

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

Certiorari to Charleston County

FEB 05 2020

Deidre L. Jefferson, Circuit Court Judge

S.C. SUPREME COURT

2019-001193

THE STATE,

RESPONDENT

V.

TERRELL L. MCCOY,

PETITIONER

APPENDIX

V

Clarissa Warren Joyner

P.O. Box 1724

Orangeburg, South Carolina

29115

(803)534-8393

ATTORNEY FOR PETITIONER

862

STATE OF SOUTH CAROLINA
COURT OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH CIRCUIT JUDICIAL COURT
Civil action. : 2013-CP-10-1994

Terrell L. McCoy, 256070

Applicant,

AFFIDAVIT OF TERRELL MCCOY

v.

State of South Carolina
Respondent.

FILED

AUG 29 2013

JULIE J. ARMSTRONG
CLERK, C.P. & G.S.

PERSONALLY APPEARED BEFORE ME, Terrell Lynwood McCoy, who being first duly sworn, and deposes and says

1. I am confined in South Carolina Department of Correction at Perry Correctional Institution
2. I have by due diligence discovered such evidence and had not know of the existence of such evidence at the time of the trial on February 2, 2009.
3. On August 2, 2013 I received a letter from Beth Woodall, an employee at the City of North Charleston, SC Legal department. Enclosed in the letter was information that shows that during my trial, February 2, 2009, there was only one person employed at the North Charleston Police Department with the Name J. Fowler, and her name is Jenie Fowler.
4. I had Confided ⁱⁿ ~~with~~ Public Defender Lorelle Proctor to subpoena all necessary witnesses for my trial. During a recess at my trial, I was told by Lorelle Proctor and Detective Deckard that there were ~~two~~ people with the name J. Fowler and that the Subpoena had went to the wrong person. Verdell Young was also present.
5. I was not able to call Jenie Fowler to testify at my trial due to the deception of my Stand by Attorney Lorelle Proctor. If she deceived me then, then I know it was why she ask me to represent myself at my Second trial.

6. Before trial I was unaware that the Prosecutor was in possession of ~~newly disc~~ new testimony by Carinda Snowden. Being that I was incarcerated I wasn't able to question Carinda Snowden so therefore I did not know that she had change her story again.

7. I wasn't aware of her new testimony and therefore I wasn't able to prepare a adequate defense. I learned of Carinda Snowden new testimony during trial and being that I am unexperience in law, I didn't know how to rebut the new evidence.

8. I did file a motion to Compel discovery with the Clerk of Court and sent a copy to Burns Wetmore seeking discovery. He never informed me that Carinda Snowden had changed her testimony.

9. If I was ~~was~~ aware of Carinda Snowden new testimony, I would have prepared to rebut the evidence and show the Jury that her testimony is not reliable and how the prosecutor had only filled the gaps in the State's case in order to convict me. I also would not have chose to represent myself at Trial if I knew she was going to change her testimony and present new testimony.

10. I further Sayeth Not.

151 Terrell McCoy
TERRELL MCCOY 256070
PCI C.O.P.
430 OAK LAWN RD
Pelzer, SC 29669

Sworn or affirmed to and Subscribed before
me this 21st day of August, 2013

Nancy C. Munk
Notary Public

My Commission Expires: 1-23-2023

1C to R. Davis
1C to Judge

Terrell L. McCoy
PCI D-18
430 Oaklawn rd.
Pelzer, SC 29669

November 19, 2013

THE Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street
Charleston, SC 29401

FILED
2013 NOV 22 PM 2:44
JULIE J. ARMSTRONG
CLERK OF COURT

RE: Terrell McCoy, #256070 v. State of South Carolina
2013-CP-10-1994

Dear Ms. Armstrong:

I am writing you in regards to the attorney Rodney D. Davis, ~~who~~ this Court appointed me on April 16, 2013. I have copies of numerous letters that present Mr. Davis concerning my above case. Mr. Davis hasn't attempt to write me at all. He hasn't even wrote me and let me know he was appointed to represent me in my PCR. At this time I am compel to ask that he be remove from ^{my} case so that another Counsel can be appointed to represent me. Can you please forward the attach letter to Mr. Davis along with documents to file a motion for removal. Please put a copy of ~~the~~ letter in my file for the Judge's ~~review~~. Also file the letter in Court of Common Pleas. Can you also forward a copy of both letters to the Disciplinary Counsel board in Columbia to Tiffany N. Richardson for their filing.

11-19-13

Thank You.

Tam
Terrell McCoy

865

Terrell L. McCoy, 256070

PCI D.Y. 18

430 Oaklawn rd

Pelzer, SC 29669

November 19, 2013

Rodney Davis
Attorney at Law
4000 Faber Place drive
Suite 300
Charleston, SC 29405

FILED
2013 NOV 22 PM 2:44
JULIE J. ARMSTRONG
CLERK OF COURT

RE: Terrell McCoy #256070 v. State of South Carolina
2013-CP-10-1994

Dear Mr. Davis:

I am writing requesting for you to file a motion to remove yourself from my case so that another attorney can be appointed to represent me in my case. I've been writing you letters since May of 2013 and you have not once written me back. Also my mom, Mary Johnson, went to your office, left her name and number, and you have failed to respond. To prevent further delay in ^{my} PCR, I ask that you file a motion to be remove so that the Clerk of Court can appoint me new Counsel.

I am,

11-19-13

Julie J. Armstrong
Clerk of Court

Terrell McCoy

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

2013-CP-10-1994

Terrell McCoy, #256070,

Applicant,

v.

State of South Carolina,

Respondent.

RETURN

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2014 MAY 19 AM 11:25

FILED

The Respondent, making its Return to the application for post-conviction relief (PCR) filed April 4, 2013, would respectfully show this Court:

I.

The Applicant is presently confined in 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 (2006-GS-10-4987).

The Applicant proceeded to trial for the first time on July 15, 2008. He was represented by Lorelle Proctor, Esquire. 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. 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. 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 Dudek, Esquire, of the 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 March 6, 2013. The Remittitur was issued on March 8, 2013.

Attached herewith and incorporated herein are the records of the Charleston County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, and the Applicant's appellate records. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his applications, the Applicant alleges that he is being held in custody unlawfully for the following reasons:¹

1. Conviction is in violation of U.S. Constitution
 - a. Due Process Violation- Malice instruction given by the trial judge was similar to malice 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.

¹ 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).

- 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 bipolar.
- 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 that evidence was tampered with.
 - g. Failure to raise the trial court erred by denying Applicant's motion to allow unavailable witness, 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 and depression.
 - b. Applicant did not finish school.
 - c. Applicant's mother suffers from mental illness.
- 8. Actual innocence

III.

First, the Applicant alleges a violation of his due process rights. Specifically, the Applicant alleges the malice instruction given by judge during his trial was similar to the malice charge given in Yates v. Evatt. The Respondent submits this allegation is wholly without merit and should be dismissed. In Yates v. Evatt, the U.S. Supreme Court held the S.C. Supreme Court failed to apply the proper harmless-error standard and the unconstitutional jury instruction on malice given to the jury during the Petitioner's trial could not be excused as harmless error. 500 U.S. 391 (1991). The trial judge in Yates instructed the jury that "malice is implied or presumed" from either the "willful, deliberate, and intentional doing of an unlawful act" or from the "use of a deadly weapon." Id. at 391.

The Respondent submits the malice instruction given to the jury in the Applicant's case did not include a presumption of malice on the use of a deadly weapon and can be distinguished from the instruction challenged in Yates. While the malice instruction in both Yates and the present case both refer to the fact that malice aforethought may be expressed or inferred, the instruction given to the jury in the Applicant's case did not include the language challenged in Yates. (Trial Tran. pp. 704-705). Unlike in Yates, the jury in the Applicant's case was not told

that "malice is implied or presumed" from the "willful, deliberate, and intentional doing of an unlawful act" and from the "use of a deadly weapon". The Respondent submits the malice instruction given by the trial judge in the Applicant's case was proper and not affected by the Court's ruling in Yates. The Respondent asks this Court to deny and dismiss this allegation with prejudice.

II.

In his second allegation, the Applicant alleges ineffective assistance of counsel. The Respondent submits this allegation is wholly without merit and should be denied and dismissed with prejudice. Specifically, the Respondent submits the Applicant should not be allowed to pursue this allegation considering he proceeded to trial *pro se* with the assistance of standby counsel. The Applicant proceeded to trial for the first time on July 15, 2008. He was represented by Lorelle Proctor, Esquire. The trial resulted in a mistrial after the jury was unable to reach a verdict. On January 27, 2009, the Honorable R. Markley Dennis heard the Petitioner's motion to relieve Ms. Proctor as counsel and to proceed *pro se*. Judge Dennis granted the motion and requested Ms. Proctor be available in a "stand-by-counsel" position. A second jury trial was held on February 2-6, 2009 before the Honorable Roger M. Young. The Applicant represented himself with Ms. Proctor as "stand-by-counsel".

The Respondent submits this Court should deny and dismiss any allegations of ineffective assistance of counsel during the Applicant's first trial since the Applicant's first trial during which he was represented by counsel, did not result in a conviction. The Uniform Post-Conviction Relief Act states "any person who has been convicted of, or sentenced for, a crime" may institute a post-conviction relief proceeding." S.C. Code § 17-27-20 (1976). Because a conviction or sentence was not obtained after the Applicant's first trial during which he was

represented by counsel, the Respondent submits the Applicant should not be able to challenge trial counsel's performance during that proceeding.

The Respondent also submits this Court should deny and dismiss any allegations of ineffective assistance of standby counsel during the Applicant's first trial. The United States Court of Appeals for the Fourth Circuit has held "[t]he Sixth Amendment does not require a court to grant advisory counsel to a criminal defendant who chooses to exercise his right to self-representation by proceeding *pro se*." United States v. Lawrence, 161 F.3d 250, 253 (4th Cir. 1998); see also United States v. Mikolajczyk, 137 F.3d 237, 246 (5th Cir. 1998) (holding that, as the defendant "had no right to standby counsel, it seems unlikely that standby counsel's failure to assist could be a violation of his Sixth Amendment rights"); United States v. Bova, 350 F.3d 224, 226 (1st Cir. 2003) (noting that the defendant did not have the right to both "represent himself and to enjoy the benefit of standby appointed counsel") (emphasis in original). The Respondent submits the Applicant should not be allowed to allege a violation of his Sixth Amendment right to counsel based on assistance by standby counsel. The Respondent submits the Applicant's allegation of ineffective assistance of counsel is wholly without merit and should be denied and dismissed with prejudice because the conviction he is challenging in this application resulted after the Applicant proceeded to trial *pro se* and there is no ineffective assistance of standby counsel.

III.

In his third allegation, the Applicant alleges ineffective assistance of appellate counsel. A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "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) (citing Jones v. Barnes, 463 U.S. 745 (1983)). “For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy...” Jones, 463 U.S. at 754.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Respondent was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of appellate counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

In his fourth allegation, the Applicant alleges lack of subject matter jurisdiction. Specifically, the Applicant alleges the grand jury was never empaneled making his indictment fraudulent. The Respondent submits this allegation is wholly without merit. The record reflects the Applicant's indictment for murder was true billed on July 12, 2006 by Charleston County Grand Jury and signed by the grand jury foreperson. The Respondent submits the Applicant has

failed to present any evidence to show his indictment for murder was fraudulent in any way. The Respondent submits this allegation should be denied and dismissed with prejudice.

V.

In his fifth allegation, the Applicant alleges prosecutorial misconduct. Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issues 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 Applicant could have raised this issue on appeal. The failure to do so has waived this 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 Respondent submits the Applicant has not carried his burden of proving actual prosecutorial misconduct, therefore, this allegation should be summarily dismissed.

VI.

In his sixth allegation, the Applicant alleges double jeopardy. Specifically, the Applicant alleges the solicitor failed to carry his burden of proof during his first trial therefore his conviction after a second trial violated his double jeopardy right. The Respondent submits this allegation is wholly without merit. The South Carolina Supreme Court has held "the constitutional prohibition against double jeopardy permits a retrial following a mistrial only if there was a 'manifest necessity' for the mistrial." State v. Kirby, 269 S.C. 25, 28-29, 236 S.E.2d 33, 34-35 (1977). The Court held in State v. Robinson that "it is universally recognized that a genuine inability of the jury to reach unanimous verdict constitutes a manifest necessity for the

declaration of a mistrial.” 360 S.C. 187, 193, 600 S.E.2d 100, 103 (Ct. App. 2004) (citing Oregon v. Kennedy, 456 U.S. 667, 672, (1982)). Since the basis of the declaration of a mistrial during the Applicant’s first trial was the inability of the jury to reach a unanimous verdict which constitutes a “manifest necessity”, the Respondent submits double jeopardy did not attach after the Applicant’s first trial and the Applicant’s second trial was not in violation of the Double Jeopardy clause. The Respondent submits this allegation should be denied and dismissed with prejudice.

VII.

In his seventh allegation, the Applicant alleges newly discovered evidence. The Applicant alleges his mental health diagnosis after being incarcerated is newly discovered evidence. The Respondent submits this allegation is without merit and should be denied and dismissed. A defendant requesting a new trial based on after discovered evidence must show that the evidence:

(1) Is such as would probably change the result if a new trial was had; (2) Has been discovered since the trial; (3) Could not by the exercise of due diligence have been discovered before the trial; (4) Is material to the issue of guilt or innocence; and (5) Is not merely cumulative or impeaching. Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983).

The Applicant has not shown that the alleged evidence meets *any* of the requirements for after-discovered evidence. Most importantly, the "new evidence" offered by the Applicant is not "material to the issue of guilt or innocence," and probably would not "change the result if a new trial was had." Hayden, Id. Specifically, the Applicant has failed to show how a mental health diagnosis obtained after conviction showing the Applicant suffers from depression and bi-polar syndrome affected the outcome of his trial or is material to guilt or innocence. This Court should deny and dismiss this allegation with prejudice.

VIII.

Lastly, the Applicant alleges actual innocence. The Respondent submits this allegation should be dismissed be it fails to specify a basis for this claim. The Uniform Post-Conviction Procedure Act requires the Applicant to "specifically set forth the grounds upon which the application is based." S.C. Code Ann. § 17-27-50 (1985). Before the Court will hold an evidentiary hearing, the Applicant must make a *prima facie* showing that he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). This allegation is so vague that it is impossible for the State to respond. Since the Applicant has not made the minimum *prima facie* showing, the Court should dismiss this ground for failure to comply with the Uniform Post-Conviction Procedure Act.

IX.

Each and every allegation contained within the application not herein before either expressly admitted, qualified or explained is hereby denied.

X.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

[Signature on the following page.]

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

By: AL R. WILSON
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

May 15, 2014

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

TERRELL McCOY, #256070

Applicant,

vs

STATE OF SOUTH CAROLINA,
Respondent.

IN THE COURT OF COMMON PLEAS

2012-CP-10-1994

2013

AFFIDAVIT OF SERVICE BY MAIL

BY

JULIE A. ARNOLD
CLERK OF COURT

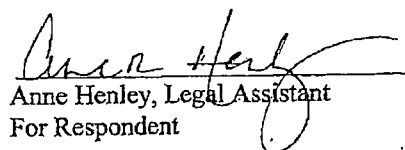
2014 MAY 19 AM 11:25

FILED

1. I am an employee of the Respondent in the abovecaptioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Rodney Davis, Esquire
Lowcountry Law Office
4000 Faber Place Drive
Suite 300
Charleston, SC 29405

DATED this 16th day of May, 2014


Anne Henley, Legal Assistant
For Respondent

Terrell McCoy, 256070
LCI ASU# 39
990 Wilsack Hwy
Bishopville, SC 29010

June 30, 2014

Julie J. Armstrong
Clerk of Court C.P. & GS
Charleston County
100 Broad Street, Suite 106
Charleston, SC 29401-2258

RE: McCoy V. State
CASE NO. 2013 CP-10-1994

Dear Ms. Armstrong/Clerk of Court:

Back in April, of 2013, this court appointed Mr. Robert Duane Davis to represent me during my PCR. As of the above date, I have not spoken to Mr. Davis or seen him to discuss my claims. As you can see 14 months has pass, and my evidentiary hearing is slowly approaching. Enclosed please find a copy of the Applicant's Interrogatories and Production of document Motion, and Motion for leave to obtain discovery. If this Court will, please send all three motions to Mr. Davis and the letter that I request for him to file the documents with the Clerk of Court on my behalf because I can not file the documents. Also please place a copy of each document into my ^{file} ~~box~~ for the Judge's review just in case my lawyer fail to file the motions or state he never received them. Can you please stamp-file the proof of service and return it to me for

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my record. I appreciate your assistance in the matter.

Thank you.

Lucille M. Gray

6-30-14

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2013-CP-10-1994

Terrell Lynwood McCoy, 256070

Applicant,

v.

State of South Carolina

Defendants

Proof of Service.

BY _____
BY _____

2014 JUL -2 PM 4:10
JULIE J. JARVIS
CLERK OF COURT

The Undersigned, Terrell McCoy, does hereby certify that on this 30th day of June, 2014, by first class mail, proper postage affixed, he mailed a copy of the Applicant's Motion for Leave to Obtain Discovery, Interrogatories, and Production of Documents to the Clerk of Court, C.P. Charleston County 100 Broad Street, Ste 106, Charleston, SC, 29401, for them to mail to my attorney address listed below:

Robert Duane Davis
Low Country Law Office
4000 Faber Place drive, Ste 300
Charleston, SC 29405

/s/ Terrell McCoy

dated 6-30-14

2013-1994

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Ex parte,

Terrell Lynwood McCoy, 256070

Applicant,

v.

State of South Carolina

Defendants

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2013-CP-10-1994

Motion for Substitute Counsel and
Withdrawal of present counsel

FILED

JUL 21 2014

JULIE J. ARMSTRONG
CLERK, C.P. & G.S.

JP

To: Administrative Judge:

The above Applicant, Terrell McCoy, move this court with a motion for Appointment of Counsel, and withdrawal of present Counsel.

Concise Statement of Case

On April 4, 2013, the Applicant filed a PCR application with the Ninth Judicial Circuit Court stating that he is being held unlawfully and his conviction and Sentence is in violation of state laws and the U.S. Constitution.

On April 6, 2013, the clerk of Court issued a Order stating that attorney Rodney Duane Davis has been appointed to represent the Applicant in his PCR. An Order was delivered to the Applicant, and he began writing his attorney in order to explain his claims. The Applicant has filed numerous motion with the clerk of Court including two Amended PCR applications. [See Initial application, 2nd, 3rd Amended application, Rule 65 motions & orders.]

Mr. Davis has never Corresponded with the Applicant, about his claims, as of

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July 4, 2014. This is prejudicial because the Applicant's claims have merit and the PCR hearing is slowly approaching. Witnesses need to be subpoena and interview, expert witness is needed, discovery is needed and the Applicant is indigent and cannot perfect his PCR without an Attorney. This is the Applicant one bite of the apple which he is entitled to a full adjudication on the merits of the PCR application which includes the right to appeal the denial of a PCR application and the right to assistance of Counsel in that appeal. See Alice V. State, 409 S.E. 2d at 395.

Mr. Davis has lied to the Applicant, in a letter, and stated he would come visit him and never appeared. [see Attach letter] With this said, the Applicant request that Mr. Davis be removed from his case and this Court appoint new Counsel to represent the Applicant in his PCR. Mr. Davis has no interest in the matter. 12 months has elapse since his appointment, and he has not consulted with his client pursuant to Rule 407. South Carolina Rules of Professional Conduct. Mr. Davis has not yet move for discovery pursuant to S.C. Code 17-27-150 (b) and receive my trial Counsel's file. Mr. Davis has not filed a Motion to default. The Respondents have not yet responded to the Applicants PCR application. I haven't been provided my trial transcripts, Pro Se hearing transcript. This is Prejudicial.

Conclusion

Therefore ~~the~~ Applicant request that Mr. Davis is removed from the case, and a new effective attorney is appointed to represent him in the matter.

July 9, 2014

x Imell McCoy
LEI AEU # 39
990 Wisacky Hwy
Bishopville SC 29010

State of South Carolina
County of Charleston

Ex parte,

Terrell Lynwood McCoy, 256070

Applicant,

v.

State of South Carolina

Respondents

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. : 2013-CP-10-1994

CERTIFICATE OF SERVICE

FILED

JUL 21 2014

JULIE J. ARMSTRONG
CLERK, C.P. & G.S.

The Undersigned, Terrell McCoy, does hereby certify that on this 9th day of July 2014, by proper postage affixed, he mailed a copy of the Applicant's motion for Substitution ~~of~~ counsel and withdrawal of present counsel, at the address listed below:

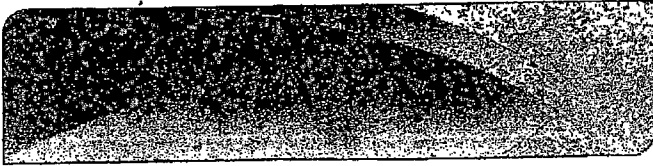
Rodney D. Davis

4000 Faber place drive, Suite 300

Charleston, SC 29405

TS Terrell McCoy

9-9-14



Lowcountry Law Office

4000 Faber Place Drive, Suite 300

Charleston, SC 29405

Phone: 843-323-4353 Fax: 843-323-4101

E-Mail: Davis@LowcountryLawOffice.com

April 7, 2014

Terrell McCoy
Inmate #: 256070
Lee Correctional Institution
990 Wisacky Highway
Bishopville, SC 29010

RE: Receipt of Letter

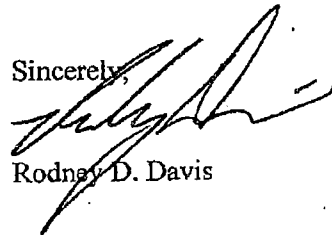
Dear Mr. White:

I recently received a letter from you. I will meet with you as soon as I can. Also, I may call and talk to you privately. If you are told to report for a telephone call, please bring all the paperwork that you have so that you will have access to it when we speak on the phone.

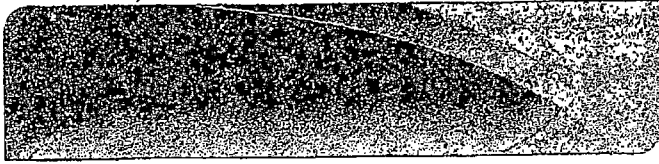
I do not know when your case will be scheduled. I do know the next available time for PCR hearings in Charleston County is the week of May 19, 2014. As soon as I know when your case will be scheduled, I will let you know.

Please, write me if you have any questions or concerns. I will speak with you in person and by phone before our court date. Thanks helping me understand your concerns. The information you provide to me helps me prepare your case in the best way that I can.

Sincerely,



Rodney D. Davis



Lowcountry Law Office

4000 Faber Place Drive, Suite 300

Charleston, SC 29405

Phone: 843-323-4353 Fax: 843-323-4101

E-Mail: Davis@LowcountryLawOffice.com

January 7, 2014

Terrell McCoy
Inmate #: 256070
Perry Correctional Institution
430 Oaklawn Road
Pelzer, SC 29669

RE: McCoy v. State
Case #: 2013-CP-10-1994

Dear Mr. McCoy,

I want to apologize for not contacting you sooner. I intend to meet with you the week of February 10, 2014. I have a double burglary trial the week of February 3, 2014 that I am currently preparing. I will see you when that trial is completed. I received your complaint to the Bar and have responded. I am including my reply with this letter. I want to ensure you that your case has not been damaged by my lack of communication with you to this point. I spoke with your mother today and explained things, as well.

I want you to know that I will follow the complaints in your Application and amend them only if necessary. I will meet with you to get more details. I will speak with the lawyers that represented you before. I will review their file on your case. I will review the State's response to your Application. I will review the transcript from your court date. I will share information from these sources with you. At this time I have received the following:

- ☒ PCR Application
- ☐ State's Reply
- ☐ Transcript
- ☐ State's Motion to Dismiss

I want to ensure that you understand the standard we must meet to prevail in a PCR claim. I am including the Strickland v. Washington, 466 U.S. 668 (1984) case that sets out the 2-prong standard to win a PCR case. To summarize, we must first show that your previous attorney(s) was ineffective **AND** we must prove that because of that your case turned out the way it did. Please review the case and contact me with any questions you have.

Finally, I want to make sure that you have a clear picture of what a "win" looks like. If we are successful in your PCR claim, your conviction will be reversed and the charges will be put back in place. You will return to the county jail where you were convicted. You will be assigned a public defender (unless you can afford to hire any attorney). The Solicitor will decide whether to prosecute your case again, dismiss it or offer a plea deal. Your case starts over from square one. The judge hearing our PCR claim does not have the authority to reduce your sentence, set you free or dismiss the charge(s). I do not

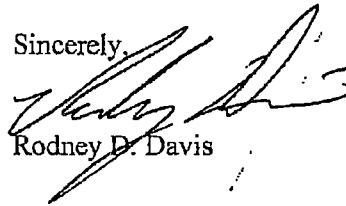
MC Missouri

886

say this to discourage you. I must tell you the reality of winning a PCR action. If you have any questions about this, please contact me.

I know you have complaints about your former lawyer(s). I look forward to working with you, researching and investigating the attorney's conduct and presenting your case to a judge at your hearing. I will stay in touch as matters develop in your case.

Sincerely,



Rodney D. Davis

Enclosures

Terrell McCoy, 256070

LCI SMU # 39

990 Wilsacky Hwy

Bishopville SC 29010

July 16, 2014

RE: McCoy v. State of SC
CA # 2013-CP-10-1994

~~Julie J. Armstrong
Clerk of Court
100 Broad Street Ste 106
Charleston SC 29401~~

Rodney D. Davis
4000 Faber Place Drive, Suite 300
Charleston SC 29405

Dear Mr. Davis:

Enclose please find the Applicant's motion for Substitution of Counsel to be file in your office and set for a hearing date. I have also enclosed a certificate of service as evidence upon you

Thank you

Terrell McCoy

13-1994

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. : 2013-CP-10-1994

Terrell McCoy, 256070

4th Amended PCR APPLICATION

Applicant,

v.

State of South Carolina

Respondents.

FILED
2014 AUG 11 PM 4:54
JULIE J. ARMSTRONG
CLERK OF COURT

The Applicant move the Court of Common Pleas with a motion to amend PCR application pursuant to SCRPC Rule 15(a)

The Applicant further state he is being held unlawfully in violation of the United States Constitution and the laws of this State. The Applicant amends as follows:

(1) Appellate Counsel failed to Order transcripts during my right to Appeal phase. Appellate Counsel Did NOT ORDER First trial transcript.

7-7-14

Terrell McCoy
LCI SMU #31
990 W. Backy Hwy
Bishopville, SC 29010

889

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 2013-CP-10-1994

Terrell L. McCoy, 256070

Proof of Service

Applicant,

v.

