STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

The Honorable Deadra L. Jefferson, PCR Court Judge

Appellate Case No. 2016-002186

TERRELL L. MCCOY,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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b. Whether the PCR Court erred in finding that appellate counsel was not ineffective for failing to raise a claim of violation of Petitioner's due process right to a fair trial under the U.S. Const. amend.V and S.C. Const. art. I §3, where the Trial Judge properly sustained the State's objection to the use of the 911 dispatch log on the basis of hearsay?

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d. Whether the PCR Court erred in finding that appellate counsel was not ineffective in failing to raise the issue of bad faith on the part of the State and the North Charleston Police Department under Arizona v. Youngblood, where the failure to preserve what Petitioner deemed to be exculpatory evidence was not in bad faith?

e. Whether the PCR Court erred in finding that appellate counsel was not ineffective in failing to raise a Neil v. Biggers issue where the Trial Court found that the identification of Petitioner was not unduly suggestive?

f. Whether the PCR Court erred in finding appellate counsel was not ineffective for failing to raise an issue regarding the denial of Petitioner's

request for a voluntary manslaughter charge where the record does not support that such a charge was warranted?

STATEMENT OF THE CASE

Procedural history

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. Petitioner was indicted at the July 2006 term of the Charleston County Grand Jury for murder (2006-GS-10-4987). He was represented by Lorelle Proctor, Esquire. The case was prosecuted by Assistant Solicitors Brynes Wetmore, Esquire and Peter McCoy, Esquire.

Petitioner proceeded to trial for the first time on July 15, 2008 before the Honorable R. Markley Dennis. The jury was unable to reach a verdict and the court declared a mistrial. On January 27, 2009, Judge Dennis heard Petitioner's motion to relieve Ms. Proctor as counsel and to proceed *pro se*. Judge Dennis granted the motion and requested Ms. Proctor be available as standby counsel.

A second jury trial was held on February 2-6, 2009 before the Honorable Roger M. Young, Sr., Petitioner represented himself with Ms. Proctor as standby counsel. The jury convicted Petitioner of murder. Petitioner was sentenced by Judge Young to fifty years imprisonment. On March 5, 2009, Ms. Proctor filed a Motion to Reconsider Petitioner's sentence. Judge Young reduced Petitioner's sentence to forty years imprisonment.

Petitioner filed a timely Notice of Appeal. His appeal was perfected by Chief Appellate Defender Robert M. Dudek, Esquire, of the South Carolina Commission on Indigent Defense-Office of Appellate Defense. Petitioner raised the issue of whether the court erred in allowing him to represent himself, where the record did not establish that he was adequately warned of the dangers and disadvantages of self-representation.

The Court of Appeals ruled that the circuit court's colloquy and Petitioner's repeated desire to represent himself revealed a knowing and intelligent waiver of Petitioner's right to

counsel. Petitioner's conviction and sentence were affirmed by the South Carolina Court of Appeals. State v. McCoy, No. 2011-UP-471 (S.C. Ct. App. filed October 26, 2011). Petitioner filed a Petition for Rehearing, which was denied by the Court of Appeals on December 19, 2011. Petitioner then filed a Petition for Writ of Certiorari to the South Carolina Supreme Court. On March 6, 2013, the Supreme Court denied the Petition. The Remittitur was issued on March 8, 2013.

Petitioner subsequently filed a post-conviction relief application on April 4, 2013. In his application, Petitioner alleged he was being held in custody unlawfully for the following reasons:

1. Conviction is in violation of U.S. Constitution
2. Ineffective Assistance of Counsel
3. Ineffective Assistance of Appellate Counsel
4. Subject Matter Jurisdiction
5. Prosecutorial Misconduct
6. Double Jeopardy
    a. The first trial jury was impaneled, heard prosecutor's case, and prosecutor failed to prove his case beyond a reasonable doubt.
7. Newly Discovered Evidence
8. Actual innocence

