THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Post Conviction Relief
William P. Keesley, Circuit Court Judge

Case No. 2006-CP-40-0754
Appellate Case No. 2012-212996

Matthew Jamison,.....Respondent,

vs.

State of South Carolina,.....Petitioner.

BRIEF OF RESPONDENT

TRICIA A. BLANCHETTE
Post Office Box 12725
Columbia, SC 29211
(803) 988-0008

ATTORNEY FOR RESPONDENT

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STANDARD OF REVIEW

In a Post Conviction Relief Appeal, the reviewing court gives great deference to the lower court's findings of fact and conclusions of law. McCrary v. State, 317 S.C. 557, 455 S.E.2d 686 (1985). The existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling. Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984).

STATEMENT OF THE CASE

During the October 2000 term of the Richland County Grand Jury, Respondent was indicted for murder (2000-GS-40-53234). App. p. 265. Respondent retained John Delgado, Esquire. On August 28, 2001, Respondent entered a plea to the lesser-included offense of voluntary manslaughter. App. p. 1. The Honorable L. Casey Manning sentenced Respondent to a term of twenty (20) years. App. p. 264. Respondent did not appeal his conviction or sentence.

On January 24, 2002, Respondent filed an Application for Post Conviction Relief (Docket No.: 2002-CP-40-3078). The State made its Return on April 3, 2003. On April 27, 2005, an evidentiary hearing into the matter was held in front of the Honorable G. Thomas Cooper, Jr., at the Richland County Courthouse. App. p. 39. Respondent was present at the hearing and was represented by Melissa J. Kimbrough, Esquire. The State was represented by Arie D. Bax, Assistant Attorney General.

On July 7, 2005, the Honorable G. Thomas Cooper, Jr., issued an Order of Dismissal. Respondent filed a timely Notice of Intent to Appeal. On behalf of Respondent, Robert M. Pachak, South Carolina Office of Appellate Defense, submitted a Johnson Petition and a request to withdraw from further representation of the Respondent. Respondent filed "Petitioner's Pro-Se Johnson Reply" on December 19, 2005, which had a handwritten statement from Theotis Bellamy attached. App. pp. 214, 219-20. On March 6, 2007, the South Carolina Court of Appeals issued an Order denying the Petition for Writ of Certiorari and granting counsel's request to withdraw. App. p. 221. In response, Respondent filed a "Petition for Rehearing and Rehearing En Banc Pursuant to Rule 221 SCACR." App. p. 222. On April 24, 2007, the South Carolina Court

of Appeals issued an Order Denying Petition for Rehearing and an Order Denying Petition for Rehearing En Banc. App. p. 223-24.

Respondent filed an Application for Post Conviction Relief on November 28, 2006. App. p. 88. In that Application, Respondent asserted that he was being held unlawfully for the following reasons:

1. Pursuant to SCRCP 60(b)1, 2, 5;

2. Ineffective Assistance of Counsel;

3. Applicant has discovered new evidence which by due diligence could have not been discovered in time to move for a new trial under Rule 59(e) to include other findings of fact.

App. pp. 90-1. In his Amendment, Respondent, through appointed counsel, raised the following issues "to be verified and pursued as follows":

1. Attorney Theresa Johns (plea counsel on other drug possession charges dated 6/20/2000), needs to be subpoenaed and her actions in regards what the solicitor communicated to her in respect of accepting a pleas of 7 to 10 on the manslaughter charge. Also her communication with Mr. Delgado and what was his position as to her assisting him in my representation.

2. Verification of what Mr. Delgado knew and did not know in respect of Agent Kimberly T. Black's findings as it pertains to the SLED report conclusions, in light of what the SLED report now reveals. Also, statements that were attributed to Ms. Black at the PCR hearing that the report does not support. See PCR Tr. P. 12, Line 2-19. Further, the PCR Court's Order of Dismissal at page 20 concerning Mr. Delgado's testimony, which was not stated at the PCR hearing. Note: On information and belief, I've learned that Mr. Delgado may have been also employed with the State Law Enforcement Division as an instructor in the Firearms Division. I would like this verified.

