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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Daniel D. Hall, Circuit Court Judge

Case No. 2020-CP-42-01278

Appellate Case No. 2022-001341

Deven Michael Ford #312731,

Petitioner,

v.

State of South Carolina, Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Did the PCR Court err in finding that the sworn testimony from the only living victim and eyewitness exonerating Petitioner of the crimes for which he was convicted and sentenced did not constitute newly discovered evidence when the Court found the evidence could have been previously discovered despite the victim's testimony that he was threatened by the police to implicate Petitioner?

II. Did the PCR Court err in denying Petitioner an opportunity to have his claim of newly discovered evidence adjudicated by an independent judicial officer in violation of the separation of powers doctrine when the Court did not provide any specific findings of fact or conclusions of law other than delegating the responsibility to the State and adopting the State's adversarial order of dismissal?

STATEMENT OF THE CASE

Factual Background

On December 7, 2004, Ikethia Davis was shot and killed sitting in the passenger side of a white car. The driver of that vehicle, Jonathan Martin, was also shot multiple times but survived. Following the shooting, the police arrested Petitioner Devon Ford and his Co-Defendant, Kim Lilly, based on Ms. Davis's *alleged* dying declaration, and Mr. Martin's statements to police implicating Petitioner as the shooter.

On December 8 and 10, 2004, the Spartanburg County Sheriff's Department Interrogated Petitioner, and he denied shooting Ms. Davis. (App. 317 – 351). Petitioner also told the police that he believed Mr. Martin had shot Ms. Davis, and he gave his gun to an individual he knew as "Flint Rim."[1] (App. 352 – 357, pages 1-3; App. 385 – 464, pages 53, line 1 – 54, line 3).

Petitioner also told the police where to find his gun, so they could perform ballistics comparison against the shell casings and bullets found at the crime scene and autopsy. (App. 352 – 357, pages 1-3; App. 385 – 464, pages 53, line 1 – 54, line 3). The police subsequently recovered Petitioner's gun—an "Intratec Model TEC-9, 9mm Luger Caliber pistol"—from Flint Rhem. (App. 385 – 464, page 55, lines 6-17; App. 465 – 469). The police also obtained the following relevant evidence from the crime scene and autopsy: Four 9-millimeter Luger shell casings and three 9-millimeter bullets, including a bullet taken from the body of Ms. Davis. (App. 465 – 469).

On December 9, 2004, the Spartanburg County Sheriff's Department also interrogated the surviving victim, Jonathan Martin. He denied having a gun on the night of the incident and denied firing any shots. (App. 301 – 314, page 8). Mr. Martin further told the police that he

[1] The proper spelling of Flint's last name is "Rhem." (App. 352 – 357).

knew Petitioner to have a 9-millimeter gun and did not know Petitioner to have any other guns. (App. 301 – 314, page 9).

On August 25, 2005, the Spartanburg County Grand Jury indicted Petitioner for Murder (2005-GS-42-03376) and Assault and Battery with Intent to Kill (2005-GS-42-03377). (App. 499 – 505).

On November 9, 2005, the South Carolina Law Enforcement Division ("SLED") compared the bullets and shell casings recovered by the police to Petitioner's gun and concluded Petitioner's firearm did *not* fire any of the bullets or shell casings. (App. 465 – 469). Notably, the ballistics evidence *excluded* Petitioner as the shooter, and SLED had provided this report to the Solicitor's Office approximately two weeks *prior* to his plea hearing.

***Alford* Plea**

On December 5, 2005, Petitioner initially proceeded to trial but ultimately appeared before Honorable Doyet Early, III, for a plea hearing. Michael Bartosh represented Petitioner, and Robert Coler prosecuted the case on behalf of the State. The Plea Court almost canceled the plea hearing when Petitioner responded that he was not satisfied with his attorney's representation. Petitioner ultimately pled guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). Despite the favorable ballistics report, Plea Counsel did *not* reference the report during the plea hearing when discussing the strength of the State's evidence against Petitioner. (App. 358 – 464, Exhibit numbers 3-4).

It appears Mr. Martin was present during the plea hearing but did *not* address the Plea Court or provide a victim impact statement. (App. 358 – 384; page 4, lines 3-7; page 17, lines 4-7; page 19, lines 12-13) (emphasis added). When asked by the Plea Court: "[H]ow are you this morning?", Petitioner replied, "I guess you could say I'm all right . . . cause some things I don't

understand." (App. 358 – 384; page 6, lines 12-17).