Respondent filed its Return and partial Motion to Dismiss Petitioner's application for post-conviction relief on May 15, 2014, requesting that the court dismiss Petitioner's claims of ineffective assistance of counsel against Lorelle Proctor. A motions hearing was convened on September 9, 2015, at the Charleston County Courthouse before the Honorable Larry B. Hyman, Jr. Petitioner was present at the hearing and represented by Rodney Davis, Esquire. J. Rutledge Johnson, Esquire of the South Carolina Attorney General's Office, represented the State. Judge Hyman granted the Respondent's motion for summary judgement as to the claims of ineffective assistance of trial counsel, but allowed Petitioner to proceed forward on the remainder of the issues at a future hearing.

On December 14, 2015, an evidentiary hearing was convened on the surviving allegations at the Charleston County Courthouse before the Honorable Deadra Jefferson. At the hearing, Petitioner was represented Rodney Davis, Esquire. Petitioner testified on his behalf. Appellate counsel Dudek also testified. On May 5, 2016, Judge Jefferson issued an Order of Dismissal denying and dismissing Petitioner's application. In the order, the PCR Court found Petitioner's testimony regarding Appellate Counsel's ineffectiveness was not credible while also finding the testimony of Appellate Counsel to be persuasive and very credible. The PCR Court also found Appellate Counsel's representation of Petitioner was well above professional norms. Specifically, the PCR Court found Appellate Counsel fully investigated potential preserved issues on appeal. The court also found Appellate Counsel was not ineffective in his decision to not raise an issue regarding the involuntary manslaughter charge objection on appeal. Lastly, the Court found Appellate Counsel's decision not to proceed on an appeal for the Batson challenge was proper. App. p. 1042. In regards to Petitioner's claims of prosecutorial misconduct the PCR Court found the issue to be a direct appeal issue procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). App. p. 1043.[1]

On May 27, 2016, Petitioner filed a motion pursuant to Rule 59 (a) and (e), SCRCP. In his motion, Petitioner alleged that the Order of Dismissal failed to address a number of issues presented at the hearing. On February 6, 2017, Respondent filed its Return to Petitioner's motion to alter or amend. On February 10, 2017, Judge Jefferson issued the Order denying Petitioner's motion.

[1] While awaiting the Order of Dismissal from Judge Jefferson, Petitioner retained the services of Melisa W. Gay, Esquire, to represent him on appeal.

On March 8, 2017, Petitioner filed a timely notice of appeal. On November 20, 2017, Petitioner filed his petition for writ of certiorari and accompanying appendix in this Court through Counsel, Melissa Gay, Esquire.[2]

Statement of Facts

On March 25, 2006, Petitioner a/k/a "Sleezie", along with his brother, Travis Holcombe, left Club Good Times to go to Delta Street along with a friend, Brandon "Bizzy" Cuttino. The three gentlemen stopped by a local gas station and picked up another friend, victim Antwan "Cell Block" Bryant, then continued to Delta Street. The home of Carinda Snowden Williams, Travis' "off and on" girlfriend, was located on Delta Street. App. p. 150, lines 1-3; pg. 151, lines 5-7. Around 5:00 or 5:30 a.m. just outside of Ms. William's home, Petitioner shot several times into the air. App. p. 152, lines 1-19. The four men entered the home of Ms. Williams while engaged in a confrontation with Petitioner. App. p. 156, lines 12-25; p. 157, lines 1- 2.

Ms. Williams, who had been awakened by the shots and the entry into her home, heard arguing and saw Petitioner fighting with his brother, Travis. She recalled Petitioner "was fussing with him about shooting a gun outside, in the air". App. p. 156, lines 12-19. Petitioner had a gun pointed at his brother, Travis. When Ms. Williams attempted to get between the brothers, Petitioner pointed the gun at her head. App. p. 158, lines 9-12. According to Ms. Williams, Antwan "got in between them and told them they would need ... to stop fussing and arguing, that it was stupid." App. p. 159; lines 21-25. Petitioner and Travis continued to "exchange words", with Travis "provoking" Petitioner. App. p. 160, lines 7-13.

