

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
Deadra L. Jefferson, Post-Conviction Relief Judge
Roger M. Young, Sr., Trial Judge

Appellate Case No. 2019-001193

RECEIVED

Jun 26 2020

S.C. SUPREME COURT

TERRELL L. MCCOY, SCDC #256070,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED ON CERTIORARI

Petitioner's Statement of Issues on Certiorari

- I. Did the circuit court err in granting Summary Judgement wherein Petitioner was barred from going forward with his ineffective assistance of counsel action (PCR) against Petitioner's trial counsel Lorelle Proctor when Petitioner was given erroneous advice regarding self-representation and the consequences of proceeding pro se at his trial on January 27, 2009?
- II. Did the circuit court err in refusing to allow petitioner to represent himself during the PCR hearing held on December 14, 2015 when PCR counsel refused to admit Petitioner's prepared memorandum of law, failed to admit as an exhibit trial counsel Lorelle Proctor's Rule 5 discovery request, and failed to subpoena trial counsel to the PCR hearing to testify that she had requested discovery, more specifically the 911 tape on several occasions, all before the 911 tape had been destroyed by the North Charleston Police Department such that a hearing should have been held pursuant to Faretta v. California, 422 U.S. 806, 95 S.Ct., 45 L. Ed 562 (1975)?
- III. Did the circuit Court judge err in finding that Petitioner's appellate counsel, Robert Dudek, was not ineffective when appellate counsel only raised one issue in Petitioner's appellate brief, the issue of self-representation, when in fact several viable substantive issues had been raised and the issues had been contemporaneously preserved by Petitioner during his trial and Petitioner repeatedly discussed the appellate issues that he had preserved during the trial with appellate counsel?
- IV. Did the circuit judge err in finding that Petitioner's appellate counsel was not ineffective when appellate counsel did not raise a violation of Maryland v. Brady in violation of South Carolina Rules of Criminal Procedure Rule 5 in Petitioner's appellate brief wherein the State violated Brady and did not provide Petitioner a 911 tape that was in the possession of North Charleston Police Department and the existence of which was imputed to the Charleston County Solicitor handling Petitioner's prosecution that was material and exculpatory for impeachment purposes in Petitioner's defense and the Brady violation was prejudicial to Petitioner's case because the outcome of Petitioner's presentation of his defense would have been different if the 911 tape had been provided to Petitioner when Petitioner raised the issue during his trial and preserved the issue for appellate review?
- V. Did the circuit judge erred in finding that Petitioner's appellate counsel was not ineffective when appellate counsel did not raise a violation of Petitioner's due process right to a fair trial under the Fifth Amendment of the U.S. Constitution and the South Carolina State Constitution art. I § 3, when the trial judge sustained the State's objection to the 911 dispatcher's log prejudicing Petitioner and preventing him from being able to impeach the State's primary witness and present his defense that the 911 caller indicated that the facts of the incident could not have happened as the State's witness Corinda Snowden testified to the jury thereby impeaching her testimony and exonerating

Petitioner in the case when Petitioner raised the issue during his trial and preserved the issue for appellate review?

- VI. Did the circuit court err in finding that Petitioner's appellate counsel was not ineffective when appellate counsel did not raise a Batson v. Kentucky issue when Petitioner argued that the State's use of preemptory challenges to strike two jurors of the same racial composition of Petitioner, but did not use preemptory challenges to strike two Caucasian jurors similarly situated and that the State's justification for striking the African American jurors was not in fact race neutral when Petitioner raised the issue during his trial and preserved the issue for appellate review?
- VII. Did the circuit court err in finding that Petitioner's appellate counsel was not ineffective when appellate counsel did not raise the issue of bad faith on the part of the State and North Charleston Police Department under Arizona v. Youngblood when Petitioner raised and preserved the issue during trial that North Charleston police officer Angela Bunker had failed to preserve valuable exculpatory evidence in the form of DNA from blood evidence found at the scene of incident?
- VIII. Did the circuit court err in finding that Petitioner's appellate counsel was not ineffective in raising the issue of a prejudicial witness identification when Petitioner objected to the witness identification during her testimony and moved to exclude her testimony raising the issue and preserving the issue for appellate review?
- IX. Did the circuit court err in finding petitioners appellate counsel was not ineffective when appellate counsel did not raise the issue of the denial of petitioner's request for a voluntary manslaughter charge when there was in fact evidence in the record that factually support the charge being given to the jury when Petitioner raised the issue during his trial and preserved the issue for appellate review?

