

**PETITION FOR A WRIT OF CERTIORARI
IN POST-CONVICTION RELIEF ACTIONS**

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Case No. 2010-CP-10-9745

Norris Earl White,

Petitioner,

v.

State of South Carolina,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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S.C. Supreme Court

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ISSUES PRESENTED

I.

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II.

Whether the Uniform Post-Conviction Procedure Act grants the Petitioner standing to address the claim that Petitioner's conviction was in violation of his constitutional rights to due process as applied through the Fourteenth Amendment?

STATEMENT OF FACTS

Introduction

On November 8, 2009, while dining at the Waffle House located at 2571 Ashley Phosphate Rd., in the City of North Charleston, South Carolina, Petitioner was arrested on the charge of disorderly conduct by North Charleston Police Officer Sierra Shivers. App., 54. The following day, November 9, 2009, Petitioner filed a complaint with the City of North Charleston Police Department against arresting officer Shivers alleging unlawful arrest and excessive force. App., 55-56. On November 10, 2009 a complaint against Officer Shivers was filed by witness Celina Johnson regarding the wrongful arrest of Petitioner. App., 57-59. On November 11, 2009 North Charleston Police Department, Office of Professional Conduct, formally opened a file. App., 61.

On November 24, 2009 Petitioner appeared *pro se* before the local magistrate, Thaddeus Doughty, and entered a plea of not guilty. The court proceeded with a bench trial, while arresting officer, Sierra Shivers, acted as the sole prosecuting witness. Based upon the testimony of Officer Shivers, Judge Doughty found Petitioner guilty. Trial Transcript, North Charleston Magistrate Court (Nov. 24, 2009) (CD). Petitioner received a suspended sentence, five (5) days in jail suspended on his payment of a Four Hundred and Seventy (\$470.00) Dollars. Petitioner asked the trial judge how he could appeal his conviction, and the trial judge told him to use a form from the clerk's office. *Id.* Petitioner asked personnel in the clerk office for an appeal form, and he was informed that he could not appeal his conviction until he paid the fine. Petitioner could not pay the fine. Believing his right to an appeal was barred, Petitioner did not appeal.

North Charleston Police Department (hereinafter referred to as "NCPD"), Office of Professional Standards began investigating Officer Shivers' arrest of Petitioner on November 8,

2009. On November 11, 2009, Corporal T. DiCenzo-Driggers, Office of Professional Standards, formally requested a copy of a surveillance video from Waffle House Corporate Security, the corporate entity responsible for management of surveillance video captured at the above-captioned Waffle House, and the place of Petitioner's arrest. App., 59-60. On November 12, 2009, Corporal DiZenzo-Driggers interviewed two police officers that witnessed Petitioner's arrest. Both Officers offered testimony material to Petitioner's innocence or guilt. App., 63-64. The exculpatory surveillance video evidence was viewed on December 11, 2009 by Corporal T. DiCenzo-Driggers. App., 66, II. Officer DiCenzo-Driggers states that she viewed the video after "going through the proper channels." *Id.* On December 21, 2009 DiCenzo-Driggers, obtained a digital audio copy of the Petitioner's November 23, 2009 trial, and notes in the investigative file that Petitioner's trial resulted in a guilty finding after Petitioner pleaded not guilty. App., 64, III, 1. The last sentence of the next paragraph in the report states "[t]here was no probable cause to detain the complainant." App., 65, II, 1.

NCPD Office of Professional Standards later issued a finding that Officer Shivers' arrest of Petitioner was effected by the following violations: Unlawful Arrest, Conduct Unbecoming, and Excessive Force. App., 62, 67. The date of issuance cannot be determined from the investigative file.

Investigating Officer DeCenzo-Driggers investigative report shows that exculpatory surveillance video evidence and exculpatory witness testimony were known, as this evidence was used to support the Office of Professional Standards "sustained" recommendation related to the three above-stated violations ("In his statement, from the video and from other statements it is clear that MPO Shivers did not have grounds for a lawful arrest. There was no probable cause to detain the complainant.") App. 67, II(1), 2. Officer Shivers would not be disciplined for

Unlawful Arrest and Conduct Unbecoming until February 18, 2010 App., 69-70.

