PETITION FOR A WRIT OF CERTIORARI
FROM DENIAL OF POST-CONVICTION RELIEF

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2010-CP-46-0436

Berry Scott Bolin, Petitioner,

v.

State of South Carolina, Respondent.

2014-000281

PETITION FOR A WRIT OF CERTIORARI

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INDEX

QUESTIONS PRESENTED FOR REVIEW

I. THE PCR COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO CALL A POTENTIAL EXCULPATORY WITNESS AFTER DECIDING TO PUT UP A DEFENSE CASE IN CHIEF, THEREBY LOSING LAST CLOSING

II. THE PCR COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO SUBPOENA OR OTHERWISE OBTAIN VIDEOTAPE SURVEILLANCE FROM AMERICAN AUTO SALES, WHERE THE ALLEGED VICTIMS STOPPED THEIR VEHICLE ON THE WAY TO THE POLICE STATION WHEN IT WAS THE DEFENSE'S THEORY AT TRIAL THAT THE PURPOSE OF THE STOP WAS TO DISCARD WEAPONS

III. THE PCR COURT ERRED IN DENYING PETITIONER'S REQUEST TO CONDUCT AN IN-CAMERA REVIEW OF MATERIALS WITHHELD BY THE STATE UNDER A PURPORTED ATTORNEY WORK-PRODUCT PRIVILEGE WHEN THE MATERIALS WERE NOTES FROM WITNESS INTERVIEWS CONDUCTED BY THE DEPUTY SOLICITOR

IV. THE PCR COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ASCERTAIN THAT THE "CASTLE DOCTRINE" STATUTE DID NOT APPLY TO THE CASE. THIS DEFICIENT REPRESENTATION LED TO PETITIONER REJECTING A 15 YEAR PLEA OFFER IN FAVOR OF RELYING ON THE ACT THAT WAS CLEARLY NOT APPLICABLE

V. THE PCR COURT ERRED IN DENYING PETITIONER LEAVE TO AMEND HIS POST-CONVICTION RELIEF APPLICATION AFTER THE EVIDENTIARY HEARING IN ORDER TO CONFORM THE PLEADINGS TO THE EVIDENCE ADDUCED, WHICH

   a. SHOWED THAT THE STATE HAD ELICITED FALSE TESTIMONY FROM HOLLY MCCARTER BECAUSE SHE DID NOT SWITCH SEATS AS SHE TESTIFIED IN THE STATE'S CASE IN CHIEF

   b. SHOWED THAT TRIAL COUNSEL WAS INEFFECTIVE IN THAT HE FAILED TO EVEN MENTION THE POLICE STATION VIDEO PROVING MCCARTER LIED

VI. TRIAL COUNSEL WAS DEFICIENT IN FAILING TO REQUEST A NEW JURY FOLLOWING PETITIONER'S CO-DEFENDANT PLEADING GUILTY AFTER BEING INTRODUCED TO THE JURY.

TRIAL COUNSEL FAILED TO REQUEST A NEW JURY OR A CURATIVE INSTRUCTION FROM THE COURT EXPLAINING THE NON-TESTIFYING CO-DEFENDANT'S ABSENCE

STATEMENT OF THE CASE

On the night of February 18th, 2006, Petitioner, Berry Bolin, and several other individuals were guests in the home of Bradley Deal. Travis Falls, Holly McCarter, Bobby Hovis, and two others decided to drive to Deal's home to attack Deal, his brother, and various other parties present at Deal's home. Falls, who was recently arrested for assaulting Bradley Deal, was under a bond provision forbidding any contact with Deal or his home. Despite the bond provision, he and four others drove to Deal's home, pulling up on the roadside just past the front of the driveway. Several antagonistic phone messages were exchanged by the groups prior to Falls and company arriving at the Deal house. Upon their arrival, people began to rush outside of Deal's home, including the Petitioner, Berry Bolin. Falls and the others exited the car and several altercations ensued.

As the Petitioner exited the home, he heard someone yell to get a gun. He proceeded to his truck parked in the front of Deal's home and retrieved a pistol from the glove compartment. Petitioner testified heard gunfire near the car and to his side. Falls and the others ran back to the car and got inside. As they entered the vehicle, Petitioner heard more shots being fired near the car. Petitioner and another individual who was standing beside him fired several shots at the vehicle. A bullet of the same caliber as the Petitioner's pistol shattered the rear window, passed through Falls' wrist and hit Hovis in the head. The car proceeded away from the scene and headed to the Clover Police Department, stopping along the way at a business called

American Auto Sales. The reason for this stop became a major issue in the case, with the Defense arguing that its purpose was to dispose of weapons while the State's theory was that Holly McCarter became too hysterical to drive when she discovered that Hovis was dead. An ambulance was dispatched and Falls and Hovis were taken to the hospital. Hovis was pronounced dead at the hospital. Falls received treatment and was released.