Respondent's Counterstatement of Issues on Certiorari

- I. Did the PCR court correctly deny relief, where the record fully supports that Petitioner was advised of the dangers and disadvantages of self-representation and made a knowing and voluntary waiver of his right to counsel?
- II. Did the PCR court properly refuse to allow Petitioner to represent himself during the PCR hearing held on December 14, 2015, where Petitioner failed to demonstrate a satisfactory cause to dismiss PCR Counsel?
- III. Did the PCR court properly find that Appellate Counsel was not ineffective, where he raised the most viable issue on appeal?
 - a. Did the PCR court correctly deny relief where appellate counsel was not ineffective for failing to raise a violation of Brady v. Maryland in Petitioner's appellate brief, where appellate counsel in "good faith" briefed the issue that in his profession opinion was the most viable issue?

- b. Did the PCR court properly find that appellate counsel was not ineffective for failing to raise a claim of violation of Petitioner's due process right to a fair trial under the U.S. Const. Amend. V and S.C. Const. art. I §3, where the Trial Judge properly sustained the State's objection to calling the 911 dispatcher as a witness on the basis of hearsay?
- c. Did the PCR court properly find that appellate counsel was not ineffective for failing to raise a Batson v. Kentucky issue where the State's striking of jurors was in fact race neutral?
- d. Did the PCR court properly find that appellate counsel was not ineffective in failing to raise the issue of bad faith on the part of the State and the North Charleston Police Department under Arizona v. Youngblood, where the failure to preserve what Petitioner deemed to be exculpatory evidence was not in bad faith?
- e. Did the PCR court properly find that appellate counsel was not ineffective in failing to raise a Neil v. Biggers issue where the Trial Court found that the identification of Petitioner was not unduly suggestive?
- f. Did the PCR court properly find appellate counsel was not ineffective for failing to raise an issue regarding the denial of Petitioner's request for a voluntary manslaughter charge where the record does not support that such a charge was warranted?

STATEMENT OF THE CASE

Procedural history

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

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

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

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

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

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

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

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

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

On December 14, 2015, an evidentiary hearing was convened on the surviving allegations at the Charleston County Courthouse before the Honorable Deadra Jefferson. At the hearing, Petitioner was represented Rodney Davis, Esquire. Petitioner testified on his behalf. Appellate Counsel Dudek also testified. On May 5, 2016, Judge Jefferson issued an Order of Dismissal denying and dismissing Petitioner's application. In the order, the PCR Court found Petitioner's testimony regarding Appellate Counsel's ineffectiveness was not credible while also finding the testimony of Appellate Counsel to be persuasive and very credible. The PCR Court also found Appellate Counsel's representation of Petitioner was well above professional norms. Specifically, the PCR Court found Appellate Counsel fully investigated potential preserved issues on appeal. The PCR Court also found Appellate Counsel was not ineffective in his decision not to raise an issue regarding the involuntary manslaughter charge objection on appeal. The PCR court cited to Appellate Counsel's testimony that there must be sufficient legal provocation for such a charge and there was no evidence that the victim provoked Petitioner. App. pp. 1020. Lastly, the PCR Court found Appellate Counsel's decision not to proceed on an appeal for the Batson challenge was proper. App. p. 1042. In regards to Petitioner's claims of prosecutorial misconduct, the PCR Court found the issue to be a direct appeal issue procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). However, the PCR Court further found that for the reasons stated in its rulings on the alleged Brady and blood evidence issues, it failed to discern any evidence of prosecutorial misconduct and Petitioner failed to meet his burden. App. pp. 1088-1089.

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

motion to alter or amend. On February 10, 2017, Judge Jefferson issued the Order denying Petitioner's motion.

On March 8, 2017, Petitioner filed a timely notice of appeal. On November 20, 2017, Petitioner filed his petition for writ of certiorari and accompanying appendix in this Court through his appellate counsel, Melissa Gay, Esquire.¹ This Court issued an Order on February 1, 2019, finding the PCR judge's order denying Petitioner's PCR application and his Rule 59(e) motion did not comply with the law. (App. pp. 1067-1069). This Court ruled the orders did not rule on the merits of all the issues properly presented. (App. V, page 1067). This Court vacated the orders dismissing Petitioner's PCR application and denying the Rule 59(e) motion, and remanded the case back to the PCR judge to issue an order containing specific findings on each of the allegations raised by Petitioner at the PCR hearing and in his Rule 59(e) motion. (App. V, page 1068). The Honorable Deadra L. Jefferson issued her Amended Order of Dismissal and Amended Order Denying Applicant's Motion to Alter or Amend on June 14, 2019. (App. V, page 1070-1103). Petitioner filed another Rule 59(e) Motion to Alter or Amend on July 30, 2019, and Judge Jefferson issued an Order Denying Applicant's Motion to Alter or Amend on August 29, 2019. (App. V, page 1104-1118). A Notice of Appeal was timely filed by Petitioner seeking a writ of certiorari to review this denial of relief.