State of South Carolina

Respondents

FILED
2014 AUG 11 PM 4:54
JULIE J. ARMSTRONG
CLERK OF COURT

The undersigned, Terrell McCoy, declare that on August 7, 2014, I personally placed a copy of the Applicant's 4th Amended PCR Application, in a legal envelope to be mail-U.S. postal service to the following address:

Anne Henley, Legal Assistant
for Ashtleigh R. Wilson, AAG
Rembert C. Dennis Building
PO. BOX 11849
Columbia, SC 29211

8-7-14

/s/ Terrell McCoy

Terrell McCoy 256070

LCI SMU# 39

490. Wiscacky Hwy

Bishopville, SC 29010

August 7, 2014

Julie J. Armstrong
Clerk of Court

Court of Common Pleas

156 Broad Street Suite 106

Charleston SC 29401

RE: TERRELL MCCOY V STATE OF SOUTH CAROLINA

CJA # 2013-CP-10-1994

Dear clerk of Court:

Enclosed please find a copy of the Applicant's 4th Amend-
ed PCR Application to be filed in your office. Can you please tell
me whether I am on the PCR docket for the week of September 8, 2014
so that I can be prepared.

I appreciate your assistance & patience.

slm

Terrell McCoy

8-7-14

STATE OF SOUTH CAROLINA
County of Charleston,

Terrell McCoy,

Applicant

VS.

State of South Carolina

Defendants.

) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
) CASE NO. 2013-CP-10-1994

MOTION TO COMPEL

FILED
AUG 22 PM 3:38
JULIE J. ANTHONY
CLERK OF COURT

To: CLERK of COURT:

-The Applicant hereby move the Clerk of Court with a Motion, To COMPEL, Compelling trial Counsel Lorelle Proctor and Appellate Counsel Robert Dudek, to produce the 1st Pro Se waiver hearing transcript, held in December of 2008 in the General Sessions Court Ninth Judicial Circuit, pursuant to SCACR Rule 207.

The Applicant have requested numerous times through Mr. Dudek For his 1st Pro Se waiver hearing transcript, when Mr. Dudek represented him in his Appeal. These transcripts were never ordered, therefore Mr. Dudek did not have a full record of the Applicants Case. The Applicant Now Move the Court with a motion to Compel documents.

Terrell McCoy
LCI SMU # 39
990 Wisacky Hwy
Bishopville SC, 29010

Terrell McCoy 256070
LCI SMU # 39
990 Wisacky Hwy
Bishopville, SC 29010

August 18, 2014

Julie J. Armstrong
Clerk of Court
Court of Common Pleas
100 Broad Street Suite 106
Charleston, SC 29401

FILED
2014 AUG 22 PM 3:38
JULIE J. ARMSTRONG
CLERK OF COURT
BY 

RE: McCoy V. STATE of SOUTH CAROLINA / C/A # 2013-CP-10-1994

Dear Clerk of Court, enclosed please find a Motion to Compel ~~that~~
I have drafted to be filed in reference to the above civil action. I ask
that a Motion hearing date be schedule. I have also enclosed a certificate
of service as evidence of proof of service upon you

1/1 Terrell McCoy

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Terrell McCoy Applicant,

v. STATE of South Carolina Defendants

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE No. 2013-CP-10-1994

CERTIFICATE OF SERVICE

To: Clerk of Court:

THE UNDERSIGNED Hereby declare that he has personally placed a Copy
of the Applicant Motion to Compel inside prepaid stamp envelope, on August
18, 2014, to be mailed U.S. Postal to the following address:

Julie J. Armstrong
Clerk of Court
Court of Common Pleas
100 Broad Street Ste. 106
Charleston, SC 29406

1/1 Terrell McCoy

IN THE STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2013-CP-10-1994

Terrell McCoy, 256070

Applicant

Applicants 5th

MOTION To Amend

V.

The State of South Carolina
Respondents

FILED
2014 AUG 27 PM 4:23
JULIE J. ARMSTRONG
CLERK OF COURT

To: Clerk of Court / ATTORNEY GENERAL

The Applicant move this Court To Amend His PCR APPLICATION PURSUANT TO SCR CP RULE 15. THE APPLICANT AMEND HIS PLEADING AS FOLLOWS:

1. TRIAL JUDGE "ABUSE HIS DISCRETION" DURING THE APPLICANT'S SECOND TRIAL BY DENYING EVERY MOTION AND OBJECTIONS, THE APPLICANT RAISE DURING HIS PRE-TRIAL & DURING SECOND TRIAL & FIRST TRIAL.

2. THE HONORABLE MARKLEY DENNIS "ABUSE HIS DISCRETION" DURING THE PRO SE SELF-REPRESENTATION HEARING ON JANUARY 27, 2009

8-25-14

Terrell McCoy
LEI SMU # 39
990 Wilsack Hwy
Bishopville, SC 29010

Terrell McCoy 256070
LCI Sum # 39
990 WPsacky Hwy
Bishopville SC 29010

August , 2014

Julie J. Armstrong
Clerk of Court
Court of Common Pleas
100 Broad Street St 106
Charleston, SC 29401

RE: Terrell McCoy v. State of SC
2013-CP-10-1994

Dear Clerk of Court:

The above-referenced Applicant has Filed a Fifth Amended Pleading. Enclose please find the Amended Pleading. I have also enclosed a copy of the Proof of Service as evidence upon you.

8-25-14

cc: Attorney General
Rodney D. Davis

IN THE STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Terrell McCoy, 256070

Applicant,

v.

The State of South Carolina
Respondent

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2013-CP-10-1994

Proof of Service

I, Terrell McCoy, the undersigned, hereby declare, that on August 25, 2014, I personally, place a hand written copy of Applicant's 5th Amended PLEADING inside a prepaid stamp envelope to be mailed U.S. Postal mail to the following address:

Rodney D. Davis
4000 Faber place drive Ste. 300
Charleston, SC 29405

Attorney General
Rembert C. Dennis Bldg
Post office Box 11549
Cola SC 29211-1549

151 Terrell McCoy

FILED
2014 AUG 27 PM 4:29
JULIE J. ARMSTRONG
CLERK OF COURT

Thank you

Terrell McCoy

1 STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
 2 COUNTY OF CHARLESTON) CASE NO. 2013-CP-10-1994
 3 TERRELL MCCOY,)
 4 Plaintiff,) Transcript of Record
 5 vs.)
 6 STATE OF SOUTH) Date: September 9, 2015
 7 CAROLINA,)
 Defendant.

8 * * * * *

9
 10 B E F O R E:

11 The Honorable LARRY B. HYMAN,
 12 JUNIOR

13
 14
 15
 16 * * * * *

17
 18 Denise J. Lauder, RPR

19 Ninth Judicial Circuit

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22

23

24

25

1 A P P E A R A N C E S

2

3 REPRESENTING THE PLAINTIFF:

4 RODNEY DAVIS, ESQUIRE

5 Lowcountry Law Office

6 4000 Faber Place Drive, Suite 300

7 Charleston, SC 29405

8

9 REPRESENTING THE STATE OF SOUTH CAROLINA:

10 J. RUTLEDGE JOHNSON,

11 ASSISTANT ATTORNEY GENERAL

12 Office of the Attorney General

13 Rembert Dennis Building

14 1000 Assembly Street, Room 519

15 Columbia, SC 29201

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INDEX OF EXHIBITS

(No exhibits were offered or
marked for identification.)

1 (The following proceedings were held
2 September 9, 2015, 10:14 a.m., Charleston County,
3 Charleston, South Carolina.)

4 MR. JOHNSON: May it please the Court.
5 This is Terrell McCoy versus the State of South
6 Carolina, case number 2013-CP-10-1994. He was
7 indicted at the July 7 sixth term of the Charleston
8 County Grand Jury for murder. He proceeded to
9 trial for the first time on July 15, 2008. At that
10 hearing he was represented by Lorell Proctor. The
11 jury was unable to reach a verdict and the Court
12 declared a mistrial.

13 On January 27, 2009, before the
14 Honorable R. Markley Dennis, Junior, there was an
15 applicant's motion to relieve Ms. Proctor as
16 counsel and proceed pro se. There was a full
17 Faretta hearing; I believe that is in your packet.
18 Judge Dennis granted the motion and requested that
19 Ms. Proctor be available as standby counsel.

20 A second jury trial was held
21 February 2nd through the 6th, 2009, before the
22 Honorable Roger M. Young. He represented himself
23 and the jury convicted him of murder. He was
24 sentenced by Judge Young to 50 years imprisonment.
25 There was a motion to reconsider his sentence,

1 which was granted by Judge Young on March 5, 2009.

2 And to clarify, Judge Young sentenced him to

3 40 years.

4 There was a timely notice of appeal and
5 an appeal perfected pursuant to Anders v.

6 California. The Court of Appeals affirmed that
7 conviction and there was a petition for rehearing,
8 which was denied, and there was a petition for writ
9 of cert to the South Carolina Supreme Court, which
10 was also denied. So the remittitur was issued on
11 March 8, 2013.

12 He filed this action April 4, 2013, the
13 State filed its return on May 16th of 2014, and
14 he's represented here today by Mr. Rodney Davis;
15 however, the State does have a motion for summary
16 judgment. As 56(b) states, a party against whom a
17 claim is asserted, is sought -- may seek at any
18 time -- may move with or without supporting
19 affidavits for summary judgment in his favor, as to
20 all or any part thereof, and the judgment shall be
21 rendered forthwith if the pleadings -- all of the
22 others show there is no genuine issue as to any
23 material fact, and the moving party is entitled to
24 judgment as a matter of law.

25 Your Honor, as he was his own counsel,

1 he cannot therefore claim that there is ineffective
2 assistance of counsel, and so we would ask that the
3 Court grant summary judgment in the State's favor
4 on that issue.

5 He's also claimed ineffective
6 assistance of appellate counsel. As I stated,
7 there was an Anders brief submitted on his behalf.
8 That procedure allows the Court of Appeals to
9 review the entire record for any issue that was
10 raised and ruled upon at a trial level, but because
11 he was his own counsel, it was incumbent upon him
12 to raise and preserve those issues if, for what I
13 believe, that he can prove no prejudice in
14 counsel's filing of that Anders brief, and we would
15 also ask there be summary judgment granted on that
16 as well.

17 Your Honor, I'll turn this over to his
18 counsel.

19 THE COURT: Mr. Davis.

20 MR. DAVIS: Your Honor, just a moment.
21 May it please the Court. Judge, I do represent
22 Mr. McCoy, and if it please the Court, I would like
23 to approach. Your Honor, I'm handing you an Order
24 -- there were actually two -- an Order relieving
25 Ms. Proctor as counsel, dated January 28, 2009,

1 signed by Judge Dennis. I'll be referencing this
2 in a moment, Your Honor. I don't believe that was
3 a part of the -- part of the original packet that
4 you would have received.

5 THE COURT: Okay.

6 MR. DAVIS: Judge, we had a brief
7 conference at the bench to give a -- kind of a
8 direction of this hearing today. On behalf of my
9 client, Mr. McCoy, let's deal with the --

10 THE COURT: Let me ask this: It's my
11 understanding Ms. Proctor got a hung jury on a
12 murder trial, and then he moved to have her
13 relieved?

14 MR. DAVIS: Yes, sir.

15 THE COURT: And this is the conviction
16 from the second trial, which he represented
17 himself?

18 MR. DAVIS: That's correct, Your Honor.

19 THE COURT: Okay. I will hear you.

20 MR. DAVIS: As to that very issue,
21 Judge, you have before you -- there was -- it's the
22 second Order, and if it's not in the packet I can
23 certainly provide that to you, but the issue of
24 this Order is a couple of things. First of all,
25 procedurally, just as an officer of the court, I

1 will tell you that the exact language of this Order
2 I did not have until last week, probably Tuesday.

3 In speaking with Ms. Proctor, the
4 language in this came up the first time. I went to
5 the clerk of court's office, obtained it, contacted
6 the assistant attorney general, provided him a
7 copy. I don't believe -- he'll correct me if I'm
8 wrong. I don't believe he had seen the language of
9 this until I provided it to him.

10 Most importantly on this Order is the
11 last sentence of the first paragraph, which Judge
12 Dennis ordered that Ms. Proctor is hereby relieved
13 of postconviction relief action effective after
14 12:00 p.m. on January 27, 2009.

15 Certainly, that -- I'll tell the Court,
16 in 20 years, I have not seen language that
17 specific. Of course this is a unique situation
18 where Mr. McCoy is filing a postconviction relief
19 after being convicted at a trial in which he
20 represented himself.

21 THE COURT: Let me just ask you, can
22 you point to any authority from any state, or the
23 federal courts, where anyone who has chosen to
24 represent himself, not a situation where somebody
25 has been denied counsel, but when someone has a

1 full Faretta hearing and -- we have to understand,
2 the purpose of Faretta is not to determine whether
3 the person is competent to try it himself or
4 represent himself, I don't think that's ever the
5 case for a lay person to do that, but whether or
6 not he knowingly and voluntarily waived his right
7 to counsel, but after a Faretta hearing, he
8 undertakes to represent himself and he's given
9 relief on a postconviction relief application for
10 his own ineffective assistance? Can you point me
11 to any case anywhere?

12 MR. JOHNSON: Your Honor, before he
13 answers that question, as an officer of the court,
14 I'm reading the appellate opinion, and I want to
15 correct my earlier procedural history. It was not
16 an Anders brief. That issue was whether or not he
17 made a knowingly intelligent waiver of counsel.
18 The State's position is that would be the law of
19 the case because the Court of Appeals, that's what
20 they decided. I needed to correct myself.

21 THE COURT: Not only was there a
22 finding by Judge Dennis, but it was also reviewed
23 by the appellate court.

24 MR. JOHNSON: Yes, Your Honor.

25 THE COURT: All right. Mr. Davis.

1 MR. DAVIS: To that question, Judge,
2 no. What I would submit for my client is, and --
3 submit for my client is that there is a total claim
4 against Ms. Proctor for performance leading up to
5 his pro se trial. Specifically this, Judge; the
6 last act that she was required to do by the Court
7 before being relieved was to Subpoena any witnesses
8 on Mr. McCoy's behalf for his upcoming trial. She
9 had the ability more quickly and easily to do that
10 than a pro se defendant.

11 THE COURT: Show me where there's an
12 Order requiring her to do that.

13 MR. DAVIS: It is either the second
14 Order or it's in the transcript, Judge.

15 THE COURT: Well, I have --

16 MR. DAVIS: And if you will give me a
17 moment --

18 THE COURT: I have the January 28th
19 Order.

20 MR. DAVIS: If you will give me a
21 moment, while we're dealing with that particular
22 issue, let me make a record of this if I may. As
23 you can see, Mr. McCoy comes in with many binders
24 of paperwork here with him. He's very well
25 researched on his particular case. I've been

1 representing him since I was appointed on
2 April 16th of 2013.

3 This is unusual, Judge, but at the
4 appropriate time, if you will -- with leave of the
5 Court, I would ask that he address you on a couple
6 of things.

7 THE COURT: No, I'm not going to allow
8 hybrid representation. You either represent him or
9 he represents himself.

10 THE DEFENDANT: Judge, for the record,
11 I would like to speak.

12 THE COURT: No.

13 MR. DAVIS: If I could have a moment,
14 Your Honor. Thank you.

15 (Brief pause)

16 MR. DAVIS: Thank you, Your Honor.

17 THE COURT: All right.

18 MR. DAVIS: It is in the transcript
19 that is part of the record, that Ms. Proctor's last
20 administrative act as his attorney prior to being
21 relieved is to Subpoena a witness for the upcoming
22 trial in which he would proceed pro se.

23 We do have a specific argument about a
24 witness that was attempted to be Subpoenaed
25 unsuccessfully by Ms. Proctor. So that would fall

1 in the last Order that the judge ruled; despite
2 that she was not going to represent him at trial,
3 she was only going to be standby, that the judge
4 ordered that that witness be Subpoenaed and that
5 was not completed.

6 At this stage -- we understand the
7 State's position. So at this stage --

8 THE COURT: Well, what effort did Ms.
9 Proctor make to Subpoena that witness?

10 MR. DAVIS: My understanding of the
11 testimony from Ms. Proctor would be that the
12 witness was Subpoenaed, the name was given to North
13 Charleston Police Department. They responded that
14 no such officer by that name works here. That was
15 incorrect. That officer did, in fact, work there
16 and did exist and did not show up for court.

17 So while a Subpoena was initially sent
18 by Ms. Proctor from the public defender's office,
19 that when there -- there was an issue about
20 complying with it. It should have been complied
21 with, it was a valid Subpoena, there was an
22 employee by that name, but with North Charleston
23 incorrectly indicating that officer did not exist,
24 then --

25 THE COURT: But that has nothing to do

1 with the directive from the Court that Ms. Proctor
2 issue the Subpoena, which she did. Now, if there's
3 an issue with that Subpoena, compliance with that
4 Subpoena, how does that fall back on Ms. Proctor,
5 if the Court required her to issue the Subpoena and
6 she did just that?

7 MR. DAVIS: We would argue that the
8 attempt does not satisfy affecting the standards,
9 that if -- if -- we know she wasn't, but if she had
10 been the attorney at trial, certainly, if I send a
11 Subpoena and they say that officer doesn't exist,
12 no, I know they do, they're referenced in the
13 documentation, then it's incumbent upon the
14 attorney to pursue that and clear up that issue.

15 Granted, she would not be the attorney
16 at trial, but that is a continuation of that
17 obligation to actually fulfill her requirement, not
18 simply go through the administrative tasks of
19 sending it out.

20 THE COURT: But didn't you just tell me
21 a minute ago the reason she was tasked with the
22 issue of the Subpoena by the Court was simply
23 because she could do it more efficiently and more
24 easily than the pro se defendant?

25 MR. DAVIS: Certainly. Which would

1 include following up on any issues of, we don't
2 know who that officer is. You do know who that
3 officer is, they're in the report.

4 THE COURT: Following up on that, isn't
5 that a trial issue?

6 MR. DAVIS: Yes and no, Your Honor. I
7 would argue both because --

8 THE COURT: He was Subpoenaed to trial;
9 was he not?

10 MR. DAVIS: It was a she.

11 THE COURT: She was Subpoenaed to trial
12 and she did not fail to respond to the Subpoena
13 until the day of trial; is that correct?

14 MR. DAVIS: Procedurally, yes. It
15 wouldn't have become manifest until --

16 THE COURT: And there's no question
17 that was after January 27th of 2009.

18 MR. DAVIS: His trial date would have
19 been after that, yes.

20 THE COURT: And Judge Dennis says that
21 she is relieved of postconviction relief actions
22 effective January 27, 2009. And that Order was not
23 appealed, was it?

24 MR. JOHNSON: Not to the State's
25 knowledge, Your Honor.

1 MR. DAVIS: And, Judge, we certainly
2 understand and don't disagree with the timeline
3 you're laying out. Certainly, on behalf of my
4 client, we would argue again that it's -- it's
5 insufficient simply to --

6 THE COURT: Judge Dennis's Order, that
7 was not appealed, was it?

8 MR. DAVIS: No, Your Honor.

9 THE COURT: You had every opportunity
10 to do it posttrial. Posttrial, certainly you could
11 have done it, included it.

12 MR. DAVIS: If I may have a moment,
13 Your Honor.

14 (Brief pause)

15 MR. DAVIS: Judge, the final argument
16 that we will make about Ms. Proctor is, we would
17 argue that is a -- it does state grounds for relief
18 should survive the State's motion to -- for summary
19 judgment. On that issue we would ask -- and just
20 as a future note, we approached prior to starting
21 this hearing, certainly on behalf of my client, I
22 would ask that any remaining issues remain after
23 the State's motion, based on your ruling, given the
24 complexity and unique nature of this case, and I
25 don't believe the State has an objection, if there

1 remains arguments on behalf of Mr. McCoy, that
2 those be scheduled for the December 14th date.

3 THE COURT: All right. Let me -- go
4 ahead, I'm sorry.

5 MR. DAVIS: So that's all we have on
6 that issue, Your Honor. Certainly, we would ask
7 you to at the December date state his grounds that
8 Ms. Proctor did not fulfill her last and final
9 obligation as his attorney, which then hindered him
10 at trial where he was pro se so that would have
11 affected the outcome, we would ask to be heard on
12 that at the evidentiary hearing.

13 As to -- let me jump to the other part
14 that he was represented which was on appeal. As
15 the State corrected the record, the appeal was
16 based on the -- Mr. McCoy proceeding pro se, that
17 was the issue on appeal. We claim that that was
18 ineffective because he did a -- he attempted a
19 thorough job as a nonlawyer at trial. He did
20 object to testimony, to evidence. There were
21 things that were objected to and preserved for
22 appeal on the record more than just prior to the
23 trial and his decision to proceed pro se. Those
24 are the issues that we believe we are entitled to
25 and would like to raise as to Mr. Dudek, the

1 appellate defense; that there were issues preserved
2 by the client at trial that were not raised on
3 appeal. We think that's fair game.

4 We understand the State's position
5 today, but I believe in their Return they even
6 requested an evidentiary hearing as to the
7 appellate issue.

8 Then, finally, Your Honor, the major
9 part of his argument -- I'll be clear to the Court,
10 we do have an argument, we believe, against
11 appellate counsel and against original trial
12 counsel before she was relieved, but the major
13 component of his PCR that we would like to pursue
14 at an evidentiary hearing in December is the
15 State's failure to disclose evidence to him and the
16 State's destruction of evidence which leads to
17 misconduct by the State, which is a constitutional
18 violation, Brady violation, that has been admitted
19 to. He has a separate civil action against North
20 Charleston Police Department, and they have
21 admitted to destruction of evidence in that matter.

22 I want to be clear, our client, at his
23 request -- obviously, he cites a case that allows
24 him in State court one bite of the apple. What
25 we're asking the Court is to those constitutional

1 violations which would not be directed back to Ms.
2 Proctor, nor to appellate defense, but there -- we
3 have constitutional violations that are
4 appropriately raised in this forum, that we would
5 be -- we would request a hearing at least on those
6 issues, if not as to Ms. Proctor.

7 THE COURT: All right. I am going to
8 grant the State's motion as to trial counsel. It's
9 obvious what Judge Dennis I believe intended; he
10 wanted as a matter of convenience to have Ms.
11 Proctor Subpoena the witnesses. Mr. McCoy made a
12 conscious voluntary decision, which has not only
13 been reviewed -- not only reviewed by trial court,
14 but by the appellate courts as well, to proceed pro
15 se, which was his right.

16 Ms. Proctor was there as standby.
17 There's no question that she issued the Subpoena.
18 There is a problem with whether or not there was
19 compliance with one of the Subpoenas, but that
20 compliance did not fail until trial. He was -- as
21 I understand it, the witness was subpoenaed to
22 appear at trial.

23 At that time, Ms. Proctor was still
24 standby. If there had been an issue, Mr. McCoy
25 could have asked for her assistance with that,

1 could have reviewed it with her. I do not believe
2 that she had an obligation to interject herself
3 into the trial when it was determined that this
4 particular witness had not appeared.

5 I think we also have to look at Judge
6 Markley Dennis's Order of January 28, 2009,
7 relieving Ms. Proctor of postconviction relief
8 after 12:00 p.m. January 27, 2009, obviously, some
9 years, I think, or year, before the actual trial.
10 Very clearly what his intent was there, that has
11 not been appealed, it's the law of the case.

12 I am going to grant the motion as to
13 the trial attorney; however, I do think there are
14 issues that should be addressed constitutionally
15 and involving the appellate counsel. I will
16 continue, at both parties' request, those issues
17 until the December term of postconviction relief so
18 that an action may be heard. Maybe they can
19 schedule a whole day for it. Thank you very much.

20 MR. JOHNSON: Your Honor, and just for
21 the record, our -- the State's position is that
22 prosecutorial misconduct as alleged by Mr. McCoy is
23 a direct appeal issue. Simmons v. State and Ashley
24 v. State stand for that proposition.

25 THE COURT: And I'm not ruling on that.

1 I'm just going to continue that issue, and I will
2 allow the trial judge to address it. I'm not
3 precluding you from making another motion for
4 summary judgment on that issue. I'm just going to
5 preserve that particular issue for the December
6 term.

7 MR. JOHNSON: Thank you, Your Honor.
8 And, Your Honor, if you will just for the State's
9 clarification, I guess, issue an Order as to
10 examine what issues appellate counsel did not
11 raise. I have yet to get that information.

12 MR. DAVIS: May I suggest this, Your
13 Honor. Today is September 9th. What I would
14 certainly be prepared to do is -- I appreciate that
15 this hearing has narrowed the issue somewhat. I
16 would be prepared with Mr. McCoy's help to actually
17 file an amended specified complaint --

18 THE COURT: All right. I'm going to
19 require that. Okay?

20 MR. DAVIS: Yes, Your Honor.

21 THE COURT: Would you put -- you're
22 going to prepare me an Order?

23 MR. DAVIS: Yes, Your Honor.

24 THE COURT: If he does not include it
25 in the Order, you can prepare a secondary Order.

1 MR. JOHNSON: Okay. Thank you, Your
2 Honor.

3 MR. DAVIS: As to the amended
4 application?

5 THE COURT: Right.

6 MR. DAVIS: Yes, Your Honor.

7 THE COURT: Thank you.

8 MR. DAVIS: Thank you, Your Honor.

9 Your Honor, could I have 30 days on
10 that?

11 THE COURT: Yes.

12 (These proceedings were concluded at
13 10:41 a.m.)

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1 CERTIFICATE OF REPORTER

2

3 I, Carol Denise Lauder, Registered
4 Professional Reporter and Notary Public for the
5 State of South Carolina at Large, do hereby certify
6 that the foregoing transcript is a true, accurate,
7 and complete record.

8 I further certify that I am neither related
9 to nor counsel for any party to the cause pending
10 or interested in the events thereof.

11 Witness my hand, I have hereunto affixed my
12 official seal this 9th day of December, 2015 at
13 Charleston, Charleston County, South Carolina.

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Carol Denise Lauder
Registered Professional
Reporter, CP
My Commission expires
August 2, 2017

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	CASE NO: 2013-CP-10-1994
TERRELL MCCOY,	)	
	)	
Applicant,	)	
	)	
vs.	)	AMENDED APPLICATION FOR
	)	POST CONVICTION RELIEF
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

The Applicant, Terrell McCoy, now having the benefit of appointed counsel and pursuant to a ruling by Judge Larry B. Hyman, Jr. on September 9, 2015, alleges the following:

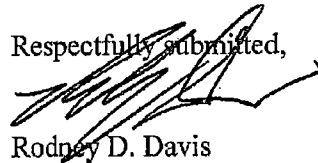
1. Terrell McCoy is detained at Broad River Correctional Institution under Inmate Number: 256070.
2. He was convicted and sentenced in Charleston County for Murder on February 6, 2009 under Indictment Number: 2006-GS-10-4987.
3. He was granted his request to proceed to trial pro se by order of Judge R. Markley Dennis, Jr. on January 27, 2009.
4. That order relieved Lorelle Proctor (original attorney) from her duties in representing Mr. McCoy.
5. A timely Notice of Appeal was filed and his appeal was perfected by Robert Dudek (appellate attorney) of the Office of Appellate Defense.
6. His conviction and sentence were affirmed by the South Carolina Court of Appeals.
7. He filed a Petition for Re-Hearing which was denied.
8. He filed a Petition for Writ of Certiorari which was denied and Remittitur was issued on March 8, 2013.
9. The Applicant filed an *in forma pauperis* application for post conviction relief on April 4, 2013.