Petitioner was indicted in May 2006 by the York County Grand Jury for murder (2006-GS-46-1595), assault and battery with intent to kill (ABIK) (2006-GS-46-1596); possession of a firearm during commission of a violent crime (2006-GS-46-1597); two charges of assault with intent to kill (AIK) (2006-GS-46-1598 & -1599), discharging a firearm into an occupied vehicle (2006-GS-46-1600), and possession of a pistol under the age of 21. App. 355.

In August 2006, Mr. Bolin went to trial in the Circuit Court in York County before The Honorable John Hayes, Circuit Court Judge, and was represented by Leland B. Greeley, Esquire. Also present at the outset of his trial was his co-defendant, Ronald Lee Owens, who was represented by Thomas A McKinney, Esquire. Although Mr. Owens had admitted to contemporaneously firing his own pistol into the same car as Mr. Bolin, Mr. Owens was never charged with murder under "the hand of one is the hand of all" theory of accomplice liability. Instead, Mr. Owens was only charged with discharging a firearm into a vehicle and several counts of assault with intent to kill (AIK).

After a jury was selected and introduced to the defendants, but before the jury was sworn, the trial court dismissed the jury for the day and took up pre-trial

motions. Mr. Bolin and Mr. Owens both filed motions to dismiss the charges on the basis that they had immunity afforded by the Protection of Persons and Property Act, S.C. Code of Laws 16-11-410 et. Seq. (effective June 9, 2006). See App. Vol 4 p. 1813 et seq. The State opposed the motions, arguing that the Act was prospective in nature, and, therefore, would not apply to this case because the incident in question preceded the effective date of the Act. The State further argued that, even if the Act were applicable to this case, the defendants were not entitled to a dismissal based on the facts of the case. Judge Hayes ruled that the issue of self-defense was one for a jury, and therefore declined to rule upon the motions. App. Vol 2 p. 817.

Mr. Bolin also filed a pre-trial motion to quash the indictment against him for possession of a pistol by a person less than 21 years of age on the basis that it was unconstitutional under the South Carolina Constitution. This motion was granted by the trial Court, and the Court's order was ultimately upheld on the State's appeal to the Supreme Court of South Carolina. See *State v. Bolin 378 S.C. 96 (2008)*. App. P. 46.

At the start of court on the first morning after jury selection, Mr. Ronald Lee Owens entered a negotiated no-contest plea to his charges and received a sentence of 10 years, suspended on service of 5 years and 5 years probation.

After Mr. Owens pled no contest and was sentenced the trial against Mr. Bolin proceeded with the same jury. At the close of the State's case, Mr. Bolin moved for a directed verdict, again attempting to apply the Protection of Persons and Property Act, and that motion was denied. After putting up one defense witness, Mr. Bolin requested that the statutory presumptions contained in the Protection of

Persons and Property Act be charged to the jury, and the motion was denied. The jury returned guilty verdicts against Mr. Bolin on lesser-included offenses. On the murder charge Mr. Bolin was convicted of the lesser-included offense of voluntary manslaughter, and he received a 30-year sentence. Mr. Bolin was also convicted of the lesser included on all but one of his other charges – possession of a weapon during the commission of a violent crime, on which he was acquitted – and all sentences were ordered to run concurrently. App. Vol. 4 P. 1806.

Mr. Bolin was represented by Mr. Greeley on the direct appeal of his case, which was affirmed by the South Carolina South Carolina Court of Appeals. See *State v. Bolin, 381 S.C. 557 (2009)*. App. P. 51. Petitioner then brought this action *pro se* seeking post-conviction relief on February 1, 2010 alleging only ineffective assistance of counsel. App P. 58. The State filed its return on June 30, 2010. Counsel was retained and a First Amended PCR application was filed on or about December 29, 2011. App. P. 64. Petitioner filed a Motion for Leave to Conduct Limited Discovery on February 16, 2012, which was denied following a hearing before The Hon. Lee S. Alford, Circuit Court Judge. App. P. 301; 374. The materials sought in the Discovery motion were part of the subpoena issued to Deputy Solicitor Willy Thompson for his appearance at the PCR hearing on October 11, 2012. At the hearing, Mr. Thompson produced a privilege log. App. P. 311. After reviewing the privilege log following the hearing, Petitioner's request for documents to be reviewed by the Court was reduced to 3 boxes that the State said were work-product privileged witness interview notes. App. P. 314. The Court ultimately denied Petitioner's access to these records.

Following the evidentiary hearing, Petitioner filed a Second Amended PCR Application in order to add claims of prosecutorial misconduct and ineffective assistance of counsel related to Holly McCarter's trial testimony. App. P. 324. The State opposed this and the Court ultimately denied Petitioner's motion to file the Second Amended PCR application. The PCR Court issued its dismissal of Petitioner's PCR case on December 27, 2013. App. P. 8. Petitioner filed a Rule 59(e) motion to alter or amend the judgment of the PCR court, which was denied on February 6, 2014. App. P. 1.

The circuit court denied the application on January 7, 2014, and a notice of appeal was served on February 20, 2014. Petitioner new seeks a writ of certiorari to review this denial.

