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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO CHARLESTON COUNTY

The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2017-000755

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

v.

State of South Carolina, ... Respondent

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

Clarissa Warren Joyner
Attorney for the Petitioner
S.C. Bar # 0066576
Post Office Box 1724
Orangeburg, SC 29116-1724
(803) 534-8393 Telephone
(803) 534-7885 Facsimile

Other Counsel of Record:
Benjamin H. Limbaugh, Esquire
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29202

ARGUMENT

First , the Respondent argues the court correctly denied Petitioner's claim where the record fully supports that Petitioner was advised of the dangers and disadvantages of self-representation, and made a knowingly and intelligently waiver of his rights. This is not issue presented during the summary judgment hearing.

Petitioner did proceed without counsel , during his criminal trial ,but the issue presented at the Summary Judgment hearing was whether trial counsel gave Petitioner erroneous advise to represent himself and whether Petitioner was barred from going forward with ineffective assistance of trial counsel claim where counsel was ineffective for failing to compel the attendance of favorable witness during Petitioner's trial. (See Appendix V Page 901 -906 line 18-25 Summary Judgment hearing)

During the Summary Judgment hearing, Ms.Lorelle Proctor was present but Judge Hyman would not allow her testimony. PCR counsel explained to the court that during the self-representation hearing held on January 27, 2009, Judge Dennis ordered Ms. Proctor's last administrative duty was to compel the attendance of a favorable witness on behalf of Petitioner. (See Appendix January 27 2009 hearing). During trial, Ms. Proctor advised Petitioner and the trial judge that the subpeona for Jenie Fowler (NCPD dispatcher) went to the wrong person. This misinformation was perceived to be true during Petitioner's trial. (See Appendix IV page 639-640). After Petitioner was convicted, he learned through the Freedom of Information Act that this information was erroneous and that counsel had failed to secure attendance of a favorable witness

(See Appendix IV page 856 Beth Woodall letter). If Judge Hyman had allowed Ms. Proctor to testified during the Summary Judgment hearing, it would have been established that standby counsel gave Petitioner erroneous advice to represent himself and gave him erroneous advice that a subpoena went to the wrong witness therefore denying Petitioner due process right to compulsory process. See SC Constitution Article 1 section 14; see also SC Constitution Article 1 section 3; SC code Ann section 17-23-60(1976); SC code Ann 19-7-60 (1976). "These safeguard ensure the accused will benefit from a fair and impartial trial". Chambers v. Mississippi 410 U.S 284 , 302 (1973); see also California v. Trombetta ,467 U.S 479 , 485 ,(1985); United States v. Scheffer 523 U.S. 303,308; State v. Hutton , 358 S.C 622 , 631 , 595 S.E.2d 876, 881 (ct app 2004). Due process guarantees that a criminal defendant be given a reasonable opportunity to present a complete defense. Petitioner's claim is not procedurally barred as Petitioner was denied the right to present the claim and PCR counsel could not appeal the Judge's decision because the ruling did not finalize his claim. The Sixth amendment guarantees Petitioner's the right to effective counsel and compulsory process to obtain attendance of witness in his favor. Had counsel not given erroneous advice, Petitioner would have never proceeded without counsel, and Petitioner would have compelled the attendance of Jenie Fowler, and held her in contempt of court for failing to appear at his trial. This prejudiced Petitioner's to fair trial guarantee by the S. C Constitution Article 1 section 3.

Respondent argues that no Brady violation occurred, however stated it is uncontradicted that the recorded 911 tape was suppressed prior to trial, and in fact before Petitioner was even indicted. The State argues that at no time during Petitioner's trial did Petitioner raise a Brady violation claim. The State also argues no prejudice occurred due to the State failing to produce evidence. The State

also argues that the 911 tape was never in the possession of the Solicitor's Office so no Brady violation occurred. First, Petitioner raised this argument during the pretrial motions to court in which all the motions were denied. (See Appendix I page 52-85;639-644;663-664) During the beginning of trial to the end of trial, Petitioner argued that evidence were either destroyed or tampered with by police. During Petitioner's trial, there was a hearing held outside the presence of the jury regarding the 911 tape recording, and the 911 dispatcher report. Standby counsel, Lorelle Proctor, argued that she had made specific request for the 911 tape before suppression. (See Appendix IV page 642 line 20-25) This court has held "that the suppression by the prosecution of evidence favorable to an accused upon request by accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution". Brady v. Maryland 373 U.S 87, *supra*.