The Plea Court then asked him what he did not understand, and Petitioner responded, "About some more evidence that we ain't (*sic*) able to bring up." (App. 358 – 384; page 6, lines 18-22). After asking whether he wanted to plead guilty under *North Carolina v. Alford* or proceed to trial that afternoon, Petitioner inquired: The "only question I'd like to ask you, Your Honor, is about the, by me plea[d]ing [guilty], is the appeal, and then I'll plea [*sic*] about the appeal." Defense Counsel interjected, Petitioner "feels he also gives up his right to an appeal, and I've explained to him that he does not. He can still appeal the, the sentence of the Court." (App. 358 – 384; page 12, lines 2-13).

When asked whether he was satisfied with his lawyer, Petitioner stated simply, "No." (App. 358 – 384; page 13, lines 8-12). In response, the Plea Court aborted the plea, "All right. We'll stand aside and we'll start at 2:15 drawing the jury." (App. 358 – 384; page 13, lines 15-16). After the lunch break, the Plea Court asked Petitioner again whether he was satisfied with his attorney, and he responded, "Yes, Sir." (App. 358 – 384; page 14, lines 2-6).

During the recitation of the facts, Assistant Solicitor Robert Coler maintained that Ms. Davis "gave a dying declaration of who the shooter was [referring to Petitioner]", and "Mr. Martin identified the shooter for the police [also referring to Petitioner]." (App. 358 – 384; page 18, lines 17-18). Plea Counsel provided the following explanation in mitigation: "[I]n discussing the evidence with Mr. Ford [Petitioner], *this would be a triable case, but for the dying declaration by, by Ms. Davis.* I don't think that - - the witnesses that the State would call all have contradictory statements, and, and it would be - - *it would just be a question of who the jury believed.*" (App. 358 – 384; page 20, lines 5-13) (emphasis added).

Plea Counsel also reiterated to the Plea Court that Petitioner was pleading guilty pursuant to *North Carolina v. Alford* because "*[h]e's not admitting to, to doing this*. However, he feels that it's in his best interest to enter this plea because, *knowing the evidence*, that he believes there's a good likelihood he'd be convicted." (App. 358 – 384; page 22, lines 1-8). Petitioner also asked the Plea Court again about having ten days to file an appeal, and the Plea Court noted, "There ain't no sense in pleading if you're gonna appeal. Why are you - - you don't have to do this. I'll back out of it right now. We'll let a jury decide if you're guilty or not guilty." (App. 358 – 384; page 22, lines 12-25). In response, Petitioner stated, "We'll go ahead with it, Your Honor." (App. 358 – 384; page 22, lines 12-25).

Direct Appeal

On December 9, 2005, Plea Counsel filed a Notice of Appeal in the South Carolina Court of Appeals. Appellate Counsel Robert Dudek represented Petitioner an filed an *Anders* brief. *See Anders v. California*, 386 U.S. 738 (1967). Notably, Petitioner argued on appeal that he did not knowingly, intelligently, and voluntarily plead guilty.

While his direct appeal was pending, Petitioner conducted his own investigation and obtained a copy of the ballistics report directly from SLED. The ballistics report concluded that Petitioner's firearm did *not* match the shell casings and bullets used in the murder of Ms. Davis and the ABWIK of Mr. Martin. (App. 385 – 469; PCR Hearing Exhibit numbers 2 and 3).

On September 17, 2007, the South Carolina Court of Appeals dismissed Petitioner's direct appeal without oral argument pursuant to Rule 215, SCACR. *See State v. Devon Ford*, Op. No. 07-UP-365 (S.C. Ct. App. filed Sept. 17, 2007). The Court of Appeals issued a Remittitur on October 3, 2007.

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First PCR Application and Hearing

On January 24, 2008, Petitioner filed a *pro se* application requesting Post-Conviction Relief (PCR) (2008-CP-42-0395). (App. 31 – 38). Petitioner subsequently filed Amended PCR applications on July 30, 2008, and August 22, 2008, arguing that Defense Counsel was ineffective for failing to advise him of the existence of the SLED Ballistics Lab Report prior to his *Alford* plea. (App. 39 – 65; App. 385 – 464; pages 85, line 15 – 86, line 11). The South Carolina Attorney General's Office (Respondent) filed a Return on April 9, 2008.

