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00-5156

SUPREME COURT OF THE UNITED STATES

October Term, 2000

Supreme Court, U.S.
FILED
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In Re: James Michael Barkett

Petition for Writ of Habeas Corpus

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QUESTION PRESENTED

Whether the District Court of Appeal, First District of Florida's summary denial of Petitioner's state habeas petition alleging that appellate counsel rendered prejudicially ineffective assistance in failing to raise fundamental *per se* reversible error in his direct appeal brief involved an unreasonable application of clearly established Federal Law as determined by the Supreme Court of the United States?

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TABLE OF CONTENTS

	PAGE(S)
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF THE BASIS FOR JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
A. Introduction	3
B. Procedural History	4
C. The Writ is In Aid of this Court's Appellate Jurisdiction	5
D. Exhaustion of State Remedies	6
E. Reasons for Not Applying to a Federal District Court	6
F. Material Facts	7
REASONS FOR GRANTING THE WRIT	8
A. Federal Habeas Relief Should be Granted	8
1. Petitioner's Claim was Based on "Clearly Established Federal Law, as Determined by the Supreme Court of the United States."	9
2. The State Court's Decision was "Contrary to" or an "an Unreasonable Application of" Strickland v. Washington, 466 U.S. 668 (1984)	9
3. Appellate Cousnel Unreasonably Failed to Raise on Appeal an Issue which	

TABLE OF CONTENTS

	PAGE(S)
Constituted Fundamental, *Per Se* Reversible Error under State Law	10
B. Exceptional Circumstances Warrant this Court's Exercise of its Discretionary Authority to Issue the Writ.	14
CONCLUSION	20
APPENDIX	

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PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner, James Barkett, respectfully requests this Court to issue a writ of habeas corpus directing that Petitioner be granted a new appeal and that if the new appeal is not granted that his conviction be vacated and that he be released from custody. In support of his request, Petitioner sets forth the following:

CITATIONS TO THE OPINIONS BELOW

Following his conviction for first degree murder, the Court of Appeal, First District of Florida, denied relief on direct appeal. Barkett v. State, 666 So.2d 902 (Fla. 1st DCA 1996). (Appendix 1). This Court denied certiorari on June 3, 1996. Barkett v. State, 517 U.S. 1237 (1996). (Appendix 2). On July 20, 1998, the trial court denied Petitioner's state motion for post-conviction relief in an unpublished order. (Appendix 3). On appeal, the First District reversed and remanded the case to the trial court, holding that the motion was timely. Barkett v. State, 728 So. 2d 792 (Fla. 1st DCA 1999). (Appendix 6). On remand, the trial court denied relief on September 24, 1999 in an unpublished order. (Appendix 7). On February 29, 2000 the District Court of Appeal, First District of Florida denied Petitioner's state petition for a writ of habeas corpus in an unpublished order, (Appendix 15), and on April 4, 2000, it denied rehearing. (Appendix 16).

a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A) (1994 ed., Supp. III).

"The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (1994 ed., Supp. III).

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (1994 ed., Supp. III).

STATEMENT OF THE CASE

A. Introduction

Petitioner's appellate attorney rendered constitutionally ineffective assistance when he failed to include in the direct appeal brief an issue constituting fundamental, *per se* reversible error under State law. Petitioner was tried before a jury on a first degree murder charge and defended against it by presenting evidence that he did not intend to kill the victim. During its deliberations, the jury had a question. The direct appeal record fails to affirmatively reflect that Petitioner's counsel and counsel for the State had notice of the question and were present when

the trial court determined how to answer it and in fact answered it. As will be shown, this omission from the record constituted fundamental *per se* reversible error under Florida law at the time of Petitioner's trial and direct appeal. On direct appeal retained counsel filed a brief on challenging Petitioner's conviction, but failed to challenge the jury question proceedings.

B. Procedural History

On July 28, 1994, Petitioner was adjudicated guilty of first degree murder following a jury trial. He filed a timely notice of appeal and counsel[1] filed an appellate brief. In an order dated January 5, 1996, the District Court of Appeal, First District of Florida summarily affirmed Petitioner's conviction. Barkett v. State, 666 So. 2d 902 (Fla. 1st DCA 1996). Petitioner filed a petition for a writ of certiorari in this Court, which was denied on June 3, 1996. Barkett v. State, 517 U.S. 1237 (1996). On May 26, 1998, Petitioner filed a motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850, which the trial court denied as untimely on July 20, 1998. Petitioner's August 3, 1998 motion for rehearing was denied on August 13, 1998. Petitioner appealed, and the District Court of Appeal, First District of Florida held that the motion was timely and remanded the case. Barkett v. State, 728 So. 2d 792 (Fla. 1st DCA 1999). On August 4, 1999, the trial court held an evidentiary hearing[2] on Petitioner's state post-conviction motion, and on September 24, 1999 entered an order denying all relief.

