STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Deidre L. Jefferson, Circuit Court Judge

2017-000-755

THE STATE,

RESPONDENT

V.

TERRELL L. MCCOY,

PETITIONER

APPENDIX

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APPENDIX

ORDER TO BE RELEIVED AS COUNSEL

ORDER TO PROCEED PRO SE

TRANSCRIPT OF RECORD

MOTION FOR RECONSIDERATION OF SENTENCE

SENTENCE SHEET

AMENDED SENTENCE SHEET

NOTICE OF APPEAL WITH PROOF OF SERVICE

AMENDED NOTICE OF APPEAL WITH PROOF OF SERVICE

AMENDED, AMENDED NOTICE OF APPEAL WITH PROOF OF SERVICE

FINAL BRIEF OF APPELLANT

FINAL BRIEF OF RESPONDENT

SOUTH CAROLINA COURT OF APPEALS OPINION

SOUTH CAROLINA COURT OF APPEALS PETITION FOR REHEARING

SOUTH CAROLINA COURT OF APPEALS ORDER DENYING PETITION FOR REHEARING

APPLICATION FOR POST CONVICTION RELIEF

MOTION TO AMEND POST CONVICTION RELIEF APPLICATION (1ST)

ORDER APPOINTING COUNSEL

RULE 65 MOTION/ORDER PETITION FOR GRAND JURY

DECLARATION FOR ENTRY OF DEFAULT

AMENDED POST CONVICTION RELIEF APPLICATION SCRCP RULE 15(A)

AFFIDAVIT OF TERRELL MCCOY

LETTER FROM TERRELL MCCOY TO CHARLESTON COUNTY CLERK OF COURT

LETTER FROM TERRELL MCCOY TO APPOINT COUNSEL, RODNEY DAVIS

RETURN

LETTER FROM TERRELL MCCOY TO CHARLESTON COUNTY CLERK OF COURT WITH PROOF OF SERVICE

MOTION FOR SUBSTITUTE COUNSEL AND WITHDRAW OF PRESENT COUNSEL

4TH AMENDED POST CONVICTION RELIEF APPLICATION

MOTION TO COMPEL

APPLICANT'S 5TH MOTION TO AMEND POST CONVICTION RELIEF APPLICATION

TRANSCRIPT OF RECORD

ORDER

AMENDED APPLICATION FOR POST CONVICTION RELIEF

ORDER DENYING APPLICATION FOR POST CONVICTION RELIEF

MOTION TO RELIEVE COUNSEL

NOTICE OF APPEARANCE OF COUNSEL FOR APPLICANT

ORDER SUBSTITUTING COUNSEL

ORDER OF DISMISSAL

MOTION PURSUANT TO RULE 59(a) & (e)SCRCP

RETURN TO APPLICANT'S MOTION TO ALTER OR AMEND

ORDER DENYING APPLICANT'S MOTION TO ALTER OR AMEND

MOTION TO CLARIFY MOTION PURSUANT TO RULE 59(a) & (e)SCRCP AND RESPONSE TO STATE'S RETURN

NOTICE OF INTENT TO APPEAL

LETTER FROM TERRELL MCCOY TO CHARLESTON COUNTY CLERK OF COURT WITH EXHIBIT 10

STATEMENT OF THE CASE

On July 2006, a Charleston County Grand Jury Indicted Petitioner for Murder. (2006-GS-10-4887). On July 15, 2009, Petitioner, while represented by Lorelle Proctor, went to trial, however the jury was unable to reach a verdict and a mistrial was declared. On January 27, 2009 and January 28, 2009, The Honorable Markley Dennis signed Orders Relieving Lorelle Proctor and allowing Petitioner to proceed Pro Se. On February 2, 2009, Petitioner's second Trial began. Petitioner represented himself with Lorelle Proctor as stand by counsel. On February 6, 2009 The jury convicted Petitioner of Murder. Petitioner was sentenced to fifty (50) years imprisonment. Ultimately, Petitioner's sentenced was reduced to forty (40) years imprisonment.

A timely Notice of Intent to Appeal was filed March 11, 2009. Robert M. Dudek, Esquire of the South Carolina Office of Appellate Defense was appointed to represent Petitioner and perfected Petitioner's appeal. Petitioner's conviction and sentence was affirmed by the S.C. Court of Appeals in State v. McCoy, No. 2011-UP-471 (S.C. Ct. App. Filed October 26, 2011). Mr. Dudek filed a Petition for Rehearing which was denied on December 19, 2011. Petitioner filed a Writ of Certiorari in the S.C. Supreme Court which was denied on March 6, 2013.

Petitioner filed an Application for Post Conviction Relief on April 4, 2013. Petitioner alleged that trial counsel Lorelle Proctor was ineffective before she was relieved of counsel April 10, 2013. September 14 Petitioner alleged Appellate counsel was ineffective during his appellate process. R. ___ State filed a Return to PCR Application of _____ R. Petioner filed ----------

Petitioners first PCR hearing was held on _____. R._ The Honorable _____ issued an Order granting State's Summary Judgement Motion, thereby dismissing Petitioner's PCR action against his trial/ stand by counsel Lorelle Proctor. R.___ Petitioner file _____-_-----. R. ___ Petitioner's second PCR hearing was held in front of The Honorable Deidre __ Jefferson on December 14, 2015. R. __ Mr. Dudek testified by telephone R.__ Petitioner was represented by Rodney Davis, esquire at the second PCR hearing. R. __ Petitioner moved to represent himself during the hearing based on the presentation of his case by Mr. Davis R. ___ Petitioner's request for self-representation during the hearing was denied, however Petietioner filed a Motion to Relieve Mr Davis on ___ R __ Judge Jefferson issued an Order denying Petitioner's PCR application on ___ R. __ A form Order denying Petitioner's PCR was signed on _____ R. __ Petitioner hired Melisa W. Gay, Esquire to represent him during the balance of his PCR action. A Substitution Order was filed on _____. R __ Petitioner filed a Motion to Clarify order under Rule 56 (e) on _____ R. __ State filed a Response to Motion to Clarify R.___ Petitioner filed a Motion to Clarify Motion pursuant to Rule 56 (e) R. __ Judge Jefferson issued a Final Order denying Petitioner's PCR application of _____. R. _ Petitioner now seeks a writ of certiorari from this Court.

STATEMENT OF THE FACTS

Petitioner was arrested on March 27, 2016 and charged with shooting his brother the victim in the case. Petitioner was represented by Lorelle Proctor of the Charleston County Public defender Corp from the time of his arrest until she was relieved of counsel on January 28, 2009 when Petitioner appeared before Judge Dennis and sought to represent himself from that point forward. While Ms. Proctor represented Petitioner, she filed motions on his behalf in furtherance of her representation. One such Motion was a request Pursuant to SC Rules of Criminal Procedure – Rule 5 & 6 Edwards Notice that was filed on March 30, 2006 and served on the State on April 10, 2006. Petitioner had two trials in his case. The first trial resulted in a hung jury. Petitioner decided that he wanted to represent himself during his second trial. The Honorable Markley Dennis held a hearing on the matter. After a long colloquy with Petitioner January 28,2009, Judge Dennis issued an Ordered that Lorelle Proctor was relieved of counsel. Janaury 30, 2009 an Order filed allowing Petitioner to represent himself. Lorelle Proctor agreed to be Petitioner's stand by counsel.

Petitioner's second trial began on February 2, 2009. The Honorable Judge Roger Young was the presiding judge for the trial. Judge Young again addressed the issue of self-representation. Petitioner decided to go forward pro se. Petitioner made several contemporaneous objections to the admission of evidence during his trial. Petitioner on February 5, 2009 made a Motion for Directed Verdict and asked the trial judge to direct a verdict in his favor. Judge Young denied Petitioner's Motion. Petitioner At the end of the State's case, Petitioner renewed his Motions to properly preserve any issues and objections that he had raised during his trial for appeal which were denied (TrTr P.653).