Statement of Facts

On March 25, 2006, Petitioner a/k/a "Sleezie", along with his brother, Travis Holcombe, left Club Good Times to go to Delta Street along with a friend, Brandon "Bizzy" Cuttino. The three gentlemen stopped by a local gas station and picked up another friend, victim Antwan "Cell Block" Bryant, then continued to Delta Street. The home of Carinda Snowden Williams, Travis'

¹ Ms. Gay was suspended from the practice of law on March 21, 2018. Respondent is serving this response on Peyre Thomas Lumpkin, Esquire, as receiver.

“off and on” girlfriend, was located on Delta Street. App. p. 150, lines 1-3; pg. 151, lines 5-7. Around 5:00 or 5:30 a.m. just outside of Ms. William’s home, Petitioner shot several times into the air. App. p. 152, lines 1-19. All four men entered the home, while the other three simultaneously engaged in a confrontation with Petitioner. App. p. 156, lines 12-25; p. 157, lines 1-2.

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

Ms. Williams recalled, “Travis was trying to put Sleezie down. Antwan was just trying to stop them from arguing and stuff, and Travis stated to Sleezie that Antwan is more of a brother than what [Petitioner] is, or would be, and they was just going back and forth.” App. p. 162, lines 7-11. Antwan turned to use a nearby ashtray, and Petitioner shot him. App. p. 162, lines 16-25. Antwan fell on Ms. Williams. Petitioner continued shooting. Ms. Williams’ estimated approximately five or seven shots. App. p. 168, lines 13-25; p. 169, line 1. Ms. Williams was also grazed, above her left ear. App. p. 165, lines 8-15). Petitioner then pushed through the front storm door with his left hand, the gun still in his right hand. Antwan died in Ms. Williams’ arms. App. p. 170 -172. Ms. Williams then went to a neighbor, who called 9-1-1. App. p. 175. Officers arrived shortly thereafter

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court’s findings of fact and will uphold them if

there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove “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 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. “There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.” Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Petitioner must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, Petitioner must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Id. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel’s deficient performance must have prejudiced Petitioner 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 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

- I. **The PCR Court correctly granted summary judgement where the record fully supports that Petitioner was advised of the dangers and disadvantages of self-representation and made a knowing and voluntary waiver of his right to counsel at trial, and therefore, Petitioner was procedurally barred from raising any allegations of ineffective assistance of counsel.**

Petitioner contends the PCR Court erred in granting summary judgement pursuant to Rule 56, SCRCR, as to Petitioner's claims of ineffective assistance of standby counsel. Petitioner argues he was improperly barred from raising his claim of ineffective assistance of counsel against his standby counsel Lorelle Proctor. Petitioner contends in his first issue on appeal and in his argument heading that summary judgment was granted to Respondent in error because he was given erroneous advice regarding the consequences associated with self-representation at his January 27, 2009, hearing at which he waived his right to counsel in his criminal case.

For a knowing and intelligent waiver to occur, the defendant must be "(1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation." Osbey v. State, 425 S.C. 615, 619, 825 S.E.2d 48, 50 (2019). There is "no constitutional right to hybrid representation," where the defendant "share[s] the duties of conducting [his] defense with a lawyer." United States v. Schmidt, 105 F.3d 82, 90 (2d Cir. 1997) (citing McKaskle v. Wiggins, 465 U.S. 168, 183 (1984) ("Faretta does not require a trial judge to permit 'hybrid' representation of the type Wiggins was actually allowed.")). Without a constitutional right to standby counsel, a defendant generally cannot prove standby counsel was ineffective. United States v. Cochrane, 985 F.2d 1027, 1029 n. 1 (9th Cir. 1993) (rejecting ineffective assistance of standby counsel argument in this context without foreclosing argument in future); United States v. Windsor, 981 F.2d 943, 947 (7th Cir. 1992) (explaining the "court knows of no constitutional right to effective assistance of standby counsel"); United States v. Morrison, 153 F.3d 34, 55 (2d

Cir. 1998) (holding “without a constitutional right to standby counsel, a defendant is not entitled to relief for ineffectiveness of standby counsel”). Cf. United States v. Cohen, 888 F.3d 667, 680 (4th Cir. 2018) (recognizing that a defendant has no right to the appointment of a standby counsel after he chooses to proceed *pro se*).