In February 2010 Petitioner consulted attorney Stratos regarding a civil claim against NCPD. On March 23, 2010, Petitioner formally employed Attorney Stratos. On March 29, 2010, and again on June 17, 2010, Attorney for Petitioner made repeated requests to obtain the surveillance video along with all other documents held by NCPD in association to Petitioner's arrest and conviction. App., 72, 73-74. During this time period Attorney for Petitioner also placed several phone calls to Captain Karen Cordray, NCPD, Office of Professional Standards, wherein Attorney was assured that the surveillance video evidence was forthcoming.

On June 23, 2010, Attorney for Petitioner requested Petitioner's November 25, 2010 trial transcript from the City of North Charleston Municipal Court. App., 75. This request was followed up by several telephone conversations with the court's administrative staff. The court later contacted Attorney by telephone and informed Attorney that there was no trial transcript available. An audio transcript was later produced on March 20, 2012, as part of discovery in a related civil case filed against the City of North Charleston, case number 2011-CP-10-8196. App., 45 – 53, Trial Transcript, North Charleston Magistrate Court (Nov. 24, 2009) (CD). This is the same audio transcript obtained by Officer DeCenzo-Driggers on December 21, 2009.

Petitioner was unable to pay his fine under the conditions of his suspended sentence, and on May 27, 2010 a bench warrant was issued. On July 12, 2010, Petitioner was arrested and incarcerated without a hearing and held in the Charleston County Detention Center until he was able to pay the fine on July 19, 2010.

Sometime between June 2010 and October 2010 Attorney for Petitioner obtained a copy of the surveillance video footage in response to a subpoena directed to the Waffle House in connection to Petitioner's civil suit. On October 22, 2010, within one year of Petitioner's

conviction, and within one year of discovering new evidence, namely the surveillance video, Petitioner filed with North Charleston Municipal Court a Rule 29 Motion for a new trial based on newly discovered evidence. App. 42-44. Petitioner alleged to have discovered new and dispositive evidence, which was unknown to Petitioner before, during or immediately after Petitioner's bench trial, and which would clearly show that Officer Shiver's testimony in Petitioner's trial was inaccurate, and prove Petitioner's innocence. The Rule 29 Motion filed with North Charleston Municipal Court was scheduled for a hearing dated May 18, 2011. App., 41. However, Attorney for Petitioner was scheduled to be out of town on vacation, and on May 6, 2011 Attorney for Petitioner forwarded notice to the court of a scheduling conflict, requested a continuance, and requested notice of the rescheduled hearing date. App., 77-78. The North Charleston Municipal Court clerk's office claims not to have received the request to continue the hearing, and the Motion was summarily dismissed on May 18, 2011 without any further notice or correspondence from the trial court. The dismissal of the Rule 29 Motion for a new trial was not appealed. Successive attempts to reopen the matter were unsuccessful. App. 79-82.

Application for Post-Conviction Relief

On November 24, 2010, Petitioner filed a post-conviction relief application of his uncounseled criminal conviction. App., 1-9. Petitioner alleged that NCPD Officer Sierra Shivers, acting as both the arresting officer and the prosecuting witness, misrepresented facts material to the finding of guilt to the trial court, averred that said testimony was tantamount to fraud, and that the fraud perpetrated by Officer Shivers was a "substantial violation of the Defendant's constitutional rights." App. 1, 1-7 (White v. State, 2010-CP-10-9745 (Form 5, S.C. Court of Common Pleas, Charleston County, filed November 24, 2010)). Petitioner alleged that evidence discovered after the date of his trial, which led to the discovery of evidence that

arresting Officer Shiver gave perjured testimony of material facts to obtain conviction, warranted a reversal of the finding of guilt. In addition, Petitioner asserted that waiver of appeal was unknowing and involuntary. Lastly, Petitioner alleged that his fundamental rights and privileges arising under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and Article I, § 3 of the South Carolina Constitution were violated, and that these violations warranted a reversal of his conviction. Id.

The first PCR hearing was held on September 16, 2011, and the circuit court continued the matter with instruction to file supportive briefs. App., 41. The court further directed North Charleston Municipal Court to reschedule the Motion to Reopen, however, following two requests by Attorney to schedule the same the lower court refused to reopen the matter. App., 79-82. Following submission of supportive briefs and a hearing on July 3, 2012, Petitioner's PCR action Application was dismissed. App., 30, 37-40. A notice of appeal was served on August 1, 2012.