Petitioner was sentenced to fifty (50) years. Ms. Proctor filed a Motion to reconsider sentence. Petitioners sentence was reduced to forty (40) years. Notice of Intent to appeal was filed in a timely manner. Robert Dudek from the South Carolina Office of Appellate Defense was appointed to represent Petitioner. Mr. Dudek and Petitioner communicated on several occasions about the issues that Petitioner had raised and preserved during his trial. Petitioner had represented himself at trial, therefore he was very aware of the substantive issues that were present in his case. Mr. Dudek chose to brief one issue for Petitioner's appeal, the issue of self-representation. He did not choose to file a brief under Anders v. California He did not raise any substantive issues that Petitioner preserved during his trial. See Appellate brief, State's Reply brief and Court of Appeals Opinion Petition for Rehearing R. ___ R. ___ R.___ R. ___

Petitioner filed an Application for Post Conviction Relief (PCR) with multiple exhibits. R.___ Petitioner filed ___ #Amended Applications for PCR . R. __ R.___ R.___ R. __Rodney Davis was appointed as PCR counsel. Petitioner alleged in his application ineffective assistance of counsel against Lorelle Proctor, stand by counsel, and Robert Dudek, appellate counsel. Petitioner's allegations are set forth in his application. Issues relating to Ms. Proctor involve erroneous advice regarding self-

representation and other pre-trial issues. Petitioner's allegation against Mr. Dudek involve ineffective assistance of counsel based on his decision to only appeal the self-representation issue and not any substantive legal issues preserved at trial by Petitioner. The State filed a Reply to Petitioner's PCR Application R.___

At the first PCR hearing for Petitioner, the State made a motion to dismiss Petitioner's ineffective assistance of counsel claim against Lorelle Proctor based on the fact that Petitioner represented himself at trial. R.___ The Honorable ___ Hyman issued an Order on ____ granting State's Motion for Summary Judgement. PCR counsel Davis did not file a Notice of Intent to Appeal to the Order, because it was not a final decision in Petitioner's PCR action.

On ____ Petitioner's PCR case was heard in Charleston County, the Honorable Deidre__ Jefferson presiding. R. ___ Mr. Dudek testified for the State at the hearing. He defended his decision to file a brief with only one issue. In response to State's question regarding his evaluation of Petitoner's legal issues, Mr. Dudek testified that he would have reviewed the entire transcript. PCR Hrg pg 22 line 16 he acknowledged that he and Petitioner had "on going communication between us" PCR page 22 lin-___25. "He would go along with Petitioner's memory to any specific requests to issues being raised PCR 22 lin 18-25 23 lin 2-12. Dudek testified that he decided that self-representation should not have been allowed because Petitioner did not adequately appreciate the dangers of self-representation. PCR pg 22 lin 4-17 Judge Jefferson inquired of Dudek about his decision. He testified Yes sir That was the only fround PCR pg 22 lin 13. Dudek testified, "I would have thought that the only issue that gave us the chance, and the best chance to win on was him being allowed to represent himself at trial." PCR 31 lin 15-18 The State asked Mr. Dudek "you have a duty as an attorney to raise non frivolous issues" and his response was " my duty as an applellate lawyer is to raise the issue or issues that I think give us the best shot of prevailing on.." PCR 33 lin 3-7

When asked about other issues in the trial transcript, appellate counsel did not recall an issue in the transcript about a 911 tape recording that was held outside the presence of the jury PCR 25 line 6-18 With regard to Petitioner's assertion that the failure to provide a 911 tape to Petitioner in his case was a violation of Maryland v. Brady, appellate counsel was asked by the State "if there were items of evidence that the Defendant requested from the state and it was not provided, would you agree that's a Brady violation" PCR 26 lin 10-13 Mr. Dudek responded with an explanation of the duty of the state to provide evidence to defendants and stated, "...if it would have assisted his defense whatever the evidence was yes I would agree with that." PCR 26 lin 20-23 Dudek testified in response to a question from the State about the prosecution's actual possession of evidence. Dudec's response to the scenario is "well, I guess I partially agree with that. I mean, evidence in the possession as I understand the law evidence in the possession of say the police department that was helping with the prosecution or the investigating police officer, that evidence is imputed to the state or to the solicitor is my understanding of the law. PCR 34 lin 19-25

PCR counsel Davis cross examined Dudek about Petitioner's Brady issue. He introduced Petitioner's Exhibit 1, Affidavit of Chris Neeley of North Charleston Legal Department, a document

verifying the existence of the 911 tape in Petitioner's case. PCR 39 lin 8-13 The exhibit confirmed that a 911 tape had been generated from March 25, 2006 at the time of the shooting. PCR pg 39 Exhibit 1 Judge Jefferson intimated that the existence of the Affidavit should have been related to a direct appeal (on the Brady issue) PCR 40 lin 1-2 The State stated, " I still don't think that it shows anything that could not have been raised on direct appeal " , wherein Judge Jefferson stated ," I agree". PCR 40 lin 3

During PCR hearing, Judge Jefferson went into a colloquy regarding Petitioner and Petitioner's trial/stand by counsel's efforts to obtain the 911 tape during the course of Petitioner's case. Judge Jefferson stated, "I would have imagined that Ms. Proctor would have asked for the 911 tape originally. Did she not? "PCR 41 lin 5-7. She went on to say "the state would have produced it at the time of the original trial, didn't they?" PCR 41 lin 4-8 PCR counsel Davis responded "it was never produced your honor" . PCR 41 lin 9-10

Petitioner testified at his PCR hearing. He testified that during Lorelle Proctor's initial representation, she filed a discovery Motion on March 30, 2006 that was served upon the solicitor in his case on April 10, 2006. PCR 46 lin 19-21 Petitioner attempted to admit a copy of the Motion filed by Ms. Proctor, however Judge Jefferson would not allow Petitioner to admit the document and chided Petitioner for his attempt to represent himself at the PCR hearing PCR 46 lin 24-47 lin 6 The document was never admitted into the PCR hearing record based on the confusion from the Judge

Petitioner testified that he believed he had a valid Brady issue for appeal. During the trial, he attempted to admit a document from North Charleston a Dispatch Log CAD report of the 911 call regarding the shooting incident for which he was charged. Petitoner believed that the State had failed to provide him with the 911 in violation of Brady. Petitoner had attempted to admit into evidence the CAD log as comparable evidence to the 911 tape. R.___ During the PCR hearing, PCR counsel asked Petitioner ," let me ask you about that report. Did you attempt to admit that report into evidence? Yes sir I tried to admit it into evidence and the state objected to it as being hearsay. It was the only evidence that we had to show the judge that there existed a 911 tape." PCR 49 lin 12-18 Petitioner testified that he was aware that the "the 911 tape was destroyed two months and 15 days after his lawyer had requested it That clearly raised a violation that was preserved for the record" PCR 52 9-12 Petitioner testified that the states witness Corinda Snowden/Williams gave testimony at his trial, and he should have been able to impeach her testimony with the 911 dispatch CAD log. PCR ___ Petitioner testified in response to the State's question that the witness Corinda Snowden Williams first statement which was corroborated by the 911 tape recording was truth. PCR 67 lin 20-24 Petitioner believed that Ms. Williams first statement is consistent with the 911 tape that was not provided to him by the State.

Judge Jefferson erroneously responded about Petitioner's trial transcript, "he would have had to have raised that at the time of trial. We don't get to recreate the record." PCR 52 lin 15-17 This statement is not consistent with the trial record, because Petitioner did in fact raise and preserve the issue of the 911 tape and the CAD report R. _____

Petitioner testified that there was other evidence of a Brady violation in his trial. He testified that blood evidence was not collected therefore no DNA evidence was available. "There was a lot of

evidence, blood evidence that was left on the crime scene that was not collected." PCR 52 lin 1-3 PCR counsel Davis stated that Officer Bunker of North Charleston Police Department testified in the trial. In the trial she testified about what was collected and what was not collected. PCR 55 lin 3-7 Tr Tr ___ PCR counsel argued that tangible biological evidence that was at the scene that was not obtained by law enforcement and submitted for testing was unlike other items that were submitted for testing PCR ___

Petitioner testified that he raised other substantive issues during his trial that should have been briefed in his appellate case. Petitioner testified that he raised an objection to the jury instructions. He asked for a lesser included charge of voluntary manslaughter. The trial judge denied his request. He believes that he preserved the issue for appeal PCR 62 13-18. The State questioned appellate counsel about the voluntary manslaughter jury PCR ___ Petitioner testified that where the judge's failure to give a lesser included (voluntary manslaughter instruction) when available was not done, both prongs of Strickland have been met. PCR 71 lin 1-5

Petitioner testified about a Batson v. Kentucky violation in his trial. "Batson was not raised I made an objection to the solicitor striking all black jurors and seating all white jurors I objected and the judge denied." PCR 63 lin 13-16 Petitoner testified that the "Gender neutral explanation given by the state was mere pretext pursuant to Batson v. Kentucky PCR 64 1-5

During the PCR hearing Petitioner became dissatisfied with PCR counsel Davis. He stated "at this time I would like to fire my attorney and proceed. " Judge Jefferson responded " No sir that request is denied. PCR 68-25 PCR 69 1

Petitioner believes that his application against Lorelle Proctor should not have been summarily dismissed by Judge Hyman. During the PCR hearing, Judge Jefferson makes reference to Petitioner's application against Lorelle Proctor. She states that the Order of Judge Hyman regarding the Summary Judgment hearing was "dispositive" and a "final judgment" PCR 69 lin 25 Pcr 70 1-5 Petitoner's PCR application was still pending against appellate counsel Dudek, therefore the action was not finalized.