In Riddle v. Ozmint, 369 , S.C 39 , 44 , 631 S.E2d 70,73 (2006), this court has agreed with the interpretation of SCRcrimp Rule 5 (a)(1)(C) that the constitutional dictates of Brady are judicially created discovery mechanism for use in criminal proceedings. The Rule clearly applies to evidence within the actual possession of the prosecution and seems to apply to evidence within the government agencies. State v. Gullege v. 326 S.C 220 , 487 S.E2d 590(1997); Fradella v Town of Mt. Pleasant , 325;S.C 469,482 S.E2d 53 (ct app 1997) state v. trotter 322 s.c 537 , 473 S.E. 2d 452(1996); State v. Wilkins 310 s.c 81 , 425 SE2d 68 (1992) Kyle's v. Whitley ,514 U.S 419,432-42,115 S.Ct. 1555,1565-69,131 L.Ed.2d 490,505-10(1995) Brady,373 U S at 87, 83 S.Ct at 1196, 10 L.Ed.2d at 218 ; 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. United States v. Bagley 473 U.S. 667 , 676 , 105 S.Ct .3375, 3380 , 87 L.E.2d 481 , 490 (1985); State v. Von Dohlen , supra.

In this case, analysis must be used to determine if either has been violated. The favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. First , the state witness Cerenda Snowden gave 3 inconsistent statement to police. In her first statement given to police, she indicated that she heard some guys arguing in her backyard. About 10 minutes later, she heard banging at her front door really, really hard. Then she heard a loud boom at the front door like someone kicking the door, and that's when she heard three to four guns shots. She was still in bed so she jumped up and came out the room. She stated she saw a guy just laying on her living room floor and her front door kicked open. She then stated she ran over to the guy and grabbed him. She states he was choking real badly, and she freaked out and ran into her bedroom, opened the window and stopped. She states she didn't know what to do so she ran out the front door, and saw a guy running down the street with a black hoodie running towards Rivers' Avenue from Rebecca Street. She states she ran to the next door neighbor, and told them to call the police. (See Appendix IV page 829-830 Witness statement). Hours later she gave another statement to police. In her second statement, she states that she wasn't completely honest, and that the guy she stated she saw running down the street in a black hoodie away from the area is her friend brother. His street name is Sleezie Boy. (See Appendix IV page 828 Witness second statement). Twenty-four (24) hours after giving the second statement, she gave a third statement. In her third statement, she states that Petitioner, Travis Johnson, Bizzy and the victim entered her house through the side door. She stated everyone was drunk and mad at Sleezie for allegedly shooting a gun, and Travis was

calling Sleezie stupid and belittling him. She states that Travis was provoking Sleezie and the victim kept getting in between them trying to break it up and Sleezie shot the victim then ran out the front door. (See Cerenda Snowden trial testimony). Ms. Snowden statement are inconsistent with her trial testimony.

