THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Deidre L. Jefferson, Circuit Court Judge

Case No. 2019-001193

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

v.

State of South Carolina, ... Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Circuit Court err in granting Summary Judgement wherein Petitioner was barred from going forward with his ineffective assistance of counsel action (PCR) against Petitioner's trial counsel Lorelle Proctor when Petitioner was given erroneous advice regarding self-representation and the consequences of proceeding *pro se* at his trial on January 27, 2009?

2. Did the circuit court err in refusing to allow petitioner to represent himself during the PCR hearing hearing held on December 14, 2015 when PCR counsel refused to admit petitioners prepared memorandum of law, failed to admit as an exhibit trial counsel Lorelle Proctor's Rule 5 discovery request, and failed to subpoena trial counsel to the PCR hearing to testify that she had requested discovery, more specifically the 911 tape on several occasions, all before the 911 tape had been destroyed by North Charleston Police department such that a hearing should have been held pursuant to Faretta v. California, 422 US 806, 95 S.Ct., 45 L.Ed 562 (1975)?

3. Did the circuit judge err in finding that Petitioner's appellate counsel, Robert Dudek, was not ineffective when appellate counsel only raised one issue in petitioner's appellate brief, the issue of self-representation, when in fact several viable substantive issues had been raised and the issues had been contemporaneously preserved by Petitioner during his trial and petitioner repeatedly discussed the appellate issues that he had preserved during the trial with Appellate counsel?

4. Did the circuit judge err in finding that petitioner's appellate counsel was not ineffective when appellate counsel did not raise a violation of Maryland v. Brady in violation of South Carolina Rules of Criminal Procedure Rule 5 in Petitioner's Appellate brief wherein the State violated Brady and did not provide Petitioner a 911 tape that was in the possession of North Charleston Police Department and the existence of which was imputed to the Charleston County Solicitor handling Petitioner's prosecution that was material and exculpatory for impeachment purposes in Petitioner's defense and the Brady violation was prejudicial to Petitioner's case because the outcome of Petitioner's presentation of his defense would have been different if the 911 tape had been provided to Petitioner when Petitioner raised the issue during his trial and preserved the issue for appellate review?

5. Did the circuit judge err in finding that petitioner's appellate counsel was not ineffective when appellate counsel did not raise a violation of Petitoner's due process right to a fair trial under the Fifth Amendment of the U S Constitution, Article I Section III of the South Carolina State Constitution when the trial judge sustained the State's objection to the 911 Dispatchers log prejudicing Petitioner and preventing him from being able to impeach the State's primary witness and present his defense that the 911 caller indicated that the facts of the incident could not have happened as the State's witness Corinda Snowden testified to the jury thereby impeaching her testimony and exonerating Petitioner in the case when Petitioner raised the issue during his trial and preserved the issue for appellate review?

6. Did the circuit court err in finding that Petitioner's appellate counsel was not ineffective when appellate counsel did not a raise a Batson v. Kentucky issue when Petitioner argued that the State's use of preemptory challenges to strike two jurors of the same racial composition of Petitioner, but did not use peremptory challenges to strike two Caucasian jurors similarly situated and that the State's justification for striking the African American jurors was not, in fact, race neutral when Petitioner raised the issue during his trial and preserved the issue for appellate review?

7. Did the circuit court err in finding that Petitioner's appellate counsel was not ineffective when appellate counsel did not raise the issue of bad faith on the part of the State and North Charleston Police department under Arizona v. Youngblood when Petitioner raised and preserved the issue during trial that North Charleston police officer Angela Bunker had failed to preserve valuable exculpatory evidence in the form of DNA from blood evidence found at the scene of the incident?

8. Did the Circuit court err in finding that Petitioner's appellate counsel was not ineffective in raising the issue of a prejudicial witness identification when Petitioner objected to the witness identification during her testimony and moved to exclude her testimony raising the issue and preserving the issue for appellate review?

9. Did the circuit court err in finding petitioners appellate counsel was not ineffective when appellate counsel did not raise the issue of the denial of petitioners request for a voluntary manslaughter charge when there was, in fact, evidence in the record that factually support the charge being given to the jury when Petitioner raised the issue during his trial and preserved the issue for appellate review?

STATEMENT OF THE CASE
Procedural History

On July 2006, a Charleston County Grand Jury Indicted Petitioner for Murder. (2006-GS-10-4987). On July 15, 2008, Petitioner, while represented by Lorelle Proctor, went to trial, however the jury was unable to reach a verdict and a mistrial was declared. On January 27, 2009 and January 28, 2009, the Honorable Markley Dennis signed Orders Relieving Lorelle Proctor and allowing Petitioner to proceed *pro se*.(App I. page 4-5) On February 2, 2009, Petitioner's second trial began. Petitioner represented himself with Lorelle Proctor as stand-by counsel. The jury convicted Petitioner of Murder. Petitioner was sentenced to fifty (50) years imprisonment,. Ultimately, his sentenced was reduced to forty (40) years imprisonment. (App IV, page 735-736).

