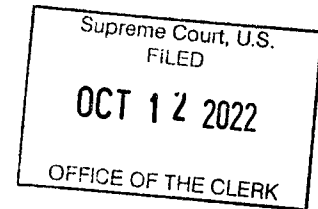


No. 22-589

ORIGINAL
FILED

IN THE
Supreme Court Of The United States

DALE V. MERRITT
Petitioner,



V.

STATE OF TENNESSEE
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

PETITION FOR WRIT OF CERTIORARI

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October 10th, 2022

QUESTION PRESENTED

- I.) WHETHER SHINN V RAMIREZ'S HOLDING PETITIONER "AT FAULT" FOR POST-CONVICTION COUNSEL'S APPELLATE ERRORS GIVE INDIGENT POST-CONVICTION APPELLANTS AUTONOMY OVER THE APPEAL PROVIDING THEM OPTIONS TO DISMISS APPELLATE COUNSEL, RETAIN NEW COUNSEL, OR BE PRO SE IF FEDERAL ISSUES OF INEFFECTIVE ASSISTANCE ARE NOT PROPERLY BEING PRESENTED BY COUNSEL ON APPEAL, AND IF SO, DID THE TENN. COURT OF CRIM. APP. AND SUP. CT. OF TENN.'S DENIAL OF INDIGENT PETITIONER'S MOTION TO REPLACE POST-CONVICTION COUNSEL, RETAIN NEW COUNSEL, OR PROCEED PRO SE VIOLATE THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE XIVTH AMENDMENT UNDER GRIFFIN V ILLINOIS AND ROSS V MOFFITT?
- II.) WHETHER PETITIONER'S OBJECTION IN HIS MOTION TO REPLACE COUNSEL, RETAIN NEW COUNSEL OR PROCEED PRO SE PROVIDING EVIDENCE OF A CONFLICT OF INTEREST WITH APPELLATE COUNSEL GAVE PETITIONER THE XIVTH AMENDMENT DUE PROCESS AND EQUAL PROTECTION CLAUSE RIGHTS HAVE HIM REMOVED DUE TO THAT CONFLICT OF INTEREST, AND IF SO, DID TENNESSEE APPELLATE COURTS ERR IN DENYING PETITIONER'S MOTION?

PARTIES TO PROCEEDINGS BELOW

In the Criminal Court of Davidson County, Tennessee, the Petitioner was named as: Petitioner and the State of Tennessee as: Respondent. In the Tennessee Court of Criminal Appeals, Petitioner was named as: Appellant and The State of Tennessee as: Appellee. In the Supreme Court of Tennessee the Petitioner was named as: Petitioner and the State of Tennessee as: Appellee. In this Court, Petitioner is named as: Petitioner, and The State of Tennessee as: Respondent.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Dale V. Merritt respectfully petitions for a writ of certiorari in the U.S. Supreme Court to review the judgment of the Supreme Court of Tennessee [SCT].

JURISDICTION

The order of the Supreme Court of Tennessee was entered by that Court on September 9, 2022. The order of the Tennessee Court of Criminal Appeals [TCCA] was entered by that Court on May 24th, 2022. Petitioner's motion to reconsider was denied on June 14th, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

The Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution are the relevant constitutional provisions in this case regarding indigent appellant's rights to similarly situated affluent persons during post-conviction appeals in Tennessee Appellate Courts. U.S. Const. Amend. XIV §

