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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

FREDDIE EUGENE OWENS,
Petitioner,
v.

STATE OF SOUTH CAROLINA
Respondent.

Case No. 1999-011364

REPLY IN SUPPORT OF FIRST MOTION FOR STAY OF EXECUTION

Freddie Eugene Owens, AKA Khalil-Divine Black Sun-Allah, seeks to temporarily stay his execution—currently scheduled for September 20, 2024—to allow a court to consider newly discovered material evidence casting doubt on his conviction and death sentence. Despite the evidence of misconduct by the solicitor who prosecuted Owens, the State urges this Court to allow Owens's execution to proceed, claiming he could have litigated these constitutional errors in prior proceedings. But the State's arguments depend upon misreading the record and proposing farfetched scenarios in which Owens's prior counsel could have uncovered the evidence that the solicitor hid. This reply will address those misrepresentations, which further demonstrate the "exceptional circumstances warranting the issuance of the stay" Owens seeks. *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 548, 471 S.E.2d 140, 142 (1996).

1. Owens is entitled to a PCR hearing on his claim regarding Golden's undisclosed side agreement with the solicitor's office.

Owens's August 30 application for post-conviction relief (PCR) presents newly discovered evidence that the State failed to disclose an informal plea agreement with Owens's co-defendant Steven Golden, and then knowingly used Golden's false testimony regarding his

plea agreement to secure Owens's conviction, in violation of Owens's rights under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763 (1972), and *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173 (1959). Golden acknowledged in an affidavit signed August 22, 2024—the day before Owens's execution notice issued—that the solicitor's office made him an undisclosed deal in exchange for his testimony against Owens, then directed him to falsely testify that his formal agreement contained all the terms of his plea deal. Ex. E to Stay Motion. Owens also produced an affidavit drafted in 1999 by Golden's attorney that corroborates Golden's current account of the true terms of his agreement with the State: while Golden's formal plea agreement said that the death penalty and life without parole were still possible outcomes, the State had agreed to a term of years if Golden testified that Owens shot Irene Graves. Ex. G to Stay Motion; Ex. E to Stay Motion; Ex. C to Stay Motion. Accepting these allegations as true, Owens is entitled to an evidentiary hearing on his petition. *See* S.C. Code Ann. § 17-27-70(c); *Robertson v. State*, 418 S.C. 505, 519, 795 S.E.2d 29, 36 (2016).

The State asks this Court to ignore these two compelling pieces of evidence of the undisclosed plea agreement, insisting that "the claim of a 'secret deal' with co-defendant Golden was debunked at the 1999 trial." Resp. at 9. It asserts that "the terms of [Golden's] deal"—that is, his formal plea agreement—"were set out on the record." Resp. at 9. And it claims that "the trial record and Golden's plea record plainly refutes" the existence of a side agreement—presumably because the side agreement does not appear in those records. Resp. at 10. This argument misapprehends Owens's specific claims and claims under *Brady*, *Giglio*, and *Napue* more generally. The thrust of Owens's claim is that the solicitor's office intentionally withheld exculpatory evidence and knowingly used false testimony about the terms of Golden's deal. If

that evidence was withheld, how could its absence from the record "debunk" those claims? Its absence is a predicate for the claims. In other words, the fact that the side agreement does not appear in the trial record is not evidence contradicting Owens's claim—it is precisely the harm Owens seeks to rectify.

