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November 20, 2017

The Supreme Court of South Carolina  
1231 Gervais Street  
Columbia, SC 29201

**RECEIVED**

NOV 20 2017

S.C. SUPREME COURT

RE: State of South Carolina v. Terrell McCoy  
Supreme Court Case No.: 2017-000-755

Dear Madame Clerk:

Enclosed for filing please find an original and six copies of the Petition for Certiorari for the above referenced case as well as two copies of the record, bound and unbound. Additionally, please find a Proof of Service to the Assistance Attorney General, Judah Vansyekel.

Sincerely,



Melisa W. Gay

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

**RECEIVED**

NOV 20 2017

Certiorari to Charleston County

Deidre L. Jefferson, Circuit Court Judge

S.C. SUPREME COURT

2017-000-755

Terrell McCoy, Petitioner,

V.

State of South Carolina, Respondent.

**PETITION FOR WRIT OF CERTIORARI  
TO THE CIRCUIT COURT**

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**ATTORNEY FOR PETITIONER**

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**CERTIFICATE OF COUNSEL**

Counsel for Petitioner certifies that the Post Conviction Relief hearing was held and finally ruled upon by the Circuit Court Judge, Deidre L. Jefferson on December 14, 2015.

## Questions Presented

1. 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 Trial on January 27, 2009.
2. Did the circuit court err in refusing to allow petitioner to represent himself during the PCR hearing held on December 14, 2015 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 April 19, 2006, 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.
3. Did the circuit judge err in finding that Petitioner's appellate counsel, Robert Dudec, 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 however 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.
4. Did the circuit judge err in finding that petitioner's appellate counsel was not ineffective when appellate counsel did not raise a violation of Brady v. Maryland 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.
5. Did the circuit judge err in finding that petitioner's appellate counsel was not ineffective when appellate counsel did not raise a violation of Petitioner's due process right to a fair trial under the Fifth Amendment of the U S Constitution, Article I Section III of the South 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 Williams 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.

6. Did the circuit court err in finding that Petitioner's appellate counsel was not ineffective when appellate counsel did not raise a Batson v. Kentucky 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 preemptory 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.
7. 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 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.
8. 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 under Neil v. Biggers and preserving the issue for appellate review.
9. 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.

## 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 R1, R4. 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) R 735 years imprisonment. Ultimately, Petitioner's sentenced was reduced to forty (40) years imprisonment R736.

A timely Notice of Intent to Appeal was filed March 11, 2009 R 737-741. Robert M. Dudek, Esquire of the South Carolina Office of Appellate Defense was appointed to represent Petitioner and perfected Petitioner's appeal R 743-787. 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) R788. Mr. Dudek filed a Petition for Rehearing which was denied on December 19, 2011 R790. Petitioner filed a Writ of Certiorari in the S.C. Supreme Court which was denied on March 6, 2013 R797.

Petitioner filed an Application for Post Conviction Relief on April 4, 2013 R798. 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 831-834. May 19, 2014 State filed a Return to PCR Application of April 4, 2013 R 867. Petitioner filed Motion to Substitute Counsel and Withdrawal of Present Counsel on July 21, 2014.

Petitioner's first PCR hearing was held on September 9, 2015 R 896-917. The Honorable Larry Hyman issued an Order granting State's Summary Judgement Motion, thereby dismissing Petitioner's PCR action against his trial/ stand by counsel Lorelle Proctor R 1005. Petitioner filed Post Conviction Relief on April 4, 2013(2<sup>nd</sup>). Petitioner's second PCR hearing was held in front of The Honorable Deadre L. Jefferson on December 14, 2015. Mr. Dudek testified by telephone R. Petitioner was represented by Rodney Davis, esquire at the second PCR hearing. Petitioner moved to represent himself during the hearing based on the presentation of his case by Mr. Davis. Petitioner's request for self-representation during the hearing was denied, however Petitioner filed a Motion to Relieve Mr. Davis on January 8, 2016 R 1006. Judge Jefferson issued an Order denying Petitioner's PCR application on December 15, 2015 R 1012. A form Order denying Petitioner's PCR was signed on May 27, 2016. March 24, 2016 Petitioner hired Melisa W. Gay, Esquire to represent him during the balance of his PCR action. A Substitution Order was filed on March 29, 2016 R 1011. February 14, 2017 Petitioner filed a Motion Purauant to Rule 56 (e) R 1025. State filed a Response to Motion to Clarify R 1031. Petitioner filed a Motion to Clarify Motion pursuant to Rule 56 (e) R 1056. February 10, 2017 Judge Jefferson issued a Final Order denying Petitioner's PCR application of April 4, 2015. Petitioner now seeks a Writ of Certiorari from this Court R 1063.

## STATEMENT OF THE FACTS

Petitioner was arrested on March 27, 2006 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 Order that Lorelle Proctor was relieved of counsel. January 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 R 663.

Petitioner was sentenced to fifty (50) years. Ms. Proctor filed a Motion to reconsider sentence. Petitioner's 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, 386 U S 738, 87 S Ct 1396, (1967). He did not raise any substantive issues that Petitioner preserved during his trial. See Record Documents Appellate Brief, State's Reply Brief Court of Appeals Opinion and Petition for Rehearing.

Petitioner filed an Application for Post Conviction Relief (PCR) with multiple exhibits. On April 10, 2013; May 4, 2013 and August 29, 2013 Petitioner filed four Amended Applications for PCR. December 5, 2013 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 May 19,2014.

