

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Appeal from Charleston County

Diane S. Goodstein, Circuit Court Judge

Case No. 2016-000650

Terrell L. McCoy

o o o o o o o o o Petitioner

v.

**RECEIVED**

FEB 28 2018

SC Court of Appeals

North Charleston Police Department and

Thomas Dechard, of which, North

Charleston Police Department is

o o o o o o o o Respondent

PETITION FOR REHEARING

Pursuant to Rule 221 (a), SCACR, Petitioner respectfully request rehearing because this court may have overlooked and misapprehended the fact that Petitioner did raise actual fraud in his initial complaint and to trial judge. Petitioner also filed a timely Rule 59(e) SCRPC.

This court is correct that "[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to preserved for appellate

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review. Wilder Corp. v. Witke, 330 S.C. 711, 76, 497 S.E. 2d 731 (1998).

The Colloquy between the Circuit Judge and petitioner is the spoliation of "material evidence", by Respondents, prevented him from fully exhibiting and trying his criminal case. In a Criminal proceeding, Defendants have a Sixth Amendment of the United States Constitution right to a fair trial. (May 7, 2015 Transcript pg 6 line 3-7; page 10 line 9-25, thru page 10 line 1-20).

This Court overlook the facts that Petitioner is (1) a "lay man" and doesn't have the qualified legal skills as an attorney. As a layman, he argued that the destruction of evidence prevented him from fully exhibiting and trying his case in layman terms. This Court overlook the facts that Petitioner did raise actual fraud in his pleadings, which acts as an affidavit in civil proceeding for prisoners. (Complaint page 13 line 10-17) Appeal Record Exhibit

The Respondents filed a defense pursuant to Rule (12) SCRPC regarding Petitioner's actual fraud claim. A hearing was held on May 7, 2015, Honorable Judge J.C. Nicolson presided and dismissed Petitioner's civil action. Petitioner filed a timely Rule 59(e) SCRPC requesting the Court to "make specific finding of facts, and state expressly its conclusion of law, relating to each issue presented.

A rehearing was held, Honorable Judge Diane S. Goodstein presided. As a layman, Petitioner, again argued that spoliation of evidence prevented him from fully exhibiting and trying his criminal case, (December 2, 2013 hearing transcript pg 4 line 19-21; pg 6 line 1-8, pg 16 line 23-25).

Judge Goodstein denied the motion, failing to make specific

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finding and facts and conclusion of law.

In a PCR, which is govern by the South Carolina Rules of Civil Procedure, a timely 59 (e) SCRPC preserves issues presented for Appellate review, when the Judge has failed to rule on the issue. Marlar v. State, 653 S.E. 2d 266, 267 (S.C. 2007).

The Respondent filed a response brief, which is in the record of appeal, alleging Petitioner, in his Complaint, has not alleged any facts that would support a claim for any type of fraud by the defendants. This is not true.

In the pleadings, Petitioner gave "a short and plain statement of the facts showing that the pleader is entitled to relief. Petitioner stated clearly that Respondents never gave a 911 tape recording to the Solicitor nor his defense, which prevented him from exhibiting and trying his case in layman terms.

Respondents do not refute that spoliation of evidence occurred. This Court overlook the facts, that Respondents acknowledge a 911 tape recording was destroyed pursuant to an alleged retention period, but failed to produce evidence which would show that North Charleston police department can destroy evidence during a pending criminal investigation.

The question here is, did Petitioner discover actual fraud, and does the spoliation of evidence during a pending criminal investigation constitute actual fraud?

The question is whether, in light most favorable to Plaintiff, and every doubt resolve in his behalf, the Complaint states any valid claim for relief. "Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E. 2d 8, 9 (1987).

Extrinsic fraud is the ability to discover fraud. "Equitable Relief" from judgment is granted for extrinsic fraud on the theory that because the fraud, prevented a party from fully exhibiting and trying his case, there has never been a real contest before the Court on the subject matter of the action. Hilton Head Ctr, of South Carolina v. Public Serv. Commw, 294 S.C. 9, 11; 362 S.E. 2d 176, 177, (1987); See also Bryan v. Bryan, 220 S.C. 164, 167, 68; 66 S.E. 2d 609, 610 (1951); Chewing v. Ford Motor Company, 354 S.C. 72, 579 S.E. 2d 605-08.

During Petitioner's trial, Lorelle Proctor, an officer of the Court, explained to trial judge Roger Young that she requested the 911 tape recording from Greg Voigt before its destruction. (Trial transcript pg 634 line 20-22).