Ms. Williams recalled that: "Travis was trying to put Sleezie down. Antwan was just trying to stop them from arguing and stuff and Travis stated to Sleezie that Antwan is more of a

[2] Mrs. Gay was suspended from the practice of law on March 21, 2018. Respondent is serving this response on Peyre Thomas Lumpkin, Esquire, as receiver.

brother than what he is, or would be, and they was just going back and forth." App. p. 162, lines 7-11. Antwan turned to use a nearby ashtray, and Petitioner shot him. App. p. 162, lines 16-25. Antwan fell on Ms. Williams. Petitioner continued shooting. Ms. Williams' estimated approximately five or seven shots. App. p. 168, lines 13-25; p. 169, line 1. Ms. Williams was also grazed, above her left ear. App. p. 165, lines 8-15). Petitioner then pushed through the front storm door with his left hand, the gun still in his right hand. Antwan died in Ms. Williams' arms. App. p. 170 -172. Ms. Williams then went to a neighbor, who called 9-1-1. App. p. 175. Officers arrived shortly thereafter.

STANDARD OF REVIEW

This Court must affirm the post-conviction relief court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010).

ARGUMENT

I. The PCR Court did not err in granting Summary Judgement where the record fully supports that Petitioner was advised of the dangers and disadvantages of self-representation and made a knowing and voluntary waiver of his right to counsel.

Petitioner contends that the PCR Court erred in granting of summary judgement pursuant to Rule 56, SCRCP as to Petitioner's claims of ineffective assistance of standby counsel because the order was issued while Petitioner's PCR application was still pending. Petitioner argues he was barred from going forward with his claim of ineffective assistance of counsel against his standby counsel Lorelle Proctor. Petitioner contends in his first issue on appeal and in his argument heading that summary judgment was granted to Respondent in error because he was given erroneous advice regarding the consequences associated with self-representation at his January 27, 2009 hearing.

In South Carolina, a criminal defendant has the constitutional right to represent himself under both federal and state constitutions. State v. Barnes, 407 S.C. 27, 753 S.E.2d 545 (2014). Recognizing that it may be to the defendant's detriment to be allowed to conduct his own defense, his choice to do so "must be honored out of that respect for the individual which is the lifeblood of the law." Id. at 36.

In the present case, Judge Dennis engaged in a lengthy discussion with Petitioner, referencing not only the right to counsel, but also its value. Judge Dennis advised Petitioner of the dangers and disadvantages associated with self-representation. Judge Dennis advised, "the law is not so much what you can read in a book, it's the subtleties and the things that are really connected by just understanding how it all flows." R. p. 5, lines 17-21. He determined that appellant had no formal legal education, or training, but had read the rules of evidence. R. p. 6, lines 9-18. He advised that there are specific rules for specific issues, such as the rule against

hearsay, rules dealing with character issues and habit, and emphasizing appellant had no background in dealing with such rules. R. p. 6, line 21 - p. 7, line 6. He also advised that another defendant insisted upon representing himself, as much as Judge Dennis attempted to dissuade him, and it was not "pleasurable to the defendant in the end," R. p. 7, lines 14- p. 8, line 2.

When asked what makes him think that he was prepared to handle his own case, Petitioner replied that he had read and looked over his trial transcript, and knew how to present evidence and his defenses. R. p. 9, lines 7-12. Petitioner also advised Judge Dennis that he had "a clear understanding of how trial works," and was "confident" that he was able to represent himself. R. 9, lines 23-25- p. 10, lines 1-2. Judge Dennis then inquired about whether Petitioner was "under the influence of any medication" to which he responded he was not. R. p. 13, lines 3-5. Judge Dennis further warned Petitioner would be giving up his right to have post-conviction relief. R. 15, lines 19-25-R. 16, lines 1-9. Petitioner still wished to represent himself despite Judge Dennis' warnings. R. 18, lines 8-24.