On September 18, 2008, Petitioner appeared before the Honorable Roger L. Couch for an evidentiary hearing. (App. 385 – 464). David Alford, Esq., represented Petitioner and requested a continuance at the beginning of the evidentiary hearing:

> As a preliminary matter, I'd like to file a motion for a continuance. As I understand the situation, this case was scheduled previously this week. Due to my trial - - it was suppose to go Monday. We, we first continued all these and then we rest them for today . . . As I understand, talking to my client, that he was told I think yesterday to be prepared to come up. *Normally they are given adequate time and notice that they're gonna be coming up for PCR.* Because of that, there's, you know, various stuff he wanted to be able to bring. *Possibly two additional witnesses* to get word for me, which I understand were in a message to my office from yesterday, which I haven't been in my office about five minutes since yesterday afternoon. . . . But because of the nature of the rescheduling and *the adequate time to make sure that he had all his stuff with him, he feels he's prejudiced cause he has some notes he wanted to make sure that he was able to submit to the Court.*

(App. 385 – 464; page 72, line 17 – 73, line 11) (emphasis added).

Petitioner also requested a continuance, "I would like the continuance so I can be better prepared for this because they came and got me on short notice . . . *Your Honor, that's the reason why he didn't have no witnesses on the stand.*" (App. 385 – 464; page 78, lines 1-11) (emphasis added). Despite requests from both PCR Counsel and Petitioner, the PCR Court

denied the motion for continuance. (App. 385 – 464; page 79, line 22). Notably, Plea Counsel did *not* testify at the PCR hearing because he had since died, and his file did *not* contain the SLED Ballistics Laboratory Report. (App. 385 – 464; page 115, lines 3-8).

At the hearing, Petitioner testified he specifically requested that his attorney obtain the ballistics report but only discovered the favorable results until after he personally wrote SLED and received the report (after his *Alford* plea). (App. 385 – 464; page 84, line 18 – 87, line 1). Specifically, Petitioner stated, "Now, SLED wrote me back [on] February 26th, 2007...stating that my pistol is not a match to the victim's body...the whole time I kept asking Mr. Bartosh [Plea Counsel] can he get my ballistics test for me. He kept telling me they [the Prosecutor] did not have them, they did not them, they [the test results of the ballistics evidence] were not ready." (App. 385 – 464; page 85, line 19 – 86, line 3). Petitioner also testified, "on April the 6th, 2006, while I was in SCDC, some more evidence came up where the [deceased] victim [Ms. Davis] did not have no gunshot residue on her shirt cause [*sic*] the prosecution is stating that I ran to the car and shot the person in [*sic*] point blank range[.]" (App. 385 – 464; page 86, lines 6-10). Petitioner further testified that he did *not* know about the ballistics report *prior* to the plea hearing. (App. 385 – 464; page 85, line 19 – 87, line 3).

The Seventh Circuit Solicitor's Office's case file also contained no guarantee that the ballistics report was provided to Plea Counsel prior to Petitioner's plea hearing. (App. 480 – 483). However, the Prosecutor maintained that he provided the SLED ballistics report to Plea Counsel prior to Petitioner's *Alford* plea. (App. 484 – 488; pages 2-4).

On December 14, 2009, original PCR Judge issued an Order of Dismissal denying Petitioner's PCR application, and an Amended Order of Dismissal on March 18, 2010. (App. 133 – 142).

On June 21, 2010, Petitioner filed a Petition for Writ of Certiorari in the South Carolina Supreme Court. (App. 163 – 171). Respondent filed a Return on October 7, 2010. This Court denied the Petition for Writ of Certiorari by written Order and issued the remittitur on December 19, 2011.

Federal Habeas Corpus and Appeals

On August 9, 2012, Petitioner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 in the U.S. District Court for South Carolina (Case No. 8:12-cv-02266-GRA). The United States Court of Appeals for the Fourth Circuit denied a certificate of appealability and dismissed the appeal on March 10, 2014.

On April 23, 2014, Petitioner appealed to the United States Supreme Court, and the Court denied the Petition for Writ of Certiorari on October 6, 2014.

Second PCR Application and Hearing: Newly Discovered Evidence

On April 9, 2020, Petitioner filed a second PCR application due to newly discovered evidence. Specifically, Petitioner became aware of a letter and notarized affidavit that he received from the surviving victim, Jonathan Martin, exonerating him of the crimes for which he was convicted and sentenced. (App. 295 – 300). Below are excerpts from the surviving victim's affidavit dated January 17, 2020:

(A) "It has been fifteen (15) years since the conviction of Mr. Ford [Petitioner] and I realized it is not right that Mr. Ford is serving time. Because Mr. Ford did not do anything wrong, I feel bad that my actions contributed to him being incarcerated. Therefore, I wanted to come forward and tell the truth about this matter."

