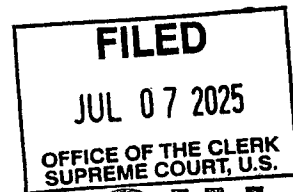


No. 25-5336



IN THE
SUPREME COURT OF THE UNITED STATES

ORIGINAL

Terrell McCoy — PETITIONER
(Your Name)

vs.

John Palmer — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeal for the Fourth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Terrell McCoy
(Your Name)

WAB#167
4460 Broad River Correctional Institution
(Address)

Columbia SC 29210
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

- 1) Did Petitioner voluntarily, knowingly, and intelligently waive his Sixth Amendment right to effective assistance of trial counsel, where the record reveals counsel suggested he waive his Sixth Amendment right during a jail visit because he was dissatisfied with counsel?
- 2) Whether pretrial counsel was ineffective for failure to investigate, and obtain evidence, and failure to subpoena witnesses as directed by Judge Dennis pursuant to the Sixth Amendment?

LIST OF PARTIES

- [✓] All parties appear in the caption of the case on the cover page.
- [✓] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

STATE of South Carolina

RELATED CASES

STATE OF SOUTH CAROLINA v. Terrell McCoy Unpublished opinion No. 2011-UP-471

The State v. Terrell McCoy Appellate Case No. 2012-206366

Terrell McCoy v. State of South Carolina C/A 2013-CP-10-1994

State of South Carolina v. Terrell McCoy C/Nº 06-GS-10-4987

Terrell McCoy v. State of South Carolina Appellate Case: 2017-000755

Terrell McCoy v. State of South Carolina Appellate Case: 2019-001193

Terrell McCoy v. Warden John Palmer Civil Action No: 9:23-089-MGL

Terrell McCoy v. Warden John Palmer No : 246653

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APPENDIX C The South Carolina Supreme Court denying petition for writ of Certiorari, March 6, 2013; The South Carolina Supreme Court Order vacating PCR Judge Order, February 1, 2019
The South Carolina Supreme Court denial of Petition for Writ of Certiorari, October 4, 2022

APPENDIX D South Carolina Court of Appeal affirmed 2011-UP-471, Order denying Petition for Rehearing December 19, 2011, order denying petition for Writ of Certiorari May 18, 2022, Order denying petition for Rehearing, September 08, 2022

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Argensinger v. Hamlin	407 U.S. 25, 34, 37 92 S.Ct. 2006 32 L.Ed. 2d 530
Arizona v. Youngblood	488 U.S. 51 109 S.Ct. 333 102 L.Ed. 2d 281
Bannister v. State	333 S.C. 298, 509 S.E. 2d 807 (1998)
Bergen v. United States	295 U.S. 78, 88, 55 S.Ct. 629, 633 79 L.Ed 1314 (1935)
Brady v. United States	397 U.S. 742, 749, 90 S.Ct. 1463 at 1469 (25 L.Ed. 2d 747)
Brady v. Maryland	373 U.S. 83 87, 83 S.Ct. 1994, 1196-97, 10 L.Ed. 2d 215 (1963)
Brookhart v. Janis	384 U.S. 1 86 S.Ct. 1245 16 L.Ed. 2d 314 (1966)
Brown v. Craven	424 F. 2d 1166, 1169-70 (CA 9 1970)
Chapman v. California	386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967)
City of Columbia v. Assa ad fatus	420 S.C. 28, 800 S.E. 2d 782 (2017)
Faretta v. California	422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1974)
Fay v. Noia	372 U.S. 391, 439 U.S. 1, 86 S.Ct. 822, 849 9 L.Ed. 2d 837 (1963)
Foster v. State	298 S.C. 306 379 S.E. 2d 907 (1989)

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Amendment XIV U.S. STATES Constitution

The S.C. Constitution Article 1 § 3, and Section 14

Code of Laws of South Carolina title 17 Chapter 27, § 17-27-20 (A)(1)(4)

Rule 41(d)(1) Federal Rules of Appellate Procedure

United States SUPREME COURT RULE 13, 28 U.S.C.A (1)(5)

Rule 602 South Carolina Appellate Rule

United States Sup Ct. Rule 10, 28 U.S.C.A

28 U.S.C.A 2254(d)(E)(2)

S.C. Code of Law title 17 Chapter 27

17-27-20 (A)(1)(4)

OTHER

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- Gibson v. State 334 S.C. 515, 514 S.E.2d 320 (1999)
- Giglio v. U.S. 405 U.S. 150 92 S.Ct. 763 31 L.Ed. 2d 104 (1972)
- Godinez v. Moran 509 U.S. 389 113 S.Ct. 2680 125 L.Ed. 321
- Harrington v. Richter 562 U.S. 86, 131 S.Ct. 770 178 L.Ed. 2d 624 (2011)
- Hazel-Atlas Glass Co. v. Hartford Empire Co. 322 U.S. 238 64 S.Ct. 997 88 L.Ed. 1250
- Hill v. Lockhart 474 U.S. 52, 56 106 S.Ct. 366, 369, 88 L.Ed. 2d 203 (1985)
- Janes v. Brigano 470 F.3d 636 (2006)
- Johnson v. Zerbst 304 U.S. 458 58 S.Ct. 1019 (1938)
- Jones v. State 348 S.C. 13, 14, 558 S.E. 2d 517, 518 (2002)
- Kimmelman v. Morrison 477 U.S. 365, 378 106 S.Ct. 2574 91 L.Ed. 2d 305 (1986)
- Lewis v. State 439 S.C. 635 889 S.E. 2d 570 (2023)
- McKnight v. State, 326 S.C. 356, 358 465 S.E. 2d 352, 353 (1995)
- Muhammad v. Kelly 575 F.3d 359 (4th Cir. 2009)
- Napue v. People of State of Illinois 360 U.S. 264 79 S.Ct. 1173 32 L.Ed. 2d 1217 (1959)
- Pozden v. Maurer 424 F.3d 303 2005
- Pennsylvania v. Ritchie 480 U.S. 39 56, 107 S.Ct. 989, 94 L.Ed. 2d 40 (1987)
- Powell v. Alabama 287 U.S. 45, 53 S.Ct. 55 77 L.Ed. 158 (1932)
- Richardson v. State 377 S.C. 103, 107, 659 S.E. 2d 493, 495 (2008)
- Riddle v. Ozmint 369 S.C. 39 631 S.E. 2d 70 (2006)
- Schneekloth v. Bustamonte 412 U.S. 218, 238 n. 25 93 S.Ct. 2041, 2053 36 L.Ed. 2d 854 (1973)
- Sell v. United States 539 U.S. 166, 180 123 S.Ct. 2174 156 L.Ed. 2d 197 (2003)
- Shinn v. Ramirez 596 U.S. 366 142 S.Ct. 1718, 212 L.Ed. 2d 713 (2022)
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- Talianetti v. United States 394 U.S. 316, 89 S.Ct. 1099 22 L.Ed. 302 n. 1 (1969)
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- United States v. Fraizer EL 204 F.3d 553
- United States v. King 119 F.3d 290, 295 (4th Cir. 1997)
- United States v. Mackovich 209 F.3d at 1231
- United States v. Richardson 195 F.3d 192, 198 (4th Cir. 1999)
- United States v. Scott 909 F.2d 488 (11th Cir. 1990)
- U.S. v. Thomas 391 Fed App 321
- United States v. Valenzuela Bernal 458 U.S. 858, 867, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982)
- Van Sant v. Gondles 596 F.Supp 484 (1983)
- Van Moltke v. Gillis 392 U.S. 708, 724, 68 S.Ct. 316, 323, 92 L.Ed. 309 (1948)
- Wahl v. State 400 P.2d 679, 679 Kan App. (2017)
- Washington v. Texas 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed. 2d 1019
- Whitehead v. State 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992)
- Wiggins v. Smith 539 U.S. 510, 526, 123 S.Ct. 25, 27, 156 L.Ed. 2d 471 (2003)
- Williams v. Taylor 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed. 2d 389 (2000)
- Wilkes v. Israel 627 F.2d 32, 35 (7th Cir. 1980)
- Wilson v. Parker 515 F.3d 682, 698 (6th Cir. 2008)
- Winston v. Kelly (Winston I) 592 F.3d 535, 553 (4th Cir. 2010)
- Winston v. Pearson (Winston II) 683 F.3d 489 (2012)
- W. LaFare & J Israel, Criminal Procedure § 11 (4) (d) at 495 (1989)