3. At the PCR hearing of 4/27/2005, at Tr. Page 44, Line 4, Tr. Page 48, Line 7, PCR Counsel made a request to leave the record open to take testimony from a correctional officer, Josephine Williams, who was present in the room when Attorney Delgado informed Applicant of the possible death sentence if a plea was not tendered. However, to date, this witness has not been interviewed nor was the record ever closed. Applicant informed Appellate Counsel of these

events but nothing was done. It's the Applicant understanding that Ms. Williams is still employed at Lee Correctional Institution.

4. The affidavits of Theotis Bellamy of March 21, 2006 and March 28, 2006 and a November date which was filed with the Court of Appeals needs to be obtained again to ask the following questions: What happened after the shooting at the scene?, and What was discussed that would happen to the Applicant once they reached him on the of the attack? These verifications are critical.

5. In light of the prior assaults upon the Applicant and the assaults upon his girlfriend and sister, Counsel could have considered case law under the theory in U.S. v. Bailey, 444 U.S. 394, 425-77, 100 S.Ct. 624 (1980); Matthew v. United States, 485 U.S. 58, 63, 108 S.Ct. 883, 886-87 (1988), stating, Absence of lawful alternatives is an element of all lesser-evil defenses, of which self-defense is one. Bailey is not about duress so much as it is about the set of lesser-evil defenses that includes duress, necessity and self-defense. Also see Model Penal Code 3.02 (collecting these defenses under the Rubric "Choice of Evils"). Each rest on the belief that a person facing harm is justified in performing an act, otherwise, otherwise illegal, less injurious than the impending loss. Could these cases be of help in my defense?

   Again if these issues are pursued and expanded, I feel we can obtain the relief I seek.

App. p. 98-100.

The State made its Return on March 26, 2007. App. p. 101. An evidentiary hearing into the matter was held in front of the Honorable William P. Keesley on June 27, 2008 at the Richland County Courthouse. App. p. 105. Respondent was present at the hearing and was represented by Tommy A. Thomas, Esquire, and Tricia A. Blanchette, Esquire. Petitioner was represented by Brian T. Petrano, Assistant Attorney General.

At the beginning of the evidentiary hearing, Respondent's counsel explained that Respondent was going forward on three issues:

1. At the previous PCR hearing, the record was left open for counsel to obtain testimony from an SCDC Correctional Officer and such testimony was not obtained.

2. Since the previous PCR hearing, the Applicant has obtained after-discovered evidence, which showed that Mr. Delgado misinformed him about the SLED results regarding gun powder residue.

3. Since the previous PCR hearing, the Applicant has obtained after-discovered evidence in the form of an Affidavit from an eyewitness, Theotis Bellamy, which supported his theory of self-defense.

App. p. 109-11.

Respondent's counsel further explained that Respondent was withdrawing his first allegation since the correctional officer was not willing to cooperate with the private investigator that had been retained to contact her. App. pp. 109-10. In the interest of a complete record, counsel submitted an Affidavit from Lee T. Connelly, Private Investigator, which explained that the witness was not willing to cooperate. App. pp. 110, 189-90.

During the hearing, Respondent testified on his own behalf. App. p. 111. Respondent's counsel also called Theotis Bellamy to the stand and introduced four exhibits during the presentation of Respondent's case. The court also had before it a copy of the Application, the State's Return, the records of the Richland County Clerk of Court concerning the subject conviction, and Respondent's records from the South Carolina Department of Corrections. At the close of the hearing, the court took the matter under advisement and issued a Memorandum Order granting relief on June 30, 2008. App. pp. 187, 198.

On July 2, 2008, the State submitted a Motion to Supplement the Record and/or Motion for Rehearing Pursuant to Rule 59(a), SCRCP, and/or Rule 59(e), SCRCP Motion to Alter or Amend. App. p. 202. On July 8, 2008, Respondent's counsel submitted a

proposed Order pursuant to the court's Memorandum Order and Return to the State's Motion. App. p. 226.

On August 15, 2008, the court issued an Order withdrawing the prior Memorandum Order and ordering that a rehearing be scheduled on the issues raised in the State's Motion. App. p. 229. On September 24, 2008, a rehearing was held in front of the Honorable William P. Keesley at the Richland County Courthouse. App. p. 231. At the hearing, Brian T. Petrano argued that the current Application was barred by Respondent's prior PCR proceeding, specifically, due to his *pro-se* Petition for Writ of Certiorari. In response, Tricia A. Blanchette, Attorney for Respondent, presented an oral argument and provided the court with a copy of the following cases: Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060 (1989); Marlar v. State, 375 SC. 407, 653 S.E.2d 266 (2007); Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992); State v. Rucker, 321 S.C. 352, 471 S.E.2d 145 (1996). App. p. 238.

