

Appendix G
Byrd v. State
U.S. Court of Appeals
Application for
Appealability

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
AT CINCINNATI, OHIO

MAURICE O. BYRD, JR.	)	6 th Cir. No.: 21-5422
Petitioner/Appellant	)	
	)	Judge Aleta A. Trauger
vs.	)	M.D. Tenn. No.: 3:18-CV-00142
	)	
STATE OF TENNESSEE	)	
Respondent/Appellee	)	

**APPLICATION FOR APPELLATE CERTIFICATE
OF APPEALABILITY PURSUANT TO 28 U.S.C. §
2253(c)(1) and/or FED. R. APP. P. 22(b)(1) or
IN THE ALTERNATIVE A NOTICE OF APPEAL**

Comes now the Petitioner/Appellant, Maurice O. Byrd, Jr., pursuant to 28 U.S.C. § 2253(c)(1) and/or Fed. R. App. P. 22(b)(1) and respectfully prays for a certificate of appealability (COA) from this Honorable Court. Petitioner/Appellant would show unto the Court the following:

I. PROCEDURAL HISTORY

- 1.1)** On March 29, 2021, the United State District Court for the Middle District of Tennessee, Nashville Division, speaking through the Honorable Aleta A. Trauger, denied *habeas* relief and denied a certificate of appealability, even though the Court found clear attorney error in Petitioner/Appellant's case. [*See* attached "Ex. A"].
- 1.2)** State post-conviction relief was sought, but denied. [*See, Byrd v. State*, 2017 Tenn. Crim. App. Lexis 749 (Tenn. Crim. App. 8/24/2017), T.R.A.P. 11 denied 2017 Tenn. Lexis 823 (Tenn. 11/16/2017). [*See* attached "Ex. B"].
- 1.3)** Petitioner/Appellant was convicted of First Degree Murder, Felony Murder and Aggravated Robbery via jury trial. This conviction was upheld on direct appeal. [*State v. Byrd*, 2012 Tenn. Crim. App. Lexis 968 (Tenn. Crim. App. 11/29/2012), T.R.A.P. 11 denied 2013 Tenn. Lexis 1046 (Tenn. 12/11/2013). [*See* attached "Ex. C"].

II. RELEVANT FACTS

- 2.1)** On direct appeal, Petitioner/Appellant was represented by attorneys Carrie W. Gasaway and John Herbison. Both have since lost their law licenses for other reasons. Attorney Gassaway initially withdrew from an appointment on Petitioner/Appellant's case due to an actual conflict, only later to come back into the case without addressing how or why the actual conflict ceased to exist.

- 2.2)** In Petitioner/Appellant's direct appeal, the attorneys argued a sufficiency of evidenced claim using State v. Crawford, 470 S.W.2d 610, 612-613 (Tenn. 1971), which was the old circumstantial evidence "web of guilt" standard. The problem is that the Tennessee Supreme Court had abandoned the web of guilt review, and Crawford, by name, prior to Petitioner/Appellant's appeal via State v. Dorantes, 331 S.W.3d 370, 381 (Tenn. 2011).
- 2.3)** The State replied to the initial brief filed by the original trial attorneys on direct appeal by pointing out that the legal standard argued on behalf of Petitioner/Appellant had been specifically overturned in a case that directly cited and overruled State v. Crawford, 470 S.W.2d 610 (Tenn. 1971). Neither Ms. Gasaway nor Mr. Herbison filed a reply brief, addressed the Crawford dilemma, nor filed a T.R.A.P. 11 Petition. Simply put, the appeal was abandoned.
- 2.4)** The State, the state courts, and federal courts all agree that arguing overturned law and then not responding, followed by complete abandonment of the appeal, constitutes attorney error. Those same sources all argue that said actions do not amount to a structural defect where prejudice under Strickland v. Washington, 466 U.S. 668 (1984) may be presumed. That is the issue at hand. The District Court denied a certificate of appealability for Petitioner/Appellant's case.