(B) "On the day of the shooting, Ms. Davis [the deceased victim] and I made plans to meet with Mr. Ford [Petitioner] and Mr. Lilly [Petitioner's co-defendant]. I was the driving [*sic*] one vehicle and Ms. Davis was the passenger in my vehicle. There was a second vehicle involved that Mr. Lilly was the driver and Mr. Ford was the passenger. We met Lilly and Ford and stopped our vehicles. Mr. Lilly pulled his vehicle beside ours. At this time, Mr. Lilly was face to face and beside Ms. Davis, who was the passenger in my vehicle."

(C) "I was threatened by the police to implicate Mr. Ford in this crime. I gave a statement to the police that Mr. Ford was the shooter in this incident. I did this in an attempt to protect myself."

(D) "I do not know who is responsible for this shooting, although I do know, that it was not Mr. Ford. At no time did I see Lilly [Petitioner's co-defendant] or Mr. Ford get out of the vehicle that they were in."

(E) "To the best of my knowledge, I am unaware of Ms. Davis [the deceased victim] disclosing to the responding police officers that Mr. Ford [Petitioner] was the shooter involved in this case."

(F) "I had pending charges from an unrelated incident at the time of this incident. The police threatened to put me back into prison if I did not cooperate with them."

(App. 295-300; pages 1-2).

Below are excerpts from the surviving victim Jonathan Martin's Letter:

(A) "It's been 15 years" and "[i]t's not right I got this man back here knowing he didn't do it."

(B) "I didn't see deven [Petitioner] jump out no car [sic] nor Did T [the deceased victim, Ikethia Davis]."

(C) "And when me [and] T [the deceased victim] was at the gas station, t [the deceased victim] did not say he [Petitioner] did anything" because "[s]he was in too much pain to talk."

(D) "I know she [the deceased victim] didn't make no [sic] statement [because] . . . She went straight to ICU."

(E) "Plus I was there when the police lied and co-Hearsed [sic] all of this about what to say. They was telling me I was going to jail, saying I did this to her [the deceased victim] so I can coopurate [sic] with them. Then told me if I help they will make sure I didn't go to prison for the charges I had at the time."

(F) "That man didn't do it[,] you got the wrong man locked up."

(G) "Deven [Petitioner] is innocent."

On February 10, 2022, Petitioner appeared before the Honorable Daniel Dewitt Hall for a virtual hearing on Respondent's Motion to Dismiss. Dayne Phillips represented Petitioner and called both Petitioner and Jonathan Martin to testify regarding the newly discovered evidence

disclosed in Mr. Martin's letter and notarized affidavit. Assistant Attorney General William Ray, Esquire, represented Respondent and did not present any witnesses. At the close of evidence and hearing arguments from counsel, the PCR Court informed the parties that it would take the matter under advisement and notify the parties of its ruling within one (1) week. (App. 522 – 586, pages 61, line 25 – 62, lines 1-5).

Victim Jonathan Martin

At the PCR hearing, the only surviving victim, Jonathan Martin, testified that he wrote the letter and notarized affidavit because Petitioner was innocent and he "felt it was only right to do it." (App. 522 – 586, pages 23, lines 23-25 – 24, lines 1-2). Martin also testified that he was threatened by the police to implicate Petitioner as the shooter. (App. 522 – 586, page 24, lines 3-9). Specifically, Martin testified that, because he had pending drug charges from an unrelated incident at the time, the police threatened him with a jail sentence if he did not implicate Petitioner as the shooter. Martin further testified that he named Petitioner as the shooter solely due to the threats by the police. (App. 522 – 586, pages 24, lines 3-25 – 26, lines 1-2).

Furthermore, Martin testified that Ikethia Davis (the deceased victim) was unconscious and unable to speak immediately after the shooting. (App. 522 – 586, page 26, lines 3-17). Martin also testified that he did not witness Davis regain consciousness prior to being placed in an ambulance. Martin further stated that he did not see the police speak with Davis prior to her being transported to the hospital nor did he see the police enter the ambulance. (App. 522 – 586, pages 26, lines 3-25 – 27, lines 1-2). Martin ultimately testified that, in his opinion, Davis was unconscious and unable to speak immediately following the shooting. (App. 522 – 586, page 30, lines 13-23).

On cross-examination, Martin testified that he did not recall who was at the scene of the incident. (App. 522 – 586, page 31, lines 18-21). After Respondent referenced Martin's former affidavit, Martin mentioned Petitioner's co-defendant, Kim Lilly, but testified that he could not see and identify any other people who may have been present at the scene. (App. 522 – 586, pages 31, lines 22-25 – 32, lines 1-2). When Respondent referenced specific information from Martin's prior affidavit, Martin testified that, while he did name other individuals in his prior affidavit, he wrote the affidavit two (2) years ago and had not reviewed it. (App. 522 – 586, page 32, lines 3-23).