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the South Carolina Court of Appeals court appears at Appendix D to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

JURISDICTION

[] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 12, 2025.

[] No petition for rehearing was timely filed in my case.

[✓] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 15, 2025, and a copy of the order denying rehearing appears at Appendix A pages 28-33

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[] For cases from **state courts**:

The date on which the highest state court decided my case was October 4, 2022. A copy of that decision appears at Appendix C, pages 47-50

[] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Organic Laws of the United States of America Constitution of the UNITED STATES

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV Section 1.

All Person born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its Jurisdiction the equal protection of the laws.

The Constitution of The State of South Carolina 1895

Article 1 § 3

The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.

Article 1 § 14

The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

Continued from page 3

impartial jury, to be fully informed of the nature and cause of the accusation, to be confronted with the witnesses against him to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both

Code of laws of South Carolina 1976 Annotated title 17 Chapter 27

§ 17-27-20 Persons who may institute proceeding; exclusiveness of remedy

(A) Any person who has been convicted of, or sentence for, a crime and who claims:

(1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;

(4) That there exist evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of Justice:

STATEMENT OF THE CASE

The Petitioner, Terrell Lynwood McCoy, a prisoner in the South Carolina Department of Correction filed a petition for Writ of Habeas Corpus by person in State custody with the United States District Court District of Charleston on 1-9-23. The petition, inter alia, attacked the voluntariness of waiver of trial Counsel entered in the Charleston County, South Carolina, General Session in January 27, 2009.

The State of South Carolina charged Mr. McCoy with Murder on March 27, 2006. Mr. McCoy was convicted on February 6, 2009, and sentence to 50 years imprisonment for murder. The sentence was ultimately reduced to 40 years imprisonment.

Mr. McCoy filed a timely appeal raising the federal claim "Whether the Court erred by allowing appellant to represent himself prior to his murder trial where the record did not establish that appellant was adequately warned of the dangers and disadvantage of self-representation... and the record does not reveal a knowing and intelligent waiver. See (Pet. App page 51

The South Carolina Court of Appeals affirmed. (Pet. App page 51

Petition for Rehearing was denied. (Pet. App. pg 53), and on March 6, 2013, the South Carolina Supreme Court denied Petition for Writ of Certiorari. (Pet. App page 47), Petitioner did not file a petition for Writ of Certiorari in the United States Supreme Court, instead, he filed a timely post conviction relief application on April 4, 2013. (Pet. App pages 56-71

On September 9, 2015, the circuit court held a summary judgment hearing. (Pet App. pg 72-93) The State argued, Mr. McCoy waived counsel, and therefore could not raise ineffective assistance of trial counsel claim. PCR counsel Rodney Davis argued trial counsel had failed to investigate and obtain evidence prior to filing the motion to be relieved, and had failed to subpoena witnesses as directed by the Judge. (Pet. App. pg 81-92. Lewis v. State 439 S.C. 635 889 S.E.2d 570 (2023)

At the conclusion of the hearing, Judge Hyman allowed PCR Counsel to amend PCR application pursuant Rule 15, South Carolina Rules of Civil Procedure, and scheduled the PCR hearing for the December term. (Pet. App pg 91 line 12-25

STATEMENT OF THE CASE

(continued)

The PCR hearing was held on December 14, 2015. PCR Counsel called Corelle Proctor as a witness, and Attorney General Rutledge Johnson objected. The PCR Judge sustained the objection, and Ms. Proctor was not allowed to testify (Pet. App. pg 96 line 6-25 - 99 line 1-16)

The PCR Court issued an order of dismissal on May 6, 2016. (Pet. App. pg 177-188) After receipt of the order of dismissal, PCR Counsel Melissa Gay filed a timely Rule 59 (e) motion. (Pet. App. pg 189-193)

The PCR Court denied the Rule 59 (e) motion, and Petitioner filed a timely appeal. On February 1, 2019, The Supreme Court of South Carolina granted Certiorari, vacated, and Remanded. (Pet. App. pg 48-49)

On June 14, 2019, the PCR judge issued an Amended Order of Dismissal. The PCR judge objectively unreasonably determined Petitioner did not call Corelle Proctor as a witness, thereby eliminating the Court's ability to make an independent factual determination as to what advice if any, Ms. Proctor provided to the Applicant regarding the consequences of his proceeding prose in the trial of this matter. (Pet. App. pg 194-214)

Petitioner then filed a timely Rule 59 (e), and notice of Appeal. On August 29, 2019, the PCR Court denied the Rule 59 (e) (Pet. App. 215-222)

On May 18, 2022, the SC Court of Appeals affirmed the Circuit Court's decision. (Pet. App. pg 54)

On 2-15-2023, Petitioner filed a timely Habeas Application under 2254. He raised several claims including Ground one: Trial Counsel was ineffective for given erroneous advice or suggested he waived his Sixth Amendment right during a jail visit, and failure to investigate, and subpoena witnesses as directed by the Judge. (Pet. App. 223-225)

Ground Eight: Does the timely filing of Post Conviction Relief application toll the 90 day time limit to file a petition for Writ of Certiorari in the United States Supreme Court?

