Clarissa Warren Joyner

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RECEIVED
JUL 19 2019
S.C. SUPREME COURT

July 19, 2019

VIA HAND-DELIVERY
The Honorable Daniel Shearouse
Clerk of the South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Terrell McCoy v. State of South Carolina
Civil Action Number 2013-CP-10-1994

Dear Mr. Shearouse:

Please find enclosed the Notice of Appeal in the above-referenced case, which I hereby serve upon you. Attached are Proofs of Service for filing with the Court.

Should you have any questions or need any additional information, please do not hesitate to contact me.

With kind regards, I am

Sincerely,

Clarissa Warren Joyner
Attorney at Law

CWJ/mdc
Enclosures
cc: Terrell McCoy

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JUL 19 2019
S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2013-CP-10-1994

State of South Carolina, ... Respondent,

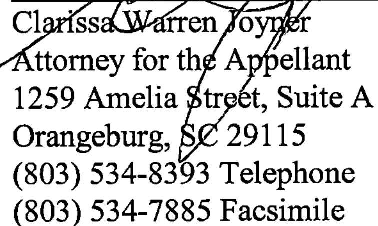
v.

Terrell McCoy, #256070 .... Petitioner.

NOTICE OF APPEAL

Terrell McCoy appeals the Amended Order of Dismissal and the Amended Order Denying Applicant's Motion to Alter or Amend issued by the Honorable Deadra L. Jefferson denying his application for post conviction relief and his Motion to Alter of Amend issued on the 14h day of June, 2019 and ~~served on~~ counsel on the 21st day of June, 2019.

Dated: July 19, 2019



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Megan Harrigan Jameson
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IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JUL 19 2019
S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2013-CP-10-1994

State of South Carolina, ... Respondent,

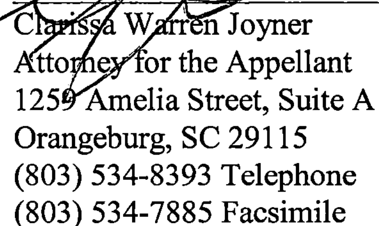
v.

Terrell McCoy, #256070 .... Petitioner.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the South Carolina Attorney General's Office by depositing a copy of it in the United States Mail, postage prepaid, on July 19, 2019, addressed to the attorney of Record, Megan Harrigan Jameson, Post Office Box 11549, Columbia, South Carolina 29202.

Dated: July 19, 2019



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IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JUL 19 2019
S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2013-CP-10-1994

State of South Carolina, ... Respondent,

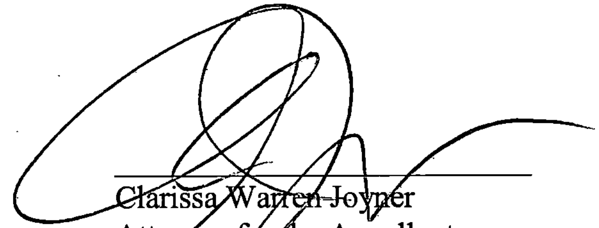
v.

Terrell McCoy, #256070 .... Petitioner.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Terrell McCoy by depositing a copy of it in the United States Mail, postage prepaid, on July 19, 2019, addressed to Terrell McCoy, Inmate #256070, MCI F3 266, McCormick Correctional Institution, 386 Redemption Way, McCormick, South Carolina 29899.

Dated: July 19, 2019



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IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JUL 19 2019
S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2013-CP-10-1994

State of South Carolina, ... Respondent,

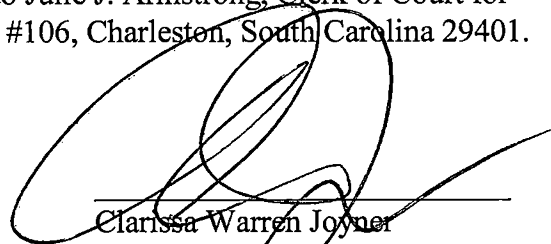
v.

Terrell McCoy, #256070 .... Petitioner.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the Charleston County Clerk of Court's Office by depositing a copy of it in the United States Mail, postage prepaid, on July 19, 2019, addressed to Julie J. Armstrong, Clerk of Court for Charleston County, 100 Broad Street, #106, Charleston, South Carolina 29401.

Dated: July 19, 2019



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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Terrell McCoy, #256070,
Applicant,
v.
State of South Carolina,
Respondent.

Case No. 2013-CP-10-1994

RECEIVED
JUL 19 2019
S.C. SUPREME COURT

FILED
2019 JUN 14 PM 1:37
JULIE J. ARMSTRONG
CLERK OF COURT

AMENDED[1] ORDER OF DISMISSAL

Presiding Judge:	Hon. Deadra L. Jefferson
Applicant's Attorney:	Rodney D. Davis, Esq.
Respondent's Attorney:	J. Rutledge Johnson, Esq.
Standby Counsel:	Lorelle Proctor, Esq.
Appellate Counsel:	Robert M. Dudek, Esq.
Date of Hearing:	December 14, 2015
Court Reporter:	Denise Lauder

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR), filed April 4, 2013. The Respondent made its Return on May 15, 2014, and filed on May 19, 2014. An evidentiary hearing into the matter was convened on December 14, 2015, at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Rodney D. Davis, Esquire. J. Rutledge Johnson, Esquire of the South Carolina Office of the Attorney General represented the Respondent At the hearing, Applicant testified on his behalf. Robert Dudek, Esquire, also testified.[2] This Court had before it a copy of the records of the Charleston County Clerk of Court, records from the South Carolina Department of Corrections, the Applicant's PCR application, the State's Return, the trial transcript and the appellate records.

PROCEDURAL HISTORY

[1] This Order is amended pursuant to a remand of the Supreme Court by Order filed February 1, 2019 and filed with the Charleston County Clerk of Court on February 26, 2019.
[2] Robert M. Dudek, Esquire of the Office of Appellate Defense testified by telephone without objection.

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The Applicant is presently confined to the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the July 2006 term of the Charleston County Grand Jury for murder[3] (Indictment #: 2006-GS-10-4987).

The Applicant proceeded to trial for the first time on July 15, 2008, with Lorelle D. Proctor, Esquire as counsel. The jury was unable to reach a verdict and the Court declared a mistrial. On January 27, 2009, the Honorable R. Markley Dennis heard the Applicant'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.. The Applicant represented himself with Ms. Proctor as standby counsel. The jury convicted the Applicant of murder. The Applicant was sentenced by Judge Young to fifty (50) years imprisonment. On March 5, 2009, Ms. Proctor filed a Motion to Reconsider the Applicant's sentence. The Motion was granted and Judge Young reduced the Applicant's sentence to forty (40) years imprisonment.