First, in the present case, Judge Dennis engaged in a lengthy discussion with Petitioner, referencing not only the right to counsel, but also its value. Judge Dennis advised Petitioner of the dangers and disadvantages associated with self-representation. Judge Dennis advised, “the law is not so much what you can read in a book, it’s the subtleties and the things that are really connected by just understanding how it all flows.” App. pp. 769. He determined that appellant had no formal legal education, or training, but had read the rules of evidence. App. pp. 769. He advised that there are specific rules for specific issues, such as the rule against hearsay, rules dealing with character issues and habit, and emphasizing appellant had no background in dealing with such rules. App. pp. 769. He also advised Petitioner another defendant insisted upon representing himself, as much as Judge Dennis attempted to dissuade him, and it was not “pleasurable to the defendant in the end,” App. pp. 769.

Petitioner replied that he had read and reviewed his first trial transcript, and knew how to present evidence and his defenses. App. pp. 770. Petitioner also advised Judge Dennis that he had “a clear understanding of how trial works,” and was “confident” that he was able to represent himself. App. pp. 770. Judge Dennis then inquired about whether Petitioner was “under the influence of any medication” to which he responded he was not. App. pp. 770. Judge Dennis further warned Petitioner would be giving up his right to have post-conviction relief. App. pp. 771. Petitioner still wished to represent himself despite Judge Dennis’ warnings. App. pp. 772.

Petitioner was fully and fairly advised of the dangers and disadvantages of self-representation. State v. McCoy, No. 2011-UP-471 (S.C. Ct. App. filed October 26, 2011). Unless Petitioner shows that the advice of Judge Dennis was not sufficient he cannot rely on the record to show the absence of a knowing and voluntary waiver. Therefore, the Circuit did not err in granting summary judgment on the issue of ineffective assistance of counsel because the record shows that it was solely Petitioner's decision to represent himself at trial, and that decision was made with "eyes open" and a full understanding of the dangers and disadvantages of self-representation. App. pp. 769-772; Watts v. State, 347 S.C. 399, 556 S.E.2d 368 (2001). Additionally, Petitioner has failed to argue why the discussion between he and Judge Dennis was inadequate or insufficient to advise him of the dangers and disadvantages of self-representation. Knox v. State, 340 S.C. 81, 530 S.E.2d 887 (2000) *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

Second, Petitioner is attempting to frame a previously decided direct appeal issue as a claim of ineffective assistance of counsel. Petitioner raised on appeal the issue of whether or not the circuit court erred in allowing him to represent himself where the record did not show he made a knowing and intelligent waiver of his right to counsel. The Court of Appeals affirmed the convictions. The Court of Appeals held that the circuit court made a specific inquiry about the disadvantages and obstacles inherent in self-representation, the subtleties of the rules of evidence, preservation issues, trial strategy, the advantages of an experience and objective lawyer, and expressly advised Petitioner against representing himself. State v. McCoy, No. 2011-UP-471 (S.C. Ct. App. filed October 26, 2011). The Court of Appeals has held that Petitioner's waiver of his right to counsel was made knowingly and intelligently, therefore, that is the law of this case. Further, it is Petitioner's burden to prove that counsel in fact gave him erroneous

advice and that advice was prejudicial. Petitioner had the opportunity to call Lorelle Proctor to testify as a witness at the hearing on Respondent's motion for summary judgement. Petitioner failed to do, thus, leaving this record void of any evidence whatsoever that Ms. Proctor was ineffective in her pre-trial representation or that Petitioner was prejudiced as a result of any alleged deficiency. Finally, Petitioner argues the PCR court erred in not allowing him to call Ms. Proctor to testify to the issue during his evidentiary hearing. The PCR court's decision was proper, as it had no authority to set aside the order of another Circuit Court judge. Circuit_Court Rule 60, Cook v. Taylor, 272 S.C. 536, 252 S.E.2d 923 (1979). Therefore, this Court should affirm the Circuit Court's ruling.

II. The PCR Court appropriately refused to allow Petitioner to represent himself during the PCR hearing held on December 14, 2015, where Petitioner failed to demonstrate a satisfactory cause to dismiss PCR Counsel.