STATEMENT OF THE CASE

(Continued)

First, Petitioner mailed a timely petition for writ of Certiorari to the United States Supreme Court raising the issue that was raised on direct appeal, and to the SC Supreme Court on 11 - 10 - 2022. The clerk of court erroneously returned the Petition and did not file the Petition. (Pet. App. pg 226

See: Talianetti v. United States 394 U.S. 316, 89 S.Ct. 1099 22 L.Ed. 302 n. 1 (1969) (Time limitation for filing petition for certiorari is not jurisdictional and failure to timely file petition did not bar the Supreme Court's exercise of discretion to consider the case)

The Magistrate Judge denied habeas relief on November 15, 2023. Petitioner filed objection on December 21, 2023. On January 29, 2024, the district Judge denied the objection. The order adopting the Report & Recommendation was entered. Petitioner then filed a timely Rule 59(c) motion which was denied on May 21, 2024. Pet. App pg 34-46

Mr. McCoy appealed to the United States Court of Appeals for the Fourth Circuit asserting that he was entitled to an evidentiary hearing in regards to the state court rejecting his ineffective assistance of counsel claims, where the voluntariness of the waiver required a de novo review, where the record revealed counsel suggested he waived his constitutional rights without any other alternative. The Fourth Circuit Court denied appeal. (Pet. App. pg 28-29

Mr. McCoy then filed a petition for Rehearing and Rehearing En banc which were denied on April 15, 2025. (Pet. App. pg 30

1. Background

Mr. McCoy was arrested on March 27, 2006, and the state appointed public defender Lovelle Proctor as counsel. On April of 2006, Petitioner retained attorney Peter David Brown to represent him, and the Preliminary hearing was held on May 9, 2006. (Pet. App. pg 229

STATEMENT OF THE CASE

(Continued)

The first trial was held on July 15, 2008. The jury could not reach a verdict, and the Honorable Judge Deadra Jefferson declared a hung jury on July 17, 2008.

Mr. McCoy then wrote the South Carolina office of Disciplinary Counsel board in 2008 regarding Ms. Proctor failure to investigate, and obtain evidence. (Pet. App. 229-230, - 2008 Disciplinary Counsel board documents)

On December 9, 2008, Ms. Proctor filed a motion to be relieved in violation of Rule 602 (a) (2) South Carolina Appellate Court Rules. (Pet. App. pg 231)

Attorney Peter Brown never filed a motion to be relieved as counsel, and Petitioner is unaware how Ms. Proctor became his attorney during the first trial.

On December 16, a hearing was held regarding Substitution of Counsel. At this hearing, Mr. McCoy denied self-representation, and requested substitution of counsel. (See Pet. App. pg 232-235) Reconstructed December 16, 2008 initial Waring hearing transcript.

The December 16, 2008 hearing transcript certified and notarized, show Mr. McCoy was brought to court, and he requested substitution of counsel. The record also shows Mr. McCoy argued his family retain counsel, and is supported by General Session Case history. (Pet. App. pg 228) The record does not reveal Ms. Proctor was appointed.

As shown above, Attorney Peter Brown was retained in April of 2006, and represented Mr. McCoy during the preliminary hearing held on May 9, 2006.

Petitioner requested Mr. Brown's assistance, and stated that Mr. Brown was never notified about the first trial date nor the December 16, 2008 hearing. Mr. McCoy explained that Ms. Proctor never corresponded with him, nor did she investigate. He also complained Ms. Proctor did not contact any of his alibi witnesses during the first trial.

Judge Deadra Jefferson denied the motion to substitute. (See Pet. App pg 235)

STATEMENT OF THE CASE

(Continued)

A Second waiver of counsel hearing was held on January 27, 2009. Judge Markley Dennis presided. Ms. Proctor told the Judge that she visited Mr. McCoy at the County Jail and suggested he either proceed with Ms. Mulvaney and her or represent himself. (Pet. App pg 238, January 27, 2009 Waiver hearing transcript page 3 line 11-14)

Petitioner then addressed the Court:

Defendant: My name is Terrell McCoy, as you know, I filed a motion to Compel evidence ---- (Pet. App pg 239 Waiver hearing pg 4 line 18-20)

The Court: No, first of all we have to -- let me explain something to you, Mr. McCoy". (Pet. App pg 239 Waiver hearing pg 4 line 21-23)

Judge Dennis then began explaining how his grandfather studied law, and then asked Petitioner did he have formal training in the legal profession?

Mr. McCoy replied "No" (Pet. App 240-242 January 27, 2009 Waiver hearing page 5 line 9-15, page 7 line 1-12)

Judge Dennis then inquired into a civil lawsuit involving stockholders. (Pet. App pg 243, January 27, 2009 Waiver hearing page 8 line 13-25)

Judge Dennis also asked, "What makes you more competent than your lawyer?"

Mr. McCoy: "I am not more competent than her ... (Pet. App 245, January 27, 2009 Waiver hearing page 10 line 6-25)

Mr. McCoy also indicated he filed speedy trial motions, that Counsel refused to file on his behalf, and she misinformed him South Carolina didn't have speedy-trial rights. (Pet. App. 245, January 27, 2009 Waiver hearing page 10 line 12-25)

Here, Mr. McCoy stated his dissatisfaction with Counsel, however Judge failed to make a more searching inquiry into the reasons Mr. McCoy was dissatisfied with Counsel. The Court then asked: "It's your desire to

STATEMENT OF THE CASE

(Continued)

represent yourself."

This is the further the inquiry went. Judge Dennis did not inquire into the nature of the charges, the statutory offenses included within them, the range of allowable punishment, thereunder possible defenses to the charges, and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter, (Pet. App. 249-256, January 27, 2009 waiver hearing page 14 through 21 line 1-11) as required under clearly established federal law. Von Moltke v. Gillis 332 U.S. 708, 724, 68 S.Ct. 316, 323, 92 L.Ed. 309 (1948) Johnson v. Zerbst, 304 U.S. at 465, 58 S.Ct. at 1023. Faretta v. California, 422 U.S. 806, 835, 95 S.Ct. 2525 45 L.Ed. 2d 562 (1974) U.S. v. Bush 404 F. 3d 263, 2005 (4th Cir.). Possible defenses were necessary because he had an alibi defense.

Mr. McCoy again stated, he filed a motion to compel, and the judge stated "You see what's happening here? Let me give you a good example of why? I should deny your motion. Since we've been together, you have one thing on your time. I want you to hear my motion. That's all that you've thought about, and that's exactly what I'm talking about." (Pet. App. 249, January 27, 2009 waiver hearing page 14 line 3-9).

During the remainder of the waiver hearing, Mr. McCoy argued the state failed to disclose material evidence, and counsel failure to have DNA tested. The court ruled the DNA did not exist. (Pet. App. 256-264 January 27, 2009 waiver hearing page 21 line 15-25, page 22 line 1-25, page 23 line 1-25, page 24 line 1-25, page 25 line 1-25 page 26 line 1-25, page 27 line 1-13 Page 29 line 8-24

Mrs. Proctor remained silent. Judge Dennis also directed U.S. Proctor to subpoena witnesses. See (Pet. App. 269-70, February 2, 2009 trial transcript pages 83, Affidavit of Terence Rizzie.