A timely Notice of Intent to Appeal was filed. (App IV, page 737) Robert M. Dudek, Esquire of the South Carolina Office of Appellate Defense was appointed to represent Petitioner and perfected Petitioner's appeal. (App IV, page 743-787) Petitioner's conviction and sentence was affirmed by the S.C. Court of Appeals in State v. McCoy, No. 2011-UP-471 (S.C. Ct. App. Filed October 26, 2011)(App IV, page 788-789). Mr. Dudek filed a Petition for Rehearing which was denied on December 19, 2011. (App IV, page 790). Petitioner filed a Writ of Certiorari in the S.C. Supreme Court which was denied on March 6, 2013. (App IV, page 797).

Petitioner filed an Application for Post Conviction Relief on April 4, 2013.(App IV, page 798). Petitioner alleged that trial counsel, Lorelle Proctor, was ineffective before she was relieved as counsel, and that she gave erroneous advice which led to his *pro se* representation before she was relieved as counsel, and she failed to subpoena witnesses as directed. (App IV, page 798–815, 831-

834, App. V., pages 868-870). Petitioner alleged Appellate counsel was ineffective during his appellate process. (App IV, page 804-807). On May 19, 2014, the State filed a Return to Petitioner's PCR application. (App V, page 767-877).

Petitioners first PCR hearing was held on September 9, 2015. (App. V, page 896-917) The Honorable Larry B. Hyman issued an Order granting the State's Summary Judgement Motion, thereby dismissing Petitioner's PCR action against his trial/ stand- by counsel Lorelle Proctor, but allowed Petitioner to proceed forward on the remainder of the issues. (App V, page 914, lines 12-19, page 923, lines 15-24, page 926, lines 2-8). Petitioner's second PCR evidentiary hearing was held in front of the Honorable Deadra L. Jefferson on December 14, 2015. (App. V, page 920-1004) Mr. Dudek testified by telephone. (App. V, page 940) Petitioner was represented by Rodney Davis, Esquire at the second PCR hearing. Petitioner moved to represent himself during the hearing based on the presentation of his case by Mr. Davis. (App. V, page 936-938, 987, line 25, 988, lines 1-25, 989, lines 1-8). Petitioner's request for self-representation during the hearing was denied, however Petitioner filed a Motion to Relieve Mr. Davis on January 8, 2016. (App V, page 1006) Petitioner hired Melisa W. Gay, Esquire to represent him during the balance of his PCR action. A Substitution Order was filed on March 26, 2016. (App. V, page 1011). Judge Jefferson issued a Final Order denying Petitioner's PCR application on May 5, 2016. (App. V, page 1012-1023) Petitioner, through counsel, filed a Motion to Clarify Order under Rule 59(e). (App. V, page 1025-1029) The State filed a Response to Motion to Clarify. (App. V, page 1031-1032) The Honorable Deadra L. Jefferson denied the Rule 59(e) motion, and failed to make specific findings of facts and conclusions of law relating to all issues addressed in Petitioner's PCR application. (App. V, page 1053-1055) Petitioner filed a Notice of Intent to Appeal on March 8, 2017 (App. V, page 1063) and this Court

issued an Order on February 1, 2019 finding that the PCR judge's orders denying Petitioner's PCR application and his Rule 59(e) motion did not comply with the law. (App. V, page 1067-1069) This Court ruled that the orders did not rule on the merits of all the issues properly presented. (App. V, page 1067). This Court vacated the orders dismissing Petitioner's PCR application and denying the Rule 59 (e) motion, and remanded the case back to the PCR judge to issue an order that contains specific findings on each of the allegations raised by Petitioner at the PCR hearing and in his Rule 59 (e) motion. (App. V, page 1068) This Court mandated that the new PCR order shall be issued within thirty (30) days of the date of its February 1, 2019 Order. (App. V, page 1068) The Honorable Deadra L. Jefferson issued her Amended Order of Dismissal and Amended Order Denying Applicant's Motion to Alter or Amend on June 14, 2019. (App. V, page 1070-1103). Petitioner filed another 59 (e) Motion on July 30, 2019, and Judge Jefferson issued an Order Denying Applicant's Motion to Alter/Amend on August 29, 2019. (App. V, page 1104-1118). Notice of Appeal was timely filed by Petitioner seeking a writ of certiorari to review this denial.

Statement of Facts

When Petitioner's PCR case was heard in Charleston County before the Honorable Deadra L. Jefferson, Petitioner's appellate counsel, Mr. Dudek, testified for the State at the hearing. (App. V, page 940). He defended his decision to file a brief with only one issue. In response to State's question regarding his evaluation of Petitioner's legal issues, Mr. Dudek testified that he would have reviewed the entire transcript. (App. page 941, line 16). He acknowledged that he and Petitioner had "on going communication between us" (App. page 941, 23-25). "He would go along with Petitioner's memory to any specific requests to issues being raised (App. Page 942, lines 7-9). Dudek

testified that he decided that self-representation should not have been allowed because Petitioner did not adequately appreciate the dangers of self-representation. (App. Page 941. lines 4-17). Judge Jefferson inquired of Dudek about his decision. He testified, "Yes sir, that was the only ground." (App. Page 941, line 13). Dudek testified, "I would have thought that the only issue that gave us the chance, and the best chance to win on was him being allowed to represent himself at trial."(App. Page 950, lines 15-18). The State asked Mr. Dudek "you have a duty as an attorney to raise non frivolous issues" and his response was " my duty as an appellate lawyer is to raise the issue or issues that I think give us the best shot of prevailing on.." (App. Page 952, lines 3-7).

