

No. COA19-1055

JUDICIAL DISTRICT 27A

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA)	
)	
v.)	<u>From Gaston</u>
)	
MARK BRADLEY CARVER)	

PETITION FOR WRIT OF CERTIORARI

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STATE OF NORTH CAROLINA)	
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MARK BRADLEY CARVER)	

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Defendant-Petitioner, Mr. Mark Bradley Carver, respectfully petitions this Court pursuant to N.C. Const. art. IV, § 12(2), N.C. Gen. Stat. §§ 7A-32(c), 15A-1422(c)(3), and 15A-1444(f), and N.C. R. App. P. 21(e) to issue its Writ of Certiorari and review the Order of the Honorable Christopher W. Bragg, filed on 12 June 2019 in Gaston County Superior Court, denying the *Brady* violation, misrepresentation of critical evidence, and actual innocence claims which Mr. Carver raised in his 8 December 2016 Motion for Appropriate Relief (MAR) and amendments filed on 26 July 2018 and 8 April 2019. In support of this Petition, Mr. Carver shows the following:

FACTUAL AND PROCEDURAL BACKGROUND

On 15 December 2008, a grand jury in Gaston County Superior Court indicted Mr. Carver and his cousin, Mr. Neal Cassada, with first-degree murder and conspiracy to commit first-degree murder in connection with the 5 May 2008 death of Ms. Irina Yarmolenko. (R p 4; Trial T p 2).¹ Mr. Cassada died of a heart attack on the day before his October 2010 trial, while Mr. Carver's case went to trial in March 2011 before the Honorable Timothy S. Kincaid. (R p 391; Trial T p 1). Although the trial court dismissed the conspiracy charge, the jury found Mr. Carver guilty of first-degree murder. (R p 7; Trial T pp 336-337, 851). On 21 March 2011, the court entered judgment and sentenced Mr. Carver to a mandatory sentence of life without parole. (R pp 10-11; Trial T pp 854-855).

Mr. Carver gave oral notice of appeal in open court upon entry of judgment and filed an MAR on 29 March 2011 in Gaston County Superior Court pursuant to N.C. Gen. Stat. § 15A-1414. (R pp 12-20; Trial T p 855). The trial court summarily denied the MAR in a 14 April 2011 administrative order. (R p 21). On 5 June 2012, a divided panel of this Court upheld Mr.

¹ The Petition for Writ of Certiorari and Defendant-Appellee's Brief will use these designations: March 2011 trial transcript (Trial T p ___); April 2019 hearing transcript (T p ___); Record on Appeal and Supplement to Record on Appeal (R p ___).

Carver's conviction. *State v. Carver*, 221 N.C. App. 120, 122, 725 S.E.2d 902, 904 (2012), *aff'd per curiam*, 366 N.C. 372, 736 S.E.2d 172 (2013).

On 8 December 2016, Mr. Carver filed an MAR in Gaston County Superior Court pursuant to N.C. Gen. Stat. § 15A-1415. (R pp 22-51). He amended the MAR on 26 July 2018 and 8 April 2019. (R pp 100-122, 156-162). Mr. Carver asserted claims of ineffective assistance of counsel and newly discovered evidence. (R pp 39-46, 109-110). He also alleged that the State violated his Fourteenth Amendment due process rights by withholding material evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and by mispresenting critical evidence at his March 2011 trial, and he sought relief on the grounds that he is factually innocent and was incarcerated in violation of the Eighth Amendment. (R pp 47, 115-118, 156-160).

On 10 January 2017, the Honorable Jesse B. Caldwell III ordered an evidentiary hearing for Mr. Carver's MAR. (R pp 52-53). The nine-day April 2019 hearing took place in Gaston County Superior Court, with Judge Bragg presiding. (R p 165). Mr. Carver and the State presented a combined 25 witnesses and 156 exhibits over the course of the hearing. (R pp 146-155). "Having heard the evidence and testimony presented during the April 2, 2019 Special Session of Superior Court, considered the arguments of counsel, and reviewed the entire record and the materials provided by the parties," the trial court filed a written Order on 12 June 2019. (R pp 165-179). In the

Order, the court granted Mr. Carver's MAR on the grounds of ineffective assistance of counsel and newly discovered evidence. (R p 175). The court denied Mr. Carver's *Brady* violation, misrepresentation of critical evidence, and actual innocence claims. (R p 174). From this Order, the State filed written notice of appeal on 13 June 2019. (R pp 180-181).