ARGUMENT

I. THE PCR COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO CALL A POTENTIAL EXCULPATORY WITNESS AFTER DECIDING TO PUT UP A DEFENSE CASE IN CHIEF, THEREBY LOSING LAST CLOSING

Petitioner's First Amended Application for Post Conviction Relief had claims for failing to call two witness – Samantha Eason and Eric Brown. Ms. Eason failed to show at the hearing, and the claim based on her testimony was denied by the PCR court. App. P. 20. Petitioner is not appealing the PCR court's determination based on trial counsel's failure to call Ms. Eason as a witness.

At the PCR evidentiary hearing, Petitioner called Eric Brown as a witness. App. P. 462. Mr. Brown was at the party and testified that he saw gunfire coming from one of two cars that he saw come to the party before the fight started (some of the people at the party recounted seeing two cars and some only one car). Mr. Brown

testified that he was interviewed by detectives for the police and the solicitor's office – stating that Deputy Solicitor Willy Thompson may have interviewed him – as well as by a detective working for Petitioner's trial counsel. Mr. Brown testified that, had he been called as a witness, he would have testified that he "saw gunfire coming from a car before anybody started shooting from the house." Trial counsel explained that he hadn't called Mr. Brown to testify for "a couple of reasons." The reasons, in essence, were that it wouldn't make sense to put up cumulative evidence from a "yahoo gathering." Second, that Mr. Brown's testimony would have been that gunfire was coming from a different car than the one that Petitioner fired into. App. Vol. 2 P. 501 *et seq.* The person who was supposedly driving the second car, Jeff Buck, died about a month and a half after the altercation from a drug overdose, so trial counsel felt that to put up Mr. Brown would not have been credible as the two car theory lacked evidentiary support. Id.

On the first point, trial counsel was mistaken because Mr. Brown's testimony was not cumulative. As Deputy Solicitor Thompson would ultimately admit, the only other person who would ultimately testify at trial to seeing any gunfire coming from one of the vehicles was Bradley Deal. App. P.. One other witness, Robert Beverly, had previously testified that he saw gunfire, but he later recanted that at trial. App. P. 599. Line 2. See also App. P. 600 line 13; see also App. P. 1372 lines 17 *et seq.* (witness recanting prior statement on cross by trial counsel). Therefore, because trial counsel failed to call Mr. Brown as a witness, the jury was left with only Bradley Deal's testimony that Petitioner was rightfully responding to gunfire from one of the cars. See App. P. 558 line 13 thru p. 599 line 14 (jury heard

testimony of gunfire from car only from Robert Beverly, who changed his statement, and Bradley Deal).

As Deputy Solicitor Thompson went on to explain, Deal's testimony – the only testimony put to the jury that gunfire came from the cars first – was not believable because Deal's version of events was physically impossible. App. P. 591 line 20 thru P. 593 line 25; see also p. 1543 (Deal testifying that it was the front passenger window from which he saw a gun fired). This testimony was apparently so ridiculous that the jury audibly gasped at its absurdity, yet trial counsel relied on it exclusively to support his theory that Petitioner was acting in self-defense when he fired. App. P. 600 line 5 et seq.

Counsel's failure to call Mr. Brown as a witness in this case was unreasonable and constitutes ineffective assistance of counsel. *Grier v. State*, 299 S.C. 321, 384 S.E.2d 722 (1989). Here, Brown's testimony that he saw gunfire coming from one of the assailants' cars prior to Petitioner firing was crucial to the Petitioner's self-defense claim. "A PCR Petitioner is entitled to relief based on ineffective assistance of trial counsel if he can establish that counsel's performance was deficient and that this deficiency prejudiced his defense." *Grier*, 299 S.C. at 323 (citing *Strickland v. Washington*, 466 U.S. 668 (1984). The PCR court held that trial counsel was not ineffective for failing to call Mr. Brown. App. P. 51-52. Petitioner respectfully submits that the PCR court's reasoning is incorrect because trial counsel was not able to put forth any evidence that there was gunfire coming from a car prior to Petitioner firing other than from Bradley Deal, and, as previously discussed, that version of events was not remotely credible. Petitioner respectfully disagrees with

the PCR court that there was any law enforcement derived evidence that would support its holding that such evidence was used by trial counsel to support the self-defense theory at trial because no law enforcement person testified that there was evidence of gunfire from a car – the only evidence was from Bradley Deal. Petitioner furthermore respectfully disagrees that Mr. Brown's version of events was not consistent – Petitioner is unaware of any time that it changed. Petitioner finally disagrees with the PCR court's determination that testimony from Mr. Brown that gunfire was coming from a car different from the one that Petitioner fired into would have obviated a jury finding of self-defense. It would be for the jury to determine whether Petitioner acted in fear for his life and whether firing into Mr. Hovis' vehicle was a reasonable reaction to such fear. While witnesses disagreed as to the number of vehicles that came to the party, no one would deny that all of the people in the vehicles were acting in concert because, as Holly McCarter testified they went there to fight. App. P. 1157.