STATEMENT OF THE CASE

Petitioner was convicted by a Knox County Jury for Delivery of a Schedule I Controlled Substance of Heroin in an amount less than fifteen (15) grams within one thousand feet (1,000) of the real property that comprises a park and a child care agency in violation of T.C.A. § 39-17-432 and T.C.A. § 39-17-417. State V. Merritt, 2018 WL 1673763, *1-3 (Tenn. Crim. App.) Petitioner filed for post-conviction relief represented by Attorney Gerald “Gulley” Jr., which was denied. Petitioner appealed the denial of his post-conviction relief to the TCCA. *Ex. A, (TCCA Order)* Petitioner filed a “motion to replace post-conviction counsel and/or to proceed pro se in his pending post-conviction appeal” (*Ex. B, Order of SCT; Ex. E, Copy of Petitioner’s Motion filed in TCCA*) submitting a copy of his pro se appellate brief in support of that motion (*Ex. C, Copy of Proposed Pro Se Brief*) contending that counsel’s appellate brief (*Ex. D, Copy of Counsel’s Appellate Brief*) was an *Anders* Brief under Tennessee’s Standards, and did not properly present his federal questions of effective assistance of counsel to the TCCA under State and Federal standards. *Ex. E, (Copy of Petitioner’s Motion Filed In TCCA With Motion)* The TCCA denied Petitioner’s motion as a “motion to dismiss counsel”. *Ex. A, (TCCA Order)* Petitioner filed a motion to rehear, which was denied. (*Ex. A1, Order of TCCA*) Petitioner appealed to the SCT, filing an application for permission to appeal. *Ex. F, (Application for Permission to Appeal)* On Sept. 9, 2022, the SCT denied Petitioner’s appeal under Rule 11 of the Tennessee Rules of Appellate Procedure [TRAP] as an application under Rule 10(a) of the TRAP. *Ex. B, (Order of SCT)* Petitioner now petitions this court for certiorari to the SCT.

STATEMENT OF THE FACTS

Petitioner was convicted by a Knox County Jury for Delivery of a Schedule I Controlled Substance of Heroin in an amount less than fifteen (15) grams within one thousand feet (1,000) of the real property that comprises a park and a child care agency in violation of T.C.A. § 39-17-432 and T.C.A. § 39-17-417. State V. Merritt, 2018 WL 1673763, *1-3 (Tenn. Crim. App.) Petitioner filed a petition for post-conviction relief, which was denied by the trial court, and Petitioner appealed to the TCCA. While the appeal was pending, Petitioner mailed a proposed Pro Se appellate brief to his appellate counsel, Mr. Gulley. *Ex. C1, (Apr. 7th 2022, Gulley Received Pro Se Brief)* In that proposed brief, the appellant raised several issues using Strickland V. Washington, 466 U.S. 668 (1984) and State cases construing that federal case, arguing that he should obtain post-conviction relief because counsel's performance was deficient, and that deficient performance prejudiced his defense, undermining confidence in the outcome of the proceeding. *Ex. C-C1, Pg. (Copy of Proposed Pro Se Brief at Pg. 8-29)* Petitioner also requested for Mr. Gulley to include the in-car video footage of officer Caryn Heitz's police car which corroborated his post-conviction testimony, failed to include that evidence during his post-conviction hearing. Mr. Gulley failed to include that evidence in the record for the post-conviction appeal. Petitioner then filed several complaints with the Tennessee Board of Professional Responsibility concerning the matter with correspondence from Mr. Gulley wherein Counsel argued: "...the CD did not contain the scene that" (*Ex. G, Response from Professional Responsibility 5/20/22, at Pg. 1*) Petitioner

“described...” (Ibid at Pg. 1) Petitioner responded contended: “My Pro-Bono Attorney Mr. Forrest Wallace, and his Investigator [both] visited me on 4/16/15 [prior to trial] to review all the CD’s in my case, and let me be clear I have seen all CD’s myself...” (Ibid at Pg. 1) Mr. Gulley responded to Appellant’s contentions providing: “I have no way of knowing whether these factual allegations are true or false.” (Ibid)¹ Mr. Gulley then purported the following response as a way to evade responsibility:

“...Mr. Merritt’s trial lawyer never questioned Officer Jinks about the presence or absence of Officer McNew [at the scene]. Assuming arguendo that there is a video that contains what Mr. Merritt says is on it, that content would not be conclusive of either error or legal prejudice under the Strickland/Baxter standard; hence any error with regard to the presence or absence of such a video would be at best non-constitutional error.”² (Id at Pg. 2)

In response to Petitioner’s complaints to the Board and Pro Se requests for appellate filings, Mr. Gulley submitted an official appellate brief that failed to

