

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Charleston County

Deadra Jefferson, Circuit Court Judge

ORDER NO. 2019-001193

Lower Court Case No. 2013-Cp-10-01994

Terrell L. McCoy

Appellant

v.

THE STATE

RESPONDENT

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PETITION FOR WRIT of Certiorari

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Terrell McCoy, 256070  
MCI F4-175  
386 Redemption Way  
McCormick SC 29899

RECEIVED

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S.C. SUPREME COURT

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- State v. McCoy No 2011 - UP 471 (S.C Ct App. filed October 26, 2011)
- State v. Sanders, 269 S.C. 215, 237 S.E.2d 53
- Stickland v. Washington, 466 U.S. 668, 104 S.Ct 2052, 80 L.Ed 2nd (1984)

### RULES OF COURT

- SCRCP Rule 59(e)
- SCACR Rule 243(i)
- SCACR Rule 242
- SCACR Rule 407 1.16 (a)(d)

## STATEMENT OF ISSUE ON APPEAL

Whether the PCR COURT erred by denying Petitioner a evidentiary hearing on substantial constitutional issue regarding ineffective assistance of trial counsel Lorelle Proctor, who gave Petitioner erroneous advice to waive Sixth Amendment right to effective assistance of counsel during a jail visit at the Charleston County Detention Center?

## STATEMENT OF CASE

Petitioner was arrested for Murder in Charleston County. On April of 2006, Petitioner signed a indengency form requesting the state appoint Counsel with the Public Defenders Office.

The State appointed Lorelle Proctor.

On July of 2006, a Charleston County grand jury indicted Petitioner for murder. (2006-45-104987). On July 15, 2008, Petitioner while represented by Lorelle Proctor went to trial, however the Jury was unable to reach a verdict and a mistrial was declared.

On December 2008, Lorelle Proctor visited Petitioner at the Charleston County detention Center, and filed a motion to be relieved as Counsel. (App page 1

A hearing was held on January 27, 2009, Mrs. Lorelle Proctor informed Honorable Markley Dennis, that she visited Petitioner at the Charleston County Jail, and explained that either Ms. Mulvaney and her would be trying the case or he would, that Petitioner could not be apart --- be Co-counsel and be apart of the trial. App pg 4 line 11-16 ipt

F P  
On January 28, 2009, the Honorable Markley Dennis signed orders relieving Lorelle Proctor as Counsel. (App page 35-36)

On February 2, 2009, Petitioner represented himself with Lorelle Proctor as standby counsel. The jury convicted Petitioner of Murder, Petitioner was sentenced to fifty years imprisonment. Ultimately, his sentence was reduced to forty (40) years imprisonment.  
(App page 37-38)

A timely Notice of Intent to Appeal was filed. (App page 39-44)

Robert Dudek, Esquire of the South Carolina office of Appellate Defense was appointed to represent Petitioner. (App page 45)

Petitioner's conviction and sentence was affirmed by the S.C. Court of Appeals in State v. McCoy, No. 2011-UP-471 (S.C. Ct App. filed October 26, 2011) (App page 45-46)

Mr. Dudek filed a Petition for Rehearing which was denied on December 19, 2011. (App page 47)

Petitioner filed a Writ of Certiorari in the S.C. Supreme Court which was denied on March 6, 2013. (App page 48)

Petitioner filed an application on April 4, 2013. (App pg. 49-65)

Petitioner claimed that trial counsel, Lorelle Proctor was ineffective before she was relieved as counsel, and that she gave erroneous advice which led to his pro se representation before she was relieved as counsel, and she failed to subpoena witness as directed by the Court. (App pg. 60)

The State Appointed Rodney Davis to represent Petitioner on PCR application. (App. pg. 66)

On May 19, 2014, the state filed a Return to Petitioner's PCR application. (App. pg. 67)

On September 9, 2015, A hearing was held to dismiss ineffective Assistance of trial counsel claims. (App. pg. 67-68)

The Honorable Larry B Hyman issued an Order granting the state's Summary Judgment motion, thereby dismissing Petitioner's claim against trial counsel Lorelle Proctor, but

allow Petitioner to proceed forward on the remainder of the issues.  
(App. pg 12-13)

PCR Counsel Rodney Davis filed an Amended Application for Post Conviction Relief on December 4, 2015. (App. pg 89-90)