III. ISSUE

- 3.1)** Should a certificate of appealability be granted from this Honorable Court to address whether or not arguing overturned law and then abandoning an appeal outright amounts to a structural error that allows for presumed prejudice under Arizona v. Fulminante, 499 U.S. 279 (1991).

IV. DISCUSSION – ABANDONMENT

- 4.1)** The Report and Recommendation, "R&R", [attached "Ex. D"],¹ says there is no law supporting the prospect that grossly inadequate representation by appellate counsel can qualify as a structural error of ineffective assistance of counsel amounting to presumed prejudice. [R&R, at 20-25]. The Magistrate appears to overlook Cooper v. State, 847 S.W.2d 521, 536 (Tenn. Crim. App. 1992). Cooper states:

The petitioner asserts that he was inadequately represented on appeal in violation of his constitutional right to the effective assistance of counsel on direct appeal. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). He points to no specific issue lost or prejudice incurred, but he claims that the representation was, in effect, the equivalent of him having no counsel at all so as

¹ Byrd v. Washington, 2021 U.S. Dist. Lexis 61055 (M.D. Tenn. 2/26/2021), Frensley, M.J.

to require no showing of prejudice. See, Penson v. Ohio, 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.12d 300 (1989).

[Cooper, 847 S.W.2d at 536]. The CCA transferred the case to the Tennessee Supreme Court to address this point. [Id].

- 4.2)** The Tennessee Supreme Court's version of the Cooper case, contrary to the opinion of the Magistrate in this case, opined "that prejudice can be presumed in those cases where the defendant is denied the right to assistance of counsel on appeal. [Penson] 488 U.S. at 88, 109 S.Ct. at 354, 102 L. Ed.2d at 310." [Cooper v. State, 849 S.W.2d 744, 748 (Tenn. 1993), parenthetical added]. The Tennessee Supreme Court held that Cooper was distinguishable because in Penson, had an attorney withdraw, leaving the defendant to fend for himself. [Id]. That is analogous to the case at hand because incorrect law was argued in the appellant's brief, only to have a de facto withdraw/abandonment by counsel after filing said improper brief.
- 4.3)** As noted by the U.S. Supreme Court, "*a party's whose counsel is unable to provide effective representation is in no better position than one who has to counsel at all.*" [Evitts v. Lucey, 469 U.S. at 396. Quoted with approval in State v. Draper, 800 S.W.2d 489, 498 (Tenn. Crim. App. 1989)].
- 4.4)** In the case at hand, counsel argued law that was, by name, overturned by the Tennessee Supreme Court in the most common appellate issue any criminal appellate court case addresses – namely sufficiency of evidence. It was invalid law for approximately a year prior to the decision in Petitioner's case being rendered. That point was specifically pointed out as improper by the State. The point went either unseen or ignored. It does not matter if Ms. Gasaway, Mr. Herbison, or both abandoned Petitioner, the error was structural and prejudice should be presumed. A certificate of appealability should issue because Petitioner/Appellant had a de facto abandonment of his case, even if a brief was filed. [See e.g., Griffin v. U.S., 109 F.3d 1217, 1219 (7th Cir. 1997); Hankton v. U.S., 2012 U.S. Dist. Lexis 113870 (N.D. Ill. 8/8/2012), at *18; and Denton v. Stephens, 2015 U.S. Dist. Lexis 33003 (N.D. Tex. 2/27/2015), at *37-38].

V. ACTUAL CONFLICT

- 5.1)** The R&R found that presumed prejudice does not exist regarding the actual conflict of interest Ms. Gasaway claimed to initially withdraw from Petitioner's case. [R&R at 22]. In a note of irony, Strickland v. Washington, 466 U.S. 668, 692 (1984) itself, said "*prejudice is presumed when counsel is burdened by an actual conflict of interest.*" An actual conflict of interest cannot generally be waived and an attorney may be disqualified from representing a defendant. [U.S. v. Schwartz, 283 F.2d 76, 95 (2nd Cir. 2002)]. Ms.

Gasaway used this point to withdraw from Petitioner's indigent case. [R&R, at 10 and Byrd v. State, (2017), at *32 to *33].