Ms. Snowden gave inconsistent theories of the crime. The evidence that was suppressed supports the witness' first statement. The dispatcher report indicated that a female called and advised that she heard someone banging on the door and the door flew open. A black male as C2d she does not know who he is. (See Appendix IV page 852) The suppressed evidence was material to the defense. Also the coroner, Rae Wooten, testified at trial that she found blood on a raised window in the back room leading to a backyard. (See Appendix III page 536-537) This also supports the witness' first statement and the 911 tape. During Petitioner's trial, NCPD crime scene investigator Angela Bunker misled the jury to believe that the crime scene investigator did not go into the backroom where the blood was found on a raised window by coroner Rae Wooten (Appendix III page 583 line -585). It's apparent that the suppression of the 911 tape was material and could have been used to undermine the State theories of the crime. Petitioner argued that the analysis in Brady and Riddle v. Ozmint should be determined in this case as to materiality of the evidence sought to be suppressed pursuant to Brady & Kyles. The record is clear that counsel made a specific request for the evidence before it's suppression to satisfy the Brady prong. Also, Petitioner's alibi witness, Travis Holcombe, testified that he nor Petitioner were at the scene when the crime occurred, and that he and Petitioner never had a confrontation which led to the shooting of the victim. (See Appendix III page 608 -624) Petitioner introduced another alibi witness, his girlfriend, who testified that

Petitioner was not in Charleston during the time of the incident and that he was out of town selling music. (See Appendix IV page 633-638). The North Charleston Police Department seized Petitioner's vehicle after Petitioner was arrested, and clothes and music CDs were found in the trunk of his car to support the alibi witness testimony.

Respondent alleges that Petitioner did not attempt to admit the 911 tape dispatcher's log into the record therefore it was not properly preserved for Appellate review. This is not true. A hearing was held outside the presence of the jury concerning the subpoena sent to Jenie Fowler, the 911 tape and the dispatcher's report. Standby counsel, Lorelle Proctor, asked to stipulate with the solicitor about the contents of the 911 dispatcher's report because the State had misinformed her that the subpoena for Jenie Fowler allegedly went to another Jenie Fowler and that there were two (2) Jenie Fowlers that work for North Charleston Police Department. After, Petitioner discovered evidence to prove that the State gave falsify information to the defense regarding the 911 tape and Jenie Fowler. (Appendix IV page 640 line 14-25 & page 856,857&858) If the State had never destroyed the 911 tape, and had disclosed the evidence to Petitioner when standby counsel filed the SCRcrimp Rule 5 motion, Petitioner would have learned who made the 911 call. Petitioner's due process right to a fair trial was violated.

The state objected to the admission of the 911 tape report because they alleged they did not know who had made the call, and the caller wasn't present to testify nor was Jenie Fowler present to testify. A proffer was made during the hearing on the contents of what was said on the 911 tape report. (Appendix IV page 641 line 20-25; page 643 line 6-20) The trial court sustained the Solicitor's objection preserving the issue for Appellate review. Ms. Proctor argued the admission

of the dispatcher report, and Petitioner argued he wanted the jury to hear the 911 tape recording. The trial judge denied the motion.

In Blacks law dictionary the term stipulation clearly means " Parties may stipulate to any matter concerning the rights or obligations of the parties. The litigants cannot, however, stipulate as to the validity or constitutionality of a statute or as to what the law is, because such issues must be determined by the court. " The exclusion of the evidence was preserved for appeal. In State v. Lyles , this court has held "the admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001); accord State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006); State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (citing State v. Bailey, 276 S.C. 32, 37, 274 S.E.2d 913, 916 (1981)); Wright v. Craft, 372 S.C. 1, 33, 640 S.E.2d 486, 503 (Ct. App. 2006); State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249-250 (Ct. App. 2006); State v. Broadus, 361 S.C. 534, 539, 605 S.E.2d 579, 582 (Ct. App. 2004). "A court's ruling on the admissibility of evidence will not be reversed by this Court absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant." State v. Hamilton, 344 S.C. 344, 353, 543 S.E.2d 586, 591 (Ct. App. 2001), overruled on other grounds by State v. Gentry, 362 S.C. 93, 610 S.E.2d 494 (2005); accord Preslar, 364 S.C. at 472, 613 S.E.2d at 384; State v. McLeod, 362 S.C. 73, 79, 606 S.E.2d 215, 218-219 (Ct. App. 2004); State v. Mansfield, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct. App. 2000); State v. Blassingame, 338 S.C. 240, 251, 525 S.E.2d 535, 541 (Ct. App. 1999); State v. Patterson, 337 S.C.