After the parties presented their arguments, the court took the matter under advisement. App. p. 246. On September 24, 2008, the court issued a Memorandum Order on Reconsideration. App. p. 248. Thereafter, the court issued an Order Granting Post Conviction Relief on October 7, 2008. App. p. 249. Respondent filed a Notice of Intent to Appeal on October 13, 2008. The State filed a Petition for Writ of Certiorari and Appendix on or about April 23, 2009. Petitioner filed a Supplemental Appendix on or around July 30, 2009. On August 21, 2009, Respondent filed a Return to Petition for Writ of Certiorari. By way of a Rule 243(l), SCACR, Order dated March 10, 2010, the case was transferred to the South Carolina Court of Appeals.

On January 8, 2009, Respondent, through counsel, submitted a Petition for Appeal Bond, and Petitioner submitted a Return on January 16, 2009. On February 20, 2009, this Court issued an Order granting the Petition for Appeal Bond, from which a Post Conviction Appeal Bond Order was issued by the Honorable L. Casey Manning on February 25, 2009. On March 5, 2012, Robert D. Corney, Assistant Attorney General, on behalf of Petitioner, filed a Motion to Revoke and Vacate Appeal Bond in the South Carolina Court of Appeals. On March 14, 2012, Respondent filed a Response to Petitioner's Motion to Revoke and Vacate Appeal Bond. On March 19, 2012, Petitioner filed an Amended Affidavit in Support of Petition to Revoke and Vacate Appeal Bond. On March 30, 2012, the South Carolina Court of Appeals issued an Order denying Petitioner's Motion but adding conditions to Respondent's bond with instructions for a hearing to be held in the circuit court. On April 6, 2012, Respondent filed a Motion to Set Aside Order on Appellate Bond and/or for Clarification of Conditions.[1] On April 9, 2012, Petitioner filed a Response to Court's Order on Petition to Revoke and Vacate PCR Appeal Bond, which was followed by a Return to Respondent's Motion to Set Aside Order on Appellate Bond and/or for Clarification of Conditions on April 13, 2012. On April 16, 2012, the South Carolina Court of Appeals issued an Order with amended conditions, which allowed Applicant to fulfill his twenty-four hour towing contract with the South Carolina Highway Patrol. Prior to a hearing being held in the circuit court, Petitioner filed a Motion to Withdraw Petition to Revoke and Vacate Appeal Bond and to Rescind the Order amending Respondent's PCR Appeal Bond. By way of an Order dated August 20, 2012, the South Carolina Court of Appeals granted Petitioner's Motion.

[1] By way of this Motion, Respondent's counsel informed the Court that she was thirty-eight weeks pregnant and had a medical conflict for appearing in the circuit court for six to eight weeks.

Therefore, Petitioner is currently out on appellate bond under the Order of this Court issued on February 20, 2009.

On February 10, 2011, the South Carolina Court of Appeals granted certiorari and instructed the parties to submit briefs. An oral argument was held on June 21, 2012. On July 18, 2012, the South Carolina Court of Appeals issued an Opinion affirming the decision of the lower court. Jamison v. State, Op. No. 2012-UP-437 (S.C. Ct. App. filed July 18, 2012). App. p. 389. On July 27, 2012, Petitioner filed a Petition for Rehearing, which was denied on August 22, 2012. App. pp. 391-6. On December 21, 2012,

Pursuant to Rule 243(l), SCACR, Petitioner submitted a Petition for Writ of Certiorari, and Respondent filed a Return to Petition for Writ of Certiorari on January 24, 2013. This Court granted Certiorari on March 20, 2013. The Brief of Petitioner was submitted on May 17, 2013, from which this Brief follows.

ARGUMENT

I. THE COURT OF APPEALS DID NOT ERR IN UPHOLDING THE LOWER COURT'S FINDING THAT AN ISSUE PRESENTED IN A *PRO-SE* JOHNSON RESPONSE DURING A PRIOR PCR APPEAL MAY, FOR THE PURPOSES OF A SUBSEQUENT PCR APPLICATION, BE NEWLY DISCOVERED EVIDENCE.