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

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

Petitioner's contention that Judge Jefferson should have adjourned the PCR hearing to a hold a Faretta² hearing when he expressed dissatisfaction with PCR Counsel is wholly without merit. While Petitioner may have disagreed with PCR Counsel's strategy, PCR Counsel amended the application and presented at the hearing those issues he deemed to be meritorious. Moreover, Petitioner did not express any dissatisfaction with PCR Counsel until the conclusion of the hearing. App. p. 988, lines 10-14. Where the request to proceed *pro se* is made after trial has begun, the decision to grant or deny such a request rests in the sound discretion of the trial judge. State v. Fuller, 337 S.C. 236, 523 S.E.2d 168 (1999). Therefore, the PCR Court did not err in its refusal to allow Petitioner to proceed *pro se* at the conclusion of his PCR hearing, and this Court should deny certiorari as to this issue. Further, Respondent has not been able to find any formal disciplinary action taken by this Court as it relates to Rodney Davis' representation of Petitioner in this matter. Respondent moves to strike reference to this alleged disciplinary action from Petitioner's Writ of Certiorari.

III. The PCR Court correctly found Appellate Counsel was not ineffective where Appellate Counsel reviewed the entire record and raised what he believed in his professional judgement to be the most viable issue on appeal.

Petitioner argues the PCR Court erred in denying Petitioner's allegations that Appellate Counsel was ineffective for raising only one issue in Petitioner's appellate brief – the issue of whether Petitioner freely and voluntarily waived his right to counsel. Petitioner also contends the record sets forth facts sufficient to establish that Appellate Counsel's choice to brief only the issue of self-representation was deficient. Petitioner further argues that by only briefing one issue Appellate Counsel limited the Court of Appeals' review, and he is therefore entitled to

² Faretta v. California, 422 U.S. 806 (1975).

either a new trial or a new direct appeal to the Court of Appeals. On the contrary, the PCR court correctly denied relief as to this issue because. . . . Therefore, this Court should deny certiorari.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 835(1999) (citing Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985)). However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record. Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985). “For judges to second-guess reasonable professional judgments and impose on... counsel a duty to raise every ‘colorable’ claim suggested by a client would dissuade the very goal of vigorous and effective advocacy....” Tisdale v. State, 357 S.C. 474, 594 S.E.2d 166 (2004).

Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id. In such a case, the applicant must show that appellate counsel’s performance was deficient, and he was prejudiced by the deficiency. Thrift, 302 S.C. at 537; Gilchrist v. State, 364 S.C. 173, 178, 612 S.E.2d 702, 705 (2005); Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). When a claim of ineffective assistance of appellate counsel is based upon failure to raise meritorious issues, the court must examine the record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

In this case, Appellate Counsel testified he had been employed with Appellate Defense since February 1990. App. p. 943. Appellate Counsel testified he reviewed the entire trial transcript in Petitioner’s case in preparing Petitioner’s appeal. App. p. 941, lines 14-17. He further testified it is his common practice to raise the issue or issues that would give the appellant the best chance of winning. App. 943, lines 14-20. Appellate Counsel also testified he would not knowingly fail to raise an issue that he thinks could win, and if Petitioner identified a winning issue, he would not have had a strategic reason not to raise that issue. App. p. 950, lines 4-11. Similarly, Appellate Counsel testified he thought the only issue that would give Petitioner the best chance to prevail was the issue of self-representation, and Appellate Counsel based his briefing of that issue on his experience and the facts of the case. App. p. 950, lines 15-25; p. 951 lines 1-5. Therefore, the PCR Court correctly found Appellate Counsel made a strategic decision to pursue the issue that he deemed to be most “winnable” on appeal. App. pp. 1081.

Indigent defendants do not have a constitutional right to compel appointed counsel to raise non-frivolous issues requested by the client, if counsel, as a matter of professional judgment, decides not to present those issues. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). The PCR Court therefore correctly held Appellate Counsel was not “ineffective for failing to raise something that in good faith he does not in his professional opinion feel that the [Petitioner] would have prevailed on”. App. p. 997, lines 16-24. Therefore, the PCR Court did not err in finding that Appellate Counsel was not ineffective, and certiorari should be denied as to this question.

A. The PCR Court did not err in finding Appellate Counsel was not ineffective for failing to raise a violation of Brady v. Maryland³ regarding the destruction of the 911 tape on direct appeal because Petitioner has failed to present any evidence, either at trial or at the PCR evidentiary hearing, as to the contents of the tape, and therefore, Petitioner cannot meet his burden of

³ 373 U.S. 83 (1963).

proving this issue was plainly stronger than the issue actually raised on appeal.