215, 228, 522 S.E.2d 845, 851 (Ct. App. 1999); see State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001) ("The trial judge's decision to admit or exclude the evidence is reviewed on appeal under an abuse of discretion standard."); State v. Taylor, 333 S.C. 159, 172, 508 S.E.2d 870, 876 (1998) ("[I]n order for this Court to reverse a case based on the erroneous admission or exclusion of evidence, prejudice must be shown."). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v. Irick, 344 S.C. 460, 463, 545 S.E.2d 282, 284 (2001) (citing Lee v. Suess, 318 S.C. 283, 285, 457 S.E.2d 344, 346 (1995)); accord State v. Edwards, 374 S.C. 543, 553, 649 S.E.2d 112, 117 (Ct. App. 2007); State v. Sweet, 374 S.C. 1, 5, 647 S.E.2d 202, 204-205 (Ct. App. 2007); State v. Douglas, 367 S.C. 498, 507, 626 S.E.2d 59, 64 (Ct. App. 2006); State v. Adkins, 353 S.C. 312, 326, 577 S.E.2d 460, 468 (Ct. App. 2003).

Had the evidence been admitted, it would've weakened the State's case and strengthened the defense. The facts that someone called 911 and reported the crime totally different from what the State's witness testified to was withheld from the jury. The jury would have had to make an inference between Cerenda Snowden's first statement, 911 dispatcher report, Jenie Fowler's testimony & Cerenda Snowden's trial testimony. The record is complete that Ms. Snowden gave inconsistent theories and statements. Therefore, Petitioner was prejudiced and his due process rights were violated. Petitioner's conviction should be reversed.

Respondent alleged Petitioner did not present evidence that the NCPD's failure to preserve potential useful evidence, (DNA), was in bad faith. Respondent relates this to evidence of blood found on a curtain, but failed to acknowledge Petitioner's claims. Petitioner argues that there was blood found on a raised window in the bedroom at the crime scene by coroner Rae Wooten. (See

Appendix III page 530 line 9-25; page 524 line 1-25;) During direct examination of Crime Scene Investigator Angela Bunker, she testified that the crime scene investigator did not enter the bedroom where the blood was located on the walls and bedroom door. (See Appendix III page 583 line 13-25). Ms. Bunker misled the jury to believe that the crime scene investigator did not enter the bedroom where blood was noted on walls, the door knob, and on a raise window leading to a backyard. Coroner Rae Wooten testified that when she discovered the evidence, the crime scene investigator was in the room. (Appendix III page 593 – 595).

Ms. Bunker testified that she did not collect the evidence (DNA) that was discovered in the bedroom on a raised window. During the trial, Petitioner sought to preserve this evidence and testimony by moving to have Ms. Bunker arrested for perjury, and the trial judge informed Petitioner he would need to order the trial transcript and have the Solicitor file charges at a later time. (Appendix III page 595 – 596)

The evidence found on the raised window was marked as evidence and introduced into the trial record as an exhibit (Appendix page 530 line 23-24; page 532 line 12-13) through coroner Rae Wooten. In Arizona v. Youngblood, the court held that the failure to preserve potential useful evidence violated the due process right of the defendants. South Carolina has adopted the duty to preserve. While recognizing that the State does not possess an absolute duty to preserve potentially useful evidence, our state Supreme Court has held that a defendant must demonstrate either that the State destroyed evidence in bad faith, or the state destroyed evidence that possessed an exculpatory value that is apparent before the evidence was destroyed, and the defendant cannot obtain other evidence of comparable value by other means. State v. Mabe, 306 S.C. 355, 358-59, 412 S.E.2d 386,

388 (1991); see also State v. Cheeseboro, 346 S.C. 526, 538, 552 S.E.2d 300, 307 (2001) (finding "[t]he State does not have an absolute duty to preserve potentially useful evidence that might exonerate a defendant.") (emphasis added); State v. Singleton, 319 S.C. 312, 317, 460 S.E.2d 573, 576 (1995) ("[I]f the evidence possesses exculpatory value that is apparent before its destruction, its disposal constitutes a denial of due process." (citing Youngblood, 488 U.S. at 56 n.3)).