ARGUMENT

I. The lower court erred in dismissing Petitioner's application for PCR on the grounds that Petitioner failed to directly appeal his conviction and thus failed to articulate a cognizable claim for relief under the uniform post-conviction procedure act where direct appeal is not a prerequisite for the filing of a PCR action, petitioner's application was timely filed and alleged the discovery of new evidence dispositive of petitioner's innocence, and the newly discovered evidence supports a finding that Petitioner's conviction was procured by fraud and false testimony of a prosecuting police officer.

In South Carolina, the PCR Act was "designed to incorporate all rights available under federal habeas corpus," thereby replacing "all other common law, statutory or other remedies." S.C. Code Ann. § 17-27-20(b). Claims raised on PCR must be cognizable under the Post-Conviction Relief Act and the Act recognizes almost any abridgment of a state created right. Specifically, the statute permits the following six categories of claims:

(1) the conviction or sentence was in violation of the Constitution of the United

States, the South Carolina constitution, or South Carolina state law;

(2) the court was without jurisdiction to impose the sentence;

(3) the sentence exceeds the maximum authorized by law;

(4) *there is evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;*

(5) the sentence has expired; probation, parole or conditional release has been unlawfully revoked; or that the applicant is otherwise unlawfully held in custody or other restraint; and

(6) the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error previously available under any common law, statutory or other writ, motion, petition, proceeding or remedy.

S.C. Code Ann. § 17-27-20(a)(1)-(6)(emphasis added).

Petitioner contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, or a new trial, and that S.C. Code Ann. § 17-27-10(4) grants jurisdiction to the Court to review the conviction or sentence in the interest of justice.

A. *Direct appeal is not a prerequisite for the filing of a PCR action where new and material evidence was discovered after time for direct appeal had lapsed.*

Petitioner's PCR application was dismissed because "the allegations raised in the Applicant's PCR application were not directly appealed." App. 40. Petitioner contends that newly discovered evidence could not have been raised as grounds for appeal to the extent the evidence was not and could not have been discovered. Additionally, Petitioner asserts that a direct appeal is not a prerequisite for PCR.

The PCR Act does not contain express language limiting standing to those who have appealed a conviction. The Act confers standing to "any person who has been convicted of, or sentenced for, a crime..." Id. The Act does not expressly require the applicant receive a sentence of imprisonment before bringing a PCR action. Under the Act, any convicted persons or those

sentenced for the commission of a crime may institute a PCR proceeding. S.C. Code Ann. § 17-27-20(a). One has standing to apply for PCR if in custody, or the “results of his prior conviction still persist.” Jackson v. State, 489 S.E.2d 915, 331 S.C. 486 (1997); Jones v. State, 322 S.C. 101, 102, 470 S.E.2d 110, 110 (1996); McDuffie v. State, 276 S.C. 229, 277 S.E.2d 595 (1981).

In 1991, the petitioner in Jackson was convicted by a magistrate for possession of marijuana. He did not appeal his case and he was not incarcerated as a result of the sentence imposed by the trial court. Nonetheless, the S.C. Supreme Court held that Jackson was entitled to proceed with his PCR application, which alleged a violation of constitutional rights, if the lower court determined that he was suffering continuing consequences as a result of his alleged invalid conviction, including where the sentence is already fully served. Jackson, 489 S.E.2d 915, 331 S.C. 486 (1997).

In the present matter, Petitioner continues to suffer from continuing consequences in that he has incurred and will continue to realize real employment opportunity consequences, as well as negative social and emotional consequences attached to his guilty finding. As in Jackson where the petitioner was granted PCR review despite failing to directly appeal his conviction, here Petitioner did not directly appeal his conviction and is continuing to suffer the adverse consequences of this conviction.