FILED
2015 DEC -4 PM 4:35
JULIE J. ARMSTRONG
CLERK OF COURT
BY

10. The undersigned counsel, Rodney D. Davis, was appointed to represent the Applicant on April 16, 2013.
11. The State filed a Return on May 19, 2014.
12. Applicant's original attorney provided ineffective assistance of counsel in failing to obtain evidence and witnesses for trial prior to being relieved as counsel.
13. The State engaged in prosecutorial misconduct depriving the Applicant of a fair trial in violation of his Constitutional rights by failing to disclose evidence, destroying evidence and submitting inappropriate testimonial evidence.
14. Applicant's appellate attorney provided ineffective assistance of counsel in failing to argue relevant grounds for appeal.

Wherefore, the Applicant requests that the Conditional Order of Dismissal be rescinded and his Application for Post Conviction Relief be reinstated and a hearing on the merits scheduled.

Respectfully submitted,



Rodney D. Davis
Attorney for Applicant
4000 Faber Place Drive, Suite 300
Charleston, SC 29405
Davis@LowcountryLawOffice.com
(843) 323-4353

December 4, 2015

1

2 STATE OF SOUTH CAROLINA

) COURT OF COMMON PLEAS

3 COUNTY OF CHARLESTON

) CASE NO. 2013-CP-10-1994

4

5 TERRELL MCCOY,

6 Plaintiff,

) Transcript of Record

7 vs.

8 STATE OF SOUTH
9 CAROLINA,

) Date: December 14, 2015

10

Defendant.

11

* * * * *

12

13 B E F O R E:

14 The Honorable Deadra Jefferson

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21 Denise J. Lauder, RPR

22 Ninth Judicial Circuit

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A P P E A R A N C E S

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REPRESENTING THE PLAINTIFF:

RODNEY DAVIS, ESQUIRE
4000 Faber Place Drive
Charleston, SC 29405

REPRESENTING THE DEFENDANT:

RUTLEDGE JOHNSON, ESQUIRE
Office of the Atttorney General
1000 Assembly Street
Columbia, SC 29201

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1 (The following proceedings were had
2 December 14, 2105, Charleston County Circuit Court,
3 Judge Deadra Jefferson, 10:21 a.m.)
4 THE COURT: State ready to proceed?
5 MR. JOHNSON: Yes, Your Honor.
6 THE COURT: Applicant ready to proceed?
7 MR. DAVIS: If you could give me a
8 moment; I'm letting Ms. Proctor know that we called
9 this one.
10 (Brief pause)
11 MR. DAVIS: Your Honor, may it please
12 the Court?
13 THE COURT: Give me one second.
14 MR. DAVIS: Yes, ma'am.
15 THE COURT: Did you-all get an order to
16 Judge Hyman, that he specified in his form order?
17 MR. DAVIS: To whom, Your Honor?
18 MR. JOHNSON: Judge Hyman's order.
19 MR. DAVIS: I apologize, Judge, no.
20 And that's something -- on the record, no. I wish
21 I could tell the Judge when I saw that form.
22 That's a drop-the-ball on my part, obviously,
23 summary judgment in favor of the State and I did
24 not.
25 I have in my notes that I was to

1 provide an order against my client, and so I did
2 not. Within the past -- not long, Your Honor. I
3 apologize, but I have seen it --

4 THE COURT: I don't know that it's
5 necessary because I think his finding on the
6 record, as well as his form order, is clear.

7 MR. DAVIS: I understand, Your Honor,
8 but, for the record, I did not see that until not
9 long ago and I did not provide --

10 THE COURT: I wouldn't lose any sleep
11 over it. I was just curious when I saw it because
12 I didn't see it in the file, and I wanted to make
13 sure.

14 MR. DAVIS: Yes, ma'am.

15 THE COURT: Let's see here. The
16 applicant filed his application for post-conviction
17 relief on April 4th of 2013. The matter was
18 appealed to the court of appeals which was affirmed
19 in Opinion Number -- it's an unpublished opinion --
20 2011 UP 471. It was tried by Judge Young, and that
21 opinion was filed October 26th of 2011.

22 At that time, Mr. McCoy represented
23 himself. He was sentenced to 40 years confinement
24 by Judge Young on 3/5/09, on the charge of murder.
25 And that is Indictment 2006-GS-74987. He was

1 originally sentenced to 50 years on 2/6/09 -- I
2 think I have my dates wrong, I apologize. No, I
3 have them right. I couldn't read his handwriting
4 -- on 2/6/09. It appears Judge Young amended that
5 sentence in March and reduced it by ten years.

6 A motion for summary judgment was heard
7 on September 9th of 2015, and that was heard by
8 Judge Hyman. And the record reflects that on
9 January 27, 2009, Judge Dennis heard a motion to
10 relieve Ms. Proctor as counsel and for the
11 defendant to proceed pro se. There was a full
12 Faretta hearing and Judge Dennis granted the motion
13 and relieved Ms. Proctor, but asked her to remain
14 as standby counsel.

15 Trial was held on February 2nd through
16 6th of 2009 before Judge Young. The applicant
17 represented himself, the jury convicted him of
18 murder, he was sentenced as I've already indicated
19 for the record. There was a timely notice of
20 appeal which was filed, which was denied, as well
21 as a petition for rehearing, as well as the
22 application for certiorari to the supreme court.
23 The remittitur was issued on March 8th of 2013.

24 Just for the record, the State filed
25 its return on May 19th of 2014, to the application

1 for post-conviction relief.

2 Going back to Judge Hyman, apparently,
3 the State at that time moved for a motion -- made a
4 motion for summary judgment, and he found at that
5 time that since the applicant proceeded on his own
6 that he could not make an application or sustain an
7 application for ineffective assistance of counsel,
8 at least at the trial level.

9 Also, within the order relieving Ms.
10 Proctor, Judge Dennis noted that she was relieved
11 of any post-conviction relief action effective
12 after 12:00 p.m. on January 27th of 2009. Judge
13 Hyman granted summary judgment as to trial counsel,
14 and based on this transcript it involved all
15 parameters of her representation prior to being
16 relieved.

17 The only issues that would be left then
18 would be the alleged prosecutorial misconduct as
19 well as appellate counsel.

20 Was the summary judgment ever
21 appealed --

22 MR. DAVIS: No, Your Honor. And --

23 THE COURT: The State still takes the
24 position that any alleged prosecutorial misconduct
25 is a direct appeal issue?

1 MR. JOHNSON: Yes, Your Honor. I would
2 renew that motion at this time.

3 THE COURT: Mr. Davis, would you like
4 to respond?

5 MR. DAVIS: Yes, Your Honor. One
6 moment. Judge, there is a line of cases that begin
7 with --

8 THE COURT: There are a lot of cases
9 that deal with prosecutorial misconduct within the
10 context of the lawyer failing to raise it, but I'm
11 not aware of any that say it's an issue for a PCR
12 when somebody represented themselves. And without
13 an attorney to allege ineffective assistance of
14 counsel, I don't know how you proceed on it within
15 the confines of a PCR.

16 MR. DAVIS: So --

17 THE COURT: I'm not aware of any cases
18 that would support a proposition that a pro se
19 litigant can pursue prosecutorial misconduct within
20 a PCR, or alleged prosecutorial misconduct, unless
21 you have one for me that you have found. I will be
22 glad to review it. But I'm not aware of any from
23 the Fourth Circuit or any from the South Carolina
24 Supreme Court, or from the United States Supreme
25 Court for that matter.

1 Did you find any cases on point?

2 MR. DAVIS: Your Honor, I begin with

3 Stepney v. State --

4 THE COURT: Did she represent herself?

5 MR. DAVIS: No, Your Honor. And that

6 -- that case does stand -- it's our position the

7 State argued that alleged errors which may be

8 reviewed on direct appeal may not be asserted at

9 the first time on PCR hearings; however --

10 THE COURT: That's a different factual

11 situation. If you have a lawyer, and the lawyer

12 failed to raise something, that's within the

13 confines of a PCR. The purpose of a PCR is

14 ineffective assistance of counsel.

15 So I need a case that says, without a

16 lawyer, that you can -- you can pursue

17 prosecutorial misconduct in a PCR where somebody

18 represented themselves.

19 MR. DAVIS: Judge, I can tell you, I do

20 not have a case where a pro se applicant did that.

21 What I can tell the Court is that Judge v. State,

22 issues that -- again, issues that could have been

23 raised on direct appeal cannot be considered in

24 post-conviction relief applications absent a claim

25 of ineffective assistance of appellate counsel.

1 We do have a claim of ineffective
2 assistance of appellate counsel.

3 THE C: You can raise it within that
4 context, but you can't raise it on its own.

5 MR. DAVIS: Your Honor, we would argue
6 that we could because we, secondarily argue, that
7 it's a constitutional violation --

8 THE COURT: You can raise it within
9 the context of Mr. Dudek's representation only, but
10 you are not going to pursue a separate claim that
11 it's prosecutorial misconduct. That's a direct
12 appeal issue. So you can proceed within those
13 parameters.

14 MR. DAVIS: Your Honor, we would like
15 to make a proffer as to the evidence we present on
16 the prosecutorial misconduct.

17 THE COURT: There's nothing that
18 precludes you from questioning Mr. Dudek about the
19 record. There's nothing precludes you from
20 questioning him as to why he didn't pursue it on
21 direct appeal, but I'm not going to have any
22 testimony that would amount to the direct appeal.

23 And I think within the confines of you
24 questioning Mr. Dudek, you should be able to
25 establish what it is you contend was prosecutorial

1 misconduct. So that eliminates the issue of a
2 proffer. I suggest you think carefully about your
3 questions.

4 MR. DAVIS: From my client?

5 THE COURT: I'm sorry?

6 MR. DAVIS: From my client?

7 THE COURT: Only as it relates to
8 ineffective assistance of counsel.

9 MR. DAVIS: And, Your Honor,
10 respectfully, I would like to make the record as to
11 what he has to present as prosecutorial misconduct.

12 THE COURT: I think you need to
13 question him first. I'm not taking a proffer from
14 him as to anything that deals with an appellate --
15 a direct appeal issue.

16 I have not precluded you from
17 questioning Mr. Dudek about those issues, so I
18 don't think you're prejudiced in any way.

19 I'm not -- the Rules are very clear.
20 The only way you would be able to question him
21 about prosecutorial misconduct would be within the
22 context of ineffective assistance of counsel. I'm
23 trying to think of a real easy example.

24 If the prosecutor made some derogatory
25 comment that made some reference to the defendant's

1 character, and his counsel failed to object, then
2 that would be relevant and it would be germane
3 because that is ineffective assistance of counsel.

4 If you want to question Mr. Dudek about
5 any issues of prosecutorial misconduct that existed
6 in the record, why he did not pursue them, why you
7 feel he was ineffective for failing to pursue them,
8 that's fair game. If you want to question your
9 client in that context, that's fair game.

10 I see no reason to duplicate it. There
11 is no necessity of a proffer. It's all going to
12 say the same thing. I would suggest you proceed
13 within those confines. I'm not going to have
14 people not -- and I need to rephrase that.

15 PCRs are for a very specific purpose.
16 They are for ineffective assistance of counsel, and
17 they are for ineffective assistance of appellate
18 counsel. They are not to be used as a veil for
19 direct appeal issues that have not been raised.

20 If we allowed that, then there would
21 never be finality to any proceeding. People could
22 circumvent the Rule and come back and raise direct
23 appeal issues in a PCR, and that's not the purpose
24 of a PCR. And I think the case law is very clear
25 on that.

1 MR. DAVIS: Your Honor, finally, just
2 one other thing, my client has -- and I have here
3 -- reminded me of the Riddle v. Ozmint case, which
4 deals with the Brady violation --

5 THE COURT: Then you need to ask his
6 appellate counsel about that, because that should
7 be in the record. And he -- the appellate court
8 was very clear, he made a free and voluntary waiver
9 to represent himself. That's one of the risks you
10 run when you don't know the Rules and you represent
11 yourself, and you have a competent attorney who is
12 more than well-seasoned to represent you and you
13 don't take advantage of it when they could have
14 raised all those issues to help preserve for an
15 appellate record and for direct appeal.

16 MR. JOHNSON: Your Honor, if I may,
17 just to make sure that the record is complete, Mr.
18 McCoy in representing himself had pretrial motions,
19 pages 47 through 55, that he claimed that the
20 Solicitor failed to produce evidence.

21 So, basically, he's claiming
22 prosecutorial misconduct within the confines of the
23 trial transcript itself; and on page 64, the Court
24 denies that and rules against him.

25 THE COURT: And that's why I said, Mr.

1 Dudek can be questioned about that; because he has
2 reviewed the record, and there must be a reason he
3 didn't pursue it. Either he was ineffective in
4 failing to pursue it, or he had a good reason for
5 not pursuing it. All of these things can be
6 covered in his testimony.

7 MR. JOHNSON: Yes, ma'am.

8 THE COURT: Because it's all within the
9 record.

10 MR. JOHNSON: Yes, ma'am.

11 THE COURT: Okay. Do we have to get
12 him on the phone?

13 MR. DAVIS: What I would ask the Court
14 to do is, if you could talk about the benefits and
15 risks of the PCR on the record?

16 THE COURT: Sure. Sir, you understand
17 that in a post-conviction relief action, that the
18 Court -- the only relief the Court can grant you is
19 a new trial?

20 THE DEFENDANT: Ma'am? No, ma'am.

21 THE COURT: You understand you can't be
22 resentenced in a PCR?

23 THE DEFENDANT: No, ma'am, I don't
24 understand PCR. Could you --

25 THE COURT: A PCR is post-conviction

1 relief. It means that you are filing an action
2 that says your lawyer was ineffective, and that
3 because of their ineffective assistance you have
4 been prejudiced such that the result of the trial
5 -- the courts should not have any confidence in the
6 result of the trial.

7 I think you should know what a PCR is.
8 You've filed a very lengthy application with a lot
9 of citations so I would imagine you had some
10 inclination of what it was about, but, in short,
11 that's what it's about. And the only thing that
12 the Court can do is grant you a new trial, which
13 means you would start from square zero and you get
14 tried again, which means you always run the risk of
15 getting a worse result.

16 THE DEFENDANT: Correct.

17 THE COURT: In other words, the Court
18 could give you -- on a murder, it's 30 years to
19 life, correct? Isn't that --

20 MR. JOHNSON: Yes, Your Honor.

21 MR. DAVIS: Yes, Your Honor.

22 THE COURT: So you run the risk of
23 getting a life sentence. And life in South
24 Carolina is without parole, which means you would
25 never get out. The sentence that you received, at

1 this point you could max out -- Judge Young
2 originally sentenced you to 50 years. He reduced
3 it to 40 years when a motion for reconsideration
4 was filed.

5 So, technically, you would have to
6 serve 85 percent of 40 years, which is 34 years
7 where you would max out, versus you getting a new
8 trial, the State trying the case again, conceivably
9 worst case scenario getting another conviction and
10 you receiving a life sentence.

11 MR. DAVIS: Your Honor, it would be day
12 for day and that's exactly the reason that the
13 Judge indicated on the record he reduced it --

14 THE COURT: Because it is day for day.
15 I apologize, it is day for day. But still you have
16 -- you still have the ability to get out versus --
17 so really the only thing it changes is how much
18 time you serve.

19 How old are you?

20 THE DEFENDANT: I'm 36 years old,
21 ma'am.

22 THE COURT: So in 40 years you would be
23 -- they don't get any good time credit?

24 MR. JOHNSON: You get credit for time
25 served, but murder is day for day.

1 THE COURT: Straight day for day.

2 MR. DAVIS: Your Honor, his conviction
3 date from the Department of Corrections outside the
4 -- his start date is March 27, '06. His predicted
5 date of release is March 17th of 2046.

6 THE COURT: So how old would he be at
7 that time?

8 MR. DAVIS: If you would give me a
9 moment on the math.

10 MR. JOHNSON: Your Honor, may we swear
11 him in for the record?

12 THE DEFENDANT: I have a question.

13 THE COURT: Give me one second.

14 TERRELL MCCOY,
15 being first duly sworn, testified as follows:

16 THE DEFENDANT: Yes, ma'am.

17 EXAMINATION

18 BY THE COURT:

19 Q. Okay. Sir, do you understand all of
20 the questions that I've previously asked you?

21 A. Somewhat. I was just hearing you speak
22 with my attorney, and I understand from reading the
23 law that post-convictions are based on arguing
24 constitutional violation --

25 Q. Only as it regards -- sir, you're not a

1 lawyer.

2 A. Section 172720.

3 Q. -- it only relates to ineffective
4 assistance of counsel, period. So if there's a
5 constitutional violation, it has to relate that
6 somehow where your attorney was ineffective in
7 pursuing that right for you.

8 Constitutional -- straight
9 constitutional issues have to be pursued in a
10 direct appeal. That's why you ran the risk of
11 representing yourself.

12 A. I understand the risk of representing
13 myself, Your Honor, and I also understand the law
14 clearly. And it's like I said --

15 Q. Sir, I'm not going to have hybrid
16 representation and I'm not going to give you the
17 opportunity --

18 A. This is my PCR.

19 Q. -- dialogue about the law. I only
20 asked you a very simple set of questions. One of
21 which --

22 A. I'm trying to understand the PCR.

23 Q. I believe you understand what a PCR is.
24 You filed an over-20-page application with lots of
25 citations to the law. I don't think you're unclear

1 about what PCR is.

2 My question to you very simply is, so
3 you understand that the only relief this Court can
4 grant you is a new trial?

5 A. Now I do.

6 Q. Do you understand this Court cannot
7 engage in any resentencing?

8 A. Yes.

9 Q. Do you understand that if you were to
10 receive the relief that you're seeking, you simply
11 would start from the beginning and the State would
12 try you again?

13 A. Yes.

14 Q. Do you understand that you have the
15 potential of receiving a greater sentence than the
16 one you received in this case?

17 A. Yes.

18 Q. Do you understand that instead of 40
19 years, you have the potential of receiving a life
20 sentence, which in South Carolina is life without
21 parole?

22 A. Yes.

23 Q. And knowing that, do you still wish to
24 proceed with this application for post-conviction
25 relief?

1 A. Yes. But I want to know, would I be
2 able to get on the stand and testify on my
3 behalf --

4 Q. With some limitations. I'm not going
5 to allow you to just go on and talk indefinitely.
6 You're only going to answer questions in response
7 to what your lawyer asks. That's why you have a
8 lawyer.

9 A. I just want it to be on the record.

10 Q. It's on the record. I don't talk to
11 people without a court reporter.

12 A. Thank you.

13 Q. I'm real strict about that.

14 A. Thank you.

15 Q. I don't want anybody to ever
16 misapprehend what I said.

17 A. Thank you, ma'am.

18 THE COURT: Can we go ahead and get
19 Mr. Dudek on the phone?

20 MR. DAVIS: By my math he would be 67,
21 Your Honor.

22 THE COURT: I had miscalculated it
23 because I didn't know his start date. So under the
24 Rules, as they apply at this time, he still would
25 have the ability to come out and -- you know, 67 is

1 the new 50, so -- my mentor is 95 and he still
2 drives, so keep hope alive.

3 Ready to proceed?

4 (Whereupon, Mr. Dudek appeared via
5 telephone to testify.)

6 MR. JOHNSON: Hey, Bob. This is
7 Rutledge.

8 We're in court on Terrell McCoy. We
9 have Judge Jefferson presiding, and Rodney Davis is
10 calling you for the applicant. I believe the Clerk
11 of Court needs to swear you as a witness.

12 THE WITNESS: Okay.

13 ROBERT DUDEK,
14 being first duly sworn, testified as follows:

15 THE CLERK: Thank you so much.

16 THE COURT: Now, are we calling him in
17 the State's case or the applicant's case?

18 MR. DAVIS: My case.

19 THE COURT: I just needed the record
20 to be clear. You may proceed, Mr. Davis.

21 MR. DAVIS: Thank you, Your Honor.

22 DIRECT EXAMINATION

23 BY MR. DAVIS:

24 Q. Mr. Dudek, can you hear me all right?

25 A. Yes, sir, I can.

1 Q. Okay. If ever there's an issue, let me
2 know. Okay?

3 A. Yes, sir.

4 Q. Okay. Mr. Dudek, can you tell the
5 Court the grounds on which you appealed Mr. McCoy's
6 conviction?

7 A. Sure. It was on the grounds -- the
8 argument was that Mr. McCoy should not have been
9 allowed to represent himself because he did not
10 adequately appreciate the dangers and disadvantages
11 of self-representation.

12 Q. That was the only ground, correct?

13 A. Yes, sir, that was the only ground.

14 Q. In preparing the appeal, you reviewed
15 the transcript in this case?

16 A. Yes. I would have reviewed the entire
17 transcript, yes, sir.

18 Q. And I believe you had written
19 communication with Mr. McCoy during the pendency of
20 his appeal as well?

21 A. Yeah. My -- my memory -- Mr. McCoy can
22 correct me if I'm wrong, but my memory is that
23 there was some ongoing communication between us. I
24 don't remember Mr. McCoy being passive or like many
25 of my clients, you know, where I don't hear from

1 them during the appeal at all. So my memory,
2 again, is that there was communication between us.

3 Q. Do you recall a request that you argue
4 -- that you appeal the issue that a voluntary
5 manslaughter jury charge was not given by the
6 judge? Do you recall Mr. McCoy requesting that?

7 A. Mr. Davis, I do not recall that, but if
8 Mr. McCoy says he made that request, I -- you know,
9 I would go with his memory, but, frankly, I do not
10 recall as of today him making that request. I'm
11 sure his memory, this being his only case, would be
12 better than mine.

13 Q. That was not argued on appeal?

14 A. It was not argued on appeal, that's
15 correct.

16 Q. And back in April of 2010, you were
17 employed at appellate defense?

18 A. Yes.

19 Q. Okay. And you recall that Mr. McCoy
20 was convicted of the murder charge?

21 A. Right; he was convicted of murder. And
22 I'm looking at my brief, he received a 50-year
23 sentence.

24 Q. And you are aware that the judge did
25 not give a voluntary manslaughter charge?

1 A. I'll take your word for that.

2 Q. Okay. On March 30th of 2011, you were
3 employed at appellate defense?

4 A. Yes. I've been employed here since
5 February of 1990.

6 Q. Do you recall a letter to Mr. McCoy of
7 that date indicating that a voluntary manslaughter
8 was -- if the judge refused to give that and he
9 requested it, that that would be an issue on PCR?

10 A. No. Give me the date again; I can see
11 if I can find it. I should be able to put my
12 finger on it pretty quick.

13 Q. March 30th of 2011.

14 A. March 30th. I see I have a letter that
15 went out to him on the 23rd of 2013. I don't
16 recall the letter, Mr. Davis, but I can tell you if
17 Mr. McCoy asks for that and I didn't raise it, it
18 would kind of be my common practice to say, listen,
19 I've raised the issue, or issues, that I think give
20 you the best chance of winning, and if I've missed
21 something there is -- you're playing with a net and
22 that net is called post-conviction relief.

23 If you think I've missed the winning
24 issue, you can bring it up there. If the Court
25 agrees that I was wrong and that you would have won

1 if I raised the issue, you will get relief. I
2 don't remember the letter specifically, but that
3 would not be an uncommon thing for me to do. If
4 that -- answer your question the best I can answer
5 it.

6 Q. All right. Let's move on to -- do you
7 recall some issue in the transcript about a 911
8 recording? Do you recall reviewing that?

9 A. I don't recall the issue as of today,
10 no, sir.

11 Q. Okay. Do you recall an issue dealing
12 with a dispatch log that was attempted to be
13 introduced by Mr. McCoy that the State objected to?

14 A. Vaguely, but not -- not in detail. I
15 do remember there being something about a dispatch
16 log, and that might have been something -- another
17 thing Mr. McCoy talked about, but, as of today, I
18 don't recall that.

19 Q. Procedurally, if the -- and he was pro
20 se. Procedurally, if he attempted to introduce a
21 dispatch log, the State objected, and the Court
22 sustained that objection, that would preserve that
23 issue for you to appeal the issue if it were
24 favorable grounds, correct?

25 A. Yeah. If there was a document, and he

1 asked for it to be admitted and it was not
2 admitted, and he made it a Court's exhibit then so
3 the appellate court could review it, that would
4 preserve the issue.

5 Q. Okay. Do you recall in the record, in
6 addition to evidence by 911 call, do you recall an
7 issue about evidence of blood and DNA testing?

8 A. No, Mr. Davis, I really don't. Sorry.

9 Q. If there were items of evidence that
10 Mr. McCoy -- or any defendant. If there were items
11 of evidence that the defendant requested from the
12 State and it was not provided, would you agree
13 that's a Brady violation?

14 A. Well, I mean, it depends on, you know,
15 whether it had to be provided; under Brady, you
16 know, was it helpful to the defense or -- you know,
17 under other cases, I guess Giglio wasn't
18 exculpatory.

19 So, I mean, you know, it would depend
20 on the nature of the evidence. It's hard to answer
21 that in the abstract, but if it would have assisted
22 his defense, whatever the evidence was, yes, I
23 would agree with that.

24 Q. And Giglio, even if it were for
25 impeachment purposes, correct?

1 A. Right, yes, sir.

2 Q. I believe you've already testified, but
3 you reviewed the entirety of the trial transcript?

4 A. Yes. My practice is, I read through
5 the transcript and I, you know, take notes on the
6 testimony and, you know, try and note objections
7 that -- or motions that I think may be significant
8 or that I might raise on appeal.

9 Q. Would you have reviewed any other
10 items, other than the trial transcript, in
11 preparation for the appeal?

12 A. Again, I don't remember this specific
13 case. Our practice is to -- we have a person here
14 whose job is only to request exhibits that were
15 introduced from the Clerk of Court.

16 I don't specifically remember this case
17 as to that or, you know, or reviewing -- or
18 reviewing exhibits. So, I mean, I can't swear to
19 you that I reviewed the exhibits in this case.
20 Only that that is our practice to request them.

21 Q. Mr. Dudek, if you will give me a
22 moment?

23 A. Sure.

24 (Off the record.)