1. On December 14, 2003, Mr. McCoy filed a DNA PCR application. The state has not filed a Return, nor have the clerk appointed counsel. See:
2. Mr. McCoy gave an alibi statement to police. Mrs. Proctor failed to subpoena alibi witnesses as directed by Judge Dennis. Waiver hearing page 29 line 8-24

REASONS FOR GRANTING THE PETITION

1. Involuntary Waiver/Incompetent waiver

Johnson v. Zerbst 304 U.S. 458 58 S.Ct. 1019 (1938) (A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege) (Where a defendant without counsel acquiesces in trial resulting in his conviction and later seeks relief by habeas Corpus, the burden of proof vest on him to establish that he did not competently and intelligently waive his constitutional right to the assistance of counsel)

We have not, however, prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel. The information a defendant must possess in order to proceed without counsel. The information a defendant must possess in order to make an intelligent election; our decisions indicate, will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding. See Johnson, 304 U.S. at 464, 58 S.Ct. 1019.

Argersinger v. Hamlin, 407 U.S. 25, 34, 37, 92 S.Ct. 2006, 32 L.Ed. 2d 530 (Although an accused may choose to forego representation, any waiver of the right to counsel must be knowing, voluntary, and intelligent) Brewer v. Williams 430 U.S. 387, 404 97 S.Ct. 1232, 51 L.Ed. 2d 424 (1977) (In order to effectively invoke this right of self-representation, the defendant must knowingly, intelligently and voluntarily assert his desire to proceed pro se) Foretta v. California, 422 U.S. at 819, 21, 95 S.Ct. 2525. United States v. Frazer E.L. 204 F.3d 553.

Where a defendant invokes his right of self-representation before trial, the only inquiry the Circuit Judge may undertake is that required by Foretta. State v. Barnes 407 S.C. 27, 35 753 S.E. 2d 545, 550 (2014). Thus, the only basis upon which a circuit judge may deny a defendant's pretrial motion to proceed pro se is if the court determines the defendant has not knowingly, intelligently, voluntarily waive his right to counsel.

In Schneekloth v. Bustamonte, 412 U.S. 218, 238 n. 25, 93 S.Ct. 2041, 2053 36 L.Ed. 2d 854 (1973), the court analyzed the distinction between a voluntary act and the waiver of a right; there Mr. Justice Stewart stated for the court:

REASON FOR GRANTING THE PETITION

(continued)

[T]he question whether a person acted "voluntarily" is quite distinct from the question whether he has waived a trial right. The former question as we made clear in Brady v. United States, 397 U.S. 742, 749, 90 S.Ct. 1463 at 1469 (25 L.Ed. 2d 747) can be answered only by examining all relevant circumstances to determine if he was being coerced. The later question turns on the extent of his knowledge.

The waiver hearing reveal Petitioner was coerced, and free to choose between incompetent state appointed counsel or proceed pro se. See Merriam Webster Dictionary Coerce to get (something) by using force or threats, transitive verb to compel to an act or choice < was coerced into agreeing >

Frankel v. United States, 558 U.S. 801, 130 S.Ct. 72, 175 L.Ed. 2d 4 (2009) (A Judgment vacated and case remanded in light of Solicitor General's acknowledging that the second circuit had erred if it had relieved CJA counsel and compelled Petitioner to proceed pro se based on Petitioner (1) having submitted papers that contain scandalous allegations and (2) having caused two previous CJA counsel to be removed: the Solicitor General's brief acknowledged that a litigant's inclusion of inappropriate matter "in an appellate filing [does] not evidence an intention to waive counsel, and the circumstances of previous CJA counsel's termination" cannot fairly be treated as a waiver as one withdrew as a result of disagreement as to the value of the appeal and the other "was relieved after twice failing to comply with the court-order briefing schedule.")

This case is different. Here, Counsel filed the motion to be relieved under Rule 652(c)(2), See Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989)

Ms. Proctor had not shown a satisfactory reason to be relieved as counsel. See State v. Hyman 276 S.C. 559, 281 S.E.2d 209 (1981) overruled on other grounds, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (Trial judge did not abuse his discretion in denying defendant's motion to be relieve counsel based on defendant's allegation that counsel was not up to date on the law).

State v. Gregory 364 S.C. 150 612 S.E. 2d 449 (2005)

Here, Mr. McCoy filed a motion to compel evidence, in which by South

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(Continued)

Carolina law, Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989) The clerk of court should have never filed but should have returned the motion to compel unfilled. Petitioner did not file a motion to relieve counsel. The initial waiver hearing would show, Petitioner was unaware Ms. Proctor's representation, and had retained attorney Peter Brown. Mr. McCoy also complained with the South Carolina disciplinary counsel board. See Richardson v. State, 377 S.C. 103, 107, 659 S.E.2d 493, 495 (2008). In Richardson v. State, The SC Supreme Court held "that the filing of a disciplinary complaint should not result in automatic removal of appointed counsel. If this were not the case, applicants could obtain substitute counsel by the simple expedient of filing an ethical complaint even if that complaint is without any factual or legal basis." State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991) See Pet. App 229-230 Disciplinary Counsel Complaint

Judge Dennis should have denied counsel's motion to be relieved. See: U.S. v. Fraizer-EL 204 F.3d 553 citing Faretta "when the circumstances surrounding an accused's purported assertion of the right to proceed without counsel suggest "a manipulation of the system [rather] than an unequivocal desire to invoke [the] right of self-representation" and "dispense with the benefits of counsel," a court is justified in insisting that the accused proceed with assistance of counsel. Id. at 566 (refusing to let a defendant proceed pro se as part of manipulative strategy to advance frivolous arguments counsel had previously refused to make).

"At bottom, the Faretta right to self-representation is not absolute, and the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." Id.