This Court overlook facts, that Petitioner's Complaint states the following:

"Employee Sergeant Thomas Deckard, is a proper party of NCPD as an Defendant. Employee Thomas Deckard and (NCPD Records) immunity under Section 15-78-70 (a), was waived when the 911 tape recording was destroyed in a grossly negligent manner two months and (15) fifteen days after Plaintiff requested it pursuant to: SCRCrmp Rule (5) and (6), which constituted actual malice, actual fraud, intent to harm, or a crime involving moral turpitude, and his conduct was not within the scope of his official duties."

(Petitioner's Complaint pg 13 line 10-17)

This Court has misapprehended the facts that in a criminal proceeding, the police department have a duty to turn over all evidence in a criminal proceeding, pursuant to: Brady v. Maryland, 373

U.S. § 3. ~~1963~~ (1963); United States v. Bagley, 473 U.S. 67 (1985); State v. Kennerly, 357 S.C. 442 (S.C. App. 1998).

This court overlooked the facts that, if police have a duty to turn over all evidence during a pending criminal investigation, the spoilation of exculpatory evidence would constitute actual fraud. Petitioner did raise this issue in his complaint, and filed a timely 59(e) SCRPC. It was the judge's duty to apply the law and make specific findings and facts and conclusion of law on each issue presented, not Petitioner.

Petitioner again submit that this record was insufficient to show that he did not raise actual fraud in his complaint. Petitioner request that this court remand case back to the Circuit Court, giving the Circuit Judge opportunity to make specific finding and facts and conclusion of law of all issues presented in Petitioner's complaint. ~~the court denied the issue was not ruled on.~~ Rehearing should respectfully be granted.

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SC Court of Appeals

Respectfully Submitted

Senell McC

Prose Litigant

This 28 day of February, 2018

I CERTIFY, THAT SERVICE OF PRISONER'S MOTION FOR REHEARING HAS BEEN SERVED UPON ALL PARTIES ON FEBRUARY

(5)

28, 2018

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON  
PLEAS FOR THE 9<sup>TH</sup> CIRCUIT  
CIVIL ACTION NO:

2014-CP-10-7702

Terrell McCoy, 256070

Plaintiff,

v.

North Charleston Police Dept;  
sergeant Thomas Deckard  
Defendants

-Complaint

State Prisoner  
Jury trial demand

Exhibit 5

FILED  
2015 FEB 18 AM 10:43  
JULIE J. ARMSTRONG  
CLERK OF COURT

- PARTIES -

1. North Charleston Police Department (NCPD), is an party listed as an "Agency" to be sued pursuant to : SC code : Ann § 15-78-70 (c) (Supp. 2001); of its governmental entity "employee" / "gross negligence," while acting in the scope of their official duty . . .
2. The (NCPD) lead detective, Thomas Deckard, in Criminal Case No. 06-GS 10-4987, is an party which exercise destruction of evidence in bad faith, placing his conduct to constitute negligent and gross negligence in an reckless ness, wilfulness, or wantonness conduct, pursuant to : "South Carolina Tort Claims Act § 15-78-60 (a)(5) & (25)" . . .
3. Terrell McCoy 256070, is the Plaintiff listed at all times with in his Complaint; as was the sole custody of NCPD during the time of Defendants Negligence.
4. Pursuant to : South Carolina Rules of Civil Procedure Rule 82, Plain-

Plaintiff asserts Jurisdiction and venue are properly set. S.C. Code Ann. § 15-78-10 - et. seq.

-CLAIM-

5. The essential elements in a negligence action are: (1) a duty of care owed by the defendant to the Plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately caused by a breach of duty.

(i) Negligent/Gross Negligence is the intentional conscious failure to do something one ought not to do. It is the failure to exercise slight care. Where a person is so indifferent to the consequences of his conduct as not to give slight care to what he is doing, he is guilty of Negligent/Gross Negligence. Gross Negligence is a mixed question of law and fact and should be presented to the jury unless the evidence supports only one reasonable inference.

A) Defendants and its agent and employee Sergeant Thomas Deckard, owed Plaintiff a care of duty by turning over all evidence to the Solicitor office, whether inculpatory or exculpatory, pursuant to: SCRCRIMP. P(5)

B. Plaintiff placed trust, confidence and reliance upon the judgment and care in Defendants.

C. Defendant Sergeant Thomas Deckard, breached his duties by allowing the all tape recording to be destroyed, as an wilfulness, recklessness, or wantonness act, constituting Negligent/Gross Negligence.

