STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
KENT, SC. **SUPERIOR COURT**

FILED: NOVEMBER 8, 2012

STATE OF RHODE ISLAND

v. **K1 No. 2006-188A**

JAMES RICHARDSON

DECISION

LANPHEAR, J. This Decision focuses on the extent of a criminal defendant's entitlement to representation by an attorney post-appeal, if any.

FACTS AND TRAVEL

This matter is now before the Court on Mr. Richardson's Motion for Reduction of Sentence.

After a jury trial, Mr. Richardson was convicted of murder in the first degree and burglary. In February, 2009, he was sentenced to two terms of life imprisonment. He promptly appealed his conviction to the Rhode Island Supreme Court. The high court thoroughly reviewed the issues and evidence present at trial and affirmed the conviction. State v. Richardson, 47 A.3d 305, 318 (R.I. 2012). The Supreme Court quoted the trial justice in part:

> ….the trial justice came to the firm conclusion that "the circumstantial evidence in this case … amounted to overwhelming evidence that the defendant was the only person who would have had the knowledge, opportunity and access to the premises to perpetrate this crime" and that the DNA evidence was "the lynchpin that directly tied the defendant to this case." We conclude that there is no basis for disturbing that conclusion....
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> State v. Richardson, 47 A.3d 305, 318 (R.I. 2012)

In September of 2012, Mr. Richardson moved to reduce his sentence. As the trial justice had retired, the matter was referred to another judicial officer. The written motion is barebones, offering no explanation as to why the sentence should be reduced. When Mr. Richardson was brought to the motion hearing from the state prison, he provided scant justification for reducing his sentence and then requested a court appointed attorney.[1] This Court reserved decision on whether to appoint counsel, providing each party with the opportunity to supplement its arguments at hearing.

ANALYSIS

The Sixth Amendment to the United States Constitution states, in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial … and to have the assistance of counsel for his defense."[2]

The United States Supreme Court ruled in Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L.Ed. 158. (1932), that the Fourteenth Amendment extended the right to assistance of counsel to certain state capital cases. In the legendary case of Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed. 2d 799 (1963) the right was broadly extended to other state cases. Nevertheless, this Constitutional right only pertains to "criminal prosecutions". Mr. Richardson has already been indicted, prosecuted, tried and convicted. Now, he has exhausted his appeal.

In an ideal world, all parties could be represented by attorneys at all times. Attorneys do not only assist criminal defendants, they are of great assistance in explaining rights, tactics, legal principles and risks to their clients and expressing reasoned arguments to the court in the midst of conflict. Skilled practitioners deserve to be fairly compensated for their labor. The state,

[1] At one point, Mr. Richardson suggested that the purpose of the motion was merely to protect other procedural avenues.

[2] The right to counsel in Article 1, Section 10 of the Rhode Island Constitution is similarly phrased.

which bears the burden of compensating court-appointed attorneys for indigent clients, has limited resources.[3]

In U.S. v Wade, 388 U.S. 218 (1967) the high court further refined a defendant's right to counsel by holding that a defendant has a right to counsel at any "critical stage" in the prosecution. The court found that a pretrial lineup was a critical stage (id. at 223) and therefore the right to counsel was triggered, referencing Powell v. Alabama, 287 U.S. 45. Several years later the court clarified that "counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." Mempa v. Rhay, 339 U.S. 128 (1967).

While preserving the right of the accused to enjoy the benefit of counsel for trial, the United States Supreme Court denied the right to counsel during a post-conviction relief, after the direct appeal had been exhausted and where there was no state statutory right to counsel. The high court explained:

> We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, see Johnson v. Avery, 393 U. S. 483, 393 U.S. 488 (1969), and we decline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further. Thus, we have rejected suggestions that we establish a right to counsel on discretionary appeals. Wainwright v. Torna, 455 U.S. 586 (1982); Ross v. Moffitt, 417 U.S. 600 (1974). We think that, since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori* he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process. See Boyd v. Dutton, 405 U. S. 1, 405 U.S. 7, n. 2 (1972) (POWELL, J., dissenting).
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> Pennsylvania v. Finley, 481 U.S. 551, 556 (1987).

[3] For the fiscal year ending June 30, 2011, the budget of the Office of Rhode Island Public Defender was over 10 million dollars. http://www.ripd.org/aboutus/budget.htm. In addition, the Rhode Island Judiciary expends over $3,500,000 for indigent defense. An Act Relating to Making Appropriations for the Support of the State for the Fiscal Year Ending June 30, 2013, 2012 R.I. Public Laws, ch. 241.