Petitioner filed a timely notice of appeal and on January 25, 2000, post-conviction

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[1]Petitioner had different counsel for his trial and his appeal.

[2]The trial court appointed counsel to represent Petitioner at the evidentiary hearing. This attorney was neither his trial nor his direct appeal attorney.

appellate counsel[3] filed a "no merits" brief in the 3.850 appeal and state habeas petition alleging that direct appeal counsel was prejudicially ineffective for not asserting that the direct appeal record's failure to reflect whether counsel were presence during the jury question proceedings required reversal of Petitioner's conviction. In the state habeas petition, Petitioner specifically alleged that because sections 924.01 and 924.05 of the 1995 Florida Statutes gave Petitioner the right to a direct appeal, he had a right to counsel and counsel's effective assistance, citing Douglas v. California 372 U.S. 353 (1963) and Evitts v. Lucey, 469 U.S. 387 (1984). Petitioner alleged that the issue omitted from his direct appeal brief was fundamental, *per se* reversible error pursuant to state law, State v. Franklin, 618 So.2d 171, 173 (Fla.1993); Bradley v. State, 513 So.2d 112, 113 (Fla.1987); Curtis v. State, 480 So.2d 1277, 1279 (Fla.1985); Ivory v. State, 351 So.2d 26, 28 (Fla.1977), and that under the standard established in Strickland v. Washington, 466 U.S. 668 (1984), he should be granted a new direct appeal. The post-conviction appeal is still pending[4] in the district court, but that court issued an order summarily denying the petition for habeas corpus relief on February 29, 2000. On March 6, 2000 Petitioner filed a timely motion for rehearing, which was denied on April 4, 2000.

C. The Writ is in Aid of this Court's Appellate Jurisdiction

The Florida District Court of Appeal is the highest State court to which Petitioner had resort and its final judgment addresses a right claimed under the federal Constitution. Therefore, Petitioner could have invoked this Court's certiorari jurisdiction. 28 U.S.C. § 1257(a) (1994 ed.,

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[3]Different counsel was appointed to handle the Rule 3.850 appeal.

[4]The claim raised in the state habeas was not, and could not be Knight v. State, 394 So. 2d 997 (Fla. 1981) , raised in the Rule 3.850 motion or appeal.

Supp. III). In the event this Court declines to exercise its habeas jurisdiction, it may treat this petition as requesting certiorari. See Reynolds v. Cochran, 363 U.S. 801 (1960), (mem.).

D. Exhaustion of State Remedies

No State procedure is available through which Petitioner can either raise the issue of direct appeal counsel's ineffectiveness or through which he may seek mandatory or discretionary review of the district court's order. Rehearing is the final procedure available in the district court. Fla. R. App. P. 9.330. Petitioner cannot raise this claim in the Florida Supreme Court because it has no certiorari jurisdiction over lower appellate court decisions, and no other form of review is available. Fla. Const. art. V, § 3(b).

E. Reasons for Not Applying to a Federal District Court

Federal law precludes Petitioner from applying to a federal district court for habeas relief. A petitioner in custody pursuant to a state court judgment must apply for federal review within one year of one of several events, which in this case is the conclusion of direct review. 28 U.S.C. § 2244(d)(1)(A) (1994 ed., Supp. III). This Court denied certiorari on June 3, 1996. Barkett v. State, 517 U.S. 1237 (1996). Although a properly filed application for state post-conviction relief tolls the federal filing deadline, 28 U.S.C. § 2244(d)(2) (1994 ed., Supp. III), Petitioner did not file his *pro se*[5] state application until May 26, 1998.

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[5]Petitioner was without counsel from the time certiorari was denied until the time of his State post-conviction appeal. Florida granted a statutory right to counsel in post-conviction proceedings only to individuals who receive a death sentence, see § 27.701, Fla. Stat. (1995), and Petitioner received a life sentence. Trial courts have the discretion to appoint counsel in non-death post-conviction cases only after the Rule 3.850 motion is filed. Williams v. State, 472 So.2d 738, 740 (Fla.1985).