¹ This response gives an indication that Mr. Gulley has not personally reviewed the requested CD as he previously purported, or does not have access to the requested CD because he has “no way of knowing whether these factual allegations are true or false” regarding Petitioner’s assertions that he personally saw the CD with he previous attorney and a private investigator prior to trial. Ibid at Pg. 1

² The CD/DVR is not about “constitutional error” or “legal prejudice” of itself. Rather, the CD/DVR would unquestionably provide evidence that would corroborate Appellant’s testimony and affidavit in support of his post-conviction petition. It would also discredit the testimony of the Officers who wrongfully have testified that Officer McNew was not present when the evidence from the CD/DVR would show that he was present at Appellant’s house. With the conflicting stories, the Appellant’s testimony with the corresponding CD/DVR would substantiate his claims.

adequately raise federal issues argued by Petitioner's Pro Se proposed brief by: 1.) omitting Strickland V. Washington³ (*Ex. D, Gulley's Brief at Pg. 2 & 14*); 2.) Failing to argue a State case construing Strickland V. Washington (*Id Ex. D, Gulley's Brief at Pg. 3 & 14*); and 3.) Improperly Presenting Standards for Review purporting guilty plea issues asking: "...Whether a guilty plea meets the constitutional standards of voluntary and knowing is mixed question of law and fact. See, e.g., United States V. Gray, 152 F. 3d 816, 819 (8th Cir. 1998) Mixed questions of fact and law are reviewed de novo...Fields V. State, 40 S.W. 3d 450, 458 (Tenn. 2001)." (*Ex. D, at Pg. 2*); and 5.) Presented one-sentenced questions of review that violated State standards set forth by the TCCA. (*Ex. D, Gulley's Brief at Pg. 1*)

Once Gulley mailed a copy of the official appellate brief to Petitioner, Petitioner filed a Pro Se motion "to replace post-conviction counsel and/or to proceed pro se in his pending post-conviction appeal" (*Ex. B, Order of SCT*), which was denied by the TCCA as a "motion to dismiss counsel". *Ex. A, (Order of TCCA)* The TCCA misconstrued Petitioner's complaints mentioned in the motion as the basis of what has "created a conflict of interest requiring dismissal of counsel" (*Id at ¶ 1*), considered Counsel's brief as "not an Anders brief" and concluded that "professional complaints...does not automatically create a conflict of interest requiring counsel's dismissal." (*Id at ¶ 2*) The TCCA concluded that "...the right to court-appointed counsel does not include the right to the appointment of counsel of choice" denying relief. (*Ibid*) Petitioner

³ Petitioner would note that Mr. Gulley strategically responded to Professional Responsibility mentioning "Strickland/Baxter standard" as a way to discredit Petitioner, and deliberately omitted the Federal Strickland standard of ineffective assistance of counsel from the official appellate brief. (*Ex. G, at Pg. 2*)

motioned for rehearing requesting the TCCA reconsider the issue, and was denied relief. *Ex. A1, (Order of TCCA)*

Petitioner filed an application in the SCT under Rule 11, for review of the TCCA's Order denying his motion to replace post-conviction counsel and/or to proceed pro se. *Ex. E, (Application Under Rule 11)* The Petitioner argued: 1.) he was being denied Due Process and Equal Protection Under the XIVth Amendment in accessing the State's Appellate System because he was prevented from adequately raising Federal Issues of Ineffective Assistance of Counsel; 2.) he was deprived of having a properly developed post-conviction appellate record; 3.) Counsel failed to file an adequate appellate brief under state and federal standards in the TCCA as more affluent persons similarly situated. (*Ex. E, Id at Pg. 9-23*); and 4.) Petitioner was being represented by appellate counsel who had a conflict of interest with respect to his inherent autonomy presented in his proposed pro se appellate brief, and the choice between pro se and counsel who has a conflict of interest is, in essence, "no choice at all". (*Id at Pg. 24-26*)

Petitioner also argued that he maintains total *autonomy* of his post-conviction appeal because U.S. Supreme Court holding in Shinn V. Ramirez places responsibility upon him for the errors of appellate counsel. Thus, his timely objection to Counsel's errors in the appellate proceedings should have been respected by the TCCA. (*Id Ex. E, at Pg. 9-11 and 21*) The SCT denied relief construing "the filing as a Rule 10(a) application for extraordinary appeal." *Ex. B, (Order of SCT)*; TRAP 10(a) (Review only "...if the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review".) Now, Petitioner timely petitions this court for certiorari.