In City of Columbia v. Assa'ad Faltas, the SC Supreme Court recognized the record as a whole indicates the underlying reason Appellant was dissatisfied with counsel was her frustration that counsel refused to give her control in how her proceedings were handled, refused to file frivolous subpoenas and motions, and refused to proffer irrelevant materials as evidentiary exhibits. It is apparent that Appellant sought to proceed pro se

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only to bombard the courts with irrelevant and meritless arguments and factual assertions) This is essentially the same rationale upon which the defendant in Fraizer-EL sought to dismiss his counsel and proceed pro se; however, instead of finding error, the fourth Circuit Court of Appeals affirmed the district court's insistence that the defendant proceed with appointed counsel as the defendant's asserted right to self-representation was merely a manipulative tactic. 204 F.3d at 560. See also United States v. Edelmann, 458 F.3d 791, 809 (8th Cir. 2006) (affirming denial of request for self-representation which was partly based on the defendant's frustration that counsel refused to file frivolous pleadings); Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 518 (2002) (forbidding counsel to act as a conduit for pro se filings and insisting that counsel "use professional judgment in reviewing the documents and [] submit the client's argument only if relevant and only after they have been edited by counsel for review by the court") See Wahl v. State 400 P.3d 679, 679 Kan App (2017) Citing City of Columbia Ass'n v. Fallos 420 S.C. 28, 800 S.E.2d 782 (2017)

The record shows Judge Dennis stated "You see what's happening here? Let me give you a good example of why I should deny your motion. Since we've been together, you have one thing on your time. I want you to hear my motion. That's all you've thought about, and that's exactly what I'm talking about. (Pet App pg 249, January 27, 2009 waiver hearing page 14 line 3-9

Next, State appointed Counsel Lurelle Proctor stated "she visited Mr. McCoy at the County Jail and suggested he either proceed with Ms. Mulvaney and her or proceed pro se". (Pet. App. pg 238, January 27, 2009 waiver hearing page 3 line 11-14.

See W. LaFare & J. Israel Criminal Procedure § 11(4) (a) at 495 (1984) (A clear choice presented to a petitioner to make voluntary decision. If a choice presented to a petitioner is constitutionally offensive then the choice cannot be voluntary) U.S. v. Thomas 391 Fed App 321 Hill v. Lockhart, 474 U.S. 52, 56 106 S.Ct. 366, 369, 88 L.Ed. 2d 203, 208 (1985) (A trial court must be permitted to distinguish between a manipulative effort to present particular arguments, and a sincere desire to dispense)

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(Continue)

United States v. Scott, 909 F.2d 488 (11th Cir. 1990) (held a waiver of counsel is involuntary where the counsel moved to withdraw "for reason which she believed could not be disclosed to the Court, and the court, after further discussions, offered defendant the following choice, either to proceed with counsel with the caveat that (defendant) could be kept off the witness stand, if his attorney so desired, or to proceed pro se."

Noting that it had no need to decide whether counsel could keep a defendant entirely off the stand if counsel believes the defendant will commit perjury as the record failed to show that the conflict between defendant and counsel related to potential perjured testimony, the Scott court reasoned that the trial judge had placed improper pressure upon the defendant in speculating that this was the case here, and thereby forcing him to choose between the right to testify and the right to counsel.

In this case, the court placed improper pressure upon Mr. McCoy. He had retained attorney Peter Brown who represented him during preliminary hearing. There is no record counsel Brown filed a motion to be relieved. Mr. McCoy was unaware of Ms. Proctor's representation, and Ms. Proctor also failed to investigate and obtain evidence, and failed to investigate witnesses, compelling their attendance.

See Wilks v. Israel 627 F.2d 32, 35 (7th Cir. 1980); Jones v. Brigano 470 F.3d 636 (2006) Fowler v. Collins, 253 F.3d 244-49-50 (6th Cir. 2001) Pazden v. Maurer 424 F.3d 303 2005 (A defendant may not be forced to proceed with incompetent counsel) a choice between proceeding with incompetent counsel or no counsel is in essence no choice at all. The permissibility or choice presented to the petitioner... depends on whether alternative to self-representation offered to deprive him of a fair trial. Van Sant v. Gondles 596 F.supp 484 (1983)

Kimmelman v. Morrison 477 U.S. 365, 378 106 S.Ct. 2574, 91 L.Ed. 2d 305 (1986) (Importantly the right to effective assistance of counsel exist because it has long been understood that "a layman will ordinarily be unable to recognize counsel's error and to evaluate counsel's professional performance").

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2. Ineffective Assistance

Lewis v. State 439 S.C. 635 889 S.E.2d 570 (2023) In Lewis, The South Carolina Supreme Court has held "We have never adopted a bright-line rule forbidding prose defendants from alleging ineffective assistance of pretrial counsel, and we decline to do so today. Rather, we acknowledge as a prose defendant may present a colorable claim of pretrial ineffective assistance of pretrial counsel."

Wiggins v. Smith 539 U.S. 510, 526, 123 S.Ct. 25, 27 156 L.Ed. 2d 471 (2003) (noting that when failure to investigate thoroughly resulted from inattention, "It is not a strategic judgment. However, when counsel unquestionably acts (or fails to act) based on a mistaken legal or factual understanding, their conduct lacks strategic reason or as a matter of law."

In this case, PCR counsel filed an Amended PCR application which asserted additional ineffective assistance of counsel claims to support the ineffective assistance of counsel claims for given erroneous advice. Ineffective Assistance for failure to (1) obtain evidence and (2) subpoena witnesses. See Pet. App pg 61, April 4, 2013 PCR application; December 4, 2015 Amended PCR application. See Pet. App. page 94-95

The State Court rejected the IAOC claims without holding a evidentiary hearing. Pet App 96-99 December 14, 2015 PCR hearing transcript pages 4-7 line 1-16.

The PCR judge issued an Order May 16, 2006. However the order of dismissal did not address the IAOC claims. (Pet. App 177-188 May 16, 2016 Order of dismissal.

After receipt of the order of dismissal, PCR counsel Melissa Gray filed a timely Rule 59 (c) SCRPC motion. (Pet. App. 189-193 May 27, 2016, Rule 59(c) motion.

Petitioner appealed denial of Rule 59(c). The South Carolina Supreme Court granted the petition, vacated the PCR Judge's order, and remanded the case with instructions. (Pet. App. 48-49) February 01, 2019 S.C. Supreme Court Order.

On June 14, 2019, the PCR Judge issued an Amended Order of dismissal. However, the State Court's decision in regards to the IAOC claims are objectively unreasonable, and "Contrary", unreasonable application of federal law as provided under Williams v. Taylor 529 U.S. 362 120 S.Ct. 1495, 146 L.Ed. 2d 389 (2000), and Strickland v. Washington 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674, Winston v. Pearson (Winston II) 683 F.3d 489 (2012), Winston v. Kelly (Winston I), 592 F.3d 535 553 (4th Cir. 2010) Shinn v. Ramirez 596 U.S. 366, 142 S.Ct. 1718, 212 L.Ed. 2d 713 (2022)

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The District Court overlooked facts presented during the September 9, 2015 Summary Judgment hearing. During the hearing, Judge Hyman ruled there was no case in South Carolina, where a Pro Se litigant raised ineffective assistance of counsel, and denied Mr. McCoy the right to raise the claims during PCR. See Pet App. page 79, September 9, 2015 Summary Judgment hearing page 8 line 21-25, page 9 line 1-11. This unreasonable decision was contrary to Harrington v. Richter, Strickland v. Washington, and Lewis v. State.

