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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2013-CP-10-1994

State of South Carolina, ... Respondent,

v.

Terrell McCoy, #256070 . . . . Petitioner.

PETITION FOR REHEARING

The Appellant, Terrell McCoy, pursuant to Rule 221, *SCACR*, moves the Court to reconsider and modify its Order dated May 18, 2022 denying his petition for writ of certiorari which followed the denial of his application for post-conviction relief. In support of the petition for rehearing, the appellant shows the following to the court:

This court overlooked or has erroneously construed or misapplied a provision of law or a controlling authority where no probative evidence exist to support the PCR judge ruling on the following issues : See **Cherry v. State** , 300 S.C 115, 119 , 386 S.E2d 624(1989) ; **Pierce v. State** 338 S.C. 139 , 144 , 526 S.E.2d 225(2000) If the PCR judge makes error of law then this court must reverse.

1. Did the PCR judge err in denying Appellate counsel was ineffective where he failed to raised several substantive issues during appeal when the issues had been

contemporaneously preserved by Petitioner during his trial & petitioner repeatedly discussed the Appellate issues he had preserved during trial with Appellate counsel ?

2. Whether there is any evidence to support the PCR judges finding that no Brady violation occurred?

3. Where there any evidence to support the Summary Judgment Judges ruling that Petitioner could not raise ineffective assistance of trial counsel claims during Post Conviction Relief & Whether there is any evidence to support the PCR judges finding that Petitioner did not call trial counsel Lorelle Proctor to testify at PCR hearing to determine what advice she gave Petitioner regarding a waiver of constitutional rights to effective assistance of counsel ?

First the burden of proof is upon to show that counsel's performance was deficient as measured by the standard of reasonableness under prevailing professional norms. Second the Petitioner must prove that he or she was prejudiced by such deficiency to the extent of there being a reasonable probability that , but for counsel's unprofessional errors , the result of the would have been different. **Strickland v. Washington** , 466 US 668 , 104 S.Ct.2052 , 80 L.Ed(2nd) (1984) . Petitioner is " constitutionally entitled to the effective assistance of appellate counsel. **Evitts v. Lucey** , 469 U.S 387 , 105 S.ct 830 , 83 L.Ed 821 (1985)(to be effective appellate counsel must give assistance of such quality as to make appellate proceeding fair) " In deciding a claim of ineffective assistance of counsel's , the focus is " the fundamental fairness of the proceeding who result is being challenged" . Strickland v. Washington. , 466 US 668, 104 S.ct 2053 , 80 L.Ed (2nd) 1984. PCR Judge Jefferson (hereinafter called PCR judge) committed an error of law in denying Petitioners application for PCR. PCR judge made her ruling that appellate counsel was not ineffective, and that Petitioner, in representing himself , had not made

adequate objections or preserved his issued for appeal during his trial. In fact, Petitioner had raised all his issued and preserved then for appellate review. (See Record of Appeal Appendix page 920 thru 1003 , December 14 , 2015 PCR evidentiary hearing transcript) compare (Appendix page 52 through 85; page 639 through page 644; page 663 line 13-25 ; page 664 line 1-5) Appellate counsel was ineffective for failing to raise Petitioner substantial Issues during appeal. **Southland v State** , 337.S.C 610 ,616 , 524 S.E2d 833, 836 (1999) Generally, in analyzing a claim of ineffective of assistance of appellate counsel claim , this court applies the Strickland test as it would when analyzing a claim of Ineffective assistance of trial counsel . Supra Southland. Thus in this case we ask 1) whether appellate counsel's performance was deficient, and 2) whether Petitioner was prejudiced by appellate counsel performance.

Appellate counsel performance was deficient for failing to raise :

I1) Brady v. Maryland 373 US 83 (1963) claims , State failure to disclosed evidence during trial , where Petitioner, through counsel made a specific request for evidence. (See Record of Appeal Appendix Trial transcript page) the undisclosed evidence (911 tape) was destroyed by State after the request was made. PCR counsel admitted an affidavit by Chris Neely which show facts that the evidence was destroyed after specific request was made for the evidence. (Appendix page 958 line 4-25; 959 line 1-6) Petitioners SCRPcrimp Rule 5&6 were served upon solicitor office dated April 10, 2006 and was attached to Petitioner PCR application. See (Petitioner PCR application & Appendix page 1066)Petitioner trial was held on February 2 2009. During pre trial , Petitioner made Brady claims that evidence was destroyed or never disclosed. Trial counsel informed Petitioner , that if he prove that any evidence was destroyed by the State he would give a certain jury instructions regarding any evidence destroyed if Petitioner could prove his claim. (See Appendix page 77 line 14-22) During trial , Petitioner seek to call Jennie Fowler , North