Trial counsel's decision not to call Mr. Brown is particularly unreasonable when considered in light of the fact that counsel did call a witness in the defense's case in chief, and thereby lost last closing. The one witness that counsel called was Merry Collins, who compiled the discovery materials on the case for the York County Solicitor's Office. App. P. 1654. Trial counsel testified that he called Ms. Collins to establish that two pages of one of Petitioner's statements to law enforcement were turned over to the defense two months apart. App. P. 557. Trial counsel admitted that he lost last closing because of this, and that losing last closing was important. Id. At trial, Ms. Collins explained that she turned over materials as

the Sheriff provided them to her, and that it is not uncommon to get things out of chronological order. App. P. 1658-60. Petitioner submits that it is not reasonable to conclude that trial counsel was not ineffective when he decided not to call a witness that had crucial testimony about gunfire coming from the vehicles first yet lost last closing to call a completely pointless witness as the sole defense witness in the case. Petitioner submits that, had Mr. Brown been called as a witness, the jury verdict would likely have been different in this case.

II. THE PCR COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO SUBPOENA OR OTHERWISE OBTAIN VIDEOTAPE SURVEILLANCE FROM AMERICAN AUTO SALES, WHERE THE ALLEGED VICTIMS STOPPED THEIR VEHICLE ON THE WAY TO THE POLICE STATION WHEN IT WAS THE DEFENSE'S THEORY AT TRIAL THAT THE PURPOSE OF THE STOP WAS TO DISCARD WEAPONS

Petitioner called Mr. Rodney Nivens as a witness in his PCR evidentiary hearing. App. P. 453. Mr. Nivens owns American Auto Sales, which is where Ms. McCarter said she stopped her vehicle on the way to the police station to switch drivers. Mr. Nivens testified that his business had a video surveillance system and that no one from law enforcement, the Solicitor's office, or the defense ever came to ask him for a copy of his video. App. P. 454. Mr. Nivens testified that "they captured everything" that happened on his property, but that he had not reviewed the video from that night and it was no longer in existence. App. P. 456.

The issue of why Ms. McCarter stopped the vehicle at American Auto Sales on the way to the police station was critical to the defense of this case. Ms. McCarter testified that it was because she was too distraught to continue driving. App. P. 1146. At trial, the defense's theory was that they stopped there to get rid of weapons,

and that is why there weren't any weapons in the car when it arrived at the Clover Police station. App. P. 511 lines 19-22.

If trial counsel had obtained the video, then Petitioner would not have had to rely on other circumstantial evidence to rebut the real reason for the stop. Contrary to the PCR Court's determination, it is not mere speculation that this video would have been beneficial to the defense – there are two witnesses in the record who testified that McCarter was still driving when the vehicle arrived at the police station. The first witness is Clover Police Sergeant Michael Trabue, who testified that when the vehicle arrived at the Clover Police Department, the driver was female. App. P. 866 line 12. The second witness in the record is trial counsel, who testified emphatically at the PCR hearing that he had seen a video from the Clover Police Department surveillance that showed McCarter was still driving when they arrived there. App. P. 511 lines 2-24.

It is not mere speculation that this video would have provided exculpatory evidence to the Defense. These two witnesses provide strong evidence that the American Auto Sales video would have provided irrefutable evidence that the vehicle occupants discarded weapons when they stopped because, if the car didn't stop there to change drivers, there is no plausible reason other than to have discarded weapons. Counsel's failure to even inquire as to the existence of the video constitutes ineffective assistance of counsel.

III. THE PCR COURT ERRED IN DENYING PETITIONER'S REQUEST TO CONDUCT AN IN-CAMERA REVIEW OF MATERIALS WITHHELD BY THE STATE UNDER A PURPORTED ATTORNEY WORK-PRODUCT PRIVILEGE WHEN THE MATERIALS WERE NOTES FROM WITNESS INTERVIEWS CONDUCTED BY THE DEPUTY SOLICITOR

The Petitioner issued a subpoena to Deputy Solicitor Willy Thompson ("Solicitor") to appear at the evidentiary hearing and produce "any and all documents in the possession of the York County Solicitor's Office related to Travis Falls (DOB: XXXXX AND Berry Bolin (DOB: XXXXX." The Solicitor appeared and asserted a work-product privilege for a large amount of materials. The Petitioner sought for the PCR court to make the materials an exhibit for the record, which the court took under advisement. Thereafter, the Petitioner, having reviewed the Solicitor's privilege log, reduced his request to three folders containing witness interview notes from the Solicitor and his investigator. The PCR court denied the Petitioner's request. App. P. 66-71. The PCR court held that "[t]his Court finds that the discovery of the folders sought by Petitioner containing notes taken by the prosecutor and the prosecutor's investigator during interviews with potential witnesses in preparation for trial constitutes attorney work product. See Rule 26(b)(1), SCRCP." The Petitioner respectfully submits that this was error.