When asked about other issues in the trial transcript, appellate counsel did not recall an issue in the transcript about a 911 tape recording that was held outside the presence of the jury (App. Page 944, lines 6-18). With regard to Petitioner's assertion that the failure to provide a 911 tape to Petitioner in his case was a violation of Maryland v. Brady, appellate counsel was asked by the State "if there were items of evidence that the Defendant requested from the state and it was not provided, would you agree that's a Brady violation" (App. Page 945, lines 10-13). Mr. Dudek responded with an explanation of the duty of the state to provide evidence to defendants and stated, "...if it would have assisted his defense whatever the evidence was, yes I would agree with that." (App. Page 945, lines 20-23). Dudek testified in response to a question from the State about the prosecution's actual possession of evidence. Dudek's response to the scenario is "well, I guess I partially agree with that. I mean, evidence in the possession as I understand the law evidence in the possession of say the police department that was helping with the prosecution or the investigating police officer, that evidence is imputed to the state or to the solicitor is my understanding of the law. (App. Page 953, lines 19-25).

PCR counsel Davis cross-examined Dudek about Petitioner's Brady issue. He introduced Petitioner's Exhibit 1, Affidavit of Chris Neeley of North Charleston Legal Department, a document verifying the existence of the 911 tape in Petitioner's case. (App. Page 958, lines 8-15). The exhibit confirmed that a 911 tape had been generated from March 25, 2006 at the time of the shooting. (App. Page 958, lines 20-21, App. Page 959, lines 7-9). Judge Jefferson intimated that the existence of the Affidavit should have been related to a direct appeal (on the Brady issue) (App. Page 959, lines 1-2) The State stated, " I still don't think that it shows anything that could not have been raised on direct appeal, " wherein Judge Jefferson stated ," I agree". (App. Page 959, line 3)

During PCR hearing, Judge Jefferson went into a colloquy regarding Petitioner and Petitioner's trial/stand by counsel's efforts to obtain the 911 tape during the course of Petitioner's case. Judge Jefferson stated, "I would have imagined that Ms. Proctor would have asked for the 911 tape originally. Did she not? " (App. Page 960, lines 5-7). She went on to say "the state would have produced it at the time of the original trial, didn't they?" (App. Page 960, lines 4-8). PCR counsel Davis responded "it was never produced, Your Honor" . (App. Page 960, lines 9-10).

Petitioner testified at his PCR hearing. He testified that during Lorelle Proctor's initial representation, she filed a discovery Motion on March 30, 2006 that was served upon the solicitor in his case on April 10, 2006. (App. Page 965, lines 19-21). Petitioner attempted to admit a copy of the Motion filed by Ms. Proctor, however Judge Jefferson would not allow Petitioner to admit the document and chided Petitioner for his attempt to represent himself at the PCR hearing (App. Page 965, lines 24-25, App. Page 966, lines 1-4). The document was never admitted into the PCR hearing record based on the confusion from the Judge. The Rule 5 Motion was however attached to Petitioner's PCR application pursuant to S.C. Code of Laws § 17-27-45(c) and 17-27-50.

Petitioner testified that he believed he had a valid Brady issue for appeal. During the trial, he attempted to admit a document from North Charleston a Dispatch Log CAD report of the 911 call regarding the shooting incident for which he was charged. Petitioner believed that the State had failed to provide him with the 911 tape in violation of Brady. During trial, Petitioner had attempted to admit into evidence the CAD log as comparable evidence to the 911 tape under the excited utterance exception to the hearsay rule, Rule 803 (1) & (2), SCRE. The Judge sustained the State's objection although stand-by counsel explained that she requested the 911 tape before the police destroyed it. (App. Pages 639-644) . During the PCR hearing, PCR counsel asked Petitioner," let me ask you about that report. Did you attempt to admit that report into evidence? Yes sir, I tried to admit it into evidence and the state objected to it as being hearsay. It was the only evidence that we had to show the judge that there existed a 911 tape." (App. Page 968, lines 12-18, App. Pages 641, lines 1-25). Petitioner testified that he was aware that the "the 911 tape was destroyed two months and 15 days after his lawyer had requested it. That clearly raised a violation that was preserved for the record" (App. Page 971, lines 9-12). Petitioner testified that the State's witness Corinda Snowden/Williams gave testimony at his trial (App. Page 186 -206), and he should have been able to impeach her testimony with the 911CAD log . (App. Page 178, lines 11-25, App. Page 180, lines 1-16,). Petitioner testified in response to the State's question that the witness Corinda Snowden Williams first statement which was corroborated by the 911 tape recording was truth. (App. Page 968, lines 20-24). Petitioner believed that Ms. Williams first statement is consistent with the 911 tape that was not provided to him by the State.