REASONS FOR GRANTING WRIT

- I.) THE ISSUES IN THIS WRIT ARE WITHIN THE CONSIDERATIONS LISTED UNDER U.S. SUP. CT. R. 10(b)-(c). THE TCCA AND SCT HAVE BOTH DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH U.S. SUP. CT. AND SIXTH CIRCUIT'S STANDARDS OF EXHAUSTION OF FEDERAL ISSUES WHEN PRESENTING THEM IN STATE APPELALTE COURTS. DENIAL OF THIS WRIT WOULD GIVE THE TCCA AND SCT INDIRECT "PERMISSION" TO CONTINUE DEPRIVING INDIGENT APPELLANTS OF THE ABILITY TO FAIRLY RAISE FEDERAL ISSUES OF INEFFECTIVE ASSISTANCE OF COUNSEL, WHILE ALLOWING MORE AFFLUENT PERSONS THE ABILITY TO DO SO.

Compelling Reasons

"[A] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. Sup. Ct. R. 10 (c) When "factual findings" or "misapplication of a properly stated rule of law" (Id) are found asserting an error within a writ of certiorari, it is "rarely granted" by this Court. (Id) However, those matters do not apply to "compelling reasons" (Id R. 10) established within a petition for writ of certiorari. (Id) (Emphasis) This writ presents matters noted by the SCT that demonstrate Tennessee Appellate Courts have "so far departed from the accepted and usual course of judicial proceedings...as to call for an exercise of this Court's supervisory power". U.S. Sup. Ct. R. 10 (a); Ex. B, (Order

of SCT dismissing Application as TRAP Rule 10); TRAP 10(a) (Extraordinary Appeal lies: "...if the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review".) This Court should address the matter of: "Whether indigent appellants are deprived of Due Process and Equal Protection under the XIVth Amendment when they are appointed assistance of counsel that intentionally or unintentionally fails to adequately raise federal issues on appeal from denial of their post-conviction petitions upon their timely appellate objection(s) to such error(s), are entitled to abort such appellate errors with the options to either: a.) Have counsel withdraw; b.) File an adequate pro se brief; or c.) Have new counsel appointed who will properly present those federal issues of ineffective assistance of counsel on their behalf?" The question of: "Whether appellant's who are represented by counsel that has a conflict of interest are entitled to dismiss them upon timely objections", is another question herein! When more affluent persons are afforded the option of obtaining counsel who corrects such errors, does *fairness* exist?

Standard of Review

Due Process, Equal Protection During Appeal

The U.S. Constitution does not require States to grant appeals as of right. McKane V. Durston, 153 U.S. 684 (1894) However, if a State has created appellate courts as "[a]n integral part of the...system for finally adjudicating the guilt or innocence of a defendant" (Griffin V Illinois, 351 U.S. 12, 18 (1956)) "the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." Evitts V. Lucey, 469 U.S. 387, 393 (1985);

Pirkel V. Burton, 970 F. 3d 684, 696 (6th Cir. 2020) (Citations omitted); U.S. Const. Amend. XIV The Equal Protection Clause requires “that the state appellate system be ‘free of unreasoned distinctions’...and that indigents have an adequate opportunity to present their claims fairly within the adversary system.” Ross V. Moffitt, 417 U.S. 600, 612 (1974); City of Cleburne V. Cleburne Living Center, 473 U.S. 432, 439 (1985) (Holding that the 14th Amendment requires that similarly situated persons be treated alike.) “A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state court...brief...by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim ‘federal.’” Baldwin V. Reese, 541 U.S. 27, 32 (2004); Franklin V. Rose, 881 F. 2d 322, 324-25 (6th Cir. 1987) Federal law clearly requires the Petitioner’s claims of ineffective assistance of counsel to either: 1.) rely upon federal cases employing constitutional analysis⁴; 2.) rely upon state cases employing federal constitutional analysis⁵; 3.) phrase the appellate claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or 4.) allege facts well within the mainstream of constitutional law to be “fairly presented” in the State Appellate Courts. Id 881 F. 2d 322 at 324-25 Furthermore, Equal Protection Clause standards requires that “similarly situated” persons “be treated alike” (City of Cleburne V. Cleburne Living Center, 473 U.S. 432, 439 (1985)), mandating appellate counsel appointed to indigent appellants the equal duty