Petitioner cited *Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006) and *Gibson v. State*, 334 S.C. 515, 514 S.E.2d 320 (1999) for the well-settled proposition that a defendant is entitled to statements made to Solicitor and law enforcement where they are material to guilt or punishment.

As the Solicitor noted throughout his testimony in the PCR hearing, the witnesses in this case changed their stories over and over. They were all friends with the people involved in the case, and none of them particularly wanted to appear in the trial. App. P. 596 line 17 et seq ("They weren't happy to be here. They didn't want to come. And they gave whatever story they gave at that point in time. And as I

said, I had to basically on most of the witnesses call them. Have them give what their statement was at that point I time and then cross examine them with their prior statements.").

It strains credulity to believe that not one note taken by the Solicitor or his investigative staff would impeach a prior statement from any witness that was given to law enforcement officers and thereafter turned over to the defense. Furthermore, for the court to adopt the position that the Solicitor can evade such a request with the blanket statement that all materials responsive to Brady/Rule 5 have been produced without honoring the Petitioner's very focused request to review three folders to ensure that the rules have been observed would be to create a system where the prosecution, and not the court, would take over the role of the gatekeeper of what is presented in court. Petitioner respectfully requests that this Court order a review of the materials *in camera* to determine whether any materials were improperly withheld.

Petitioner further argues that witness interview notes taken by a solicitor as to what a witness says to them are not privileged work product. Mental impressions, strategy, summary reports regarding witnesses and the like, are vastly different from the statement of a fact witness to a representative of the State. If the Solicitor's position, adopted by the PCR court, were correct, then all witness statements could be taken by a representative from the Solicitor's office rather than a sheriff or police department, and then they would all be attorney work-product. See App. P. 38 ("This Court finds that the discovery of the folders sought by Petitioner containing notes taken by the prosecutor and the prosecutor's investigator during interviews

with potential witnesses in preparation for trial constitutes attorney work product. See Rule 26(b)(1), SCRCP.."). Even in the case cited by the PCR court, both the trial court and this Court reviewed the challenged documents to determine whether the privilege was properly asserted and whether the documents contained Brady/Rule 5 material. See *State v. Myers*, 359 S.C. 40, 49 (2006). The PCR court erred in foreclosing an *in camera* review of these materials.

In reviewing the privilege log provided by Mr. Thompson at the PCR hearing, it is clear that his interpretation of what constitutes work product goes far beyond mental impressions and strategy. App. P. 311-313. For instance, listed in the contents of the log at number 6 is "A transcript of the arraignment of Berry Scott Bolin dated May 22, 2006." At number 29 is listed "The prosecution file on Travis Falls for Possession of Codeine with the arrest date of November 23, 2002. This case was prosecuted in 2003 some 3 years prior to Berry Bolin's arrest and is not related to Bolin's case." At number 25 there is listed "A folder containing various potential witness lists." See *State v. Powers*, 331 S.C. 37, 44 (1998) (list of witnesses not work product). These are but examples of the 29 items withheld pursuant to privilege. These items are examples of the many things listed that could not conceivably be subject to any recognized privilege. The prosecution used this expansive interpretation of what was subject to privilege in deciding which witness statements and notes on witness interviews to turn over to the defense, and even said as much in its letter to the PCR court opposing the court's review of the folders containing witness statements. See App. P. 319 ("These [folders] contain numerous notes of interviews conducted with witnesses by the prosecution in preparation for

trial. The notes of Investigator Parrish were taken at my direction in preparation for trial. I was present and conducted almost all of the interviews with Investigator Parrish. These notes are clear work product and are not subject to discovery."

This statement is in conflict with Rule 5 (2) SCRCrimP, which states:

> *Information Not Subject to Disclosure.* Except as provided in Paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal prosecution documents made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case, or of statements made by prosecution witnesses or prospective prosecution witnesses **provided that after a prosecution witness has testified on direct examination, the court shall, on motion of the defendant, order the prosecution to produce any statement of the witness in the possession of the prosecution which relates to the subject matter as to which the witness has testified**; and provided further that the court may upon sufficient showing require the production of any statement of any prospective witness prior to the time such witness testifies.

SCRCrimP Rule 5 (emphasis added).

Surely, if Rule 5 requires that witness notes, even those taken by the prosecutor or his agents, become discoverable after a witness testifies, the PCR Court's ruling that these files cannot be inspected must be reversed. Petitioner prays that this Court will allow Petitioner to inspect the files as requested in Petitioner's motion to the PCR court.

IV. THE PCR COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ASCERTAIN THAT THE "CASTLE DOCTRINE" STATUTE DID NOT APPLY TO THE CASE. THIS DEFICIENT REPRESENTATION LED TO PETITIONER REJECTING A 15 YEAR PLEA OFFER IN FAVOR OF RELYING ON THE ACT THAT WAS CLEARLY NOT APPLICABLE

Throughout his representation of Petitioner, trial counsel based his strategy of the defense on the recently-enacted "castle doctrine" statute ("the Act"). See

Protection of Persons and Property Act, S.C. Code Ann §16-11-410 et seq. (effective Jun 9, 2006). At a pre-trial hearing, trial counsel sought to quash the indictments against Petitioner based on the Act. App. P. 486. Trial counsel noted in his motion that this case arose from events on February 18, 2006, almost four months prior to the effective date of the act. At the PCR hearing, trial counsel testified that he felt the Act was poorly drafted in terms of its procedural dictates, but that he "was hoping" it would be retroactive so that it would apply to Petitioner. App. P. 488-89. Trial counsel admitted "[I]f it was not to be retroactive then we were not going to benefit from it." App. P. 482 line 4.

