ELECTRONICALLY FILED FEB 23, 2017 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
Supreme Court No. 16-1619

GUILLERMO HERNANDEZ RUIZ,
Applicant-Appellee,

vs.

STATE OF IOWA,
Respondent-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE LAWRENCE P. MCLELLAN, JUDGE

APPELLANT'S BRIEF

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. Whether The District Court Erred in Granting Postconviction Relief Based on Ineffective Assistance of Counsel, As Hernandez Ruiz Had No Right to Counsel at the Time of the Alleged Breach of Duty?

McMann v. Richardson¸397 U.S. 759 (1970)
Pennsylvania v. Finley, 481 U.S. 551 (1987)
Strickland v. Washington, 466 U.S. 668 (1984)
Wainwright v. Torna, 455 U.S. 586 (1982)
United States v. Bowers, 517 F. Supp. 666 (W.D. Pa. 1981)
United States v. Gouveia, 467 U.S. 180 (1981)
Ledezma v. State, 626 N.W.2d 134 (Iowa 2001)
Millam v. State, 745 N.W.2d 719 (Iowa 2008)
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State v. Senn, 882 N.W.2d 1 (Iowa 2016)
State v. Walker, 390 N.W.2d 589 (Iowa 1986)
U.S. Const. Amend VI and XIV
Iowa Const. Art. I, § 10

ROUTING STATEMENT

Because this case involves the application of existing legal principles, transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

Guillermo Hernandez Ruiz sought postconviction relief alleging ineffective assistance of counsel after pleading guilty to fraudulent practices in the fourth degree in violation of Iowa Code § 712.14. The State appeals from the district court's grant of the application.

Course of Proceedings

Hernandez Ruiz filed an application for postconviction relief on May 29, 2015. Application 05/29/15; App. 6-53. He amended his application just prior to trial in May of 2016. Amended Application 06/01/16; App. 71-78. The matter was tried before the Honorable Lawrence P. McClellan on May 31, 2016. On August 29, 2016, the district court granted Hernandez Ruiz's application and vacated his guilty plea and sentence. PCR Order; App. 79-91. The State filed a timely notice of appeal. Notice of Appeal; App. 102.

Facts

The district court found the following facts. Hernandez Ruiz is a citizen of Mexico. PCR Order; App. 79. He entered the United States without permission in 1999. PCR Order; App. 79. On November 3, 2010, Hernandez Ruiz received a Notice to Appear from the United States Department of Homeland Security initiating removal proceedings against him. PCR Order; App. 79. He hired attorney Michael Said to represent him in the removal proceedings. PCR Order; App. 79.

Said filed an application for cancellation of removal on February 28, 2011. PCR Order; App. 79. As a result, Hernandez Ruiz obtained employment authorization and a social security number from the United States government, making him eligible to apply for an Iowa driver license. PCR Order; App. 79. Hernandez Ruiz spoke to Said prior to attempting to obtain a license. Upon applying for a driver license, the Iowa Department of Transportation computer system alerted that Hernandez Ruiz had used a false social security number to register vehicles in Iowa. Hernandez Ruiz admitted to using a false social security number and left the driver license station without a license. PCR Order; App. 79-80.

Hernandez Ruiz then spoke with Said about his unsuccessful attempt to obtain a license. Said explained that if Hernandez Ruiz returned to the DOT alone, he could be charged with a felony. PCR Order; App. 80. As an alternative, Said offered to contact DOT Investigator Don Sharr. Said had worked with Sharr in the past to arrange to have his clients charged with a misdemeanor, to which they would plead guilty, rather than risking a felony. PCR Order; App. 80. Said offered to arrange a meeting between Hernandez Ruiz and Sharr and explained the risk of returning to the DOT alone. PCR Order; App. 80. Said also explained the possible immigration consequences related to a felony versus a misdemeanor. PCR Order; App. 80. Hernandez Ruiz chose to meet with Sharr. PCR Order; App. 80.

At the meeting, Hernandez Ruiz was charged with fraudulent practices in the third degree in violation of Iowa Code Section 714.11, an aggravated misdemeanor. PCR Order; App. 80. He pleaded to guilty to the lesser charge of fraudulent practices in the fourth degree, a serious misdemeanor. PCR Order; App. 80. Following his plea and conviction, the United States filed a motion to pre-termit his application for cancellation of removal on the ground that fraudulent

practices in the fourth degree constitutes a crime involving moral turpitude, rendering him ineligible for cancellation. PCR Order; App. 80-81. The immigration court concluded that the charge indeed constituted a crime involving moral turpitude and granted the motion. PCR Order; App. 80-81.

ARGUMENT

I. The District Court Erred in Granting Postconviction Relief Based on Ineffective Assistance of Counsel, As Hernandez Ruiz Had No Right to Counsel at the Time of the Alleged Breach of Duty.

Preservation of Error

The State argued at trial and in post-trial briefing that Hernandez Ruiz had no right to counsel prior to the filing of any charges against him. PCR Tr. P.38 Ls.1-5, P.47 L.23 – P.48 L.21; App. 58, 60-61; Proposed Findings of Fact, Conclusions of Law, and Ruling at 3-4; App. 94-95. Error was preserved.

Standard of Review

"[I]neffective-assistance-of-counsel claims are constitutional in nature, and as such, [appellate] review is de novo." *See Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008) (citing *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001)).