Petitioner was fully and fairly advised of the dangers and disadvantages of self-representation. Unless Petitioner shows that the advice of Judge Dennis was not sufficient he cannot rely on the record to show the absence of a knowing and voluntary waiver. Therefore, the Circuit did not err in granting summary judgment on the issue of ineffective assistance of counsel because the record shows that it was solely Petitioner's decision to represent himself at trial, and that decision was made with "eyes open" and a full understanding of the dangers and disadvantages of self-representation. Additionally, Petitioner has failed to argue why the discussion between he and Judge Dennis was inadequate or insufficient to advise him of the

dangers and disadvantages of self-representation. Therefore, this Court should affirm Circuit Court's ruling.

II. The PCR Court did not err in refusing to allow Petitioner to represent himself during the PCR hearing held on December 14, 2015 where Petitioner failed to demonstrate a satisfactory cause to dismiss PCR Counsel.

Petitioner contends the PCR Court erred in refusing to allow him to proceed *pro se* when PCR Counsel refused to admit Petitioner's prepared memorandum of law, to admit as an exhibit Trial Counsel's Rule 5 discovery request motion, and failed to subpoena Trial Counsel to the PCR hearing to testify that she had requested discovery.

This Court has held "a mere disagreement between an applicant and his counsel as to how to proceed with the PCR application, including the allegations to be raised, is not sufficient, in itself, to require the PCR judge to replace" court appointed counsel. Richardson v. State, 377 S.C. 103, 659 S.E.2d 493 (2008). Additionally, "counsel should not be relieved, and the process delayed, because an applicant is dissatisfied with counsel's legitimate refusal to pursue allegations that are meritless and/or not proper in PCR." Id.

Petitioner's contention that Judge Jefferson should have adjourned the PCR hearing to a hold a Faretta[3] hearing when he expressed dissatisfaction with PCR Counsel is wholly without merit. While Petitioner may have disagreed with PCR Counsel's strategy, PCR Counsel amended the application and presented at the hearing those issues he deemed to be meritorious. Moreover, Petitioner did not express any dissatisfaction with PCR Counsel until the conclusion of the hearing. App. p. 988, lines 10-14. Where the request to proceed *pro se* is made after trial has begun, the decision to grant or deny such a request rest in the sound discretion of the trial

[3] Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975).

judge. State v. Fuller, 337 S.C. 236, 523 S.E.2d 168 (1999). Therefore, the PCR Court did not err in its refusal to allow Petitioner to proceed pro se at the conclusion of his PCR hearing.

III. The PCR Court did not err in finding that Appellate Counsel Robert Dudek was not ineffective where he raised the most viable issue on appeal.

Petitioner argues the PCR Court erred in denying Petitioner's allegations that appellate counsel was ineffective for raising only one issue in Petitioner's appellate brief. Petitioner also contends that the trial transcript and post-conviction relief hearing sets forth facts sufficient to establish that Appellate Counsel's choice to brief the issue of self-representation was deficient. Petitioner further argues that by only briefing one issue Appellate Counsel limited the Court of Appeals review and he is therefore entitled to a new trial or appeal to the Court of Appeals.

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

A defendant is constitutionally entitled to effective assistance of appellate counsel." Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 835(1999) (citing Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985)). However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record. Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226

(4th Cir. 1985). The applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, 302 S.C. at 537; Gilchrist v. State, 364 S.C. 173, 178, 612 S.E.2d 702, 705 (2005); Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). "For judges to second-guess reasonable professional judgments and impose on... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy...." Tisdale v. State, 357 S.C. 474, 594 S.E.2d 166 (2004).