See also Pet App 194-214, June 14, 2019 PCR Judge's order of dismissal page 10 of 21. The PCR Judge objectively unreasonably determined Mr. McCoy failed to call Ms. Proctor as a witness. This is not supported by the facts presented. See Pet App 96, December 14, 2015 PCR hearing transcript page 4 line 6-25.)

PCR Counsel Rodney Davis called Ms. Proctor as a witness, the state objected and the PCR Judge sustained the objection. When Petitioner attempted to mention deficiency by Ms. Proctor during his testimony, The State objected again. (Pet. App. 137-138 December 14, 2015 PCR hearing transcript page 45-46.)

The PCR Judge decision was objectively unreasonable, and the district court erred by denying Mr. McCoy habeas relief.

Under South Carolina state law § 17-27-20 (A)(1)(4) "There existed evidence of material facts, not previously presented and heard, that required vacation of the conviction or sentence in the interest of Justice, and that the conviction or sentence was in violation of the Constitution of the United States or the Constitution or laws of this State."

See: Strickland v. Washington, Powell v. Alabama 287 U.S. 45, 53 S.Ct. 55 77 L.Ed 158 (1932); Brady v. Maryland 373 U.S. 83 87 and n2 83 S.Ct. 1194, 1196-1197 10 L.Ed. 2d 215 (1963) Berger v. United States 295 U.S. 78 88 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935) United States v. Cronin 466 U.S. 648, 654 104 S.Ct. 2039, 2044 80 L.Ed. 2d 657, 664 (1984).

Petitioner was entitled to a evidentiary hearing in State Court base on the facts, Ms Proctor indicated, she visited Mr. McCoy at the County Jail and suggested he waive his rights to counsel; and where she had failed to investigate and obtain evidence; and also failed to subpoena alibi witness Terence Prizzie, and misrepresented that there were two Jenie Fowler's and she subpoena the wrong person.

These claims could not have been raised during Appeal pursuant to

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(continue)

State v. Carpenter 277 S.C. 309, 286 S.E.2d 384 (Supreme Court would not consider issue of ineffective assistance of counsel at trial on appeal, rather defendant had to assert his claim under Post Conviction Procedure Act)

During the waiver hearing, Ms. Proctor remained silent in regards to the State failure to disclose evidence. Mr. McCoy, through PCR counsel Rodney Davis obtained affidavit of Kriston D. Neely when asserts the police suppress evidence June 25, 2006, and before the first trial held on July 15, 2008. (Pet. App. pg 271 December 11, 2015 affidavit of Kriston Neely.)

This issue was preserved during trial. See (Pet. App 272-73, February 2, 2009 trial transcript pages 70 line 13-25, page 76 line 1-25)

During the waiver hearing, Judge Dennis ruled the evidence did not exist. Ms. Proctor remained silent. Petitioner was unaware the State suppress the 911 tape. During the Second trial, Petitioner sought to stipulate the admission of the 911 dispatcher's report, and the State objected on grounds of not knowing who made the 911 call. (Pet. App 274-277, February 2, 2009 trial transcript page 632 line 15-23 - page 633 line 20-25 ; page 635 line 1-17 ; page 636 line 1-6) Judge Young ruled the 911 tape did not exist.

Ms. Proctor made no reference the State suppress evidence during the waiver hearing when Mr. McCoy raised the motion to compel. She also failed to advise him of DNA in the prosecution possession that was never tested. She allowed Judge Dennis to rule the DNA did not exist, and failed to correct the State's misrepresentation. Hazel-Atlas Glass Co. v. Hartford Empire Co. 322 U.S. 238, 64 S.Ct. 997 88 L.Ed. 1250

During the second trial, the State presented DNA it stated did not exist during the waiver. See Pet. App 278-281, February 2, 2009 trial transcript pages 340 line 1-25, 341 line 1-25, 342 line 1-25, page 343 line 1-17)

The DNA was never sent to South Carolina law Enforcement Division for testing by the State nor by Ms. Proctor. The DNA test was necessary because Det. Angela Bunker testified the DNA was not related to the homicide. (Pet. App pg 281, February 2, 2009 trial transcript page 343 line 7-15) See: 17-28-350 willful destruction of DNA; Gibson v. State

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(Continue)

334 S.C. 515 514 S.E.2d 320 (1999) (When a defendant lacks knowledge of material evidence in the prosecutor's possession, the waiver of constitutional rights cannot be deemed knowing and voluntary.)

During the Waiver hearing, Mr. McCoy raised there was DNA on curtains which shows or prove his innocence, and that the Coroner observed blood on a curtain on an open window. (Pet. App. 260 and page 284, January 27, 2009 waiver hearing page 25 line 12-23; February 2, 2009 trial transcript page 521-23.)

Judge Dennis ruled the DNA did not exist. (Pet. App 260 January 27 2009 waiver hearing page 25 line 22-23.) Ms. Proctor remained silent.

During trial, Chief Coroner Rae Wooten testified for the defense (Pet App. page 282, February 2, 2009 trial transcript page 521 line 5-20. During the trial, Ms. Wooten testified she observed blood on the curtains by an window, which was identified as Defendant Exhibit 44. (Pet App. page 285, February 2, 2009 trial transcript page 523 line 9-24)

The DNA was material to impeach Angela Bunker's credibility, and also to show the state presented false testimony.

Ms. Proctor failed to investigate the DNA during pre-trial, and Petitioner sought to correct, pretrial counsel's error, but was told the DNA did not exist. The waiver cannot be deemed knowing and voluntary if Mr. McCoy lacked knowledge of material evidence in the prosecutor's possession. Gibson v. State. Both the waiver Judge, and trial Judge ruled the evidence did not exist ~~just~~ the prosecutor later presented "State's Exhibit 18, 19, and 20 which show the evidence did exist.

During the trial, Judge Young ruled if Mr. McCoy could prove the state destroyed evidence, he would give the proper Jury charge. (Pet. App 286-288, February 2, 2009 trial transcript page 57 line 1-9, and page 72 line 14-22) At the ~~Jury~~ charge phase, Judge Young refused to give the proper requested Jury charge. (Pet. App. page 289-290 February 2, 2009 trial transcript page 653 line 8-25, page 654 line 1-5).