Judge Jefferson erroneously responded about Petitioner's trial transcript, "he would have had to have raised that at the time of trial. We don't get to recreate the record." (App. Page 971, lines 15-

17). This statement is not consistent with the trial record, because Petitioner did, in fact, raise and preserve the issue of the 911 tape and the CAD report. For these reasons, the State did not perform its duty of disclosing the exculpatory evidence when a timely request was made for the 911 tapes four (4) days after Petitioner's arrest, and later destroyed. PCR counsel Davis explained to the Judge that the issue was raised and ruled on, but appellate counsel did not raise the issue during direct appeal which demonstrated appellate counsel's ineffectiveness. (App. Page 957-962).

Petitioner testified that there was other evidence of a Brady violation in his trial. He testified that blood evidence was not collected therefore no DNA evidence was available. "There was a lot of evidence, blood evidence that was left on the crime scene that was not collected." (App. Page 971, lines 1-3). Petitioner maintained this denied him his due process right to test potentially exculpatory evidence pursuant to Arizona v. Youngblood. (App. Page 971, lines 1-3). PCR counsel Davis stated that Officer Bunker of North Charleston Police Department testified in the trial. In the trial she testified about what was collected and what was not collected. (App. Page 974, lines 3-7, App. Page 396-407). In fact, Charleston County coroner Rae Wooten testified about the conditions of the crime scene also. (App. Page 530 - 535). PCR counsel argued that tangible biological evidence that was at the scene that was not obtained by law enforcement and submitted for testing was unlike other items that were submitted for testing. (App. Pages 592-596).

Petitioner testified that he raised other substantive issues during his trial that should have been briefed in his appellate case. Petitioner testified that he raised an objection to the jury instructions. He asked for a lesser included charge of voluntary manslaughter. The trial judge denied his request. He believes that he preserved the issue for appeal (app. Page 981, lines 13-18). The State questioned appellate counsel about the voluntary manslaughter jury charge. Petitioner

testified that where the judge's failure to give a lesser included (voluntary manslaughter instruction) when available, was not done, both prongs of Strickland have been met. (App. Page 990, lines 1-5).

Petitioner testified about a Batson v. Kentucky violation in his trial. "Batson was not raised by appellate counsel. I made an objection to the solicitor striking all black jurors and seating all white jurors I objected and the judge denied." (app. Page 982, lines 13-16). Petitioner testified that the "Gender neutral explanation given by the state was mere pretext pursuant to Batson v. Kentucky (App. Page 983, lines 1-5)

During the PCR hearing, Petitioner became dissatisfied with PCR counsel Davis because of his failure to admit the Rule 5 Motion filed on March 30, 2006 into evidence and failed to examine Lorelle Proctor concerning her actions before she was relieved as counsel, his failure to subpoena Greg Voigt, and his failure to subpoena dispatcher Jenny Fowler and his failure to argue newly acquired evidence. He stated "at this time I would like to fire my attorney and proceed *pro se.* " Judge Jefferson responded " No sir that request is denied. (App. Page 987, lines 21-25, App Page 988, lines 1-3).

Petitioner believes that his application against Lorelle Proctor should not have been summarily dismissed by Judge Hyman. During the PCR hearing, Judge Jefferson makes reference to Petitioner's application against Lorelle Proctor. She states that the Order of Judge Hyman regarding the Summary Judgment hearing was "dispositive" and a "final judgment" (App. Page 988, line 25, App. Page 989, lines 1-5). Petitoner's PCR application was still pending against appellate counsel Dudek, therefore the action was not finalized.

PCR counsel made his final arguments on behalf of Petitioner. He reiterated Petitioners valid preserved substantive appeal issues. (App. Page 989, lines 20-22). He argued that Petitoner's

appellate counsel should have raised these preserved issues in Petitioner's appeal case and in not doing so, appellate counsel was ineffective. Petitioner was prejudiced by appellate counsel's unilateral decision without Petitioner's consent to file a brief only raising one legal issue on behalf of Petitioner. (App. Page 989, lines 18-25, App. Page 990, lines 23-25, App. Page 991, lines 1-2). PCR counsel argued that Petitioner had proven in his PCR action in that appellate counsel's representation fell below the standard of general accepted appellate practice and in as much as Petitioner was prejudiced, because his substantive issues with genuine appellate value were not raised by Mr. Dudek. PCR counsel's summation established the basis for granting Petitioner relief under his PCR action. Petitioner's PCR counsel asked that the judge grant Petitioner a new trial based on appellate counsel's ineffective representation.

ARGUMENT

I. Did the Circuit Court err in granting Summary Judgement wherein Petitioner was barred from going forward with his ineffective assistance of counsel action (PCR) against Petitioner's trial counsel Lorelle Proctor when Petitioner was given erroneous advice regarding self-representation and the consequences of proceeding *pro se* at his trial on January 27, 2009?

