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No. 24A115

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

JUSTIN ERSKINE-PETITIONER

vs.

STATE OF DELAWARE-RESPONDENT

ON A PETITION FOR A WRIT OF CERTIORARI TO
TO THE SUPREME COURT OF THE STATE OF DELAWARE

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a criminal defendant on an initial-review collateral proceeding("IRCP") is entitled to the appointment of counsel when the state creates a procedural right to it, and after hired counsel abandons him. If so, were his rights to due process violated when the state failed to appoint counsel?

RELATED CASES

Erskine v. State, 4 A.3d 391, Delaware Supreme Court. Judgment entered June 24, 2010.

State v. Erskine, No.0703019916, Delaware Superior Court. Judgment entered November 20, 2012.

Erskine v. State, 65 A.3d 616, Delaware Supreme Court. Judgment entered May 7, 2013.

State v. Erskine, No. 0703019916, Delaware Superior Court. Judgment entered March 31, 2014.

Erskine v. State, 100 A.3d 1021, Delaware Supreme Court. Judgment entered August 21, 2014.

Erskine v. Pierce, 225 F.Supp.3d 246, U.S. District Court for the District of Delaware. Judgment entered December 21, 2016.

Erskine v. Vaughn, 2017 U.S. App. LEXIS 13477, U.S. Court of Appeals for the Third Circuit. Judgment entered April 11, 2017.

Erskine v. Ceresini, No. 23-94(MN), U.S. District Court for the District of Delaware. Judgment entered April 27, 2023.

Erskine v. Ceresini, No. 23-1962, U.S. Court of Appeals for the Third Circuit. Judgment entered November 8, 2023.

In re Erskine, 2024 Del LEXIS 134, Delaware Supreme Court. Judgment entered April 18, 2024.

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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:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is reported at 2024 Del. LEXIS 134.

The opinion of the Superior Court of the State of Delaware for IRCP appears at Appendix B to the petition and is not reported or published.

The opinion of the Delaware Supreme Court on appeal from denial of IRCP appears at Appendix C and is reported at 65 A.3d 616.

JURISDICTION

The date on which the highest state court decided the case below was April 18, 2024. A copy of that decision appears at Appendix A. An application for an extension of time within which to file the present petition was granted by Justice Alito on July 31, 2024, extending the time to and including August 31, 2024.

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

CONSTITUTIONAL PROVISIONS INVOLVED

Amend. XIV, § 3 UNITED STATES CONSTITUTION Amend. XIV, § 5

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities 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 protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

The present writ for certiorari review seeks to review the judgment of In re Erskine, 2024 Del. LEXIS 2024 (Appx. A).

Erskine was convicted of Murder in the First Degree after a jury trial in Kent County Superior Court in the state of Delaware in October of 2008. The crime in question occurred in 2006, when Erskine was 18 years old. He was tried as an accomplice to two older co-defendants, both of whom accepted plea bargains resulting in sentences of 25 and 30 years. Erskine was sentenced to natural life without parole. He filed a timely direct appeal, represented by the Office of the Public Defender, in the Delaware Supreme Court, which was denied in 2010, Erskine v. State, 4 A.3d 391

In Delaware, claims of ineffective assistance of trial counsel are reserved for review on a petitioner's first motion for postconviction, pursuant to Delaware Superior Court Criminal Rule 61(Sahin v. State, 7 A.3d 450). Erskine retained counsel, Peter Letang("Letang") and filed a timely Rule 61 motion in 2011, State v. Erskine, (not reported)(Appx. B). At the time of that filing, appointed counsel on initial Rule 61 motions was discretionary. Also, at the time of that filing, petitioners were able to bring successive postconviction motions, overcoming procedural bars, if they alleged a "colorable claim" of a constitutional violation.

In 2012, Erskine and Letang's attorney-client relationship broke down. Erskine had requested that Letang amend his petition

several times to include claims of erroneous jury instructions, improper introduction of out-of-court statements, and violations of his Sixth Amendment right to confrontation, both before and after the State and Trial Counsel submitted their responses(Appx E). Letang refused each time. Ultimately, Erskine wrote the court directly concerning the jury instruction issue, and requested that the Court either compel Letang to amend the motion, or allow Erskine to do so pro se(id.) . The Court then wrote to Letang to ask if he would be amending Erskine's motion(id.). Letang responded that he would not, and advocated against Erskine in his reply(id.). The Court adopted Letang's argument against Erskine in its ruling(Appx B). Letang then abandoned Erskine, filing a motion to withdraw based on the ongoing conflict(Appx E). Unfortunately, Letang passed away from a secret battle with cancer before Erskine could contest the motion and before the Court could rule on it.

