



IN THE SUPREME COURT OF THE STATE OF DELAWARE

HOLMES V. STATE,)
)
 Defendant-Below,)
 Appellant.)
) NO. 350, 2012
 v.)
)
 STATE OF DELAWARE)
 Plaintiff-Below,)
 Appellee.)

SUPPLEMENTAL MEMORANDUM

On October 4, 2011, Cory Holmes, *pro se*, filed, in Superior Court, a Motion For Postconviction Relief from his convictions in case #0901020659. DI 44. His motion included claims of ineffective assistance of counsel, ("IAC"). DI 46. On the same day, he also filed a "Motion For Appointment Of Counsel" to assist him in the postconviction proceedings. In support of this motion, Holmes explained that he "does not have the ability to present his own case" and that he "is unskilled in the law and the complexity of the legal issue(s) presented in the Motion/Complaint is beyond [his] ability to pursue an effective investigation."¹ In response to a Superior Court Commissioner's order, trial counsel submitted an affidavit and the State filed a response. DI 49, 52. On April 20, 2012, the Commissioner issued a report recommending that both of Holmes' motions be

¹ Motion for Appointment of Counsel, att. as Ex.A.

denied.² After Holmes submitted objections to the report, a Superior Court Judge denied his motion for postconviction relief and his request for counsel.³

On June 26, 2012, Holmes, *pro se*, filed, in this Court, an appeal from the Judge's decision. After briefing was complete in this appeal, this Court directed "the parties to file supplemental memoranda addressing the Superior Court's ruling on Holmes' motion for appointment of counsel in light of the United States Supreme Court's decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012)." Subsequently, Counsel was appointed to represent Holmes. This is Holmes' supplemental memorandum filed pursuant to this Court's order.

In *Martinez*, the United States Supreme Court held that where "ineffective assistance of trial counsel claims must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing [those claims] if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective."⁴ The Court specifically noted that its decision was not an answer to the question, left open in *Coleman v. Thompson*, 501 U.S. 722 (1991), of whether a defendant has a constitutional right to

² See Commissioner's Report, att. as Ex.B.

³ See Judge's Decision, att. as Ex.C.

⁴ 132 S.Ct. at 1320.

effective counsel in initial-review collateral proceedings.⁵ Rather, the Court explained that its current holding was based on equitable principles.⁶ However, there can be no mistake that the *Martinez* holding was a result of an analysis of the right to counsel under the United States Constitution.

Martinez was directed at jurisdictions where IAC claims cannot be raised “in the first instance upon direct appeal” and where the postconviction procedure “is the first designated proceeding for a prisoner to raise a claim of ineffective assistance of counsel[.]”⁷ In those jurisdictions, an initial-review collateral proceeding that involves an IAC claim is akin to a direct appeal from the defendant’s convictions.⁸ And, it is well-established that a defendant has the right to counsel on direct appeal primarily to ensure that he has a meaningful review of his trial.⁹

Delaware is one of the jurisdictions affected by *Martinez*. This Court “will not consider a claim of ineffective assistance of counsel in the first instance upon direct appeal.”¹⁰

⁵ *Id.* at 1315.

⁶ *Id.* at 1319-1320.

⁷ *Id.* at 1317.

⁸ *Id.*

⁹ See *Douglas v. California*, 372 U.S. 353, 357-358 (1963).

¹⁰ *Wright v. State*, 513 A.2d 1310, 1315 (Del. 1986).

Rather, a defendant must raise his IAC claim in a motion for postconviction relief pursuant to *Del.Super.Ct.Rule* 61. The postconviction proceeding set forth in Rule 61 allows a defendant to seek to have his conviction set aside on any ground "that is a sufficient factual and legal basis for a collateral attack upon a criminal conviction[.]"

This Court has stated that for a "first postconviction motion containing ineffective claims," it is "the preferable practice" for trial counsel to submit an "affidavit or sworn testimony" in order for the attorney to defend himself and for this Court's "review of the reasonableness of counsel's representation" to be complete and adequate.¹¹ Thus, in initial-review collateral proceedings that involve IAC claims, the Judge should render her decision only after she has reviewed at least some discovery, (i.e. an affidavit of trial counsel).

In order for these proceedings to be meaningful, counsel may be necessary to "ensure that proper consideration [i]s given to a substantial claim."¹² However, under, Rule 61, the Judge

¹¹ *Horne v. State*, 887 A.2d 973, 974-75 (Del. 2005).