Therefore the error was not cured by the Judge, because the Judge refused to give the adverse inference Jury instruction, and the prosecutor failed to Cor-

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ect Angela Bunker's false testimony. See Napue v. People of State of Illinois 360 U.S. 264 79 S.Ct. 1173 3 L.Ed. 2d 1217 (1959); Riddle v. Ozmint 369 S.C. 39 631 S.E. 2d 70 (2006) Arizona v. Youngblood

pretrial counsel's representation, fell below an objective standard of reasonableness measured according to prevailing professional norms" 466 U.S. at 668, 104 S.Ct. 2052, and (b) that the deficient performance prejudice the defense." Id. at 687, 104 S.Ct. 2052. 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 694, 104 S.Ct. 2052. Hill v. Lockhart 474 U.S. 52, 62 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985) Giglio v. U.S. 405 U.S. 150. (1972)

of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." United States v. Cronin 466 U.S. 648, 654, 104 S.Ct. 2039, 2044 80 L.Ed. 2d 657, 664 (1984) The erroneous deprivation of a defendant's fundamental right to the assistance of counsel is per se reversible error. State v. Boykin, 324 S.C. 552, 555, 478 S.E. 2d 689, 690 C Ct. App 1996) (citing Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967) Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. McKnight v. State, 320 S.C. 356, 358 465 S.E. 2d 352, 353 (1995) quoting Strickland v. Washington 466 U.S. 668, 692, 104 S.Ct. 2052, 2067 80 L.Ed. 2d 674, 696 (1984)

(The prosecution is more than an ordinary litigant, and the trial judge is not simply an automation who insures that technical rules are adhered to. Both are charged with the duty of insuring that Justice, in the broadest sense of that term, is achieved in every criminal trial)

See Brady v. Maryland 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-1197, 10 L.Ed. 2d 215 (1963); Berger v. United States 295 U.S. 78, 88, 55 S.Ct. 629, 633 79 L.Ed. 1314 (1935) That goal is ill-served, and the integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to the defendant's ill advised decision to waive counsel. The damage thus inflicted is not mitigated by the lame explanation that

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the defendant simply availed himself of the freedom to go to jail under his own banner... United States Ex rel Maldonado v. Denno 348 F.2d 12, 15 (CA 2 1965) The system of criminal justice should not be available as an instrument of self-destruction. Faretta 422 U.S. at 839

Mr. Justice Blackmun, with whom THE CHIEF JUSTICE, and Mr. Justice REHNQUIST join dissenting in Faretta stated "This is not a case where defense counsel against the wishes of the defendant or with inadequate consultation, has adopted a trial strategy that significantly affects one of the accused's constitutional rights. For such overbearing conduct by counsel, there is a remedy. Brookhart v. Janis 384 U.S. 1 86 S.Ct. 1245 16 L.Ed. 2d 314 (1966); Fay v. Noia 372 U.S. 391, 439, 83 S.Ct. 822, 849 9 L.Ed. 2d 837 (1963) Nor is this a case where distrust, animosity, or personal differences between the accused and his would-be counsel have effective representation unlikely or impossible. Faretta 422 U.S. at 849. See Brown v. Craven 424 F.2d 1166, 1169-1170 (CA 9 1970) See also Anders v. California 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed. 2d 493 (1967)

In this particular case, Counsel suggested Mr. McCoy represent himself or proceed with incompetent counsel after he filed complaints with office of disciplinary counsel board. He was given a constitutionally offensive choice described in Frankel v. United States 558 U.S. 801, 130 S.Ct. 72, 175 L.Ed. 2d 4 (2009) W. LaFare & J Israel Criminal Procedure § 11(4)(d) at 495 (1984) The choice was not voluntary. U.S. v. Thomas, 391 Fed App 321

In United States v. Mackovich, 209 F.3d at 1231 (on the eve of trial, the defendant moved to represent himself because of a rift, with Counsel, Id at 1235. The district court denied the request and the tenth circuit affirmed. The Tenth Circuit reaffirmed that defendants cannot use the right to self-representation as a tactic for delay. "Id at 1237. In upholding the district court ruling, the tenth circuit found important that the defendant had (1) used counsel for almost seven months (2) appeared in court with his attorney on multiple occasions (3) made the request only six days before trial (4) made the request because

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Counsel failed to file frivolous motions, and (S) threatened to stand mute if the request was denied.

Judge Dennis should have denied Ms. Proctor's motion to be relieved, as there was no good cause shown. See State v. Hyman 276 S.C. 559, 281 S.E. 2d 209 (1981) overruled on other grounds, State v. Torrence, 305 S.C. 45, 406 S.E. 2d 815 (1991) State v. Gregory 364 S.C. 150, 612 S.E. 2d 449 (2005)

Judge Dennis clearly stated "You see what's happening here? Let me give you a good example of why I should deny your motion. Since we've been together you have nothing on your time. I want you to hear my motion. That's all that you've thought about, and that's exactly what I'm talking about."

Petitioner, filed a pro se motion to Compel evidence, which by law in South Carolina should have been returned unfiled. Foster v. State, 298 S.C. 306 379 S.E. 2d 907 (1989) He had no intentions to proceed ~~self~~ representation, he only attempted to advance frivolous arguments Counsel had previously refuse to make during the first trial which ended with an hung jury; and later proven not to be speculative but supported by affidavit of Kriston D. Neely. State v. Graddick 345 S.C. 383 548 S.E. 2d 210 (2013)

The waiver of constitutional rights cannot be deemed voluntary where the defendant's lacks knowledge of material evidence in the prosecution possession. Gibson v. State

The standard adopted by the Ninth Circuit is whether a defendant who seeks to plead guilty or waive counsel has the capacity for reasoned choice among the alternative available to him. Godinez v. Moran 509 U.S. 389 113 S.Ct. 2680 125 L.Ed. 3d 381. Sell v. United States 539 U.S. 166, 180 123 S.Ct. 2174 156 L.Ed. 2d 197 (2003) (The government has a concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one.)

During the waiver hearing, Judge Dennis ordered Ms. Proctor to subpoena Mr. McCoy witnesses. (Pet. App 104, January 27, 2009 waiver hearing page 29 line 8-18.

At the trial, Mr. McCoy motion the court regarding a witness, all dis-

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patcher Jenie Fowler Contempt of Court in failure to appear. During this hearing Ms. Proctor misrepresentation that she subpoena the wrong person and that there were two Jenie Fowler that work at North Charleston police department. (Pet. App. pg 274, February 2, 2009 trial transcript pages 631 line 6-25, page 632 line 1-15)

Judge Young did not held Ms. Fowler in contempt of court, nor order her presence duces tectum to bring the all tapes. State v. Mansfield 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000), where Ms. Fowler's testimony was relevant under Rule 402 South Carolina Rules of Evidence, and under Rule 803 (2) South Carolina Rules of Evidence.

The Sixth Amendment guarantee a defendant right to have compulsory process for obtaining witnesses in his favor, and to compel their attendance. Washington v. Texas 388 U.S. 14 87 S.Ct. 1920 18 L.Ed. 2d 1019

"Criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial. Pennsylvania v. Ritchie 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed. 2d 40 (1987) United States v. Valenzuela-Bernal 458 U.S. 858, 867, 102 S.Ct. 3440, 73 L.Ed. 2d 1193 (1982)

Had, Mr. McCoy been aware that he would not have been allowed to subpoena Jenie Fowler, and alibi witness Terence Prizzie, he would have rejected proceeding with Counsel's Coerce advice. (Pet. App. pg 104, January 27, 2009 Waiver hearing pages 29 line 8-10. Mr. McCoy requested government assistance to subpoena witnesses, and Judge Dennis ordered Ms. Proctor to do so. The Waiver was not knowingly under Faretta.