Four years later, the Supreme Court was even more forthright in explicitly limiting the right to counsel:

> In Ross v. Moffitt, 417 U.S. 600 (1974), and Pennsylvania v. Finley, 481 U. S. 551 (1987), we declined to extend the right to counsel beyond the first appeal of a criminal conviction. We held in Ross that neither the fundamental fairness required by the Due Process Clause nor the Fourteenth Amendment's equal protection guarantee necessitated that States provide counsel in state discretionary appeals where defendants already had one appeal as of right.
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> "The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process."
> 417 U.S. at 417 U.S. 616.
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> Similarly, in Finley, we held that there is no right to counsel in state collateral proceedings after exhaustion of direct appellate review. 481 U.S. at 481 U.S. 556 (citing Ross, supra).
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> These cases dictate the answer here**. Given that a criminal defendant has no right to counsel beyond his first appeal in pursuing state discretionary or collateral review**, it would defy logic for us to hold that Coleman had a right to counsel to appeal a state collateral determination of his claims of trial error.
> Coleman v. Thompson, 501 U.S. 722, 757-758 (1991) (emphasis added).[4]

With this backdrop, lower courts have considered whether the right to appointed counsel applies during motions to reduce the sentence. In Illinois, such motions were once required to be filed before the appeal could preserve issues for appeal. An Illinois intermediate appellate court found the motion to be a critical stage, so the defendant was entitled to counsel. People v. Brasseaux, 660 N.E.2d 1321 (Ill. App. 1991).

[4] Since these decisions, the high court required appointed counsel for an appeal when that appeal appeared to be the last and only resort after a defendant's conviction and after the hearing justice informed the defendant during the plea colloquy that "the Court must appoint an attorney" and "the Court may appoint an attorney" for the appeal in various circumstance. Halbert v. Michigan, 545 U.S. 605, 614, 125 S.Ct. 2582, 2589, 162 L.Ed.2d 552 (2005). Of course, that is not the case at bar where the defendant has already exhausted his direct appeal right.

. The state law was later modified to allow motions to reduce after the appeal. As the motion was no longer necessary to preserve appellate issues, the appellate court found the motion to reduce was no longer a critical stage. People v. Arna, 635 N.E. 2d 815, (Ill. App. 1994).

In State v. Bradley, 324 S.C. 387, 478 S.E.2d 537 (1996) the court considered whether the defendant had a right to be present for a hearing on a motion to reduce. In doing so, the Court questioned whether the proceeding was a critical stage, concluding "The trial was over. Sentence had already been decided. The motion in question, to reduce his sentence, was premised on vindictiveness of the trial judge. There is no showing that Bradley had any knowledge of relevant facts supporting this premise." The Court concluded that the motion was not a critical stage and Mr. Bradley was not entitled to be present for the hearing on the motion to reduce.

Where an interview study was required of convicted defendants, that study was found not to be a critical stage, even though the results of the study could be used to reduce one's sentence. U.S. v. Coffee, 415 F.2d 119 (10th Cir. 1969).

In the case at bar Mr. Richardson has already been arrested, indicted, tried (on two occasions with two separate attorneys), convicted and sentenced. The direct appeal (with counsel) is at an end. The filing of this motion does not preserve any issue for further review. It is not a critical stage in the proceedings. In considering a motion to reduce, the trial court is not required to apply the appellate standard for review of such motions but should assume the original sentence is valid and affirmatively exercise discretion to the extent appropriate under the law. Accordingly, such a motion is not a critical stage. State v. Diefenderfer, 32 A.3d 931, 936

(R.I. 2011). Moreover, post-conviction relief, in which the defendant is entitled to representation by statute, is still available and has not been impaired.[5]

CONCLUSION

Mr. Richardson has no right to counsel for this Motion to Reduce. His request for appointment of counsel is Denied.

Having already been given a hearing on his Motion to Reduce, the Court will take the Motion under advisement providing Mr. Richardson and the State with fifteen (15) additional days, from the date of this Decision, to supplement their arguments by doing so in writing.

[5] The lack of a Constitutional right to counsel at the motion to reduce should not be confused with Rhode Island's broad statutory right to counsel in post-conviction cases. Post-conviction relief may be requested by convicted criminals pursuant to Chapter 10-9.1 of the General Laws. That chapter contains a specific provision statutorily entitling the convicted to representation during those proceedings. R.I.G.L. section 10-9.1-5. The extent of that entitlement is limited, of course, to the finding of the counsel or the Court of a plausible argument. Louro V. State, 740 A.2d 343 (R.I. 1999), Shatney v. State, 755 A.2d 130 (R.I. 2000).