The reporters delivered all transcript volumes from Mr. Carver's evidentiary hearing by 28 August 2019. The transcript from the March 2011 trial and April 2019 evidentiary hearing consists of a combined 2,043 pages. On 11 September 2019, the State served the Proposed Record on Appeal on Ms. Christine C. Mumma of the N.C. Center on Actual Innocence (NCCAI), Mr. Carver's attorney of record at that time. (R p 186). On 23 September 2019, the Office of the Appellate Defender (OAD) was appointed to serve as Mr. Carver's appellate counsel. (R p 187). On 4 October 2019, OAD assigned the case to Assistant Appellate Defender Amanda S. Zimmer. (R p 188).

On 8 November 2019, Mr. Carver served an alternative Proposed Record on Appeal on the State. (R p 190). On 25 November 2019, the State-Appellant filed the settled Record on Appeal in this Court, which docketed the appeal on 3 December 2019. The Record on Appeal, which includes three supplement volumes, consists of 739 pages. Pursuant to N.C. R. App. P. 9(d), all exhibits received in evidence in this case are part of the Record on Appeal. (R p 163).

On 24 January 2020, after receiving one extension of time, the State-Appellant filed the Brief for the State. The Brief presented two issues (framed as a single issue): Did the trial court err by granting Mr. Carver's MAR on the grounds of ineffective assistance of counsel and newly discovered evidence? (Brief for the State pp 12-30).

In Orders entered on 21 February 2020 and 24 March 2020, this Court allowed Motions to Extend Time to File Brief which Ms. Zimmer had filed on Mr. Carver's behalf, with the second extension running through and including 27 April 2020. On 27 March 2020, the Chief Justice of the N.C. Supreme Court entered an Order extending all deadlines imposed by the N.C. Rules of Appellate Procedure which fell between 27 March 2020 and 30 April 2020 by 60 days. As a result, the deadline for the Defendant-Appellee's Brief in the present case was extended to 26 June 2020.

On 15 April 2020, this Court entered an Order which allowed Ms. Zimmer's Motion to Withdraw as Appointed Appellate Counsel and permitted retained appellate counsel, Ms. Mumma and Mr. Guy J. Loranger of the NCCAI, to be substituted as Mr. Carver's appellate counsel of record.

On 19 June 2020, Mr. Carver, through undersigned counsel, filed the Defendant-Appellee's Motion for Expansion of Word Limit and Extension of Time to File Brief. In the Motion, Mr. Carver cited this case's voluminous record and his intent to raise additional issues pursuant to N.C. R. App. P.

28(c) as grounds for expanding the word limit in the Defendant-Appellee's Brief to 22,500 words. He also asked this Court to extend the deadline for filing this Brief to "a period equal to the number of days which it takes for the Court to rule on this matter[.]" Mr. Carver noted that Mr. Joseph L. Hyde, Assistant Attorney General, counsel for the State-Appellant, stated in an 18 June 2020 e-mail that the State would object to the word-limit expansion on the ground that Mr. Carver "did not take an appeal from the order allowing his motion for appropriate relief."

On 19 June 2020, this Court entered an Order allowing Mr. Carver an extension through 27 July 2020 to file the Defendant-Appellee's Brief. On 2 July 2020, this Court entered an Order allowing an expansion of the word limit up to 14,000 words for the Defendant-Appellee's Brief.

On this date, 27 July 2020, Mr. Carver has filed the Defendant-Appellee's Brief and Motion to Dismiss State's Appeal / Motion to Strike Portions of State's Brief simultaneously with this Petition for Writ of Certiorari. The Brief and Motion are incorporated by reference as if fully set forth herein.

In Issue I of the Brief, Mr. Carver responds to the single issue raised in the Brief for the State. (Defendant-Appellee's Brief pp 21-48). Mr. Carver also raises two additional issues pursuant to N.C. R. App. P. 28(c):

II. Did the trial court err by denying Mr. Carver's *Brady* violation and misrepresentation of critical evidence claims?

III. Did the trial court err by holding that it lacked legal authority to rule on Mr. Carver's innocence claim? (Defendant-Appellee's Brief pp 48-57).