- 5.2)** The Sixth Circuit has implied in dicta, that an active actual conflict can be presumed prejudice. [See, Stewart v. Wolfenbarger, 468 F.3d 338, 351 (6th Cir. 2006)]. Upon withdrawing for a conflict, it was incumbent on Ms. Gasaway to show said conflict was waived or resolved before resuming her representation of Petitioner. That was not done, so prejudice should be presumed. A certificate of appealability should issue because an actual conflict of interest was acknowledged here and said conflict, at least once, adversely impacted Petitioner/Appellant's defense to the point that Ms. Gasaway withdrew as counsel for Petitioner/Appellant, while not explaining how that active conflict changed to allow her representation. [See generally, Burger v. Kemp, 483 U.S. 776, 783 (1987); U.S. v. Hoffman, 926 F. Sup. 659, 677 (W.D. Tenn. 1996); and U.S. v. Beasley, 27 F. Supp.3d 793, 816-817 (E.D. Mich. 2014)]. The U.S. Supreme Court, in Strickland v. Washington, 466 U.S. 668, 692 (1984), specifically says "prejudice is presumed when counsel is burdened by an actual conflict of interest." This view was followed by this Honorable Court in Leonard v. Warren, 846 F.3d 832, 844 (6th Cir. 2017) and Jalowiec v. Bradshaw, 657 F.3d 293, 314 (6th Cir. 2011)]. Counsel used an actual conflict as the basis of her original withdrawal. If an officer of the court makes claims of an actual conflict, said statement is made as if under oath. [Smith v. Anderson, 689 F.2d 59, 67 (6th Cir. 1982) and Laethem Equip. Co. v. Deere & Co., 261 F.R.D. 127, 137 (E.D. Mich. 2009)].

VI. THE NEED FOR REVIEW

- 6.1)** A certificate of appealability may issue "...if that applicant has made a substantial showing of the denial of a constitutional right." [U.S. v. Pearce, 146 F.3d 771, 773 (10th Cir. 1998)]. The Seventh Circuit holds that a certificate of appealability should issue if a substantial question of a constitutional right being violated, even if the appeal is eventually unsuccessful. [Thomas v. U.S., 328 F.3d 305, 308 (7th Cir. 2003)].
- 6.2)** When a substantial showing of a constitutional deprivation is offered, even if a court questions the eventual outcome of an appeal of a habeas case, the prudent path is to grant a certificate of appealability. [See e.g., Porter v. Gramley, 112 F.3d 1308, 1313 (7th Cir. 1997) and Melton v. Fla. Dept. of Corr., 778 F.3d 1234, 1241 (11th Cir. 2015), Martin dissenting]. The appellate review of a certificate of appealability request is an "issue-by-issue) basis. [Morales v. Woodford, 388 F.3d 1159, 1167-1168 (9th Cir. 2003)]. Petitioner/Appellant's case deserves a proper appellate review by this Honorable Court. A certificate of appealability should be granted.

VII. CONCLUSION

- 7.1)** For the foregoing reasons, this Honorable Court should grant a certificate of appealability to address how Fulimante impacts abandonment/improper argument/actual conflict cases.

This is the 26th day of April, 2021.

Respectfully Submitted:

/s/Gregory D. Smith

Gregory D. Smith
Attorney for Petitioner/Appellant
BPR #013420
331 Franklin Street, Ste. 1
Clarksville, TN 37040
(931) 647-1299

CERTIFICATE OF SERVICE

I, Gregory D. Smith, hereby certify that a true and accurate copy of the foregoing has been mailed, adequate postage prepaid, to the following on this the 26th day of April, 2021.

/s/Gregory D. Smith

Gregory D. Smith

1. T. Austin Watkins
Asst. A.G.
P.O. Box 20207
Nashville, TN 37202
austin.watkins@ag.tn.gov
2. Maurice O. Byrd, #339807
c/o TTCC
140 Macon Way
Hartsville, TN 37074
3. Sandra McQueen
1 Cypress Grove Lane SW
Huntsville, AL 35824