The granting of Summary Judgment under Rule 56, *SCRCP*, in Petitioner's PCR action is not a final decision, and therefore can be appealed to this court at this time. The Order was issued while Petitioner's PCR application was still pending. The Order did not resolve the action in its finality. Pursuant to Rule 243(a), South Carolina Appellate Court Rules , a "final decision, entered under the Post Conviction Relief (PCR) Act shall be reviewed by the Court upon a petition for writ of certiorari. Under the general civil rules, Rule 71.1(g), South Carolina Rules of Civil Procedure

(SCRCP) uses similar language about the review of a "final decision" and Rule 201(a), SCACR refers to an appeal from "any final judgment, appealable order or decision, however the rules provide that the procedure in a PCR is governed by Rule 243. Section 17-27-100 of the S.C. Code provides that 'a final judgement entered under this chapter may be reviewed by the appellate court."

Rule 56(d), SCRCP allows for the granting of summary judgement for some of the issues in a trial, but not all the issues. The Rule indicates that trial shall proceed on the remaining issues, when summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary.

Section 14-3-330 of the S.C. Code defines appellate jurisdiction and permits an appeal from any intermediate judgement ...in a law case involving the merits in actions commenced in the court of common pleas... and final judgments in such actions. It states that provided, that if no appeal be taken until final judgment is entered, the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from.

Section 17-27-80 SC Code defines final judgment as the court's making specific findings of fact and conclusions of law as to each issue presented. Judge Hyman's Summary Judgment order did not make specific findings of fact and conclusions of law on each of Petitioner's issues presented in his PCR application. Petitioner's PCR action was still pending after the order was issued. The merits of Petitioner's application had not all be decided and a "trial" hearing was still required to finalize Petitioner's action. The Final Order in Petitioner's case was not issued until it was done by Judge Jefferson.

The applicant, through counsel, filed a writ of certiorari regarding the issue, and this court vacated the PCR judge's order and remanded the case back to the Circuit Court for the PCR judge

to make specific findings of fact and conclusions of law as to each of the issues presented in Petitioner's PCR application, and issues presented at the hearing. (App. Pages 1067-1068). More than three (3) months after the mandated date for submission of the amended order, on June 14, 2019, the PCR judge issued an amended order of dismissal, but she still failed to make specific findings of fact and conclusions of law on each issue as instructed to do by this Court. In her amended order, Judge Jefferson denied Petitioner's Motion to Alter or Amend the claim that trial counsel, Lorelle Proctor, was ineffective for giving Petitioner erroneous advice to represent himself. In the Amended Order, she clearly states that the Applicant has failed to establish any entitlement to relief on the grounds of ineffective assistance of trial counsel. Moreover, the Court noted that the Applicant failed to call Ms. Proctor as a witness during the hearing thereby eliminating the Court's ability to make an independent factual determination as to what advice, if any, Ms. Proctor provided to Applicant regarding the consequences of his proceeding *pro se* in the trial. (App. Page 1094). This is not true. At the December 14, 2015 PCR hearing, PCR Counsel Davis attempted to call Ms. Proctor as a witness and Judge Jefferson informed counsel that Judge Hyman has ruled on the issue during summary judgment and that the issue needed to be appealed. (App. Page 899, lines 4-9, 11-15, App. Page 900, lines 4-9, 15-25, App. Page 901, lines 1-25, App. Page 902, lines 1-25). Had Judge Jefferson allowed testimony of Lorelle Proctor, the record would have established that Lorelle Proctor gave Petitioner erroneous advice to represent himself, and that the first self-representation hearing was held in December 2008, and at that time, applicant refused self-representation. A second hearing was held on January 27, 2009.

II. Did the circuit court err in refusing to allow petitioner to represent himself during the PCR hearing held on December 14, 2015 when PCR counsel refused to admit petitioners prepared memorandum of law, failed to admit as an exhibit trial counsel Lorelle Proctor's Rule 5 discovery request, and failed to subpoena trial counsel to the PCR hearing to testify that she had requested discovery, more specifically the 911 tape on several occasions, all before the 911 tape had been destroyed by North Charleston Police department such that a hearing should have been held pursuant to Faretta v. California?

Under Faretta v. California, 422 US 806, 95 S.Ct., 45 L.Ed 562 (1975), Petitioner should have been allowed to represent himself at his PCR hearing. Petitioner expressed dissatisfaction with PCR counsel, and Judge Jefferson should have adjourned the hearing to hold a Faretta hearing. Faretta v. California stands for the principal that a defendant has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so. In Petitioner's PCR hearing, he should have been afforded an opportunity to state his position regarding self-representation and his dissatisfaction with PCR counsel Davis. Petitioner clearly informed the court he would like to fire his attorney and proceed. Petitioner did not request a continuance, he requested to proceed without counsel. The PCR record shows that petitioner did relieve his PCR counsel Davis and retained counsel Melissa Gay, Esquire before the PCR judge's order was issued. Therefore, Petitioner was entitled to a Faretta hearing to state his dissatisfaction with counsel and inform the court that PCR counsel Davis had been sanctioned by the South Carolina Disciplinary Counsel Board for failing to communicate with Petitioner, and failing to amend Petitioner's application.