Respondent submits that the South Carolina Court of Appeals did not err in upholding the lower court's finding that an issue presented in a *pro-se* Johnson response during a prior PCR appeal may, for the purposes of a subsequent PCR Application, be newly discovered evidence. Furthermore, Respondent would urge this Court to find that the Petitioner's argument that an issue cannot be newly discovered evidence for the purposes of S.C. Code § 17-25-45(c) if that issue was presented and/or ruled upon during a prior PCR, including while on appeal, is an erroneous interpretation of the facts and completely contradicts the body of cases regarding issue preservation in regards to Post Conviction Relief.

Following the evidentiary hearing and the issuance of a Memorandum Order, the lower court granted a rehearing on "whether and to what extent the applicant raised the after-discovered evidence issue in the previous proceedings." App. p. 229-30. On September 24, 2008, a rehearing was conducted at the Richland County Courthouse. App. p. 231. At that hearing, Respondent's counsel explained that the evidentiary hearing on Respondent's first PCR Application was held on April 27, 2005, and the affidavit at issue was not obtained until November 28, 2005. Counsel further explained that upon receiving the affidavit, Respondent attempted to bring it to the appellate court's attention through an argument in his *pro-se* Petition, which stated: "Petitioner's case should be remanded back to the lower court for a hearing to ascertain the after

discovered evidence and its validity." App. p. 218. Respondent's two paragraph argument was followed by a handwritten affidavit of Theotis Bellamy. App. pp. 219-220.

At the rehearing, Respondent's counsel informed the court that she would be presenting two arguments:

1) The affidavit and the corresponding issue of newly discovered evidence was not properly before the appellate court, and

2) A denial of a Petition for Writ of Certiorari is not a ruling on the merits of case.

App. p. 238. After making those arguments, the court took the matter under advisement. App. p. 240. Thereafter, the court issued a Memorandum Order upholding his previous finding that the newly discovered evidence was not precluded from being raised by "any prior ruling of the South Carolina Court of Appeals or Supreme Court of South Carolina." App. p. 248. Thereafter, the court issued an Order Granting Post Conviction Relief, which held: "That the State's assertion that the arguments presented here are barred by the previous decisions of the appellate courts is rejected." App. p. 262.

Respondent submits that the lower court's ruling should be upheld since the record clearly establishes that the court's analysis properly applies the law and meets the "any evidence" standard of review. Furthermore, the lower court's ruling should be upheld since the issue of newly discovered evidence was not properly before the Court of Appeals on the prior appeal, the denial of a writ of certiorari is not a decision on the merits, and that the State's analysis pursuant to Anders is in error.

A. The affidavit and corresponding issue of newly discovered evidence were not properly before the South Carolina Court of Appeals on Respondent's prior PCR appeal.

In contrast to the State's attempt to alter the clear precedent regarding issue preservation, Respondent submits that the affidavit and corresponding issue of newly discovered evidence were not properly before the South Carolina Court of Appeals during his prior PCR appeal. In Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992), Applicant raised issues in his Application and presented evidence at his evidentiary hearing, but the issues were not addressed in the Final Order. This Court found that remand was necessary to address all issues raised at the evidentiary hearing. Id. at 255-6, 423 S.E.2d at 128. This Court also made it clear that the general rule, which held that all issues must be raised and ruled upon by a PCR court to be preserved for appellate review, was not being abandoned by their ruling in Pruitt. Id. at 255, 423 S.E.2d at 128.

Thereafter, in Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007), this Court held that failure to specifically rule on issues presented at an evidentiary hearing precluded appellate review of those issues. This Court further explained that Applicant's failure to file a Motion pursuant to Rule 59(e), SCRCP, asking the PCR court to make specific findings of fact and conclusions of law precluded those issues from being properly preserved for appellate review. Id. at 410, 653 S.E.2d at 267.