In this case, Appellate Counsel testified he had been employed with Appellate Defense since February of 1990. App. p. 943. Regarding how he prepared for Petitioner's appeal, Appellate Counsel testified he reviewed the entire trial transcript in Petitioner's case. App. p. 941, lines 14-17. He further testified it is his common practice to raise the issue or issues that would give the appellant the best chance of winning. App. 943, lines 14-20. Appellate Counsel also testified he would not knowingly fail raise an issue that he thinks would win, and if Petitioner identified a wining issue, he would not have had a strategic reason not to raise that issue. App. p. 950, lines 4-11. Similarly, Appellate Counsel testified he thought the only issue that would give best chance to win was the issue of self-representation, and he based his briefing of that issue on his experience and the facts of the case. App. p. 950, lines 15-25; p. 951 lines 1-5. Appellate Counsel made a strategic decision to pursue the issue that he deemed to be winnable on appeal.

Petitioner suggests his opportunity for appellate review of his record would have been enlarged by Appellate Counsel merely filing an Anders[4] brief on his behalf. However, he cites no case law to support this position. Nothing in Anders, suggest that indigent defendants have a constitutional right to compel appointed counsel to raise non-frivolous issues request by the client, if counsel, as a matter of professional judgment, decides not to present those issues.

[4] Anders v. California, 386 U.S. 738 (1967).

Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). The PCR Court correctly held that Appellate Counsel was not "ineffective for failing to raise something that in good faith he does not in his professional opinion feel that the [Petitioner] would have prevailed on". App. p. 997, lines 16-24. Therefore, the PCR Court did not err in finding that Appellate Counsel was not ineffective, and the Petition should be denied as to this question.

A. The PCR Court did not err in finding that Appellate Counsel was not ineffective for failing to raise a violation of Brady v. Maryland[5] in Petitioner's appellate brief where Appellate Counsel in "good faith" briefed the issue that in his professional opinion was the most viable issue.

Petitioner contends the State violated South Carolina Rules of Criminal Procedure Rule 5 and Brady because the State did not provide Petitioner with a copy of a 911 tape that was in possession of the North Charleston Police Department. Petitioner further alleges the existence of the 911 tape was imputed to the Charleston County Solicitor in charge of handling the prosecution of Petitioner's case, and that the 911 tape was material and exculpatory evidence for impeachment purposes. Petitioner also argues the outcome of Petitioner's case would have been different if the 911 tape had been provided to Petitioner, and Petitioner raised the issue during trial and preserved it for appellate review.

Brady only requires the government to turn over evidence in its possession to the defense that is both favorable to the accused and material to guilt or punishment. U.S. v. Jones, 399 F.3d 640 (6th Cir. 2005). Under Brady, the government has an affirmative duty to disclose any evidence its possession that is favorable to the defendant and is material to either the issue of guilt or punishment. U.S. v. Bhutani, 175 F.3d.572 (7th Cir. 1999). However, even though the government has an affirmative duty to disclose exculpatory evidence in its possession, it is not obligated to disclose "every possible shred of evidence that could conceivably benefit the

[5] 373 U.S. 83 (1963).

defendant." Id. A Brady violation requires three essential components: the evidence at issue must be favorable to the accused, because either it is exculpatory, or because it is impeaching; the evidence must have been suppressed by the State, either willfully or inadvertently; prejudice must have ensued. Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936 (1999).

Here, the 911 tapes were never in the possession of the prosecution, the only evidence relating to the 911 tapes that was in their possession was the CAD or dispatch report which contained a transcript of the 911 tape. Petitioner was provided a copy of the dispatch report, and even requested that the State stipulate to the information regarding a female caller. The State refused to stipulate because without the female caller being present at the hearing to testify, the information presented would have been hearsay. App. p. 641-643. The 911 tape that Petitioner requested had previously been destroyed by the North Charleston Police Department in compliance with their rules regarding the preservation of digital files. App. p. 642, lines 1-5.

No Brady violation occurred because there was no suppression of the evidence nor was Petitioner prejudiced. The 911 tapes were never in the possession of the Solicitor's office because they were destroyed before either side could obtain them. However, the State possessed a copy of the dispatch report, and Petitioner was provided with a copy of the report which contained the transcribed version of the 911 tape but insisted on having the actual tape which did not exist at the time of his trial. Judge Jefferson was therefore correct in her finding that Appellate Counsel was not ineffective for failing to raise an issue that in "good faith" he did not in his "professional opinion" feel that Petitioner would have prevailed on. App. p. 998. Therefore, the Petition should also be denied as to this question.

