claimed denial of the Right to Counsel on direct review to the Washington Supreme Court for discretionary review . . . . .	3 pgs

APPENDIX A

Opinion of the Washington State Court of  
Appeals, Division Three. . . . . 32 pgs