The Applicant filed a timely Notice of Appeal. His Appeal was perfected by Robert M. Dudek, Esquire, of the South Carolina Office of Appellate Defense. The Applicant's conviction and sentence were affirmed by the S.C. Court of Appeals. State v. McCoy, No. 2011-UP-471 (S.C. Ct. App. Filed October 26, 2011). The Applicant filed a Petition for Rehearing which was denied on December 19, 2011. The Applicant then filed a Petition for Writ of Certiorari in the S.C. Supreme Court which was denied on March 6, 2013. The Remittitur was issued on March 8, 2013.

[3] Murder is a violent, most serious felony punishable by death, imprisonment for life, or by a mandatory minimum term of imprisonment for thirty (30) years. See S.C. Code Ann. §§ 16-3-10 – 16-3-20 (2003), 16-1-60 (2003), 17-25-45 (2003). Life imprisonment means until death of the offender without the possibility of parole. See S.C. Code Ann. § 16-3-20 (2003).

Prior to this evidentiary hearing the State's Motion for Summary Judgment was heard before the Honorable Larry B. Hyman on September 9, 2015. At the aforementioned hearing, the State made a Motion for Summary Judgment as to Applicant's ineffective assistance of counsel claim, and his ineffective assistance of appellate counsel claim. (Transcript of Evidentiary Hearing at 5:25 – 6:16, Terrell McCoy v. State, September 9, 2015). The State argued that their Motion for Summary Judgment should be granted as to the ineffective assistance of trial counsel claim since Applicant acted as his own counsel. (Id.) The State further argued that the Motion should be granted as to the Applicant's ineffective assistance of appellate counsel claim since any failure to raise issues on appeal was subject to the Applicant's preservation of those issues during his trial in which he acted as his own attorney. (Id.) Judge Hyman granted the Summary Judgment motion as to the ineffective assistance of trial counsel claim. Judge Hyman ruled that Applicant made a conscious and voluntary decision to proceed pro se, as was his right, and that his decision to proceed without an attorney was reviewed by the trial court and the appellate court, respectively. (Id. at 18:7-16). After the conclusion of the evidentiary hearing on September 9, 2015, Judge Hyman filed an Order granting the State's motion for Summary Judgment as to Ineffective Assistance of Trial Counsel on September 14, 2015.

ALLEGATIONS

In his applications, the Applicant alleges that he is being held in custody unlawfully for the following reasons:[4]

1. Conviction is in violation of the U.S. Constitution

[4] The Applicant has filed several amended applications since the filing of his original application for post-conviction relief. Since counsel has been appointed to represent the Applicant and our State does not recognize hybrid representation, the Respondent will not consider or respond to the *pro se* filings of the Applicant. See State v. Stuckey, 333 S.C. 56, 57, 508 S.E.2d 564 (1998). However, the Applicant was allowed and did proceed on all claims he deemed viable supporting his application for relief.

a. Due Process Violation – Malic instruction given by the trial judge was similar to malic charge given in Yates v. Evatt.

2. Ineffective Assistance of Counsel
   a. Trial counsel gave Applicant erroneous legal advice leading to Applicant's self-representation.
   b. Trial counsel failed to object to Judge Jefferson declaring a hung jury during the Applicant's first trial when the jury did not decide whether the Applicant was innocent or guilty.
   c. Trial counsel failed to send the Applicant to have a mental health evaluation after suggested by Judge Jefferson that the Applicant may suffer from bi-polar disorder.
3. Ineffective Assistance of Appellate Counsel
   a. Failure to raise issue that trial judge erred by not instructing the jury with voluntary manslaughter when there was evidence supporting the requested charge.
   b. Failure to raise whether trial judge erred by not finding a Batson violation during jury selection.
   c. Failure to raise whether trial judge erred by denying the Applicant's motion to dismiss the indictment for the State's violation of his speedy trial right when the issue was raised and ruled on.
   d. Failure to raise the issue of whether the trial judge erred in ruling the State's witness identification of Applicant was not unduly suggestive.
   e. Failure to raise the issue of whether the trial judge erred by allowing Brandon Cuttino's statement into evidence.
   f. Failure to raise the trial court erred by denying the Applicant's motion to dismiss indictment on grounds that exculpatory evidence was withheld before trial and the evidence was tampered with.
   g. Failure to raise the trial court erred by denying Applicant's motion to allow unavailable, Cierra Witness, statement into evidence.
   h. Failure to raise the trial court erred by ruling Applicant was not allowed to comment on the destruction of evidence during his opening statement.
   i. Failure to raise the issue whether Judge Young abused his discretion by not warning Detective Angela Bunker about committing perjury at trial when the Applicant raised the issue outside the presence of the jury.
4. Subject Matter Jurisdiction
   a. Fraudulent indictment because grand jury never empaneled and court reporter not present.
5. Prosecutorial Misconduct
   a. Prosecutor failed to correct false testimony given by Detective Angela Bunker concerning the collection of DNA evidence for testing.
   b. Prosecutor presented inconsistent theories which were withheld from Applicant during the second trial.
   c. Prosecutor vouched for witness Carinda Williams, expressing and implying her personal opinion during closing argument
   d. Police failure to preserve potentially useful evidence was in bad faith in violation of the fundamental fairness of the due process clause of the U.S. Constitution.
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
   a. Evaluated by mental health counselor at SCDC and it's been discovered that the Applicant suffers from mental illnesses such as bi-polar disorder and depression.
   b. Applicant did not finish school.
   c. Applicant's mother suffers from mental illness.
8. Actual innocence

After the conclusion of the evidentiary hearing on September 9, 2015, Judge Hyman filed an Order granting the State's motion for summary judgment as to Ineffective Assistance of Trial Counsel on September 14, 2015. Applicant proceeded on the issues of Ineffective Assistance of Appellate Counsel and Prosecutorial Misconduct.

SUMMARY OF TESTIMONY

At the evidentiary hearing, the Appellate Counsel testified he appealed Applicant's case on the grounds that Applicant should not have been permitted to represent himself because he did not fully understand the advantages and disadvantages of self-representation. Counsel stated he received a letter on March 30, 2011 from Applicant, but the Applicant did not request and he does not recall the Applicant requesting that he argue the failure of a voluntary manslaughter charge as a basis for the appeal. Counsel then stated if Applicant requested an issue be raised and he did not raise it, it was because Counsel believed it was not the best issue to raise on appeal. Counsel stated he did not recall an issue about a 911 tape, but vaguely remembered an issue concerning a dispatch log. Counsel stated that if the State objected to the admission of a dispatch log and Defendant objected, then it was preserved for appeal. Counsel also testified that he did not recall evidence of blood or DNA testing.

Additionally, Counsel testified about items which would be required for disclosure by the State. Counsel then stated it was his practice to highlight and review issues that have the most

merit, but he does not recall reviewing all of the exhibits. Counsel then articulated that he is aware of cases being reversed for pro se defendants for Brady violations, failure to give proper jury instructions, prosecutorial misconduct, Batson issues, improper admission of certain witness testimony, and unduly suggestive identifications.