III. Did the circuit judge err in finding that Petitioner's appellate counsel, Robert Dudek, was not ineffective when appellate counsel only raised one issue in petitioner's appellate brief, the issue of self-representation, when, in fact, several viable substantive issues had been raised and the issues had been contemporaneously preserved by Petitioner during

his trial and petitioner repeatedly discussed the appellate issues that he had preserved during the trial with Appellate counsel?

The right to seek appellate review of the denial of PCR is expressly authorized by state law. Section 17-27-100(1985), S. C. Code Ann see Austin v. State, 305 S,C, 453, 409 S E 2nd 395. The standard of review in a PCR case is error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 624, Judge Jefferson committed an error of law in denying Petitioner's application for PCR. Judge Jefferson made her ruling that appellate counsel was not ineffective after making several comments in the PCR hearing record inferring that Petitioner, in representing himself, had not made adequate objections or preserved his issues for appeal during his trial. In fact, Petitioner had raised all his issues and preserved them for appellate review.

Petitioner is "constitutionally entitled to the effective assistance of appellate counsel. Evitts v.Lucey,469 U.S. 387, 105 S. Ct. 830, 83 L. Ed 821(1985)(to be effective appellate counsel must give assistance of such quality as to make appellate proceedings fair). "In deciding a claim of ineffective assistance of counsel, the focus is on 'the fundamental fairness of the proceeding whose result is being challenged". Strickland v. Washington, 466 US 668, 104 S. Ct. 2052, 80 L.Ed (2nd) (1984).

First, the burden of proof is upon Petitioner to show that counsel's performance was deficient as measured by the standard of reasonableness under prevailing professional norms. Second, the Petitioner must prove that he or she was prejudiced by such deficiency to the extent of there being a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, supra. Accord Smith v. State, 309 S.C. 413, 424 S. Ed 480 (1992)." Southerland v. State.

The standard established by Strickland is that the Petitioner must establish a reasonable probability that the result of the proceeding would have been different. Southerland, citing Smith v. State 309 S C. 413, 424 S. E. 2nd 480, 481 (1992), (Petitioner must prove there is a 'a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.')". In this case, Petitioner must prove that appellate counsel's failure to argue issues that he did not raise on Petitioner's behalf was objectively unreasonable and that, Petitioner's conviction would have been reversed. Southerland, People v. Griffen, 178 Ill. 2d 65, 27 Ill dec. 338, 687 N.E 2d 820 (1997).

PCR Judge decided that appellate counsel was within the range of effective assistance of appellate counsel in briefing only one issue. Petitioner's trial transcript and the PCR hearing transcript clearly sets forth facts sufficient to establish that appellate counsel's choice in only briefing the self-representation was deficient, because Petitioner had raised and preserved several constitutionally valid appellate issued during his trial. (App. Page 948, lines 6-12, App. Page 89, lines 10-25, App. Page 90-116, App. Pages 956, lines 24-25). Petitioner sets forth such arguments in this document to establish that the appellate issues that appellate counsel ignored would have in fact reversed his conviction. People v. Griffen, Id.

Judge Jefferson committed an error in law when she based her ruling in Petitioner's case on her singular conclusion that there were no other valid appellate issues in the case. Judge Jefferson found that Petitioner's issue had no appellate value, however her ruling was in contradiction to established law regarding issues including a violations of Due Process under Brady v. Maryland, as well as other constitutionally sound appellate issues. Judge Jefferson's Order did not specifically address her factual findings and conclusions of law regarding

Petitioner's genuine appellate issues. She misapplied the law in several areas while determining that appellate counsel's failure to use due diligence in reviewing Petitioner's record and limiting the Court of Appeals review of the not record was unreasonable performance, and but for his deficiency, petitioner's conviction would have been overturned.

IV. Did the circuit judge err in finding that petitioner's appellate counsel was not ineffective when appellate counsel did not raise a violation of Maryland v. Brady in violation of South Carolina Rules of Criminal Procedure Rule 5 in Petitioner's Appellate brief wherein the State violated Brady and did not provide Petitioner a 911 tape that was in the possession of North Charleston Police Department and the existence of which was imputed to the Charleston County Solicitor handling Petitioner's prosecution that was material and exculpatory for impeachment purposes in Petitioner's defense and the Brady violation was prejudicial to Petitioner's case because the outcome of Petitioner's presentation of his defense would have been different if the 911 tape had been provided to Petitioner when Petitioner raised the issue during his trial and preserved the issue for appellate review?

Judge Jefferson commented that she did not find any other issues in Petitioner's record that could be appealed. She did not find that the issue of the 911 tape, the Brady v. Maryand, 373 U S 83 (1963) violation in Petitioner's case, was in fact a viable preserved appellate issue. Her conclusion failed to recognize the legal basis for Petitioner's Brady issue. She failed to recognize that Petitioner had appropriately preserved for appellate review the issue involving the State's failure to provide all the discovery material to Petitioner in his case pursuant to Brady and Rule 5 of the South Carolina Rules of Criminal Procedure in violation of the 14th Amendment Due Process Clause of the U S Constitution and South Carolina State Constitution.