The Court did not grant leave for Erskine to amend his petition, despite being amenable to an amendment by counsel(Appx E.), and did not appoint counsel. Instead, the Court interpreted the letter from Erskine in which he sought leave for amendment as a pro se argument(Appx B). The Court did not allow Erskine to brief this pro se argument or any other pro se argument as required by court rules(Rule.61(b)(2)), nor did the Court allow the State to respond, as required by court rules(Rule 61(f)(1)). The Court denied the postconviction motion on November 20, 2012(Appx. B). Erskine did not enjoy the benefit of the continuing obligations of counsel(Rule 61(e)(1))(quoting Delaware Supreme Court Rule 26).

Erskine then filed a timely notice of appeal to the Delaware Supreme Court -- his first foray into pro se litigation. While his appeal was pending, on May 6, 2013, the Delaware Superior Court promulgated an amendment to its Rule 61 which required that the court appoint counsel on initial postconviction motions to any petitioner convicted of Class A, B, or C felonies (Appx. F). The effect of this amendment was that the Delaware Supreme Court, sua sponte, remanded all pending appeals from initial Rule 61 motions to the Superior Court for abuse of discretion if the appellant had not been appointed counsel (Coles v. State, 2013 Del. LEXIS 295; Stevens v. State, 74 A.3d 655; Matos v. State, 82 A.3d 730). Erskine's appeal, however, was decided and denied the next day, on May 7, 2013, while the first remand resulting from the rule change occurred 16 days later, on May 23, 2013, (Holmes v. State, 67 A.3d 1022).

Because Erskine had been abandoned by counsel and was wholly unfamiliar with legal procedure, he immediately filed a second postconviction motion pro se, which was permitted under the then-existing Rule 61(i)(5) "fundamental fairness" provision, which allowed second or successive motions to overcome procedural bars if they alleged a "colorable" (non-frivolous) constitutional claim. Erskine argued that he had been denied effective assistance of trial counsel, pursuant to this Court's ruling in Lafler v. Cooper, but was denied as procedurally barred for timeliness (State v. Erskine, 2014, not reported). He appealed to the Delaware Supreme Court and was denied (Erskine v. State, 100 A.3d 1021).

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Erskine then retained counsel for a §2254 petition in the U.S. District Court of Delaware. The State argued that Erskine was procedurally time barred, as his second postconviction motion did not trigger statutory tolling. The Court agreed and denied Erskine's petition without reaching the merits (Erskine v. Pierce, 255 F.Supp.3d 246). Erskine appealed to the U.S. Circuit Court of Appeals and was denied on April 11, 2017 (Erskine v. Vaughn, 2017 U.S. App. LEXIS 13477).

Erskine continued to diligently challenge his conviction and incarceration. In 2017-18 he was pursuing commutation. In 2021-23 he pursued a second habeas petition and appeal (Erskine v. Cersini, 23-94(MN); Erskine v. Cersini, 23-1962). Through his continued diligence, he discovered the aforementioned change to Delaware's Rule 61, which should have required that his appeal from his first Rule 61 petition be remanded with counsel appointed, instead of dismissed.

Upon this discovery Erskine immediately prepared and filed the timely Writ of Mandamus in the Delaware Supreme Court for which certiorari is now sought. In this Mandamus, he raised the federal question of a due process violation for not appointing counsel in accordance with the state-created right to counsel on IRCP. The Court, ruled that Erskine was not entitled to the appointment of counsel:

"This Court has previously rejected the argument that a defendant who proceeded without counsel in his first postconviction proceeding is entitled to a new proceeding with appointed counsel."

@(7)(relying on Riley v. State, 2014WL 98643, at *1, cert. denied by Riley v. Delaware, 572 US 1085).

The Court continued:

"In addition, Erskine was represented by counsel throughout his first postconviction proceeding in the Superior Court"

@7. In its ruling on appeal from the referred to Superior Court ruling, the Supreme Court acknowledges that Erskine was, in fact, not represented by counsel throughout his first IRCP proceeding by recognizing that Erskine raised a pro se argument in that very proceeding, Erskine, 65 A.3d 616 @(3).

REASONS FOR GRANTING THE PETITION

Consistent with this Court's Rule 10, the present case presents an important question that has not been settled by this Court. Additionally, the state court of last resort decided the present due process question in a way that conflicts with the U.S. Court of Appeals for the Ninth Circuit (Redd v. Guerrero, 84 F. 4th 874(2023)) and Fifth Circuit(U.S. v. Vasquez, 7 F.3d 81). Lastly, the Court below resolved the question by relying on a mischaracterization of the pertinent facts.

The question presented addresses what happens when a state creates the right to counsel on IRCP, but then does not appoint counsel. This is important because the consequences of a prisoner proceeding pro se on IRCP, especially when, as in Delaware, claims of ineffective assistance of trial counsel("IATC") are not available on direct review (Sahin, 7 A.3d 450), can be disastrous. Federal caselaw is rife with instances where prisoners become procedurally defaulted due to not having counsel, or having ineffective counsel, on IRCP, which led to this Court granting certiorari in cases such as Martinez v. Ryan and Maples v. Thomas. In the present case, Erskine was abandoned by his hired counsel, and notified the Court that he wished to amend his motion. The Court was amenable to having the motion amended(Appx. E), but then changed course, ruling on the motion without appointing counsel or allowing Erskine to amend.

