

Supreme Court, U.S.
FILED

NOV 02 2021

OFFICE OF THE CLERK

No. _____

21-6351

IN THE
SUPREME COURT OF THE UNITED STATES

Holly Harvey — PETITIONER
(Your Name)

vs.

Leslie Coots, et al. RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The Supreme Court of Georgia
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Holly Harvey
(Your Name) #1187065

LASP ; P.O. Box 709
(Address)

Alto, GA 30510
(City, State, Zip Code)

N/A
(Phone Number)

ORIGINAL

~~page 1~~

QUESTION(S) PRESENTED

- Can the right to a statutory direct appeal be waived, relinquished, or abandoned upon a silent record?
- What is required of a lay defendant to meet the threshold of sufficiently demonstrating an interest in an appeal, thereby triggering Counsel's Constitutional obligation to consult? And even if said obligation is not triggered, does improper advice amount to ineffective assistance under Strickland, when it forecloses the entire proceeding?
- Because an Out-of-Time Appeal is a remedy for a frustrated appeal and must be asserted properly or is forever lost, is it a "critical stage" in which the right to Constitutionally effective assistance of counsel attaches?

LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

X All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

- Leslie Coots, Assistant Attorney General
40 Capital Sq.
Atlanta, GA 30334
- Elizabeth Baker, District Attorney
One Center Drive
Fayetteville, GA 30214

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APPENDIX A Fayette County Superior Court
Order Denying Out of Time Appeal.

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APPENDIX C Supreme Court of Georgia order
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TABLE OF AUTHORITIES CITED

CASES

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- Boyd v. Cowan, 519 F.2d 182, 184 (6th Cir. 1975)
- Boykin v. Alabama, 395 US 238, 89 S.Ct. 1709, 23 L.Ed 2d 274 (1969)
- Carnley v. Cochran, 369 US 506, 82 S.Ct 884, 8 L.Ed 2d 70 (1962)
- Collier v. State, 834 SE2d 769, 307 Ga. 363 (2019)
- Douglas v. California, 372 US 353, 83 S.Ct. 814, 9 L.Ed 2d 811 (1963)
- Duncan v. US, 842 F.Supp 1016 Dist. Ct MD Tenn (1993)
- Gable v. State, 290 Ga 80, 81, 85 (2)(b), 720 SE 2d 170
- Harrington v. Gillis, 456 F.3d 118 (3rd Cir. 2006)
- Hill v. Lockhart, 894 3 F.2d 1009 (Ct. App 8th) (1990).
- Johnson v. Zerbst, 304 US 458 (1938)
- Miranda v. Arizona, 384 US at 468, 86 S.Ct at 1624.
- Morrow v. State, 266 Ga 3, 3-4, 463 SE2d 472 (1995)
- ~~STATUTES AND RULES~~
- Rodriguez v. United States, 395 US 327, 332, 89 S.Ct 1715, 23 L.Ed 2d 340 (1969).
- Roe v. Flores-Ortega, 528 US at 476 - 477 (11), 120 S.Ct. 1029 (2000)
- Schoicket v. State, Supreme Court of Georgia, Case# S21A0840.
Decided 11-02-21.
- Spann v. US Dist Ct. D. Maryland (2011)
- State v. McKenzie, 303 A.2d 406 Md. Ct. of Special App (1973)
- Strickland v. Washington, 466 US 668, 104 S.Ct 2052, 80 L.Ed 2d 674 (1984).
- Swenson v. Bosler, 386 US 258, 260 87 S.Ct 996, 18 L.Ed 2d 33 (1967)
- United States ex. rel Smith v. McMann, 417 F.2d 648, 654
~~OTHER~~ (2nd 1969).
- United States v. Aloia, 9 F.3d 438, 444 (6th 1993)
- United States v. Wade, 388 US 218, 87 S.Ct 1926, 18 L.Ed 2d 1149 (1967)
- Ward v. Wolfenbarger, 323 F.Supp 2d 818 Dist Ct Ed Mich (2004)
- OCGA § 5-6-33 (a)(1)
- OCGA § 17-10-6; 6.1

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix B to the petition and is

- ☐ reported at _____; or,
☒ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the Superior Court court appears at Appendix A to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 8-10-21.
A copy of that decision appears at Appendix B.

☒ A timely petition for rehearing was thereafter denied on the following date: 9-29-21, and a copy of the order denying rehearing appears at Appendix C.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution 6th Amendment right to effective Counsel

U.S. Constitution 5th + 14th Amendments: Due process requires that states respect all legal rights owed to a person.

Georgia OCGA § 5-6-33(a)(1) defendants in criminal proceedings may appeal the judgments

Former OCGA § 17-10-6 allowing review by the Sentence Review Panel

OCGA § 17-10-6.1 The panel does not have jurisdiction over life sentences.