PCR counsel made his final arguments on behalf of Petitioner. He reiterated petitoners valid preserved substantive appeal issues. PCR 70-lin 20-22 His argued that petitoner's appellate counsel should have raised these preserved issues in Petitioner's appeal case and in not doing so appellate counsel was ineffective. Petitioner was prejudiced by appellate counsel's unilateral decision without Petitioner's consent to file a brief only raising one legal issue on behalf of Petitioner. PCR 71 18-22 PCR 71 23-25 Pcr 72 1-2 PCR counsel argued that Petitioner had proven his PCR action in that appellate counsel's representation fell below the standard of general accepted appellate practice and in as much as Petitioner was prejudiced, because his substantive issues with genuine appellate value were not raised by Mr. Dudek. PCR counsel's summation established the basis for granting Petitioner relief under his PCR action. Petitioner's PCR counsel asked that the judge grant Petitioner anew trial based on appellate counsel's ineffective representation.

ARGUMENT

I. Did the Circuit Court err in granting Summary Judgement wherein Petitioner was barred from going forward with his ineffective assistance of counsel action (PCR) against Petitioner's trial counsel Lorelle Proctor when Petitioner was given erroneous advice regarding self-representation and the consequences of proceeding pro se at his tial on January 27, 2009.

The granting of Summary Judgment under Rule 56. SCRCP in Petitioner's PCR action is not a final decision, and therefore can be appealed to this court at this time. The Order was issued while Petitioner's PCR application was still pending. The Order did not resolve the action in its finality. Pursuant to Rule 243(a), South Carolina Appellate Court Rules ,(SCACR) (__??___), a "final decision, entered under the Post Conviction Relief PCR Act shall be reviewed by the Court upon a petition for writ of certiorari. Under the general civil rules, Rule 71.1(g), South Carolina Rules of Civil Procedure (SCRCP) uses similar language about the review of a "final decision" and Rule 201(a), SCACR refers to an appeal from "any final judgment, appealable order or decision, however the rules provide that the procedure in a PCR is governed by Rule 243. Section 17-27-100 of the S.C. Code provides that 'a final judgement entered under this chapter may be reviewed by the appellate court."

Rule 56(d), SCRCP allows for the granting of summary judgement for some of the issues in a trial, but not all the issues. The Rule indicates that trial shall proceed on the remaining issues, when summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary.

Section 14-3-330 of the S.C. Code defines appellate jurisdiction and permits an appeal from any intermediate judgement ...in a law case involving the merits in actions commenced in the court of common pleas... and final judgments in such actions. It states that provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from.

Section 17-27-80 SC Code defines final judgment as the court's making specific findings of fact and conclusions of law as to each issue presented. Judge Hyman's Summary Judgment order did not make specific findings of fact and conclusions of law on each of Petitioner's issues presented in his PCR application. Petitioner's PCR action was still pending after the order was issued. The merits of Petitioner's application had not all be decided and a "trial" hearing was still required to finalize Petitioner's action. The Final Order in Petitioner's case was not issued until it was done by Judge Jefferson.

II. Did the circuit court err in refusing to allow petitioner to represent himself during the PCR hearing held on _____ when PCR counsel refused to admit petitioners prepared memorandum of law, failed to admit as an exhibit trial counsel Lorelle Proctor's Rule 5 discovery request Motion dated _____, and failed to subpoena trial counsel to the PCR hearing to testify that she had requested discovery, more specifically the 911 tape on several occasions, all before the

911 tape had been destroyed by North Charleston Police department such that a hearing should have been held pursuant to Faretta v. California

Under Faretta v. California, 422 US 806, 95 S.Ct., 45 L.Ed 562 (1975), Petitioner should have been allowed to represent himself at his PCR hearing. Petitioner expressed dissatisfaction with PCR counsel, and Judge Jefferson should have adjourned the hearing to hold a Faretta hearing. Faretta v. California, stands for the principal that a defendant has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so. In Petitioner's PCR hearing, he should have been afforded an opportunity to state his position regarding self-representation and his dissatisfaction with PCR counsel Davis.

III. Did the circuit judge err in finding that Petitioner's appellate counsel, Robert Dudek, was not ineffective when appellate counsel only raised one issue in petitioner's appellate brief, the issue of self-representation, when in fact several viable substantive issues had been raised and the issues had been contemporaneously preserved by Petitioner during his trial and petitioner repeatedly discussed the appellate issues that he had preserved during the trial with Appellate counsel.

The right to seek appellate review of the denial of PCR is expressly authorized by state law. Section 17-27-100(1985), S. C. Code Ann see Austin v. State, 305 S C, 453, 409 S E 2nd 395. The PCR judge's decision to deny PCR will be reversed when the decision is controlled by an error of law Suber v. State, 371 S 554, 558-559, 640 S E 2d 884, 886 (20017) . Judge Jefferson committed an error of law in denying Petitioner's application for PCR. Judge Jefferson made her ruling that appellate counsel was not ineffective after making several comments in the PCR hearing record inferring that Petitioner, in representing himself, had not made adequate objections or preserved his issues for appeal during his trial. In fact, Petitioner had raised all his issues and preserved them for appellate review.

Petitioner is "constitutionally entitled to the effective assistance of appellate counsel." Sutherland v. State, 316 S C 377, 447 S. E 2nd 862 (1994) Evitts v. Lucey,469 U.S. 387, 105 S. Ct. 830, 83 L. Ed 821(1985) (to be effective appellate counsel must give assistance of such quality as to make appellate proceedings fair). "In deciding a claim of ineffective assistance of counsel, the focus is on 'the fundamental fairness of the proceeding whose result is being challenged". Strickland v. Washington, 466 US 668, 104 S. Ct. 2052, 80 L.Ed (2nd) (1984),. First, the burden of proof is upon Petitioner to show that counsel's performance was deficient as measured by the standard of reasonableness under prevailing professional norms. Second, the Petitioner must prove that he or she was prejudiced by such deficiency to the extent of there being a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, supra. Accord Smith v. State, 309 S.C. 413, 424 S. Ed 480 (1992)." Southerland v. State.

The standard established by Strickland is that the Petitioner must establish a reasonable probability that the result of the proceeding would have been different. Southerland, citing Smith v. State 309 S C. 413, 424 S. E. 2nd 480, 481 (1992), (Petitioner must prove there is a 'a resonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.')". In this case, Petitioner must prove that appellate counsel's failure to argue issues that he did not raise on Petitioner's behalf was objectively unreasonable and that, Petitioner's conviction would have been reversed. Southerland, People v. Griffen, 178 Ill. 2d 65, 27 Ill dec. 338, 687 N.E 2d 820 (1997).

Judge Jefferson decided that appellate counsel was within the range of effective assistance of appellate counsel in briefing only one issue. Petitioner's trial transcript and the PCR hearing transcript clearly sets forth facts sufficient to establish that appellate counsel's choice in only briefing the self-representation was deficient, because Petitioner had raised and preserved several constitutionally valid appellate issued during his trial. Petitioner sets forth such arguments in this document to establish that the appellate issues that appellate counsel ignored would have in fact reversed his conviction. People v. Griffen.

Even if appellate counsel had merely filed an Anders v. California, 386 U S 738, 87 S Crt 1396, (1967) brief on behalf of Petitioner, Petitioner's opportunity for appellate review of his record for legal error by the Court Appeals would have been enlarged. Appellant counsel limited the Court of Appeals review of Petitioner's trial record by briefing only one issue in Petitioner's appeal. Under Anders, the court would have done a de novo review of the record for error and evaluated the trial transcript in its entirety. Once presented with the opportunity to review the record unencumbered by the single briefed issue of self-representation, the Court of Appeals would have found sufficient error to reverse Petitioner's conviction. Appellate counsel's ineffectiveness in presenting Petitioner's case to the Court of Appeals prejudiced Petitioner in limiting the review that the Court could undertake of the Petitioner's preserved issues. As such, Petitioner should be granted a new trial or in the alternative a fresh opportunity to present his appeal to the Court Appeals with all the valid timely preserved arguments on his case.

Judge Jefferson committed an error in law when she based her ruling in Petitioner's case on her singular conclusion that there were no other valid appellate issues in the case. Judge Jefferson found that Petitioner's issue had no appellate value, however her ruling was in contradiction to established law regarding issues including a violations of Due Process under Brady v. Maryland, as well as other constitutionally sound appellate issues. Judge Jefferson's Order did not specifically address her factual findings and conclusions of law regarding Petitioner's genuine appellate issues. She misapplied the law in several areas while determining that appellate counsel's failure to use due diligence in reviewing Petitioner's record and limiting the Court of Appeals review of the not record was unreasonable performance, and but for his deficiency, petitioner's conviction would have been overturned.