The Brief sets forth his factual and legal grounds for relief in Issues II and III as well as a "full, non-argumentative summary of all material facts necessary to understand the new issues supported by references to pages in the record on appeal, the transcript of proceedings, or the appendixes, as appropriate, as well as a statement of the applicable standard(s) of review for those additional issues," in compliance with N.C. R. App. P. 28(c).

REASONS WHY WRIT SHOULD ISSUE

Rule 28 of the N.C. Rules of Appellate Procedure permits an appellee, "[w]ithout taking an appeal," to "present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken." N.C. R. App. P. 28(c). Although the trial court in this case granted Mr. Carver's MAR on grounds of ineffective assistance of counsel and newly discovered evidence, the court denied his *Brady* violation, misrepresentation of critical evidence and actual innocence claims. (R pp 174-175). The State appealed from that Order. (R pp 180-181).

The Brief for the State addresses the portion of the trial court's Order which granted Mr. Carver's ineffective assistance and newly discovered evidence claims. (Brief for the State pp 12-30). However, under N.C. Gen. § 15A-1445(a)(2), the State may appeal only "questions of law" that arise from the trial court's granting of Mr. Carver's newly discovered evidence claim. The State has no right to appeal from the trial court's granting of Mr. Carver's claim of ineffective assistance of counsel. Because the trial court's holding that Mr. Carver was deprived of his right to effective assistance of counsel would support the court's Order vacating Mr. Carver's first-degree murder conviction and granting him a new trial, the State's appeal should be dismissed as moot.

Should this Court review the State's appeal, N.C. R. App. 28(c) entitles Mr. Carver to respond to the State's argument as well as to present issues based on the trial court's denial of his *Brady* violation, misrepresentation of critical evidence, and actual innocence claims, which "deprived [him] of an alternative basis in law for supporting the ... order ... from which appeal has been taken." N.C. R. App. P. 28(c). In light of the State's objection to Mr. Carver's Motion for Expansion of Word Limit and Extension of Time to File Brief, and out of an abundance of caution, Mr. Carver files this Petition and requests this Court's review of Issues II and III in the Defendant-Appellee's

Brief pursuant to N.C. Const. art. IV, § 12(2), N.C. Gen. Stat. §§ 7A-32(c), 15A-1422(c)(3), and 15A-1444(f), and N.C. R. App. P. 21(e).

“The Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe.” N.C. Const. art. IV, § 12(2). Under N.C. Gen. Stat. § 7A-32(c), this Court has authority “to issue the prerogative writs, including ... certiorari ... in aid of its own jurisdiction” which accord with the “practice and procedure” provided “by statute or rule of the Supreme Court.” N.C. Gen. Stat. § 15A-1444(f) provides that a trial court’s ruling on an MAR “is subject to review upon appeal or by writ of certiorari” as provided in N.C. Gen. Stat. § 15A-1422(c)(3). Under N.C. Gen. Stat. § 15A-1422(c)(3), a trial court’s ruling on an MAR is subject to review “[i]f the time for appeal has expired and no appeal is pending, by writ of certiorari.”

Rule 21 provides “the appropriate ‘practice[s] and procedure[s]’ for this Court to issue a writ of certiorari, guide [the Court’s] processes to exercise [its] jurisdiction as provided by” statute. *State v. Biddix*, 244 N.C. App. 482, 494, 780 S.E.2d 863, 870 (2015). Under N.C. R. App. P. 21(e), a defendant may file a petition for writ of certiorari and seek review of a trial court’s denial of an MAR. The Court may dismiss the petition if the petitioner “unreasonably delays in filing the petition or otherwise fails to comply with a rule of procedure,” and the Court may deny the petition if it is “without merit.”

Here, Mr. Carver, through undersigned counsel, has acted diligently and has not “unreasonably delay[ed]” the filing of this Petition. First, the undersigned counsel has served as Mr. Carver's appellate counsel of record since only 15 April 2020. Second, counsel entered Mr. Carver's case during a period of significant disruption caused by the COVID-19 pandemic. Third, Mr. Carver's case involves a voluminous record, including a combined 2,043 in transcript pages from the March 2011 trial and April 2019 evidentiary hearing, 739 pages in the Record on Appeal and supplement volumes and several hundred more pages of documents presented as hearing exhibits. (R pp 146-155). Finally, Mr. Carver has acted upon the belief that N.C. R. App. P. 28(c) permits him to raise Issues II and III in the Defendant-Appellee’s Brief, which he filed on this date in compliance with N.C. R. App. P. 28(c) and this Court’s 19 June 2020 and 2 July 2020 Orders.

