

Ewing Redmond Samuels #317774

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In Propria Persona

FILED

MAR 28 2018 11:26 am

MICHAEL K. JEANES, Clerk

By

Deputy

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA,

Appellee

v.

EWING REDMOND SAMUELS,

Appellant

No. 1 CA-CR 17-0225

Maricopa County Superior Court

Case No.: CR-2016-113647-001

MOTION TO STRIKE ANDERS BRIEF

AND DISMISS UNLAWFULLY APPOINTED

COUNSEL WITH IRRECONCILABLE CONFLICT

OF INTEREST (ICI) AND APPOINT

DIRECT APPEAL COUNSEL

Appellant, Ewing Redmond Samuels, In Propria Persona, now comes before the Court respectfully requesting that this Court strike the Anders brief given by counsel Stephen M. Johnson, to dismiss unlawfully appointed counsel with Irreconcilable Conflict of Interest (ICI), that is not competent in his duties to raise Constitutional Structural Error (CSE) based upon ICI;

1 not diligent and will not effectively communicate, Per Rules 6.2, 32.1(a),
2 32.4(c), Rule 42 ER 1.16, 1st, 6th and 14th U.S.C.A.; AZ Const. Art.
3 II, Sec §§ 4, 5, 13 and 24 and to appoint qualified, competent and
4 conflict-free direct appeal counsel.

5 This motion is fully supported by the following Memorandum of
6 Points and Authorities and Exhibits.

MEMORANDUM OF POINTS AND AUTHORITIES

I. POINTS AND FACTS

1. Appellate counsel, Stephen M. Johnson failed intentionally and deliberately to comply with *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, "to file a brief referring to anything in the record that might arguably support the appeal", claiming he is unable to find appealable issues that are not frivolous.

2. Appellate counsel, Stephen M. Johnson failed intentionally and deliberately to comply with A.R.S. 13-125 of the presumption of innocence and benefit of the doubt, presuming all the facts are correct, as he stated in his 7 pages which demonstrates his CSE-161.

3. Appellate counsel, Stephen M. Johnson failed intentionally and deliberately to comply with his duties and obligations in accordance to Rule 42(c), to support the constitution and the laws of the United States and of this state.

4. Appellate counsel, Stephen M. Johnson failed intentionally and deliberately to comply with the Arizona Rules of Professional Conduct, Rule 42 ER 1.2, Scope of Representation and Allocation of Authority between Client and Lawyer, ER 1.3, Diligence and ER 1.4, Communication as exhibited and evidenced with the filing of *Anders* brief without my communication to Appellant, diligence of fact-finding issues, reasonable and promptness in representation of Appellant.

1 5. Appellate counsel, Stephen M. Johnson is in violation, according to
2 Rule 42 ER 8.4(c), engaging in conduct involving dishonesty, fraud,
3 deceit and misrepresentation with his submission of a non-compliant
4 Anders brief.

5
6 6. Appellate counsel, Stephen M. Johnson failed intentionally to identify
7 and investigate the "witness issue with fine failure to appear city warrants"
8 being sought out by the Sheriff's department for his arrest as evidenced
9 in Trial-Day 3. Relevant impeachment evidence according to Rule 604(a)
10 (2), 609(e), 608, 607, 401, 402, 404(2)(3) and 406. See Exhibits A & B.

11
12 7. Appellate counsel, Stephen M. Johnson failed intentionally to identify
13 and address the Judicial misconduct of the trial court Judge George
14 Foster mis-stating the law with "some indicia of dishonesty is more
15 under the federal rules of evidence than the state rules of evidence."
16 When a trial court commits an error of law in the process of reaching
17 a discretionary conclusion, it may be regarded as having abused its discretion.
18 Francis, 222 Ariz. at 426, 215 p. 3d at 400. See Exhibits A & E.

19
20 8. Appellate counsel, Stephen M. Johnson failed intentionally to modify
21 and supplement the record on appeal to obtain a complete record on
22 appeal of vital documents and significant preliminary hearing transcripts
23 further demonstrating his irreconcilable conflict of interest. "Failure
24 to consider key aspects of the record is a defect in the fact-finding process."
25 Miller-El, 537 U.S. at 346, 123 S.Ct. 1029; Collins, 348 F.3d at 1087.

1 9. Appellate counsel, Stephen M. Johnson filed intentionally and deliberately
2 elected to ignore the requirements of Anders, and, as such, deprived the
3 Appellant completely of his right to counsel on appeal. *Perison v. Ohio*,
4 488 U.S. 75, 84-89 (1988). "The need for forceful advocacy does not
5 come to an abrupt halt as the legal proceeding moves from trial to
6 appellate stage. The record to counsel is 'so basic to a fair trial
7 [or appeal] that its infraction can never be harmless error.' Because...
8 the presumption of prejudice must extend to the denial of counsel on
9 appeal."