IV. Did the circuit judge err in finding that petitioner's appellate counsel was not ineffective when appellate counsel did not raise a violation of Maryland v. Brady in violation of South Carolina Rules of Criminal Procedure Rule 5 in Petitioner's Appellate brief wherein the State violated Brady and did not provide Petitioner a 911 tape that was in the possession of North Charleston Police Department and the existence of which was imputed to the Charleston County Solicitor handling Petitioner's prosecution that was material and exculpatory for impeachment purposes in Petitioner's defense and the Brady violation was prejudicial to Petitioner's case because the outcome of Petitioner's presentation of his defense would have been different if the 911 tape had been provided to Petitioner when Petitioner raised the issue during his trial and preserved the issue for appellate review.

Judge Jefferson commented that she did not find any other issues in Petitioner's record that could be appealed. She did not find that the issue of the 911 tape, the Brady v. Maryand, 373 U S 83 (1963) violation in Petitioner's case, was in fact a viable preserved appellate issue. Her conclusion failed to recognize the legal basis for Petitioner's Brady issue. She failed to recognize that Petitioner had appropriately preserved for appellate review the issue involving the State's failure to provide all the discovery material to Petitioner in his case pursuant to Brady and Rule 5 of the South Carolina Rules of Criminal Procedure SCRCP in violation of the 14th Amendment Due Process Clause of the U S Constitution and the Article I section 3 of the South Carolina State Constitution.

In Brady v. Maryland, the court held that the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. The State's suppression of favorable material evidence undermines the confidence in the jury 's verdict. U.S. v. Snipes, 388 F. 3rd 471 (2004). The Snipe court found that," in the interest of justice...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. Kennerty, 331 S.C. 646, 660, 594 S.E. 2d 462, 470 (2004)

To establish a Brady violation Petitioner must make three showings:

1. The evidence at issue must be favorable to the accused, either because it is exculpatory, or it is impeaching;
2. That the evidence must have been suppressed by the State, either willfully or inadvertently; Prejudice must have ensued. U.S. v. Snipe

Petitioner must first establish that the concealed evidence in question was material. The materiality inquiry is defined in Brady as, "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. U.S. v. Snipe, quoting Brady v. Maryland. If the impeaching evidence 'would seriously undermine the testimony of a key witness on an

essential issue or there is no strong corroboration, the withheld evidence has been found to be material.'" U.S. v. Snipe , quoting Brady.

In State. Hutton, 358 S.C. 622, 595 S.E.2d 882, (Ct. App 2004), the court found that the defendant's destruction of evidence issue could be resolved by defendant's use of evidence of comparable value obtained by other means. The Hutton court allowed cross-examination of the trial witness about the destroyed evidence to resolve the issue.

The evidence at issue in Petitioner's case is a 911 tape that existed in Petitioner's prosecution file, but was never given to Petitioner's court appointed attorney Ms. Lorelle Proctor. Ms. Proctor filed a written request for all the evidence in Petitioner's case. At the time of the written request, North Charleston Police department was in possession of the 911 tape. North Charleston Police Department is a State agency under the control of the Charleston County Solicitor's office. Any "evidence" that is in the possession of law enforcement is imputed to the prosecuting agency. The 911 tape was never disclosed to Petitioner, and by the time Petitioner verified the tapes existence through a dispatcher CAD log document, the 911 tape had been destroyed by North Charleston Police. Petitioner's defense team had confirmed the tape's existence by the written document memorializing the content of the 911 tape in the form of a dispatch CAD log that was provided by the State. Petitioner moved to admit the document as comparable evidence to the 911 tape during his trial. The trial judge sustained the State's objection to the use of the document as hearsay and refused Petitioner the opportunity to use the document and its contents to impeach the State's most significant evidence, the testimony of an eyewitness. Attacking the eyewitness's credibility was essential to Petitioner's defense. The 911 tape was exculpatory evidence. The 911 caller referenced facts that contradicted the eyewitness testimony. The 911 tape was proof that the eyewitness testimony was not credible. Presentation of evidence to the jury in the form of the Dispatch CAD Log would have been doubt and the outcome of Petitioner's trial would have been different. Petitioner was prejudiced by the suppression and destruction of the 911 tape, and as such Petitioner would have prevailed if the issues regarding his Brady violation had been briefed in his appellate case. Under the two prongs of Strickland, Petitioner's appellate counsel failed to raise the viable issue and Petitioner was prejudiced, therefore Petitioner has meet his burden of ineffective assistance of counsel. The Order of Judge Jefferson should be reversed.

V. Did the circuit judge err in finding that petitioner's appellate counsel was not ineffective when appellate counsel did not raise a violation of Petitoner's due process right to a fair trial under the Fifth Amendment of the U S Constitution, he -- Amendement of the Court carolina State Constitution when the Trial judge sustained the State's objection to the 911 Dispatchers log prejudicing Petitioner and preventing him from being able to impeach the State's primary witness and present his defense that the 911 caller indicated that the facts of the incident could not have happened as the State's witness Corinda Snowden testified to the jury thereby impeaching her testimony and exonerating Petitioner in the case when Petitioner raised the issue during his trial and preserved the issue for appellate review.

In State. Hutton, 358 S.C. 622, 595 S.E.2d 882, (Ct. App 2004), the court found that the defendant's destruction of evidence issue could be resolved by defendant's use of evidence of comparable value

obtained by other means. The Hutton court allowed cross-examination of the trial witness about the destroyed evidence to resolve the issue. Petitioner moved to admit the dispatcher CAD log document as comparable evidence to the 911 tape in his trial. Petitioner had established trough stand by counsel that he had requested any and all relevant evidence in his case in the possession of law enforcement in a timely manner. The written request was submitted on March 30, 2016 and filed on April 10, 2016. Case relevant material was requested under Brady v. Maryland and the SCRCP Rule 5 & Rule 6 PCR During Petitioner's trial, the State indicated that the 911 tape had not been revealed, because the Solicitor did not know it existed. R.___ The State argued that the solicitor's personal knowledge should control the Brady inquiry, however Petitioner argued that the 911 tape had been in possession of the North Charleston Police Department, therefore the duty to provide the evidence to Petitioner was with the solicitor.

In People of the State of New York v. Seeber, 94 A.D. 3rd 1335 (2012) the only evidence available in the prosecution of the case, was inadequate and inferior. The defendant was granted a new trial based upon the argument that the State of New York failed to provide competent evidence in response to defendant's discovery request. The procedural short comings of the prosecution were sufficient violations of Brady to overturn defendant's conviction. The defendant in Seeber was able to establis, as in this case, that better evidence was in fact in the possession of the prosecution and not disclosed nr provided to the defendant. Seeber requires reversal of the conviction to correct the ineffectiveness of the prosecution's performance. The State's failure to provide the 911 tape that was in the possession of the North Charleston Police department when requested by Ms. Proctor was inadequate and procedurally deficient.

Petitioner argued that the State's failure to provide the 911 tape had been established, therefore he could admit comparable evidence of the 911 tape in the form of the dispatcher CAD log. R.____ Under State. v. Hutton, Petitioner was attempting to impeach the State's witness with comparable evidence. Failure to allow Petitioner to admit the dispatcher CAD log was a violation of Brady, Hutton, and the due process clause of the Fourth Amendment of U S Constitution and Article 1 Section 3 of South Carolina State Constitution. Judge Jefferson's failure to recognize Petitioner's validly preserved and articulated appellate issue was an error of law. Appellant counsel's failure to brief the issue on Petitioner's behalf was deficient and fell below the reasonable standard. Petitioner was prejudiced by appellant counsel's performance in that the Court of Appeals never reviewed this compelling issue that Petitioner preserved. Petitioner would have prevailed in his appeal, but for appellant counsel's deficient representation.

VI Did the circuit court err in finding that Petitioner's appellate counsel was not ineffective when appellate counsel did not a raise a Batson issue when Petitioner argued that the State's use of preemptory challenges to strike two jurors of the same racial composition of Petitioner, but did not use peremptory challenges to strike two Caucasian jurors similarly situated and that the State's justification for striking the African American jurors was not in fact race neutral when Petitioner raised the issue during his trial and preserved the issue for appellate review.

Batson v. Kentucky, 476 U S 79 (1986), sets forth the recognized principal that a defendant can be denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury. Racial discrimination if the selection of jurors is constitutionally prohibited. Petitioner in his trial raised a Batson issue. In doing so, he raised a prima facia case of purposeful discrimination. The State did not meet its burden to establish a neutral explanation for

challenging African American jurors in Petitioner jury panel, Batson. Petitioner's appellate counsel failed to raise the issue despite Petitioner's raising the issue and preserving it for appellate review.