25 BY MR. DAVIS:

1 Q. Mr. Dudek, just a few more questions to
2 wrap up.

3 A. Sure.

4 Q. You're aware of cases that have been
5 reversed on the issue of a defendant representing
6 himself pro se, correct?

7 A. Yes.

8 Q. Okay. You -- you're aware of cases
9 that have been -- convictions have been reversed
10 for a Brady violation, correct?

11 A. Yes.

12 Q. You're aware of convictions that have
13 been reversed for failure to give lesser included
14 jury instructions, correct?

15 A. Surely, yes, sir.

16 Q. Similarly, convictions reversed for --
17 on the grounds of prosecutorial misconduct?

18 A. Yes.

19 Q. Three more, Mr. Dudek. I believe
20 that's it. You're aware of convictions reversed on
21 the grounds of Batson motions, jury selection
22 motions?

23 A. Yes, sir. Yes.

24 Q. You are aware of cases that have been
25 reversed for admitting witness statements into

1 evidence erroneously?

2 A. Yeah. I'm sure there have been. I'm
3 just not -- one is not popping right into my mind
4 as to your prior questions, but I'm sure there have
5 been.

6 Q. And then, finally, you're aware of
7 convictions that have been reversed based on unduly
8 suggestive or improper identification?

9 A. Yeah, I'm sure -- I'm sure there -- I'm
10 sure there have been. Again, one is not
11 immediately popping to mind. Identification is
12 hard to win on, but I'm sure there have been cases.

13 MR. DAVIS: Your Honor, if I may have
14 just one moment, I believe that's it. Just a
15 moment.

16 Thank you, Mr. Dudek. That's all I
17 have.

18 Thank you, Your Honor.

19 MR. JOHNSON: May it please the Court?

20 THE COURT: Yes, sir.

21 CROSS-EXAMINATION

22 BY MR. JOHNSON:

23 Q. Bob, hey; it's Rutledge. I have a few
24 questions for you.

25 A. Surely.

1 Q. How long have you been at appellate
2 defense?

3 A. It would be 26 years in February.

4 Q. And would you say that you have
5 represented thousands of clients?

6 A. Yes, sir.

7 Q. And written thousands of briefs?

8 A. Yes, sir.

9 Q. And petitions for writ of certiorari?

10 A. Yes.

11 Q. Before the court of appeals and the
12 Supreme Court?

13 A. Yes.

14 Q. And have you participated in oral
15 arguments?

16 A. Yes, sir.

17 Q. Would that be in the hundreds to
18 thousands?

19 A. I would hesitate to guess. I would
20 think over a hundred just doing the math.

21 Q. And you testified that when you get a
22 case, you review the transcript to identify any
23 potential appealable issues?

24 A. Yes, sir.

25 Q. And that you only raised the fact that

1 you didn't think that Mr. McCoy understood the
2 advantages and disadvantages of
3 self-representation?

4 A. Yes, that's the only issue I raised.
5 And, you know, again, I don't -- you know, I'm not
6 trying to be flippant at all, but I don't knowingly
7 not raise an issue that I think would win. So if
8 Mr. McCoy's identified a winning issue that I
9 didn't raise, I would not have any strategic
10 reason, obviously, not to raise something that I
11 thought was a winning issue.

12 Q. So to put that differently, you raised
13 all meritorious issues from the transcript,
14 correct?

15 A. I would have thought that the only
16 issue that gave us the chance, and the best chance
17 to win on was him being allowed to represent
18 himself at trial; because I thought -- obviously,
19 the court disagreed with me and, you know, the
20 supreme court denied cert, and we know that denial
21 of cert doesn't mean anything in and of itself.

22 But I thought, given the colloquy with
23 the trial court, that Mr. McCoy did not understand
24 the dangers and disadvantages of representing
25 himself rather than being represented by an

1 attorney. And, you know, obviously, the court of
2 appeals disagreed, but that's where we are.

3 Q. And did you base your briefing of the
4 issue on your experience and the facts of the case?

5 A. Yes, sir.

6 Q. And you stated that you have handled
7 thousands of cases before the court of appeals and
8 the supreme court. What is -- based on your
9 experience, what is your thought concerning
10 non-preserved issues at the court of appeals?

11 A. Where is my thought? I mean, I don't
12 -- you know, if I think an issue is not preserved,
13 I -- you know, I do not raise it if I think -- you
14 know, and if it's questionable and I think I can
15 make it fly, then I do. I mean, an appeal is -- as
16 you know, Mr. Johnson, an appeal is all about
17 fairness to the trial judge when it comes to error
18 preservation.

19 Was the issue fairly presented to the
20 judge so that he or she understood what the issue
21 was and what the argument of defense counsel was.
22 So if I did not think that something was fairly
23 presented to the trial court, that the appellate
24 court would not think it was fairly presented, then
25 I would not think the issue is preserved. Again, I

1 don't know exactly where you're going with that
2 issue, but that would be my answer.

3 Q. And you have a duty as an attorney to
4 raise non-frivolous issues, correct?

5 A. I -- I mean, my duty as an appellate
6 lawyer is to raise the issue or issues that I think
7 give us the best shot of prevailing on. You know,
8 just because -- you know, I mean, we can think of
9 things that might not be totally frivolous that --
10 that, you know, I still might not raise.

11 I mean, just because it doesn't meet
12 the Anders v. California standard of being totally
13 frivolous doesn't mean that I have to raise it.
14 The whole heart of being an appellate lawyer is to
15 weed out those issues that aren't going to give us
16 a chance to prevail. The whole purpose of the
17 appeal is to try to win it.

18 Q. Okay. Follow-up question, Mr. Dudek.
19 In your experience with the court of appeals, if
20 motions and objections are not renewed either prior
21 or after the State rests, or at the end of the
22 trial, what does the court of appeals typically do
23 as far as taking the argument or rejecting it for
24 lack of preservation?

25 A. Well, if evidence is offered in camera,

1 or, you know, by a pretrial motion, and there's a
2 break in the action, for lack of a better way of
3 putting it, and the evidence is later put in before
4 the jury, and there is not a repeat, the objection
5 is not repeated in the presence of the jury, the
6 court of appeals is going to find it unpreserved.

7 If you're talking about a directed
8 verdict motion, I don't know if you are or not, but
9 that would have to be renewed also at the -- at the
10 end of the evidence to preserve the issue.

11 Q. All right. Couple of more questions,
12 Mr. Dudek. And you are familiar with the Brady
13 line of cases and the Giglio case?

14 A. Yes, sir.

15 Q. And if the -- will you agree with me in
16 the statement, if the prosecution does not possess
17 evidence, they have no duty to turn over what they
18 don't possess?

19 A. Well, I guess I partially agree with
20 that. I mean, evidence in the possession -- as I
21 understand the law, evidence in the possession of
22 say the police department that was helping with the
23 prosecution or the investigating police officers,
24 that evidence is imputed to the State or to the
25 Solicitor is my understanding of the law.

1 Q. Okay. And if the police don't possess
2 it, then the Solicitor can't possess it, correct?

3 A. Yeah. I mean, that makes sense. If
4 the police never, you know, came upon certain
5 evidence, then -- and they don't have it and they
6 don't know about it, then that wouldn't be imputed
7 to the prosecution.

8 Q. Okay. Last question: If there is no
9 evidence of a lesser included offence, a trial
10 judge does not have a duty to instruct the jury
11 concerning that lesser included offense, correct?

12 A. That's right. If there's no evidence,
13 in the Court's words, quote, whatsoever, unquote,
14 of the lesser offense, then the judge doesn't have
15 to give the instruction on the lesser included
16 offense. If there's any evidence of the lesser
17 included offense then, you know, the judge does
18 have an obligation to charge is my understanding of
19 the law.

20 MR. JOHNSON: Okay. That's all I have
21 right now, Mr. Dudek. I appreciate it.

22 THE WITNESS: Yes, sir.

23 THE COURT: You may proceed.

24 MR. DAVIS: No redirect, Your Honor.

25 THE COURT: Any objection to the

1 witness being excused? From the State?

2 MR. JOHNSON: No, ma'am.

3 THE COURT: From the defense -- the
4 applicant, I'm sorry?

5 MR. DAVIS: No, Your Honor.

6 THE COURT: Mr. Dudek, thank you.

7 THE WITNESS: Thank you, Judge
8 Jefferson.

9 THE COURT: Have a good day.

10 THE WITNESS: You too, ma'am. Thank
11 you.

12 THE COURT: All right. The applicant
13 may proceed.

14 MR. DAVIS: Your Honor, we would call
15 Burns Whetmore.

16 THE COURT: Mr. Whetmore, please come
17 to the stand to be sworn please.

18 THE WITNESS: Yes, ma'am.

19 MR. JOHNSON: Your Honor, at this time,
20 I want to renew that objection as to prosecutorial
21 misconduct.

22 THE COURT: Is that why Mr. Whetmore
23 is being called?

24 MR. DAVIS: Yes, Your Honor.

25 THE COURT: Your client raised that

1 issue at page 653, and the Court heard it. He
2 raised it in a motion of limine. The judge found
3 there was no basis for him -- for prosecutorial
4 misconduct in terms of -- I believe the word he
5 used was destroying evidence, tampering with
6 evidence, and stuff like that. And he found there
7 was no basis in the record for it and denied the
8 motion, so it was preserved. Mr. Dudek had the
9 availability to look at it and decide if it was a
10 viable issue for appeal.

11 I'm trying to figure out what more
12 Mr. Whetmore could add to that, other than raising
13 it for a direct appeal issue. What can he add to
14 what's already in the record?

15 MR. DAVIS: If you would give me a
16 minute.

17 THE COURT: I thought the way you all
18 raised it originally was silent, but, again -- I
19 read these a couple of weeks ago. And now looking
20 at my notes again, it was raised several times in
21 the record and ruled directly on by the judge, as
22 well as the voluntary manslaughter objection and
23 the Batson motion.

24 MR. JOHNSON: To add to that, the Neil
25 v. Biggers hearing was also in the transcript.

1 THE COURT: Uh-huh.

2 (Off the record.)

3 MR. DAVIS: Thank you for the time to
4 talk to my client. We understand that you have the
5 entirety of the trial record with you, and with
6 that being a part of this record, we will agree
7 that Mr. Whetmore does not have additional
8 information since the time of that trial that we
9 would add, other than what was put in on direct.

10 THE COURT: Thank you. Mr. Whetmore,
11 you're excused.

12 MR. WHETMORE: Thank you, Judge.

13 THE COURT: You may proceed.

14 MR. DAVIS: Judge, may I approach?

15 THE COURT: Uh-huh.

16 MR. DAVIS: The one issue my client
17 wanted me to raise is the fact that in that record
18 Mr. Whetmore indicated, I don't think there was a
19 911 tape.

20 THE COURT: He had to raise that at the
21 time of trial. That's why when you represent
22 yourself you have the duty to discover everything
23 that was available to you at that time. That would
24 be a direct appeal issue, he raised it, he should
25 have had that at the time.

1 I cannot now go back behind the issue
2 and decide it, basically creating an entirely new
3 record. It doesn't work that way.

4 MR. DAVIS: Your Honor, I would ask
5 that this exhibit be marked as Applicant's Number
6 1.

7 THE WITNESS: What is it?

8 MR. DAVIS: It's an affidavit from
9 Chris Neely of the North Charleston Legal
10 Department.

11 THE COURT: Indicating?

12 MR. DAVIS: Indicating that a 911 call
13 and CAD report did exist at the time of Mr. McCoy's
14 trial. It was destroyed and/or taped over at a
15 later date. Of course, Mr. Whetmore would not have
16 known that, and he could not have testified to this
17 issue.

18 THE COURT: What's the State's
19 position?

20 MR. JOHNSON: Your Honor, I have no
21 problem with that. Let me check one date.

22 THE COURT: Certainly.

23 MR. JOHNSON: Give me two seconds, Your
24 Honor. I have no problem with the affidavit. Mr.
25 Davis and I have been in contact concerning this;

1 however, I still don't think it shows anything that
2 could not have been raised on direct appeal.

3 THE COURT: I agree. It will be marked
4 as Applicant's 1.

5 (APPLICANT EXH. 1, Affidavit, was
6 marked for identification.)

7 MR. DAVIS: That is now part of the
8 record, Your Honor?

9 THE COURT: Yes.

10 MR. DAVIS: Thank you.

11 THE COURT: It doesn't change anything.
12 It's a direct appeal issue. And when you represent
13 yourself -- a lawyer would have gone back behind
14 it, would have researched it, would have subpoenaed
15 whoever they needed to subpoena, and would have
16 done whatever needed to be done.

17 It doesn't really raise any new issue
18 that Mr. McCoy did not raise at that time, which as
19 he said, something was destroyed, hypothecated,
20 hidden, whatever. It was his duty at that time to
21 present the Court with evidence of that, and he
22 didn't. And so he's the architect of his own
23 dilemma.

24 The lawyer would have pursued it and
25 found out and got that information, but I really

1 don't know that what Mr. Neely says makes any
2 difference. It's no different than what's in the
3 record.

4 The 911 tapes you have to ask for
5 within -- I would imagine that Ms. Proctor would
6 have asked for the 911 tape originally. Did she
7 not? The State would have produced it at the time
8 of the original trial, didn't they?

9 MR. DAVIS: It was never produced, Your
10 Honor.

11 THE COURT: Well, I mean, they usually
12 play it. But did they ask for it? I don't know
13 that it makes a difference. In the grand scheme of
14 the totality of this record, I don't know that it
15 makes a difference.

16 MR. DAVIS: I believe it's already in
17 the record, Mr. Whetmore testified he -- if not,
18 he's nearby and we would seek to call him, but Mr.
19 Whetmore never obtained it and, in fact, didn't
20 believe one existed. And that's why it was never
21 obtained --

22 THE COURT: That's not prosecutorial
23 misconduct, if he didn't believe it existed and he
24 didn't have it in his possession. Prosecutorial
25 misconduct is when you have it and you fail to

1 produce it; you know it exists and you fail to
2 produce it. But either way, it's a direct appeal
3 issue and it was raised, and it was ruled upon, and
4 appellate counsel didn't feel there was any merits
5 to it.

6 But he said a winnable issue -- I'm
7 getting a little ahead of myself. When you look at
8 the totality of this record, it doesn't undermine
9 the Court's confidence in the end result. You can
10 always pick apart a record with little minutia;
11 when isolated, looks one way.

12 The Court's responsibility is to look
13 at the entire record. I have to look at all of
14 that minutia as a big picture, like a puzzle, and
15 put it together and determine whether -- and,
16 actually, in this case, it's not whether confidence
17 in the underlying matter -- whether my competence
18 in the underlying matter is -- whether I questioned
19 that.

20 The issue is whether appellate counsel
21 had anything in this record that he could pursue
22 that was winnable, and I'm using his words, not my
23 words. But based on the review of this record, he
24 pursued the issue that was in his words winnable.

25 Your client represented himself. He

1 understood the risks of that. He raised all these
2 issues. The Court ruled contemporaneously and the
3 appellate counsel was stuck with that record.
4 That's all he had to appeal.

5 And so, again, we're -- the basis of
6 his claim would be ineffective assistance of
7 appellate counsel, not a direct appeal issue.

8 All right. Ready to proceed? Any
9 further witnesses?

10 MR. DAVIS: We would call Mr. McCoy.

11 THE COURT: Sir, you can stay at
12 counsel table. Raise your right hand to be sworn.

13 THE DEFENDANT: Ma'am?

14 THE COURT: You can stay at counsel
15 table. Raise your right hand to be sworn.

16 THE DEFENDANT: Yes.

17 TERRELL MCCOY,
18 being first duly sworn, testified as follows:

19 THE COURT: You may be seated. State
20 your full name for the record.

21 THE DEFENDANT: My name is Terrell
22 Lynwood McCoy.

23 THE COURT: Please spell your middle
24 name for the Court Reporter.

25 THE DEFENDANT: L-Y-N-W-O-O-D.

1 THE COURT: Take your seat.

2 Mr. Davis, you may proceed.

3 MR. DAVIS: May I be seated as well?

4 THE COURT: Yes.

5 MR. DAVIS: Thank you.

6 THE COURT: Sir, I need you to take
7 your seat. You're going to make security very
8 nervous. Let your lawyer do his job. Thank you.

9 MR. DAVIS: Your Honor, if I may have a
10 moment. I don't know what he's handed me.

11 THE COURT: I would suggest that you
12 just keep it. He was handing something -- he was
13 trying to hand something to the attorney general.
14 You represent him. He doesn't represent himself.
15 It can't be both ways.

16 So I'm instructing Mr. McCoy, and I
17 hope he listens very carefully, the only questions
18 I expect -- the only responses I expect are in your
19 direct questioning of him and the assistant
20 attorney general's questions of him and any
21 redirect, but I am not going to entertain any
22 diatribes and attempts to represent himself. He
23 has a lawyer or he doesn't. And I suggest that he
24 let you do your job.

25 MR. DAVIS: Can I have a moment to --

1 THE COURT: I would suggest that you
2 do that after. I'm certain it's some
3 conglomeration of what he's already presented to
4 the court. I think you came to court prepared this
5 morning I would imagine.

6 I will give you a moment to review it
7 later, but that's not germane to the line of
8 questions that you have prepared for him.

9 MR. DAVIS: Thank you.

10 THE COURT: You may proceed.

11 DIRECT EXAMINATION

12 BY MR. DAVIS:

13 Q. Mr. McCoy, before you represented
14 yourself pro se, are you aware that your original
15 attorney requested discovery from the State?

16 MR. JOHNSON: Objection to any
17 questioning concerning Ms. Proctor.

18 THE COURT: I'm trying to figure out
19 how it's going to relate to us.

20 MR. DAVIS: It's not going to relate to
21 Ms. Proctor. It's at least with -- that he is
22 aware of the discovery request.

23 THE COURT: Well, I guess I'm trying
24 to figure out how that relates to appellate counsel
25 being ineffective. He can't be ineffective. I

1 mean, he chose to represent himself. So he -- to
2 some extent, he's the architect of his own dilemma
3 at this point. So anything that happened up to
4 that point, Judge Hyman's already insulated Ms.
5 Proctor and you'll have to appeal that.

6 Now, I don't know whether that's going
7 to go or it's not. It's not my business frankly.
8 It's the law of the case at this point, it wasn't
9 appealed. It was dispositive and it could have
10 been appealed.

11 MR. DAVIS: And, again, I do not intend
12 to -- I understand the Court's ruling --

13 THE COURT: I will give you a little
14 latitude, but you need to connect the dots.

15 Proceed.

16 BY MR. DAVIS:

17 Q. You were aware that discovery was
18 requested, correct?

19 A. Yes, sir. A motion was filed on
20 March 30th of 2006, and was served upon the
21 Solicitor on April 10th of 2006. I have the
22 document right here as Exhibit 2. I would like to
23 mark as --

24 THE COURT: No, sir. The only things
25 that are going to be marked is what your lawyer

1 seeks to introduce. I have instructed you very
2 clearly, you have a lawyer, let him do his job.
3 You can't represent yourself in this hearing.
4 Well, you could, but right now you have a lawyer so
5 I suggest that you take advantage of him.

6 Proceed, Mr. Davis.

7 MR. DAVIS: Thank you, Your Honor.

8 BY MR. DAVIS:

9 Q. Mr. McCoy, you have issues with what
10 was omitted from your appeal, correct?

11 A. Sir?

12 Q. You have issues with what was omitted
13 from your appeal, correct?

14 A. Yes, sir.

15 Q. You have concerns that your appellate
16 attorney, Mr. Dudek, did not argue any Brady
17 violations; is that correct?

18 A. Yes, sir.

19 Q. As to the Brady violation, what
20 evidence is it that you felt gave rise to the
21 ground for a Brady violation?

22 A. Okay.

23 THE COURT: Which is confined within
24 the record of this case, which is what he would
25 have raised before the Court.

1 BY MR. DAVIS:

2 Q. Mr. McCoy, did you hear the Court on
3 that? Did you hear the judge?

4 A. No.

5 THE COURT: He's bound by this record.
6 Whatever he raised -- he was his own lawyer.
7 Whatever he raised at that time, he's bound by that
8 and how the Court ruled on it. I can't review what
9 Judge Dennis did. I'm not an appellate court and
10 it's already been reviewed.

11 THE WITNESS: Your Honor, appellate
12 counsel was ineffective for failing to raise the
13 trial judge (inaudible) applicant's right to admit
14 the 911 report into evidence.

15 THE COURT: That's not responsive to
16 the question. Please repeat the question,
17 Mr. Davis, and be specific in what you're asking so
18 he can be responsive.

19 MR. DAVIS: I'll try to rephrase, Your
20 Honor.

21 BY MR. DAVIS:

22 Q. Mr. McCoy, do you have an issue that
23 Mr. Dudek, the appellate attorney, did not raise a
24 Brady violation on appeal?

25 A. Yes. I put that in my post-conviction

1 application, sir.

2 Q. Tell the Court specifically what
3 evidence in the trial transcript leads to grounds
4 for a Brady violation argument that should have
5 been made.

6 A. There existed a 911 tape that was never
7 given to my attorney at the time, Ms. Lori Proctor,
8 when we requested it. It was a 911 tape that
9 contradicts the State's witness's testimony.
10 Basically, what was said on the 911 -- I have the
11 operation report.

12 Q. Let me ask you about that report. Did
13 you attempt to admit that report into evidence at
14 your trial?

15 A. Yes, sir. I tried to admit it into
16 evidence and the State objected to it as being
17 hearsay. It was the only evidence that we had to
18 show the judge that there existed a 911 tape, which
19 was -- showed a link in the case that showed that
20 another witness was available, a primary witness
21 that was -- who called 911 and reported what she
22 saw.

23 MR. JOHNSON: Objection to any hearsay.

24 THE COURT: Sustained; hearsay.

25 Sir, you can't say what anyone else

1 said. You can only say what you did as a result.

2 BY MR. DAVIS:

3 Q. The State objected to this CAD report
4 based on hearsay; is that right?

5 A. Yes, sir.

6 Q. Did the Court allow you to admit the
7 evidence or prevented you from admitting it?

8 A. No comparable evidence was allowed into
9 evidence.

10 Q. I'm going to ask you a direct question.
11 Did the judge allow you to admit this evidence on
12 this report or not?

13 A. No, sir.

14 MR. DAVIS: Your Honor, may I approach?

15 I would like to have this marked, Your
16 Honor.

17 THE COURT: I'm trying to figure out,
18 how does that apply to ineffective assistance when
19 it's been ruled upon and it's in the record? That
20 would circumvent basically the Rules. If the judge
21 didn't allow it admitted at trial, how does he get
22 to admit it on PCR? That can't implicate appellate
23 counsel if he never saw it.

24 MR. DAVIS: I did question Mr. Dudek
25 about objections that were sustained by the State

1 would preserve the issue for appeal, and this is
2 the only --

3 THE COURT: Yeah, but he would have had
4 to present that at trial and have it marked as a
5 Court's Exhibit to preserve it, and he didn't. He
6 doesn't get to circumvent the Rules and do it here.
7 Again, he was his own lawyer.

8 MR. DAVIS: May I make it a Court's
9 Exhibit?

10 THE COURT: Any exception?

11 MR. JOHNSON: No, Your Honor.

12 THE COURT: It will be marked as a
13 Court's Exhibit.

14 (COURT'S EXH. 1, CAD report, was marked
15 for identification.)

16 BY MR. DAVIS:

17 Q. Mr. McCoy, in addition to the 911 tape
18 that was not presented to the defense and the CAD
19 report, which was not -- which the -- your trial
20 judge ruled against admission, are there any other
21 items of evidence that you believe give rise to a
22 Brady violation that should have been argued on
23 appeal?

24 A. Yes, sir, the fact that police failed
25 to collect evidence at the crime scene. Basically,

1 just -- basically, it was a lot of evidence, blood
2 evidence that was left on the crime scene that was
3 not collected and sent to SLED for testing, such as
4 blood DNA that was left on walls, on the doorknob,
5 on the room window -- in the woodwork on a window
6 that was leading to the backyard. That was never
7 collected and sent to SLED by the North Charleston
8 Police Department.

9 As far as the 911 tape, like I said,
10 the 911 tape was destroyed two months and 15 days
11 after my lawyer had requested it. That clearly
12 raised a violation. It was preserved for the
13 record.

14 THE COURT: I was very clear about
15 being responsive to the question; and he would have
16 had to have raised that at the time of trial. We
17 don't get to recreate the record. He's bound by
18 the report.

19 THE DEFENDANT: Yes, that's what we're
20 trying to show you. We're trying to show you --

21 THE COURT: Sir --

22 THE DEFENDANT: -- I have --

23 THE COURT: You don't get to reargue
24 it. You have to argue what was in the record at
25 the time.

1 THE DEFENDANT: Can I please speak,
2 Your Honor?

3 THE COURT: No, sir. Ask your next
4 question.

5 THE DEFENDANT: This is my first bite
6 of the apple.

7 THE COURT: Please ask the next
8 question, Mr. Davis.

9 MR. DAVIS: Yes, Your Honor.

10 THE COURT: And please control your
11 client in terms of making sure -- we need the
12 record to be clear, and I do not want sort of these
13 responses that are unresponsive that do not aid the
14 Court in rendering a ruling. So I need you to ask
15 him specific questions that are targeted at him
16 eliciting the information he needs for his
17 post-conviction relief action as it regards
18 appellate counsel.

19 MR. DAVIS: And, Your Honor, just to
20 make the record clear, I would move to strike the
21 prior testimony right before you stopped him.

22 THE COURT: Sustained.

23 MR. DAVIS: Thank you, Your Honor.

24 And, Your Honor, specifically what part
25 of that testimony?

1 THE COURT: The part that was
2 nonresponsive, which was pretty much the --

3 MR. DAVIS: When he started about the
4 911? Because I had asked him about the -- any
5 other evidence. He did talk about some blood
6 evidence that was not collected.

7 THE COURT: How is it relevant? He
8 didn't raise it. He was his own lawyer, he should
9 have raised it at the time of trial.

10 MR. DAVIS: And he did, Your Honor.
11 It's in the record.

12 THE COURT: Blood evidence?

13 THE DEFENDANT: Yes, ma'am.

14 THE COURT: Anything that's in the
15 record that was raised and ruled on, he can talk
16 about how Mr. Dudek was ineffective, but we cannot
17 recreate a record that didn't exist. He's bound by
18 the record, he created it.

19 MR. DAVIS: And, Your Honor, just to
20 point you --

21 THE COURT: Mr. Dudek cannot appeal
22 something that was not preserved.

23 MR. DAVIS: Just to point you to where
24 I think Mr. McCoy is talking about, I believe
25 that's pretrial motion between pages 47 and 64.