South Carolina Supreme Court precedence further supports the contention that direct appeal is not a prerequisite for PCR standing. See, Prince v. State, 301 S.C. 422, 392 S.E.2d 462 (1990); Watts, 347 S.C. 399 (2001); Gardner, 570 S.E.2d 184 (S.C. 2002). In Prince, Watts and Gardner the South Carolina Supreme Court granted certiorari to determine whether the petitioners knowingly and intelligently waived their right to counsel. In all three cases the Court reversed the PCR court’s order of dismissal and remanded for a new trial, and in all three cases

the petitioners did not appeal the trial court but instead elected to file a PCR action, as is the case here.

Respondent cites the Court's ruling in Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975) as persuasive. ("...relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been review on direct appeal, citing Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993)). Based on the court's ruling in Simmons, Respondent contends Petitioner is precluded from PCR because Petitioner did not directly appeal to the trial court. Respondent's reliance on Simmons is misplaced insofar as Simmons was appealing a life sentence as cruel and unusual, claiming trial error, and insufficiency of evidence. Specifically, appellant alleged the following four errors:

- I. Whether the penalty of life imprisonment for conduct causing death by the reckless operation of a motor vehicle, as applied to Appellant, is 'cruel and unusual' punishment in violation of Article I, Section 19 of the South Carolina Constitution and the Eighth Amendment to the United States Constitution...
- II. Whether the Trial Judge's rebuke of trial counsel constituted prejudicial error?
- III. Whether it was prejudicial error for the Trial Judge to permit comment by the solicitor on Appellant's failure to call his wife as a witness when she was unavailable?
- IV. Whether Appellant was deprived of his constitutional rights under the due process clause of the United States Constitution by reason of the insufficiency of the evidence to support the conviction for murder?

Id. As illustrated above, the issues in Simmons were evidentiary trial court rulings under an abuse of discretion standard; rulings on evidence that were not objected to at trial and were not raised on appeal. Id.

Contrary to Simmons, here Petitioner's Application is not based in trial error, but rather newly discovered evidence of material facts not previously presented and heard that requires

vacation of the conviction or sentence. S.C. Code § 17-27-45(C). Petitioner's claim is based upon the discovery of material evidence that could not have been discovered prior to the lapse of Petitioner's right to appeal. Petitioner filed the PCR Application within one year after the date of actual discovery of the facts, or one year after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code 17-27-45. Therefore, contrary to the State's argument, Petitioner's PCR Application should not be barred by failure to appeal where Petitioner's Application is based on newly discovered exculpatory evidence; evidence which patently proves Petitioner's innocence, and which shows blatant violations of Petitioner's due process rights.

The lower court erred in the dismissal of Petitioner's PCR application where the South Carolina Supreme Court has consistently allowed for PCR reviews despite the lack of direct appeals of convictions demonstrating that direct appeals are not a prerequisite to PCR review.

B. Petitioner's application was timely filed and alleges the discovery of new evidence dispositive of Petitioner's innocence, and the discovery of this new evidence supports a finding that petitioner's conviction was procured by fraud and false testimony of a prosecuting police officer; and, therefore requires vacation of his conviction in the interest of justice:

Petitioner contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, or a new trial, and that S.C. Code Ann. § 17-27-10(4) grants jurisdiction to the Court to review the conviction or sentence in the interest of justice. Under the Uniform Post-Conviction Act, a PCR action is permitted where, "there is evidence of material facts, not previously presented and heard that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(a)(4).

Petitioner successively discovered evidence before and after filing for PCR material to a finding of guilt after Petitioner's right of appeal had lapsed. Petitioner proceeded with PCR after a motion for a new trial was summarily dismissed. The newly discovered evidence is comprised

of a video surveillance recording which was known to the NCPD, observed by the City of North Charleston on December 11, 2009, and concealed by the City despite repeated Brady requests for production from Petitioner's attorney. The evidence includes two witness statements material to Petitioner's charge, and the statements were obtained by the Office of Professional Standards on November 11, 2009, prior to Petitioner's conviction. Furthermore, the evidence consists of an investigatory report produced by the Office of Professional Standards which concludes that Petitioner's arrest was without probable cause, that the arrest was unlawful, and that the arresting officer used excessive force.

Respondent argues that Appellant "has not shown that the alleged evidence meets all the requirements for after-discovered evidence," as outlined in Hayden v. State. App., 11-12, Hayden v. State, 278 S.C. 610 (1983). Respondent's argument is unfounded. The standard test governing newly discovered evidence is properly applied when relief is sought based on evidence discovered post-trial that is material to the accused's guilt or innocence. State v. South, 310 S.C. 504 (1993).