On cross-examination, Counsel testified he's been practicing for twenty-six (26) years and has handled thousands of cases. He further testified that he has been with the Office of Appellate Defense since February of 1990. Counsel stated he read the transcript and prepared which issue(s) he was going to raise on appeal. In his professional opinion, counsel testified the best chance to win this case was to attack the self-representation issue. He further testified that he reviewed the transcript and chose to proceed only on "winnable" issues of merit. He based this opinion on his extensive experience as an appellate attorney, the record as preserved and the facts of the case. Counsel stated he is also bound by issue preservation and has a duty to refrain from raising issues that have not been preserved at the trial level. He further testified, that he had to "weed out" issues that he felt the Applicant had no chance of prevailing. He further opined that even where the Applicant made objections and motions but failed to renew them he was still bound, in good faith, by issue preservation. Counsel reiterated that he raises issues that give his client the best chance at prevailing. Counsel then stated if the State has evidence in its possession, it must be turned over, but if the evidence does not exist, it is impossible for the State to turn it over. Counsel lastly stated that if there is no evidence of a lesser included charge, then the trial court is not required to give the jury a lesser included option. He further testified that his review of the record supported his assessment that there was no evidence "whatsoever" to support the court instructing a lesser included offense. He further testified that while the Applicant had raised issues regarding Brady,

Batson and prosecutorial misconduct there was nothing in the record upon which to premise an appellate issue.

Applicant testified that he requested discovery and that there were issues with what was omitted from the appeal. Applicant argued that Appellate Counsel failed to argue his Brady claim because, as Applicant claims, there was a 911 tape not turned over to his attorney and that there was blood evidence never sent to SLED. Applicant stated there were certain items that were collected and tested and other items that were not collected. Applicant then testified that the victim testified at both the first and second trials, giving different statements during the second trial.

Applicant testified that Appellate Counsel did not raise the jury instruction for voluntary manslaughter even though he requested the charge and was denied by the trial court. Applicant testified that he received a lesser included charge of voluntary manslaughter at his first trial because of evidence of voluntary manslaughter. Finally, Applicant stated that the trial judge erred in striking a black juror, but not two (2) white similarly situated jurors pursuant to Batson. He further testified that the issue of the CAD report was not raised. However, upon further examination he conceded he failed to call the necessary witness for the potential admission of the document.

On cross-examination, Applicant admitted that he was fully aware of the victim's testimony and that there were three (3) different statements given by the victim, which he used to impeach her credibility.

Assistant Solicitor Burns Wetmore was subpoenaed by the Applicant and present for the hearing. The Applicant indicated an intention to call Mr. Wetmore on the issue of prosecutorial misconduct. However, Applicant advised the Court that there was no additional information other than that contained in the record. Applicant advised the Court he wished to excuse Mr. Wetmore

from his subpoena and excuse him as a witness. As a result Mr. Wetmore was excused without objection. (Transcript of Evidentiary Hearing at 38:6 – 9, Terrell McCoy v. State, December 14, 2015).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court had the opportunity to observe the witnesses on the witness stand and listen to their testimony. The Court also read the trial transcript and the appellate records, all of which assists the Court in judging their credibility. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Trial Counsel[5]

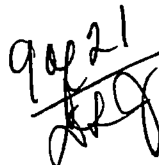
The Applicant seeks relief from his conviction on the basis that he received ineffective assistance of counsel at his criminal trial in violation of the Sixth Amendment. He contends that trial counsel was ineffective for giving Applicant erroneous advice regarding self-representation and the consequences of proceeding *pro se*. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686, 104 S. Ct. at 2064; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). However, pursuant to the United States Supreme Court's decision in Faretta, a Defendant has an unequivocal right to represent himself at trial once it is established that the accused knowingly

[5] The issue of ineffective assistance of Applicant's (standby) trial counsel was raised in his PCR Application and at the evidentiary hearing. While it could be argued this issue is precluded by the grant of the State's Motion for Summary Judgment the Court has addressed it out of an abundance of caution.

and intelligently relinquishes the benefits associated with the right to counsel. See Faretta v. California, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562 (1975).

The Court finds no merit to the Applicant's claim for relief on the ground of ineffective assistance of his trial counsel, Ms. Proctor. On January 27, 2009, before the Honorable R. Markley Dennis, Applicant made a Motion to Relieve Ms. Proctor as counsel and proceed pro se. There was a full Faretta hearing, and Judge Dennis granted the motion and requested that Ms. Proctor be available as standby counsel only. It is well settled in South Carolina that Defendants have no constitutional right to hybrid representation, but may represent themselves while enjoying the advice and assistance of standby counsel. See State v. Sanders, 269 S.C. 215, 218, 237 S.E.2d 53, 54 (1977); See also Foster v. State, 298 S.C. 306, 307, 379 S.E.2d 907, 907 (1989). Applicant represented himself during this trial held February 2 – 6, 2009 before the Honorable Roger M. Young, Sr. and the jury convicted him of murder. Thereafter, he was sentenced by Judge Young to fifty (50) years imprisonment. A Motion to Reconsider his sentence was filed and later granted by Judge Young on March 5, 2009, and his sentence was reduced to forty (40) years imprisonment. The Applicant filed a Notice of Appeal, and the Court of Appeals affirmed his conviction and denied a petition for rehearing. Subsequently there was a petition for a Writ of Certiorari to the Supreme Court, which was also denied.

As stated above, an initial evidentiary hearing on the Applicant's PCR application, filed April 4, 2013, was held before the Honorable Larry B. Hyman on September 9, 2015. At the hearing, the State made a Motion for Summary Judgment as to his ineffective assistance of trial counsel claim, as Applicant acted as his own counsel at trial. Judge Hyman granted the summary judgment motion, noting that Applicant made a conscious and voluntary decision, and that decision



has been reviewed by the trial court and the appellate courts as well. (Transcript of Evidentiary Hearing at 18:7-16, Terrell McCoy v. State, September 9, 2015).

Based on the foregoing, the issue that trial counsel was ineffective was disposed of at the Faretta hearing before Judge Dennis on January 27, 2009 and the subsequent appeals. Further, the September 9, 2015 hearing and grant of summary judgment before Judge Hyman disposed of this issue. Thus, these decisions are the law of this case, and this Court has no authority to disturb either Court's rulings. Based on the applicable law stated above and review of the record in this case, the Court finds that the Applicant has failed to establish any entitlement to relief on the ground of ineffective assistance of trial counsel.

Moreover, the Court would note that the Applicant failed to call Ms. Proctor as a witness thereby eliminating the Court's ability to make an independent factual determination as to what advice, if any, Ms. Proctor provided to the Applicant regarding the consequences of his proceeding pro se in the trial of this matter. The Court notes that it does not find the Applicant's testimony regarding this issue credible or persuasive.