VII Did the circuit court err in finding that Petitioner's appellate counsel was not ineffective when appellate counsel did not raise the issue of bad faith on the part of the State and North Charleston Police department under Arizona v. Youngblood when Petitioner requested a jury charge on spoilation of evidence raised and preserved the issue during Trial that North Charleston police officer Angela Bunker had failed to preserve valuable exculpatory evidence in the form of DNA from blood evidence found at the scene of the incident.

Petitioner's appellate counsel testified that he did not recall a DNA issue in Petitioner's transcript. PCR pg ___ Petitioner raised and preserved the issue of North Charleston Police force's bad faith destruction of blood evidence. Petitioner crossed examined Angela Bunker, a North Charleston detective, regarding blood evidence at the scene of the incident. She confirmed that no blood was collected despite the presence of blood at the scene. Tr Tr R __. Coroner Rae Wooten testified that she took pictures of the scene including pictures of a window raise with blood visible, but she did not collect any blood evidence. Both of these State's witness acknowledged that no one collected and blood from which DNA could be tested in this case. Petitioner argued that North Charleston Police had destroyed possible exculpatory evidence in his case, therefore a Due Process violation had occurred. Arizona v. Youngblood, 488 U S 51, (1988), (when the police permit the destruction of evidence that could eliminate the defendant as the perpetrator such loss is material to the defense and is a denial of due process. quoting State. v. Escalante, 153 Arizona 55, 61 734 P.2d 597, 603 (App. 1986)). Petitioner's counsel failed to raise the valid preserved issue in Petitioner's brief.

VII Did the Circuit court err in finding that Petitioner's appellate counsel was not ineffective in raising the issue of a prejudicial witness identification when Petitioner objected to the witness identification during her testimony and moved to exclude her testimony raising the issue and preserving the issue for appellate review.

Petitioner's appellate counsel failed to brief the raised and preserved issue of a tinted unduly suggestive identification of Petitioner by State's witness Corinda Snowden Williams. Petitioner objected to the testimony of Ms. Williams based on her lack of credibility due to her admission that she had lied to the police, the fact that she gave three inconsistent statements, and that she was only shown one mug shot in her identification of petitioner as the perpetrator of the crime.

In Neil v. Biggers,---- there are five factors to consider in determining if a witness identification is unduly suggestive therefore inadmissible.

1. The witness certainty;
2. The witness quality of view;
3. The amount of attention paid to the culprit;

4. The agreement between the witness's description and the suspect;
5. The amount of time between the crime and the identification attempt.

The Bigger's test when applied to Petitioner's facts challenge Ms. Williams in court identification and confirm that her testimony should not have been allowed in his trial. Admission of her identification of Petitioner was in violation Petitioner's due process right to a fair trial under Biggers.

VIII Did the circuit court err in finding petitioners appellate counsel was not ineffective when appellate counsel did not raise the issue of the denial of petitioners request for a voluntary manslaughter charge when there was in fact evidence in the record that factually support the charge being given to the jury when Petitioner raised the issue during his trial and preserved the issue for appellate review.

Petitioner asked the trial court to charge voluntary manslaughter R. Tr Tr 652. Petitioner based this request on evidence in the record that indicated there was sudden heat of passion in this case. TR TR 654

CONCLUSION

The standard of review in a PCR case is error of law. The arguments listed in this petition clearly establish the circuit judge failed to apply the applicable law in her review of Petitioner's trial record and testimony during his PCR hearing. Appellate counsel's performance in Petitioner's case fell well below the standard of reasonableness as an appellate attorney. He failed to brief several legally valid preserved appellate issues on petitioner's behalf. His ineffectiveness significantly prejudiced petitioner such that but for his lack of thoroughness and deficiencies, Petitioner would have prevailed on his appeal and his conviction overturned.

Granting Summary Judgment for the State was inappropriate in Petitioner's case. Ms. Proctor had represented Petitioner for a long time on his case. She had been given erroneous counsel to Petitioner regarding self-representation. Her counsel was ineffective and prejudiced Petitioner.

Appellant counsel should have raised many appellate issue for Petitioner. His inadequate and deficient brief to the Court of Appeals significantly prejudiced petition. But for appellate counsel's singular view of Petitioner's case, his issues would have supported a reversal of his conviction. Petitioner seeks review of the circuit court's denial of his right to Post Conviction Relief.

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November 10, 2017

Via facsimile and U.S. Mail
The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: *The Protestant Episcopal Church in the Diocese of South Carolina et al. v. The Episcopal Church (a/k/a The Protestant Episcopal Church in the United States of America) and The Episcopal Church in South Carolina*
Appellate Case No. 2015-000622

Dear Mr. Shearouse:

Pursuant to Rule 213 of the South Carolina Appellate Court Rules, please find enclosed for filing the original of the Motion for Leave to Accept Brief for 106 Religious Leaders as *Amici Curiae* in Support of Respondents' Petition for Rehearing, along with the original of the proposed *amicus* brief for conditional filing. Copies of each will be arriving under separate cover via overnight delivery.

Each document includes a proof of service on counsel of record.

Thank you for your assistance. If you have any questions, or require additional information, please do not hesitate to contact me.

Sincerely,

Christopher E. Mills

S.C. Bar. No. 101050
Enclosures

No. 2015-000622

In the Supreme Court of the State of South Carolina

THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF SOUTH CAROLINA, ET AL.,
RESPONDENTS

v.

THE EPISCOPAL CHURCH (A/K/A THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA) AND THE EPISCOPAL CHURCH IN SOUTH CAROLINA,
APPELLANTS

APPEAL FROM DORCHESTER COUNTY
COURT OF COMMON PLEAS
HON. DIANE S. GOODSTEIN, CIRCUIT COURT JUDGE

MOTION FOR LEAVE TO ACCEPT BRIEF FOR 106 RELIGIOUS LEADERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS' PETITION FOR REHEARING

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Pursuant to the South Carolina Appellate Court Rule 213, 106 religious leaders in South Carolina move for leave of the Court to file an *amicus* brief in support of Respondents' Petition for Rehearing. As set forth more fully in the attached proposed brief, the above-referenced matter addresses issues of great concern to the religious leaders, including their churches' freedom to associate or disassociate with denominations, how their congregants can ensure that gifts of time and money go to the entity they desire, how church property disputes are adjudicated, and the ease of their obtaining title and property insurance. Absent rehearing to clarify the fractured decision issued by the Court, these critical interests are threatened. As such, the religious leaders have a direct interest in the proper disposition of this case. Their brief offers the Court an explanation of the potential harms to their churches' interests from this Court's split decision, for which a petition for rehearing is now pending.

For the foregoing reasons, the religious leaders respectfully request this Court grant leave to present an *amicus curiae* brief. A copy of the proposed *amicus* brief is attached hereto, and is being filed with this motion in accordance with Rule 213, SCACR.

Respectfully submitted,

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NOVEMBER 10, 2017

PROOF OF SERVICE

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Dated: November 10, 2017

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No. 2015-000622

In the Supreme Court of the State of South Carolina

THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF SOUTH CAROLINA, ET AL.,
RESPONDENTS

v.

THE EPISCOPAL CHURCH (A/K/A THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA) AND THE EPISCOPAL CHURCH IN SOUTH CAROLINA,
APPELLANTS

APPEAL FROM DORCHESTER COUNTY
COURT OF COMMON PLEAS
HON. DIANE S. GOODSTEIN, CIRCUIT COURT JUDGE

BRIEF FOR 106 RELIGIOUS LEADERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS' PETITION FOR REHEARING

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES, TREATIES, AND CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTRODUCTION

For over 300 years, since before the Founding of this Nation, members of the Respondents' congregations contributed land, money, and labor in reliance on settled South Carolina law—only to have this Court divest them of their property based on a canon unilaterally adopted centuries later by a national denomination. This outcome was possible only because the Court fashioned a new rule of law solely for this case, and this denomination. But that rule of law departs from this Court's precedents and imposes special burdens on religious associations relative to secular ones. Those burdens violate the First Amendment.

As the U.S. Supreme Court explained in *Jones v. Wolf*, courts resolving church property disputes may not "frustrate[] the free-exercise rights of the members of [the] religious association" before the court. 443 U.S. 595, 606 (1979). Instead, courts must "ensure that [the] dispute" is "resolved in accord with the desires of the members." *Id.* at 604. This Court, however, did precisely the opposite, trampling on the free exercise and associational rights of the local congregations by establishing a new rule of law that gives special preference to certain hierarchical denominations by freeing them alone from the most basic requirements of generally applicable South Carolina property, trust, and corporate law.