11 10. Appellate counsel, Stephen M. Johnson filed intentionally to identify
12 the Prosecutorial misconduct of Lori Eidemanis in direct violation
13 of Rule 15.1. Disclosure by state, and Rule 42 ER 3.8. What emerges
14 from Trial - Day 3 transcript is that both Detective Marchelle Miller
15 and Lori Eidemanis' Prosecutorial zeal prompted the State to gain a
16 tactical advantage over the Defense by the intentional use of perjured material
17 testimony with "We ran him. There is no priors." and the deprivation of
18 clearly exculpatory evidence that the witness had a criminal record with
19 active warrants. With this egregious conduct, the Detective, the Prosecutor
20 and Defense Counsel's cumulative known improprieties effectively hindered,
21 impeded, and obstructed Appellant's right to a fair criminal procedure.
22 See Exhibits A, B, C, D.

1 11. Appellate counsel, Stephen M. Johnson faked intentionally not to
2 see nor find Daniel E. Roynak's and Duane M. Cates' CSE-ICI,
3 Total Breakdown of Communication (TBC) and Completely Fractured
4 Relationship (CFR) as exhibited and evidenced by the complete
5 record of the case in its entirety.

6
7 12. Appellate counsel, Stephen M. Johnson's performance as attorney fell
8 below standard of competent representation to recognize and to assert
9 Constitutional Structural Error (CSE), Irreconcilable Conflict of Interest
10 (ICI), Total Breakdown of Communication (TBC), Completely Fractured
11 Relationship (CFR), Intentional Prosecutorial Misconduct (IPM),
12 Intentional Judicial Misconduct (IJM) and the overall Outrageous
13 Government Misconduct (OGM).

II. LEGAL AUTHORITIES

1. According to Heines v. Kerner, 404 U.S. 519, 520 (1972) (*per curiam*) (pro se complaint held to less stringent standards than formal papers drafted by lawyers).
2. In Lofton v. Whitley, 905 F.2d 885 (CA 5 1990), an accused is constitutionally entitled to effective assistance of counsel on direct appeal as of right. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). Lofton contends that he was constructively denied assistance of counsel on appeal because his attorney filed a brief which did not assert any arguable error, and therefore prejudice should be presumed. Appellate counsel, Stephen M. Johnson filed Anders brief claiming he did not find any "arguable appellate issues", a MOTION for leave and requested the Court search the record for fundamental error, constructively denying assistance of counsel on appeal.
3. "If counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal." Anders v. California, 386 U.S. 738, 87 S.Ct. 1396. Appellate counsel, Stephen M. Johnson deliberately filed intentionally clearly not to follow the Anders procedures.

1 4. The actual and constructive denial of the assistance of counsel
2 altogether is legally presumed to result in prejudice. So are various kinds
3 of state interference with counsel's assistance, such as the denial of
4 MOTION OBJECTING TO ANDERS BRIEF, MOTION FOR THE APPOINTMENT
5 OF NEW COUNSEL and MOTION FOR STAY PENDING PREPARATION OF
6 ALL RECORDS ON APPEAL. United States v. Cronie, 466 U.S., at 659,
7 and n.25, 104 S.Ct., at 2046-2047, and n. 25. Prejudice in these
8 circumstances is so likely that case-by-case inquiry into prejudice
9 is not worth the cost

11 5. United States v. Morrison, 449 U.S. 361 (1981), "Cases involving
12 Sixth Amendment deprivations are subjected to the general rule that
13 remedies should be tailored to the injury suffered from the constitutional
14 violation... to identify and then neutralize the taint by tailoring relief
15 appropriate in the circumstances to assure the Defendant the effective
16 assistance of counsel and a fair trial. The premise of our prior cases is
17 that the constitutional infringement identified has had or threatens some
18 adverse effect upon the effectiveness of counsel's representation or has produced
19 some other prejudice to the defense. Appellate counsel, Stephen M. Johnson
20 violated the Sixth Amendment depriving Appellant assistance of counsel
21 by intentionally failing to identify CSE-1C1, 1P1, 1Q1, TBL, CFR and DGM
22 so to not neutralize the taint created by the state, claiming he "found
23 no arguable question of law that is not frivolous".