Additionally, Martin reiterated his testimony that Petitioner did not shoot him or Davis. Martin testified that it was dark and everything happened so fast, so he did not see who shot him or Davis. Martin was adamant that Petitioner was not the shooter. Martin testified that he did not shoot Davis. (App. 522 – 586, pages 32, lines 24-25 – 33, lines 1-15).

Martin further testified that he did *not* communicate with Petitioner when they were both housed in the Ridgeland Correctional Institution. (App. 522 – 586, pages 33, lines 22-25 – 34, lines 1-9). Martin again noted the threats made by the police regarding his cooperation in implicating Petitioner as the shooter. Martin acknowledged that he did not inform anyone about the threats because he was young and scared. (App. 522 – 586, pages 34, lines 12-25 – 35, lines 1-18). Martin stated that he believed the police was focused on Petitioner due to rumors circulating in "the streets." (App. 522 – 586, page 36, lines 2-12).

Notably, Martin testified that he had never met Petitioner's current PCR counsel prior to the evidentiary hearing; that no one threatened or pressured him into making the statement regarding Petitioner's innocence; and that he received no benefit from signing the notarized affidavit. (App. 522 – 586, page 23, lines 13-17; pages 38, lines 9-25 – 39, lines 1-4).

Petitioner Devon Ford

Petitioner testified at the hearing that he did not have any contact with Martin prior to finding out about the recantation letter. (App. 522 – 586, page 40, lines 1-17). Petitioner also testified that his family hired a private investigator and connected with Mr. Martin's family to get Martin's notarized affidavit. (App. 522 – 586, pages 40, lines 23-25 – 42, lines 1-5). Petitioner further testified that he did not threaten, pressure, or offer any benefit to Martin in-exchange for his statement. (App. 522 – 586, page 40, lines 18-22).

On cross-examination, Petitioner testified that he had known Martin since they were younger. (App. 522 – 586, page 43, lines 8-22). Petitioner also testified that he had not made any direct or indirect contact with Martin following his arrest. Petitioner further testified that, although he requested his attorneys to visit with him at the jail and to interview Martin, both of his former attorneys failed to comply with his requests (App. 522 – 586, pages 43, line 25 – 44, lines 1-15).

Petitioner corroborated Victim Martin's testimony that they did not communicate while incarcerated at the Ridgeland Correctional Institution. (App. 522 – 586, pages 45, lines 24-25 – 46, lines 1-7). Petitioner also emphasized that he only became aware of Martin's statement after his family connected with Martin and hired a private investigator to obtain the notarized affidavit. (App. 522 – 586, page 46, lines 8-23).

When questioned as to who shot and killed Davis, Petitioner testified that Kim Lilly—Petitioner's Co-Defendant—must have been the shooter. (App. 522 – 586, pages 46, lines 24-25 –47, lines 1-8). Petitioner testified that he did not recall telling the police about his intent to kill Martin. Petitioner maintained that he must have lied to the police if he previously admitted to shooting Martin. (App. 522 – 586, pages 47, lines 9-25 – 48, lines 1-20). Petitioner reiterated

that he did not directly or indirectly threaten or promise Martin anything in-exchange for his statement and testimony. (App. 522 – 586, pages 48, lines 21-25 – 49, lines 1-5).

On re-direct examination, Petitioner testified he expressed concerns to the Plea Court about additional evidence Plea Counsel was not "able to bring up" during the hearing. Specifically, Petitioner noted his former counsel's failure to conduct witness interviews and to challenge the ballistic evidence. (App. 522 – 586, pages 49, lines 11-25 – 51, lines 1-3). Petitioner also noted that he specifically informed the Plea Court that he was dissatisfied with Plea Counsel due to his failure to investigate the case. (App. 522 – 586, page 51, lines 4-7).

Petitioner testified that the Prosecutor did not reference any ballistic evidence during the plea hearing. (App. 522 – 586, page 51, lines 8-10). Petitioner also noted Plea Counsel told the Plea Court that the case was triable except for Davis's dying declaration. (App. 522 – 586, page 51, lines 11-15). Petitioner again explained that his Co-Defendant was the actual shooter. (App. 522 – 586, page 51, lines 16-18).

Petitioner testified that the statements he gave to law enforcement were not hand-written by him but typed out by the police. Petitioner emphasized he never told the police that he was the shooter or that he was going to shoot Martin. (App. 522 – 586, pages 53, lines 4-25 – 54, lines 1-6). Petitioner also explained that he had always maintained his innocence, which is evidenced by his *Alford* plea and the procedural history of this case. Petitioner further testified that, although he does not want to incriminate anyone, his Co-Defendant was the actual perpetrator. (App. 522 – 586, pages 54, lines 7-25 – 55, lines 1-13).