Respondent outlines Hayden's five prong test to determine whether a new trial is warranted based on newly discovered evidence, but Respondent fails to show how Petitioner has failed meet the test. Under Hayden, an applicant seeking a new trial based on the discovery of new evidence must show that:

- (1) the newly discovered evidence would probably change the result if a new trial was allowed;
- (2) the evidence has been discovered since the original trial;
- (3) the evidence could not have been discovered before the original trial by the exercise of due diligence;
- (4) the evidence is material to the issue of applicant's guilt or innocence; and

(5) the evidence is not merely cumulative or impeaching.

See, Hayden, 278 S.C. at 611-12.

Applying Hayden herein, Petitioner asserts that the newly discovered video evidence and investigative report would (1) change the result if a new trial was allowed insofar as the evidence clearly proves that Petitioner's arrest was without probable cause, that Petitioner's conviction was based on false prosecutorial testimony, and that the City of North Charleston actively concealed exculpatory evidence prior to and after Petitioner's trial. (2), (3) Petitioner asserts that the evidence could not have been discovered after due diligence, that Petitioner did exercise due diligence in attempting to uncover exculpatory evidence, but that those efforts were obstructed by intentional state concealment, action or inaction with a duty to act. The release of the audio transcript of the trial and exculpatory evidence were not revealed until years after the original trial despite numerous attempts on the Petitioner's behalf to have such information produced. It was not until April of 2012, after filing a FOIA request, civil suit was instituted and a motion to compel was filed, that the gravity of state misconduct was discovered. (4) The video recording of the arrest, the trial transcript, and the internal investigative report are patently material to question of innocence or guilt in that the charge was that of disorderly conduct and the evidence proves Petitioner's innocence. Finally, (5) the newly discovered evidence is not cumulative since the evidence which Petitioner relies upon was concealed from Petitioner until well after the trial and after the time for an appeal had run. Under S.C. Code Ann. § 17-27-20(a)(4) "any person who has been convicted of 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" can seek post-conviction relief. Here, the video recording of the incident is material to the case, it was not released to Petitioner when originally sought, and

therefore it was never presented or considered at trial.

Furthermore, the discovery of this new evidence supports Petitioner's contention that his conviction was procured by fraud and false testimony of the prosecuting officer. Under the Act, a review is warranted where the newly discovered evidence "requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-10(4). Petitioner asserts that his conviction was based on prosecutorial misconduct and the presentation of false evidence that denied Petitioner his constitutional right to due process. The discovery of this new evidence, along with the NCPD's own internal investigation and conclusion that the arresting officer lacked probable cause, used excessive force, and unlawfully arrested Petitioner, strongly supports the contention that vacation of Petitioner's conviction should be granted in the interest of justice. "The failure to correct false evidence is as reprehensible as its presentation." Washington v. State, 324 S.C. 232, 478 S.E.2d 833 (1996).

Where Petitioner timely filed a PCR application based on newly discovered evidence that is material to his innocence or guilt, said material could not be discovered previously despite due diligence to obtain the same, the evidence is not cumulative, and where the evidence supports that the conviction should be vacated in the interest of justice, Petitioner is entitled to a PCR review and the lower court erred in its dismissal of such an action.

II. The Uniform Post-Conviction Procedure Act grants the Petitioner standing to address the claim that Petitioner's conviction was in violation of his constitutional rights to due process as applied through the Fourteenth Amendment where: (1) the state intentionally failed to disclose exculpatory evidence obtained prior to and after Petitioner's conviction; (2) Petitioner did not knowingly waive his right to counsel; and (3) Petitioner did not knowingly and voluntarily waive direct appeal.

In a PCR proceeding, a defendant collaterally attacks his conviction and may raise any claims of constitutional violations relating to his conviction. S.C. Code Ann. § 17-27-20(a) (2007). Here, Petitioner does not assert the routine issue of whether trial counsel was ineffective,

but instead whether prosecutorial misconduct, the presentation of false evidence and State misconduct denied Petitioner his constitutional right to due process.