¹² *Martinez*, 132 S.Ct. at 1318. Relying on the same rationale discussed in *Martinez*, other States have recognized either a statutory or constitutional right to counsel in initial-review collateral proceedings. See, e.g., *Grinols v. State*, 74 P.3d 889, 894 (Alaska 2003) ("If defendant's post-conviction relief counsel were ineffective, viable challenges to a conviction would be foreclosed and relief would be denied if a second petition for post-conviction relief were barred."); *Lozada v. Warden, State Prison*, 613 A.2d 818, 821-22 (Conn. 1992)

can appoint counsel in postconviction proceedings "only in the exercise of discretion and for good cause shown, but not otherwise."¹³ While counsel is generally not appointed in these proceedings, when this rule was proposed in 1986, "it [wa]s expected that counsel will usually be appointed when a motion survives summary dismissal, especially if discovery or an evidentiary hearing is ordered[.]"¹⁴

The importance of counsel in these cases is supported by the fact that a state postconviction court's factual findings may control the scope of a federal court's review of a subsequent petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254[.]"¹⁵ Also, "[g]iven the stringency with which th[e] United States Supreme] Court adheres to procedural default rules, it is of great importance to the prisoner that all his substantial claims be presented fully and professionally in his first state collateral proceeding."¹⁶

(recognizing statutory right to counsel for postconviction relief required effective and competent counsel); *State v. Webster*, 901 A.2d 338, 339-40 (N.J. 2006) (requiring an attorney to represent the defendant in first postconviction proceedings in order to "fashion the most effective arguments possible").

¹³ Del.Super.Ct.Crim.R. 61 (e) (1).

¹⁴ *State v. Wright*, 2012 WL 1400932*51 (Del.Super.) (quoting Balick, Bernard, *Proposed Rule For Postconviction Proceeding In The Superior Court Of The State Of Delaware* (April 1, 1986)).

¹⁵ *Murray v. Giaratano*, 492 U.S. 1, 26-27 (1989) (STEVENS, J., dissenting).

¹⁶ *Id.*

Here, Holmes filed an unwieldy 93-page memorandum in support of his motion for postconviction relief that contained several IAC claims. In recommending the denial of Holmes' postconviction motion the Commissioner characterized Holmes' claims as "theoretical."¹⁷ The Commissioner also recommended that Holmes' request for counsel be denied, in part because Holmes was able to express his claims in a "coherent" manner.¹⁸ Thereafter, the Judge denied Holmes' motion for postconviction relief after characterizing his IAC claims as "speculation."¹⁹ The Judge denied his detailed request for counsel without any analysis.

Both the Commissioner's recommendation and the Judge's decision were made after assessing the opinions of an experienced defense attorney and an experienced prosecutor with respect to trial strategy. It is hard to imagine that a criminal defendant could counter such opinions with more than "speculation" and "theory" if he does not have the assistance of counsel. In light of the constitutional principles and equitable holding in *Martinez* and considering the spirit of Rule 61, this Court must conclude that the Judge abused her discretion when she summarily denied Holmes' request for counsel.

¹⁷ Ex.B at 11.

¹⁸ Ex.B at 23.

¹⁹ Ex.C at 12, 13,15.

Assuming, *arguendo*, this Court does not find that the Judge abused her discretion when she summarily denied Holmes' request for counsel, it must conclude that the denial violated his State constitutional right to counsel. Delaware has a long history of providing the right to counsel for the criminally accused.²⁰ In fact, the Delaware Constitution provides greater protection than the Federal Constitution for the right to counsel.²¹ This heightened protection of the right to counsel in conjunction with the holding in *Martinez* and the defendant's federal right to counsel on direct appeal requires this Court to conclude that under the Delaware Constitution, criminal defendants have the right to counsel in initial-review collateral proceedings that involve IAC claims.

Accordingly, the decisions denying Holmes' request for counsel and his motion for postconviction relief must be reversed for new postconviction proceedings and the appointment of counsel to assist Holmes in those proceedings.

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²⁰ See *Hooks v. State*, 416 A.2d 189, 199 (Del. 1980) (setting forth the history of Delaware's right to counsel).

²¹ See *Jones v. State*, 745 A.2d 856, 863 (Del. 1999).