On December 14, 2015, A PCR hearing was held in front of the Honorable Deadra L. Jefferson. (App. pg 91-175)

PCR Counsel stated at the beginning of hearing. "I'm letting Ms. Proctor know that we called this one." (App. pg 94 line 6-9)

PCR Judge explained Judge Hyman issued a order dismissing claims of ineffective assistance of trial counsel, and his order needed to be appeal. (App. pg. 97 line 2-8)

PCR Counsel explained he never received an Order from Judge Hyman. (App. pg. 94 line 15-20)

On December 15, 2015, PCR Judge denied relief and directed the attorney general to submit to the Court a proposed order within 20 days. (App. pg. 176)

~~On December 15, 2015, PCR Judge denied relief and directed the attorney general to submit to the Court a proposed order within 20 days. (App. pg. 176)~~

On March 22, 2016, Petitioner substituted Counsel and retained Melisa Gay, Esquire while waiting on the PCR Judge's order. (App pg 177-179)

On May 6, 2016, PCR Judge Deadra Jefferson issued a final order of Dismissal of Petitioner's PCR claims. (App. pg. 180-191)

Petitioner, through Counsel, filed SCRCP Rule 59(e) motion. (App. pg 192-197)

The state filed a response to the SCRCP Rule 59(e). (App. pg 198-200)

The Honorable Deadra L. Jefferson denied the Rule 59(e) motion, and failed to make specific findings of facts and conclusions of law relating to all issues addressed in Petitioner's PCR application. (App. pg 201-203)

Petitioner filed a notice of intent to Appeal on March 8, 2017 (App. page 204-205)

This Court issued an order on February 1, 2019

finding that the PCR Judge's order denying Petitioner's PCR application and his Rule 59(e) motion did not comply with the law. (App pg 206-208)

This Court vacated the orders, and remanded the case back to the PCR Judge to issue an order that contains specific findings on each of the allegation raised by Petitioner at the PCR hearing and in his SCRP Rule 59(e) motion. This court mandated that the new PCR order shall be issued within thirty (30) days of the date of its February 1, 2019 Order.

The Honorable Deadra Jefferson issued her Amended order of dismissal denying Applicants motion to Alter or Amend on June 14, 2019. (App pg 209-229 & 230-242)

Petitioner did not receive the Judges Amended Order until July ~~20~~<sup>21</sup>, 2019. Petitioner timely filed another SCRPC Rule 59(e) on July 30, 2019 (App pg 243-249)

PCR Judge issued a Order Denying Applicant's Motion to Alter/Amend on August 29, 2019. Notice of Appeal was timely filed by Petitioner Seeking a Writ of Certiorari to review this denial. (App pg 250-257)

The South Carolina Supreme Court transferred petition to Court of Appeals pursuant to SCACR Rule 243(L).

The South Carolina Court of Appeals issued a Order denying Petition for a Writ of Certiorari on May 18, 2022. (App pg 258)

Petitioner through Counsel filed a timely Petition for Rehearing which was denied on September 8, 2022. (App pg 259)

Petitioner seek discretionary review by this Court pursuant to SCACR Rule (A)(B)(4)(5).

### ARGUMENT

The PCR Court erred by denying Petitioner a evidentiary hearing on substantial constitutional issue regarding ineffec-

assistance of trial counsel, Lorelle Proctor, who gave Petitioner erroneous advice to waive his Sixth Amendment right to effective assistance of counsel during a jail visit at the Charleston County Detention Center.

### Relevant Facts

At the January 27, 2009 hearing before Judge Dennis, trial counsel explained she "spoke to Petitioner yesterday at the jail, and explained to him either Ms. Mulvaney and I would be trying the case, or he would, that I could not be -- that he could not be my co-counsel and be apart of the trial." (App pg 3 line 8-16)

Based on trial counsel advice, Petitioner proceeded Pro Se. During the January 27, 2009, Judge Dennis asked "What makes you more competent than your lawyers?" (App pg 10 line 6-7)

Petitioner explained "I'm not more competent than her." (App pg 10 line 8-9)

Judge Dennis asked "What rights do you think that your lawyer has not protected that you have?" (App pg 10 line 12-17.)