The State makes two attempts to escape from the contemporaneous affidavit drafted by Golden's attorney, Ex. G to Stay Motion, corroborating the side agreement. First, the State misreads or misconstrues the trial record to suggest that this 1999 draft affidavit was "clearly available for prior litigation." Resp. at 2. The state's assertion that "the affidavit was known, discussed, and *made a court's exhibit at the 1999 trial*" is seriously misleading. Resp. at 9. As the transcripts attached to Owens's Motion to Stay demonstrate, Owens's attorney knew that a draft affidavit existed and believed it contained impeaching evidence regarding Golden's plea agreement, and therefore made a motion under *Brady* for the State to disclose it. Ex. D to Stay Motion at 1339 ("I am advised that there is an unsigned affidavit by the defendant Golden that apparently was part of the negotiations in the deal for the plea agreement. We would ask that we receive a copy of that, as well."). When the State objected to the *Brady* motion, the court placed the document under seal and reviewed it *in camera* without allowing Owens's attorneys to view its contents. *Id.* at 1344–46. The trial court ultimately denied the *Brady* motion, holding that the document was privileged and that it did not contain impeachment information.[1] Ex. F. to Stay Motion at 1815–16. So, while it is technically correct that the affidavit was "known, discussed, and *made a court's exhibit at the 1999 trial*," Resp. at 9, the affidavit was not disclosed to

[1] Whether or not the unsigned affidavit was privileged or discoverable under *Brady* is immaterial to Owens's current claim. Owens does not, at this point, seek relief on the basis of the trial court's *Brady* ruling. He instead points out that the contents of the unsigned affidavit corroborate Golden's account of the true terms of his agreement with the State—terms that, of course, were subject to disclosure under *Brady*.

Owens's counsel at trial despite their attempts to obtain it. *See also* Ex. C to Stay Motion (Owens's trial counsel affirming that, in response to the *Brady* motion, they received only Golden's formal plea agreement).

Second, the State attempts to rely on the trial transcript to argue that the unsigned draft affidavit did not contain information about the plea negotiations between the State and Golden. The state points out that Golden's attorney said on the record that the unsigned affidavit "had nothing to do with negotiations with the solicitors office whatsoever," Ex. D to Stay Motion at 1341, and also said that the solicitor's office had "offered no guarantees except that as the plea agreement indicated if he cooperated, testified truthfully that the solicitor would consider leniency in this case," Ex. F to Stay Motion at 1808. While Owens's defense counsel had no way to refute these contentions at the time, the text of the affidavit itself clearly does: "As a result of negotiations between my lawyers and the solicitor's office, I have been advised that if I cooperate and testify truthfully in accordance with my written statement that the solicitor will withdraw the death penalty and the possibility that I would serve life without parole." Ex. G. to Stay Motion at 4. In short, the State asks this Court to credit statements made by Golden's attorney about the affidavit, even though those statements are clearly belied by the plain text of the affidavit.

Finally, the State argues that Owens should not be allowed to litigate his *Brady* or *Napue* claims "because there is no reasonable probability of a different result." Resp. at 14. It contends that "Owens cannot possibly show impeachment regarding a co-defendant's expectation of a certain sentence could require the conviction or sentence to be overturned." Resp. at 13 n.9. Owens is entitled to relief if there is "a reasonable probability the jury would have decided differently" had the side deal been disclosed. *State v. Brown*, 441 S.C. 464, 476, 894 S.E.2d 525,

531 (2023); *see also State v. Jones*, 343 S.C. 562, 570–71, 541 S.E.2d 813, 817–18 (2001) (reversing a conviction due to the trial court's failure to allow cross-examination of co-defendant on prior deals because the "excluded evidence had a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity" of his testimony, where the co-defendant said he was "solely motivated by concern for his salvation").

This Court's precedents establish that the evidence against Owens was not the kind of overwhelming proof of guilt that could lead a court to overlook the failure to disclose material impeachment evidence about the State's key witness. In *Lowry v. State*, this Court weighed the evidence against the defendant in deciding that an improper jury instruction on malice was not harmless error. 376 S.C. 499, 657 S.E.2d 760, 765. The evidence at issue in *Lowry* mirrored the State's evidence against Owens. There, the State presented evidence of three statements the defendant made to police, along with testimony of two co-defendants who described the defendant's participation in the crime, and statements of two friends who testified that the defendant bragged about the murder. *Id.* at 509, 657 S.E.2d at 765. The Court found "little direct probative evidence" in the defendant's unsigned statements to police, which "merely consisted of notes by the SLED agent assigned to the case." *Id.* It likewise found the co-defendant testimony "questionable at best," noting that a co-defendant "received a lighter sentence for her role in the crime in exchange for her testimony." *Id.* Finally, this Court articulated the lack of probative value in a defendant's putative admissions to friends; the defendant's friend testified that the defendant bragged about a murder, but also stated that he did not believe the defendant's story because "where I'm from, you kill somebody, you don't walk around and talk about it." *Id.* at 510, 657 S.E.2d at 766.