Merits

Hernandez Ruiz was not entitled to postconviction relief because he had no right to assistance of counsel at the time of his counsel's alleged error. The Sixth and Fourteenth Amendments to the United States Constitution and Article I, section 10 of the Iowa Constitution guarantee a right to counsel for an "accused" facing a "criminal prosecution" or a "case[] involving the life, or liberty of an individual." *See* Iowa Const. art. I, § 10. The United States Supreme Court has held that the Sixth Amendment right to counsel does not attach until the commencement of "adversary judicial proceedings" against an accused. *See United States v. Gouveia*, 467 U.S. 180, 187-88 (1981); *see also State v. Walker*, 390 N.W.2d 589, 591-92 (Iowa 1986). A plurality of the Iowa Supreme Court would hold that the right to counsel under the Iowa Constitution does not attach until charges have been filed by the State. *See State v. Senn*, 882 N.W.2d 1, 31 (Iowa 2016).

Critical to the district court's order was a legal error concerning the connection between the right to counsel and an ineffective assistance of counsel claim. The district court explained:

> Our supreme court has held that the accused has a right to counsel when 1) formal judicial

> proceedings have begun; and 2) it must be a critical stage of the prosecution. The cases addressing when counsel should be provided are those situations where the defendant had not yet retained counsel. Ruiz is not arguing that he should have had counsel appointed for him prior to proceeding to the DOT to obtain his driver's license because he was already represented by counsel. Ruiz's complaint is that the counsel that was representing him failed to properly advise him of the potential criminal and immigration consequences if he sought a driver's license.

PCR Order at 9; App. 87. In other words, the district court recognized that the right to *appointed* counsel had not attached at the time of the alleged ineffective assistance, but that Hernandez Ruiz nevertheless had a constitutional right to effective assistance of his retained counsel.

The constitutional guarantee of effective assistance of counsel flows from the constitutional right to counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*¸ 397 U.S. 759, 771 n.4 (1970). As such, attachment of the right to counsel is a prerequisite for a claim of ineffective assistance of counsel. *See Wainwright v. Torna*¸ 455 U.S. 586, 587-88 (1982). "Since [Hernandez Ruiz] had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his

retained counsel's failure to [advise him properly]." *Torna*, 455 U.S. at 587-88; *see also Pennsylvania v. Finley*, 481 U.S. 551, 557-58 (1987) (rejecting constitutional claim based on improper withdrawal by appointed counsel at a postconviction proceeding where state had no obligation to provide counsel for the proceeding); *State v. Dudley*, 766 N.W.2d 606, 617 (Iowa 2009) ("Without a right to counsel, [a defendant] also has no commensurate right to effective assistance of that counsel"); *State v. Dowell*, No. 13-1269, 2015 WL 4158758 at *3 (Iowa Ct. App. July 9, 2015) (rejecting an ineffective assistance of retained counsel claim where defendant had no right to counsel for the particular proceeding).

A marked lack of authority supported the district court's decision. The court relied on a single federal district court case in which a defendant was granted relief based on pre-indictment assistance of counsel. *See United States v. Bowers*, 517 F. Supp. 666 (W.D. Pa. 1981). The decision was not appealed, and pre-dated *Gouveia*. In *Bowers*, the defendant was under investigation when the prosecution advised her attorney that she would be granted immunity from prosecution in exchange for cooperation. *Id.* at 669. The defendant's counsel failed to respond or convey the offer to her,

and an indictment followed. *Id.* The court concluded that the defendant had been prejudiced by her counsel's failure to inform her of the immunity offer and dismissed the indictment. *Id.* at 671-72.

The *Bowers* decision is of little value to Hernandez Ruiz. First, the United States Supreme Court confirmed three years after *Bowers* that the Sixth Amendment provides no protection prior to the initiation of adversary judicial proceedings. *Gouveia*, 467 U.S. at 187-88. Moreover, the defendant in Bowers was already under investigation at the time of her counsel's alleged error, and the prosecutor had made his intention to indict known. *Bowers* 517 F. Supp. at 669 (The offer of immunity was made in the following language: "Does your client desire to be a witness or a defendant?"). Thus, even under *Bowers*, Hernandez Ruiz would not be entitled to effective assistance until after he had already admitted to having registered vehicles using a false social security number, thereby triggering an investigation.

In short, the district court erred in concluding that Hernandez Ruiz was entitled to effective assistance of counsel as a constitutional right prior to applying for a driver license. Any remedy for

inadequate advice given by counsel at that stage would be in the form of a tort claim against his private attorney.

CONCLUSION

The State respectfully requests that this Court vacate the district court's ruling that granted post-conviction relief, and remand for entry of an order denying the application.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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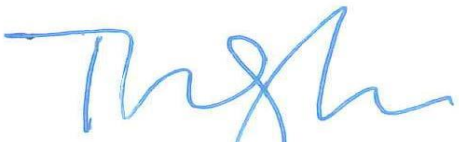

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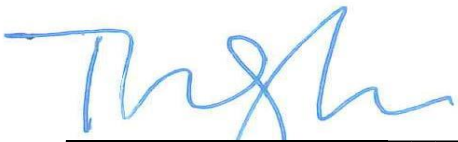

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