In Brady v. Maryland, the court held that the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to

guilt or punishment, irrespective of the good faith or bad faith of the prosecution. The State's suppression of favorable material evidence undermines the confidence in the jury 's verdict. U.S. v. Snipes, 388 F. 3rd 471 (2004). The Snipe court found that," in the interest of justice...there is a reasonable probability that had the evidence been disclosed to the Defense, the result of the proceeding would have been different..." State v. Kennerty, 331 S.C. 646, 660, 594 S.E. 2d 462, 470 (2004)

To establish a Brady violation Petitioner must make three showings:

1. The evidence at issue must be favorable to the accused, either because it is exculpatory, or it is impeaching;
2. That the evidence must have been suppressed by the State, either willfully or inadvertently;
3. Prejudice must have ensued. U.S. v. Snipe

Petitioner must first establish that the concealed evidence in question was material. The materiality inquiry is defined in Brady as, "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. U.S. v. Snipe, quoting Brady v. Maryland. If the impeaching evidence 'would seriously undermine the testimony of a key witness on an essential issue or there is no strong corroboration, the withheld evidence has been found to be material.'" U.S. v. Snipe , quoting Brady.

In State. Hutton, 358 S.C. 622, 595 S.E.2d 882, (Ct. App 2004), the court found that the defendant's destruction of evidence issue could be resolved by defendant's use of evidence of comparable value obtained by other means. The Hutton court allowed cross-examination of the trial witness about the destroyed evidence to resolve the issue.

The evidence at issue in Petitioner's case is a 911 tape that existed in Petitioner's prosecution file, but was never given to Petitioner's court appointed attorney Ms. Lorelle Proctor. Ms. Proctor

filed a written request for all the evidence in Petitioner's case. At the time of the written request, North Charleston Police department was in possession of the 911 tape. North Charleston Police Department is a State agency under the control of the Charleston County Solicitor's office. Any "evidence" that is in the possession of law enforcement is imputed to the prosecuting agency. The 911 tape was never disclosed to Petitioner, and by the time Petitioner verified the tapes existence through other means, the 911 tape had been destroyed by North Charleston Police. Petitioner's defense team had confirmed the tape's existence and obtained a written document memorializing the content of the 911 tape in the form of a dispatch CAD log. Petitioner moved to admit the document as comparable evidence to the 911 tape during his trial. The trial judge sustained the State's objection to the use of the document as hearsay and refused Petitioner the opportunity to use the document and its contents to impeach the State's most significant evidence, the testimony of an eyewitness. Attacking the eyewitness's credibility was essential to Petitioner's defense. This witness, Carinda Snowden, gave multiple conflicting statements.

The 911 tape was exculpatory evidence. The 911 caller referenced facts that contradicted the eyewitness testimony. The 911 tape was proof that the eyewitness testimony was not credible. Presentation of evidence to the jury in the form of the Dispatch CAD Log would have created doubt and the outcome of Petitioner's trial would have been different. Petitioner was prejudiced by the suppression and destruction of the 911 evidence, and as such Petitioner would have prevailed if the issues regarding his Brady violation had been briefed in his appellate case. Under the two prongs of Strickland, Petitioner's appellate counsel failed to raise the viable issue and Petitioner was prejudiced, therefore Petitioner has meet his burden of ineffective assistance of counsel. The Order of Judge Jefferson should be reversed.

V. Did the circuit judge err in finding that petitioner's appellate counsel was not ineffective when appellate counsel did not raise a violation of Petitoner's due process right to a fair trial under the Fifth Amendment of the U S Constitution , Amendement of the South Carolina State Constitution when the Trial judge sustained the State's objection to the 911 Dispatchers log prejudicing Petitioner and preventing him from being able to impeach the State's primary witness and present his defense that the 911 caller indicated that the facts of the incident could not have happened as the State's witness Corinda Snowden testified to the jury thereby impeaching her testimony and exonerating Petitioner in the case when Petitioner raised the issue during his trial and preserved the issue for appellate review?

In State. Hutton, 358 S.C. 622, 595 S.E.2d 882, (Ct. App 2004), the court found that the defendant's destruction of evidence issue could be resolved by defendant's use of evidence of comparable value obtained by other means. The Hutton court allowed cross-examination of the trial witness about the destroyed evidence to resolve the issue. Petitioner moved to admit the dispatcher CAD log document as comparable evidence to the 911 tape in his trial. Petitioner had established trough stand by counsel that he had requested any and all relevant evidence in his case in the possession of law enforcement in a timely manner. All relevant material was requested under Brady v. Maryland and Rule 5 of the SCRCP. During Petitioner's trial, the State indicated that the 911 tape had not been revealed, because the Solicitor did not know it existed. The State argued that the solicitor's personal knowledge should control the Brady inquiry, however Petitioner argued that the 911 tape had been in possession of the North Charleston Police Department, therefore the duty to provide the evidence to Petitioner was with the solicitor's. Petitioner argued that the State's failure to provide the 911 tape had been established, therefore he could admit comparable evidence of the 911 tape in the form of the dispatcher CAD log. Under State. v. Hutton, Petitioner was attempting