Petitioner's Due Process rights, guaranteed by the Fourteenth Amendment of the United States Constitution, were violated when (1) the State intentionally failed to disclose exculpatory evidence obtained prior to and after Petitioner's conviction; (2) Petitioner did not knowingly waive his right to counsel; and (3) Petitioner did not knowingly and voluntarily waive direct appeal. For these reasons, Petitioner is permitted to bring an action under the Uniform Post-Conviction Act, which allows for relief where, "the conviction or sentence was in violation of the Constitution of the United States, the South Carolina constitution, or South Carolina state law." S.C. Code Ann. § 17-27-20(a)(1).

A. *The State intentionally failed to disclose exculpatory evidence obtained prior to and after Petitioner's conviction despite numerous requests for disclosure under Brady and Rule 5.*

Petitioner's PCR Application posits facts based on after discovered evidence showing violations of Brady and Rule 5. Rule 5 is a judicially created discovery mechanism for use in criminal proceedings. State v. Proctor, 348 S.C. 322, 559 S.E.2d 318, 322 (Ct. App. 2001), rev'd on other grounds. "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." State v. Von Dohlen, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996).

A Brady violation is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment." Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320,

324 (1999). "This rule applies to impeachment evidence as well as exculpatory evidence." *Id.* This rule applies regardless of how a state has chosen to structure its discovery process. Brady v. Maryland, 373 U.S. 83 (1963).

Due process requires disclosure of any evidence that provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation, to impeach the credibility of the state's witnesses, or to bolster the defense case against prosecutorial attacks. Kyles v. Whitley, 514 U.S. 419 (1995).

Brady material is not limited to things that are within the actual knowledge or possession of a prosecutor. Anything actually known to or in the possession of the police, anything actually known to or in the possession of anyone else acting on behalf of the State is subject to the Brady requirement. Brady, 373 U.S. 83 (1963). Evidence considered favorable to the defendant includes both exculpatory and impeachment evidence and extends to evidence that is not in the actual possession of the prosecution, but also to evidence known by others acting on the government's behalf, including the police. Kennerly, 331 S.C. at 452-53, 503 S.E.2d at 220. Moreover, "[e]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); Kyles v. Whitley, 514 U.S. 419, 433-34, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); Riddle, 369 S.C. at 45, 631 S.E.2d at 73 ("The question is not whether petitioner would more likely have been acquitted had this evidence been disclosed, but whether, without this impeachment evidence, he received a fair trial 'resulting in a verdict worthy of confidence.") Reversal of a conviction is required only if the undisclosed evidence is material and the omission deprived the defendant of a fair trial. State

v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996); State v. Freeman, 319 S.C. 110, 459 S.E.2d 867 (Ct. App. 1995).

As applied to PCR, South Carolina courts have consistently held that state misconduct and the presentation of false evidence are cognizable claims arising under the Act. Applying Brady v. Maryland, the court in Riddle v. Ozmint ruled in favor of the petitioner holding that solicitor's office violated Brady when it suppressed witness evidence, and that it violated petitioner's due process rights when it failed to correct misstatement made by witness while testifying against petitioner. Riddle v. Ozmint, 639 S.C. 39 (2006).

Under the given facts, the State (NCPD and Agents thereof) had a duty to disclose the evidence on which Petitioner now relies. Relevant evidence that was not disclosed is comprised of exculpatory eye witness accounts taken by the NCPD, which were collected and known to the NCPD prior to Petitioner's original trial; a surveillance video; and, evidence of material testimonial fraud in prosecuting Petitioner. This evidence was recovered by Petitioner's attorney in June 2011, March 2012, and April 2012, pursuant to a subpoena served on Waffle House, the filing of a Freedom of Information Request with NCPD, and a contemporaneous motion to compel, filed on March 1, 2012 in Petitioner's civil suit. Evidence that the arresting officer lacked probable cause and committed a fraud upon the court is favorable to the accused and clearly material. The evidence was known to the State prior to and after the Petitioner's trial, and the evidence could not have been discovered by Petitioner prior to or directly after his trial or within the time period for an appeal with reasonable due diligence. The evidence was concealed and suppressed despite repeated Brady requests by Petitioner's Attorney, and this failure resulted in a violation of Petitioner's due process rights. Petitioner contends these violations are grounds for the relief requested.