1 THE COURT: Thank you.

2 MR. DAVIS: Yes, Your Honor. Also,
3 Your Honor, we would refer you to when Officer
4 Bunker from North Charleston Police Department
5 testified and it's in the record at 389 to 401. He
6 testified about what was collected and what was not
7 collected.

8 THE COURT: Only if he raised it and
9 it was ruled upon. You don't get to just appeal
10 something in the record just because it's
11 mentioned. You have to make a contemporaneous
12 objection and it has to be specific. It can't be a
13 general objection, and it has to be ruled upon;
14 otherwise, it's not preserved.

15 BY MR. DAVIS:

16 Q. Mr. McCoy, you were aware that certain
17 items of evidence in your case were collected and
18 submitted for testing?

19 A. Yes. I was aware that some evidence
20 was collected, but evidence that was available to
21 -- evidence that...

22 Q. And there's other evidence that was not
23 collected however and submitted for testing?

24 A. Yes, sir. And I raised that issue in
25 front of -- I raised that issue to Judge Young,

1 that there was evidence that was not collected at
2 the crime scene. I mean, it was like throughout
3 the whole trial we had pretrial motions on it, and
4 I keep on telling the judge that there was evidence
5 that was tampered with. There was evidence that
6 was not tested during the course of the trial.

7 Q. There was a witness, Ms. Williams, who
8 testified at your trial; is that correct?

9 A. That's her married name. Her name was
10 Corinda Williams Snowden.

11 Q. And at the trial in which you
12 represented yourself, did she give testimony that
13 you were familiar with or unfamiliar with?

14 A. Sir?

15 Q. Did she give testimony that you were
16 familiar with or unfamiliar with?

17 A. Unfamiliar.

18 MR. JOHNSON: Objection as to
19 relevance, Your Honor.

20 THE COURT: Sustained. Proceed.

21 BY MR. DAVIS:

22 Q. She had testified at your original
23 trial as well, correct?

24 A. Sir?

25 Q. Ms. Williams had testified at your

1 original trial as a witness --

2 A. Yes, sir.

3 Q. The State presented her at your second
4 trial, again, as a witness, correct?

5 A. Yes.

6 Q. And the second trial she gave a
7 different story, correct?

8 A. Yeah. She gave testimony --

9 MR. JOHNSON: Objection to the form of
10 the question, Your Honor. This is leading.

11 THE COURT: Please rephrase.

12 MR. DAVIS: Your Honor, in --

13 THE COURT: No. No.

14 MR. DAVIS: -- lieu of your prior
15 order, I'm trying to keep in control and trying to
16 limit -- I certainly understand, but I'm almost to
17 the point of asking that this be a situation where
18 I can lead.

19 THE COURT: I'm going to give you a
20 little latitude, but I need you to --

21 MR. DAVIS: Thank you, Your Honor.

22 So if I can have -- I know it's a
23 leading question, but --

24 THE COURT: I'll give you a little
25 latitude. Sir, you may answer the question.

1 BY MR. DAVIS:

2 Q. The State -- I believe what I said is,
3 the State called her as a witness in the second
4 trial and she gave a different story at the second
5 trial; is that correct?

6 A. Yes, sir.

7 Q. Were you ever made aware of that before
8 she took the stand?

9 A. No, sir. I actually filed a Brady -- a
10 second Brady motion right before my trial asking --
11 and Roger Young told the State that --

12 MR. JOHNSON: Objection; hearsay.

13 THE COURT: Sustained.

14 THE DEFENDANT: That's not hearsay.
15 Oh, I'm sorry. I did file a second motion for the
16 State to turn over evidence. I think that motion
17 was filed -- it was filed like two days before my
18 trial. I filed a motion asking for the State to
19 turn over all evidence, and they failed to turn
20 over that evidence. That issue was --

21 MR. JOHNSON: Objection --

22 THE COURT: Yeah. I need to know
23 specifically what evidence he's talking about. If
24 he's talking about somebody testifying
25 inconsistently, that would be a trial transcript

1 and it would be his responsibility to procure that
2 since he was representing himself.

3 I need clarity on what it is you're
4 saying the State failed to provide him, because
5 they don't have any duty to provide him with a
6 transcript.

7 MR. DAVIS: No, Your Honor, -- I'll
8 summarize.

9 THE COURT: It's not clear.

10 MR. DAVIS: I apologize. At the first
11 trial Ms. Williams testified, and then at the
12 second trial she was called again by the State. At
13 her second trial, she -- her story had changed in
14 between the two trials, and Mr. McCoy has testified
15 that he did not receive any notification by the
16 State --

17 THE COURT: They don't have to. They
18 can change theories, and it's for him to get a copy
19 of the transcript and to impeach her. If he didn't
20 do that then -- and that's what I'm trying to get
21 clarity on.

22 The State didn't have any duty to
23 provide him with anything. They don't have to tell
24 him their theory.

25 Q. And under Giglio, impeachment evidence

1 they would require --

2 THE COURT: If they had it in writing;
3 otherwise, it is what you would call -- if they
4 didn't have a written statement from her changing
5 her position, they didn't have to turn over
6 anything. They do not have to tell him their trial
7 strategy.

8 If she testified inconsistently, then
9 he should have procured a copy of the transcript
10 and impeached her with it. That's how you do it,
11 an extraneous statement under oath. And if he
12 needed time to have obtained it, I'm certain that
13 the Court would have given him that opportunity,
14 especially since he was representing himself.

15 But he would have to prove that the
16 State had some written statement from her or some
17 report, something, where she was changing her story
18 to make that issue viable. Do you understand? And
19 I guess I'm trying to --

20 MR. DAVIS: The only objection, Your
21 Honor, I would argue that whether written or not,
22 the State is aware of new evidence --

23 THE COURT: Yeah, but he's his own
24 lawyer. He should have raised that at the time,
25 and if he didn't, it's not preserved; and appellate

1 counsel could not raise something that was not
2 preserved. He can't be ineffective against
3 himself. Now, if we had a lawyer that failed to do
4 it, that's different, but he chose to represent
5 himself. Next question.

6 BY MR. DAVIS:

7 Q. Do you have a complaint as to appellate
8 counsel not raising the issue as to jury
9 instructions?

10 A. Yes, sir.

11 Q. And can you tell the Court what
12 evidence you felt led to grounds for an appeal of
13 the jury instructions?

14 A. (No response)

15 Q. Okay. I'll ask it this way: Did you
16 request a voluntary manslaughter instruction in
17 your trial?

18 A. Yes, sir, I did.

19 Q. Did the Court grant that and give that
20 instruction, or fail to give that instruction?

21 A. The judge failed to give that
22 instruction.

23 Q. Was there any other issues about the
24 jury instructions or voluntary manslaughter that
25 you felt needed to be raised by appellate counsel?

1 A. Repeat that.

2 Q. Were there any other issues with the
3 jury instruction involving voluntary manslaughter
4 that you have a complaint about not being raised by
5 appellate counsel?

6 A. There was evidence, like I said, in my
7 first trial. And I guess Deadra Jefferson was the
8 judge during that first trial. My lawyer had
9 requested at the time for the lesser included
10 offence and she denied that motion. There was
11 evidence that showed that in the case -- in my
12 case.

13 When I tried to do it in my second
14 trial, the judge denied every motion. Every motion
15 I filed, he denied every motion that I raised. And
16 I actually did raise that issue, because there was
17 evidence in the first case that showed a lessor
18 included offence of murder.

19 Back to the question about the Batson,
20 in the second trial transcript, page 39, lines 10
21 through 16, and page 40, lines 1 through 25, and
22 page 44, lines 1 through 25, the Batson hearing that
23 was held --

24 MR. JOHNSON: Objection; this is not
25 responsive. He's talking Batson versus voluntary

1 manslaughter.

2 THE DEFENDANT: I'm getting to that,
3 sir.

4 THE COURT: No, sir. You need to be
5 responsive to the question.

6 Mr. Davis, ask the next question. The
7 objection is sustained.

8 BY MR. DAVIS:

9 Q. Other than the voluntary manslaughter
10 charge, is there another jury charge that you feel
11 the appellate counsel did not raise that should
12 have been raised?

13 A. Yes, the Batson hearing. I made an
14 objection to the jury -- to the Solicitor striking
15 all black jurors and seating all white jurors.
16 There was a Batson hearing that was held outside
17 the -- well, inside the presence of the jury.

18 There was a juror -- Juror No. 136 was
19 a black male, he was struck. And the State's
20 position was that he -- the reason why they struck
21 him was because he was reluctant to serve and he
22 lived in North Charleston, but then they seated two
23 white Americans who both lived in North Charleston
24 and was reluctant to serve.

25 And I objected, and the judge denied --

1 and I tried to show the judge that -- the judge
2 allowed me to show their race- and gender-neutral
3 explanation given by the State was mere pretext
4 pursuant to Batson v. Kentucky. That's in the
5 record.

6 MR. DAVIS: Your Honor, if we could
7 have just one moment?

8 THE COURT: Uh-huh.

9 MR. DAVIS: Mr. McCoy, I have no other
10 questions. The State may have some questions for
11 you.

12 THE COURT: You may proceed.

13 MR. JOHNSON: Just a couple of
14 questions, Your Honor.

15 THE COURT: Yes, sir.

16 CROSS-EXAMINATION

17 BY MR. JOHNSON:

18 Q. Mr. McCoy, concerning Ms. Williams'
19 married name, Corinda being the first name, you
20 stated that she testified at the first trial and
21 the second trial, correct?

22 A. Yes, sir.

23 Q. And that your claim is she gave a
24 different statement in the second trial than the
25 first trial, correct?

1 A. Yes, sir. Say that again.

2 Q. That she testified differently in the
3 second trial than she did the first trial?

4 A. Yeah. She -- she stated some things
5 that my defense -- we didn't have adequate time to
6 prepare a defense for her testimony. It was --
7 like I said, I filed a motion right before my trial
8 asking the State to turn over any new evidence or
9 any new evidence they had, and Judge Young told the
10 State to --

11 MR. JOHNSON: Objection to hearsay,
12 Your Honor.

13 THE COURT: Objection.

14 THE DEFENDANT: Well, it was -- a
15 motion was filed with the Court for the State to
16 turn over the evidence, and the evidence was not
17 turned over and it was new. She was not a surprise
18 witness and she testified to something totally
19 different than the first trial. And we wasn't
20 prepared for that defense.

21 BY MR. JOHNSON:

22 Q. You had an opportunity to cross-examine
23 Ms. Williams, correct?

24 A. Yes, but --

25 Q. Yes, or no?

1 A. Yes, sir, but at the same time, her --
2 the testimony was critical because I would have to
3 investigate what she had -- I would have to prepare
4 a defense for her testimony, because I didn't have
5 a defense for the testimony. I mean, she -- she --
6 her testimony -- what she stated in her testimony
7 was that my --

8 MR. JOHNSON: Objection to hearsay,
9 Your Honor.

10 THE COURT: Sustained.

11 THE WITNESS: Well, it's in the record.
12 She testified to totally something different. I
13 didn't have a chance to prepare a defense and I
14 didn't have adequate time.

15 Like, under the Sixth Amendment states
16 that I have a right --

17 MR. JOHNSON: Objection to any legal
18 argument, Your Honor.

19 THE COURT: I will give him a little
20 latitude -- sir, don't respond when an objection is
21 pending.

22 THE DEFENDANT: I'm sorry.

23 THE COURT: You may answer the
24 question.

25 THE DEFENDANT: According to the Sixth

1 Amendment, it states that I have a right to be --
2 an accusation against me, I have the right to
3 confront the witnesses and evidence against me. I
4 was never given ample opportunity to confront that
5 evidence. I was not able to prepare a defense
6 against that evidence.

7 BY MR. JOHNSON:

8 Q. But you were given three statements she
9 gave to the police in this case, correct?

10 A. Yes, sir.

11 Q. And you cross-examined her concerning
12 those statements, correct?

13 A. Yes, sir.

14 Q. And your argument was that the first
15 statement was the truth, right? And that her third
16 one was a lie?

17 A. Well, she testified to -- I don't
18 understand. Repeat that.

19 Q. So your argument at trial was that her
20 first statement to the police, which you were
21 provided, that that was the truth of what happened
22 that night, correct? Or that early morning?

23 A. It corroborates the 911 tape recording,
24 yes, sir.

25 Q. But you had all three statements,

1 correct?

2 A. Yes, sir.

3 Q. And you cross-examined her concerning
4 those statements?

5 A. Yes, sir.

6 MR. JOHNSON: Okay. No further
7 questions, Your Honor.

8 THE COURT: Any redirect, Mr. Davis?

9 MR. DAVIS: Your Honor, if I could have
10 a moment?

11 THE COURT: Uh-huh.

12 MR. DAVIS: No additional questions,
13 Your Honor.

14 THE COURT: Any further witnesses from
15 the applicant?

16 MR. DAVIS: No additional witnesses.

17 THE COURT: State have any witnesses?

18 MR. JOHNSON: No, Your Honor.

19 THE COURT: Any closing arguments from
20 the applicant or the State?

21 THE DEFENDANT: Yes, ma'am.

22 THE COURT: No, sir, you don't get to
23 speak. Your lawyer speaks.

24 Mr. Davis, do you --

25 THE DEFENDANT: At this time, I would

1 like to fire my attorney and proceed --

2 THE COURT: No, sir; that request is
3 denied.

4 Mr. Davis, do you have any closing
5 argument?

6 MR. DAVIS: I do. If I could just have
7 a moment.

8 THE COURT: Certainly, I will give you
9 a moment to collect your thoughts.

10 THE DEFENDANT: Your Honor, the reason
11 why I want to fire --

12 THE COURT: Sir, I have already ruled,
13 and there's to be no further discussion once the
14 Court has ruled. Thank you.

15 Mr. Davis will argue all of your
16 grounds.

17 MR. DAVIS: Thank you. May it please
18 the Court?

19 THE COURT: Yes, sir.

20 MR. DAVIS: Your Honor, I will not --
21 we made the record as to Ms. Proctor. I'm not
22 going to argue anything on that. I respect your
23 decision on that.

24 THE COURT: Well, it's not my decision.
25 It's Judge Hyman's decision. It's the law of the

1 case and it hasn't been appealed. I don't know
2 whether you will be able to appeal because it was
3 dispositive, and I think there could be a valid
4 argument that it should have been appealed within
5 30 days because it was a final judgment.

6 But I'm sure the court of appeals will
7 take that up and make the decision if you should
8 desire to pursue it.

9 MR. DAVIS: Moving in the order in
10 which the testimony was presented, we make the
11 argument that appellate counsel was ineffective in
12 failing to raise any -- all valid arguments on
13 appeal. I will not belabor the point. The record
14 is quite in depth.

15 What I will point out, a couple of
16 things to the Court is, we would argue that the
17 only ground that was raised on appeal was the issue
18 of Mr. McCoy representing himself pro se. That was
19 the only issue, but we would direct the Court to
20 other issues.

21 We would direct the Court to the jury
22 instruction issue. We believe there is sufficient
23 ground on the record that voluntary manslaughter
24 should have been given. It was preserved for
25 appeal and was not raised.

1 The testimony is that failing to give a
2 lesser included when available could be grounds for
3 any reversal of the convictions; so, therefore, we
4 argue that both -- both prongs of Strickland have
5 been met; that Mr. Dudek was ineffective in raising
6 that and it could affect the outcome of the case.

7 The more general argument, Your Honor,
8 is to the issue of what evidence was produced or
9 not. I'm going to direct the Court -- if I may
10 approach, Your Honor?

11 THE COURT: You can just give me a
12 citation. I'm just going to recycle all the paper.

13 MR. DAVIS: Yes, Your Honor.
14 334SC515, Gibson v. State, a 1999 opinion. We cite
15 that for the proposition that a Brady claim can be
16 made on a PCR and it can be successful on PCR. The
17 summary of that presentation, Your Honor, is that
18 there was witness testimony that the State was
19 aware of prior to the second trial that was not
20 delivered to the defense. There was a 911 call and
21 a corresponding report that was not obtained or
22 given to the defense prior to his trial.

23 And, finally, there was tangible
24 biological evidence that was at the scene that was
25 not obtained by law enforcement and submitted for

1 testing, unlike other items that were submitted for
2 testing. We would argue that those areas of
3 failures on behalf of the State, if they do not
4 lead to the level of prosecutorial misconduct, that
5 we would argue that they do, they would at least
6 rise to the level of Brady violations.

7 And the Gibson case talks about the
8 fact that, that failure to comply with Brady is
9 sufficient enough for reversal on a PCR claim.

10 So we would argue that we have made our
11 case as to ineffective assistance of appellate
12 counsel for failing to raise issues, and those
13 issues not only deal with jury instructions, but
14 also underlying Brady violations, which can either
15 be a grounds for reversal on ineffective assistance
16 of appellate counsel, or we would argue they stand
17 alone and could provide grounds for a reversal of
18 his conviction and relief under the PCR Act based
19 upon specific violations of Brady.

20 That's the presentation we have. Thank
21 you.

22 THE COURT: Would the state like to
23 respond?

24 MR. JOHNSON: May it please the Court?

25 I will take them in reverse order, if

1 you don't mind. First, as to the production of
2 evidence. First of all, you can't produce anything
3 that you don't possess. Just because the SLED
4 investigation and the investigators did not collect
5 the evidence, does not mean that it is a Brady
6 violation.

7 He was able to cross-examine those
8 investigators on that issue, he argued it in his
9 closing; and, therefore, it's the State's position
10 that doesn't lead to Brady because it doesn't --
11 it's their call whether or not to collect it or
12 not.

13 Now, if they did have evidence and
14 didn't turn it over, that's a different case.
15 That's not the case we have here today.

16 As far as not having statements, in
17 this Gibson case I was briefly reviewing, applicant
18 already testified that he was given three
19 statements prior to his trial, and he claims that
20 the testimony that Ms. Williams gave in the first
21 trial and the second trial differed; however, if
22 you -- once you, I'm sure you have already, review
23 the record, you realize that third statement she
24 gave to law enforcement is substantially the exact
25 same testimony she gave while on the witness stand.

1 And the applicant had the opportunity to
2 cross-examine her concerning that and concerning
3 the first statement that she gave, which she claims
4 is the actual truth of the situation.

5 He then argued it during closing and so
6 I -- it's the State's position that he was fully
7 aware of all of her testimony and, therefore, there
8 is no Brady and/or Giglio violation in this case,
9 Your Honor:

10 As far as the jury instruction, the
11 case -- the State would cite the case of State v
12 Fields, at 356SC517, appellate -- court of appeals
13 case 2003, that states that for a defendant to be
14 entitled to a jury instruction on a lesser included
15 offense, there must be some evidence in the record
16 that would tend to show the defendant is guilty of
17 a lesser included.

18 As Your Honor knows, voluntary
19 manslaughter is the killing of another, but it also
20 has to have sufficient legal provocation and a lack
21 of a cooling off period. There is no sufficient
22 legal provocation in the record, if you read the
23 facts as presented by the witnesses or applicant's
24 -- don't worry about the beginning -- but as
25 they're in Ms. Williams' apartment, he and his

1 brother are arguing over whether or not the fact
2 that he, Mr. McCoy, shot -- fired some shots out in
3 the parking lot. His brother gets into an argument
4 with him. The victim happens to step in to cool
5 him off and that's when Mr. McCoy turns and pops
6 him five times with the handgun.

7 There is no sufficient legal
8 provocation. The victim in this case, according to
9 the record, did not start a fight, did not provoke
10 anything; therefore, he would not be entitled to a
11 lesser included jury instruction, and I do believe
12 Judge Young correctly denied that request and
13 denied giving the jury the option of a lesser
14 included.

15 And, also, then as to the ineffective
16 assistance of appellate counsel, Mr. Dudek
17 testified what he typically does in this case is
18 read the transcript, look for any appellate issues,
19 any appealable issues, any preserved issues, and
20 that he thought the best chance of winning the case
21 was to attack whether or not the decision to go pro
22 se by Mr. McCoy was voluntarily and intelligently
23 made in this case. He -- the court of appeals
24 found that it was, so that is not an issue here
25 today.

1 But, you know, according to Mr. Dudek's
2 testimony, I believe he certainly provided
3 effective assistance of counsel based on his
4 experience and the facts of the case, and the State
5 would ask you to deny this application, Your Honor.

6 THE COURT: Anything further from the
7 applicant?

8 MR. DAVIS: Your Honor, two things. On
9 the issue of voluntary manslaughter, we would point
10 out that there was testimony about a scuffle. So
11 we would -- and I'll let you of course review that,
12 but I will direct you to --

13 THE COURT: I can read it, but it's
14 discretionary. It's a call of the judge; is it
15 not?

16 MR. DAVIS: It is.

17 THE COURT: And the standard is abuse
18 of discretion, and if there's any evidence to
19 support his decision then I'm pretty much --

20 MR. DAVIS: Just --

21 THE COURT: And cases are presented
22 differently. You know, when you have a mistrial as
23 we had in this case, the State often changes their
24 strategy as to how they're going to -- and their
25 theory of the case. So that can often change the

1 fact, and that is what appeared happened in the
2 second trial.

3 MR. DAVIS: Finally, Judge, simply, I
4 don't -- forgive me if Mr. Johnson mentioned this,
5 not only items of evidence, and we understand your
6 position, that were not collected at the scene, but
7 we do have evidence that the 911 call was in the
8 possession of law enforcement and, you know
9 testimony by Mr. Dudek and, certainly, the law in
10 South Carolina is possession of evidence by law
11 enforcement is impugnable and the State to have
12 knowledge and, therefore, a requirement under
13 Brady. Those are the only two things that I would
14 raise to the Court.

15 Thank you, Your Honor.

16 THE COURT: Thank you.

17 I've reviewed the totality of this
18 record. And going probably in reverse order, we're
19 only dealing with appellate counsel. Mr. Dudek
20 reviewed the entirety of this record. Based on
21 what I've reviewed, I agree with him that he
22 appealed what he felt was -- and I want to use his
23 words, not mine. He appealed what he thought was
24 the most winnable issue in the case after reviewing
25 the transcript.

1 And based on his experience, he could
2 not, of course, raise any issues that were not
3 preserved. And he very aptly stated that it was
4 Mr. McCoy's responsibility to raise any issues and
5 have them ruled upon.

6 And he did raise many issues which were
7 -- of which were ruled upon contemporaneously by
8 the Court. And Mr. Dudek testified that he felt
9 the most winnable issue was the order by Judge
10 Dennis to relieve Ms. Proctor and to have her act
11 as standby counsel in the case and allow Mr. McCoy
12 to represent himself.

13 But the record really is quite thorough
14 and the appellate court wrote a very thorough
15 opinion regarding that.

16 He raised several issues regarding
17 appellate counsel as to why he did not appeal
18 certain issues. And it appears from my own review
19 of the record, that I, again, agree with Mr. Dudek
20 that these issues were certainly not winnable. He
21 could have raised them, but it is not ineffective
22 for him failing to raise something that in good
23 faith he does not in his professional opinion feel
24 that the applicant would have prevailed upon.

25 And dealing first with the -- with the

1 Batson issue, it is very clearly covered at page 44
2 of the transcript, and it goes from there. Very
3 clearly the State articulates race neutral reasons
4 for their strikes. Mr. McCoy is unable then to
5 meet his burden once it shifted to him to establish
6 pretext.

7 While he argued some new things today,
8 he cannot argue something new today. He's bound by
9 what was preserved in the record, and the Court
10 very clearly ruled he could not meet that burden.
11 And I do not find it was ineffective assistance for
12 Mr. Dudek to have raised that in the appeal. As it
13 appears from this record, he would not have
14 prevailed upon it.

15 As regards to the Batson issue, that
16 was raised as well. And he raised that in the
17 transcript and indicated, and I'm going to
18 paraphrase in the interest of time, that there was
19 certain testimony that was hypothecated, lost,
20 obscured, kept from him, and the Court
21 contemporaneously ruled on that issue as well.

22 And there is no evidence to support
23 that in the record, that something was -- in order
24 for it to raise to the level of prosecutorial
25 misconduct, he would have to establish that the

1 prosecutor knew that he had it either within his
2 actual possession or he could reach out to law
3 enforcement; in other words, that he had
4 constructive ability to obtain it. And there's no
5 evidence in the record to support that. And
6 appellate counsel is bound by that record.

7 Again, the risk that you run when you
8 represent yourself, which is a lack of objectivity,
9 as well as knowing the mechanisms to obtain
10 additional information that was available at the
11 time that could have assisted him.

12 And I'm not certain -- and I'm going to
13 review Mr. Neely's affidavit, but based on what was
14 represented to the Court, I don't -- there's
15 nothing in there that really contravenes or
16 contradicts what's in this record, and I don't
17 think it would have changed anything in terms of
18 the appellate posture of the case.

19 He raised the Brady issues at page 653
20 and the Court ruled on it. And there is nothing in
21 the record, again, for appellate counsel to have
22 pursued in that regard.

23 THE DEFENDANT: Actually, it was 631
24 and 636 --

25 THE COURT: Sir, while the Court is

1 ruling, you don't speak.

2 THE DEFENDANT: I'm sorry.

3 THE COURT: As regards to the lesser
4 included charge, the Court is required to give a
5 charge that accurately reflects the facts that are
6 presented in the case. It appears that the State
7 changed somewhat their theory of this case, and
8 very -- in minor ways, but nonetheless, the Court
9 is not bound by how a trial was tried the first
10 time. It is bound by the facts that are developed
11 at that time.

12 Sir, please don't interact with anybody
13 in the gallery, and I expect court security to
14 handle that please. I don't expect that to happen
15 again with him or any other applicant that is
16 present.

17 Bottom line is, Judge Dennis
18 entertained the issue, Ms. Proctor, as standby
19 counsel, assisted Mr. McCoy in raising the issue.
20 And the Court even gave time overnight to fashion
21 something and to think about it and to reargue it
22 the next morning.

23 It was argued and the Court found there
24 was no basis for a voluntary manslaughter charge.
25 And that certainly was within the court's

1 prerogative, within its discretion. And I can't
2 discern anything that would rise to an abuse of
3 discretion such -- or any factual circumstance in
4 the record upon which Mr. Dudek could have
5 successfully prevailed on appeal, or in good
6 conscious really to have raised it.

7 Again, you don't just raise things in
8 an appeal just to raise them. You raise them
9 because you think you can prevail, and there's
10 nothing in the record to support that.

11 And in addition, if he felt that there
12 was conflicting testimony, it was incumbent upon
13 him to get the transcript from the previous trial
14 and to have used that transcript to impeach the
15 witness, but I don't have anything before me that
16 validates or corroborates that argument that the
17 testimony was inconsistent.

18 And there is ample testimony in the
19 record that he was provided with three separate
20 statements from the witness and that he was able to
21 fully -- he was fully aware of what the substance
22 of her testimony was, and he was able to
23 cross-examine her regarding those issues.