In determining whether the Act would be retrospective, trial counsel could have simply applied well-settled rules of statutory construction. The presumption for a newly enacted statute is that it is prospective in nature only. *Am. Nat. Fire Ins. Co. v. Smith Grading & Paving*, 317 S.C. 445, 448, 454 S.E.2d 897, 899 (1995). Unless there is clear legislative intent to the contrary the Act would not apply to Petitioner. Trial counsel, when asked "is there a default rule of whether a statute is retroactive or prospective?" responded, "I can't tell you off the top of my head right now." App. P. 484 Lines 17-20. When pressed further, "Do you remember researching that issue then?" responded, "No, I don't." App. P. 484 Lines 21-22. Trial counsel was asked to read the savings clause that was enacted with the Act, and when asked whether he consulted that prior to advising Petitioner as to the applicability of the law stated, "Well, I am sure I did. Okay. And I am sure that I knew at that point in time just like I do reading it now that it is not very favorable to us that language." App. P. 483 lines 21-25.

In the case of this Act, the Legislature made it unmistakably clear that the Act would not apply retrospectively in a savings clause that was published upon enactment of the Act. App. P. 1818 (savings clause for the Act). Trial counsel was given a copy of the motion that he filed in his pre-trial motion to quash. App. P. 486 line 4. Trial counsel attached a copy of the law that he had printed when he drafted the motion to his pre-trial motion, and admitted during examination that his printed version of the law did not have the savings clause. App. P. 488 line 3. After saying that he didn't remember whether he ever found the savings clause prior to making the motion to quash, trial counsel admitted that he "didn't have much confidence in the success of the motion at trial anyway." App. P. 488 lines 7-14.

It was after the ruling on this motion, which trial counsel wasn't very confident in to begin with, that the State offered Petitioner a plea to voluntary manslaughter for 15 years. App. P. 497 lines 9-15. Remarkably, trial counsel testified that he counseled Petitioner "I had talked with my client and told him that we really needed to consider if the State ever came to us with something around ten years. I was hoping we would be able to get to that point. Okay. We never did. But they came to us with a firm offer of negotiated 15 years for voluntarily [sic] manslaughter and concurrent sentences on some of the other charges." App. P. 497 lines 19-24.

Ultimately, the trial court ruled that the ruling on whether to quash the murder indictment was not ripe, and entered no order on whether the Act would apply retroactively and therefore to Petitioner. App. P. 493 Lines 2-9. The trial court did accept the plea of Petitioner's co-defendant and told him that his sentences of 10

suspended on service of 5 and 5 years probation but told him, "if it was just up to me the sentence would be much harsher. I can assure you of that. I don't take lightly what happened in this event, not that you or your attorneys do, but this is a very, very generous sentence." App. P. 490 lines 5-10. While trial counsel testified that he advised Petitioner to accept the 15 year offer, Petitioner respectfully submits that the record shows that trial counsel was too hopeful that the Act would work to the benefit of Petitioner at trial, and therefore the Petitioner made his decision relying on bad legal advice because it is clear that trial counsel had not consulted the savings clause of the Act. Petitioner was prejudiced by this advice by receiving an additional 15 years in jail.

V. THE PCR COURT ERRED IN DENYING PETITIONER LEAVE TO AMEND HIS POST-CONVICTION RELIEF APPLICATION AFTER THE EVIDENTIARY HEARING IN ORDER TO CONFORM THE PLEADINGS TO THE EVIDENCE ADDUCED, WHICH:
   a. SHOWED THAT THE STATE HAD ELICITED FALSE TESTIMONY FROM HOLLY MCCARTER BECAUSE SHE DID NOT SWITCH SEATS AS SHE TESTIFIED IN THE STATE'S CASE IN CHIEF
   b. SHOWED THAT TRIAL COUNSEL WAS INEFFECTIVE IN THAT HE FAILED TO EVEN MENTION THE POLICE STATION VIDEO PROVING MCCARTER LIED

The PCR court denied Petitioner's motion to amend his pleadings to conform to the evidence adduced at the PCR hearing. App. P. 324. Petitioner filed the Second Amended PCR application to add claims relating to testimony that was not brought out in any proceedings or documents prior to the PCR hearing. See App. P. 322 (letter to PCR court in support of motion to amend and file Second Amended PCR). The State objected, arguing that the Second Amended application would amount to a successive claim, barred under Arnold v. State, 309 S.C. 157, 420 S.E.2d

834 (1992), and that to allow the amended petition would prejudice the State. The PCR court denied the motion to amend under SCRCP Rule 15(b) and cases related thereto. App. P. 40. Petitioner raised this issue in his Rule 59(e) motion to alter or amend in order to preserve the issues raised in the Second Amended Application, which were not ruled upon by the PCR court.