Petitioner contends the State violated South Carolina Rules of Criminal Procedure Rule 5 and Brady because the State did not provide Petitioner with a copy of a 911 tape that was at one time in possession of the North Charleston Police Department. Petitioner further alleges the existence of the 911 tape was imputed to the Charleston County solicitor in charge of handling the prosecution of Petitioner's case, and that the 911 tape was material and exculpatory evidence for impeachment purposes. Petitioner also argues the outcome of Petitioner's case would have been different if the 911 tape had been provided to Petitioner and that Petitioner raised the issue during trial and preserved it for appellate review. However, it is uncontradicted in the record the 911 tape was destroyed prior to trial, and in fact before Petitioner was even indicted. App. pp. 1085.

Brady only requires the government to turn over evidence in its possession to the defense that is both favorable to the accused and material to guilt or punishment. U.S. v. Jones, 399 F.3d 640 (6th Cir. 2005). Under Brady, the government has an affirmative duty to disclose any evidence its possession that is favorable to the defendant and is material to either the issue of guilt or punishment. U.S. v. Bhutani, 175 F.3d.572 (7th Cir. 1999). However, even though the government has an affirmative duty to disclose exculpatory evidence in its possession, it is not obligated to disclose "every possible shred of evidence that could conceivably benefit the defendant." Id. A Brady violation requires three essential components: the evidence at issue must be favorable to the accused, because either it is exculpatory, or because it is impeaching; the evidence must have been suppressed by the State, either willfully or inadvertently; prejudice must have ensued. Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936 (1999).

First, Petitioner's issue was not properly preserved for appellate review. Petitioner is expressly barred from raising ineffective assistance claims about his own conduct in trial. Faretta, 422 U.S. at 834 n.46 ("Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel."). Neither may he raise an allegation regarding Proctor's pretrial conduct because Applicant assumed responsibility for correcting any pretrial errors when he elected to represent himself. See Cook v. Ryan, 688 F.3d 598 (9th Cir. 2012) (holding a *pro se* defendant could not complain of quality of defense by arguing ineffective assistance of counsel even if pretrial counsel erred because the defendant had the opportunity to correct those errors). Petitioner failed to request to continue his trial in order to investigate the existence of the 911 tape, he failed to argue pre-trial the State failing to produce the tape was Brady violation, he failed to argue to the trial court when the issue was discussed that he wished to allege a Brady violation, and he failed to obtain a ruling on the record as to any objection to the State failing to produce the tape. Therefore, Petitioner has failed to meet his burden in proving appellate counsel was deficient for failing to raise an issue on appeal that was not properly preserved by Petitioner.

Petitioner has fail. Petitioner was provided a copy of the dispatch report, and even requested that the State stipulate to the information regarding a female caller. The State refused to stipulate because without the female caller being present at the hearing to testify, the information presented would have been hearsay. App. p. 641-643. The 911 tape that Petitioner requested had previously been destroyed by the North Charleston Police Department in compliance with their rules regarding the preservation of digital files and was destroyed prior to Petitioner being indicted. App. p. 642, lines 1-5; pp. 1085.

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

B. The PCR Court did not err in finding that Appellate Counsel was not ineffective for failing to raise a claim of violation of Petitioners due process right to a fair trial under the Fifth Amendment of the U.S. Constitution and Article One Section Three of the South Carolina State Constitution where the Trial Judge properly sustained the State's objection to calling the 911 dispatcher as a witness.

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

Here, Petitioner argues Judge Jefferson failed to recognize his validly preserved and articulated appellate issue such that denying relief on the basis of ineffective assistance of appellate counsel was an error of law. However, the PCR Court properly recognized that Appellate Counsel's performance was not deficient in any way nor was Petitioner prejudiced by Appellate Counsel's performance. Appellate Counsel exercised his professional discretion in his

decision to raise the most viable issue. Petitioner contends that failure to allow him to admit the dispatcher CAD log was a violation of due process clause of the Fifth Amendment of the United States Constitution and Article 1 Section 3 of the South Carolina State Constitution, this allegation is wholly without merit. During the trial, Judge Young informed Petitioner he could not bring someone in to read the dispatch log. Petitioner insisted that he wanted the tape to be heard, but at the time of trial, the tape was not in existence and could not be heard. App. p. 641, lines 21-25 and App p. 644, lines 1-7. Thus, not only was appellate counsel not deficient for failing to raise the issue on appeal, appellate counsel could not in fact raise the issue as it was not properly preserved. Petitioner argues, and the lower court found, the issue was properly preserved; however, Petitioner did not attempt to introduce the CAD report at trial and the trial court never ruled that he could not do so. Appellate Counsel testified at the evidentiary hearing that in order for the issue to be properly preserved Petitioner would have needed to ask that the document be admitted and if it was not admitted that it be made a court's exhibit. App. pp. 944, ln. 25; pp. 945, ln. 1-5. As noted above, Petitioner insisted that he wanted the actual 911 call to be played for the jury or that the dispatcher who took the call be allowed to testify as to its contents. Therefore, appellate counsel was not deficient even if the issue had been preserved, however the issue was also not likely properly preserved for appellate review.

