

Phil Dixon
919.966.4248
dixon@sog.unc.edu
UNC School of Government

Case Summaries: Fourth Circuit Court of Appeals (May 10 and 11, 2022)

Claim of ineffective assistance based on failure to seek discretionary review following unsuccessful direct appeal properly denied; district court erred by improperly interpreting a failure to file claim as a failure to consult claim; grant of habeas relief reversed

[Folkes v. Nelsen](#), 34 F. 4th 258 (May 10, 2022). The petitioner was convicted in South Carolina state court of assault and battery with intent to kill and received a life sentence. Court-appointed appellate counsel filed a direct appeal but quit her job prior to a decision in the case. The state intermediate appellate court affirmed the conviction. The petitioner then received a letter incorrectly informing him that his petition for writ of certiorari had been denied and that his state appellate remedies were exhausted. Under South Carolina law, appellate counsel is required to petition the intermediate appellate court for rehearing in order to preserve the right to seek discretionary review at the state supreme court. Appellate counsel here failed to do so. The petitioner sought state post-conviction relief, arguing that appellate counsel was ineffective for failing to seek rehearing. Appellate counsel testified at an evidentiary hearing that she would have filed the petition for rehearing had she not left her employment. The state post-conviction court denied relief on the grounds that there is no right to effective representation for discretionary appellate review. *See Wainwright v. Torna*, 455 U.S. 586 (1982). That decision was affirmed in the state appellate division, and the petitioner sought federal habeas relief, again arguing that appellate counsel was ineffective for failing to seek rehearing. The federal district court denied relief on that claim but granted the petition on grounds that the appellate counsel failed to consult with the petitioner about the right to seek further review and misinformed him of the decision in his case. It ordered South Carolina to reinstate the petitioner's right to seek discretionary review at the state supreme court but stayed the decision pending the state's appeal.

On appeal, a divided panel of the Fourth Circuit reversed. The habeas petition alleged that appellate counsel was ineffective for failure to file a petition but did not properly plead a failure to consult claim. Further, even if a failure to consult claim had been properly alleged, it was without merit. The district court erred by interpreting the petition as a failure to consult claim and should have limited its review to the issue of appellate counsel's failure to seek discretionary review at the state supreme court. Because the petition only alleged ineffective assistance based on the failure to file a petition for rehearing in the intermediate state appellate court, the district court improperly expanded the petition to consider other, unraised issues. Even when liberally construed, the petition did not raise the grounds on which the district court granted relief, and the grant of habeas relief was therefore improper. While failure to consult with a defendant about the right to file a *direct* appeal may constitute ineffective assistance of appellate counsel, there can be no violation of the right to effective representation at the point where the direct appeal has been exhausted and only a potential for discretionary, subsequent review remains. "[T]he Supreme Court [has] unequivocally held that because the state petitioner 'had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely.'" *Id.* at 26-27 (citation omitted). The district court properly

recognized that this claim failed and should have denied the petition. The case was therefore reversed and remanded with instructions for the petition to be denied.

Judge Wynn dissented and would have affirmed the district court's grant of relief.

Motion to suppress statements made while in custody on another offense properly denied where defendant failed to invoke *Miranda* protections; no error to use acquitted conduct at sentencing under existing precedent

[U.S. v. Medley](#), 34 F. 4th 326 (May 11, 2022). In this case from the district of Maryland, the defendant was arrested for possession of a firearm without a license pursuant to District of Columbia law. While in custody of D.C. officials, law enforcement connected the gun seized from the defendant to shell casings from a recent carjacking and shooting in Maryland. Maryland officers then sought to interview the defendant in jail about their investigation. The officer informed the defendant that he was not involved in the D.C. case and was only there to discuss the Maryland matter. The defendant received *Miranda* warnings and stated that he understood them. An interview was conducted, and the defendant made inculpatory statements. The interview was eventually halted when the defendant became "hesitant" to answer further questions. The defendant did not mention he was represented by counsel in the D.C. case, did not request the presence of a lawyer, and did not request the interview to cease. After being charged with various federal offenses based on the carjacking and shooting, the defendant moved to suppress his statements. The trial court denied the motion. The defendant was convicted of being a felon in possession of a firearm but was acquitted of the more serious charges. The trial court added a sentencing enhancement for use of the firearm in the carjacking, finding that the gun was used in that crime despite the defendant having been acquitted of that offense at trial. The defendant appealed, arguing that the trial court erred in denying the motion to suppress and by using acquitted conduct to enhance his sentence.

On appeal, the Fourth Circuit affirmed. The defendant never asserted his right to an attorney during questioning despite having been advised of his rights, and thus waived his *Miranda* protections.

Even assuming, without deciding, that Medley's Sixth Amendment right to counsel had attached to his federal felon-in-possession charge on the day that he was questioned by [the officer], Medley waived the right because he never made a clear, unambiguous assertion of the right to counsel after receiving his *Miranda* warnings. *Medley* Slip op. at 10.

Further, the officer did not lie or deceive the defendant when interviewing him and the defendant's waiver of *Miranda* protections was therefore knowing and voluntary.

As for the defendant's challenge to the sentencing enhancement, the court noted that it was bound by circuit and U.S. Supreme Court precedent allowing the use of acquitted conduct at sentencing (despite considerable criticism of the practice). *See, e.g., U.S. v. Watts*, 519 U.S. 148, 157 (1997) (holding that acquitted conduct may be considered at sentencing where the defendant is shown to have committed the conduct by a preponderance of the evidence). Here, there was sufficient evidence to show that the defendant committed the conduct at issue, and the district court's reliance on the conduct to enhance the sentence did not violate the defendant's Sixth Amendment rights. The judgment of the district court was thus unanimously affirmed in full.