The PCR court erred in denying the Petitioner leave to amend the pleadings. First, Petitioner informed the court in the First Amended Application that he reserved the right to amend the pleadings to conform to the evidenced adduced. App. P. 297 Fn 1. Second, this motion was reiterated on the record at the PCR hearing. Most importantly, though, the testimony at the hearing leading to the second amended PCR application could not have been anticipated by counsel prior to the hearing, was rigorously litigated by both parties, and is, therefore, precisely the type of evidence for which Rule 15(b) exists.

The basis for Ground E in the Second Amended application, eliciting false testimony from Holly McCarter, was tried vigorously by both sides at the PCR hearing. The State was able to elicit testimony from both the Solicitor and trial counsel on these issues. As such, there can be no prejudice to the State in considering the claim. "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Rule 15(b) SCRCP.

At the PCR hearing, trial counsel very surprisingly asserted that the State knew that its witness, McCarter, was going to testify falsely. App. P. 511 lines 2-14. This was surprising testimony, which could not have been anticipated prior to the

hearing, because trial counsel never objected to this "perjured" testimony, never brought up the evidence that proved it to be false when he cross examined the witness at trial, and never raised it in any direct appeal.

The testimony, which trial counsel testified as the PCR hearing was known to be false by the State, concerned a matter of critical importance in the case. The witness at issue was Holly McCarter, who was driving the vehicle as it fled the party following gunshots. She testified that, upon discovering that her friend Bobby Hovis had been hit, she became too distraught to continue driving. App. P. 1146. She pulled over into the parking lot at American Auto Sales and switched places with another driver. This was all testimony elicited by the State. Trial counsel did not object to the testimony being false or cross examine the witness on the video showing her to be a liar. App. P. 1552 *et seq.*

The theory of the defense was that the car stopped at American Auto Sales to unload a gun that was used to fire at the party, gunfire to which Berry Bolin responded in self-defense. If the defense could show a video that proved that Holly McCarter was still driving when they got to the police station, then her testimony that the reason for the stop was to switch drivers would be exposed as a lie. The only remaining reason for the stop would be to get rid of weapons, which would be of paramount importance in pursuing the self-defense theory of the defense.

As Petitioner pointed out in his motion in support of filing the second amended application, the file from trial counsel did not contain a video from the Clover police department showing that Holly McCarter was still driving. App. P. 338. Furthermore, trial counsel did not even mention this video during cross-

examination of Ms. McCarter at trial or otherwise challenge her testimony about switching places. App. P. 1158-59. As such, it was impossible for Petitioner to anticipate that trial counsel would testify about a video that Petitioner never had, or that trial counsel would have failed to bring up this video when cross examining the lying witness at trial. The State was given plenty of opportunity to cross examine trial counsel on this issue, and could not possibly be prejudiced by the Court allowing the second amended PCR application. Finally, the second amended PCR application is not a "successive" application pursuant to *Arnold v. State*, 309 S.C. 157 (1992) as argued by the State in its opposition to amended pleading. App. P. 333. A "successive" application, according to *Arnold*, is one that is filed after the final order in a case has been issued – that is not the case with the second amended application.

Considering the merits of the claims added in the second amended application, the Petitioner urges this Court to grant him relief and vacate his convictions. Based on the testimony of trial counsel, there was a video that showed that Holly McCarter was still driving when she arrived at the police station. This testimony was not refuted by the State, even when given the direct opportunity to do so at the PCR hearing. See App. P. 602 lines 17-23. If Holly McCarter was still driving at the time that the car arrived at Clover Police Station then the Petitioner's self-defense argument is much stronger because it refutes the theory of the State.

Following the PCR evidentiary hearing counsel filed the second amended application for PCR and added these claims. In an effort to corroborate the testimony of trial counsel, counsel went back through the file provided by trial

counsel and looked for this video. Counsel found a video from the Clover Police Department security camera, but the vehicle is out of frame when the occupants exit the vehicle. Counsel notified the PCR court of this in a letter dated February 12, 2013, but, based on the testimony of trial counsel that he had a video showing McCarter was still driving, counsel stands by these claims. App. P. 338.

Accepting trial counsel's testimony that he had this video, there remain only two possibilities, both of them warranting relief for the Petitioner. The first possibility is that trial counsel knew that he could eviscerate Holly McCarter's testimony that she switched places by simply showing the jury irrefutable video evidence to the contrary and thereby expose her as a liar and failed to do so. This would constitute ineffective assistance of counsel and necessitate the granting of relief. The other possibility is that the State, being in possession of the same video (and having to this date not disputed that trial counsel's testimony at the PCR hearing was correct) knowingly elicited false testimony from Holly McCarter at trial. This would constitute a violation of due process and necessitate the granting of relief. See *Napue v. Illinois*, 360 U.S. 264 (1959) (failure of prosecutor to correct testimony of witness known to be false denied defendant due process of law in violation of the Fourteenth Amendment).