Further, Petitioner has failed to meet his burden in proving that any prejudice resulted from the alleged deficiency. Petitioner argues that the CAD report could have been used to impeach witness Snowden, showing that the events did not take place as she testified. First, the CAD report is not part of this record, therefore, this Court has no way of definitively knowing what it may contain. The only information as to the contents of the report is found in the discussions had during trial. Petitioner argued the CAD report would impeach Snowden in that it would show

that the 911 caller was female and not male. The State elaborated that Petitioner asked the State to stipulate that the caller was female, she advised she heard someone banging on the door, the door flew open, and a black male was shot. App. pp. 643, ln. 6-12. None of this information is exculpatory to Petitioner or would have impeached Snowden in a meaningful way. Therefore, Petitioner has failed to meet his burden in showing any prejudice resulting from the alleged deficiency.

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

C. The PCR Court correctly found Appellate Counsel was not ineffective for failing to raise a Batson v. Kentucky⁴ issue where the State's striking of jurors was in fact race neutral.

Petitioner argues the State's striking of African-American jurors was not race neutral, and Appellate Counsel failed to raise the issue on appeal despite Petitioner raising and preserving the issue for appellate review. However, because the State's striking of the jurors was race-neutral, Petitioner would not have prevailed on this issue on appeal. Therefore, the PCR Court correctly denied relief as to this issue, and this Court should deny certiorari.

When reviewing a trial court's decision on a Batson motion, appellate courts give great deference to the trial judge's decision and will review it using a clearly erroneous standard. See State v. Edwards, 384 S.C. 504, 682 S.E.2d 820 (2009). "A finding is clearly erroneous if it is not supported by the record." State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001). The Equal

⁴ Batson v. Kentucky, 476 U.S. 79 (1986).

Protection Clause of the Fourteenth Amendment to the Constitution prohibits the striking of a venire person on the basis of race or gender. State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006); State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001). The proper procedure for a Batson hearing is set forth in State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) [citing Purkett v. Elem, 514 U.S. 765 (1995)]. After a party objects to a jury strike, the proponent of the strike must offer a facially race-neutral explanation. Once the proponent states a reason that is race-neutral, the burden is on the party challenging the strike to show the explanation is a mere pretext, either by showing similarly situated members of another race were seated on the jury or that the reason given for the strike is so fundamentally implausible as to constitute mere pretext despite a lack of disparate treatment. Adams, 470 S.E.2d at 371-72. The burden of persuading the court that a Batson violation has occurred remains at all times on the opponent of the strike. State v. Haigler, 334 S.C. 623, 515 S.E.2d 88 (1999).

“Typically, the decisive question becomes whether counsel’s race-neutral explanation for a peremptory challenge should be believed. . . . [T]here is seldom much evidence in the record bearing on that issue, and the trial court’s findings regarding purposeful discrimination necessarily will rest largely on the evaluation of demeanor and credibility of counsel. Therefore, those findings are given great deference and will not be set aside unless clearly erroneous.” State v. Cochran, 369 S.C. 308, 631 S.E.2d 294, 299-300 (Ct. App. 2006)[citing State v. Guess, 318 S.C. 269, 457 S.E.2d 6 (Ct. App. 1995)].

As the Supreme Court held in Payton v. Kears, 329 S.C. 51, 495 S.E.2d 205 (1998), the right to serve on a jury and not to be discriminated against because of race or gender belongs to the potential juror, not a litigant. This is so because a defendant has no right to trial by a particular jury. Adams, 470 S.E.2d at 373.

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

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

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

Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333 (1988). If the court meant by this statement that the Due Process Clause is violated when the police fail to use a particular investigatory tool, we strongly disagree. The situation here is no different than a prosecution for drunken driving that

rests on police observation alone; the defendant is free to argue to the finder of fact that a breathalyzer test might have been exculpatory, but the police do not have a constitutional duty to perform any particular tests. Id.

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

Petitioner presented no evidence at trial to support his allegations that the North Charleston Police Department contaminated or destroyed evidence which ultimately lead to his motion being denied. App. p. 349, lines 10-17. Thus, Youngblood does not apply to the factual situation in the case at bar. At the PCR hearing, Appellate Counsel testified that he did not recall an issue about blood and DNA testing. App. pp. 945, ln. 5-8. Petitioner could, and did, cross-examine the officers at trial as to any materials they did not collect from the crime scene and why. App. pp. 348-366. However, as previously stated Appellate Counsel is not required to raise every non-frivolous issue that is presented by the record. Thrift, 302 S.C. 535, 397 S.E.2d 523 (1990). It

was not ineffective for Appellate Counsel to make a strategic decision to exclude certain issues. Therefore, certiorari should be denied as to this issue.

