IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO CHARLESTON COUNTY

The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2017-000755

Terrell L. McCoy, #256070 . . . . . Petitioner,

v.

State of South Carolina, ... Respondent

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

First, the respondent fails to address the issue, that trial counsel, Lorelle Proctor, was ineffective for giving erroneous advise which lead to petitioners self representation. A summary judgement hearing was held on September 9, 2015 before the Honorable Larry B. Hyman, Jr. Respondents argued that any issue regarding ineffective assistance of counsel could not be raised in the PCR proceeding because petitioner waived counsel. (See September 9, 2015 Summary Judgement hearing transcript). Judge Hyman granted respondent's motion, and ordered that any claims of ineffective assistance of trial counsel could not be raised. Petitioner was granted the right to proceed on all other claims. Since the order did not didn't dismiss the case in its entirety, petitioner did not appeal until the conclusion of the PCR hearing pursuant to South Carolina Code section 14-3-330(1); 17-27-80, and Rule 56(d), *SCRCP*.

An evidentiary hearing was held on December 14, 2015. The PCR judge stated during the hearing that Judge Hyman has already insulated Ms. Proctor and "you'll have to appeal that". (PCR transcript page 46, lines 3-5). During the PCR hearing, petitioner was not allowed to cross examine the Lorrelle Proctor regarding erroneous advice given which led to petitioner's self representation or issues regarding the filing of a Rule 5 Motion filed on April 10, 2006. Petitioner filed a timely Rule 59 (e), *SCRCP* Motion because the Order of Dismissal failed to make specific findings of fact and conclusions of law regarding this issue. (See Rule 59(e) Motion filed by attorney Melisa W. Gay).

Respondent's second argument is without merit. During petitioner's PCR hearing, petitioner became dissatisfied with PCR counsel Rodney Davis, and requested to relieve counsel before the conclusion of the hearing. The request was not made for the sole purpose of delay and the PCR record does not support the respondent's argument.

The PCR record does show petitioner's attempt to introduce a Rule 5 Motion filed by standby-counsel on April 10, 2006 to show that stand-by counsel had requested evidence before it's destruction, and the PCR judge refused to allow the evidence, and stated petitioner couldn't represent himself if he elected to do so. (PCR transcript page 47, lines 3-4).

Respondents argue that PCR Counsel presented all of petitioner's claims. This is not true. If this Court reviews the PCR hearing transcript and compare it to petitioner's PCR application and amended application, this court will understand why petitioner was dissatisfied with PCR counsel. PCR counsel failed to subpoena Jenie Fowler, the dispatcher, SLED, Beth Woodall, and Gregory Voit to testify at petitioner's PCR hearing when petitioner requested that these witnesses be subpoenaed for the hearing.

PCR counsel failed to argue newly discovered evidence claims, double jeopardy claims, mental health claims, due process violation claims, prosecutorial misconduct claims, malice jury instruction claims, and compulsory violation claims. Petitioner requested to proceed pro se before the conclusion of evidence to protect his constitutional violation claims which could be deemed procedurally barred if not exhausted in state court. (See *Rose v. Lundy*, 455 US 509, *State v. Lyles*, 381 S.C 442, 444, 673 S.E.2d 811, 812 (2009), citing *In Re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, 321 S. C. 563, 471 S.E.2d 454 (1990).

Prior to petitioner's PCR hearing, the petitioner filed several complaints against State appointed PCR Counsel, Rodney Davis, with the South Carolina Supreme Court Disciplinary Council Board (See Notice of Final Disposition, matter number 13 – DE – L–1429). His proceedig with representing petitioner constituted a conflict of interest and compromised zealous representation. Petitioner was entitled to a *Faretta* hearing to state his dissatisfaction with PCR Counsel. The PCR judge erred in his refusal to hold a *Faretta* hearing. See *Faretta v. California*, 422

US 806 (1975).

Third, respondent states that appellate counsel, Robert Dudek, was not ineffective when he only raised the most viable issue on appeal. This is not true. Appellate counsel's performance was deficient. The PCR record reveals that appellate counsel testified he thought only raising the issue that petitioner did not understand the disadvantage of self representation was winnable, while abandoning all other issues which were raised to the trial court and ruled on. (PCR transcript page 30, lines 21-25, page 31, lines 1-3, 15- 21).