More recently, in Kolle v. State, 386 S.C. 578, 690 S.E.2d 73 (2010), the State attempted to raise the issue of standing to attack the search warrant at issue for the first time during the appellate stage of a PCR Action. This Court found that "the State's argument regarding Kolle's lack of standing was not preserved for this Court's consideration." Id. at 589, 690 S.E.2d at 79. This Court reasoned as follows:

> Based upon our review of the record, the State did not raise this claim at the PCR hearing but did so only in its motion for reconsideration. Therefore, this argument is not properly before this Court. See Palacio v. State, 333 S.C. 506, 514 n.7, 511 S.E.2d 62, 66 n.7 (1999) (concluding issue that was neither raised to nor ruled upon by the PCR court was not preserved for appellate review); see also Johnson v. Sonoco Prods. Co., 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) (recognizing that an issue may not be raised for the first time in a motion to reconsider).

Id.

In the instant case, the affidavit and issue of newly discovered evidence were not raised at the evidentiary hearing on Respondent's first PCR Application nor was the issue ruled upon by the PCR court. Specifically, this issue was not known to Respondent at the time of the hearing, was not included in the Order, was not raised by PCR counsel or the Office of Appellate Defense and was only referenced by Respondent in his *pro-se* Response. Respondent would submit that pursuant to clear precedent on issue preservation, the "newly discovered evidence" was not properly before the Court of Appeals on Respondent's prior PCR appeal since the issue was not specifically ruled upon in the PCR Order or addressed during the PCR hearing, which was the basis of that appeal.

B. The denial of the Respondent's Petition for Writ of Certiorari was not a ruling on the merits of the newly discovered evidence issue.

At the rehearing, Brian Petrano, Assistant Attorney General, stated: "I don't want to mischaracterize this as an official motion to remand", yet on appeal that is his exact argument. App. p. 245, lns. 22-23. Even so, Respondent would submit that the characterization of the issue submitted on the Respondent's prior PCR appeal is not outcome determinative since the denial of a Petition for a Writ of Certiorari is not a ruling on the merits of the case.

It is well established that a denial of a Writ of Certiorari imports no expression of an opinion on the merits of the case. Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060 (1989). In Teague, the Supreme Court of the United States made it clear that a denial of Writ of Certiorari carries no precedential value and opinions accompanying the denial of certiorari cannot have the same effect of a decision on the merits of the case. See Id. Here, the State is asking this Court to find that this well established principle is not applicable to a Johnson Petition, but the State fails to cite to any cases in support of this position.

Furthermore, in State v. Rucker, 321 S.C. 552, 471 S.E.2d 145 (1996), this Court held that a denial of a Petition for Writ of Certiorari does not dismiss or deny the underlying appeal, it simply determines that the court does not desire to review the decision of the lower court. In complete contrast, the State asserts that the denial of certiorari in the instant case shows that all nine members of the Court of Appeals found Respondent's claims were frivolous, including his newly discovered evidence claim. Pursuant to the above detailed precedent, Respondent submits that the denial of certiorari in his case is not the equivalent of a ruling on the merits of the newly discovered evidence issue, but it is merely the denial of a discretionary review without precedential value or collateral effect. Since the Court of Appeals did not remand Respondent's case for a rehearing following his submission of his *pro-se* Response on the issue of newly discovered evidence, Respondent would submit that the issue has not been ruled upon and is not barred as successive, which was the proper finding by the lower court.

C. The State's analysis regarding Anders appeals and the applicability to PCR appeals filed pursuant to Johnson is in error.

In the Brief of Petitioner, the State argues: "Accordingly, the Petitioner submits that this Court's analysis and ruling regarding Anders appeals apply to PCR appeals filed pursuant to Johnson." Petitioner further requests that this Court find that denial of Respondent's Petition for Writ of Certiorari is the equivalent of a finding that the newly discovered evidence issue lacks arguable merit and is frivolous.

In making this argument, Petitioner has relied upon State v. Lyles, 381 S.C. 442, 673 S.E.2d 811 (2009). In Lyles, this Court cited to State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991), which explained the process to be followed when an Anders Brief is submitted. After detailing the process, this Court concluded:

> Under this procedure, a decision of the Court of Appeals dismissing an appeal after conducting a review pursuant to Anders is not a decision on the merits of the appeal, but simply reflects that the appellate court was not unable to ascertain a non-frivolous issue which would require counsel to file a merits brief.

Lyles, 673 S.E.2d at 811.

This Court's reasoning in Lyles is clear, and Petitioner's argument takes this Court's holding in Lyles out of context. Respondent submits that when this Court's holding is put into proper context it supports Respondent's position that the decision of the Court of Appeals on Respondent's Johnson Petition was not a ruling on the merits of his case. Therefore, Respondent would submit that the Court of Appeals decision affirming the lower court should be upheld since the lower court properly applied the law to the facts of Respondent's case and the court's ruling clearly meets the "any evidence" standard of review.