The Court should grant rehearing to clarify the free exercise rights of churches. The Court's decision improperly entangles civil courts in forbidden

questions of "religious doctrine, polity, and practice" (*id.* at 603) by making property rights turn on the court's interpretation of internal church issues. In so doing, the decision misreads U.S. Supreme Court precedent and conflicts with the decisions of other courts that have considered similar issues.

Moreover, the Court's fractured decision leaves church property law in this State in utter confusion. Given that the Court's opinions could not agree even on a bare *summary* of the relevant holdings (*compare* Op. at 49–50 n.27 (Hearn, J.), *with* Op. at 93–94 n.72 (Toal, J.)), it will be impossible for individuals, churches, denominations, lenders, insurers, or many others to structure their affairs in reliance on state law. Indeed, the U.S. Supreme Court has already been told—wrongly—that the Court's decision overrules *All Saints Parish Waccamaw v. Protestant Episcopal Church in Diocese of S.C.*, 385 S.C. 428, 445, 685 S.E.2d 163, 172 (2009).[1] This confusion is a recipe for endless litigation.

The prevailing legal uncertainty affects multiple denominations, thousands of churches, and millions of their members. It also has several pernicious effects in addition to causing substantial litigation. It discourages churches from expanding. It skews their decisions whether to join or leave denominations. And even when title is clear, it keeps third parties, such as lenders and insurers, from ascer-

[1] *See* Petition for Certiorari, *Presbytery of the Twin Cities Area v. Eden Prairie Presbyterian Church*, 2017 WL 4685352, at *14–15 (U.S. Oct. 16, 2017).

taining ownership without examining arcane church rules that could change without notice. Such uncertainty is inconsistent with the idea of "neutral principles," which ought to facilitate straightforward ownership determinations under "objective," "secular," and "familiar" concepts of civil law. *Jones*, 443 U.S. at 603.

South Carolina law and the First Amendment need not be thrust into conflict. A truly neutral approach to church property disputes—which requires courts to apply ordinary principles of contract and property law, and "to scrutinize the document[s] in purely secular terms"—will both free courts from the danger of entanglement in church affairs and better protect religious liberty. *Jones*, 443 U.S. at 604. Rehearing is urgently needed.

INTEREST OF THE *AMICI CURIAE*

As leaders in South Carolina's religious community, *amici curiae* prize its long and rich history of religious freedom.[2] The ability to gather freely and worship with those of common faith is what brought many of our ancestors to this land. The freedom to do so is a presumption on which all *amici*'s ministries rest today. Whether *amici* lead colonial Anglican parishes, Huguenots, Baptists, non-

[2] *Amici curiae* are listed in the Appendix. This brief is submitted pursuant to Rule 213, SCACR, in support of Respondents' Petition for Rehearing. All procedures required by Rule 213, SCACR, have been followed. No counsel for a party authored this brief in whole or in part, and no counsel, party, or any person other than the *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of the brief, which was prepared by the undersigned counsel.

denominational or any other religious tradition, they share this in common. It is what has made the rich tapestry of religious diversity in South Carolina possible. But *amici* perceive that this freedom is now in jeopardy.

The fractured decision at issue would transfer nearly $500 million in church property from the congregations of the Diocese of South Carolina who created it for their ministry, to an unincorporated New York association that contributed nothing to its development. *Amici* believe that this decision undermines core principles of religious freedom, in violation of the Constitution.

Under the First Amendment, the government cannot favor one religious group over another, and it cannot elevate non-religious over religious bodies by its treatment. Moreover, the First Amendment protects the freedom of association—which necessarily includes the freedom to disassociate. Some *amici* represent religious traditions whose very existence is predicated on this freedom. *Amici* believe strongly that churches freely associated with each other can also freely choose to disassociate. And the exercise of that freedom should not come at the price of the tools for ministry established by local sacrifice, often over the course of generations, where secular instruments of ownership confirm that title is vested in the disaffiliating bodies. When the vast majority of those so choosing—80% in this case—do so in full accord with and reliance on the existing State law and Supreme Court precedent, the courts must respect that decision.

STATEMENT OF ISSUE

Whether this Court should grant rehearing to clarify that applying "neutral principles of law" requires the application of generally applicable State law.

STATEMENT OF THE CASE

Amici adopt Respondents' statement of the case. The Court's decision is *Protestant Episcopal Church in the Diocese of S.C. v. Episcopal Church*, Op. No. 27731 (S.C. Sup. Ct. filed Aug. 2, 2017) (Shearouse Adv. Sh. No. 29 at 14) (hereinafter "Op.").

ARGUMENT

I. The Court did not properly apply neutral principles of law.

A. Precedent requires this Court to apply a pure neutral principles approach, and it failed to do so.

"[W]hen resolving church dispute cases, South Carolina courts are to apply the neutral principles of law approach as approved by the Supreme Court of the United States in *Jones v. Wolf*" and required "by this Court in *Pearson v. Church of God*." *All Saints*, 385 S.C. at 442, 685 S.E.2d at 171. This Court has held that "where a civil court can completely resolve a church dispute on neutral principles of law, the First Amendment commands it to do so." *Id.*, 385 S.C. at 445, 685 S.E.2d at 172.[3] And as in *All Saints*, resolution of all issues presented by this case

[3] Though the Court's "lead opinion" here would have overruled *All Saints*, a majority refused to do so, and thus it remains binding law on all courts within the State.

were "achievable through the application of neutral principles of property, trust, and corporate law." *Id.*

But those principles were not applied by this Court. Instead, the Court fashioned a new set of principles that apply only to certain types of religious organizations, and in so doing violated this Court's precedents and the Supreme Court's decision in *Jones*.

Under *Jones*'s neutral principles approach, the enforceability of the Dennis Canon should turn on whether the canons are embodied in "legally cognizable form" under ordinary property and contract law. 443 U.S. at 606. Indeed, the whole point of the neutral principles approach is to avoid compelling courts to "defer to the resolution of ... the hierarchical church," or to its "laws and regulations." *Id.* at 597, 609. Instead, the neutral principles analysis "is completely secular," "relies exclusively on objective, well-established concepts of trust and property law," and facilitates "ordering private rights and obligations to reflect the intentions of the parties" as embodied in "legally cognizable form." *Id.* at 603, 606.

Of course, on "issues of religious doctrine or polity," courts must defer to "the highest court of a hierarchical church organization." *Id.* at 602. But property interests are independent of such issues. Questions of religious doctrine might involve, for example, whether a denomination changed its theology (*see Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393

U.S. 440, 442–43 (1969)) or whether church figures may hold sacred offices (*see Serbian E. Orthodox Diocese for U.S. and Can. v. Milivojevich*, 426 U.S. 696 (1976)). Such doctrinal questions are inextricably intertwined with the religious beliefs and internal authority of a given religious organization.

But those types of questions are not presented here. The Court "is not being asked to adjudicate a matter of religious law, principle, doctrine, discipline, custom, or administration." *Pearson v. Church of God*, 325 S.C. 45, 53, 478 S.E.2d 849, 853 (1996). Instead, this case presents routine trust and property questions that arose between different churches—issues of State law that can and must be resolved fully by reference to neutral principles of law, *i.e.*, "under the law of the land." *Id.*, 325 S.C. at 52, 478 S.E.2d at 853 (quoting *Morris Street Baptist Church v. Dart*, 67 S.C. 338, 341–42, 45 S.E. 753, 754 (1903)). "[A]djudication of this matter does not require [the Court] to wade into the waters of religious law, doctrine, or polity." *All Saints*, 385 S.C. at 445, 685 S.E.2d at 172. Resolving this matter in any way other than through neutral principles would violate *All Saints* and impermissibly entangle the Court in religious affairs.

Contrary to Appellants' argument (Return at 5), a majority of this Court recognized that the neutral principles approach was required in this case.[4] Further, under a pure neutral principles approach, there certainly were no express or constructive trusts created here, and Respondents should prevail. *See* Op. at 55 (Kittredge, J.) ("Were the Court in the instant case permitted to apply the law of express trusts as we ordinarily would, the suggestion that any of the thirty-six local churches created a trust in favor of the national church would be laughable."); *accord All Saints*, 385 S.C. at 449, 685 S.E.2d at 174 ("It is an axiomatic principle of law that a person or entity must hold title to property in order to declare that it is held in trust for the benefit of another."); *see generally* Michael W. McConnell & Luke W. Goodrich, *On Resolving Church Property Disputes*, 58 Ariz. L. Rev. 307,

[4] Relying on the supposed "use of the word 'masquerade' by the United States Supreme Court in *Milivojevich*," Justice Hearn recasts this property case as a theological one and says that "resolving this dispute would require us to decide which faction is the 'true' Episcopal Church," and would thus defer to the denomination. Op. at 37–38. As an initial matter, the word "masquerade" appears nowhere in *Milivojevich*. And as the rest of this Court recognized, there is no support for Justice Hearn's recasting of this case, which presents a pure question of property ownership between two different churches. Indeed, *Jones* rejected a similar argument. The petitioners in *Jones* cited the denomination's internal regulations and its ecclesiastical court's determination that the minority wing of the congregation was the "true" church. 443 U.S. at 607. But as the Court held, that a group is the "true" church for ecclesiastical purposes does not govern ownership of church property under civil law. *Id.* at 607–09. Courts applying neutral principles need not "defer to the resolution of ... the hierarchical church," or to its "laws and regulations." *Id.* at 597, 609.