Appellate counsel testified that he was aware of cases that had been reversed for Brady violations, for failure to give lesser included jury instructions, for prosecutorial misconduct, for *Batson* violations and for unduly suggestive or improper identification, but failed to raise any of the preserved issues. (PCR transcript page 28, lines 8-25, page 29, lines 1-12).

Appellate counsel testified he couldn't swear he reviewed the exhibits. (PCR transcript page 27, line 9-19). Appellate counsel also testified he did not recall an issue of a 911tape or dispatch log that was attempted to be introduced by petitioner that the state objected to.(PCR Tr. Page 25, lines 6-25, Page 26, lines 1-8) Appellate counsel testified that if petitioner made a request to raise an issue on appeal, he would go with petitioner's memory. (PCR Tr. Page 23, lines 7-12). Appellate counsel also stated that any pretrial motion would have to be renewed at the end of evidence to preserve the issue. (See Tr. page 33 line 18-25, page 34, lines 1-25).

The motion in limine was raised to and renewed at the end of the evidence. The PCR Judge stated the petitioner raised the issue of prosecutorial misconduct in terms of evidence being destroyed and tampered with, and the trial judge found there was no basis for him. She also stated appellate counsel had availability to look at it. (PCR transcript page 36, line 25, page 37, lines 1-10).

The issue was whether appellate counsel's performance was deficient for failing to raise the meritorious Brady Violation claim on direct appeal, and whether the petitioner was prejudiced by counsel's failure to raise those non-frivolous issues. If the issue had been raised, petitioner's conviction would have been reversed on appeal on the Brady violation claims, where the trial record shows the petitioner request that the 911 tape from the state, through counsel. The evidence was favourable to the defence, as 911 tape could have been used for impeachment purposes, and used to contradict the state's primary witnesses' testimony because she gave three inconsistent theories of the crime.

Responded argues that the 911 tape recording was not in possession of the prosecution so no Brady violation occurred. This is not true. In *United States v. Bagley,* 473 US 667; *United States v. Agurs,* 427 US 97; *Kyles v. Whitley.* The court has stated the prosecutor has a duty to disclose regardless of whether the defendant makes a specific request. This rule extends to evidence that is not in the actual possession of the prosecution but known by others acting on the government's behalf in the particular case including police. *State v. Kennerly, 503* S.E.2d 214, 331 S.C. 442.

To support petitioners Brady violation claim, PCR counsel introduced an affidavit of the City of North Charleston's legal department which shows the police department destroyed the evidence after the request for this evidence was made. This prejudiced petitioner's right to fair trial, as it was exculpatory evidence that was never disclosed.

Petitioner attempted to introduce a 911 dispatch report as comparable evidence and the Solicitor objected it. (Trial transcript page 632, lines 14- 23, page 633, lines 20-25). A proffer was made by assistant solicitor Peter McCoy of the contents of the dispatcher's report period (see trial transcript page 635, lines 6-12) Petition renew his motion at the end of evidence, and the trial judge denied the motion. (trial transcript page 653, lines 13-25, page 654, lines 1-4)

The state's primary witness testified to something totally different from what the 911 call reported to the police on March 25, 2006 states. (See trial transcript page 140-157, lines 1-19). The state's primary witness, Carinda Snowden Williams gave three different statements to police and testified during trial that she lied to police. Therefore the undisclosed 911 tape would have been favorable to the defence and used for impeachment purposes.