B. The PCR Court did not err in finding that Appellate Counsel was not ineffective for failing to raise a claim of violation of Petitioners due process right to a fair trial under the Fifth Amendment of the U.S. Constitution and Article One Section Three of the South Carolina State Constitution where

the Trial Judge properly sustained the State's objection to the use of the 911 dispatch log on the basis of hearsay.

Petitioner asserts the sustaining of the State's objection to Petitioner's use of the 911 dispatcher's log prejudiced Petitioner because he was prevented from being able to impeach the State's primary witness. Petitioner also asserts that he was prevented from being able to present as a defense that the 911 caller indicated facts of the incident that could not have happened as the State's primary witness testified. Petitioner alleges that these issues were preserved for appellate review but Appellate Counsel failed to raise the issues in his brief.

In assessing a claim of ineffective assistance of appellate counsel, courts must apply the Strickland test to determine if appellate counsel was deficient for failing to raise an issue and whether the defendant was prejudiced from the failure to raise the issue. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record. Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); citing Tisdale v. State, 357 S.C. 474, 594 S.E.2d 166 (2004).

Here, Petitioner argues Judge Jefferson failed to recognize his validly preserved and articulated appellate issue was an error of law. Respondent respectfully disagrees. The PCR Court properly recognized that Appellate Counsel's performance was not deficient in any way nor was Petitioner prejudiced by Appellate Counsel's performance. Appellate Counsel exercised his profession discretion in his decision to raise the most viable issue. Petitioner contends that failure to allow him to admit the dispatcher CAD log was a violation of Brady, Hutton, and the due process clause of the fourth amendment of the United States Constitution and Article 1 Section 3 of the South Carolina State Constitution, this allegation is wholly without merit. During the trial, Judge Young asked Petitioner if he could bring someone in to read the dispatch log. However, Petitioner insisted that he wanted the tape to be heard, but at the time of trial, the

tape was not in existence and could not be heard. App. p. 641, lines 21-25 and App p. 644, lines 1-7. Petitioner was not prevented from admitting the dispatcher's log, he simply chose not to.

Petitioner further argues that he should receive the same outcome as the defendant in People v. Seeber, 94 A.D. 3rd 1335 (2012), in that case the defendant's motion to vacate the judgement against her on the basis of deprivation of due process of law and ineffective assistance of counsel was granted. The defendant alleged that a Brady violation had occurred because of her belief that the people had suppressed evidence of prosecutorial misconduct. However, the New York Supreme Court found that no Brady violation had occurred because defendant was provided with a copy of the fiber analysis report. In People, the court affirmed the lower court's judgment because the conviction was procured by duress, misrepresentation or fraud on the part of the prosecutor. This case differs from People in that there was no fraud, duress or misrepresentations on the part of prosecution. However, this case is similar in that like in People there is no Brady violation here because Petitioner was provided with a copy of the dispatcher CAD log.

Moreover, when given the option to read on the record the contents of the dispatcher's log, Petitioner insisted that he wanted the actual tape to be played in court. However, the tape no longer existed so it could not be heard in court. Appellate Counsel did not brief this issue because in his professional judgment it was not a winnable issue. Therefore, the PCR Court did not err in finding that Appellate Counsel's performance was not deficient.

C. The PCR Court did not err in finding that Appellate Counsel was not ineffective for failing to raise a Batson v. Kentucky[6] issue where the State's striking of jurors was in fact race neutral.

[6] Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986).

Petitioner argues that the State's striking of the African American jurors was not race neutral, and that Appellate Counsel failed to raise the issue on appeal despite Petitioner raising and preserving the issue for appellate review.