After Mr. McCoy was convicted, he discovered through the Freedom of Information Act that there was only one female dispatcher name Jenie Fowler who was employed at the North Charleston Police Department in 2009. See Pet. App page 291; August 2, 2013 Letter from Beth Woodall Legal Department City of North Charleston, South Carolina.

Mr. McCoy Post Conviction Relief application was pending.

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On September 9, 2015, PCR Counsel Rodney Davis raised the facts that Judge Dennis ordered Ms. Proctor to subpoena witnesses, and she had failed to subpoena favorable witnesses. (Pet. App. pg 81-88 September 9, 2015 Summary Judgment hearing transcript pages 10-17)

At the conclusion of the hearing, Judge Hyman allowed PCR counsel to Amend the PCR application. (Pet. App pg 91 September 9, 2015 Summary Judgment hearing transcript pages 20 line 12-19)

On December 4, 2015, PCR Counsel filed the Amended PCR application, and included additional ineffective assistance of counsel claims for failure to (1) subpoena witnesses, and (2) obtain evidence. (Pet. App 94-95 December 4, 2015 Amended PCR application.

During the PCR hearing, PCR Counsel called Ms. Proctor as a witness, and the State objected. The PCR Judge sustained the objection, and abuse its discretion under Bannister v. State, 333 S.C. 298, 509 S.E. 2d 807 (1998) (In a PCR proceeding, the burden is on the applicant to prove the allegations in his application) SC. Code of law 17-27-20 (A)

After, the SC Supreme Court granted Mr. McCoy's Petition for writ of Certiorari: ~~was~~ vacated and remand with instructions. The PCR Judge issued an Amended Order. The PCR Judge objectively unreasonably determined that Mr. McCoy failed to call Ms. Proctor as a witness thereby eliminating the Court's ability to make an independent factual determination as to what advice, if any, Ms. Proctor provided to the Applicant regarding the consequences of his proceeding prose in the trial of this matter. The Court notes that it does not find the Applicant's testimony regarding this issue credible or persuasive.

The PCR court made no ruling as to additional IADC claims raised in the Amended PCR application. The PCR court decision is unreasonable, and "contrary" to Strickland v. Washington, 466 U.S. 689, 104 S.Ct. 2052.

The PCR court rejected Ms. Proctor from testifying, but found her represent-

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ation reasonable under prevailing norms?

However, this determination was objectively unreasonable as the United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689, 104 S.Ct. 2052. Accordingly, we must be wary of second-guessing trial counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992)

See Muhammad v. Kelly 575 F.3d 359 4th Cir. 2009 (Prose litigant argument against counsel who should have objected to his self-representation where trial attorneys were informed of three abnormalities in an MRI taken prior to his October 20, 2023 request to represent himself The district court held even if we assume that his attorneys should have objected to his self-representation, the state and district courts found that Muhammad did not show that he was prejudiced).

See U.S.V. Bruson 105 Fed. App. 470 2004 Citing Faretta 422 U.S. at 835. Having chose to proceed prose, Bruson cannot assert that he was denied the effective assistance of counsel. Id. at 834-35 n. 46. Moreover, to the extent that Bruson was represented by counsel, such a challenge may be brought, if at all, in a proceeding under 28 U.S.C. § 2255 (2000) United States v. Richardson 195 F.3d 192, 198 (4th Cir. 1999); United States v. King 119 F.3d 290, 295 (4th Cir. 1997) State v. Carpenter 277 S.C. 309, 286 S.E.2d 384

Here, Judge Dennis ordered counsel to subpoena witnesses upon Mr. McCoy requesting assistance from the government. See Lewis v. State 439 S.C. 635 889 S.E.2d 570 (2023) In Lewis, The South Carolina Supreme Court has held "We have never adopted a bright-line rule forbidding prose defendants from alleging ineffective assistance of pretrial counsel, and we decline to do so today. Rather, we acknowledge a prose defendant may present a colorable claim of pretrial ineffective assistance of pretrial counsel.

See e.g., Wilson v. Parker, 515 F.3d 682, 698 (6th Cir. 2008) (stating

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that because Counsel's allegedly defective conduct occurred before the defendant waived his right to Counsel, the logic that exercising the Fare-
tla right to represent oneself necessarily eliminates claims of ineffective
assistance does not apply")

For these reasons, Petitioner was entitled to an evidentiary hearing in
State Court regarding his IAC claims, and the state court determination
of the claim was objectively unreasonable and "contrary" and unreasonable
application of Stickland v. Washington 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d
674. Lewis v. State

He was prejudice as an result. Counsel failed to investigate ~~DNA~~, which was material to
his defense of innocence, and to show the state presented false testimony under
Napue v. People of State of Illinois, 360 U.S. 264, 79 S.Ct. 1173, 32 L.Ed.2d 12
17 (1959); Riddle v. Ozmint 369 S.C. 39, 631 S.E.2d 70 (2006). Counsel failed to
investigate 911 tape, 911 caller, and alibi witness Terence Prizzie, which all
were material to prove he was not in South Carolina when the victim was kill-
ed.

During closing argument, the state argued, Mr. McCoy's girlfriend testified
she saw him pack some clothes to leave Friday, but could not say where he was Satur-
day morning. (See Pet App 292, February 2, 2009 trial transcript page 693 line 2-7.

Ms. Fowler's testimony was admissible under Rule 803(a) SCRE. The PCR
Court should have held an evidentiary hearing on IAC claims, regarding Counsel's
pretrial conduct. It was the Court directive, for Ms. Proctor to subpoena witnesses.

In South Carolina, The SC Supreme Court reverse Lewis in part and reman-
ded. The PCR Court found Lewis assumed responsibility for correcting any pre-
trial errors when he elected to represent himself. The South Carolina Supreme Court dis-
agreed. See Harrington v. Richter 562 U.S. 86, 131 S.Ct. 770, 178 L.Ed.2d 624 2011 (Richter
involves a California conviction and addresses the adequacy of representation).

When Counsel did not consult or use certain experts in pretrial preparation).
Stickland v. Washington "Counsel has a duty to make reasonable investigation or
to make reasonable decision that makes particular investigation unnecessary." Ibid.

Ms. Proctor neither investigated nor made a reasonable effort to obtain evidence. (See
Pet App. 294, and also Pet App 269 - Affidavit of Terence Prizzie, February 2, 2009
trial transcript page 83 line

Alibi is complete defense to criminal charge. See State v. Robbins 275 S.C. 373
375, 271 S.C.2d 319, 320 (1980)

For these reason, The District Court decision should be vacated, and Mr. McCoy
granted a evidentiary hearing, or new trial.

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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jeneal McCoy

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