Ineffective Assistance of Appellate Counsel

The Applicant seeks relief from his conviction on the ground that he received ineffective assistance of appellate counsel for failing to raise certain, "valid" issues on appeal. As stated above, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686, 104 S. Ct. at 2064. "The burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP).

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In evaluating allegations of ineffective assistance of counsel, the reviewing court must apply a two-pronged test. Strickland, 466 U.S. 668, 104 S. Ct. at 2064. First, the applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690, 104 S. Ct. at 2064). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690, 104 S. Ct. at 2064). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Once the Applicant has established deficient performance by counsel, he must then establish that counsel's performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-118, 386 S.E.2d at 625. "Appellate Counsel is not required to raise every non-frivolous issue that is presented by the record. Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. See Jones v. Barnes, 463 U.S. 745, 749, 103 S. Ct. 3308, 3311 (1983). "For judges to second-guess reasonable professional judgment 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[.]" Jones, 463 U.S. at 754, 103 S. Ct. at 3314. The applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. See Thrift v. State, 302 S.C. at 537,

397 S.E.2d at 525; 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).

This Court had the opportunity to observe the witnesses on the witness stand and hear their testimony. This Court also has read the trial transcript, all of which assists the Court in judging the witnesses' credibility. This Court finds the Applicant's testimony regarding Appellate Counsel's ineffectiveness is not credible while also finding Counsel's testimony persuasive and very credible. The Court finds Appellate Counsel's representation of Applicant in this case was well above the professional norms. Counsel fully investigated potential preserved issues and assisted Applicant in his defense. Counsel testified that he has been in the legal profession for twenty-six (26) years and has handled thousands of cases. Counsel testified that he reviewed the entire record and briefed the most meritorious issue, giving his client the best chance of prevailing. Further, Counsel testified that he has a duty not to raise non-preserved or frivolous issues on appeal. Counsel explained that he pursued the only "winnable" issue on appeal: Applicant's inability to adequately appreciate the dangers and disadvantages of self-representation, which should have precluded Applicant from representing himself. Further, Counsel stated he strategically decided to "weed out" issues that would not prevail.

After careful review based on the above standard, this Court finds that the Applicant has failed to carry his burden of proof in this action regarding ineffective assistance of Appellate Counsel. Below this Court makes specific findings of fact and conclusions of law in regards to each of Applicant's allegations of ineffective assistance of appellate counsel.

A. Appellate Counsel's failure to raise issue of lack of Voluntary Manslaughter Jury Instruction

"The law to be charged to the jury is determined by the evidence presented at trial." State v. Sams, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014) (quoting State v. Hill, 315 S.C. 260, 262,

433 S.E.2d 848, 849 (1993)). "The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than the greater, offense." Id. (citations omitted). In determining whether the evidence requires a charge on a lesser-included offense, courts view the facts in the light most favorable to the defendant. Id. (citing State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512–13 (2000)). "The trial court may and should refuse to charge on a lesser-included offense where there is no evidence that the defendant committed the lesser rather than the greater offense." State v. Smith, 315 S.C. 547, 549, 446 S.E.2d 411, 413–14 (1994).

The Court finds that Counsel was not ineffective for failing to raise the voluntary manslaughter charge objection on appeal. Counsel explained that there must be sufficient legal provocation for such a charge, and if the facts do not support an instruction on voluntary manslaughter, a trial judge will not instruct a jury on the lesser included offense. Appellate Counsel testified and this Court finds credible, it was his common practice to review the entire record and choose meritorious issues to raise on appeal, therefore, the Court finds appellate counsel exercised his reasonable and professional judgment in choosing not to raise the voluntary manslaughter jury instruction on appeal. Further, the Court finds that appellate counsel's performance was not deficient, and Applicant was in no way prejudiced by appellate counsel's decision not to raise the aforementioned issue.

B. Appellant Counsel's failure to raise Brady Violation issues

"A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment." Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999)

(citing Kyles v. Whitley, 514 U.S. 419, 432–42, 115 S.Ct. 1555, 1565–69, 131 L.Ed.2d 490, 505–10 (1995)); Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196, 10 L. Ed. 2d 215 (1963); State v. Von Dohlen, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996). This rule applies to impeachment evidence as well as exculpatory evidence. See United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481, 490 (1985).

i. Witness Testimony that State was Aware of, but not made available to Applicant

Applicant contends that certain witness testimony was in possession of the prosecution and not provided to the Defense during his second trial. More specifically, Applicant testified that a witness, Ms. Corinda Williams, testified at the first and second trial, but that she gave testimony that was unfamiliar to the Applicant and different from what she testified to in the first trial.

On direct examination, the Applicant asserts he was never made aware of her differing statements prior to her taking the stand. Conversely, on cross examination, Applicant testified that he was provided three (3) statements Ms. Corinda Williams gave the police, and was able to cross-examine her concerning those statements. More specifically, during Applicant's cross-examination of Ms. Williams during the trial, he asked, "You gave three different statements, but in two of your tapes you said you didn't know who committed this crime?" (Transcript of Trial Record at 105:13-15). Ms. Williams replied that she did tell the police she didn't know the identity of the suspect, but that she identified Applicant the second time. (Id. at 106:8-10). Upon a review of the trial record, the third statement the witness provided to the police mirrored her in-court testimony, and she admitted countless times that she was not initially forthcoming with the truth. (Id. at 93:21 – 94:4).

The Court can find no evidence of a Brady violation. The Applicant admits he was given all three (3) statements the State possessed, and had an ample opportunity to and did thoroughly

cross-examine Ms. Williams concerning all inconsistencies in her statements. Appellate counsel, in his professional judgment, had no duty to raise this issue on appeal.

ii. 911 Call and Corresponding CAD Report

Applicant contends that the State was in possession of a 911 tape that was never produced during discovery in violation of Brady. During his trial, the Applicant was in possession of the CAD report/dispatch log ("CAD report"), which is evidenced by his cross-examination of Officer Jason Roy. (Transcript of Trial Record at 514:24 – 516:24, State v. Terrell McCoy, February 2-6, 2019). At no time during Applicant's cross-examination of Officer Jason Roy, did Applicant attempt to enter the CAD report into the record. Moreover, at the close of the Applicant's defense, standby trial counsel informed Judge Young that Applicant wished to discuss an issue about a witness. (Id. at 631:15-16). Thereafter, the Applicant stated he tried to subpoena, J. Fowler, who was the dispatcher with North Charleston Police Department ("NCPD") that accepted the 911 call in connection to the victim's murder. (Id. at 631:18 – 632:1). Applicant sought J. Fowler's appearance at trial in order to elicit testimony that a female rather than a male made the 911 call. (Id.). Judge Young questioned the parties at length as to the whereabouts of the 911 recording, and Ms. Proctor informed the Court that she tried since the first trial three (3) years prior to obtain the tape, but that she was never able to get it and did not believe the Solicitor's officer ever possessed the 911 tape. (Id. at 633:10-14). Mr. Wetmore also advised the trial judge that he never heard a 911 recording and that he did not have a copy of the 911 recording. (Id. at 634:1-5). Furthermore, Mr. Wetmore informed the trial judge that he could not stipulate – as requested by the defense – to the contention that a female made the 911 call because he did not know who made the call, the person would not be subject to cross-examination, and the information would ultimately be hearsay. (Id. at 635:6-17). The trial record is abundantly clear that the Solicitor's office did not

ever have the 911 tape in its possession. This fact was solidified by Ms. Proctor's contention that she has been unable to obtain the recording for the last three (3) years when she represented the Applicant. The record also shows that at the end of the discussion regarding the missing 911 recording, Applicant, again, made no effort to enter the existing CAD report into the record. (Id. at 637:1-9).