Furthermore, in the Defendant-Appellee’s Brief, which has been incorporated by reference, Mr. Carver has demonstrated “merit, or that probable error was committed” below. *State v. Moore*, 210 N.C. 686, 691, 188 S.E. 421, 424 (1936). In Issue II, Mr. Carver provides a factual and legal basis for his assertion that the trial court erred by denying his *Brady* violation and misrepresentation of critical evidence claims without making the findings of fact required by N.C. Gen. Stat. § 15A-1420(c)(4) or, in the alternative, by making findings of fact which lacked the support of competent evidence.

(Defendant-Appellee's Brief pp 48-52). In Issue III, Mr. Carver provides a factual and legal basis for his assertion that the trial court erred by holding that it lacked legal authority to rule on his innocence claim where N.C. Gen. Stat. § 15A-1417(a)(4) authorizes a court to "grant '[a]ny other appropriate relief' in addition to the relief specifically enumerated in the statute." *State v. Roberts*, 351 N.C. 325, 327, 523 S.E.2d 417, 418 (2000). (Defendant-Appellee's Brief pp 52-56). Thus, should this Court find that Mr. Carver cannot raise Issues II and III pursuant to N.C. R. App. P. 28(c), the issuance of this Court's Writ of Certiorari would be warranted.

Should this Court find that Mr. Carver is not entitled to review pursuant to N.C. R. App. P. 21(e), he would respectfully request review pursuant to N.C. R. App. P. 2 to "prevent manifest injustice."

ATTACHMENTS

Attached in an appendix to this Petition for consideration by the Court are certified copies of the following documents:

1. Judgment and Commitment (21 March 2011)
2. Order Granting Defendant's Motion for Appropriate Relief (6 June 2019).

PRAYER FOR RELIEF

WHEREFORE, the Defendant-Petitioner, Mr. Mark Bradley Carver, respectfully prays that this Court:

1. Issue its Writ of Certiorari and conduct the review requested in this case in the Defendant-Appellee's Brief on the following issues:

II. DID THE TRIAL COURT ERR BY DENYING MR. CARVER'S *BRADY* VIOLATION AND MISREPRESENTATION OF CRITICAL EVIDENCE CLAIMS?

III. DID THE TRIAL COURT ERR BY HOLDING THAT IT LACKED LEGAL AUTHORITY TO RULE ON MR. CARVER'S INNOCENCE CLAIM?

2. Grant such other relief which this Court deems proper.

Respectfully submitted, this 27th day of July 2020.

s/Electronically filed

Christine C. Mumma
Executive Director
cmumma@nccai.org
State Bar No. 26103

s/Electronically filed

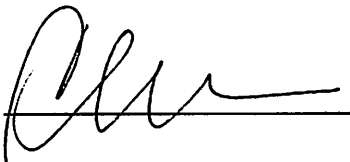
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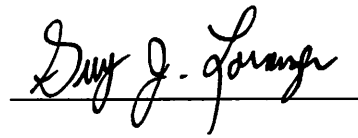
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ATTORNEYS FOR DEFENDANT-PETITIONER

VERIFICATION

Ms. Christine C. Mumma and Mr. Guy J. Loranger, being first duly sworn, depose and say that they have read the foregoing Petition for Writ of Certiorari and that the same is true to their own knowledge except as to matters alleged upon information and belief, and as to these matters, they believe them to be true.

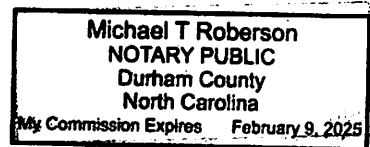

Christine C. Mumma


Guy J. Loranger

Sworn to and subscribed before me,

this 27th day of July 2020





NOTARY PUBLIC

My commission expires: 2/9/2025

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original Petition for Writ of Certiorari has, on this date, been filed in the North Carolina Court of Appeals by electronic delivery as permitted by N.C. R. App. P. 26(a)(2).

I further hereby certify that a copy of the above and foregoing Brief has, on this date, been duly served upon the State-Appellant, by electronic mail as permitted by N.C. R. App. P. Rule 26(c) addressed to:

Joseph L. Hyde
Assistant Attorney General
N.C. Department of Justice
jhyde@ncdoj.gov.

On this 27th day of July 2020.

s/Electronically filed

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