to impeach the State's witness with comparable evidence. Failure to allow Petitioner to admit the dispatcher CAD log was a violation of Brady, Hutton, and the due process clause of the Fourth Amendment of U S Constitution and South Carolina State Constitution. Judge Jefferson's failure to recognize Petitioner's validly preserved and articulated appellate issue was an error of law. Appellant counsel's failure to brief the issue on Petitioner's behalf was deficient and fell below the reasonable standard. Petitioner was prejudiced by appellant counsel's performance in that the Court of Appeals never reviewed this compelling issue that Petitioner preserved. Petitioner would have prevailed in his appeal, but for appellant counsel's deficient representation.

VI. Did the circuit court err in finding that Petitioner's appellate counsel was not ineffective when appellate counsel did not a raise a Batson issue when Petitioner argued that the State's use of preemptory challenges to strike two jurors of the same racial composition of Petitioner, but did not use peremptory challenges to strike two Caucasian jurors similarly situated and that the State's justification for striking the African American jurors was not in fact race neutral when Petitioner raised the issue during his trial and preserved the issue for appellate review?

Batson v. Kentucky, 476 U S 79 (1986), sets forth the recognized principal that a defendant can be denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury. Racial discrimination if the selection of jurors is constitutionally prohibited. Petitioner in his trial raised a Batson issue. In doing so, he raised a prima facia case of purposeful discrimination. The State did not meet its burden to establish a neutral explanation for challenging African American jurors in Petitioner jury panel, Batson. Petitioner's appellate counsel failed to raise the issue despite Petitioner's raising the issue and preserving it for appellate review.

VII Did the circuit court err in finding that Petitioner's appellate counsel was not ineffective when appellate counsel did not raise the issue of bad faith on the part of the State and North Charleston Police department under Arizona v. Youngblood when Petitioner requested a jury charge on spoilation of evidence raised and preserved the issue during trial that North Charleston police officer Angela Bunker had failed to preserve valuable exculpatory evidence in the form of DNA from blood evidence found at the scene of the incident?

Petitioner's appellate counsel testified that he did not recall a DNA issue in Petitioner's transcript. (Petitioner raised and preserved the issue of North Charleston Police force's bad faith destruction of blood evidence. Petitioner crossed examined Angela Bunker, a North Charleston detective, regarding blood evidence at the scene of the incident. She confirmed that no blood was collected despite the presence of blood at the scene. Coroner Rae Wooten testified that she took pictures of the scene including pictures of a window raise with blood visible, but she did not collect any blood evidence. Both of these State's witness acknowledged that no one collected and blood from which DNA could be tested in this case. Petitioner argued that North Charleston Police had destroyed possible exculpatory evidence in his case, therefore a Due Process violation had occurred. Arizona v. Youngblood, 488 U S 51, (1988), (when the police permit the destruction of evidence that could eliminate the defendant as the perpetrator such loss is material to the defense and is a denial of due process. quoting State. v. Escalante, 153 Arizona 55, 61 734 P.2d 597, 603 (App. 1986)). Petitioner's counsel failed to raise the valid preserved issue in Petitioner's brief.

VIII. Did the Circuit court err in finding that Petitioner's appellate counsel was not ineffective in raising the issue of a prejudicial witness identification when Petitioner objected to the witness identification during her testimony and moved to exclude her testimony raising the issue and preserving the issue for appellate review?

Petitioner's appellate counsel failed to brief the raised and preserved issue of a tinted, unduly suggestive identification of Petitioner by State's witness Corinda Snowden Williams. (App. Petitioner objected to the testimony of Ms. Williams based on her lack of credibility due to her admission that she had lied to the police, the fact that she gave three inconsistent statements, and that she was only shown one mug shot in her identification of petitioner as the perpetrator of the crime.

In Neil v. Biggers,---- there are five factors to consider in determining if a witness identification is unduly suggestive therefore inadmissible.

1. The witness certainty;
2. The witness quality of view;
3. The amount of attention paid to the culprit;
4. The agreement between the witness's description and the suspect;
5. The amount of time between the crime and the identification attempt.

The Bigger's test when applied to Petitioner's facts challenge Ms. Williams in court identification and confirm that her testimony should not have been allowed in his trial. Admission of her identification of Petitioner was in violation Petitioner's due process right to a fair trial under Biggers.

IX. Did the circuit court err in finding petitioners appellate counsel was not ineffective when appellate counsel did not raise the issue of the denial of petitioners request for a voluntary manslaughter charge when there was in fact evidence in the record that factually support the charge being given to the jury when Petitioner raised the issue during his trial and preserved the issue for appellate review?

IN THE STATE OF SOUTH CAROLINA
In The 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 Appendix and Petition for Writ of Certiorari on the South Carolina Attorney General's Office by hand delivering a copy of it on February 4, 2020 to the attorney of Record, Benjamin H. Limbaugh, Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201.

Dated: February 5, 2020

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