345–54 (2016). That should have been the end of the matter: "the civil tribunal tries the civil right, and no more." *Pearson*, 325 S.C. at 51, 478 S.E.2d at 852 (quoting *Morris Street Baptist*, 67 S.C. at 341, 45 S.E. at 754).[5]

The problem is, based on a misunderstanding of *Jones*, the Court failed to properly apply the neutral principles approach. In some Justices' view, even a court applying a neutral principles approach is *not* "permitted to apply the law of ... trusts as we ordinarily would." Op. at 55 (Kittredge, J.); *see also* Op. at 42–43 (Hearn, J.) (emphasizing "the unique nature of trusts as applied to religious organizations" and asserting that the denomination was not "required to obtain a separate trust instrument" for each property in accordance with State law). But that is precisely backwards. A court applying a neutral principles approach can *only* apply State law as it normally would; any other approach would be the opposite of neutral principles.

In the view of those Justices who adopted a modified neutral principles approach, *Jones*'s statement that "parties can ensure" which entity "will retain the church property" so long as they "embod[y]" this result "in some legally cognizable form" (443 U.S. at 606) means that parties need not adhere to the most basic

[5] Various opinions here relied on supposed accessions, but these accessions did not include a transfer of title in a form recognized under South Carolina law. *See* Petition for Rehearing at 18–22.

formalities that state law normally requires of all parties—secular or religious, private or public. These Justices rejected the notion that *Jones* requires "a *pure* application of neutral principles of law." Op. at 54 (Kittredge, J.) (emphasis added).

But that cannot be right. As many courts have agreed, a form is only "legally cognizable" if it actually satisfies neutral state law.[6] There is no halfway "legally cognizable" form; a form either complies with state law or it does not. A trust that is almost valid is not valid at all. A property interest that almost exists is not legally cognizable.

Any other holding would be inconsistent with Supreme Court precedent, and would present endless practical dilemmas. "[N]eutral principles of law" are those

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[6] *E.g.*, *Presbytery of Ohio Valley, Inc. v. OPC, Inc.*, 973 N.E.2d 1099, 1107 n.7 (Ind. 2012) (*Jones* does not "requir[e] the imposition of a trust whenever the denominational church organization enshrines such language in its constitution"; "such a rule would result in de facto compulsory deference"); *All Saints*, 385 S.C. at 444, 685 S.E.2d at 172 (*Jones* "permits the application of property, corporate, and other forms of law to church disputes"); *Ark. Presbytery v. Hudson*, 40 S.W.3d 301, 309–10 (Ark. 2001) (*Jones* did not overturn "long held" state law barring "a grantor to impose a trust upon property previously conveyed"); *accord Church of God in Christ, Inc. v. Graham*, 54 F.3d 522, 525–26 (8th Cir. 1995); *Carrollton Presbyterian Church v. Presbytery of S. La.*, 77 So.3d 975, 981 (La. Ct. App. 2011); *Heartland Presbytery v. Gashland Presbyterian Church*, 364 S.W.3d 575, 589 (Mo. Ct. App. 2012); *cf. Hope Presbyterian Church v. Presbyterian Church* (U.S.A.), 291 P.3d 711, 722 (Or. 2012) (ruling for the denomination but recognizing that "the express trust provision in PCUSA's constitution cannot be dispositive"; any trust must be "'legally cognizable'" under state "trust laws"); *accord* McConnell & Goodrich, *supra*, at 319 ("[C]hurch constitutions have legal effect only when they are embodied in 'some legally cognizable form,' such as a trust document or a deed.").

"developed for use in *all* property disputes." *Presbyterian Church*, 393 U.S. at 449 (emphasis added). And *Jones* explicitly says that state courts should use "completely secular" and "well-established concepts of trust and property law familiar to lawyers and judges" to resolve these disputes, "thereby promis[ing] to free civil courts completely from entanglement in questions of religious doctrine, policy, and practice." 443 U.S. at 603, 606. But an "almost legally cognizable" approach would achieve none of those goals. Lawyers and judges are not familiar with how to adjudicate documents that might be almost valid. And the "almost" approach would certainly entangle courts in matters of religion and practice, as what counts as almost a trust in one denomination might be entirely different from what is almost a trust in another. The inevitable result of following an almost neutral approach would be judges "pick[ing] and choos[ing] which state laws to apply in order to justify a desired result." Op. at 43 (Hearn, J.).[7]

Moreover, the practical difficulties with an almost neutral approach abound. How close to actually legally cognizable must a legal agreement be to qualify as sufficiently legally cognizable under this new almost neutral approach? Ninety

[7] Ironically, Justice Hearn went on to decry Justice Toal's "dogged effort to impose South Carolina civil law." Op. at 48 n.24. Yet by "impos[ing]" State law just as in any other property dispute, Justice Toal avoids the necessity of picking and choosing among a mishmash of state laws, internal church rules, and judicial preferences to decide this case. That necessity inheres in any halfhearted effort to impose the law.

percent? Eighty percent? Fifty percent? What are the bare minimums to create a trust that is sufficiently valid to be almost valid under otherwise applicable State law? How is a trial court judge supposed to collect evidence on how close a given agreement is to what is otherwise required by State law? Is it a question of law, or fact? Can the State legislature pass new almost valid trust requirements for use only when a court is applying "neutral" principles to a religious organization? Could such legislatively imposed different property burdens on religious organizations violate the First Amendment? If so, how can the judiciary impose such different burdens consistent with the Constitution? Once the Court abandons an actually neutral principles approach, there is no end to these difficulties.[8]

[8] Respectfully, *amici* disagree with Justice Kittredge that the neutral principles approach is "not really 'neutral' after all." Op. at 55. Justice Kittredge asked: "If it were, why would the Supreme Court have taken pains to mandate that the burden imposed on a religious organization be 'minimal'? And why would the Supreme Court have specified ways churches could establish an express trust, without indicating concern for whether those methods were valid under any state's existing trust law?" *Id.* (citation omitted). But the Court *did* express concern for whether the methods were valid under existing law, by saying that the method must be via a "legally cognizable form." *Jones*, 443 U.S. at 606. And the Court did not "*mandate*" that "the burden" of this form be "minimal"; rather, the Court offered the purely descriptive statement that "[t]he burden involved in taking such steps will be minimal" (*id.*)—a correct description of generally applicable state express trust law. *See* McConnell & Goodrich, *supra*, at 341 ("It is not a complex matter to insert a use restriction in a deed, execute a trust agreement, or transfer title to a denominational official.").

In short, this Court should grant rehearing to establish that a pure neutral principles approach is required in interchurch property disputes.

B. The Court's failure to apply neutral principles threatens religious liberty.

By holding that church law superseded secular indicia of intent and created a retroactive trust, the Court granted Appellants unilateral authority to override civil law—a right held by no other entity, secular or religious. But "both the Free Exercise and the Establishment Clauses compel[] the State to pursue a course of neutrality toward religion." *Bd. of Educ. v. Grumet*, 512 U.S. 687, 696 (1994) (internal quotation mark omitted). The Free Exercise Clause proscribes laws that "impose special disabilities on the basis of ... religious status" (*Employment Div. v. Smith*, 494 U.S. 872, 877 (1990)), and the Establishment Clause bars states from "vest[ing] in the governing bodies of churches" any "unilateral and absolute" power over others' property (*Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 117, 127 (1982)). By allowing denominations to strip local churches of their property, the Court's ruling is "inconsistent with complete religious liberty, untrammeled by state authority." *Pearson*, 325 S.C. at 52, 478 S.E.2d at 852 (quoting *Morris Street Baptist*, 67 S.C. at 341–42, 45 S.E. at 754).