When reviewing a trial court's decision on a Batson motion, appellate courts give great deference to the trial judge's decision and will review it using a clearly erroneous standard. See State v. Edwards, 384 S.C. 504, 682 S.E.2d 820 (2009). "A finding is clearly erroneous if it is not supported by the record." State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001). When a party objects to a jury strike, the proponent of the strike must provide a facially race-neutral explanation. State v. Ervin, 373 S.C. 404, 645 S.E.2d 904 (2007).

In the present case, Petitioner's assertion that the striking of five African American jurors was not race neutral is without merit. Judge Young correctly found that the State's striking of juror numbers 27,136 160, 197, and 225 was not pre-textual. Each of the stricken jurors either had criminal record or poor communication skills. App. p. 44 -49. Judge Young's determination that the State's reasons for the strikes were race-neutral and appropriate was not clearly erroneous, and should not have been disturbed on appeal. Appellate Counsel was not ineffective in making a professional decision not raise a Batson issue in Petitioner's brief. As Appellate Counsel testified, he thought the *only* issue that would give Petitioner the best chance to win was the issue of self-representation. App. p. 950, lines 12-18. Therefore, the Petition should be denied as to this question.

D. The PCR Court did not err in finding that Appellate Counsel was not ineffective in failing to raise the issue of bad faith on the part of the State and the North Charleston Police Department under Arizona v. Youngblood where the failure to preserve what Petitioner deemed to be exculpatory evidence was not in bad faith.

Petitioner asserts that a Due Process violation occurred because the blood observed at the crime scene was not tested for DNA. Petitioner argues that this was done in bad faith, and that the North Charleston Police had destroyed possible exculpatory evidence in the case.

Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333 (1988).

In the present case, Petitioner at trial made a motion to dismiss claiming that the State destroyed exculpatory evidence from the crime scene. In particular, Petitioner referred to a curtain that was underneath the victim's body, and alleged that the crime scene was contaminated and evidence was destroyed. App. p. 320-321. Judge Young denied the motion, finding that the evidence Petitioner was referring to was not exculpatory evidence. App. p. 320, lines 10-18. Petitioner also argued at trial that blood smears that were found at the scene contained fingerprints. However, the crimes scene investigator who processed the scene testified that the smears were not bloody fingerprints and did not have any detail to them. App. p. 366-367. She further testified that she did not take the curtains from the bedroom that contained the blood smear because she was unable to identify if they were related the actual crime scene. App. p. 348

Petitioner presented no evidence at trial to support his allegations that the North Charleston Police Department contaminated or destroyed evidence which ultimately lead to his motion being denied. App. p. 349, lines 10-17. At the PCR hearing, Appellate Counsel testified that he did not recall an issue about blood and DNA testing. App. p. 945, 5-8. However, as previously stated Appellate Counsel is not required to raise every non-frivolous issue that is presented by the record. Thrift, 302 S.C. 535, 397 S.E.2d 523 (1990). It was not ineffective for Appellate

Counsel to make a strategic decision to exclude certain issues. Therefore, the Petition should also be dismissed as to this issue.

E. The PCR Court did not err in finding that Appellate Counsel was not ineffective for failing to raise a Neil v. Biggers issue where the Trial Court properly found that the identification of Petitioner was not unduly suggestive.

Petitioner contends that Appellate Counsel failed to brief the raised and preserved issue of unduly suggestive identification by the State's witness Corinda Snowden Williams.

Trial courts employ a two-pronged inquiry to determine whether due process requires suppression of out-of-court eyewitness identification. State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 425 (2012). First, the court must determine whether the identification resulted from "unnecessarily suggestive" police procedures. Neil v. Biggers, 409 U.S. 188, 198-99, 93 S.Ct. 375, 381–82 (1972). If the court finds the identification did not result from impermissibly suggestive police procedures, the inquiry ends there and the court does not need to consider the second prong. State v. Dukes, 404 S.C. 553, 745 S.E.2d 137 (Ct. App. 2013). The defendant bears the burden of proving the identification procedure was impermissible suggestive. Id. at 561. If the court finds, however, that the police used an impermissibly suggestive identification procedure, it must then determine whether the identification was nevertheless "so reliable that no substantial likelihood of misidentification existed." Liverman, 398 S.C. at 138, 727 S.E.2d at 425 (2012).