Charleston Police Department(hereinafter called NCPD) 911 dispatcher a witness to testify concerning the 911 call she received on March 25 2006. The State informed Petitioner that his Subpoena for Jennie Fowler went to another Jennie Fowler that allegedly work at NCPD. Petitioner then motion the court regarding the witness contempt of court. During the hearing Petitioner was notified that the 911 tape he Subpoena did not exist or was destroyed. (See Appendix page 639 through 644) Petitioner standby counsel ask the State to stipulate regarding the contents of the 911 call in order to continue trial , while Petitioner requested for the production of the 911 tape and also stated he subpoena the 911 tape. The trial judge abused his discretion by stating " We couldn't bring somebody in just to read what is on that." (Appendix page 243 line 21-24) Petitioner last witness was the 911 dispatcher he subpoena. Although Petitioner questioned the first arriving police officer Jason Roy , concerning the dispatcher call , he need the 911 dispatcher present at his trial to testify concerning the call, and who made the call , because the state Objection concerning the dispatcher report was hearsay based on the unavailability of a witness Jennie Fowler. (Appendix page 641 line 20-25; 643 line 6-17) In order to admit the evidence into the trial record the caller or dispatcher need to be present and based on State destruction of evidence , Petitioner was unable to learn the identity of the 911 caller. The state also gave false information to the court regarding the subpoena. After discovered evidence shows , that during Petitioner trial held in 2009 , it was only one employee at NCPD named Jennie Fowler. (See appendix pages 855, 856 857, 858) The undisclosed evidence was favorable to the accused. During PCR , Appellate counsel testified he was unaware of any Brady claims and that he would go with Petitioner memory of issue and request from Petitioner. (Appendix page 940 through 954) During the close of Petitioner defense at trial , Petitioner ask the judge for a final ruling of the destruction of evidence. The judge denied the motion stating

Petitioner did not prove anything was destroyed although trial judge informed him during pretrial if he prove anything was destroyed he would give the proper jury instructions. (See Appendix page 663 line 18-25; page 664 line 1-4) The issue was properly preserved and appellate counsel was ineffective for failing to raise the issue. Appellate counsel performance was deficient and Petitioner was prejudiced by appellate counsel performance. No probative evidence exist to support the PCR judge ruling . See **Gibson v. State** , 334 S.C. 515 , 514 S.E.2d 320 (1999)
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. Kyles 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. UnitedStates v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481, 490 (1985); State v. Von Dohlen, supra.

B. This Court has held that a PCR court "shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." S.C. Code Ann. §§ 17-27-80 (2003). PCR courts have been repeatedly admonished regarding the failure to specifically rule on the issues presented in a PCR application. See Bryson v. State, 328 S.C. 236, 236-37, 493 S.E.2d 500, 500 (1997) (vacating a PCR order and remanding the matter for specific findings of fact and conclusions of law); McCullough v. State, 320 S.C. 270, 272, 464 S.E.2d 340, 341 (1995); Pruitt v. State, 310 S.C. 254, 255, 423 S.E.2d 127, 128 (1992) (vacating and remanding PCR order dismissing the action where the PCR court failed to address the issues raised in the

application); see also Garner v. State, 371 S.C. 1, 1, 626 S.E.2d 860, 860 (2006) (emphasizing language in section 17-27-80 that specific findings of fact and conclusions of law regarding each issue presented must be made by the PCR court).

C. Petitioner presented evidence to support his claims. Accordingly, Petitioner moves that a rehearing be granted and that, at such hearing, the order denying his petition for writ of certiorari entered on May 18, 2022 be withdrawn and the Court enter an amended Order reversing and/or vacating the PCR order.

Dated: June 2, 2022

S/Clarissa Warren Joyner
Clarissa Warren Joyner
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Other Counsel of Record:
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PROOF OF SERVICE

I, Clarissa Joyner, do hereby certify that on June 2, 2022, served **Petition for Rehearing** on Samantha Jo Weidaver at the address referenced below by depositing a copy of same in the U.S. Mail, postage prepaid with a return address clearly indicated and addressed as follows:

Samantha Jo Weidaver
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29202

S/Clarissa Warren Joyner
Clarissa Warren Joyner
Attorney for the Appellant
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PROOF OF SERVICE

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

Dated: June 2, 2022

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Via email ctappfilings@sccourts.org,

Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201
(by electronic filing only)

Re: Terrell McCoy, #256070 v. State of South Carolina
Appellate Case No.: 2019-001193

Dear Ms. Kitchings:

Attached please find Petitioner's Petition for Rehearing. By copy of this letter, I am serving the same on Assistant Attorney General, Samantha Jo Weidaver and Petitioner, Terrell McCoy. With kind regards, I am

Sincerely,

s/ Clarissa Warren Joyner
Clarissa Warren Joyner
Attorney at Law

cc: Samantha Jo Weidaver, Esquire
Terrell McCoy