In opposition, Respondent relies on two arguments, both of which are supported by indirect and unrelated assertions of law. App., 10-14. First, quoting Simmons v. State, 264 v. 417 (1975), Respondent contends that errors which can be reviewed on direct appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings. This rule of law was dispositive in Simmons v. State to the extent that Simmons alleged prejudicial error effected by evidentiary or trial court rulings. Here, however, Petitioner's PCR Application is based upon newly discovered evidence, not trial rulings or rulings on issues that arose at trial.

A broader reading of Simmons supports Petition's contention. "Generally, post-conviction hearing statutes do not afford relief in the case of alleged errors for which remedies were available before and during the original trial, or by review on motion for a new trial or on appeal." Id. A PCR Applicant may allege constitutional violations in a post-conviction proceeding but only if the issue could not have been raised by direct appeal. Gibson v. State, 329 37 (1998)(citing S.C. code 17-27-20(a)(1), (b); Simmons v. State, 264 S.C. 417 (1975). Here, however, Petitioner's application is not based on trial error, but new evidence material to his conviction, which demonstrates gross violations of due process. Moreover, the evidence that supports this assertion was not known to Petitioner and could not have been known to Petitioner, as it was concealed by the state. For the foregoing reasons Petitioner contends that a fuller reading of the court's opinion in Simmons supports Petitioner's PCR standing.

- B. Petitioner was denied his constitutional right to knowingly waive counsel at his trial when the trial judge failed to assess, question or direct Petitioner regarding his right to counsel, the disadvantages of pro se representation, and where the record fails to present facts that might otherwise indicate Petitioner's waiver was knowing.

Petitioner also seeks review his PCR dismissal on the bases that Petitioner did not knowingly and voluntarily waive his right to counsel at trial. Faretta v. California, 422 U.S. 806 (1975).

PCR is appropriate in this case where Petitioner was not represented by counsel during his trial and the trial judge failed to adequately warn him of the dangers of adequate representation. Gardner v. State, 570 S.E.2d 184 (S.C. 2002). On this basis, failure to directly appeal the lower court conviction is not a bar to PCR relief. Prince v. State, 301 S.C. 422, 392 S.E.2d 462 (1990). To waive the right to counsel, the accused must be: (1) advised of his right to counsel and (2) adequately warned of the dangers of self-representation. Prince, 301 S.C. 422, (1990), (Faretta v. California, 422 U.S. 806 (1975)). The trial judge must determine whether there is a knowing and intelligent waiver by the defendant. State v. Dixon, 236 S.E.2d 419 (S.C. 1977) (Johnson v. Zerbst, 304 U.S. 458 (1938)). If the trial judge fails to address the disadvantages of appearing pro se, as required by the second prong of Faretta, "this Court will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source." Prince, 392 S.E.2d 462; Wroten v. State, 391 S.E.2d 575 (1990)).

"In a PCR action, if the record fails to demonstrate the petitioner made an informed choice to proceed pro se, with eyes open, then the petitioner did not make a knowing and voluntary waiver of counsel, and the case should be remanded for a new trial." Watts v. State, 347 S.C. 399 (2001); Bridwell v. State, 306 S.C. 518, 413 S.E.2d 30 (1992).

This issue is properly before the Court as it was raised in Petitioner's May 24, 2012 PCR hearing and addressed by the PCR court. App. 18-19. The record supports Petitioner's assertion that he was not warned of the dangers inherent in self-representation. The audio transcript of the

trial, which was not made available to Petitioner, indicates that prior to commencement of Petitioner's trial, or at the beginning of the sessions, the trial judge did appraise all parties present in the court of their right to attorney. App. Trial Transcript, North Charleston Magistrate Court (Nov. 24, 2009) (CD). Petitioner was not, however, advised of the disadvantages of pro se representation, nor informed directly during his trial of his right to an attorney or the availability of a public defender. In fact, Petitioner was never questioned regarding his pro se status, or questioned if he was represented by counsel. At Petitioner's trial, the trial judge began with the following:

Q: Norris White?

Q: Mr. White how do you plead, disorderly conduct?

A: Not guilty.

Q: Alright, are you ready to go forward?

A: Yes sir.