During the above trial hearing regarding the 911 recording, Applicant withdrew from calling Mr. Burns Wetmore as a witness since his testimony would add nothing more than what was already preserved in the trial record referenced above. Judge Young found that Applicant had formed no basis for his prosecutorial misconduct claim regarding the 911 tape. As mentioned above, Mr. Wetmore testified that he did not think a 911 tape existed, therefore, no Brady violation is present where evidence was not in the control or possession of the State and where they had no knowledge.

Further, any existence or non-existence of a 911 tape and CAD report at trial should have been raised and investigated during the trial. The Applicant was representing himself therefore, he had a duty to discover everything that was available to him at the time of trial. The Court allowed Applicant to mark as Exhibit 1[6] an Affidavit from Kriston D. Neely, Esq. of the North Charleston Legal Department. The Affidavit states that the City, the North Charleston Police Department and Applicant were involved in litigation of the Applicant's claim in Case Number: 2013-CP-10-6876. The Affidavit further states that during the course of the litigation the City admitted that a 911 recording and CAD report had existed. According to Mr. Neely's Affidavit the 911 recording was destroyed on June 25, 2006 and the CAD report was destroyed on March

[6] The State consented to the admission of the Affidavit.

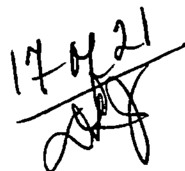
25, 2009 in compliance with the retention policies of the State of South Carolina and the City of North Charleston.

However, the Court's ruling remains the same. Appellate counsel testified that it was his common practice to review the record for any preserved issues he felt were "winnable" on appeal. The Applicant raised the issues with the 911 and CAD report during the course of his trial, they were ruled upon by the trial judge, and thus preserved for appellate purposes. The record, as preserved, indicated that there was no viable issue to appeal when the record was clear that the State did not think a 911 tape existed and was not in control or possession of the same. Therefore, the Court cannot find that appellate counsel was ineffective for failing to raise a Brady violation as to the 911 tape and corresponding CAD report.

iii. Biological Evidence not Tested at the Scene

The Applicant further testified that the State's failure to collect certain blood evidence at the scene constituted a Brady violation that appellate counsel failed to raise on appeal. Applicant testified that there was blood evidence – such as blood DNA left on walls, a doorknob, a window, and in the woodwork on a window leading to the backyard – that was never collected or sent to SLED by the North Charleston Police Department ("NCPD"). During his trial, Applicant made pretrial motions regarding the alleged failure of the NCPD to collect the aforementioned blood evidence and made contemporaneous objections which was denied by the trial judge, thus preserving the issue for appeal.

Applicant has failed to produce any blood evidence which he claims was part of the Brady violation. Further, it is not a Brady violation to not test evidence if investigators do not find it necessary, and if no evidence was ever collected there can be no withholding of exculpatory evidence in violation of Brady. Therefore, the Court cannot find appellate counsel



ineffective for failing to raise the non-collection of certain evidence at the scene on appeal, when he did not feel, in his professional opinion, this was something Applicant would have prevailed upon.

C. Appellant Counsel's failure to raise denial of motion pursuant to Batson

"In Batson, the Supreme Court held the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prevents the prosecution from striking potential jurors on the basis of race." State v. Cochran, 369 S.C. 308, 313, 631 S.E.2d 294, 297 (Ct. App. 2006) (citing Batson v. Kentucky, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719, 90 L. Ed. 2d 69 (1986)). "Once a peremptory challenge is opposed, the trial court must, upon request, conduct a Batson hearing and adhere to the procedures set forth in Purkett v. Elem, 514 U.S. 765, 767, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995), and adopted by our supreme court in State v. Adams, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996)." Cochran, 369 S.C. at 314, 631 S.E.2d at 297–98. Under Purkett, (1) the opponent of a peremptory challenge must make out a prima facie case of racial discrimination; then (2) the proponent has the burden of stating a race-neutral reason for the strike; and, finally, (3) the opponent of the strike must show the facially race-neutral explanation was mere pretext to allow the State to purposefully discriminate based on race by showing that similarly situated panel members were seated on the jury. See Cochran, 369 S.C. at 314 – 15, 631 S.E.2d at 298.

At the hearing, the Applicant testified that he made an objection based on the solicitor striking all black jurors and seating all white jurors during his trial. He stated a Batson hearing was held in which the State explained it struck one of the black jurors because the juror was reluctant to serve and the juror lived in North Charleston. The Applicant explained that the trial judge allowed him to show that the explanation was mere pretext for the solicitor to engage in purposeful

discrimination since there existed similarly situated white jurors who were seated. The trial judge denied Applicant's Batson motion, and the Applicant contends this was reversible error that should have been raised on appeal.

The Court finds that appellate counsel's decision not to raise the Batson challenge on appeal was proper under Counsel's strategy to concentrate on the Appellant's strongest issue. Moreover, the State articulated race-neutral reasons for their strikes, and the Court ruled against Applicant since he failed to meet his burden of showing purposeful discrimination. Thus, this Court finds that Applicant has failed to meet his burden of proving counsel's performance was deficient or that he was prejudiced thereby. Accordingly, this allegation is denied.

D. Prosecutorial Misconduct

Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264, S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). The failure to do so has waived the allegation as grounds for relief.

Regardless, it is applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). The Applicant has raised the issue of prosecutorial misconduct on the above-mentioned alleged Brady violations. More specifically, the Applicant asserts that the State failed to provide all the statements from witness Corinda Williams, a 911 call and CAD report, and blood evidence not collected at the scene. For the reasons set forth above in regard to each alleged Brady violation, the Court can discern no evidence of prosecutorial

misconduct or wrongdoing in this case. The Applicant has not met his burden of proving actual prosecutorial misconduct, therefore, this allegation is dismissed.

All Other Allegations

As to any and all allegations that were raised in the application in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any evidence at the evidentiary hearing regarding such allegations. Accordingly, this Court deems those allegations abandoned by the Applicant. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

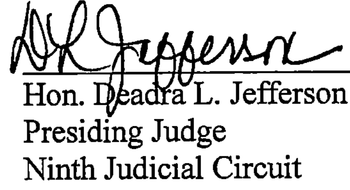
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel or written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant's attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED!