II. THE COURT OF APPEALS DID NOT ERR IN UPHOLDING THE LOWER COURT'S FINDING THAT THE RESPONDENT DID NOT WAIVE HIS RIGHT TO POST CONVICTION RELIEF ON THE ISSUE OF SELF DEFENSE DUE TO HIS WAIVER OF RIGHTS AT HIS GUILTY PLEA

The South Carolina Court of Appeals did not err in upholding the lower court's finding that the Respondent did not waive his right to Post Conviction Relief on the issue of self defense due to his waiver of rights at his guilty plea. All guilty pleas include a waiver of constitutional rights and defenses, but a PCR court may find that a waiver was not knowingly and voluntarily entered based upon newly discovered evidence and grant PCR relief. See Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999). In granting PCR relief, the Applicant is put back in the position he was following indictment, which means the Applicant may proceed with a new trial. Clearly, the right to trial is a right waived during a guilty plea, yet it is an available form of relief following a PCR Application. S.C. Code Ann. § 17-27-80 (2010).

Here, Petitioner has relied upon a litany of direct appeal cases to support his argument that the lower court erred by granting relief because the guilty plea constituted a waiver of the defense of self-defense at trial. It is well established that a guilty plea generally constitutes a waiver of non-jurisdictional defects and claims of violations of constitutional rights on **direct appeal**. State v. McKennedy, 348 S.C. 270, 559 S.E.2d 850 (2002) (Finding Appellant's guilty plea waived his right to raise the denial of his continuance on direct appeal), State v. Munsch, 287 S.C. 313, 338 S.E.2d 329 (1985) (Finding Appellant's plea of *nolo contendere* waived any right to raise an argument regarding insufficiency of the evidence on direct appeal), State v. Thomason, 341 S.C. 524, 534 S.E.2d 708 (2000), (Finding the Appellant knowingly waived any appellate

double jeopardy claim by pleading guilty). Clearly, Petitioner relies upon cases involving direct appeals, yet argues the Court of Appeals reliance on State v. DeAngelis, 245 S.C. 364, 182 S.E.2d 732 (1971), is in error. In making this argument regarding the court's reliance on DeAngelis, Petitioner fails to recognize that the Court of Appeals cited to DeAngelis, 256 S.C. at 369, 182 S.E.2d at 734, for the following holding: "Considering whether the defendant could withdraw his guilty plea based on after-discovered evidence and stating 'there are cases that motions of this character should be entertained and granted in order that wrongs be remedied.'" App. p. 390. Respondent submits that it can be inferred that the Court's reliance on DeAngelis ties into the lower court's findings regarding fundamental fairness and does not stand for the inference argued by Petitioner. App. pp. 260-1.

Additionally, Respondent submits that the Court of Appeals decision upholding the findings of the lower court is supported by the case law generated from PCR cases resulting from a guilty plea. In PCR cases stemming from a guilty plea, it is proper for the reviewing court to consider the entire record, which includes the transcript of the guilty plea and the evidence presented at the PCR hearing. Roddy v. State, 339 S.C. 29, 528 S.E.2d 418 (2000). In Kolle v. State, 386 S.C. 578, 690 S.E.2d 73 (2010), this Court applied this standard of review and upheld the lower court's order granting a new trial following a guilty plea for trafficking in cocaine. This Court upheld the lower court's finding that plea counsel was ineffective in his representation at the suppression hearing prior to the entry of his plea and was ineffective "in advising Kolle to reject the State's initial plea offer and plead guilty without a negotiated sentence" Id. at 591, 690 S.E.2d at 80. Similarly, here, the lower court reasoned:

> Plea counsel informed the court and undoubtedly advised the Applicant that the claim of self-defense could not be established. It was too risky to attempt, in the opinion of plea counsel. The only reasonable reading of this record is that the Applicant relied upon that advice to elect to accept the plea bargain. If the Applicant had known about the presence of the corroborating witness, he should not have pleaded guilty.

App. p. 260. Respondent would urge this Court to find that the lower court's reasoning is firmly supported by the record and this Court's decision in Kolle.