Q: Please raise your right hand. Do you swear to testify truthfully?

A: Yes sir.

Id. Following Petitioner's last answer above Officer Shivers began testifying. No other mention was made regarding Petitioner's pro se status. The record does not present facts which demonstrate the Petitioner's decision to appear pro se was voluntary, and Petitioner lacks sufficient background to allow the inference that Petitioner was acting with eyes open.

C. Petitioner is entitled to PCR because he was denied the constitutional right to knowingly and intelligently waive the right to appeal, where the trial judge inadequately informed Petitioner of this right and the clerk's office denied petitioner's request for appeal forms, and informed petitioner that he must pay a fine prior to filing an appeal.

“A defendant has the procedural right to one fair bite at the apple.” Davis, 288 S.C. 290, 352 S.E.2d 60 (1986). Petitioner asserts he is entitled to a review on the grounds that he did not knowingly and voluntarily waive his right to an appeal. White v. State, 263 S.C. 110 (1974). To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal. Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986). Petitioner asserts that the PCR court erred in dismissing his PCR based on his failure to appeal. Relying on Davis v. State, 288 SC 290 (1986), Petitioner asserts he did not knowingly waive his right to appeal.

This issue is properly before the court as it was raised in the PRC Application in accordance with Rule 50, §9(d). App., 4; Davis, 288 SC 290 (1986). Petitioner contends that all claims for relief specifically raised are properly before the court to the extent Petitioner did not knowingly and intelligently waive his right to appeal the trial court. The Petitioner did not include a transcript of the trial in accordance with Rule 50, because the trial court claims not to have a transcript. Petitioner concedes the Respondent’s did not address this issue in the Return; however, this failure would appear to be a tactical decision, as Respondent did not directly address nor rebut any substantive issues tending to support PCR.

The facts that give rise to Petitioner’s unknowing waiver of appeal arose during and following the original trial. At the close of Petitioner’s trial he inquired of the trial judge as to the correct process of effecting an appeal. The question and response is as follows:

Q: And, what is the process for me to appeal this?

A: You can fill out the form, uhm, stop by the clerk’s office and they will give you the form.

Upon the close of trial, Petitioner went directly to the clerk’s office in an effort to obtain the aforementioned appeal form. He specifically asked the clerk for an appeal form, and he was told

that the form was unavailable until and unless Petitioner paid his fine. Petitioner was unable to pay his fine, and relying on the clerk's statements, Petitioner did not appeal. Based on these facts, Petitioner contends he is entitled to PCR review.

CONCLUSION

This action involves the following matters of significance: (1) The PCR court erred in dismissing PCR where Petitioner's application is based upon the discovery of new evidence, involuntarily waiver of appeal, and involuntarily waiver of counsel. (2) Violations of Brady and Rule 5 occurred prior to and following Petitioner's trial, where the state failed to disclose and/or actively concealed exculpatory evidence and evidence of fraudulent prosecution. (3) The PCR court erred in dismissing PCR where Petitioner's application was based upon violations of due process. This record showing a wrongful conviction should not stand in South Carolina, and, Petitioner Norris White respectfully requests that this Court grant his petition for writ of certiorari to allow full briefing of the above six issues.

Respectfully Submitted,



Milton D. Stratos
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1041 Johnnie Dodds Blvd, STE 14A
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ATTORNEY FOR PETITIONER

This 27th Day of August, 2013

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing **Writ of Certiorari** and **Appendix**, and **Motion to File Out of Time** has been served upon the following parties by delivery or by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below this


27 day of August 2013.

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Columbia, SC 29211

Ashleigh R. Wilson
Assistant Attorney General
Post Office Box 11549
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Attorney for Respondent

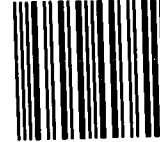
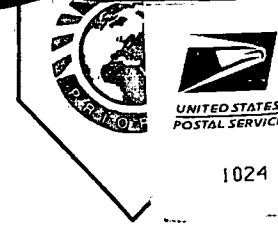
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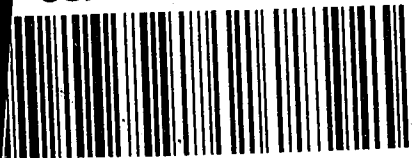
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