Civil courts may not apply "neutral principles" in a manner that "frustrate[s] the free-exercise rights of the members of [the] religious association." *Jones*, 443 U.S. at 606. Protecting religious liberty requires courts to "give effect to the result

indicated by the parties." *Id.* Even under the deference analysis of *Watson v. Jones,* 80 U.S. 679, 722–23 (1872), denominational rules cannot trump grantor intent: "regardless of the form of church government, it would be the 'obvious duty' of a civil tribunal to enforce the 'express terms' of a deed." *Jones,* 443 U.S. at 603 n.3. Yet the Court's decision violates this principle.

Giving legal effect to trusts declared in denominational documents is not even mere deference. It is giving denominations power to rewrite civil property law. By stripping churches of their property via means available to no one but hierarchical denominations, such an approach "impose[s] special disabilities on the basis of religious status"—in violation of free exercise. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 533 (1993) (internal quotation marks and ellipsis omitted). Moreover, the Court's approach in this case "puts a heavy thumb on the scales in favor of a more 'hierarchical' form of polity, contradicting the First Amendment rule that churches must remain free 'to decide for themselves, free from state interference, matters of church government.'"

McConnell & Goodrich, *supra*, at 327 (quoting *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)).[9]

Requiring that denominational trusts be embodied in "legally cognizable form" (*Jones*, 443 U.S. at 606) is also necessary to avoiding establishment violations. As *Jones* confirmed, free exercise is not implicated by "neutral provisions of state law governing the manner in which churches own property"; the "burden" of complying with such provisions is "minimal." *Id.* Thus, allowing denominations to secure ownership of congregations' properties without complying with civil law cannot be defended as a religious "accommodation," which must alleviate "a *significant* burden" on religious exercise. *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987) (emphasis added).

That is especially clear where a purported "accommodation" burdens *other parties*—here, by stripping them of their property. Even where the burdens on third parties are far less severe, states may not grant "unilateral and absolute power" to "a church" on "issues with significant economic and political implications" for others' property rights. *Grendel's Den*, 459 U.S. at 117, 127.

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[9] Several opinions here are based on the incorrect "assum[ption] that all churches are either 'congregational' or 'hierarchical,' and that 'hierarchical' churches share the same notion of implied consent. But in the real world, not all churches are purely 'congregational' or 'hierarchical,' and a church's governing structure may offer little insight into how it intends to hold its property." McConnell & Goodrich, *supra*, at 327.

This Court's brand of "neutral principles" was particularly onerous: It not only gave effect to canon law; it did so *retroactively* by abandoning its *All Saints* approach—divesting Respondents of property conveyed hundreds of years before the law changed, and long before the denomination even existed. If that conception of "neutral principles" is correct, then no church can join a denomination without jeopardizing its property. The denomination can always pass rules transferring ownership, and a court can always make those rules effective retroactively. Such a legal regime would discourage churches from expanding their buildings, from acting in accordance with their conscience as to whether to remain in association with their current denominations, and from joining denominations in the first place—all at the price of religious freedom.

Rehearing is needed.

II. The Court's fractured opinion generates uncertainty in private property rights and creates practical difficulties for churches, denominations, and third parties.

Rehearing is also needed to provide adequate guidance to lower courts, churches, denominations, lenders, insurers, and many others. The Court's fractured opinion leaves this State's church property law in disrepair and confusion. Each Justice issued a separate opinion; two would overrule *All Saints*, at least in

part; others followed *All Saints* but differed in its application[10]; and the concurrence and dissent could not even agree on a basic summary of what the decision holds. *Compare* Op. at 49–50 n.27 (Hearn, J.), *with* Op. at 93–94 n.72 (Toal, J.). The Court's present rulings throw property law into massive confusion. In a case involving half a billion dollars' worth of property, the absence of a clear rule of law creates uncertainty for churches, denominations, and third parties.

As the Supreme Court explained in *Jones*, a State must provide for "the peaceful resolution of property" conflicts of all kinds. 443 U.S. at 602. In other words, the State must provide "a civil forum" where the ownership of property, including "church property," "can be determined conclusively"—which is possible because of *Jones*'s requirement that churches define their property rights in "legally cognizable" terms. *Id.* at 602, 606. These determinations of property ownership, and the accompanying property instruments, are necessary for sellers, buyers, lenders, and third parties, all of whom need to have clarity on who owns relevant property. Moreover, donors and congregants in local churches must be certain that

[10] Indeed, accomplished lawyers have (incorrectly) told the U.S. Supreme Court that "the Supreme Court of South Carolina recently reversed *All Saints*." Petition for Certiorari, *Presbytery of the Twin Cities Area v. Eden Prairie Presbyterian Church*, 2017 WL 4685352, at *14–15. And in Justice Toal's view, the lead opinion and concurrence "overrule *Pearson* and its progeny in all but name." Op. at 78. Even Appellants do not know the status of *All Saints*: "*To the extent the Court's decision rests on overruling* All Saints, Appellants gave notice of their intent to argue against that precedent." Return at 7 (emphasis added).

their gifts of time and money are going to entities that embody their beliefs, without fear that those gifts will later be appropriated by a different body, without their consent.

Under the Court's decision, such certainty is impossible. "If ownership no longer turns on publicly recorded deeds and trust instruments, but on the meaning of internal church rules and relationships, no one can know for certain who owns church property." McConnell & Goodrich, *supra*, at 340. Any denomination could pass a retroactive internal rule that would appropriate congregants' gifts and church property. As Justice Kittredge aptly explained, "The message is clear for churches in South Carolina that are affiliated in any manner with a national organization and have never lifted a finger to transfer control or ownership of their property—if you think your property ownership is secure, think again." Op. at 62. Similarly, as Justice Toal put it: "If I were a member of a governing body of a religiously-affiliated hospital, for example, I would be gravely concerned, as the lead opinion declares today that different rules apply to religious organizations with respect to corporate organization and property ownership in this State." Op. at 88.

Without secure property ownership, many rounds of future litigation are inevitable. Yet many churches and denominations cannot afford to litigate. And both sides would prefer that limited resources now spent on litigation be spent on mission.

Moreover, the Court's ruling could eviscerate otherwise clear titles, driving up the costs faced by churches in buying or selling property and in obtaining insurance. The ruling harms the rights of lenders and insurers by rendering longstanding principles of State property law inoperative and potentially subjecting private property interests to a complex "course of internal church dealings" analysis. And such an analysis is nigh impossible given the fractured decision, with not a single Justice agreeing as to exactly how State title and property law apply in this dispute.[11]

This uncertainty is fundamentally inconsistent with the idea of the neutral principles approach, which is supposed to be predictable, "completely secular," and free from "examination of ecclesiastical polity." *Jones,* 443 U.S. at 603, 605. The "promise of nonentanglement and neutrality inherent in the neutral-principles approach" (*id.* at 604) is betrayed when courts treat church rules as superseding ordinary secular indicia of ownership. Churches and third parties seeing that neutral principles are "secular," "objective," and "familiar" would have no inkling that *canon law* might determine property ownership.

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[11] Appellants say they are "aware of no[]" "evidence" that imposing a trust would "cause chaos for mortgage lenders and title insurers." Return at 10. Yet in *All Saints* itself, because of the dispute over church canons, "the congregation was unable to acquire title insurance." 385 S.C. at 438, 685 S.E.2d at 168.

Rehearing is needed, at a minimum, to provide adequate guidance as to what rules will be applied in church property disputes. Otherwise, hundreds of millions of dollars of South Carolina property will remain subject to intractable legal uncertainty.

CONCLUSION

If the ruling below is allowed to stand, no South Carolina congregation can avoid having its property expropriated by an affiliated denomination. The denomination can always transfer ownership simply by passing unilateral rules at church conventions. It does not matter who holds title, what the donor of the property intended, who paid for and maintained the property, whether the denomination's interest is publicly recorded, what the rules were when the congregation joined the denomination, whether the congregation then held title in its own name, or even whether the denomination then existed.

The Court's decision awards half a billion dollars of property to Appellants by applying internal canons that were never embodied in any ordinary contract or recorded in any deed, and that were instead unilaterally adopted centuries after local congregants purchased the property and founded their local churches. Effectively, the court applied implied trust theory by another name, granting Appellants all of the benefits of ownership and none of the burdens—like having to pay insurance costs or the mortgage, or facing liability for conduct or injuries occurring on

the property. No other private entity in South Carolina, secular or religious, enjoys that right. That establishment of a particular religious structure violates the First Amendment.

For the foregoing reasons, this Court should grant Respondents' Petition for Rehearing.

Respectfully submitted,

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NOVEMBER 10, 2017

APPENDIX

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Pastor Bryan Ayer (Holmes Avenue Baptist Church)
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211, SCACR, I, Christopher E. Mills, an attorney, certify that the foregoing complies with the length and formatting requirements of Rules 211 and 267, SCACR.

Dated: November 10, 2017

Christopher E. Mills