6. In *Johanson v. Zerbst*, 304 U.S. 458, 467 (1938), over 70 years ago:

"If these contentions be true no legal procedural remedy is available to grant relief for a violation of Constitutional Rights, unless the Courts protect Petitioner's Rights by Habeas Corpus. Of the contention that the law provides no effective remedy for such a deprivation of rights affecting life and liberty, it may well be said - as in *Mooney v. Helohan*, 294 U.S. 103, 113 - that it 'falls with the premise.' To deprive a citizen of his only effective remedy would not only be contrary to 'rudimentary demands of justice' but destructive of a Constitutional guaranty specifically designed to prevent injustice."

7. The Sixth Amendment guarantees criminal defendants the right to representation by counsel. U.S. Const. amend. VI; see also *Ariz. Const.* art. 2 § 24. The Supreme Court extended that right to indigent defendants charged with felonies in state courts. But when there is a complete breakdown in communication or an irreconcilable conflict between a defendant and his appointed counsel, that defendant's Sixth Amendment right to counsel has been violated. Meaningful communication was not possible with Appellate Counsel, Stephen M. Johanson due to his ICI creating a TBC and CFC demonstrating his violation of Appellant's Sixth Amendment right.

1 8. According to Cuyler v. Sullivan, 446 U.S. at 345-350, 100 S.Ct.
2 at 1716-1719. "The Court held that prejudice is presumed when counsel
3 is burdened by an actual conflict of interest. In those circumstances,
4 counsel breaches the duty of loyalty, perhaps the most basic of counsel's
5 duties." The known fact of filing a non-compliant Anders brief by
6 Appellate Counsel, Stephen M. Johnson leads inevitably to the conclusion
7 of his unacceptable CSE-1C1, TBC and CFE.


9 9. The United States Supreme Court has defined "structural error"
10 as error that affects "the framework within which the trial proceeds,
11 rather simply an error in the trial process itself." Arizona v. Fulminante,
12 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). The Court has
13 limited structural errors to items like the unlawful exclusion of members
14 of defendant's race from the jury. Appellant told Appellate Counsel,
15 Stephen M. Johnson there were no member of the jury from Appellant's race,
16 intentionally ignoring findings of "structural error".

17
18 10. Ross v. U.S., 289 F.3d 677, 681-82 (11th Cir. 2002) ("extreme
19 deprivations of constitutional rights, such as denial of counsel, denial
20 of self-representation at trial, and denial of a public trial," are
21 structural errors not subject to harmless error review). Appellate
22 Counsel, Stephen M. Johnson's actual conflict of interest with
23 denial of counsel is the definition of "structural error".

1 III. CONCLUSION

2
3 Based on the foregoing, the Appellant requests that the
4 ~~Anders~~ brief be stricken and dismiss unlawfully appointed counsel,
5 Stephen M. Johnson with irreconcilable Conflict of Interest (ICI)
6 and appoint direct appeal counsel.

7
8 RESPECTFULLY SUBMITTED this 19th day of March, 2018.

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12 Ewing Redmond Samuels
13 Appellant, In Propria Persona
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CERTIFICATE OF SERVICE

STATE OF ARIZONA)

) SS

COUNTY OF MARICOPA)

EWING EDMUND SAMUELS, hereby certifies that he is the Appellant in the above-entitled action and that on the 19th day of March 2018, he caused to be delivered, the following:

MOTION TO STRIKE ANDER'S BRIEF...

That an original and 4 copies of the foregoing were delivered to:


Clerk of the Court of Appeals, State of Arizona, Division One,
1501 West Washington Street, Phoenix, Arizona 85007-3235

That one copy of the foregoing was delivered/mailed to:

Joseph T. Hozaariz, Criminal Appeals, Office of the Attorney General,
1275 West Washington, Phoenix, Arizona 85007.

Clerk of the Superior Court, Maricopa County, 201 West Jefferson, Phoenix, Arizona 85003.

RESPECTFULLY SUBMITTED this 19th day of March 2018.


Ewing Edmund Samuels

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,)	
)	
Appellee,)	
)	CR 2016-113647-001
vs.)	
)	1 CA-CR 17-0225
EWING REDMOND SAMUELS,)	
)	
Appellant.)	
)	
)	

Phoenix, Arizona
January 25, 2017

BEFORE THE HONORABLE GEORGE H. FOSTER

REPORTER'S TRANSCRIPT OF PROCEEDINGS

TRIAL - DAY 3

ORIGINAL

REPORTED BY:

HOPE J. YEAGER, CR, RPR
Certified Court Reporter #50910
yeagerh@superiorcourt.maricopa.gov

1 you, but I don't want you to leave the court general area
2 because she is going to call you back, just not at 1:30,
3 okay?