This series of events ultimately resulted in Erskine being procedurally defaulted from receiving a meritorious review of his

claims in federal court. Unlike in Maples, Erskine was unable to argue that the abandonment established cause to excuse the procedural default or require equitable tolling, as his state-created right to counsel was not discovered until years later, after his federal habeas corpus petition had long been decided.

The remedy that Erskine sought in the case below was a Writ of Mandamus in the Delaware Supreme Court (In re Erskine, 2024 Del. LEXIS 134)(Appx. A). He argued that the Superior Court had a duty to appoint counsel on IRCP, that they failed to perform that duty, and that he had no other remedy available to put forth that claim(id.). The performance of a state-created right implicates due process (Cleveland Bd. of Education v. Loudermilk, 470 U.S. 532@ 541; Logan v. Zimmerman Brush CO., 455 U.S. 422@ 430,432). In the case below, Erskine was in the midst of his appeal from the denial of his IRCP when the Superior Court amended its Rule 61, mandating that counsel be appointed on IRCP. While Erskine initially had counsel for his IRCP motion, counsel abandoned him (Appx. E). In every other case that had proceeded to the appellate stage from IRCP motions when the rule changed, the case was remanded to re-do IRCP with appointed counsel. Erskine's was not.

Because counsel abandonment on IRCP is not a rare occurrence and because this abandonment can leave meritorious claims unlitigated, it is of national import to decide the question of whether counsel should be appointed when a defendant is abandoned by counsel, particularly when the state's own rule

or statute mandates the appointment of counsel and when that abandonment has already led to the procedural default of claims never reviewed in the federal courts. In the instant case, Erskine has cognizable constitutional claims that have yet to be reviewed, such as the State's reliance on a surrogate witness to present the findings of an autopsy report and giving his own opinion on the report's conclusion.

In contrast to the U.S. Courts of Appeal for the Ninth and fifth Circuits in Redd and Vasquez, the Delaware Supreme Court ruled that Erskine was not entitled to the appointment of counsel, even though its own rules mandate this appointment. In Redd, the Court recognized the due process right to counsel for the defendant where the California statute required it for petitioner's in Redd's position, and held that state postconviction law can give rise to a liberty interest protected by due process. In that case, the State had not appointed counsel for Redd for over 20 years. In Erskine's case it has been 11 years. In Vasquez, the fifth circuit ruled that when a statutory right to counsel is abridged, harm can be presumed. In Erskine's case, the statutory right to counsel did exist, and that right was arbitrarily abrogated in violation of due process, as held in Wolff v. McDonnell, 945 S.Ct. 2963 and Hicks v. Oklahoma, 447 U.S. 343.

The Delaware Supreme Court's ruling was erroneous by ruling that Erskine was not entitled to counsel. First, they ruled that petitioners were not entitled to a "do-over" of IRCP when they were not represented on their IRCP(In re Erskine, at (7)). They relied on their rulings in Bunting v. State, 2015 WL 2147188 and

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Riley v. State, 2014 WL98642(at *1)(cert. denied by Riley v. Delaware, 572 U.S. 1085). However, in both cases, the defendants sought a do-over based on the change in Rule 61, but their cases had already completed IRCP before the change in rule. Erskine's case was still pending at the time of the change, and the Delaware Supreme Court held that all cases pending at the time of the rule change were effected by the change and must be remanded for a do-over with appointed counsel (Coles v. State; Stevens v. State; and Matos v. State). The Court's application of Bunting and Riley was incorrect; they should have applied their previous rulings for cases pending at the time of the change. Next, they ruled that "Erskine was represented by counsel throughout his first [IRCP] proceeding in the Superior Court"(In re Erskine, @ (7)). This is factually incorrect(Erskine v. State, 65 A.3d 616@ (3))(recognizing that Erskine was pro se;(Appx E.-Counsel's motion to withdraw). These erroneous findings and mischaracterizations of fact alone led the Court to rule that Erskine was not entitled to the appointment of counsel.

Lastly, this Court has jurisdiction to grant certiorari review. The reliance of the Delaware Supreme Court on Riley is a reliance on federal caselaw, as their review in Riley was a review of federal caselaw. Furthermore, failure to appoint replacement counsel in the case below was an arbitrary denial of the right that the state created, in violation of federal due process. The state's procedures were constitutionally insufficient to protect the due process interest in this case. The Supreme Court ruled in Ross v. Moffitt, 417 U.S. 600, that they will grant certiorari to consider due process protections where the subject is state appointment of counsel on state reviews.

For these reasons, Erskine respectfully prays that this Honorable Court grant the present Writ for Certiorari review to the Delaware Supreme Court.

CONCLUSION

For the reasons put forth in this petition, I respectfully request that the writ for certiorari be granted.

Respectfully submitted,

Justin Erskine

Date: -----