⁴ In this case, the federal case is Strickland V. Washington, 466 U.S. 668 (1984)

⁵ In this case, the State case employing federal constitutional analysis is Butler V. State, 789 S.W. 2d 898, 899 (Tenn. 1990)

or obligation to also comply with State Appellate Court standards set forth under *Anders*. State V. Ingram, 994 S.W. 2d 626 (Tenn. Crim. App. 1998) (Holding *Anders* requires appellate counsel's appellate briefs not present one-sentenced statement of issues for review) For the Equal Protection Clause is violated when "persons similarly situated" are "treated" differently. 473 U.S. at 439

The State of Tennessee has provided by statute, the right to file a post-conviction petition. T.C.A. § 40-30-101 In addition to that right, the State of Tennessee has provided the right to the assistance of counsel if a person filing a petition for post-conviction relief is indigent. T.C.A. 40-30-107 § (b)(1)-(2) and T.C.A. § 40-30-116 (Continuing the right to counsel on appeal from the denial of post-conviction); Lovin V. State, 286 S.W. 3d 275, 284 (Tenn. 2009) ("This statutory right applies not only to the proceedings in the trial court but also through the first level of appeal.") When such rights to be represented by counsel are granted by Statute, a State is obligated to assure that those rights are not disproportionately misapplied, discriminatively denying indigent persons the right to assistance of counsel that is not merely appointed as an empty formality. Ross, 417 U.S. 600, at 612 (A State cannot provide to an indigent person "merely a 'meaningless ritual' while others in better economic circumstances have a 'meaningful appeal.'"); Id at 607 ("...a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons.") For these reasons, indigent persons appealing the denial of post-conviction petitions possess the "autonomy" (Mc Coy V. Louisiana, 138 S. Ct. 1500, 1508 (2018)) over the direction of their appeal to raise matters that are the substance of the appellate argument with properly presented federal claims, for it is he who

is the responsible party that is ultimately “at fault” (Shinn V. Ramirez, 2022 WL 1611786 (U.S.)⁶) under law.

Counsel With Conflict of Interest or Pro Se

A “defendant will not normally be deemed to have waived the right to counsel by reluctantly agreeing to proceed pro se under circumstances where it may appear that there is no choice.” Pazden V. Maurer, 424 F. 3d 303, 318 (3rd Cir. 2005) (Citation Omitted); Pouncy V. Palmer, 846 F. 3d 144, 165 (6th Cir. 2017) (Citing Pazden, at 315-19 with approval); James V. Brigano, 470 F. 3d 636, 644 (6th Cir. 2006) (“[T]he choice between unprepared counsel and self-representation is no choice at all.”) (Quoting Fowler V. Collins, 253 F. 3d 244, 249-50 (6th Cir. 2001)) “The court must decide whether the defendant was bowing to the inevitable or voluntarily and affirmatively waiving his right to counsel.” 424 F. 3d at 313-14 (Citation omitted) “In conducting this examination a court can evaluate the motives behind the Defendant’s dismissal of counsel and decision to proceed pro se.” 424 F. 3d at 314 The Sixth Circuit has held: “that the voluntariness of waiver is measured by reference to the surrounding circumstances-as clearly establishing the principle that ‘the choice between unprepared counsel and self-representation is no choice at all.’” Pouncy, 856 F. 3d 144 at 161 (quoting James, 470 F. 3d 644)