E. The PCR Court correctly found Appellate Counsel was not ineffective for failing to raise a Neil v. Biggers issue where the Trial Court properly found the identification of Petitioner as the shooter was not unduly suggestive.

Petitioner contends Appellate Counsel rendered ineffective assistance because he failed to brief the raised and preserved issue of an unduly suggestive identification by the State's witness Corinda Snowden Williams. Trial courts employ a two-pronged inquiry to determine whether due process requires the suppression of an out-of-court eyewitness identification. State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 425 (2012). First, the court must determine whether the identification resulted from "unnecessarily suggestive" police procedures. Neil v. Biggers, 409 U.S. 188, 198-99, 93 (1972). If the court finds the identification did not result from impermissibly suggestive police procedures, the inquiry ends there, and the court does not need to consider the second prong. State v. Dukes, 404 S.C. 553, 745 S.E.2d 137 (Ct. App. 2013). The defendant bears the burden of proving the identification procedure was impermissibly suggestive. Id. at 561. If the court finds, however, that the police used an impermissibly suggestive identification procedure, it must then determine whether the identification was nevertheless "so reliable that no substantial likelihood of misidentification existed." Liverman, 398 S.C. at 138, 727 S.E.2d at 425 (2012).

Petitioner argues the Biggers test, when applied to the facts of Petitioner's case, confirms Snowden's identification testimony should not have been allowed during trial. However, because Snowden was a friend of Petitioner's and had known him for several years, his identification was never in doubt, and the lineup was used merely to match the street name given with the correct person. Therefore, the trial court correctly admitted Snowden's identification of Petitioner as the

shooter, and Petitioner would not have prevailed on this issue at trial. This Court should therefore deny certiorari on this issue.

In this case, the State's key eye witness, Snowden, was shown a six-photo lineup after giving statements to the North Charleston Police Department identifying the shooter as "Sleezie," which was Petitioner's alias. Mrs. Snowden was certain of who Petitioner was because she had known him for years. App. 94, lines 21-25. She was not only present at the time of the shooting, but she saw Petitioner shoot and kill the victim. App. p. 97, lines 10-19; p. 98. She was able to provide the North Charleston Police Department with the Petitioner's nickname and when provided with the six-photo lineup, she identified Petitioner's photo as shooter. App. p. 100. Finally, the length of time between the crime and the identification attempt was not substantial. Mrs. Williams identified the Petitioner on the same day of the incident. App. p. 99. Therefore, the trial court correctly found the identification was not unduly suggestive, and Appellate Counsel was not ineffective in choosing not to raise a Biggers issue on appeal. Appellate counsel specifically testified at the evidentiary hearing that identification is a hard issue to win on appeal, but that he was sure there have been some cases. Therefore, certiorari should be denied as to this issue.

F. The PCR Court correctly found Appellate Counsel was not ineffective in declining to raise an issue regarding the denial of Petitioner's request for a voluntary manslaughter charge where the record does not support that such a charge was warranted. Additionally, because Petitioner has not offered any support for his argument and instead merely rests on conclusory allegations, he has abandoned this issue.

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

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

At the conclusion of his trial, Petitioner requested a voluntary manslaughter charge. App. pp. 662, ln. 4-5. However, the trial judge denied the request, noting no evidence had been presented to warrant such a charge being given to the jury. App. p. 664. Petitioner did not make any argument or direct the trial judge's attention to any evidence in the record that would tend to show his request was warranted and supported by the evidence presented at during the trial.

Additionally, Petitioner has wholly failed to argue why a voluntary manslaughter charge was necessary in this case or how the record support such a request. Petitioner merely argues that there was in fact evidence in the record to factually support the charge being given to the jury. PWC p. 23. Notably, however, he does not point to where in the record the supporting evidence exist, nor does he offer any supporting authority. Petitioner has simply concluded Appellate Counsel should have raised this issue on appeal, despite there being no evidence in the record to support that a voluntary manslaughter charge was appropriate in the case. Therefore, respondent submits Petitioner has abandoned this issue on appeal, and this Court should deny certiorari. See State v. Jones, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) (argument abandoned on appeal when conclusory and without supporting authority).

CONCLUSION

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

Respectfully submitted,

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