24 Based on what's been presented to the
25 Court, the application is denied. The State will

1 provide the Court with a proposed order within
2 20 days of today by e-mail. A copy of that order
3 should be transmitted to Mr. Davis at the same time
4 it is transmitted to the Court, and within 30 days
5 the Court will issue an order in this case.

6 I never sign orders exactly the way the
7 State presents them. As a matter of fact, I
8 generally rewrite them. So when I'm done with it,
9 it will be provided to everybody. I use some of
10 it, but I have a way I like PCRs written and so I
11 end up rewriting some portions of it.

12 We'll give you a copy of the form order
13 at the conclusion of the hearing today when we take
14 them all downstairs.

15 MR. JOHNSON: May I request 30 days
16 with the holidays coming up, and I have four
17 appeals --

18 THE COURT: Oh, I forgot it's the
19 holidays. Yeah, that will work, but I really --
20 because, see, what happens, court starts back up
21 and then --

22 MR. JOHNSON: I will try to get it done
23 as soon as I can.

24 THE COURT: I've already put 20 days
25 in there, but I'll give you some time. If you can

1 get it to me before then -- within that time that's
2 fine, but if not, we'll work with you.

3 But they tend to multiply and then I
4 get behind. And I like to get them out timely,
5 because if Mr. McCoy wants to appeal, I want him to
6 have the ability to do that. I don't want him to
7 be delayed in appeal because we haven't gotten an
8 order done.

9 MR. JOHNSON: Yes, ma'am.

10 THE COURT: Okay. Thank you, sir.
11 Have a good day.

12 (These proceedings were concluded at
13 12:05 p.m.)

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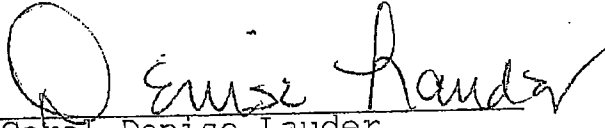
25

1 CERTIFICATE OF REPORTER
2

3 I, Carol Denise Lauder, Registered
4 Professional Reporter and Notary Public for the
5 State of South Carolina at Large, do hereby certify
6 that the foregoing transcript is a true, accurate,
7 and complete record.

8 I further certify that I am neither related
9 to nor counsel for any party to the cause pending
10 or interested in the events thereof.

11 Witness my hand, I have hereunto affixed my
12 official seal this 23rd day of August, 2017 at
13 Charleston, Charleston County, South Carolina.
14

15
16 
17 Carol Denise Lauder
18 Registered Professional
19 Reporter, CP
20 My Commission expires
21 August 2, 2017
22
23
24
25

cc
AG
AT

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Terrell McCoy, SCDC# 256070

Applicant / Petitioner

vs.

State of South Carolina,

Respondent.

COURT OF COMMON PLEAS

Case # 2013-CP-10-01994

ORDER

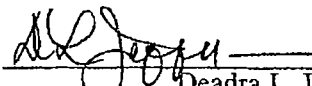
FILED
2015 DEC 15 PM 1:26
JULIE J. ARMSTRONG
CLERK OF COURT

This post-conviction relief case came before the court for a hearing. Having now heard this matter, the court orders as indicated herein.

- ☒ 1. The application for post-conviction relief is hereby: ☒ denied ☐ granted under advisement; a formal order will be filed (see below - No.6)
- ☐ 2. Motion(s) was/were heard in this case and the court orders:
☐ The motion to dismiss and/or for summary judgment is hereby ☐ granted ☐ denied under advisement based upon the ☐ statute of limitations and/or ☐ the successive nature of the application or ☐ other reason as follows:

- ☐ 3. A conditional order of dismissal was previously filed in this case. Upon review of the matter, the court finds:
☐ Good cause as to why the case should not be dismissed has been shown in response to the order of dismissal; therefore, a hearing on the merits of the application shall be scheduled.
☐ The court has considered the response to the conditional order of dismissal and finds that good cause has not been shown or ☐ no response has been filed to the conditional order of dismissal; therefore, the application is hereby dismissed.
- ☐ 4. The application was freely, voluntarily, and intelligently withdrawn as indicated on the record; therefore, this case is dismissed ☐ with prejudice ☐ without prejudice.
- ☐ 5. Other: _____
- ☒ 6. The court further orders:
☒ The ☒ Attorney General ☐ Applicant's counsel is directed to submit to the court a proposed order and to serve the order on opposing counsel within 20 days.
☐ Both sides are directed to submit proposed orders to the court and to serve the orders on each other within _____ days.
☐ The court does not request proposed orders.

IT IS SO ORDERED.


Deadra L. Jefferson
Presiding Judge

Date: December 14, 2015

Charleston, S.C.

Court Reporter: Denise Lauder

Rev 08/08/01

1005

STATE OF SOUTH CAROLINA
COURT OF CHARLESTON

IN THE COURT OF COMMON PLEAS
C/A# 2013-CP-10-1994

Terrell L. McCoy, 256070
Applicant

V.

STATE OF
South Carolina,
Respondents

MOTION TO RELIEVE
COUNSEL

FILED
JAN -8 PM 4:41
JULIE J. ARMSTRONG
CLERK OF COURT

Pursuant to Faretta V. California, The Applicant hereby
move this court to ~~relieve~~ ^{relieve} counsel, Rodney Davis, and to
proceed pro se in the above civil action. Applicant is
knowingly, and intelligently waiving his right to Counsel and
understand the danger and disadvantage of self representation.

Applicant request that Counsel be removed immediately, so
that he is able to perfect any appeals in this above action.

December 21, 2015

x Terrell McCoy
BRIE Manon 129
4460 Broad River rd
Columbia, SC 29210

13-CP-10-1994

PROOF OF SERVICE

I, Terrell McCoy, The Applicant, hereby certify that on December 21, 2015, I personally placed a motion to Relieve Counsel Mr. Rodney Davis on to a pre paid stamped envelope to be mailed U.S. postal to the following address.

Julie J. Armstrong
Clerk of Court, C.P.
Charleston County
100 Broad Street, Suite 106
Charleston, SC 29401

X Terrell McCoy
BPCI Marion 129
4460 Broad River Rd
Columbia, SC 29210

BX

JULIE J. ARMSTRONG
CLERK OF COURT

2016 JAN -8 PM 4:14

FILED

Terrell McCoy 256070

BRCI Marion 129

4460 Broad River Rd

Cola SC 29210

December 21, 2015

The Honorable Julie J. Armstrong

Clerk of Court C. P.

Charleston County

100 Broad Street, Suite 106

Charleston, SC 29401

RE: Terrell McCoy V. The State of SC

C/A 2013-CP-10-1994

Dear Clerk of Court, Enclosed please find the Applicant's motion to relieve counsel to be filed in your court in the above reference case. I have also enclosed proof of service as Evidence of Service upon you. Thank you.

I am

Terrell McCoy

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) FIRST JUDICIAL CIRCUIT
CASE NO: 2013CP1001994
TERRELL McCOY,)
Applicant.)
vs.)
THE STATE OF SOUTH CAROLINA,)
Respondent.)

**NOTICE OF APPEARANCE
OF COUNSEL FOR APPLICANT**

FILED
2016 MAR 24 PM 12:56
JULIE J. REHS-STRONG
CLERK OF COURT
BY

COMES NOW, Melisa W. Gay, Esquire of the Charleston County Bar, whom
does give notice of her general appearance as counsel for the Applicant, Terrell McCOY,
in the above-captioned action.

Respectfully Submitted,


Melisa W. Gay, Esquire
MELISA W. GAY LLC.
Post Office Box 2144
Mt. Pleasant, SC 29465-2144
Tel.: (843) 856-0580
Fax: (843) 856-0590

ATTORNEY FOR APPLICANT
Terrell McCoy

Charleston, South Carolina
Dated: March 10, 2016

Melisa W. Gay, LLC
Attorney and Counselor at Law

Melisa W. Gay

Post Office Box 2144
Mt. Pleasant, South Carolina 29465-2144

Office (843) 856-0580
Facsimile (843) 856-0590

March 22, 2016

Charleston County Clerk of Court
101 Meeting Street
Charleston, SC 29401

Re: Terrell McCoy v. State of South Carolina
Case No: 2013-CP-10-01994

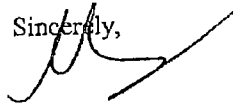
Dear Madame Clerk:

Enclosed please find an original and two copies of a Notice of Appearance of Counsel in the above referenced matter.

Upon filing, please return the certified copies to me in the self-addressed, stamped envelope that I have provided for your convenience. If you have any questions or concerns, please do not hesitate to contact my office at your earliest convenience.

Thank you for your attention to this matter.

Sincerely,



Melisa W. Gay

Enclosures

1010

cc
AB
AT

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT
CASE NO:
2013CP1001994
TERRELL MCCOY,)
Applicant)
vs.)
STATE OF SOUTH CAROLINA)
Respondent.)

ORDER SUBSTITUTING COUNSEL

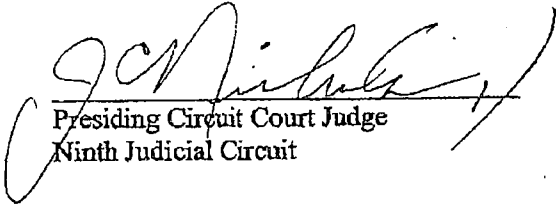
FILED
2016 MAR 29 AM 9:38
JULIE J. ARMSTRONG
CLERK OF COURT

IT APPEARING unto this Court that TERRELL MCCOY, the Applicant in the above-captioned matter, was previously represented by RODNEY DAVIS, Esquire; and

IT FURTHER APPEARS that the Applicant, TERRELL MCCOY, has retained Melisa W. Gay, Esquire as his counsel; therefore, it is hereby

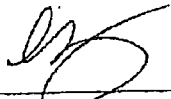
ORDERED, ADJUDGED AND DECREED that Melisa W. Gay, Esquire be and is hereby substituted as counsel of record for the above-captioned Applicant, TERRELL MCCOY; and that RODNEY DAVIS, Esquire is hereby relieved of all further duties of representation for the above-captioned Applicant.

IT IS SO ORDERED!

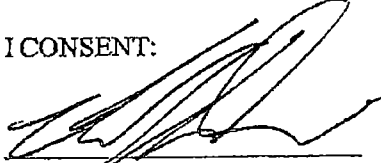

Presiding Circuit Court Judge
Ninth Judicial Circuit

Dated: 3/29, 2016
Charleston, South Carolina

I SO MOVE:


Melisa W. Gay
Attorney at Law

I CONSENT:


RODNEY DAVIS
Attorney for Applicant

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Terrell McCoy, #256070,

2013-CP-10-1994

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

Presiding Judge:
Applicant's Attorney:
Respondent's Attorney:
Trial Counsel:
Appellate Counsel:
Date of Hearing:
Court Reporter:

Hon. Deadra L. Jefferson
Rodney D. Davis, Esquire
J. Rutledge Johnson, Esquire
Lorelle Proctor, Esquire (standby counsel)
Robert M. Dudek, Esquire
December 14, 2015
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.

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At the hearing, Applicant testified on his behalf. Bob Dudek, Esquire, also testified.¹ 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

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 murder² (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. 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. Judge Young reduced the Applicant's sentence to forty (40) years imprisonment.

¹ Robert M. Dudek, Esquire of the Office of Appellate Defense testified by telephone without objection.

² 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, -20 (2003), 16-1-60 (2003), 17-25-45 (2003).

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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.

ALLEGATIONS

In his applications, the Applicant alleges that he is being held in custody unlawfully for the following reasons:³

1. Conviction is in violation of U.S. Constitution
 - a. Due Process Violation- Malice instruction given by the trial judge was similar to malice 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

Life imprisonment means until death of the offender without the possibility of parole. See S.C. CODE ANN. §§ 16-3-20 (2003).

³ 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.

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- 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 that evidence was tampered with.
 - g. Failure to raise the trial court erred by denying Applicant's motion to allow unavailable witness, Ciera 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.

4 of 12
ASG

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 15, 2009. Applicant proceeded on the issues of ineffective assistance of appellate counsel and prosecutorial misconduct.

SUMMARY OF TESTIMONY

At the evidentiary hearing, Appellate Counsel testified he appealed Applicant's case on the grounds that Applicant was not allowed 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. Concerning a dispatch log, Counsel stated the State objected and if Defendant objected, then it was preserved for appeal. Counsel also testified 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,

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but he did not review 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, witness statements, and unduly suggestive identifications.

On cross-examination, Counsel testified he's been practicing for 26 years and has handled thousands of cases. Counsel stated he read the transcript and prepared which issue 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 based this opinion on his experience as an attorney and the facts of the case. Counsel stated he is also bound by issue preservation and has a duty that if an issue is not preserved at the trial level, he cannot raise it on appeal. Counsel reiterated that he raises issues that give his client the best chance of 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.

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 Victim testified at both the first and second trials, giving different statements during the second trial.

6/4/12
[Signature]

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. Applicant lastly stated that the trial judge erred in striking a black juror, but not two (2) white similarly situated jurors pursuant to Batson.

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 cross-examine the victim's credibility.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. The Court also has 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 Appellate Counsel

In a PCR action, "[t]he 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), SCRPC). Where ineffective assistance of counsel is alleged 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 v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 441, 334 S.E.2d 813, 814 (1985).

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The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, Id. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

First, the Applicant must prove that counsel's performance was deficient. Cherry, 300 S.C. at 117, 385 S.E.2d at 625. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 749, 103 S. Ct. 3308, 3311 (1983). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy. . . ." 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. 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).

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.....

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.

This Court finds Appellate Counsel's representation of Applicant in this case was well above the professional norms. Counsel fully investigated potential preserved issues on appeal and assisted Applicant in his defense. Counsel testified that he has been in the legal profession for 26 years and has handled thousands of cases. Counsel also testified 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, which was proceeding to trial pro se. Further, Counsel stated he strategically decided to "weed out" issues that would not prevail. This Court finds that Counsel was not ineffective by not raising the involuntary manslaughter charge objection on appeal. Counsel explained that there must be sufficient legal provocation for such a charge and there was no evidence that the victim provoked the Applicant. Further, this Court finds the decision to not proceed on an appeal for the Batson challenge was proper under Counsel's strategy to concentrate on the strongest issue. Also, the State articulated race-neutral reasons for their strikes and Court ruled against the Defendant (Tr. 39: 10-25; 40-44). The Defendant failed to meet his burden at trial. Thus, this Court finds the 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.

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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 this 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). "To establish that a *Brady* violation undermines a conviction, a convicted defendant must make each of three showings: (1) the evidence at issue is 'favorable to the accused, either because it is exculpatory, or because it is impeaching'; (2) the State suppressed the evidence, 'either willfully or inadvertently'; and (3) 'prejudice ... ensued.'" Skinner v. Switzer, 562 U.S. 521, 536, 131 S. Ct. 1289, 1300 (2011).

First, there was an affidavit introduced at the evidentiary hearing which showed that SLED does not possess the alleged 911 tape. Second, Applicant has failed to produce any blood evidence which he claims was part of the *Brady* violation. "Under *Brady*, the State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." Smith v. Cain, 132 S. Ct. 627, 628 (2012). It is not a *Brady* violation to not test evidence if they do not find it necessary. This Court finds absolutely no evidence of prosecutorial

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misconduct or wrongdoing in this case. The Applicant has not carried his burden of proving actual prosecutorial misconduct; therefore, this allegation is dismissed.⁴

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 of 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.

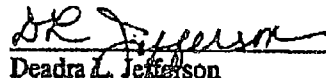
IT IS THEREFORE ORDERED:

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.

⁴ Assistant Solicitor Burns M. Wetmore, Esquire was present to testify. However, after considering the lack of additional information in the record the Applicant withdrew the witness.

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[Signature]

AND IT IS SO ORDERED!


Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

May 5, 2016
Charleston, South Carolina

12/24/12


STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

TERRELL MCCOY, #256070;

Applicant,

v.

STATE OF SOUTH CAROLINA,

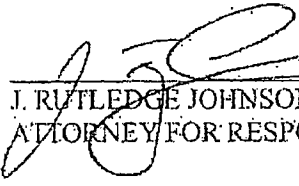
Respondent.

CERTIFICATE OF SERVICE

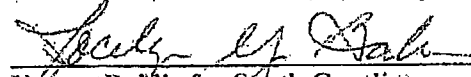
The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

Melisa W. Gay, Esquire
Melissa W. Gay, LLC
PO Box 2144
Mt. Pleasant, SC 29465-2144

This 12th day of May, 2016.


J. RUTLEDGE JOHNSON
ATTORNEY FOR RESPONDENT

SWORN to before me this 12th day of May, 2016.


Notary Public for South Carolina.
My Commission Expires: 12/16/2024

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

Common Pleas
IN THE COURT OF ~~GENERAL SESSIONS~~
NINTH JUDICIAL CIRCUIT
CASE NO: 2013-CP-10-1994

Terrell McCoy, #256070)

vs.)

STATE OF SOUTH CAROLINA)

Defendant.)

**MOTION PURSUANT TO
RULE 59(a) & (e) SCRPC**

FILED
2016 MAY 27 PM 4:12
CLERK OF COURT

COMES NOW Applicant, through his undersigned attorney, and request a rehearing and/or entry of a new judgement, pursuant to Rule 59(a)(2), and/or amendment of the findings of fact and conclusions of law in the standing Order of Dismissal, pursuant to Rule 59e SCRPC.

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction relief filed on April 4, 2013. The State submitted a Return on May 15, 2014 that was filed on May 19, 2015.

An evidentiary hearing was held on December 14, 2015 in the Charleston County Courthouse in front of the Honorable Deadra L. Jefferson. The State was represented by J. Rutledge Johnson, Esquire of the South Carolina Attorney General's Office. Applicant was present and represented by Rodney Davis, Esquire. Testifying at the evidentiary hearing was Bob Dudek, Esquire appellate counsel for Applicant.

While awaiting the Order from Judge Jefferson, Applicant retained the services of Melisa W. Gay, Esquire. A Substitution Order was filed in the Charleston County Clerk of Court on March 29, 2016. An Appearance Notice indicating that Melisa W. Gay, Esquire was giving notice of her general appearance in this action was filed on March 26,

2016.

An Order of Dismissal was issued on May 5, 2016 and filed on May 6, 2016. Applicant's counsel received a copy of the order from J. Rutledge Johnson, Esquire of South Carolina Attorney General's Office. Applicant's attorney Melisa W. Gay, Esquire and J. Rutledge Johnson, Esquire agreed that this Motion would be timely filed as of May 27, 2016.

ARGUMENT

IN Marlar v. State, 375 SC 407, 653 S.E.2d 266 (2007), the South Carolina Supreme Court made it clear that a post-conviction relief judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. See also S.C. Code Ann. Sec. 17-27-80. Therefore, applicant would respectfully request that this Court ensure that specific findings of facts and conclusions of law are entered and that the arguments and testimony of each witness is properly addressed. Applicant would further request that this Court obtain and review the evidentiary hearing transcript, reconsider the standing Order of Dismissal, and/or rehear Applicant's case pursuant to Rule 59(a) and (e), SCRCP.

In support of the instant Motion, Applicant would submit the following:

1. The standing Order of Dismissal failed to address the issue that trial counsel was ineffective for giving Applicant erroneous advice regarding self-representation and the consequences of proceeding pro-se at his Trial on January 27, 2009. This issue was in Applicant's Post-Conviction Relief Application.
2. The standing Order of Dismissal failed to address the issue of why Applicant was denied the right to represent himself pursuant to, Faretta v. California, 422 US 806, 95 S. Ct., 45 L.Ed 562 (1975).
3. The standing Order of Dismissal failed to address that there was in fact

an affidavit obtained from the City of North Charleston Police Department regarding a 911 tape and an issue of spoliation supporting Applicant's assertion that there had in fact been a Brady v. Maryland, 373 US 83 S.Ct. 1194, 10 L. Ed. 2d (1963) violation.

4. The standing order of Dismissal failed to address the facts admitted by Applicant that the issue of Prosecutorial Misconduct was not speculative but supported by the Affidavit regarding the 911 tape.
5. The standing Order of dismissal failed to address the issue of Brady v. Maryland. Bob Dudek, esquire testified that he was unaware of the 911 tape issue despite the fact that the issue was raised during Applicant's trial and preserved.
6. The standing Order of Dismissal failed to address testimony of appellate counsel, Bob Dudek, Esquire. He testified specifically that if he had known of the 911 tape spoliation issue, evidence that North Charleston Police Department had been in possession of a 911 tape, and it that tape had not been produced, it would be reversible error and an appellate issue. Reversible error on this issue is address in State v. Kennerly, 357 SC 442 (SC App 1998).
7. The standing Order of Dismissal failed to address testimony offered at the evidentiary hearing on the Brady v. Maryland issue regarding Prosecutorial Misconduct and the issue of spoliation. Applicant would ask the Judge to review relevant portions of the hearing transcript and clarify her ruling.
8. The standing Order of Dismissal failed to address the issue regarding the admission of Brandon Cuttino's statement into evidence over Applicant's objection.
9. The standing Order of Dismissal erroneously references Applicant

allegedly admitting to being aware of the victim's testimony.

Applicant would assert that the record of the evidentiary hearing will not support that statement and would ask the Judge to review the hearing transcript.

10. The standing Order of Dismissal failed to address the issue that the North Charleston Detective Angela Bunker testified at trial that she failed to preserve DNA evidence at the crime scene. This evidence was in fact available, however the actions of the North Charleston detective prevented Applicant from having valuable exculpatory evidence. Applicant asserts that her actions were done in bad faith pursuant to Arizona v. Youngblood, 488 US 51, S Ct. 333, L. Ed. 2d 281 (1988).
11. The standing Order of Dismissal fails to reference the transcript of the second trial despite the fact that the Judge indicated at the evidentiary hearing that she would review that transcript before making her Order.

For the above stated reasons, Applicant would respectfully request that this Court obtain and review the evidentiary hearing transcript and hold a motion hearing to allow Applicant, through counsel, to address this Court regarding the standing Order of Dismissal. Applicant would further request that this Court reconsider the standing Order of Dismissal and direct the entry of a new judgment or alter the standing Order of Dismissal to ensure that all arguments are fully addressed by this Court prior to Appeal.

I SO MOVE:



Melisa W. Gay
PO Box 2144
Mt. Pleasant, SC 29465-2144
(843) 856-0580 (Phone)
(843) 856-0590 (Fax)

ATTORNEY FOR APPLICANT

Charleston, South Carolina
Dated: March 27, 2016

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

Cameron Pleas
IN THE COURT OF GENERAL SESSIONS-
NINTH JUDICIAL CIRCUIT
CASE NO: 2013-CP-10-1994

Terell McCoy, #256070)

vs.)

STATE OF SOUTH CAROLINA)

Defendant.)

CERTIFICATE OF SERVICE

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2016 MAY 27 PM 4:11

FILED

Comes now the undersigned attorney on behalf of the interested party, Terell McCoy, and does hereby acknowledge that a copy of the Motion Pursuant to Rule 59(a) & (e) SCRCP was mailed by United States Postal Service on May 27, 2016 to the following:

South Carolina Attorney General office
Mr. Rutledge R. Johnson
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

Respectfully Submitted,



Melisa W. Gay
Attorney for Applicant
P.O. Box 2144
Mt. Pleasant, SC 29465
(843)856-0580
(843)856-0590 fax

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT

Terrell McCoy, #256070,)
)
Applicant,)

Case No.: 2013-CP-10-1994

**RETURN TO APPLICANT'S
MOTION TO ALTER OR AMEND**

v.)

State of South Carolina,)
)
Respondent.)

Respondent, by and through undersigned counsel, making its Return to Applicant's
"Motion Pursuant to Rule 59(a) & (e), SCRCPP" would respectfully show unto this Court

I.

This matter comes before the 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, 2016.¹ On May 27, 2016, Applicant filed a "Motion Pursuant to Rule 59(a) & (e), SCRCPP."²

II.

Applicant alleges the Court failed to address the allegation that "Counsel gave Applicant erroneous legal advice leading to Applicant's self-representation." However, as noted in the

¹ After the evidentiary hearing but before the filing of the order of dismissal, Melisa W. Gay, Esquire, was retained as counsel for Applicant, and an order of substitution was filed with Charleston County Clerk of Court March 26, 2016.

² Respondent notes that despite the certificate of service attached to the motion, it has no record of being served with the Motion. It was when the Court inquired of Respondent on January 25, 2017, regarding the Motion that it was brought to Respondent's attention.

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2017 FEB -8 AM 11:54
JULIE J. ANDERSON
CLERK OF COURT
BY

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Court's order, this allegation was dismissed prior to the evidentiary hearing by Order of the Honorable Larry B. Hyman, Jr. filed September 14, 2015. (Order of Dismissal, p. 5). Accordingly, this issue, and any other allegation pertaining to ineffective assistance of trial counsel, was not before this court.

III.

In his motion, Applicant asserts that the Court failed to address several of his allegations, and asks this Court to reconsider its ruling. Respondent submits that this Court's Order of Dismissal contains the required findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1976) and Rule 52(a) SCRPC. See also McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). Respondent submits that this Court properly ruled on all issues presented at the post-conviction relief hearing, and Applicant's motion should be denied.

IV.

WHEREFORE, having made its Return to the motion, Respondent respectfully asks the Court to deny Applicant's Motion for reconsideration.

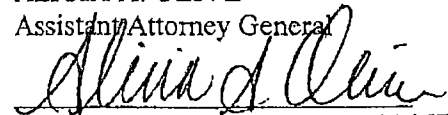
Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

ALICIA A. OLIVE
Assistant Attorney General

BY:


ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

February 6th, 2017.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

TERRELL MCCOY, #256070,

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

2013-CP-10-1994

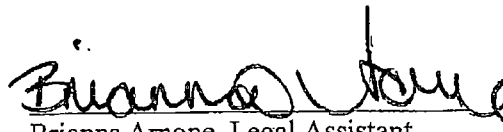
AFFIDAVIT OF SERVICE BY MAIL

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2017 FEB -8 AM 11:54
JULIE J. ARMSTRONG
CLERK OF COURT

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return to Applicant's Motion to Alter or Amend** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Melissa W. Gay, Esquire
1031 Chuck Dawley Blvd., Suite 3
PO Box 2144
Mt. Pleasant SC 29465

DATED this 6th day of February, 2017.


Brianna Arnone, Legal Assistant
For Respondent

cc
AT.
AG
SOL
CS

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Terrell McCoy, #256070,

2013-CP-10-1994

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

FILED
2016 MAY -6 PM 3:33
JULIE J. ARMSTRONG
CLERK OF COURT

Presiding Judge:
Applicant's Attorney:
Respondent's Attorney:
Trial Counsel:
Appellate Counsel:
Date of Hearing:
Court Reporter:

Hon. Deadra L. Jefferson
Rodney D. Davis, Esquire
J. Rutledge Johnson, Esquire
Lorelle Proctor, Esquire (standby counsel)
Robert M. Dudek, Esquire
December 14, 2015
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.