Furthermore, in Kolle the majority decision took the opportunity to address whether an expression of satisfaction with counsel during a plea colloquy would preclude a claim of ineffective assistance of counsel. Even though the instant case is one of newly discovered evidence, the following discussion by the majority Opinion is instructive:

> An expression of satisfaction with plea counsel is necessarily conditional. The extent of satisfaction is dependent upon the attorney's diligence and degree of information shared with the client. Although a guilty plea may preclude certain PCR claims, it would not preclude those that directly involve the voluntariness and knowledge with which the guilty plea was made. Here, Kolle entered his guilty plea without the benefit of exculpatory information or knowledge that the State's initial plea offer would not remain open. Because Kolle was unaware of this information, his claim of ineffective assistance of counsel clearly impinged upon the voluntariness and knowledge with which he entered his plea.

Id. at 592-3, 690 S.E.2d at 80. Interestingly, this Court did not find that Kolle waived his right to raise claims on PCR regarding the suppression hearing or counsel's advice to reject the initial plea offer, but Petitioner is asking this Court to make such a finding as to Respondent's self-defense claim. Respondent would submit that such a finding is not supported by the record and would be an erroneous application of the law.

As referenced in Kolle, in Spoone v. State, 379 S.C. 138, 665 S.E.2d 605 (2008), this Court upheld a written plea agreement which waived the defendant's right to file an appeal and a PCR in exchange for the State not seeking the death penalty. Here,

Respondent did not enter into any type or written agreement to waive his right to PCR relief on this issue of self-defense nor did he knowingly or voluntarily waive his right to present the testimony of Theotis Bellamy. See Narciso v. State, 397 S.C. 24, 723 S.E.2d 369 (2012) (Finding that remand was necessary since a consent agreement to waive PCR issues in consideration of a belated direct appeal did not establish a knowing and voluntary waiver).

Under the guise of an argument regarding waiver, it appears that the State is asking this Court to ignore and/or modify South Carolina Code § 17-27-45(c), which provides:

> If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

Clearly, the legislator has not precluded newly discovered evidence claims in cases stemming from guilty pleas, yet the State is essentially asking this Court to add such a preclusion to the statute. Additionally, the State's argument that the lower court erred in applying the five prong newly discovered evidence standard to the instant case is not supported by any legal precedent and stands in complete contradiction to the lower court's well reasoned analysis of each factor that is fully supported by the record. See State v. Spann, 334 S.C. 618, 619, 513 S.E.2d 98, 99 (1999).

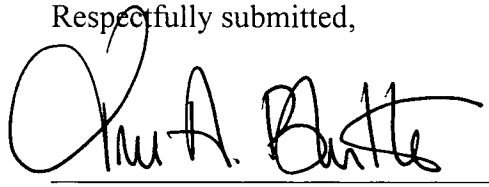
In conclusion, Respondent submits that Petitioner's argument that relies upon cases involving direct appeals and analyzes the Court of Appeals reliance on DeAngelis is misguided in contrast to the above argued precedent involving PCR cases stemming from a guilty plea and the clear statutory language. Therefore, Respondent would urge

this Court to deny the Petitioner's argument and uphold the ruling of the Court of Appeals.

CONCLUSION

For the above stated reasons, Respondent respectfully requests that this Court affirm the PCR Court's Order and remand Respondent's case to the lower court for a new trial.

Respectfully submitted,



Tricia A. Blanchette
Post Office Box 12725
Columbia, South Carolina 29211
(803) 988-0008
South Carolina Bar No. 74904

ATTORNEY FOR RESPONDENT

This 10 day of July, 2013.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JUL 17 2013
S.C. Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Post Conviction Relief
William P. Keesley, Circuit Court Judge

Case No. 2006-CP-40-0754
Appellate Case No. 2012-212996

Matthew Jamison,.....Respondent,

vs.

State of South Carolina,.....Petitioner.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Respondent, hereby certify that I hand delivered this 17th day July 2013, a copy of the Brief of Respondent, to Brian T. Petrano of the Attorney General's Office, at:

Office of the Attorney General
ATT: Brian T. Petrano, Ast. AG
1000 Assembly Street
Columbia, SC 29201

Tricia A. Blanchette
PO Box 12725
Columbia, SC 29211
(803) 988-0008
Attorney for Respondent

July 15 2013