Federal Question

⁶ In Shinn V Ramirez, 2022 WL 1611786 at * 10 the U.S. Supreme Court held that, “a prisoner is ‘at fault’ even when state post-conviction counsel is negligent.” Id However, the issue has never been addressed concerning the indigent post-conviction petitioners being denied equal access to the State’s appellate court system as wealthy appellants if counsel deliberately fails to properly present federal issues of ineffective assistance of counsel claims to State appellate courts. Id

In the SCT, Petitioner argued: “In Griffin V Illinois, the question before the U.S. Supreme Court was “...whether Illinois may, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, administer this statute so as to deny adequate appellate review to the poor while granting such review to all others.” 351 U.S. 12 at 13 This case poses a similar question for review before this court as in Griffin. That is, whether the State of Tennessee may, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, administer post-conviction statutes, granting the right or privilege of post-conviction petitioners the ability to appeal their petitions when forcing those indigent appellants to retain counsel that fails to adequately raise federal claims of ineffective assistance of counsel, while allowing more affluent appellants the privilege of retaining counsel that adequately raises such federal claims of ineffective assistance of counsel? *Ex. E, Pg. 10 ¶ 1 (Application Under Rule 11)* (Quoting Griffin V. Illinois, 351 U.S. 12 at 18) The Petitioner also raises the federal question of whether the choice between counsel who has a conflict of interest on post-conviction appellate proceedings and appearing Pro Se is an adequate choice provided to an indigent appellant? *Id Ex. E at Pg. 24-26* These matters are relevant for the granting of this petition for writ of certiorari in this court. *Id* When such matters are presented to the Sup. Ct. of Tenn. or the TCCA, they are considered “exhausted” under State Law. See Tenn. Sup. Ct. R. 39 This federal question is now properly before this Court. *Ex. E, Pg. 24-26*

The Issues Sub Judice

The Petitioner would demonstrate the heart of the issues in this petition as follows:

- 1.) “one-sentence statement of the issue for review does not fulfill the requirements of Anders” under Tenn. Law. State V. Ingram, 994 S.W. 2d 626 (Tenn. Crim. App. 1998) Petitioner demonstrated that Mr. Gulley presented the following one-sentenced statements of review against Ingram: 1) “Did the trial court commit legal error when it denied post-conviction relief, where the original trial counsel was constitutionally ineffective?”; and 2.) “Do the cumulative errors of the post-conviction trial court necessitate post-conviction relief for the Petitioner?” *Ex. D, Copy of Gulley’s Appellate Brief at Pg. 1*
- 2.) In the Statement of Facts, Mr. Gulley miscited Petitioner’s case numbers as: 114584 instead of the correct case no. 114585. *Id Ex. D, at Pg. 6*
- 3.) Knowing the Appellant did not sign for a guilty plea and was found guilty at trial, Mr. Gulley wrote in his Standards for Review: “...Whether a guilty plea meets the constitutional standards of voluntary and knowing is mixed question of law and fact. See, e.g., United States V. Gray, 152 F. 3d 816, 819 (8th Cir. 1998) Mixed questions of fact and law are reviewed de novo...Fields V. State, 40 S.W. 3d 450, 458 (Tenn. 2001).” *Ex. D, at Pg. 2* Such a question about a “guilty plea” is not relevant to Petitioner’s case. Petitioner was found guilty by a Knox County Jury. See State V. Merritt, 2018 WL 1673763 (Tenn. Crim. App.)

- 4.) Mr. Gulley omitted Strickland V. Washington from the Appellant's Brief, and cited State V. White, 144 S.W. 3d 469, 475 (Tenn. 2003), a case involving issues of a conflict of interest with counsel and his client in place thereof. *Ex. D, at Pg. 14* Mr. Gulley Only raised an ineffective assistance of counsel claim misciting State law, making it limited to a state court issue without properly citing Butler, 789 S.W. 2d 898 at 899 (Adopting Strickland)
- 5.) Mr. Gulley failed to properly prepare the appellate court record to include an in-car video footage of Officer Caryn Heitz's police car displaying evidence that corroborates Petitioner's post-conviction affidavit and testimony at the post conviction hearing. *Ex. G at Pg. 1-2*

Petitioner's proposed Pro Se brief submitted to Mr. Gulley prior to Mr. Gulley filing of the Appellate brief:

- A.) Raised three adequate issues for review that were not one-sentenced statements of review like Mr. Gulley's Brief. *Ex. C, at Pg. ii (Copy of Proposed Pro Se Brief)*
- B.) Properly stated the facts of the case pursuant to the state court record and Pro Se Affidavit filed by Appellant (*Id at Pg. 2-8*)
- C.) Raised federal issues of ineffective assistance of counsel based upon Strickland V. Washington 's two pronged test arguing counsel's failure to object to improper inflammatory comments made by the prosecutor during closing arguments in accordance with Tennessee Law that prejudiced Petitioner's defense. (*Id at Pg. 8-17*);

- D.) Raised federal arguments under Strickland and Georgia V. Randolph regarding the pre-trial errors on the motion to suppress not properly raised by previous Counsel in pre-trial proceedings that prejudiced his defense. (*Id* at Pg. 18-29)

When juxtaposing the proposed Pro Se appellate brief mailed to Mr. Gulley by Petitioner (*Id*) with Mr. Gulley's official appellate brief filed with the TCCA, Mr. Gulley had no reason to deviate from the foundation proposed to him by Petitioner for his post-conviction appeal. (*Id*) However, Mr. Gulley strategically diluted Petitioner's appellate arguments within the Pro Se proposed appellate brief (*Id*; *Ex. D, Gulley's Brief at 14-22*) and failed to properly raise the federal issues of ineffective assistance of counsel as required by Baldwin V. Reese, 541 U.S. 27 at 32 and Franklin V. Rose, 881 F. 2d 322, at 324-25. Petitioner's "motion to replace post-conviction counsel and/or to proceed pro se in his pending post-conviction appeal" (*Ex. B, Order SCT; Ex. A, Order of TCCA*) denied by the TCCA and SCT was a proper timely objection to Appellate Counsel's deficient performance in Appellant's post-conviction appeal. In Shinn, 2022 WL 1611786 at * 10 this Court has held that, "a prisoner is 'at fault' even when state post-conviction counsel is negligent." Since this rule of law is now applied, it would undermine the rudimentary principles of justice enforce such a rule of law allowing Appellate Counsel for indigents to intentionally or unintentionally file an appellate brief rooted within spiteful ineptness, founded on gross negligence, absentminded or carelessly deficient, permanently affecting the lives of indigent persons whom they represent. *Id* Since the "prisoner is 'at fault'" (*Id*), the responsibility to make such a timely objection in the State

Appellate Courts to Appellate Counsel's errors is upon the indigent appellant, who maintains the "autonomy"⁷ (McCoy V. Louisiana, 138 S. Ct. at 1508)) over the direction of the appeal. This responsibility requires such indigent appellants to move the TCCA and SCT for either: a.) removal such counsel; b.) request for newly appointed counsel; or c.) allow him to properly file a pro se brief that adequately presents federal claims to the state appellate courts. *Ex. A, (TCCA Order Denying Petitioner's Objections To Appellate Counsel's Brief)*; and *Ex. B (SCT Order Denying Petitioner's Objections To Appellate Counsel's Brief)*

In this case, Petitioner timely objected to the inadequacies of the brief of his court appointed appellate counsel, attaching exhibits of complaints to the Board of Professional Responsibility thereto, and all of those matters were disregarded with a bias holding concluding that: "...[t]he right to court-appointed counsel does not include the right to appointment of counsel of choice." (Ex. A, Order of TCCA ¶ 2) This ruling infers the bias to indigents that: **Even though "a prisoner is 'at fault' even when state post-conviction counsel is negligent" (Shinn, 2022 WL 1611786 at * 10), your objections made against the negligence of counsel are hereby DISREGARDED, and you are going to have to live with the consequences of his negligence despite the harm that it will cause to you because you are INDIGENT and you do not have a right to 'COUNSEL OF CHOICE'" (Id) because you are poor!"**

⁷ The term "autonomy" in this Application has been adopted from McCoy concerning the Appellant's inherent ability to control the direction and outcome of his fate on appeal in this case despite his Counsel's professional opinion of how the appeal should be handled. Lovin, 286 S.W. 3d 275, at 285 ("As a general matter, clients should not be forced to entrust their legal matters to an unwanted lawyer. Accordingly, clients may discharge a retained lawyer whenever they cease to have absolute confidence in the lawyer's integrity, judgment, or professional competence.")