Petitioner argues the Biggers' test when applied to the facts of Petitioner's case confirms that the witness's testimony should not have been allowed during trial. Respondent respectfully disagrees with Petitioner's contention. The State's key eye witness was shown a six photo lineup after giving statements to the North Charleston Police Department regarding the identity of the shooter. Mrs. Williams was certain of who Petitioner was because she had known him for years.

App. 94, lines 21-25. Her quality of view was not obstructed in any way; she was not only present at the time of the shooting but she saw Petitioner shoot and kill the victim. App. p. 97, lines 10-19; p. 98. Additionally, there were no discrepancies between the witness's description and the Petitioner. She was able to provide the North Charleston Police Department with the Petitioner's nickname and when provided multiple photographs, she was able to pick the Petitioner's photo out of the lineup. App. p. 100. Finally, the length of time between the crime and the identification attempt was not substantial. Mrs. Williams identified the Petitioner on the same day of the incident. App. p. 99. Therefore, the identification was not unduly suggestive, and Appellate Counsel was not ineffective in choosing not to raise a Biggers issue on appeal.

F. The PCR Court did not err in finding Appellate Counsel was not ineffective for failing to raise an issue regarding the denial of Petitioner's request for a voluntary manslaughter charge where the record does not support that such a charge was warranted.

Petitioner argues that based on the evidence in the record there was a sudden heat of passion in this case, and Petitioner's request for a voluntary manslaughter request should have been granted.

Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010). Both heat of passion and sufficient legal provocation must be present at the time of the killing in order to support a jury instruction on voluntary manslaughter in a murder prosecution. Id.

At the conclusion of his trial, Petitioner requested a voluntary manslaughter charge however, the Trial Judge pointed out to Petitioner that he had not presented any evidence to warrant such a charge being given to the jury. App. p. 664. Petitioner did not make any argument or direct the Trial Judge's attention to any evidence that would tend to show that his request was warranted and supported by the evidence presented at during the trial.

Additionally, Petitioner has wholly failed to argue why a voluntary manslaughter charge was necessary in this case or how the records support such a request. Petitioner merely argues that there was in fact evidence in the record to factually support the charge being given to the jury. However, he does not point to where in the record the supporting evidence exist nor does he offer any supporting authority. Petitioner has simply concluded that Appellate Counsel should have raised this issue on appeal, despite there being no evidence in the record to support that a voluntary manslaughter charge was necessary in the case. Therefore, respondent submits that Petitioner has abandoned the issue on appeal. See State v. Jones, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) (argument abandoned on appeal when conclusory and without supporting authority).

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied. However, should this Court grant the Petitioner, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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Attorney General

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SC Bar # 102673

By: _____
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March 6th, 2018.

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
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ON WRIT OF CERTIORARI
Appeal from Charleston County
Appellate Case No. 2017-000755

TERRELL MCCOY

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by mailing one copy in the United States mail, postage prepaid, addressed to:

Peyre Thomas Lumpkin, Esquire
Office of Commission Counsel
1205 Pendleton Street, Suite 333
Columbia, SC 29201

This 6th day of April, 2018.

Jennifer Jennison
Legal Assistant for Petitioner

ALAN WILSON
ATTORNEY GENERAL

PCR DIVISION: 803.734.3737
PCR FACSIMILE: 803.734.4113

April 6, 2018

The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Terrell McCoy v. State of South Carolina
Appellate Case No.: 2017-000755
Lower Court Case No. 2013-CP-10-1994

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the **Return to Petition for Writ of Certiorari** in the above matter for filing in your office. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Rasheeda Cleveland
Assistant Attorney General
S.C. Bar # 102673

RC/jaj
Enclosures

cc: Peyre T. Lumpkin, Esquire
Victim Advocacy Division (without enclosure)