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[Signature]

At the hearing, Applicant testified on his behalf. Bob Dudek, Esquire, also testified.¹ 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

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 murder² (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. 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. Judge Young reduced the Applicant's sentence to forty (40) years imprisonment.

¹ Robert M. Dudek, Esquire of the Office of Appellate Defense testified by telephone without objection.

² 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, -20 (2003), 16-1-60 (2003), 17-25-45 (2003).

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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.

ALLEGATIONS

In his applications, the Applicant alleges that he is being held in custody unlawfully for the following reasons:³

1. Conviction is in violation of U.S. Constitution
 - a. Due Process Violation- Malice instruction given by the trial judge was similar to malice 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

Life imprisonment means until death of the offender without the possibility of parole. See S.C. CODE ANN. §§ 16-3-20 (2003).

³ 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.

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- 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 that evidence was tampered with.
 - g. Failure to raise the trial court erred by denying Applicant's motion to allow unavailable witness, 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.

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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 15, 2009. Applicant proceeded on the issues of ineffective assistance of appellate counsel and prosecutorial misconduct.

SUMMARY OF TESTIMONY

At the evidentiary hearing, Appellate Counsel testified he appealed Applicant's case on the grounds that Applicant was not allowed 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. Concerning a dispatch log, Counsel stated the State objected and if Defendant objected, then it was preserved for appeal. Counsel also testified 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,

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but he did not review 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, witness statements, and unduly suggestive identifications.

On cross-examination, Counsel testified he's been practicing for 26 years and has handled thousands of cases. Counsel stated he read the transcript and prepared which issue 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 based this opinion on his experience as an attorney and the facts of the case. Counsel stated he is also bound by issue preservation and has a duty that if an issue is not preserved at the trial level, he cannot raise it on appeal. Counsel reiterated that he raises issues that give his client the best chance of 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.

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 Victim testified at both the first and second trials, giving different statements during the second trial.

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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. Applicant lastly stated that the trial judge erred in striking a black juror, but not two (2) white similarly situated jurors pursuant to Batson.

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 cross-examine the victim's credibility.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. The Court also has 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 Appellate Counsel

In a PCR action, "[t]he 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). Where ineffective assistance of counsel is alleged 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 v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 441, 334 S.E.2d 813, 814 (1985).

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The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, Id. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

First, the Applicant must prove that counsel's performance was deficient. Cherry, 300 S.C. at 117, 385 S.E.2d at 625. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing Strickland*. Second, counsel's deficient performance must have 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 749, 103 S. Ct. 3308, 3311 (1983). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy. . . ." 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. 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).

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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.

This Court finds Appellate Counsel's representation of Applicant in this case was well above the professional norms. Counsel fully investigated potential preserved issues on appeal and assisted Applicant in his defense. Counsel testified that he has been in the legal profession for 26 years and has handled thousands of cases. Counsel also testified 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, which was proceeding to trial pro se. Further, Counsel stated he strategically decided to "weed out" issues that would not prevail. This Court finds that Counsel was not ineffective by not raising the involuntary manslaughter charge objection on appeal. Counsel explained that there must be sufficient legal provocation for such a charge and there was no evidence that the victim provoked the Applicant. Further, this Court finds the decision to not proceed on an appeal for the Batson challenge was proper under Counsel's strategy to concentrate on the strongest issue. Also, the State articulated race-neutral reasons for their strikes and Court ruled against the Defendant (Tr. 39: 10-25; 40-44). The Defendant failed to meet his burden at trial. Thus, this Court finds the 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.

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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 this 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). "To establish that a *Brady* violation undermines a conviction, a convicted defendant must make each of three showings: (1) the evidence at issue is 'favorable to the accused, either because it is exculpatory, or because it is impeaching'; (2) the State suppressed the evidence, 'either willfully or inadvertently'; and (3) 'prejudice ... ensued.'" Skinner v. Switzer, 562 U.S. 521, 536, 131 S. Ct. 1289, 1300 (2011).

First, there was an affidavit introduced at the evidentiary hearing which showed that SLED does not possess the alleged 911 tape. Second, Applicant has failed to produce any blood evidence which he claims was part of the Brady violation. "Under Brady, the State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." Smith v. Cain, 132 S. Ct. 627, 628 (2012). It is not a *Brady* violation to not test evidence if they do not find it necessary. This Court finds absolutely no evidence of prosecutorial

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SAG

misconduct or wrongdoing in this case. The Applicant has not carried his burden of proving actual prosecutorial misconduct; therefore, this allegation is dismissed.⁴

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 of 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.

⁴ Assistant Solicitor Burns M. Wetmore, Esquire was present to testify. However, after considering the lack of additional information in the record the Applicant withdrew the witness.

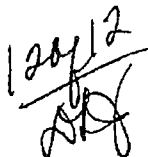
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AND IT IS SO ORDERED!



Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

May 5, 2016
Charleston, South Carolina



STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

Common Pleas
IN THE COURT OF ~~GENERAL SESSIONS~~
NINTH JUDICIAL CIRCUIT
CASE NO: 2013-CP-10-1994

Terell McCoy, #256070)

vs.)

STATE OF SOUTH CAROLINA)

Defendant.)

**MOTION PURSUANT TO
RULE 59(a) & (e) SCRPC**

CLERK OF COURT

2016 MAY 27 PM 4:12

FILED

COMES NOW Applicant, through his undersigned attorney, and request a rehearing and/or entry of a new judgement, pursuant to Rule 59(a)(2), and/or amendment of the findings of fact and conclusions of law in the standing Order of Dismissal, pursuant to Rule 59e SCRPC.

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction relief filed on April 4, 2013. The State submitted a Return on May 15, 2014 that was filed on May 19, 2015.

An evidentiary hearing was held on December 14, 2015 in the Charleston County Courthouse in front of the Honorable Deadra I. Jefferson. The State was represented by J. Rutledge Johnson, Esquire of the South Carolina Attorney General's Office. Applicant was present and represented by Rodney Davis, Esquire. Testifying at the evidentiary hearing was Bob Dudek, Esquire appellate counsel for Applicant.

While awaiting the Order from Judge Jefferson, Applicant retained the services of Melisa W. Gay, Esquire. A Substitution Order was filed in the Charleston County Clerk of Court on March 29, 2016. An Appearance Notice indicating that Melisa W. Gay, Esquire was giving notice of her general appearance in this action was filed on March 26,

2016.

An Order of Dismissal was issued on May 5, 2016 and filed on May 6, 2016. Applicant's counsel received a copy of the order from J. Rutledge Johnson, Esquire of South Carolina Attorney General's Office. Applicant's attorney Melisa W. Gay, Esquire and J. Rutledge Johnson, Esquire agreed that this Motion would be timely filed as of May 27, 2016.

ARGUMENT

IN Marlar v. State, 375 SC 407, 653 S.E.2d 266 (2007), the South Carolina Supreme Court made it clear that a post-conviction relief judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. See also S.C. Code Ann. Sec. 17-27-80. Therefore, applicant would respectfully request that this Court ensure that specific findings of facts and conclusions of law are entered and that the arguments and testimony of each witness is properly addressed. Applicant would further request that this Court obtain and review the evidentiary hearing transcript, reconsider the standing Order of Dismissal, and/or rehear Applicant's case pursuant to Rule 59(a) and (e), SCRCP.

In support of the instant Motion, Applicant would submit the following:

1. The standing Order of Dismissal failed to address the issue that trial counsel was ineffective for giving Applicant erroneous advice regarding self-representation and the consequences of proceeding pro-se at his Trial on January 27, 2009. This issue was in Applicant's Post-Conviction Relief Application.
2. The standing Order of Dismissal failed to address the issue of why Applicant was denied the right to represent himself pursuant to, Faretta v. California, 422 US 806, 95 S. Ct., 45 L.Ed 562 (1975).
3. The standing Order of Dismissal failed to address that there was in fact

an affidavit obtained from the City of North Charleston Police Department regarding a 911 tape and an issue of spoliation supporting Applicant's assertion that there had in fact been a Brady v. Maryland, 373 US 83 S.Ct. 1194, 10 L. Ed. 2d (1963) violation.

4. The standing order of Dismissal failed to address the facts admitted by Applicant that the issue of Prosecutorial Misconduct was not speculative but supported by the Affidavit regarding the 911 tape.
5. The standing Order of dismissal failed to address the issue of Brady v. Maryland. Bob Dudek, esquire testified that he was unaware of the 911 tape issue despite the fact that the issue was raised during Applicant's trial and preserved.
6. The standing Order of Dismissal failed to address testimony of appellate counsel, Bob Dudek, Esquire. He testified specifically that if he had known of the 911 tape spoliation issue, evidence that North Charleston Police Department had been in possession of a 911 tape, and if that tape had not been produced, it would be reversible error and an appellate issue. Reversible error on this issue is addressed in State v. Kennerly, 357 SC 442 (SC App 1998).
7. The standing Order of Dismissal failed to address testimony offered at the evidentiary hearing on the Brady v. Maryland issue regarding Prosecutorial Misconduct and the issue of spoliation. Applicant would ask the Judge to review relevant portions of the hearing transcript and clarify her ruling.
8. The standing Order of Dismissal failed to address the issue regarding the admission of Brandon Cuttino's statement into evidence over Applicant's objection.
9. The standing Order of Dismissal erroneously references Applicant

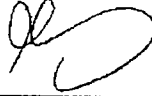
allegedly admitting to being aware of the victim's testimony.

Applicant would assert that the record of the evidentiary hearing will not support that statement and would ask the Judge to review the hearing transcript.

10. The standing Order of Dismissal failed to address the issue that the North Charleston Detective Angela Bunker testified at trial that she failed to preserve DNA evidence at the crime scene. This evidence was in fact available, however the actions of the North Charleston detective prevented Applicant from having valuable exculpatory evidence. Applicant asserts that her actions were done in bad faith pursuant to Arizona v. Youngblood, 488 US 51, S Ct. 333, L. Ed. 2d 281 (1988).
11. The standing Order of Dismissal fails to reference the transcript of the second trial despite the fact that the Judge indicated at the evidentiary hearing that she would review that transcript before making her Order.

For the above stated reasons, Applicant would respectfully request that this Court obtain and review the evidentiary hearing transcript and hold a motion hearing to allow Applicant, through counsel, to address this Court regarding the standing Order of Dismissal. Applicant would further request that this Court reconsider the standing Order of Dismissal and direct the entry of a new judgment or alter the standing Order of Dismissal to ensure that all arguments are fully addressed by this Court prior to Appeal.

ISO MOVE:



Melisa W. Gay
PO Box 2144
Mt. Pleasant, SC 29465-2144
(843) 856-0580 (Phone)
(843) 856-0590 (Fax)

ATTORNEY FOR APPLICANT

Charleston, South Carolina
Dated: March 27, 2016

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

Common Pleas
IN THE COURT OF GENERAL SESSIONS-
NINTH JUDICIAL CIRCUIT
CASE NO: 2013-CP-10-1994

Terell McCoy, #256070)

vs.)

STATE OF SOUTH CAROLINA)

Defendant.)

CERTIFICATE OF SERVICE

BY

JULIE A. ARMSTRONG
CLERK OF COURT

2016 MAY 27 PM 4:11

FILED

Comes now the undersigned attorney on behalf of the interested party, Terell McCoy, and does hereby acknowledge that a copy of the Motion Pursuant to Rule 59(a) & (e) SCRCP was mailed by United States Postal Service on May 27, 2016 to the following:

South Carolina Attorney General office
Mr. Rutledge R. Johnson
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

Respectfully Submitted,



Melisa W. Gay
Attorney for Applicant
P.O. Box 2144
Mt. Pleasant, SC 29465
(843)856-0580
(843)856-0590 fax



ALAN WILSON
ATTORNEY GENERAL

February 6, 2017

The Honorable Julie J. Armstrong
Clerk of Court, Charleston County
100 Broad Street, Suite 106
Charleston, South Carolina 29401-2210

Re: Terrell McCoy, #256070 v. State of South Carolina
2013-CP-10-1994

Dear Ms. Armstrong:

Enclosed please find the original **Return to Applicant's Motion to Alter or Amend** of the Respondent, in the above-captioned case, for filing in your office.

Sincerely,

Alicia A. Olive
Assistant Attorney General

AAO/bea
Enclosure(s)

cc: The Honorable Deadra L. Jefferson (via email)
Melisa W. Gay, Esquire (via U.S. mail and email)

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Terrell McCoy, #256070,

Applicant,

vs.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
Civil Action No. 2013-CP-10-1994

**ORDER DENYING APPLICANTS
MOTION TO ALTER OR AMEND**

FILED
2017 FEB 10 PM 12:46
CLERK OF COURT
J. ARMSTRONG

Presiding Judge:
Respondent's Attorney:
Applicant's Attorney:
Date of Hearing:
Court Reporter:

Hon. Deadra L. Jefferson
J. Rutledge Johnson, Esq.¹
Rodney D. Davis, Esq.
December 14, 2015
Denise Lauder

THIS MATTER comes before the 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, 2016.² On May 27, 2016, Applicant filed a "Motion Pursuant to Rule 59(a) & (e), SCRPC."³

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

¹ After the evidentiary hearing, J. Rutledge Johnson, Esquire was replaced as counsel for Respondent by Alicia Olive, Esquire.

² 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.

³ 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.

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[Signature]

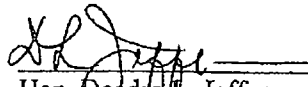
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of the order.” Rule 59(e), SCRCP. The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to allow the parties liberal opportunity to move for the trial judge to reconsider matters properly encompassed in a decision on the merits, regardless 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).

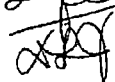
Based upon careful reconsideration of the record in this case, including submissions of the parties, this Court has discovered no findings of fact or conclusions of law that have been overlooked or misapprehended, and this Court is not persuaded to alter or amend its judgment. Applicant presented no novel facts, arguments, or theories in support of their Motion for Reconsideration. Moreover, Applicant has not highlighted any portions of the record this Court may have misunderstood, failed to fully consider, or perhaps failed to rule on. Accordingly, Defendant's Motion to Reconsider is hereby DENIED.⁴

IT IS SO ORDERED.

February 10, 2017


Hon. Deandra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

⁴ 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).

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Charleston, South Carolina
At Chambers

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STATE OF SOUTH CAROLINA

COUNTY OF _____

Terrell McCoy #256070
Plaintiff,

vs.

State of South Carolina
Defendant.

IN THE COURT OF COMMON PLEAS
_____ JUDICIAL CIRCUIT

CASE NO. 2013-CP-10-1984

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney: _____, Bar No. _____ Address: _____ Phone: _____ Fax: _____ E-mail: _____ Other: _____	Defendant's Attorney: _____, Bar No. _____ Address: _____ Phone: _____ Fax: _____ E-mail: _____ Other: _____
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: _____ Estimated Time Needed: _____ Court Reporter Needed: ☐ YES/ ☐ NO	
SECTION II: Motion/Order Type	
☐ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
Signature of Attorney for ☐ Plaintiff / ☐ Defendant Date submitted: _____	
SECTION III: Motion Fee	
☐ PAID - AMOUNT: \$ _____ ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____	
JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____	

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT
CASE NO: 2013-CP-10-1994

Terell McCoy, #256070)

vs.)

STATE OF SOUTH CAROLINA)

Defendant.)

MOTION TO
CLARIFY MOTION PURSUANT
TO RULE 59(a) & (e) SCRPC
AND RESPONSE TO STATE'S
RETURN

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2017 FEB 14 PM 4:24

FILED

COMES NOW Applicant, through his undersigned attorney, and moves to clarify his Motion Pursuant to Rule 59 (a) & (e) SCRPC and/or amendment of the findings of fact and conclusions of law in the standing Order of Dismissal, pursuant to Rule 59e SCRPC.

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction relief filed on April 4, 2013. The State submitted a Return on May 15, 2014 that was filed on May 19, 2015.

An evidentiary hearing was held on December 14, 2015 in the Charleston County Courthouse in front of the Honorable Deadra I. Jefferson. The State was represented by J. Rutledge Johnson, Esquire of the South Carolina Attorney General's Office. Applicant was present and represented by Rodney Davis, Esquire. Testifying at the evidentiary hearing was Bob Dudek, Esquire appellate counsel for Applicant.

While awaiting the Order from Judge Jefferson, Applicant retained the services of Melisa W. Gay, Esquire. A Substitution Order was filed in the Charleston County Clerk of Court on March 29, 2016. An Appearance Notice indicating that Melisa W. Gay,

Esquire was giving notice of her general appearance in this action was filed on March 26, 2016.

An Order of Dismissal was issued on May 5, 2016 and filed on May 6, 2016. Applicant's counsel received a copy of the order from J. Rutledge Johnson, Esquire of South Carolina Attorney General's Office. Applicant's attorney Melisa W. Gay, Esquire and J. Rutledge Johnson, Esquire agreed that this Motion would be timely filed as of May 27, 2016.

ARGUMENT

IN Marlar v. State, 375 SC 407, 653 S.E.2d 266 (2007), the South Carolina Supreme Court made it clear that a post-conviction relief judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. See also S.C. Code Ann. Sec. 17-27-80. Therefore, applicant would respectfully request that this Court ensure that specific findings of facts and conclusions of law are entered and that the arguments and testimony of each witness is properly addressed. Applicant would further request that this Court obtain and review the evidentiary hearing transcript, reconsider the standing Order of Dismissal, and/or rehear Applicant's case pursuant to Rule 59(a) and (e), SCRCP.

In support of the instant Motion, Applicant would submit the following:

1. The standing Order of Dismissal failed to address the issue that trial counsel was ineffective for giving Applicant erroneous advice regarding self-representation and the consequences of proceeding pro-se at his Trial on January 27, 2009. This issue was in Applicant's Post-Conviction Relief Application.
2. The standing Order of Dismissal failed to address the issue of why Applicant was denied the right to represent himself pursuant to, Faretta v. California, 422 US 806, 95 S. Ct., 45 L.Ed 562 (1975) for purposes of

his Post Conviction Relief Hearing on December 14, 2015. Applicant initially addressed the Court and requested that he be allowed to represent himself.

3. The standing Order of Dismissal failed to address the issue of Applicant's request for self representation and failure to conduct a Faretta hearing.
4. The standing Order of Dismissal failed to address that there was in fact an affidavit obtained from the City of North Charleston Police Department regarding a 911 tape and an issue of spoliation supporting Applicant's assertion that there had in fact been a Brady v. Maryland, 373 US 83 S.Ct. 1194, 10 L. Ed. 2d (1963) violation.
5. The standing Order of Dismissal failed to address the facts admitted by Applicant that the issue of Prosecutorial Misconduct was not speculative but supported by the Affidavit regarding the 911 tape.
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7. The standing Order of Dismissal failed to address testimony of appellate counsel, Bob Dudek, Esquire. He testified specifically that if he had known of the 911 tape spoliation issue, evidence that North Charleston Police Department had been in possession of a 911 tape, and if that tape had not been produced, it would be reversible error and an appellate issue. Reversible error on this issue is address in State v. Kennerly, 357 SC 442 (SC App 1998).
8. The standing Order of Dismissal failed to address testimony offered at the evidentiary hearing on the Brady v. Maryland issue regarding

Prosecutorial Misconduct and the issue of spoliation. Applicant would ask the Judge to review relevant portions of the hearing transcript and clarify her ruling.

9. The standing Order of Dismissal failed to address the issue regarding the admission of Brandon Cuttino's statement into evidence over Applicant's objection.
10. The standing Order of Dismissal erroneously references Applicant allegedly admitting to being aware of the victim's testimony. Applicant would assert that the record of the evidentiary hearing will not support that statement and would ask the Judge to review the hearing transcript.
11. The standing Order of Dismissal failed to address the issue that the North Charleston Detective Angela Bunker testified at trial that she failed to preserve DNA evidence at the crime scene. This evidence was in fact available, however the actions of the North Charleston detective prevented Applicant from having valuable exculpatory evidence. Applicant asserts that her actions were done in bad faith pursuant to Arizona v. Youngblood, 488 US 51, S Ct. 333, L. Ed. 2d 281 (1988).
12. The standing Order of Dismissal fails to reference the transcript of the second trial despite the fact that the Judge indicated at the evidentiary hearing that she would review that transcript before making her Order.

For the above stated reasons, Applicant would respectfully request that this Court obtain and review the evidentiary hearing transcript and hold a motion hearing to allow Applicant, through counsel, to address this Court regarding the standing Order of Dismissal. Applicant would further

request that this Court reconsider the standing Order of Dismissal and direct the entry of a new judgment or alter the standing Order of Dismissal to ensure that all arguments are fully addressed by this Court prior to Appeal.

I SO MOVE:



Melisa W. Gay
PO Box 2144
Mt. Pleasant, SC 29465-2144
(843) 856-0580 (Phone)
(843) 856-0590 (Fax)

ATTORNEY FOR APPLICANT

Charleston, South Carolina
Dated: March 27, 2016

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT
CASE NO: 2013-CP-10-1994

Terell McCoy, #256070)

vs.)

STATE OF SOUTH CAROLINA)

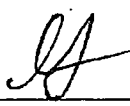
Defendant.)

CERTIFICATE OF SERVICE

Comes now the undersigned attorney on behalf of the interested party, Terell McCoy, and does hereby acknowledge that a copy of the Motion To Clarify Motion Pursuant to Rule 59(a) & (e) SCRCF was mailed by United States Postal Service on February 14, 2017 to the following:

South Carolina Attorney General office
Ms. Alicia A. Olive
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

Respectfully Submitted,


Melisa W. Gay
Attorney for Applicant
P.O. Box 2144
Mt. Pleasant, SC 29465
(843)856-0580
(843)856-0590 fax

Cc Honorable Judge Deadra L. Jefferson

FILED

2017 FEB 14 PM 4:24

JULIE J. ARMSTRONG
CLERK OF COURT

NOTICE OF INTENT TO APPEAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT OF SOUTH CAROLINA

APPEAL FROM CHALESTON COUNTY

HONORABLE DEADRE L. JEFFERSON

CASE NO.: 2013-CP-10-1994

TERRELL MCCOY
SCDC No. 256070

VS.

STATE OF SOUTH CAROLINA, RESPONDENT

NOTICE OF INTENT TO APPEAL

The Petitioner appeals from the Order Denying Post Conviction Relief of the Honorable Deadre L. Jefferson, Presiding Judge of the Ninth Judicial Circuit, dated May 6, 2016 and Order Denying Applicant's Motion to Alter or Amend dated, February 10, 2017.



MELISA W. GAY
ATTORNEY FOR APPELLANT
P.O. BOX 2144
MT. PLEASANT, SC 29465
(843) 856-0580
(843) 856-0590 fx
mgaylaw@yahoo.com

Other counsel of record are:
Alicia Olive
Assistant Attorney General
P.O. Box 11549
Columbia, South Carolina 29211

FILED
2017 MAR -8 PM 2:26
JULIE J. ARMSTRONG
CLERK OF COURT

FORM 7
PROOF OF SERVICE OF A NOTICE OF APPEAL

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadre L. Jefferson, Circuit Court Judge

Case No. 2013-CP-10-1994

FILED
2017 MAR -8 PM 2:26
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

State of
South Carolina,

Respondent;

v.

Terrell McCoy #256070

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Alicia Olive by depositing a copy of it in the United States Mail, Postage prepaid, on March 8, 2017 addressed to Assistant Attorney General, Alicia Olive post Office Box 11549 Columbia, SC 29211.

March 8, 2017



Melisa W. Gay Esquire
PO Box 2144
Mt. Pleasant, SC 29465

Terrell McCoy #256070
LCI Ashley A15
P.O. BOX 205
Ridgeville, SC 29472

May 10, 2017

Julie J. Armstrong
Court of Common Pleas
100 Broad Street
Charleston, SC 29401

FILED
2017 MAY 12 PM 3:23
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

RE: Terrell McCoy V. State of South Carolina
Case # 2013-Cp-10-1994

Dear Clerk of Court, Enclosed please find a Copy of the Petitioner's Exhibit #10 to be included into his PCR record along with the other exhibit attached to the Amended PCR application. Petitioner was notified by the Court that the exhibit was missing. Can you please send me a letter informing me that this document was received?

Shakyon
Dan

Terrell McCoy

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

STATE OF SOUTH CAROLINA)

-v-

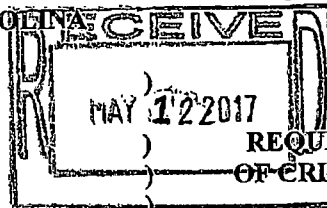
Terrell Lynwood McCoy

Defendant.

IN THE COURT OF GENERAL SESSIONS
FOR THE NINTH JUDICIAL CIRCUIT

Warrant No(s): F-969254, K-066242

Charge: Murder, PWID MARJ



REQUEST PURSUANT TO SC RULES
OF CRIMINAL PROCEDURE- RULE 5 & 6

EDWARDS NOTICE

Exhibit 10
FILED
2006 APR 19 AM 12:38
JULIE ARMSTRONG
CLERK OF COURT
BY

The Defendant respectfully requests that the Solicitor produce or otherwise make available to the Defense all documents, tangible objects, reports of examinations and tests, witness statements, physical evidence and any other information subject to disclosure pursuant to Rule 5 of the South Carolina Rules of Criminal Procedure.

The Defendant further requests the Solicitor to produce all evidence favorable to the Defendant, subject to disclosure pursuant to Brady v. Maryland, 373 U.S. 83 (1963) and its progeny.

This request is a continuing request for all such discoverable information as it becomes known to the Solicitor or any Prosecution Agents.

The Defendant hereby asserts his Fifth Amendment right to remain silent and does not wish to be questioned in the absence of counsel, pursuant to McNeil v. Wisconsin, 111 S.Ct.220(1991), and Edwards v. Arizona, 451 U.S. 477 (1981).

Furthermore, pursuant to Rule 6 of the South Carolina Rules of Criminal Procedure, Defendant objects to the introduction of a chemist's or analyst's report without such person being personally present at trial. Defendant also requests the appearance in Court of persons within the chain of custody of all physical evidence.

Respectfully Submitted,

Lorelle D Proctor

Lorelle D Proctor
Attorney for Defendant

Charleston, South Carolina

Dated: 3/30/06

CERTIFICATE OF SERVICE

I hereby certify that this Rule 5 Motion was served on the Solicitor for the Ninth Judicial Circuit on

4.10.06

MAH

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The Supreme Court of South Carolina

Terrell McCoy, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2017-000755

Lower Court Case No. 2013-CP-10-01994

ORDER

Petitioner has filed a petition for a writ of certiorari, following the denial of his application for post-conviction relief (PCR). Petitioner's arguments to this Court encompass allegations of (1) ineffective assistance of counsel against standby trial counsel for failing to warn him about the dangers of self-representation, (2) error by the PCR judge in denying petitioner's request to relieve PCR counsel and proceed *pro se* at the PCR hearing, and (3) multiple claims of ineffective assistance of appellate counsel. We grant the petition for a writ of certiorari and dispense with further briefing.