STATEMENT OF THE CASE

At age 16, Petitioner entered a guilty plea to 2 counts of Malice murder for 2 consecutive life sentences. on 4/14/05. The judge informed she could apply to the Sentence Review Panel [SRP] which she had counsel timely pursue, even though they had no jurisdiction to consider her case. Georgia courts misapplied Flores-Ortega for 20 years requiring demonstration of proof of error on the record to obtain a frustrated appeal. Morrow v. State, overruled by Collier (2019). Attempting to comply with this holding, Petitioner spent the next decade 1/2 trying to obtain the record, to no avail. She began her attempts after 4 months of her 1st access to legal resources, including 17 motions, 4 writs of mandamus for over a decade of judicial inaction, and 300+ pages of continuous pro se pleadings. In ~~2019~~ 2020 counsel was appointed for an out of time appeal hearing. There, plea counsel testified TWICE that Petitioner waived her right to a direct appeal, although that is infact untrue. She testified that Petitioner "asked questions" and she answered that the only remedy available to Petitioner was a Motion to Withdraw the Plea. Although, Petitioner sought timely review of SRP and "asked questions" about her options, the trial court found this did not sufficiently demonstrate interest in an appeal triggering Counsel's constitutional obligation to consult. It seems both courts conflated interest with intent to pursue the Motion to Withdraw. The Supreme Court of Georgia affirmed, comparing Petitioner to Palacios. This reasoning is misplaced.

STATEMENT OF THE CASE (cont)

because unlike Palacios, Petitioner actually pursued the only "appeal" [in Counsel's words] that she was advised was available. The weight of the SRP application was not considered, nor was the affirmative misadvice that Petitioner waived her appellate rights. Appellate Counsels refused to raise specific grounds requested by ~~Petio~~ Petitioner and both abandoned her during the time for ~~resentencing~~ ^{rehearing}, disregarding her requests again. Petitioner was left to file Pro Se, yet it was stricken since Counsel did not withdraw from the case.

Nearly 2 decades after her conviction, Petitioner still has not been afforded her First Appeal of right, and equitable tolling will not prevent the foreclosure of every other Right that has become untimely in the process.

Further, Georgia's supreme Court is holding that those who sought the record to satisfy Morrow "waited years" to pursue Out of time Appeals. See also Scholcket.

REASONS FOR GRANTING THE PETITION

The Court failed to consider all the relevant circumstances as required by Flores-Ortega at 480. "Only by considering all relevant factors in a given case can a court properly determine whether... the particular defendant sufficiently demonstrated to Counsel an interest in appeal." (emphasis added) Under Strickland at 688, "the performance inquiry must be whether Counsel's assessment was reasonable considering all circumstances." Misadvice that petitioner waived her right were unreasonable. A mistake of law and fact of this nature was substantially prejudicial v. Gillis. A proper analysis, considering all facts, including SRP application and Petitioner's questions, proves she was interested in appealing, because the SRP was actually represented to her as an "appeal".

Further, following the logic of Hill v. Lockhart, even if Counsel is not Constitutionally obligated to consult on an issue, any advice they disclose, or information, must be accurate, or amounts to Ineffective Assistance, when as here, it substantially affects a right of the accused.

Although Flores-Ortega rejected a bright-line rule to inform all defendants of their appellate rights, Petitioner poses that the right to appeal and to have Counsel on appeal are issues of Constitutional dimension and other circuits have found that they cannot be waived upon a silent record. Swenson v. Bosler; Boyd v. Cowan. Douglas v. California states, "the 14th Amendment guarantees a criminal appellant the right to

REASONS FOR GRANTING THE PETITION (Cont)

Counsel on a first appeal of right" and Carnley v. Cochran established that "the record must show or there must be an allegation and evidence which show that an accused was offered Counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." Not only as here where Petitioner was misinformed that she waived her right [to appeal, but not to Counsel] but a vast majority of Georgia convictions are resolved via guilty pleas. The fact that no one is REQUIRED to ensure they are aware of their rights to appeal and to have Counsel under the 6th Amendment, means that oftentimes the waiver or relinquishment of these rights is unknowing, unintelligent, and unintentional. Indeed, other circuits restore these rights if the record does not affirmatively show they were relinquished knowingly. For "rights are worthless to a defendant who does not know they are available." United States v. Aloi; Ward v. Wolfenbarger; United States ex rel. Smith v. McMann; Johnson v. Zerbst (will not presume acquiescence); Duncan v. US; State v. McKenzie; Spann v. US DIST.

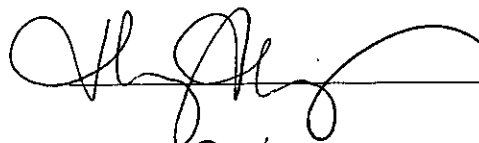
In fact, "Knowledge of the existence of the right is the threshold requirement for an intelligent decision as to its exercise." Miranda v. State of Arizona; Baykin v. Alabama. The duty to inform is on the state under Douglas v. California; Ward v. Wolfenbarger. This Court should make this explicit to all states - including Georgia.

Finally, the Out-of-Time-appeal process is a "critical stage" requiring the provision of Counsel because "potential substantial prejudice to defendants' rights inheres in the... confrontation and the ability of counsel to help avoid that prejudice." United States v. Wade. This Court should deem that a 6th Amendment right to Counsel attaches.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

 Holly Harvey, Pro Se

Date: October 25, 2021