D. As a direct and proximate cause and result of Defendant breach of duties, Plaintiff has been injured and damaged, including but not limited to physical pain and suffering, mental pain and anguish, anger and disappointment, worry, shock, humiliation, wounded feelings, shame, loss of reputation, pecuniary loss, doctors and hospital bills, loss of enjoyment of life, loss of employment opportunities, loss of earnings, loss of earning capacity, and damage to his previous good health, which are all permanent in nature.

## - FACTS -

6. On: March 25, 2006, a man name Antwan Bryant was found murdered at 5061 delta street. (NCPD) was called to the scene, and Detective Thomas Deckard was the lead Detective investigating the homicide.

On March 25, 2006, Carinda Williams gave 3 inconsistent statements to agents employed at NCPD. The First statement given on March 25, 2006, at 6:00 a.m, Ms. Williams stated she did not know who murdered Mr. Bryant in her home. At 12:30 noon, March 25, 2006, Ms. Williams, stated that she was not completely honest in her first statement, and gave a second statement, asserting as true, that she saw someone in a black hoodie running away from the area, when she looked out her house. The guy she allege she saw was her boyfriend, Travis Johnson, brother, name is Skezie Boy.

A arrest warrant was issued by a Magistrate Judge on "March 25, 2006" to arrest Plaintiff, with Detective Deckard acting as the affiant: A search was conducted at Plaintiff girlfriend's home at 1627 greenbay drive, in which was the Plaintiff's girlfriend, Tonia Theus, at the time, informed Defendant that Plaintiff was out of town, and not in North Charleston, South Carolina, and had been gone since March 24, 2006.

On March 26, 2006, Ms. Williams then gave a 3<sup>rd</sup> statement and named Travis Johnson brother, who is not the Plaintiff, as the shooter.

On March 27, 2006, Plaintiff returned to North Charleston, from vacation, and went to NCPD to be question by Sergeant Thomas Deckard and was arrested. The arrest warrant was delivered to the Plaintiff, by Thomas Deckard, who also was the affiant.

Plaintiff was detained in the Charleston County Detention Center, and was appointed Public Defender, Lorelle Proctor, to represent him due to his indigency

Status.

Plaintiff was detained in the Charleston County Detention Center, and was appointed Public Defender, Lorelle Proctor, to represent him due to his indigency status.

On April 10<sup>th</sup> 2006, Public Defender, Lorelle Proctor filed a motion pursuant to: SC Rules of Criminal Procedure Rule 5 and 6; "Edward Notice", pursuant to: Brady v. Maryland, 373 U.S. 83 (1963) and its progeny.

Several months later, Solicitor Greg Voigt provided an incomplete SC Rcrimp. P Rule 5 motion of discovery. Plaintiff received within his Rule 5, incident reports, Witnesses Statements, Coroner reports, autopsy reports, SLED reports on ballistics, The city of North Charleston CAD operation report (dispatcher) 6 pages. The 911 tape recording was printed on sheets of paper on April 5, 2006, at 11:16 am.

On page 3 of 6, ~~ON~~ the dispatcher's report, a witness, who's name has never been disclosed to Plaintiff, dialed 911 and reported at: 5:49 am on March 25, 2006; That "she heard someone banging on the door and the door flew open and BM was C2D, she does not know who he is."

Ms. Proctor, made several request to the Solicitor's office, for the 911 tape recording because the evidence was exculpatory and could help exonerate Plaintiff and rebut state witness Carinda Williams's third statement, in which she testified at Plaintiff's second trial that everything in her third statement was true and accurate.

The disclosure of the 911 tape recording would have been useful to Plaintiff defense, as it rebut an untruthful witness, Carinda Williams testimony, as Ms. Williams house was known for drugs and violence.

Solicitor Greg Voigt made promises the 911 tape recording would be delivered to Plaintiff's attorney. Greg Voigt later removed himself from the complex case, and Solicitor Burns Wetmore took the case. On July 14, 2008

Plaintiff case was called for trial.

The 911 tape recording still was not disclosed by the time of Plaintiff first trial. The jury could not decide Applicant's guilt or innocence, so Judge Deidra Jefferson declared a hung jury.

On January 17, 2009, Plaintiff asserted his right to proceed pro se, with Lorelle Proctor, acting by Standby Counsel, in case Plaintiff reinstated he wanted Counsel to represent him.

On February 2, 2009, During Applicant's second trial, The Honorable Roger Young ordered Solicitor Burns Wetmore to turn over all evidence. Mr. Wetmore stated all evidence had been disclosed to the Plaintiff.