Petitioner explained that trial counsel told him South Carolina doesn't have a speedy trial. (App pg 10 line 18-22)

Trial Counsel did not rebut Petitioner's complaint nor did Judge Dennis examine trial counsel concerning Petitioner's complaint pursuant to SCACR Rule 407 Rule 1.16 (a)(d)

Trial Judge stated "Well, what she probably told you, and you probably misheard it but -- I don't know, I wasn't present." (App pg 11 line 9-11.)

Judge Dennis was not present when Lorelle Proctor coerced Petitioner into waiving his Sixth Amendment right at the Charleston County Detention Center. This advice was done in secret.

The January 27, 2009 hearing record is sound that Petitioner was making complaints about his trial counsel performance.

Judge Dennis then asked, "Do you understand also, do you realize also that you may well be giving up your rights to have a Post Conviction relief if you represent yourself?" (App pg 15 line 19-23)

Petitioner stated he wasn't aware of that. (App pg 15 line 19-23)

Trial Counsel never informed Petitioner that he would be giving up his rights to have Post Conviction Relief if he proceed Pro Se.

During Petitioner's PCR hearing, PCR Counsel Rodney Davis asked the Court "What I would ask the Court to do is, if you could talk about the benefits and risks of the PCR on the Record" (App pg 104 Line 13-15)

PCR Judge Deadra Jefferson then asked "Sir, you understand that in a post-conviction relief action, that the Court -- the only relief the Court can grant you is a new trial?" (Appendix pg 104 Line 16-19)

Petitioner replied "No, ma'am." (App. pg 104 line 20)

PCR Court: "You understand you can't be resentenced in a PCR?"

The Defendant: "No, ma'am, I don't understand PCR. Could you --" (App. pg 104 line 23-24)

The record clearly show, trial counsel advice was erroneous, and that she suggested Petitioner to represent himself to later avoid Post conviction complaints about her deficient performance, where the trial record shows that trial counsel failed to obtain evidence in Petitioner's defense. See Strickland v. Washington

See State v. Sanders, 269 S.C. 215, 237 S.E. 2d 53

Article 1, section 14 of the South Carolina Constitution "a person charged with a criminal offense," shall enjoy the right... to be fully be heard in his defense by himself or by his counsel or by both.

The fact that Counsel advised Petitioner, that "I would be trying the case, or he would, that I could not be -- that he could not be my co counsel and be apart of the trial," was erroneous advice, rendering trial counsel ineffective before she was relieved.

During the Summary Judgment hearing, Judge Hyman ruled that Judge Dennis Order of January 28, 2009 relieving Ms. Proctor of post conviction relief after 12:00 p.m. January 27, 2009 has not been appealed, it's the law of the case. (Summary Judgment hearing September 9, 2015 page 914 line 5-11).

See Massero v. U.S. 538 U.S. 500, 123 S.Ct 1690 (2003)

Failure to raise ineffective assistance of counsel claims on direct appeal does not bar claim from being brought in later, appropriate collateral proceeding.

See State v. McCoy, No. 2011-UF-471 (S.C. Ct App. filed October 26, 2011. On Appeal, Appellate Counsel raised Petitioner did not knowingly and intelligently waive his right to counsel.

PCR Counsel never received a Order from Judge Hyman. PCR Counsel filed an Amended PCR application on December 4, 2015 which claimed Applicant's original attorney provided ineffective assistance of counsel in failing to obtain evidence and witness for trial prior to being relieved as counsel. (App pg 89-90)

A PCR hearing was held on December 14, 2015. PCR Counsel attempted to call Ms. Proctor, and PCR Judge refuse to allow trial counsel testimony. (App pg 94 line 6-9)

PCR Judge denied relief. In her Order denying relief, she clearly states that the Applicant has failed to establish any entitlement to relief on the grounds of ineffective assistance of trial counsel. Moreover, the Court noted that the Applicant failed to call Ms. Proctor as a witness during the hearing thereby eliminating the Court's ability to make an independent factual determination as to what advice, if any, Ms. Proctor provided to Applicant regarding the consequences of his proceeding pro se in the trial. (App pg 218 line 10-14)

Petitioner, through Counsel filed a timely SCRCP Rule 59(e) upon receipt of the Order. (App

See Gideon v. Wainwright, 372 U.S. 335 83 S.Ct 792 (1963)

In Grosjean v. American Press Co. 297 U.S. 233, 243-244, 56 S.Ct. 444, 446, 80 L.Ed. 660 (1936) "The United States Supreme Court stated "We concluded that certain fundamental rights, safe guarded by the first eight amendments against federal action, were also safe guarded against state action by the due process of law clause of the fourteenth, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution,"