VI. TRIAL COUNSEL WAS DEFICIENT IN FAILING TO REQUEST A NEW JURY FOLLOWING PETITIONER'S CO-DEFENDANT PLEADING GUILTY AFTER BEING INTRODUCED TO THE JURY. TRIAL COUNSEL FAILED TO REQUEST A NEW JURY OR A CURATIVE INSTRUCTION FROM THE COURT EXPLAINING THE NON-TESTIFYING CO-DEFENDANT'S ABSENCE

Following jury selection and argument on the applicability of the "castle

doctrine" statute to this case, Petitioner's co-defendant, Lee Owens, pled guilty to his charges. Mr. Owens had been introduced to the jury panel along with Mr. Bolin. App. P. 626. After accepting Mr. Owens' plea and ruling on pre-trial motions, the jury was brought back into the courtroom, where they were told by the trial judge, "We worked yesterday on some legal matters, we worked some more this morning, and you will notice if you look to my right, that Mr. Owens and his counsel are not present anymore. The case is concluded as to them. We're simply going forward as to Mr. Bolin, so we haven't just been drinking coffee and doing crosswords. We've been doing some work and what we've done we hope will move the case along more promptly than had we not done the work we did."

There was no instruction from the judge as to why the case was "concluded" as to Mr. Owens, and Mr. Owens was never called to testify at trial where he would have been subject to cross examination.

At the PCR hearing, the State objected to the line of questioning related to trial counsel's failure to request a new jury or, at a minimum, a curative instruction. App. P. 517. The PCR court allowed the questioning over the State's objection, and it was subject to thorough litigation by both sides. This claim, as noted by the PCR court, is based on ineffective assistance of counsel, and was more particularly stated in the Second Amended Application for PCR and raised in the Rule 59 motion to alter or amend when the PCR court denied leave to file the Second application. App. P. 518.

The law in South Carolina is well-settled that guilty pleas or acquittal of a co-defendant are irrelevant to the defendant's guilt or innocence. *State v. Moore*, 337

S.C. 104, 552 S.E.2d 354 (Ct. App. 1999). However, there are instances where a jury can properly be informed about a co-defendant's guilty plea when the co-defendant pleads guilty just before or during a trial. *Moore*, 337 S.C. at 107-08. *Moore* stated, "Those cases held that it was not error to inform the jury of the co-defendant's guilty plea, **provided that the jury was properly instructed not to consider the guilty plea as evidence of the guilt of the remaining defendants**. *Id.* (emphasis added).

In this case, the jury was not instructed explicitly that Mr. Owens was no longer present because he had pled guilty, but there is no other reasonable conclusion for them to draw. This is because the jury went on to hear extensive testimony from several witnesses that two people had fired at the car – Lee Owens and Berry Bolin. Furthermore, the jury heard that forensic evidence was able to determine that Mr. Bolin's gun had fired the fatal bullet, as distinguished from the smaller caliber weapon fired by Mr. Owens. Surely, the State would not contend that the jury may have concluded that the State decided to drop the charges against Mr. Owens.

In addition to the testimony about Owens that made his unexplained absence so prejudicial to Petitioner, the comments from the trial judge also add to that prejudice because the judge informs the jury that "we have been doing some work and we hope we will move the case along more promptly then had we not done the work we did." Progress, in this sense, would be a conviction for the now-absent co-defendant, and that is highly prejudicial to the Petitioner.

Trial counsel testified that he did not move for a mistrial, request a curative instruction, or ask to pull a new jury. App. P. 517. This constituted ineffective assistance of counsel. As stated in *Moore,* and the many cases from around the

country to which it cites, it is imperative that a jury be informed that they are not to consider the disposition of the case of a co-defendant when determining the guilt of the person left on trial. *Moore*, 337 S.C. 108.

In this case, the jury was not given the important instruction from the trial court that they were not to consider the absence of Mr. Owens in any way. They later heard extensive testimony about Mr. Owens firing his weapon, and had been told that he was charged with assault with intent to kill. There can be no real doubt that the jury concluded Mr. Owens had pled guilty, and there can likewise be no doubt that this conclusion, in the absence of a curative instruction, was prejudicial to the Petitioner. Trial counsel's failure to request this instruction constitutes ineffective assistance of counsel, and Petitioner prays that the Court vacate his conviction and sentences.

CONCLUSION

For the reasons stated, petitioner asks this Court to grant the petition for a writ of certiorari and vacate Petitioner's convictions.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2010-CP-46-0436

Berry Scott Bolin, Petitioner,

v.

State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

The undersigned counsel for Petitioner certifies that a true copy of the Petition for Write of Certiorari and Appendix have been served on counsel for the Respondent by hand delivery to her office located at:

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T. Micah Leddy
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This 11 day of September, 2014
Columbia, SC