During a motion hearing, held outside the presence of the jury, Plaintiff argued to the judge that he subpoena the March 25, 2006 911 tape recording and needed the evidence to support his defense of actual innocence. Ms. Proctor explained to the judge that she had tried three years ago to get the 911 tape recording from previous Solicitor Greg Voigt, but the evidence was never disclosed.

Mr. Wetmore told the judge he never heard the 911 tape and that the tape recording is kept for a certain period then there destroyed and 3 years had pass. On February 6, 2009, Plaintiff was convicted by a jury and sentence to 40 years in prison. He loss his liberty.

During September of 2013<sup>th</sup>, Plaintiff began receiving information from the city of North Charleston, through the freedom of Information Act, concerning the 911 tape, and dispatcher Jenie Fowler.

On June 20, 2014, Plaintiff received Interrogatories, during a law suit he filed against the city of North Charleston and NCPD for failing to provide public documents he requested through the FOIA.

The interrogatories provided information that reveal the actual date the 911 tape recording was destroyed. The 911 tape was destroyed on June 25, 2006, 2 months and 15 days after, Plaintiff requested the 911 tape recording through the Solicitor office.

The tape recording was exculpatory evidence which could have exonerated Plaintiff, and the defendants knew the evidence was exculpatory that's why they fail to disclose the evidence.

Til this date, Plaintiff has been incarcerated 8 years and 9 months, and has lost wages for 8 years and 9 months.

Plaintiff suffered psychological and physical damages. Plaintiff had dreams of being harmed, has been assaulted by Correctional officers with chemical munition. Plaintiff has been on mental health since his conviction and suffers from depression, anxiety, bipolar & hallucination. Plaintiff has suffered mental anguish from not being able to support his children, separation from children, and family.

## - TORT LIABILITY -

7. The South Carolina tort claims act waives government immunity for certain act by government employees. § 15-78-10 et. seq. The exception to this Waiver of immunity are contained in S.C. Code ann. Section: 15-78-60, which provides in relevant part as follows:

(a), The government entity is not liable for a loss resulting from:

(5) The exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee;

(25), responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any governmental entity", except when the responsibility or duty is exercised in a grossly negligent manner," (emphasis added)

The South Carolina Supreme Court held that these two Sect-

ions must be read in conjunctions with one another. Therefore, one must look at the definition of gross negligence in order to interpret this section fully. The term [g]ross negligence is defined as the intentional, conscious failure to do something which is incumbent upon one to do so or the doing of a thing intentionally that one ought not to do... ("Under the tort claim act, if a governmental entity or employees discretion is exercised in grossly negligent manner, then the governmental entity involved is liable for its tort as if it were a private individual.")

60. Employee Sergeant Thomas Deckard, is a properly party of NCPD, as an Defendant. Employee Thomas Deckard, and (NCPD Records) immunity under section 15-78-70 (a), was waived when the all tape recording was destroyed in a grossly negligent manner two months and 15 days after Plaintiff requested it pursuant to: SCRCrImp P Rule 5 & 6, which constituted actual malice, actual fraud, intent to harm, or a crime involving moral turpitude as his conduct was not within the scope of his official duties. Section 15-78-70(b)...

8. The above acts of negligent/gross negligence causing Plaintiff loss pursuant to section 15-78-30(f), resulting from the breach of the proper standard of care (by and through (NCPD) and its employee) have caused the plaintiff to suffer loss of liberty, severe emotional distress, humiliation, anxiety, panic, and fear for safety, loss of reputation, pecuniary loss of reputation, pecuniary loss, loss of enjoyment of life, loss of employment opportunities, loss of earning capacity and damage to his previous good health, which are all permanent in nature.

## FOR A FIRST CAUSE OF ACTION

9. The Plaintiff reiterates each and every relevant allegation stated above as if repeated verbatim herein.

10. The Defendants are liable to the Plaintiff as a result of its negligence / gross negligence, recklessness, willfulness, and wantonness in one or more of the following particulars:

### - AS TO THE DEFENDANT (NCPD) - Negligence / Gross Negligence

- (a) In failing to perform periodic and proper investigation and take remedial action as might be necessary to prevent destruction of evidence in a grossly negligent manner while on investigation is pending.
- (b) In employing and continuing to employ, Detective Thomas Deckard, when it knew or should have known of his propensity to / and inappropriate behavior
- (c) In failing to train, monitor, and / or supervise its (NCPD) agents including Thomas Deckard
- (d) In hiring, employing and continuing to employ officers as Thomas Deckard / supervisor, when they knew or should have known that he failed to disclose exculpatory evidence to the Solicitor's office during a pending criminal matter.
- (e) In consciously failing to follow (NCPD) policies, procedures, and guide regarding disclosure of evidence to the Solicitor's office for prosecution.
- (f) In failing to provide necessary protection on the Plaintiff while in care and custody of (NCPD)
- (g) In failing to implement adequate security or safety measures designed to prevent or substantially reduce the likelihood that the Plaintiff or other similarly situated would be subjected to the act of loss and

Injury as more particularly set forth while being in custody of (NCPD).