At Owens's trial, "[l]acking forensic evidence to connect Owens to the scene, the State's case rested largely on witness testimony." *Owens v. Stirling*, 967 F.3d 396, 404 (4th Cir. 2020). "Golden admitted he was one of the Speedway robbers and claimed appellant was his accomplice. He testified [Owens] shot Graves in the head after she stated she could not open the safe." *State v. Owens*, 346 S.C. 637, 646–47, 552 S.E.2d 745, 750 (2001). Golden's testimony was the only evidence of Owens's role that did not rest on Owens's own purported statements; Vance, Owens's girlfriend, and police officers all testified to what Owens allegedly said about the crime. *Owens*, 346 S.C. at 647, 552 S.E.2d at 750. And as in *Lowry*, Owens's inculpatory statements to police officers were not in signed statements, but merely in notes from investigating officers. *Id.* In short, there can be no doubt that Golden was a key witness, and as this Court recently acknowledged, "a key witness's reliability is always material." *State v. Brown*, 441 S.C. 464, 470, 894 S.E.2d 525, 528 (2023).

The State also insists that Owens's PCR application should not be allowed to go forward because "Golden does not attempt to recant that Owens shot Ms. Graves." Resp. at 10. Suggesting that the solicitor's secret side deal with Golden is immaterial unless accompanied by his confession runs contrary to law. The failure to disclose an informal plea agreement is material if the agreement "further increased the incentive to testify falsely." *Brown*, 441 S.C. at 472, 894 S.E.2d at 529. The state cannot reasonably argue that Golden's knowledge that the death penalty and life without parole would be taken off the table did not increase his incentive to testify and cast Owens as the shooter.

In short, the State's insistence that the "speculation about a deal was thoroughly discussed, and debunked, at trial," Resp. at 10, requires discrediting both Golden's 2024 affidavit and the plain text of the unsigned affidavit drafted for Golden in 1999. To do so would violate

the rules regarding PCR applications, which require that Owens's allegations must be accepted as true, and that he be given an evidentiary hearing unless there are no material facts at issue. *See Robertson*, 418 S.C. at 519, 795 S.E.2d at 36.

2. Owens is entitled to a PCR hearing on his claim regarding the use of a visible stun device.

Owens's PCR application presents newly discovered facts, not previously available, that the jurors who convicted him of murder were aware that he was wearing an electronic stun device during the 1999 trial. In its response to Owens's motion for a stay of execution, the State makes several arguments, all unavailing, for why Owens should be executed on September 20 without allowing a court to determine whether the new evidence regarding the use of a visible stun device demands relief from his conviction or death sentence.

First, the State argues that the "claim of jurors being able to see the stun belt was raised and specifically abandoned in the 2009 PCR action," and that it is therefore not the appropriate basis of a successive PCR action. Resp. at 2. That is incorrect. In the 2009 PCR action, Owens alleged that jurors during the 2006 resentencing proceedings could see his shackles.[2] *See* Ex. A,

[2] Ground 10(b) of Owens's amended PCR application alleged:

> 10(b): Applicant was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, *during his 2006 capital sentencing proceeding.*
>
> 11 (b): Supporting facts: Trial counsel's performance *during the sentencing phase* was both deficient and prejudicial . . . Counsel's acts or omissions included . . . Counsel failed to ensure that jurors did not see Applicant in restraints.

Ex. A, 2009 PCR Motion for Summary Judgment, at 1 n.2 (emphasis added).