Petitioner indicated that he inquired about his appellate options before ever entering the *Alford* plea. (App. 522 – 586, pages 55, lines 21-25 – 56, lines 1-4). Petitioner testified that he filed a direct appeal asserting that he did not knowingly, intelligently, and voluntarily plead

guilty. Petitioner also testified that he obtained the favorable ballistics evidence from SLED after his *Alford* plea. Notably, Petitioner testified that, during his first PCR hearing, he discovered Plea Counsel did not have a copy of the SLED ballistic report in the case file and that there was no conclusive evidence that the Prosecutor had ever disclosed the report to Plea Counsel. (App. 522 – 586, page 56, lines 6-23.)

Additionally, Petitioner testified that both he and his first PCR Counsel requested a continuance of the evidentiary hearing to secure two (2) additional witnesses, but that the PCR Court denied the requests. (App. 522 – 586, pages 56, lines 24-25 – 57, lines 1-23). Petitioner also testified that he had told Plea Counsel to obtain the ballistics evidence from SLED prior to trial and that he also told PCR Counsel to secure the necessary witnesses for the hearing. Petitioner stated that his former counsel failed to comply with these requests. (App. 522 – 586, page 57, lines 22-25 – 58, lines 1-8). Petitioner reiterated his prior testimony about when and how he learned of Martin's recantation letter. (App. 522 – 586, page 58, lines 9-25 – page 60, lines 1-5).

Order of Dismissal

On May 24, 2022, the PCR Court filed an Order of Dismissal (i.e., signed Respondent's proposed order). (App. 587 – 598). Specifically, the PCR Court found that Petitioner had "not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice." (App. 587 – 598, page 11). Specifically, the PCR Court found Mr. Martin's recantation and testimony unbelievable and without "weight or quality sufficient to justify vacating the plea." The PCR Court ultimately concluded that the evidence could have been discovered prior to entering the plea. (App. 587 – 598, pages 10 – 11).

Petitioner's Motion to Alter or Amend and Hearing

On June 7, 2022, Petitioner filed a Motion to Alter or Amend judgment pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. (App. 599 – 615). Petitioner provided the following arguments in support of the motion:

(1) Applicant incorporates by reference all of Applicant's prior pleadings in this action as if fully set forth verbatim below (including but not limited to Attachments A – N). The attachments referenced in this motion were filed with the PCR applications.

(2) The testimony, evidence, and arguments presented at the evidentiary hearing on February 10, 2022, necessitate that this Court should have denied Respondent's motion to dismiss. Specifically, the testimony from the only living victim and eyewitness, Jonathan Roshun Martin, exculpating Applicant of murder and ABWIK, constitutes evidence of material facts not previously presented or heard that, in the interest of justice, requires to vacate Applicant's convictions and sentences resulting from his guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). Respondent also failed to provide any direct, competent evidence attacking the credibility of Mr. Martin's testimony and ignored the evidence of innocence and ineffective assistance of counsel present in this case. Any challenge to Mr. Martin's credibility is purely speculative and not based in fact or evidence.

(3) Respectfully, the procedure followed by this Court denied Applicant an opportunity to have his PCR claims adjudicated by an independent judicial officer in violation of the separation of powers doctrine. *See* S.C. Art. I, § 8. Specifically, the Court did not provide the State with specific findings for denying Applicant's claims other than delegating the responsibility of drafting an order of dismissal.

(4) Notably, the Court adopted the State's adversarial Order of Dismissal finding the testimony from only living victim and eyewitness, Jonathan Roshun Martin, "incredible" and "unbelievable" despite that this independent judicial function cannot be delegated to an executive agency without providing specific instructions and rationale for providing or omitting findings of fact and/or denying the issue presented. *See generally Marlar v. State*, 375 S.C. 407, 408, 653 S.E.2d 266 (2007) (holding, "Pursuant to S.C. Code Ann. § 17-27-80 . . . , the PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented.").

(5) The Order of Dismissal fails to properly address Applicant's claim the newly discovered evidence corroborates the SLED ballistics report, particularly with the allegation of police misconduct by Mr. Martin (e.g., coercing him to fabricate evidence against Applicant).

(a) Mr. Martin discredited the deceased victim's alleged dying declaration and his prior statements to the police implicating Applicant as the shooter.

(b) Applicant would not have pled guilty pursuant to *North Carolina v. Alford* had Jonathan Martin originally provided this newly discovered evidence to police; and particularly, had he also known the exculpatory value of the ballistics report prior to the plea hearing. *See Brady v. United States*, 397 U.S. 742, 756 (1970) (finding "the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him.").