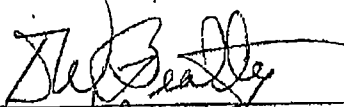
Our review of the Appendix indicates Petitioner raised numerous issues in his PCR application and at the PCR hearing. At the conclusion of the hearing, the PCR judge announced that she would issue a form order that day denying the PCR application. The PCR judge asked the State to submit a proposed, formal order and to transmit a copy to opposing counsel. The PCR judge noted that she expected to rewrite portions of the State's proposed draft so the final version would conform to her own preferences as to PCR orders.

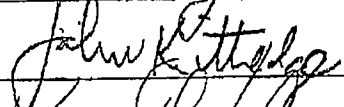
Upon reviewing the order denying Petitioner's PCR application, we conclude many of the issues Petitioner presented to the PCR judge were not ruled upon. For example, the PCR judge issued a broad ruling finding appellate counsel was effective before addressing only two of the specific issues raised by petitioner—the failure to appeal the denial of a motion under *Batson v. Kentucky*, 476 U.S. 79

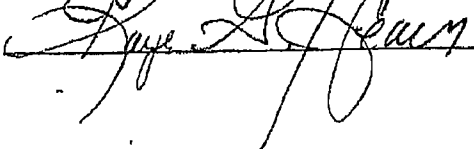
(1986), and a request for a jury charge. Petitioner filed a Rule 59(e), SCRCP, motion, which arguably preserved several additional issues that were presented at the PCR hearing. However, the PCR judge issued an order summarily denying Petitioner's Rule 59(e) motion without specifically discussing the issues raised by Petitioner.

This Court recently addressed our continuing concerns over PCR orders that do not comply with S.C. Code Ann. § 17-27-80 (2014) (requiring the PCR court to "make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented"), and Rule 52(a), SCRCP (stating "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon"). See *Reese v. State*, 425 S.C. 108, 110; 820 S.E.2d 376, 377 (2018) ("Counsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and the PCR judge should carefully review the order prior to signing it." (quoting *Pruitt v. State*, 310 S.C. 254, 256, 423 S.E.2d 127, 128 (1992))). In *Reese*, we noted *Pruitt* was decided twenty-six years earlier, and we cited numerous cases reiterating the law and our admonition that it be followed. *Id.* at 109-11, 423 S.E.2d at 377-78.

Because the PCR judge's orders denying Petitioner's PCR application and his Rule 59(e) motion did not rule on the merits of all of the issues properly presented, the orders did not comply with the law. Accordingly, we vacate the orders dismissing Petitioner's PCR application and denying the Rule 59(e) motion, and we dismiss the proceedings before this Court without prejudice. This matter is remanded 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. The new PCR order shall be issued within thirty (30) days of the date of this order. The PCR judge shall notify this Court, in writing, that she has timely complied with this order. Following the issuance of a legally sufficient PCR order and a ruling on any Rule 59(e) motion, the aggrieved party may serve and file a new Notice of Appeal.

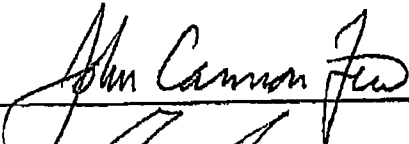
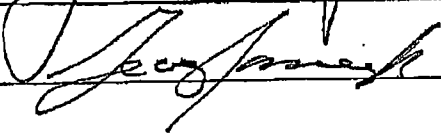


C.J.


J.


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J.

Columbia, South Carolina

February 01, 2019

cc:

Clarissa Warren Joyner, Esquire
Megan Harrigan Jameson, Esquire
The Honorable Deadra L. Jefferson
The Honorable Julie J. Armstrong

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Terrell McCoy, #256070,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2013-CP-10-1994

AMENDED¹
ORDER OF DISMISSAL

FILED
2019 JUN 14 PM 1:31
JULIE J. ARMSTRONG
CLERK OF COURT

Presiding Judge:
Applicant's Attorney:
Respondent's Attorney:
Standby Counsel:
Appellate Counsel:
Date of Hearing:
Court Reporter:

Hon. Deadra L. Jefferson
Rodney D. Davis, Esq.
J. Rutledge Johnson, Esq.
Lorelle Proctor, Esq.
Robert M. Dudek, Esq.
December 14, 2015
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 murder³ (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).

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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.

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- 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

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- 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,

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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

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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 Counsel⁵

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.

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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

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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,

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[Signature]

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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,

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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

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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 1⁶ 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.

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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

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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

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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), SCRPC, 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:

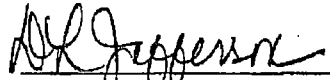
1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

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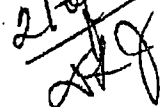
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED!



Hon. Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

June 14, 2019
Charleston, South Carolina

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Terrell McCoy, #256070

Applicant,

vs.

State of South Carolina

Respondent.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
Civil Action No. 2013-CP-10-1994

**AMENDED¹ ORDER DENYING
APPLICANT'S MOTION TO ALTER OR
AMEND**

Presiding Judge:
Respondent's Attorney:
Applicant's Attorney:
Date of Hearing:
Court Reporter:

Hon. Deadra L. Jefferson
J. Rutledge Johnson, Esq.²
Rodney D. Davis, Esq.
December 14, 2015
Denise Lauder

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

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.

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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

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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.

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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

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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

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(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 1⁶ 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.

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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 counsel⁷ 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).

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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

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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.

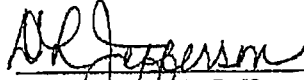
Prosecutorial Misconduct

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

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).

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

TERRELL MCCOY, 256070

Applicant,

VS.

STATE OF SOUTH CAROLINA,

Respondent

) IN THE COURT OF COMMONPLEAS
) FOR THE NINTH JUDICIAL CIRCUIT

Case No.: 2013-CP-10-1994

**Notice of Motion and Motion
To Alter or Amended Pursuant to
Rule 59(e), SCRPC**

FILED
2019 JUL 30 AM 10:55
JULIE J. ARMSTRONG
CLERK OF COURT

COMES NOW APPLICANT THROUGH UNDERSIGNED COUNSEL with a motion to alter and/or amend Amended Order of Dismissal pursuant to a Rule 59(e), *SCRPC*, *Marlar v. State*, and the following grounds:

The Amended Order of Dismissal fails to address claims of Appellate Counsel was ineffective for failing to raise the identification of APPLICANT was unduly suggestive when the issue was preserve for direct appeal. APPLICANT filed an memorandum of law attach to his PCR application raising this claim. (See PCR application) In the memorandum of law attach to PCR application Applicant point out facts that show CERENDA Williams identified APPLICANT as SLEEZIE her boyfriend Travis Johnson brother. (See second trial transcript page 91 line 14-16 & 19-25 page 92 line 20-22). During the solicitor direct examination, CERENDA Williams testified that she was shown multiple picture but failed to mark the six photo lineup. (See second trial transcript page 96 line 10-25) 24 hours later she returned to the police department and then she was shown a one photo mugshot (Second trial transcript Page 97 line 14-25 & 98 line 1-8) She then mark the one single mug shot. During cross examination Applicant ask Ms. Williams was she shown a one photo mug shot of APPLICANT with the

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words Charleston County Detention Center & she testified yes. (See second trial transcript page 102 line 22-25 & page 103 line 1-25) Applicant also attempted to introduce evidence that he was not Travis Johnson brother who MS. Williams based her identification of APPLICANT. The State did not introduced any evidence that Applicant was Travis Johnson brother. The State neither introduced evidence that the Applicant is SLEEZIE aka Willie D Applicant argued he does not have a brother name Travis Johnson and the trial judge stated it was irrelevant. This was a clear violation of APPLICANT due process where The solicitor examination of CERENDA Williams that her identification was based off her knowing Applicant as her boyfriend brother . (See second trial transcript page 104 line 10-18).The trial judge failed to hold a full Neil v. Biggers hearing when there was evidence presented that MS. Williams lied to police on numerous occasions (See second trial transcript page 94 line 2-4 & line 8-11) And that she identified APPLICANT on a mug shot and circled it but did not mark it on a six photo line up. If an Neil v Biggers hearing was properly held this court would See that on March 25 2006 when CERENDA Williams was interviewed by police she stated she did not know who killed the victim. (See second transcript page & CERENDA Williams 1st & 2nd statement given on March 25 2006 attached to PCR application) Applicant attempted to show the trial judge how the identification was unduly suggestive through CERENDA Williams 1st & 2nd statement. On March 25 2006 During her second interview with police she stated she still did not know who killed the victim but stated she saw someone running down the street with a hoody over his head that look like her boy friend Travis Johnson brother SLEEZIE. During the second trial, Defendant brother Travis Holcombe who is not CERENDA Williams boyfriend Travis Johnson testified that he did not have a girlfriend name CERENDA Williams (See second trial transcript page 601 line 19-25 ,602 line 4- 7 & 621 line 19-25& page 622 line 1-9) The solicitor believed this testimony to be

true and warn Mr. Holcombe He could be charge with perjury if he lied under oath. No charges were filed. (See transcript page 619 line 15-25 through page 620 line 1-8.) The State has failed to introduce photographic admonition affidavit signed by CERENDA WILLIAMS. The showing of a one photo mug shot of APPLICANT is a due process violation pursuant to STOVALL V DENNO 388 U.S 293 , The South Carolina Supreme Court order clearly stated APPLICANT presented claims in his PCR application and hearing that was not ruled on and this issued has not been ruled on which violates APPLICANT due process right to have all claims raised adjudicated. This is prejudicial as Applicant conviction was obtained based off perjured testimony and the identification of an untruthful witness who admitted during trial that she lied to law enforcement officers. The Neil v Biggers test should have been applied. Appellant counsel failed to raise this issue during appeal which prejudice Applicant right to his first bite of the Apple during direct appeal. Had the issue been raised Applicant would have received a new trial.

Applicant request a full FARETTA hearing to state his dissatisfaction of state appointed PCR counsel who failed to preserve potential claims during the evidentiary hearing. When PCR counsel rested his case without Applicants advice Applicant immediately requested to proceed pro se in order to protect all his constitutional claims. The record is clear PCR counsel had not raise the issue that Appellate Counsel failed to appeal Judge Dennis January 2009 order relieving Applicants counsel of PCR RELIEF. PCR counsel also failed to allow Applicant trial counsel to testify at the evidentiary hearing concerning the compulsory process phase where she was ordered by the court to secure favorable witness to Applicant trial. (January 27 2009 Judge Dennis order and Pro we hearing transcript page 29 line 11- 18.)Nor was trial counsel examined on the erroneous advice she gave APPLICANT regarding self representation when there is

evidence that the 1st FARETTA hearing was held in December of 2008 where Applicant declined self representation. (See December 2008 hearing)During Applicant first trial his counsel did not allow Applicant alibi witnesses to testify in which trial ended with a hung jury. Applicant ask trial counsel why she did not protect his rights and counsel informed Applicant to represent his self. The trial record clearly show that trial counsel was ineffective for failing to protect Applicant 6th Amendment right to have favorable witness at trial. It was Applicant due process right to have a FARETTA hearing to state his dissatisfaction of PCR counsel and to inform court that PCR counsel was sanction by the South Carolina Supreme Court Discipline Counsel for failing to communicate with Applicant and Amend Applicant's PCR application. The record is also clear that Applicant request to proceed Pro Se was not for the sole purpose of delay as PCR Counsel Rodney Davis was relieved and Applicant retain Melissa Gay to represent him. MS. Gay filed a SCRCRCP RULE 59 (e) preserving all Applicant constitutional violation claims presented in Applicant's PCR application. During the pro se hearing held in front of Judge Dennis Applicant informed the judge trial counsel was ineffective and the record is clear that trial counsel did not warn Applicant of the dangers of proceeding pro se and understanding he was abandoning PCR claims of ineffective assistance of counsel in which she would be considered ineffective for failing to investigate and failing to allow alibi witnesses to testify during Applicant first trial.

The Amended Order of Dismissal failed to address newly discovered evidence claims addressed in Applicant PCR application in which Applicant later discovered that NCPD dispatcher JENIE FOWLER was in contempt of court for failing to appear to Applicant trial. The trial record is clear that a SUBPEONA was sent to NCPD Dispatcher JENIE FOWLER. (Second

trial transcript page 631 line 18-25, 632 line 1-25, & 633 line 1-25) The evidence was discovered by Applicant during pending PCR application. Applicant received notification from city of Charleston attorney Beth Woodall that during 2009 there were only one officer employed at NCPD name JENIE FOWLER. During Applicant second trial stand by counsel and solicitor lied to the court and stated they SUBPEONA the wrong person which was untrue based off the newly discovered evidence. The State was aware of the newly discovered evidence as Applicant mailed Beth Woodall letter to previous Attorney General. Also PCR counsel explained during the 2015 summary judgment hearing held in front of Judge Hyman that it was later discovered that trial counsel failed to secure NCPD dispatcher JENIE FOWLER at trial and that she was informed by the police department that it was two officers name JENIE FOWLER. This false testimony denied Applicant due process right to a fair trial and 6th Amendment right to Compulsory process which is a guaranteed right. (See December 2015 summary judgment hearing page 12 line 10-24)

Applicant request the PCR JUDGE to clarify here ruling that Applicant did not present any blood DNA evidence regarding Bad Faith claims against NCPD crime scene investigator Angela Bunker. This is not true. The second trial record clearly shows evidence that pictures of the blood DNA was introduced into evidence.(see second trial transcript page 524 line 5-10 DNA mark as Exhibit 44&45) PCR JUDGE stated during evidentiary hearing she would review the trial transcript. If the PCR judge had review the trial transcript the record would show that Ms. Bunker destruction of potential exculpatory evidence was in bad faith where she stated that she did not collect DNA blood finger prints fount on walls, door knob , and open window leading to a back yard. MS. Bunker misled the jury to believe that NCPD was not trained in 2006 to collect DNA evidence at crime scene.(see transcript page 389 line) Angela Bunker testified that

she did not conduct a proper investigation which is her normal practice to do so. (See second transcript page 391 line 8-21, page 395 line 14-17 ,page 396 line 2-15 page 420 line 1-12 ,page 585 line 10-25, page 586 line 1-25 , page 587 line 25 thru page 588 line 1-16) The failure to collect DNA evidence is a due process violation. (See Arizona v. Young Blood) If the DNA evidence was collected by NCPD Applicant could have tested the evidence to discover who blood was left when there is evidence in the record that the victim hands was tested positive for gun powered residue and particles. (See second trial transcript page ..) Sled testified during the trial that gun powder residue and particles are found on a person hands who was handling a gun. (See second transcript page 562 thru pages 575) There is evidence of bad faith on part of NCPD in the trial record.

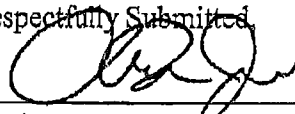
The Amended Order of Dismissal is not a legally sufficient order pursuant to the South Supreme Court Order where the conclusion of laws is not in accordance with the due process right to a fair trial guaranteed by the United State Constitution 5th , 6th, & 14th Amendment. This is prejudice to Applicant as he is being held wrongfully in violation of the United States Constitution. Therefore PCR relief should be granted and a new trial.

The Amended Order of Dismissal failed to address double jeopardy claims where Applicant was placed in jeopardy twice for the same offense. During the first trial a jury was impaneled and heard the state case. The solicitor failed to prove his case beyond a reasonable doubt and the jury could not reach a verdict. Trial judge DEADRA Jefferson declared an mistrial only after giving the jury an hour to deliberate. The first trial transcript was ordered by standby counsel and solicitor but all portion of law held outside the presence of the jury was redacted from the record. Applicant filed a pro se Amended PCR application requesting for full copy of first trial transcript in order to prove that the Judge declared a mistrial only after giving the jury

one hour to deliberate. This was a clear due process violation.

WHEREFORE, APPLICANT moves that issues raised herein be addressed and that the Amended Order of Dismissal be altered and/or amended to incorporate those issues.

Respectfully Submitted,



Clarissa Warren Joyner
1259 Amelia Street, Suite A
P.O. Box 1724
Orangeburg, SC 29116
Attorney for the Applicant

Orangeburg, South Carolina

July 25, 2019

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Terrell McCoy, #256070,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2013-CP-10-1994

**ORDER DENYING APPLICANT'S
MOTION TO ALTER/AMEND**

Presiding Judge:
Applicant's PCR Attorney:
Respondent's Attorney:
Standby Counsel:
Appellate Counsel:
Applicant's Current Attorney:
Date of Hearing:
Court Reporter:

Hon. Deadra L. Jefferson
Rodney D. Davis, Esq.
J. Rutledge Johnson, Esq.
Lorelle Proctor, Esq.
Robert M. Dudek, Esq.
Clarissa W. Joyner, Esq.
December 14, 2015
Denise Lauder

FILED
2019 AUG 29 PM 4:07
JULIE J. ARMSTRONG
CLERK OF COURT

This matter comes before the Court by way of Applicant's Motion to Alter/Amend Judgment, filed July 30, 2019, asking this Court to alter or amend its Amended Order of Dismissal, filed June 14, 2019. Applicant served the Motion to Reconsider on July 30, 2019. The Respondent was provided a copy of the Motion by the Court and given the opportunity to respond. Respondent subsequently advised the Court and opposing counsel that it did not desire to file a Return to the Motion and would rely on its previous memoranda as well as the Courts Amended Order of June 14, 2019.¹ An evidentiary hearing into the matter was convened on December 14, 2015, at the Charleston County Courthouse. Having considered the Applicant's Motion, as well as

¹ Benjamin Hunter Limbaugh, Esq. is current counsel representing the Respondent.

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the various interests balanced by the Court at the time of the ruling, the Defendants' Motion to Alter/Amend is hereby Denied.²

"The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). "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 also Arnold v. State, 309 S.C. 157, 172-73, 420 S.E.2d 834, 842 (1992).

"A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." Rule 59(e), SCRCP. "[T]he ten-day deadline in Rule 59(e) is an absolute deadline. A trial court does not have the power to alter or amend a final order if more than ten days passes and no Rule 59(e) motion has been served, nor does a trial court have any power to grant the moving party an extension of time in which to file a Rule 59(e) motion." Overland, Inc. v. Nance, 423 S.C. 253, 256-57, 815 S.E.2d 431, 433 (2018) (citation omitted) (citing Leviner v. Sonoco Prods. Co., 339 S.C. 492, 530 S.E.2d 127 (2000)). This Court filed and served its Amended Order of Dismissal on June 14, 2019. Applicant filed his Motion to Alter/Amend more than a month later on July 30, 2019. Therefore, Applicant's Motion to

² This Motion is disposed of without the necessity of a hearing and decided on the record 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).

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Alter/Amend is time-barred as a matter of law. Nevertheless, this Court finds that Applicant has presented no meritorious reason for this Court to Alter/Amend its June 14, 2019 Amended Order of Dismissal. Accordingly, Applicant's Motion to Alter/Amend is Denied.

UNDULY SUGGESTIVE IDENTIFICATION OF APPLICANT

Applicant claims that the Amended Order of Dismissal fails to address "claims of Appellate Counsel was [sic] ineffective for failing to raise the identification of Applicant was unduly suggestive when the issue was preserve [sic] for appeal." The Motion references Ms. Corinda Williams's identification of the Applicant. Having reviewed the transcript from the PCR hearing, the Court finds that the Applicant failed to present any evidence at the evidentiary hearing regarding an unduly suggestive identification by Ms. Williams. Moreover, on page 29 of the hearing transcript, PCR counsel makes only a passing reference to unduly suggestive or improper identification when questioning appellate counsel. See Transcript of Evidentiary Hearing, Terrell McCoy v. State, December 14, 2015 at 29. However, no substantive information was elicited from the witness or Applicant such that warranted a ruling from the Court on this issue. However, The Court addressed Applicant's contention that Appellate Counsel failed to raise Brady Violation issues, including the testimony of Ms. Williams. See Amended Order of Dismissal at 13-14. Further, the Court addressed Appellate counsel's strategy in determining which issues he felt appropriate and likely successful on appeal thereby, addressing Appellate Counsel's failure to raise certain issues on appeal. See Amended Order of Dismissal at 12. Therefore, the Motion to Alter/Amend on this basis is Denied.

FAILURE TO APPEAL ORDER RELIEVING TRIAL COUNSEL

Applicant further claims that Appellate counsel failed to raise on appeal Judge Dennis' Order relieving trial counsel. In fact, Appellate Counsel testified that after reviewing the entire

record, he pursued Applicant's inability to adequately appreciate the dangers and disadvantages of self-representation, which was addressed by the Court on page 12 of the Amended Order of Dismissal. This issue is further addressed in the Order from Applicant's appeal. McCoy v. State, Op. No. 2011-UP-471 (Ct. App. filed Oct. 26, 2011); R. at 788-89; Amended Order of Dismissal at 9-10. Therefore, the Motion to Alter/Amend on this basis is Denied.

NEWLY DISCOVERED EVIDENCE CLAIMS

Applicant asserts that the Amended Order of Dismissal fails to address newly discovered evidence claims addressed in his PCR Application. More specifically, Applicant addresses a 911 dispatcher that failed to appear at his trial, and blood DNA evidence that Officer Angela Bunker allegedly failed to collect.

As to the foregoing allegations, the Amended Order addresses in detail the Assistant Solicitor's attempts to procure a one J. Fowler's appearance at trial in order to testify to the 911 call and corresponding CAD report. See Amended Order of Dismissal at 15. Moreover, the Court addressed Applicant's assertion that the State failed to collect certain DNA evidence from the scene on pages 17-18 of the Amended Order of Dismissal. Further, a PCR is not the appropriate mechanism for a Motion based on newly discovered evidence. Rule 29(b), SCRCrimP. A review of the record confirms the issues raised by Applicant are not newly discovered as he raised them during the trial and Appellate Counsel considered their viability in assessing his appeal. Therefore, the Motion to Alter/Amend on this basis Denied.

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Applicant asserts, again, that trial counsel was ineffective for failing to warn Applicant of the dangers of proceeding pro se, and in understanding that he was abandoning PCR claims of ineffective assistance of counsel. As stated in the Amended Order of Dismissal, the Honorable

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Larry B. Hyman granted the State's Motion for Summary Judgement after finding that Applicant made a conscious and voluntary decision to proceed without legal counsel. See Amended Order of Dismissal at 9-10. Thus, this decision is the law of the case, and this Court has no authority to disturb the rulings. Further, the Applicant is not prejudiced as the matter is preserved for Appellate review. Moreover, this Court finds that Applicant failed to present any evidence at the evidentiary hearing regarding such allegations. Accordingly, this Court deems those allegations abandoned by the Applicant. Therefore, the Motion to Alter/Amend on this basis is Denied.

INEFFECTIVE ASSISTANCE OF PCR COUNSEL

Applicant alleges that PCR counsel, Rodney Davis was ineffective for failing to raise various issues with Appellate Counsel's representation at the evidentiary hearing. "All applicants are entitled to a full and fair opportunity to present claims in one PCR application." Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). "Successive PCR applications and appeals are generally disfavored because they allow an applicant to receive more than 'one bite at the apple as it were.'" Id.

Section 17-27-90 of the South Carolina Code generally prohibits the filing of successive PCR applications, stating:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, *unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.*

S.C. Code Ann. § 17-27-90 (2019) (emphasis added). In Aice v. State, the Supreme Court interpreted section 17-27-90 to forbid "a successive PCR application unless an applicant can point to a 'sufficient reason' why the new grounds for relief he asserts were not raised, or were not raised

properly.” Aice v. State, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). The Court in Aice acknowledged that there may be “unique” circumstances where a PCR counsel’s assistance could be challenged in a successive application. Id. at 451, 409 S.E.2d at 394. However, the Court expressly held “the contention that prior PCR counsel was ineffective is not *per se* a ‘sufficient reason’ allowing for a successive PCR application under § 17-27-90.” Id.

Applicant specifically contends that PCR counsel was ineffective for failing to raise various issues with Appellate Counsel’s representation at the evidentiary hearing. This Court finds that PCR Counsel conducted a thorough examination of Appellate Counsel, which revealed no deficiencies in Appellate Counsel’s assistance of counsel. See Amended Order of Dismissal at 12. Further, Applicant has provided no evidence suggesting a sufficient reason that would allow him to pursue a successive PCR claim against PCR Counsel. Accordingly, this Court holds that Applicant’s contention that his PCR counsel was ineffective is not a sufficient reason to grant his motion to Alter/Amend. Therefore, the Motion to Alter/Amend on this basis is Denied.

APPLICANT’S FARETTA HEARING REQUEST

Applicant alleges that the Court failed to grant his request for a full Faretta hearing at the evidentiary hearing. “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)).

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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, Terrell McCoy v. State, December 14, 2015 at 68-69. The Applicant and the State advised the Court that they had rested their cases, signaling a clear end to the proceedings. Id. at 68. The evidentiary hearing was complete and the parties had concluded 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 dilatory and a clear attempt to delay the proceedings and preclude the Court from ruling on the merits of his application. Therefore, the Motion to Alter/Amend on this basis is Denied.

DOUBLE JEOPARDY

The Applicant's Motion to Alter/Amend also asserts that the Amended Order of Dismissal failed to address double jeopardy claims. It is well settled that a double jeopardy claim is an issue for direct appeal, and not for PCR purposes. Further, this Court finds that Applicant failed to present any evidence at the evidentiary hearing regarding such allegations. Accordingly, this Court deems those allegations abandoned by the Applicant. Therefore, the Motion to Alter/Amend on this basis is Denied.

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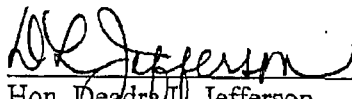
FIRST TRIAL

The Applicant alleges various claims relating to his first trial that ended in a hung jury, none of which are relevant to the present PCR application. Further, this Court finds that Applicant failed to present any evidence at the evidentiary hearing regarding such allegations. Accordingly, this Court deems those allegations abandoned by the Applicant. Further, any issues or claims with respect to Applicant's first trial are not relevant to this Court's consideration of the Applicant's PCR. Therefore, the Motion to Alter/Amend on this basis is Denied.

CONCLUSION

The Applicant presented no novel facts, arguments, or theories in support of the Motion to Alter/Amend the Judgment. The Applicant has not highlighted any portions of the record this Court may have misunderstood, failed to fully consider, or perhaps failed to rule on. Accordingly, the Motion to Alter/Amend Judgment is hereby DENIED.

IT IS SO ORDERED.


Hon. Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

29th day of August, 2019
Charleston, South Carolina



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