Ground 10(c) of Owens's amended PCR application alleged:

2009 PCR Motion for Summary Judgment.[3] In support of that claim, Owens alleged that the post-conviction investigation "revealed that members of the 2006 jury saw Owens in restraints during his re-sentencing proceeding." *Id.* at 2. Owens produced affidavits from two 2006 jurors who said they saw the shackles during the resentencing proceedings, along with a November 12, 2006, article from the Greenville News describing Owens as wearing "handcuffs and shackles." *Id.* at 8–10. Owens has never raised a restraint claim about the electronic stun device used in the 1999 trial because evidence regarding the visible use of a stun device at the 1999 trial was not previously available. *See* Ex. L to Stay Motion.

Second, the State argues that the stun device claim is not the appropriate basis of a successive PCR because it could have been raised at trial or on direct appeal. Resp. at 16. In support of this argument, the State points out that Owens's counsel knew that Owens was wearing a stun device and made no objection. *Id.* That much is not in dispute; the newly discovered evidence serving as the basis of Owens's successive PCR is not that he was wearing a stun device, but that the jurors were aware of it. Ex. A to Stay Motion (explaining that counsel were unaware until August 2024 that the stun device was visible to jurors). Indeed, Owens's trial attorney signed an affidavit explaining that—while he knew that Owens was wearing a stun device at the time of trial—he did not believe jurors were aware of it. Ex. C to Stay Motion.

> 10(c): Applicant's *death sentence* was obtained in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of South Carolina law, because the jurors saw Applicant in restraints.

Ex. A, 2009 PCR Motion for Summary Judgment, at 2 n.3 (emphasis added).

[3] As the State asserts, Owens's counsel withdrew the claim regarding the 2006 jurors being able to see the restraints during his PCR hearing.

Third, the State questions why the juror did not report seeing the stun device previously, even though prior counsel conducted interviews of the 1999 jurors. Resp. at 16–17. The argument that prior counsel could have discovered that jurors saw the stun device twists the burden of production and persuasion at this stage of PCR proceedings. At this point, "the PCR judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant." *McCoy v. State*, 401 S.C. 363, 369, 737 S.E.2d 623, 626 (2013). Owens has alleged that prior counsel conducted a thorough investigation into the 1999 jurors, and yet did not discover that jurors were aware of the stun device. Ex. L to Stay Motion. Why the previous investigation did not produce evidence that jurors saw the stun device is a question to be answered during the PCR process. The point is that Owens has alleged facts establishing an exception to the statute of limitations and the prohibition against successive PCR applications, and because "those facts are not conclusively refuted by the record before the PCR court, a question of fact is raised which can only be resolved by a hearing." *Id.* at 369, 737 S.E.22 at 626.

Finally, the State is incorrect that Owens is required to show prejudice to succeed on his stun device claim. The state does not contest that the use of a visible stun device without appropriate on-the-record justification is inherently prejudicial and that, when litigated in the normal course, a defendant need not demonstrate prejudice to make out a due process violation. Nor can it, given this Court's clear statement that when "a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation." *State v. Heyward*, 441 S.C. 484, 505, 895 S.E.2d 658, 669 (2023). Instead, the State argues that because the claim could have been raised at trial or on direct appeal, Owens can now challenge the use of a stun device only through a claim of ineffective assistance of counsel for failing to object, and he must show

prejudice to succeed under that framework. Resp. at 16–17. As discussed above, Owens does not raise the stun device claim through the lens of ineffective assistance of counsel, but rather directly, for the first time, because he could not discover the material facts underlying the claim in time to raise it on appeal or in the original PCR proceedings despite the exercise of due diligence. The error therefore "requires reversal unless the State proves beyond a reasonable doubt that the shackling error complained of did not contribute to the verdict obtained," *Heyward*, 441 S.C. at 505–06, 895 S.E.2d at 669–70, a standard the State has not even attempted to meet.

Conclusion

Given the "exceptional circumstances warranting the issuance of the stay," *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 548, 471 S.E.2d 140, 142 (1996), Owens asks this Court to vacate the August 23 execution notice and direct the Clerk of Court not to issue another execution notice while his August 30 PCR application remains pending.

Respectfully submitted on this, the 9th of September, 2024,

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