Hon. Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

June 14, 2019
Charleston, South Carolina

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	NINTH JUDICIAL CIRCUIT
	Civil Action No. 2013–CP–10–1994

RECEIVED
JUL 19 2019
S.C. SUPREME COURT

Terrell McCoy, #256070

Applicant,

vs.

State of South Carolina

Respondent.

AMENDED[1] ORDER DENYING APPLICANT'S MOTION TO ALTER OR AMEND

FILED
2019 JUN 14 PM 1:38
JULIE J. ARMSTRONG
CLERK OF COURT

Presiding Judge:	Hon. Deadra L. Jefferson
Respondent's Attorney:	J. Rutledge Johnson, Esq.[2]
Applicant's Attorney:	Rodney D. Davis, Esq.
Date of Hearing:	December 14, 2015
Court Reporter:	Denise Lauder

THIS MATTER comes before this Court by way of an Application for post-conviction relief, filed April 4, 2013. The Court convened an evidentiary hearing into the matter on December 14, 2015 at the Charleston County Courthouse. Applicant was present at the hearing and was represented by Rodney D. Davis, Esquire. Respondent was represented by J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office. The Court denied relief by written Order, filed May 6, 2016.[3] On May 27, 2016, Applicant filed a "Motion Pursuant to Rule 59(a) &

[1] This Order is amended pursuant to a remand of the Supreme Court by Order filed February 1, 2019 and filed with the Charleston County Clerk of Court on February 26, 2019.

[2] After the evidentiary hearing, J. Rutledge Johnson, Esquire was replaced by Alicia Olive, Esquire as counsel for Respondent. At the time of this remand Megan Jameson, Esquire is representing the State.

[3] After the evidentiary hearing but before the filing of the Order of Dismissal, Melisa W. Gay, Esquire, was retained as counsel for Applicant. An Order of Substitution was filed with the Charleston County Clerk of Court on March 26, 2016. Subsequently, on March 21, 2018, Ms. Gay's license to practice law was suspended. On April 30, 2018 Clarissa Joyner, Esquire assumed representation of the Applicant.

e) SCRCP."[4] However, the Applicant failed to serve the Court with the Motion upon filing. The Court subsequently was made aware of and received a copy of the Motion on January 25, 2017.

Rule 59(e) of the South Carolina Rules of Civil Procedure states that "(a) motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of entry of the order." Rule 59(e), SCRCP. The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to allow the parties liberal opportunity to move for the trial judge to reconsider matters properly encompassed in a decision on the merits, regardless of whether the issues and arguments have been previously presented. "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis in original). "A party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." Anderson Memorial Hosp., Inc. v. Hagen, 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Ct. App. 1994) (citing C.A.H. v. L.H., 315 S.C. 389, 434 S.E.2d 268 (1993)). See Arnold v. State, 309 S.C. 157, 172-73, 420 S.E.2d 834, 842 (1992).

Ineffective Assistance of Trial Counsel

The Applicant seeks relief from his conviction on the basis that he received ineffective assistance of counsel at his criminal trial in violation of the Sixth Amendment. He contends that trial counsel was ineffective for giving Applicant erroneous advice regarding self-representation and the consequences of proceeding *pro se*. The Sixth Amendment to the United States

[4] Respondent represented to the Court that despite the certificate of service attached to the motion, it had no record of being served with the Motion, prior to January 25, 2017, when the Court provided Respondent with a copy. Therefore, Respondent did not submit a response to the motion until February 6, 2017.

Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686, 104 S. Ct. at 2064; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). However, pursuant to the United States Supreme Court's decision in Faretta, a Defendant has an unequivocal right to represent himself at trial once it is established that the accused knowingly and intelligently relinquishes the benefits associated with the right to counsel. See Faretta v. California, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562 (1975).

Here, the Court finds no merit to the Applicant's claim for relief on the ground of ineffective assistance of his previous trial counsel, Ms. Proctor. On January 27, 2009, before the Honorable R. Markley Dennis, Applicant made a motion to relieve Ms. Proctor as counsel and proceed pro se. There was a full Faretta hearing, and Judge Dennis granted the motion and requested that Ms. Proctor be available as standby counsel. It is well settled in South Carolina that Defendants have no constitutional right to hybrid representation, but may represent themselves while enjoying the advice and assistance of standby counsel. See State v. Sanders, 269 S.C. 215, 218, 237 S.E.2d 53, 54 (1977); See also Foster v. State, 298 S.C. 306, 307, 379 S.E.2d 907, 907 (1989). Applicant represented himself during this trial held February 2 – 6, 2009 before the Honorable Roger M. Young, Sr. and the jury convicted him of Murder. Thereafter, he was sentenced by Judge Young to fifty (50) years imprisonment. A motion to reconsider his sentence was filed and later granted by Judge Young on March 5, 2009, and his sentence was reduced to forty (40) years imprisonment. The Applicant filed a notice of appeal, and the Court of Appeals

affirmed his conviction and denied a petition for rehearing. Subsequently there was a petition for writ of certiorari to the Supreme Court, which was also denied. On September 9, 2015, an initial evidentiary hearing on the Applicant's PCR application, filed April 4, 2013, was held before the Honorable Larry B. Hyman. At the hearing, the State made a Motion for Summary Judgment as to his ineffective assistance of trial counsel claim, as Applicant acted as his own counsel at trial. Judge Hyman granted the summary judgment motion, noting that Applicant made a conscious and voluntary decision, and that decision has been reviewed by the trial court and the appellate courts as well. (Transcript of Evidentiary Hearing at 18:7-16, Terrell McCoy v. State, September 9, 2015).

As such, the issue that trial counsel was ineffective was heard and disposed of on September 9, 2015 before Judge Hyman and was not appealed. Further, if it is interpreted that his Order granting summary judgment is interlocutory in nature then the matter is preserved for further review. Thus, it is the law of this case, and this Court has no authority to disturb Judge Hyman's ruling. Based on the foregoing procedural history, the applicable law stated above and review of the record in this case, the Court finds that the Applicant has failed to establish any entitlement to relief on the ground of ineffective assistance of trial counsel. Moreover, the Court would note that the Applicant failed to call Ms. Proctor as a witness thereby eliminating the Court's ability to make an independent factual determination as to what advice, if any, Ms. Proctor provided to the Applicant regarding the consequences of his proceeding pro se in the trial of this matter. The Court notes that it does not find the Applicant's testimony regarding this issue credible or persuasive. Therefore, the Motion to Alter/Amend on this basis is denied.