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. The Honorable Larry Hyman issued an Order on September 9, 2015 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 December 14, 2015 Petitioner's PCR case was heard in Charleston County, the Honorable Deadre L. Jefferson presiding. 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 Petitioner's legal issues, Mr. Dudek testified that he would have reviewed the entire transcript. PCR Hrg R941 line 16, he acknowledged that he and Petitioner had "on going communication between us" PCR R 941 lin-25. "He would go along with Petitioner's memory to any specific requests to issues being raised R 941 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. R 941 lin 4-17 Judge Jefferson inquired of Dudek about his decision. He testified Yes sir That was the only found R 941 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." R 950 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 appellate lawyer is to raise the issue or issues that I think give us the best shot of prevailing on.." R 950 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 R 944 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 Brady v. Maryland 373 U.S. 83(1963), 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" R 945 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." R 945 lin 20-23 Dudek testified in response to a question from the State about the prosecution's actual possession of evidence. Dudek'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. R 953 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. R 958 lin 8-13 The exhibit confirmed that a 911 tape had been generated from March 25, 2006 at the time of the shooting. R 958 39 Exhibit 1

Judge Jefferson intimated that the existence of the Affidavit should have been related to a direct appeal (on the Brady issue) R 959 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". R 959 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?" R 960 lin 5-7. She went on to say "the state would have produced it at the time of the original trial, didn't they?" R 960 lin 4-8 PCR counsel Davis responded, "it was never produced your honor". R 960 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. R 965 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 R 965 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. Petitioner believed that the State had failed to provide him with the 911 in violation of Brady. Petitioner had attempted to admit into evidence the CAD log as comparable evidence to the 911 tape R 643-644. 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." R 641-643 R 968 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" R 971 9-12 Petitioner testified that the states witness Corinda Snowden/Williams gave testimony at his trial R 186-206, and he should have been able to impeach her testimony with the 911 dispatch CAD log. R 970 lin 13-21, 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. R 986 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." R 971 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

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." R 971 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. R 974 lin 3-7 R 329. In fact Charleston County Coroner Rae Wooten testified about the condition of the crime scene. R 530-535; Angela Bunker R 592-596. 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 R 981 lin 13-18. The State questioned appellate counsel about the voluntary manslaughter jury charge R 981 lin 13-18. 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. R 990 lin 1-5

Petitioner testified about a Batson v. Kentucky 476 U.S. 79 (1986) 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." R 982 lin 13-16 Petitioner 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." R 987 R 988

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" R 988 lin 25 R 989 lin 1-5. Petitioner'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 petitioners valid preserved substantive appeal issues. R 989 lin 20-22 argued that petitioner'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. R 990 18-22 R 990 23-25 R 991 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 a new trial based on appellate counsel's ineffective representation.

## ARGUMENT

- I. Did the Circuit Court err in granting Summary Judgment 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 trial 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) use 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 December 14, 2015 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 March 30, 2006, 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 2<sup>nd</sup> 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 (2017). 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 2<sup>nd</sup> 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 (2<sup>nd</sup>) (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. 2<sup>nd</sup> 480, 481 (1992), (Petitioner must prove there is a ‘a reasonable 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 issues 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.

Even if appellate counsel had merely filed an Anders v. California, 386 U S 738, 87 S Ct 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 Brady v. Maryland 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. Maryland, 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 SCRPC in violation of the 14<sup>th</sup> 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. 3<sup>rd</sup> 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;
3. 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 v. 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 met 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 Petitioner's due process right to a fair trial under the Fifth Amendment of the U S Constitution, Article I Section III of the South 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 Williams 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 v. 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 through 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, 2006 and filed on April 10, 2006. Case relevant material was requested under Brady v. Maryland and the SCRPC Rule 5 & Rule 6. During Petitioner's trial, the State indicated that the 911 tape had not been revealed, because the Solicitor did not know it existed. 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.

People of the State of New York v. Seeber, 94 A.D. 3<sup>rd</sup> 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 shortcomings of the prosecution were sufficient violations of Brady to overturn defendant's conviction. The defendant in Seeber established as in this case, that better evidence was in fact in the possession of the prosecution and not disclosed nor 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. Under State v. Hutton 358 S.C. 622, 595 S.E.2d 876(2004); State v. Cheeseboro 246 S.C. 526, S.E. 2d 300 (2001) 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 raise a Batson v. Kentucky 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 preemptory 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 in the selection of jurors is constitutionally prohibited. Petitioner in his trial raised a Batson issue. In doing so, he raised a prima facie case of purposeful discrimination. The State did not meet its burden to establish a neutral explanation for challenging African American jurors in Petitioner's 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 spoliation 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. R 971 lin 1-8 Petitioner raised and preserved the issue of North Charleston Police force's bad faith destruction of blood evidence. Petitioner cross 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. R 368-369. 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 the State's witnesses 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.

VIII 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 under Neil v. Biggers 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, 409 U S 188 (1972) 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.

IX 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 662. Petitioner based this request on evidence in the record that indicated there was sudden heat of passion in this case. R 664

## 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.

**FORM 7**  
**PROOF OF SERVICE OF A NOTICE OF APPEAL**

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_  
CERTIORARI TO CHARLESTON COUNTY

Deadre L. Jefferson, Circuit Court Judge

\_\_\_\_\_  
Case No. 2017-000-755  
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**RECEIVED**

NOV 20 2017

S.C. SUPREME COURT

State of  
South Carolina,

Respondent,

Terrell McCoy #256070

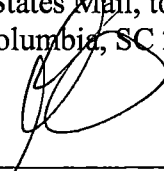
v.

Petitioner

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**PROOF OF SERVICE**  
\_\_\_\_\_

I certify that I have served the Certiorari to Charleston County to Judah Vansykel by depositing a copy of it in the United States Mail, to Assistant Attorney General Judah Vansykel Post Office Box 11549 Columbia, SC 29211.

November 20, 2017

  
\_\_\_\_\_  
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