Petitioner clearly stated NCPD destroyed evidence in bad faith and that he cannot obtain evidence of comparable means. More than fourteen (14) years have passed, and Ms. Bunker testified she left the evidence at the scene. As a crime scene investigator, it was her duty to preserve evidence at a crime scene. The failure to do so should be considered bad faith. The (DNA) left on the raised window supports Cerenda Snowden's first statement given to the police where she stated she ran over to the victim and touched him. She then ran to her bedroom and raised the window. (See Appendix page 829 -830, Cerenda Snowden first statement). The failure to preserve potential useful evidence (911 tape & DNA) , violated the Petitioner's due process right to a fair trial. Therefore, his conviction should be reversed or vacated.

Lastly, the Respondent argues that the identification of Petitioner was not unduly suggestive and that the State's key witness was shown a six (6) photo mug shot of Petitioner. A hearing was held concerning the identification of Petitioner. During the hearing, Ms. Snowden admitted to lying to the police. (Appendix I page 98 line 21-25; page 99 line 2-23; page 102 line 14-16). She also testified she was shown a one photo mug shot of Petitioner. (Appendix I page 103 line 4-10) The one photo mug shot was marked as State's exhibit number 2. (Appendix I page 103 line 19-25 &

page 104 line 1-7; page 108 line 1-25) She also testified she identified Petitioner as being her boyfriend, Travis Johnson's, brother. (Appendix I page 97 line 20-22; page 109 line 6-19)

Petitioner argued that the police never showed Cerenda Snowden a six lineup photo on March 25 , 2006 because on March 25, 2006 Cerenda Snowden told police she did not witness the shooting. (See Appendix IV page 829-830) During her second visit, she stated she saw someone running down the street from Rivers Avenue to Rebecca Street that looked like her friend's brother Sleezie (Appendix IV page 828). On March 26 , 2006, Cerenda spoke police a third time, and implicated Petitioner. Petitioner argues that the identification was unduly suggestive because first, Cerenda Snowden was shown a one photograph/mug shot of him. Second, she testified she identified Petitioner as being her boyfriend's, Travis Johnson's, brother . Third , the State had not produced any evidence that Petitioner has a brother name Travis Johnson. During trial, Travis Holcombe testified that he is Petitioner's brother, and that on March 25, 2006, he nor Petitioner was present during the shooting of the victim. Travis also testified that he and Petitioner did not have a confrontation that caused the killing of the victim. (See Appendix IV page 608 line 19-22; 609 line 6-7; page 622 line 2-5) The solicitor also warned Travis that if he testified falsely, he could be charged with perjury. (Appendix page 627 line 18-21). No charges were filed against Travis.

Under Neils v. Biggers the court has held " we have considered on four occasions the scope of due process protection against the admission of evidence deriving from suggestive identification procedures. In Stovall v. Denno, 388 U.S. 293 (1967), This court had held" As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of

attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. In this case, the witness' prior description was that she saw someone running down the street from Rivers Avenue to Rebecca Street that look like her friend's brother. The time of the incident was between 5:30 and 5:45 am. Cerenda Snowden also gave multiple statement and third statement 24 hours after the incident.

For these reasons Petitioner argues the identification was unduly suggestive as she was shown a one mug shot of Petitioner. Appellate counsel was ineffective for failing to raise the issue during appeal.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari.

S/Clarissa Warren Joyner
Clarissa Warren Joyner
1259 Amelia Street, Suite
P.O. Box 1724
Orangeburg, S.C. 29116-1724
(803) 534-8393

ATTORNEY FOR PETITIONER