(c) Applicant is innocent of murder and ABWIK, and the newly discovered evidence (letter and notarized affidavit from the only living victim and eyewitness, Jonathan Martin), is of such a weight and quality that, under the facts and circumstances of this case, the "interests of justice" requires the Court to vacate Applicant's convictions and sentences.

(6) The Order of Dismissal fails to properly summarize all the testimony presented at the hearing. Fundamental fairness necessitates the importance of an accurate summation of the testimony and arguments to ensure the Court's Order contains all the relevant findings of fact and conclusions of law to conduct an objective and independent review and to preserve all issues for appellate review.

(7) The Order of Dismissal fails to properly address how Applicant could have discovered the information sooner based on Jonathan Martin's testimony and notarized affidavit.

(App. 587 – 598). The Respondent filed a Return to the motion to alter or amend on July 11, 2022.

On August 11, 2022, Petitioner appeared before the PCR Court and presented the arguments outlined in the motion to alter or amend. (App. 622 – 639).

Order Denying Petitioner's Motion for Reconsideration

On September 21, 2022, the PCR Court filed a its Order Denying Petitioner's Motion for Reconsideration. (App. 640 – 641). Specifically, the PCR Court found that it "is unable to discovery any material fact or principle of law that has either been overlooked or disregarded, and further finds no error of law or fact not appropriately considered."

Relief Sought

Petitioner seeks a writ of certiorari for this Court to review the dismissal of his PCR action.

STANDARD OF REVIEW

In reviewing a PCR court's decision, this Court will uphold the PCR court's findings if there is any evidence of probative value to support them. *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). However, if the PCR court's conclusions are controlled by an error of law or are unsupported by the evidence, this Court must reverse the decision. *Edwards v. State*, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011).

ARGUMENT

I. THE PCR COURT ERRED IN FINDING THAT THE SWORN TESTIMONY FROM THE ONLY LIVING VICTIM AND EYEWITNESS EXONERATING PETITIONER OF THE CRIMES FOR WHICH HE WAS CONVICTED AND SENTENCED DID NOT CONSTITUTE NEWLY DISCOVERED EVIDENCE BECAUSE THE COURT FOUND THE EVIDENCE COULD HAVE BEEN PREVIOUSLY DISCOVERED DESPITE THE VICTIM'S TESTIMONY THAT HE WAS THREATENED BY THE POLICE TO IMPLICATE PETITIONER.

The Uniform Post-Conviction Procedure (PCR) Act provides that "[a]ny person who has been convicted of, or sentenced for, a crime and who claims: . . . [t]hat there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice" is authorized to file a post-conviction relief action. S.C. Code § 17-27-20(A)(4). The PCR Act also provides, "If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence." S.C. Code § 17-27-45(c).

In *Jamison v. State*, 410 S.C. 456, 765 S.E.2d 123 (2014), this Court found that the "traditional, five-factor newly discovered evidence test is not the proper test for analyzing whether a PCR applicant is entitled to relief on the basis of newly discovered evidence following a guilty plea" and held that a separate test is required:

> Guided by the language of section 17-27-20(A)(4) of the PCR Act, we hold that, when a PCR applicant seeks relief on the basis of newly discovered evidence following a guilty plea, relief is appropriate only where the applicant presents evidence showing that (1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the "interest of justice" requires the applicant's guilty plea to be vacated.

> In other words, a PCR applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the finality of guilty-plea convictions.
>
> In so holding, we caution that it will be the rare case indeed where the interests of justice will require that a knowing and voluntary guilty plea be vacated through post-conviction relief on the basis of newly discovered evidence, for an unconditional guilty plea involving an admission of guilt and a waiver of trial and all defenses will generally preclude any subsequent challenge to factual guilt. *Cf. Reise*, 192 P.3d at 955 (finding a defendant may withdraw his guilty plea on the basis of newly discovered evidence only when necessary to correct manifest injustice). *Such a determination will not be resolved in a formulaic manner, but will necessarily be context dependent.*

Jamison, 410 S.C. at 470, 765 S.E.2d at 130 (emphasis added).

Discussion

In this case, the PCR Court erred in finding that the sworn testimony from the only living victim and eyewitness exonerating Petitioner of the crimes for which he was convicted and sentenced did not constitute newly discovered evidence. (App. 587 – 598; App. 640 – 641). Specifically, this evidence could not have been previously discovered because Martin testified that he was threatened by the police to implicate Petitioner and would not have provided a different statement prior to Petitioner's guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). *See United States v. Taylor*, 659 F.3d 339, 347 (4th Cir. 2011) (noting "[a]n *Alford* plea is an arrangement in which a defendant maintains his innocence but pleads guilty for reasons of self-interest."). Notably, Petitioner has always maintained his innocence, which is supported by the evidence, and has exhausted all his potential remedies for challenging his convictions and sentences.