AS TO THE DEFENDANTS, Thomas Deckard &  
(NCPD) Records - Negligent / Gross Negligence

- (a) In failing to submit all tape recording to the Solicitor's office during pending criminal matter after requested.
- (b) In failing to ensure all evidence was submitted to the Solicitor's office or Plaintiff attorney for prosecution during Plaintiff criminal proceeding.
- (c) As a direct and proximate result of the defendants Negligence / gross Negligence, wilfulness, Recklessness, and wanton acts, the Plaintiff has been damaged and is entitled to an award of actual Consequential, and monetary damages as to this cause of action in the amount of one million dollars. \$1,000,000.

### Damages And Relief Requested

- (1) Any and all references heretofore in various causes of actions as to damages are incorporated herein as if repeated verbatim.
- (2) Pursuant to: SC Code Ann. Tort Claim Act § 15-78-30-(F) "Loss" as a direct and proximate result of the acts and omissions of the Defendant as more particularly set forth above, the Plaintiff has been made to undergo physical pain and suffering, loss of liberty, mental pain and anguish, anger, and disappointment, panic, anxiety, worry, shock, humiliation, wounded feelings, Shame, loss of reputation, pecuniary loss, doctor and hospital bills, drug expenses, loss of enjoyment of life, loss of employment opportunities, loss of earnings, loss of earning capacity, and damage to his previous good health, which are all permanent in nature.

Wherefore, the Plaintiff prays an judgment against the Defendants jointly and severally, for an award of \$1,000,000, for actual, Consequential, and monetary damages, the cost of this action and

and for such other further relief as this court deems just and proper,  
as Plaintiff pursuant to: SCRPC Rule 38(a)(b), preserve his Const-  
itutional right for an jury trial. U.S.C.A. Const: Amend 7. "Jury trial demand,"  
and "\$150,000", one hundred & Fifty Thousand, punitive damage.

Respectfully Submitted

Date 12-8-14

x Senell McGeary  
LCI ASU 39  
990 WISACKY HWY  
BISHOPVILLE, SC 29010

CERTIFICATE OF SERVICE

I, Terrell McCoy, hereby declare that I personally placed (6) copies of Petitioner's Petition for Rehearing, and one copy inside a prepaid stamp envelope to be mailed by U.S. Postal (on February 28, 2018)

Robin L. Jackson, Esquire  
SENN Legal, LLC P.O. BOX 122 79  
Charleston, SC 29422

South Carolina Court of Appeals  
Jenny ABBOTT Kitching, Clerk  
Post office Box 11629  
Columbia SC 29211

2/28/2018

151 Terrell McCoy  
PROSE L. Applicant

Terrell McCoy, 256070  
MCI B# 2  
386 Redemption Way  
McCormick, SC 29899

February 28, 2018

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SC Court of Appeals

South Carolina Court of Appeal  
Jenny ABBOTT Kitching, Clerk  
Post office Box 11629  
Columbia, SC 29211

RE: Terrell McCoy v. NCPD and Thomas DeCard  
OF WHICH, North Charleston is Respondent  
CIA 2016-000650

Dear Clerk of Court: Enclosed please find (6) six hand writing copies of Petitioner's Petition For Rehearing to be filed ~~on~~ on your court. I have also enclosed the Court of Appeals postal envelope which held the Court's ruling on brief filed by both parties dated February 14, 2018. If you review the date received at McCormick SC, I didn't receive it until February 22, 2018. I request pursuant to 240(e) SCACR, due to the fact that I am a prisoner, I would have to Request through the Mailroom at the Institution where I am confined, to mail a money order to your court for \$25.00, so I am requesting for either a waiver of the \$25.00 filing fee, or court allow me to send the \$25.00 money order, once the mailroom is able to cut a \$25.00 check and mail it to the Clerk. If this granted, I thank you kindly.

I am Jewell McCoy



South Carolina Court of Appeals

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386 REDEMPTION WAY  
MCCORMICK SC 29899

MCCOY  
MAIL ROOM

FEB 22 2018

TERRELL MCCOY



Terrell McCoy, 256070  
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386 Redemption Way  
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FEB 28 2018

SC Court of Appeals

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