The Court's Denial of Applicant's request to Proceed Pro Se

"It is well established that an accused may waive the right to counsel and proceed *pro se*." State v. Brewer, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997); See also State v. Fuller, 337 S.C. 236, 523 S.E.2d 168 (1999). That right must be preserved even if the court believes that the defendant will benefit from the advice of counsel, or even if the decision to proceed pro se may be to the defendant's own detriment. See State v. Brewer, 328 S.C. 117, 492 S.E.2d 97 (1997). However, a defendant's right to waive the assistance of counsel is not unlimited. "The right to proceed *pro se* must be clearly asserted by the defendant prior to trial." State v. Brewer, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997) (citing State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991)); See also United States v. Lorick, 753 F.2d 1295 (4th Cir.1985). "If the request to proceed *pro se* is made after trial has begun, the grant or denial of the right to proceed *pro se* rests within the sound discretion of the trial judge." State v. Winkler, 388 S.C. 574, 586, 698 S.E.2d 596, 602 (2010) (citing State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999).

Here, the proceeding before the Court was an evidentiary hearing and not a trial. Moreover, the hearing began at or around 10:21 a.m. on December 14, 2015 and ended at approximately 12:05 p.m. Applicant made no attempt to release Mr. Davis prior to the start of the evidentiary hearing. In fact, the Applicant did not attempt to relieve his attorney until the end of the evidentiary hearing following the Court's request for closing arguments. (Transcript of Evidentiary Hearing at 68:19 – 69:1, Terrell McCoy v. State, December 14, 2015). The Applicant and the State both advised the Court that they would not be calling anymore witnesses, signaling a clear end to the proceedings. (Id. at 68:14-18). The evidentiary hearing was complete, the parties had rested their presentations with the exception of closing argument, when the Applicant made his request to relieve Mr. Davis as counsel. Due to the timing of the Applicant's request, there existed no

necessity for the Court to conduct a full Faretta hearing for proceedings that were, for all intents and purposes, concluded at the time the request was made. Further, it was clear from the conduct of the Applicant that the timing of his request was an attempt to delay and preclude the Court from ruling on the merits of his application.

Alleged Brady Violations and Prosecutorial Misconduct

"A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was *material* to guilt or punishment." Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999) (citing Kyles v. Whitley, 514 U.S. 419, 432–42, 115 S.Ct. 1555, 1565–69, 131 L.Ed.2d 490, 505–10 (1995)); Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196, 10 L. Ed. 2d 215 (1963); State v. Von Dohlen, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996) (emphasis added). This rule applies to impeachment evidence as well as exculpatory evidence. See United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481, 490 (1985). Further, prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264, S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). The failure to do so has waived the allegation as grounds for relief.

Affidavit Regarding 911 tape

"If a Brady violation is found to have occurred, PCR must be granted." Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006); See Gibson v. State, 334 S.C. 515, 514 S.E.2d 320

(1999). Evidence is material under Brady if there is a "reasonable probability" that the result of the proceeding would have been different had the information been disclosed. E.g., State v. Proctor, 358 S.C. 424, 595 S.E.2d 480 (2004). The question is not whether petitioner would more likely have been acquitted had this evidence been disclosed, but whether, without this impeachment evidence, he received a fair trial "resulting in a verdict worthy of confidence." Riddle v. Ozmint, 369 S.C. 39, 44–45, 631 S.E.2d 70, 73 (2006) (citing Kyles v. Whitley, at 434, 115 S.Ct. 1555).

Here, Applicant asserts that the State violated Brady and engaged in prosecutorial misconduct by failing to disclose a 911 recording to the Defendant during his trial. During the hearing, the Court allowed Applicant to mark as Exhibit 1[6] an affidavit from Kriston D. Neely, Esq. of the North Charleston Legal Department. The Affidavit states that the City, the North Charleston Police Department and Applicant were involved in litigation of the Applicant's claim in Case Number: 2013-CP-10-6876. The Affidavit further states that during the course of the litigation the City admitted that a 911 recording and CAD report had existed. According to Mr. Neely's Affidavit the 911 recording was destroyed on June 25, 2006 and the CAD report was destroyed on March 25, 2009 in compliance with the retention policies of the State of South Carolina and the City of North Charleston. The Applicant was in possession of the CAD report/dispatch log ("CAD report"), which is evidenced by his cross-examination of Officer Jason Roy regarding the CAD report during his trial. (Transcript of Trial Record at 514:24 – 516:24, State v. Terrell McCoy, February 2-6, 2019). At no time during Applicant's cross-examination of Officer Jason Roy, did Applicant attempt to enter the CAD report into the record. Moreover, at the close of the Applicant's defense, standby trial counsel informed Judge Young

[6] The State consented to the admission of the Affidavit.

that Applicant wished to discuss an issue about a witness. (Id. at 631:15-16). Thereafter, the Applicant stated he tried to subpoena, J. Fowler, who was the dispatcher with North Charleston Police Department ("NCPD") that accepted the 911 call in connection to the victim's murder. (Id. at 631:18 – 632:1). Applicant sought J. Fowler's appearance at trial in order to elicit testimony that a female rather than a male made the 911 call. (Id.). Judge Young questioned the parties at length as to the whereabouts of the 911 recording. Ms. Proctor informed the Court that she tried since the first trial three years prior to obtain the tape, but that she was never able to get it and did not believe the solicitor's officer ever possessed the 911 tape. (Id. at 633:10-14). Mr. Wetmore also advised the trial judge that he never heard a 911 recording and that he did not have a copy of the 911 recording. (Id. at 634:1-5). Further, Mr. Wetmore informed the trial judge that he could not stipulate – as requested by the defense – to the contention that a female made the 911 call because he did not know who made the call, the person would not be subject to cross-examination, and the information would ultimately be hearsay. (Id. at 635:6-17). The trial record is abundantly clear that the solicitor's office did not have the 911 tape in its control or possession. This fact was solidified by Ms. Proctor's contention that she has been unable to obtain the recording for the last three (3) years when she represented Applicant. The record also shows that at the end of the discussion regarding the missing 911 recording, Applicant, again, made no effort to enter the existing CAD report into the record. (Id. at 637:1-9).

Current Supreme Court precedent asserts that "individual prosecutor[s] [have] a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555, 1567, 131 L. Ed. 2d 490 (1995). Though it is now evident that a 911 tape may have existed at the time of Applicant's trial, the Court is not convinced that this creates a "reasonable probability" that the result of the

Applicant's trial would have been different had the 911 tape been disclosed by the police. The Applicant was free to further investigate the existence of a 911 recording and subpoena the necessary agency, but failed to do so while acting as his own attorney. In fact, his previous attorney, Ms. Proctor, asserted that she subpoenaed the 911 recording, but was never able to obtain it. The Applicant raised the issues regarding the 911 recording and CAD report during the course of his trial, and Judge Young made it clear that he could not create a 911 recording that neither party ever had in their control or possession. The record, as preserved, indicated that there was no viable issue to appeal when the record was clear that the State did not think a 911 tape existed and was not in control or possession of the same. Moreover, Applicant cross-examined Officer Jason Roy about the contents of the CAD report, in which he testifies to the entire contents of the report including the portion that indicates the victim advised that a black male came busting through her door with gunshot wounds in his body, which Applicant could have used to impeach Ms. Williams' credibility. In fact, Applicant was able to cross-examine Ms. Williams regarding her three (3) differing statements she gave police, which included the story about a guy breaking through her door with gunshot wounds, which is the exact same information relayed to the 911 dispatcher.