Therefore, the PCR judge's order should be reversed, as the record is clear that appellate counsel's performance was deficient and petitioner was prejudiced, and had the issue been raised on direct appeal, the outcome of the proceeding would have been different. *See Washington v. Strickland, supra.*

Next, respondent states the petitioner's argues that a due process violation occurred because the blood observed that the crime scene was not tested for DNA. This is a misrepresentation of the argument. Petitioner argues the North Charleston Police Department's failure to preserve potentially useful evidence was in bad faith on the part of the police. (See PCR application, Rule 59(e) Motion, page 4). Respondents failed to address that blood on a raised window discovered by Coroner Rae Wooten and police was never collected. The issue was addressed in PCR hearing and in petitioner's PCR application. The issue was also addressed during trial and the trial judge abused its discretion in denying the motion. (trial transcript page 524, lines 5-25, page 528, lines 1-7, 579, lines 22-25, 580, lines 1-12, 585, lines 10-14; 586, lines 1-14, 587-588 lines 1-25 and 589, lines 1-23). Appellate counsel testified he was unaware of blood and DNA testing. (trial tr. page 26, lines 5-8). Appellate counsel's performance was deficient and petitioner was prejudiced thereby. Had the issue been raised, the outcome of the proceedings would have been different.

During petitioners trial, the trial judge abused his discretion and told petitioner to get a copy of the transcript and then have the solicitor bring charges against CSI Angela Bunker (See Trial

transcript page 589, lines 1-23). Petitioner renew his motion at the end of evidence. (See trial tr. page 653, lines 13-25, 654, lines 1-4).

The trial judge failed to determine whether the police's failure to preserve evidence was in bad faith. Had the issue been raised on direct appeal the outcome of the proceeding would have been different where there is evidence in the record that NCPD, CSI Angela Bunker did not preserve potentially exculpatory evidence where the preservation of evidence could have been sent to SLED for testing. The evidence was exculpatory as SLED agent testified that the victim's hands were tested positive for gunpowder residue and gunpowder particles. There is a possibility that the victim could have shot a gun, as SLED agent testified that gunpowder particles appear on a person's hands after handling a gun. (See trial transcript 562, line 18-25, page 564, lines 3-1, 565 lines 7-25, 556 lines 1-5, 570, lines 4-10).

Also the State's primary witness, Carinda S. Williams, testified that Travis Johnson took something off of the victim. (See trial transcript page 162, lines 24-25). The DNA evidence was useful to determine whose blood was on was on the window, if it had been preserved. The failure to preserve evidence prejudiced petitioner to a fair trial and the failure to preserve evidence is a violation of the Due Process Clause. *Arizona v. Youngblood.* Had the evidence been preserved for testing, the outcome of the proceedings would have been different.

Respondent also states that appellate counsel was not ineffective for failing to raise a *Batson* issue. Appellate counsel testified that he recalls cases being reversed on *Batson* issues but failed to raise a *Batson* issue on appeal. Appellate counsel performance was deficient and as a result, petitioner was prejudiced by appellate counsel's failure to raise the Batson issue where the trial record reveals that the solicitor struck five African American jurors. (Trial transcript pages 39-44).

During trial, the solicitor stated he struck juror 225 because throughout the process he's been

very reluctant to serve, he indicated he was single, and he indicated he was from North Charleston. (trial transcript page 43). However, the solicitor also seated white Americans who were reluctant to serve and were from North Charleston. Appellate counsel's failure to raise the issue prejudiced petitioner to a fair trial. Had issue been raised on appeal, the proceeding ould have been different.

Next, respondent states the identification was not unduly suggestive and appellate counsel was not ineffective for not raising a *Bigger* issue during trial. This is not true. Appellate counsel's performance was deficient. During petitioners trial, a pre-trial motion to suppress the identification was held outside the presence of the jury. During the hearing, primary state's witness testified that she lied to police several times. (See trial transcript page 21- 25, page 94 line 1-21, page 99 line 4-6, page 103, line 11-14). The trial judge then ruled that the identification was not unduly suggestive without applying the two prongs outlined in *Neil v. Biggers* . The state's primary witness testified that she was shown a mug shot of petitioner with the words Charleston County detention center. The showing of a mug shot was unduly suggestive. The identification of petitioner was tainted.

The respondent argued that the witness was shown a six photo Mugshot of petitioner on March 25, 2006. This is not true because on March 25, 2006, Carina Snowden Williams told police she had not witnessed the murder. (trial transcript pages 94 lines 1-10, page 97 lines 14- 25, 103 lines 1-16).