4 MR. CURD: Okay.

5 (Lunch recess.)

6 THE COURT: All right. Let me see counsel
7 at the bench for a minute.

8 (Sidebar conference heard, reported as
9 follows:)

10 THE COURT: My secretary tells me we may
11 have a witness issue.

12 MS. EIDEMANIS: Well, I'm advised that the
13 Sheriff's department was contacted by Mr. Cates, seeking
14 the arrest of Jamil Curd on some city warrants.

15 MR. CATES: He has like five failure to
16 appear warrants.

17 MS. EIDEMANIS: The Sergeant advised me that
18 he wasn't going to run and do that given that he's a
19 witness in an ongoing trial unless the Court -- this
20 happened -- late part of the lunch hour I found out. So
21 I'm having my case agent out of city court -- she's a city
22 cop. So I'm hoping she can get more information
23 about -- I sent her the date of birth. She didn't have
24 her file with her. And I think she's still chasing that
25 down. She's not back yet.

1 My suggestion is -- I haven't seen Jamil,
2 but I told him since the doc was on, no need to rush back
3 at 1:30. My preference would be to do the doc, get him
4 gone, and deal with this when we -- by that time, my case
5 agent will know more about what's going on. Jamil will be
6 back, and we can deal with it then. I don't want to hold
7 up the surgeon if at all possible.

8 MR. CATES: And part of the -- I just found
9 out about this at noon, okay. My -- I had checked for
10 felony stuff and couldn't find any felony stuff. I didn't
11 check misdemeanor stuff. My staff checked it and informed
12 me of this. I know that Dan Raynack started this case. I
13 used Dan Raynack's discovery letter. I know he asked for
14 any and all -- you know, notice of any and all
15 convictions, stuff that's going on with -- you know, legal
16 stuff that's going on with any of the witnesses, and I
17 wasn't told of any of this. I don't get to interview him.
18 So it's not like I could ask him if he has any stuff.

19 MS. EIDEMANIS: They're not entitled to any
20 and all legal stuff. We ran him. There is no priors.
21 And I confirmed with him when I talked to him today.

22 MR. CATES: There's misdemeanor priors.

23 MS. EIDEMANIS: Never been charged with a --
24 well, unless they relate to trustworthiness, which DUI
25 traffic does not, we don't disclose. And I'm not aware --

1 MR. CATES: Well, failure to appear does.

2 MS. EIDEMANIS: Yeah, but failure to appear
3 prior to conviction?

4 MR. CATES: It has to do with
5 trustworthiness. I mean, he's broken -- he made a promise
6 and broken it.

7 MS. EIDEMANIS: We don't have that
8 information.

9 MR. CATES: Well, the warrants from around
10 the time -- the two warrant -- the two cases are from
11 around the time -- warrants were issued around the time
12 this happened.

13 THE COURT: So what is your point?

14 MR. CATES: Well, he never disclosed to me
15 that there was -- that these issues were out there.

16 THE COURT: I don't know of any legal
17 authority that says the failure to appear on a misdemeanor
18 is a matter of trustworthiness.

19 MS. EIDEMANIS: Exactly.

20 MR. CATES: Well --

21 THE COURT: Felonies, yes. And even that's
22 circumstantial.

23 MR. CATES: Right.

24 THE COURT: Unless you can cite some legal
25 authority to me for that proposition, I tend to reject it,

1 might not, but I would want the opportunity to try.

2 THE COURT: I have indicated you have that
3 opportunity.

4 MR. CATES: Thank you.

5 THE COURT: Yes, ma'am?

6 MS. MILLER: In speaking with Mr. Curd, it
7 sounds like it's a financial situation. He needed to pay
8 fees. And that's the reason why there was a failure
9 appear. Obviously, he was not able to work, given that
10 the fact that he had a fractured femur. Now he is able
11 and does have a job and is able to set up a payment plan.
12 I would hope that the Court, when he presents himself,
13 will take that into consideration.

14 THE COURT: We would have to have a factual
15 basis for the failure to appear for the Court to consider
16 whether or not that is something that constitutes
17 a -- some indication of dishonesty. And quite frankly,
* 18 some indicia of dishonesty is more under the federal rules
19 of evidence than the state rules of evidence. That rule
20 is slightly different. You can look that up, too.

21 MR. CATES: Just to clarify. I do want to
22 clarify, Judge. All the information that I have is that
23 he failed to appear for the case, not failure to pay
24 fines. There has no been no conviction in either one of
25 these cases. Because failure to pay fines, there is a