The Court finds that there was no Brady violation on behalf of the State. Further, the Court finds that even without the 911 recording, the Applicant was able to cross-examine the witnesses in detail regarding the contents of the CAD report at length. The Applicant's trial resulted in a verdict worthy of confidence. Therefore, the Court cannot find that appellate counsel[7] was

[7] Mr. Dudek testified at the hearing that he did not remember an issue about a 911 recording, but that he vaguely remembered an issue concerning a dispatch log. (See Transcript of Evidentiary Hearing 25:6-18). He never stated he was "unaware" of the 911 issue as mischaracterized in the Applicants Rule 59(e) Motion. Further, the Rule 59(e) Motion, again, mischaracterizes Mr. Dudek's testimony in that he never said "that if he had known of the 911 tape spoliation issue…it would be reversible error and an appellate issue." (See Rule 59(e) Mot. p. 7). Speaking generally, Mr. Dudek testified that depending on the nature of the evidence allegedly suppressed and the ability of the evidence to help the defense, he would agree that withholding such items would be a Brady violation. (Id. at 26:9-23).

ineffective for failing to raise a Brady violation as to the 911 tape and corresponding CAD report. Further, the Court finds there is no objective evidence in the record to support that the Assistant Solicitor or the North Charleston Police Department(NCPD) engaged in deliberate acts to destroy evidence to support any allegations of spoliation of the 911 tape or CAD report. Thus, the Motion to Alter/Amend on this basis is denied.

Admission of Brandon Cuttino's Statement

In his PCR application, Applicant alleged that appellate counsel was ineffective for failing to raise the issue of whether the trial judge erred by allowing Brandon Cuttino's statement into evidence. This Court finds Applicant failed to present any evidence at the evidentiary hearing regarding such allegations. The only mention of erroneously admitted witness testimony came in the form of a general question by Mr. Davis during his direct examination of Mr. Dudek, where he asks appellate counsel "[y]ou are aware of cases that have been reversed for admitting witness statements into evidence erroneously?" (Transcript of Evidentiary Hearing at 28:24 – 29:1, Terrell McCoy v. State, December 14, 2015). Applicant, nor his attorney, elicited any testimony regarding the erroneous admission of statements made by the witness Brandon Cuttino, therefore, the issue, though alleged in his PCR application, is waived. Accordingly, this Court deemed the allegation abandoned by the Applicant.

Testimony of Victim

Applicant contends that certain witness testimony was in possession of the prosecution and not provided to the Defense during his second trial. More specifically, Applicant testified that a witness, Ms. Corinda Williams, testified at the first and second trial, but that she gave testimony that was unfamiliar to the Applicant and different from what she testified to in the first trial.

On direct examination, the Applicant asserts he was never made aware of her differing statements prior to her taking the stand. Conversely, on cross examination, Applicant testified that he was provided three (3) statements Ms. Williams gave the police, and was able to cross-examine her concerning those statements. More specifically, during Applicant's cross-examination of Ms. Williams during his trial, he asked, "You gave three different statements, but in two of your tapes you said you didn't know who committed this crime?" (Transcript of Trial Record at 105:13-15). Ms. Williams replied that she did tell the police she didn't know the identity of the suspect, but that she identified the Applicant the second time. (Id. at 106:8-10). Upon a review of the trial record, the third statement the witness provided to the police mirrored her in-court testimony, and she admitted countless times that she was not initially forthcoming with the truth. (Id. at 93:21 – 94:4).

The Court can find no evidence of a Brady violation where the Applicant admits he was given all three (3) statements the State possessed, and had the opportunity to and did cross-examine Ms. Williams concerning the alleged inconsistencies in all of her statements. Further, if Ms. Williams testified inconsistently, Applicant had the capacity and should have considered procuring a copy of the transcript from the first trial in order to impeach her with the inconsistent statements. Therefore, the Motion to Alter/Amend on this basis is denied.

DNA evidence not tested and Angela Bunker's Testimony

The Applicant further testified that the State's failure to collect certain blood evidence at the scene constituted a Brady violation appellate counsel failed to raise on appeal. Applicant testified that there was blood evidence – such as blood DNA left on walls, a doorknob, a window, and in the woodwork on a window leading to the backyard – that was never collected or sent to SLED by the NCPD. During his trial, Applicant made pretrial motions regarding the

alleged failure of the NCPD to collect the aforementioned blood evidence and made contemporaneous objections which were denied by the trial judge, thus preserving the issue for appeal.

Applicant has failed to produce any blood evidence which he claims was part of the Brady violation. Further, it is not a Brady violation to not test evidence if investigators do not find its necessary, and if no evidence was ever collected there can be no withholding of exculpatory evidence in violation of Brady. Therefore, the Court cannot find appellate counsel ineffective for failing to raise the non-collection of certain evidence at the scene on appeal, when he did not feel, in his professional opinion, this was something Applicant would have prevailed upon. Thus, the Motion to Alter/Amend on this basis is denied.

Prosecutorial Misconduct

The Applicant has raised the issue of prosecutorial misconduct on the above-mentioned alleged Brady violations. More specifically, the Applicant asserts that the State failed to provide all the statements from the victim, a 911 call, CAD report, and blood evidence not collected at the scene. For the reasons set forth above in regard to each alleged Brady violation, the Court cannot discern any evidence of prosecutorial misconduct or wrongdoing in this case. The Applicant has not met his burden of proving actual prosecutorial misconduct, therefore, this allegation is dismissed.

Based upon careful consideration of the record in this case, including any submissions of the parties, this Court has discovered no findings of fact or conclusions of law that have been overlooked or misapprehended, and this Court is not persuaded to alter or amend its judgment. Applicant has presented no novel facts, arguments, or theories in support of his Motion to Alter or Amend. Moreover, Applicant has not highlighted any portions of the record this Court may have

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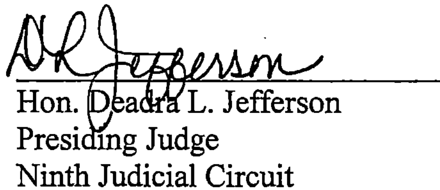
misunderstood, failed to fully consider, or perhaps failed to rule on. Accordingly, the Applicant's Motion to Alter or Amend is hereby DENIED.[8]

IT IS SO ORDERED.



Hon. Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

14th day of June, 2019
Charleston, South Carolina

[8] This motion is disposed of without the necessity of a hearing and decided on the record, written motion, and briefs. Rule 59(f), SCRCP; Pollard v. City of Florence, 314 S.C. 397, 401-402, 444 S.E.2d 534, 536 (Ct. App. 1994).