Carinda Snowden Williams testified during the hearing that she identified petitioner as sleazy and Willie D. When asked who is Willie , she stated petitioner. She testified she knew petitioner through his brother, named Travis Johnson. Petitioner then inform Ms. Williams that he does not have a brother named Travis Johnson. (Trial tr. page 104, lines 1-19). The court then stated that this was irrelevant. The identification of petitioner was unduly suggestive because on March 25, 2006, Miss Williams told police she had not witnessed the murder so the police could not have shown her

a six photo line up on March 25, 2006. It was on March 26, 2006 that Ms. Williams told police that petitioner was the shooter. (See three (3) statements of Carinda S. Williams, trial transcript page 182, lines 21- 25, page 185, line 3).

If Carinda Williams admitted to lying to police on March 25, 2006 when she was allegedly shown a six photo lineup, then it is clear that the identification of petitioner was unduly suggestive. The police could not have not shown a six photo line-up of petitioner on March 25, 2006 because on March 25, 2006 Ms. Williams told police she had not witnessed the murder. If the police did show Ms. Williams a six photo line of Petitioner on March 25, 2006 then clearly the identification was tainted by police. The trial record shows that the petitioner was not identified as the shooter until March 26, 2006, more than 24 hours after the crime.

Appellate counsel's performance was deficient and it prejudiced petitioner. Had appellate counsel raised this issue on appeal, the Appellate court would have reviewed all exhibits introduced and determined that the identification petitioner was tainted and the outcome of the proceeding would have been different.

Appellate counsel testified he did not review the exhibit (PCR transcript page 27 line 9-19). Lastly Respondent argued that his appellate counsel was not ineffective for failing to raise an issue regarding the denial of Petitioner's request for a voluntary manslaughter, but appellate counsel's performance was deficient for failing to raise the issue to the court to charge the jury with voluntary manslaughter when the issue is preserved for appellate review, the trial record shows that there was a sudden heat of passion in this case.

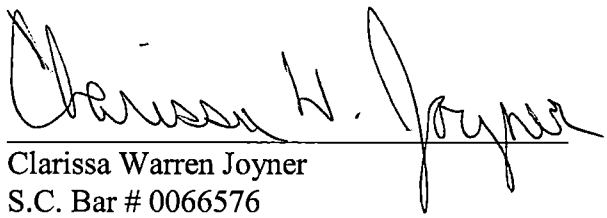
State's witness Carinda Williams testified that everyone was drinking and doing drugs and an argument occurred because Petitioner allegedly shot a gun in the air, however there is no evidence in the record of malice of forethought between the victim and petitioner. The trial record

does not indicate that the murder was planned and the record is sound on the issue of heat of passion and therefore the trial judge, Erin Sally, erred in failing to give a voluntary manslaughter charge to the jury. It would have then been up to the jury to determine whether the crime was voluntary manslaughter or murder. The burden is then shifted to the petitioner.

The failure to raise the issue during direct appeal prejudiced the petitioner. Had the issue been raised on direct appeal the outcome of the preceding would have been different. Where there is no evidence on the record of malice of forethought, had the issue been raised, the Court of Appeals would have reversed petitioner's conviction.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing of the issues presented.



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Terrell McCoy, #256070 . . . . . Petitioner,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Reply to Return to Petition for Writ of Certorari has been served upon the respondent by mailing one (1) copy in the United States Mail, postage prepaid, addressed to:

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May 29, 2018

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

Re: Terrell McCoy, #256070 v. State of South Carolina
Appellate Case No.: 2017-000755
Lower Court Case No.: 2013-CP-10-1994

Dear Mr. Shearouse:

Enclosed herewith please find the original and six copies of the **Reply to Return to Petition for Writ of Certiorari and Certificate of Service** in the above-referenced case for filing in your office. By copy of this letter, I am serving opposing counsel with the same.

Thank you for your assistance. With kind regards, I am

Sincerely,

Clarissa Warren Joyner
Attorney at Law

CWJ/jb
Enclosures
cc: Terrell McCoy, #256070
Rasheeda Cleveland, Assistant Attorney General