Such conditions are fundamentally unfair to the indigent post-conviction appellants who are not afforded the equal opportunity to hire new appellate counsel for their post-convictions who commit such gross negligent actions that prejudice the appellate status of the appellants. *Id.*; U.S. Const. Amend. XIV § 1

Moreover, Mr. Gulley's issues of having a conflict of interest with Petitioner can be proven by:

- i.) Mr. Gulley told Professional Responsibility that he saw the CD/DVR of Caryn Heitz's in-car video footage and "did not contain the scene that" Petitioner "described". Ex. G, at Pg. 1
- ii.) After Petitioner responded to Professional Responsibility asserting that he previously witnessed the video footage of that in-car police video with his previous attorney and private investigator prior to trial (*Ibid.*), Mr. Gulley replied "[I] have no way of knowing whether these factual allegations are true or false." *Ibid.* This proves that Mr. Gulley's previous statement that he saw the video footage and it "did not contain the scene" as Petitioner "described" was a false statement to Professional Responsibility, and a strategy to evade the obligation to have that evidence placed in the appellate record for the post-conviction appeal. *Ibid.*
- iii.) Mr. Gulley properly cited "Strickland" in his response to Professional

Responsibility as a way to avoid adequate preparation of the appellate court record to include the CD/DVR of the in-car police video footage from officer Caryn Heitz's police car that corroborated his Pro Se affidavit and post-conviction testimony therein. (*Ex. G, Response from Professional Responsibility 5/20/22, at Pg. 2*)

- iv.) Mr. Gulley's strategically omitted "Strickland" from his official appellate brief he filed on Petitioner's behalf with the TCCA after receiving Petitioner's Pro Se appellate brief properly relying on Strickland's standard of review. *Ex. D, Gulley's Brief at Pg. 14; Ex. C, Pro Se Proposed Brief at Pg. 8-17*
- v.) All matters juxtaposed on previous pages of this Petition on *Ante Pg. 11-13*.

When addressing the apparent issue of Mr. Gulley's conflict of interest with Petitioner, it can be gleaned from the record that such a dilemma provided Petitioner with a "choice between" an attorney manifesting a working "conflict of interest" (Lockhart V. Fretwell, 506 U.S. 346, 378 (1993)) "adversely" affecting "the attorney's performance" (Bonin V. California, 494 U.S. 1039 (1990)) and "self-representation", which is clearly, "no choice at all". James V. Brigano, 470 F. 3d 636 at 644 (Citation Omitted) Thus, the judgment of the TCCA and SCT was in error and must be reversed. Id; Ex. F, at Pg.

CONCLUSION

WHEREFORE, THE PREMISES IS CONSIDERED, the foregoing reasons provide that indigent post-conviction appellants in Tennessee are not afforded equal opportunities to raise federal issues of ineffective assistance of counsel as more affluent persons, even upon timely objections to appointed counsel's appellate errors in failing to do so. This is and of itself sufficient as compelling reasons for this Court to grant certiorari in the interest of justice. Denial of this writ gives the Tennessee Appellate Courts the silent "approval" to continue denying Due Process and Equal Protection Clause rights of indigent post-conviction appellants as similarly situated affluent persons.

Respectfully Submitted,

Dale V. Merritt #555819

Petitioner/Pro Se

Dale V. Merritt#555819

TCIX

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Certificate of Service

I, Dale V. Merritt, declare and certify that a copy of the foregoing with motion to proceed IFP have been mailed first class postage prepaid to the U.S. Sup. Ct. Clrk. & counsel for respondent on this 10th day of October 2022.

Certificate of Compliance

I Dale V. Merritt, certify in accordance with U.S. Sup. Ct. R. 33 (1)(h) that this document complies with the word and page limitations prescribed by the rules of this Court, and that this document consists of 5, 450 words.