(The assistance of counsel) is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty \*\*\* The Sixth Amendment stands as a constant admonition that if the Constitutional safeguards it provides be lost, justice will not, "still be done." Johnson v. Zerbst, 304 U.S. 458, 462, 58 S.Ct. 1019, 1022, 82 L.Ed. 1461 (1938). To the same effect. See Avery v. Alabama, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 859 (1941) and Smith v. O'Grady, 312 U.S. 329, 61 S.Ct. at 1256, 86 L.Ed. 1595)

In Gideon v. Wainwright, the United States Supreme Court cited this language. "The Courts in Bettis v. Brady made an abrupt break with its own well-considered precedents. In returning to these old precedents sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into the court, who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him. The right of one charged with a crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.

From the very beginning, our state and national constitution and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. A defendant's needs for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in Powell v. Alabama:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by Counsel. Even the intelligent and educated layman has small and sometimes no skills in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of Counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of Counsel at every step in the proceeding against him. Without it, though he be not guilty, he faces the dangers of conviction because he does not know how to establish his innocence. 287 U.S. at 68-69, 53 S.Ct at 64, 77 L.Ed 158.

Trial Counsel's performance was deficient as measured by the standard of reasonableness under prevailing professional norms. Counsel should have never suggested Petitioner to waive his Sixth Amendment right to Counsel. Trial Counsel remained mute during the Pro se hearing when Petitioner indicated his rights were being violated. Under SCACR Rule 407, Petitioner had a right to grievance the Court concerning his Counsel's performance. Pursuant to Article 1 section 14, "shall enjoy the right ... to be fully heard in his defense by himself, or by his counsel, or by both."

Petitioner was prejudiced by such deficiency to the extent of there being a reasonable probability that, but for Counsel's unprofessional error, the result of the proceeding would have been different. Had Counsel not suggested Petitioner represent his self on a murder charge, and explained what Post Conviction relief was, Petitioner would have never accepted her advice. The record shows Petitioner complaints were to substitute Counsel. Petitioner had no prior criminal record to understand the law or what Post Conviction

Relief. Trial counsel advice that he could not be a part of the trial and assist in his defense was erroneous. See State v. Sanders, 269 S.C. 215, 237 S.E.2d 53. Petitioner should be granted a new PCR hearing regarding ineffective assistance of trial counsel for failing to obtain evidence, and failure to subpoena witness as directed by the court. No probative evidence exist to support the PCR Judge Ruling. See Pierce v. State, 338 S.C. 139, 144, 526 S.E.2d 225 (2000). See per v. State 416, S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Question of law are reviewed de novo, and we will reverse the PCR Court's decision when it is controlled by error of law.

### Conclusion

Petitioner pray that this Court reverse the PCR Judge's Order and grant a new trial based on the facts of his case. Petitioner should be allow a new PCR hearing regarding trial counsel failure to obtain evidence and subpoena witness during his trial.

PCR counsel introduce an affidavit by Kriston D Neely into the PCR record according to the rules of evidence which showed North Charleston police department destroyed exculpatory evidence prior to Petitioner's trial. (App pg 130 line 5-8, page 260)

PCR counsel also introduce CAD report of the 911 tape that was not presented to the defense into the PCR record. (App 141 pg Line 12-15; App page 261)

Petitioner's trial counsel failed to obtain this evidence, and then filed a motion to be relieved as counsel after suggesting Petitioner to waive his Sixth Amendment right. Trial Counsel performance was deficient and Petitioner was prejudice.

See Frazier v. State, 351 S.C. 385, 389 S.E.2d 172, 174 2002. The Court held "The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." (Citing Rule 71.1 (e) SCRCP.

Bannister v. State, 333 S.C. 509, 516 S.E.2d 807 (1998); Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998); Glover v. State, 318 S.C. 496, 450 S.E.2d 538 (1995); Martin v. State, 427 S.C. 450, 453 832 S.E.2d 271-78, 79 (2019)

## CERTIFICATION BY Petitioner

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I hereby declare that a Petition for Rehearing was made and finally ruled on by the Court of appeals. I have attached the Court of appeals Order to this Petition.

dated: September 26, 2022

/s/ Jewell M. O'Byrne, 256070  
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