Furthermore, Martin's sworn testimony corroborates the exculpatory SLED ballistics report (which Petitioner had no knowledge of prior to his *Alford* plea and was not in Plea

Counsel's file after he had died). Martin's testimony of police misconduct is also a compelling, unique circumstance in this case (i.e., coercing Martin to fabricate evidence against Petitioner). Martin's testimony further discredited the deceased victim's *alleged* dying declaration based on her being immediately unconscious after the shooting. Accordingly, this evidence exonerates Petitioner as the shooter and supports that he would not have proceeded with the *Alford* plea had he known of its existence prior to the plea hearing. *See Brady v. United States*, 397 U.S. 742, 756 (1970) (finding "the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him.").

In adopting the State's adversarial Order of Dismissal, the PCR Court failed to provide any direct, competent evidence attacking the credibility of Martin's testimony and ignored the evidence of innocence and ineffective assistance of former counsel presented in this case. Any challenge to Martin's credibility is purely speculative and not based on any evidence presented during the evidentiary hearings. This is the rare case where a new trial is necessary to correct manifest injustice. Therefore, Martin's sworn testimony constitutes evidence of material facts not previously presented or heard that, in the interest of justice, requires to vacate Petitioner's convictions and sentences. *Jamison*, 410 S.C. at 470, 765 S.E.2d at 130.

II. THE PCR COURT ERRED IN DENYING PETITIONER AN OPPORTUNITY TO HAVE HIS CLAIM OF NEWLY DISCOVERED EVIDENCE ADJUDICATED BY AN INDEPENDENT JUDICIAL OFFICER IN VIOLATION OF THE SEPARATION OF POWERS DOCTRINE BECAUSE THE COURT DID NOT PROVIDE ANY SPECIFIC FINDINGS OF FACT OR CONCLUSIONS OF LAW OTHER THAN DELEGATING THE RESPONSIBILITY TO THE STATE AND ADOPTING THE STATE'S ADVERSARIAL ORDER OF DISMISSAL.

Article I, Section 8 of the South Carolina Constitution provides: "In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." Section 17-27-80 of the South Carolina Code of Laws provides, in relevant part: "The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." *See Marlar v. State*, 375 S.C. 407, 408, 653 S.E.2d 266 (2007) ("Pursuant to S.C. Code Ann. § 17-27-80 . . . , the PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented.").

Discussion

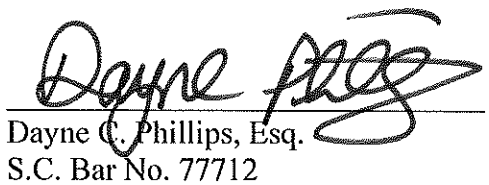
In this case, the PCR Court erred in denying Petitioner an opportunity to have his claim of newly discovered evidence adjudicated by an independent judicial officer in violation of the separation of powers doctrine because the Court did not provide any specific findings of fact or conclusions of law other than delegating the responsibility to the State and adopting the State's adversarial order of dismissal. *See* S.C. Const. Art. I, 8; (App. 587 – 598). The PCR Court adopted the State's adversarial Order of Dismissal that contained purely speculative findings against Martin's credibility despite that were not based on any evidence presented during the evidentiary hearings.

Specifically, the adversarial Order found the testimony from only living victim and eyewitness "incredible", "unbelievable", and "fantastical" despite that this independent judicial function cannot be delegated to an executive agency without providing specific instructions and rationale for providing or omitting findings of fact (assessing the credibility a witness) and/or denying the issue presented (whether evidence constitutes newly discovered evidence). *See generally Marlar v. State*, 375 S.C. at 408, 653 S.E.2d 266. Therefore, the procedure followed by the PCR Court denied Petitioner an opportunity to have his PCR claim adjudicated by an independent judicial officer in violation of the separation of powers doctrine. *See* S.C. Const. Art. I, 8.

CONCLUSION

Based on the foregoing reasons, Petitioner Devon Ford respectfully requests that this Court grant his Petition for Writ of Certiorari. *See* U.S. Const. amends. VI, XIV; S.C. Const. Art. I, §§§ 3, 8, and 14; S.C. Code §§§ 17-27-20(A)(4), 17-27-45(c), and 17-27-80.

Respectfully submitted,



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