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Aug 30 2024
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

FREDDIE EUGENE OWENS,
Petitioner,
v.

STATE OF SOUTH CAROLINA
Appellants.

Case No. 1999-011364

MOTION FOR A STAY OF EXECUTION

Freddie Eugene Owens,[1] an indigent prisoner under sentence of death, respectfully requests that this Court stay his execution, currently scheduled for September 20, 2024, to allow adjudication of his pending Application for Post-Conviction Relief (PCR). Days before Owens's execution date was set, his counsel discovered two pieces of evidence, previously unavailable, that undermine the validity of Owens's conviction and death sentence:

First, Steven Golden, Owens's co-defendant and the State's principal witness, acknowledged in an affidavit signed August 22, 2024—the day before Owens's execution notice issued—that the solicitor's office made him a secret deal in exchange for his testimony against Owens. The solicitor's office not only failed to disclose the deal, but also instructed Golden to give false testimony about the promises he received from the State, in violation of Owens's due process rights under *Brady v. Maryland*, *Giglio v. United States*, *Napue v. Illinois*, and related South Carolina case law. U.S. Const. amends. VI, VIII, XIV, S.C. Const. art. I, §§ 3 and 14.

[1] By order of the Dorchester County Family Court, Owens's legal name was changed to Khalil-Divine Black Sun-Allah. All previous pleadings in this case have been filed under the name Freddie Owens.

Second, a juror from Owens's guilt-phase trial acknowledged on August 21, 2024—two days before Owens's execution notice issued—that she saw the electric shock device Owens was forced to wear during trial and that she understood what it was. The use of the shock device violated Owens's rights to due process, effective assistance of counsel, to be present, the presumption of innocence, and a fair trial. U.S. Const. amends. VI, VIII, XIV, S.C. Const. art. I, §§ 3 and 14.

Under this Court's procedures, a request for a stay of execution "pending the filing of a successive action for post-conviction relief" shall be granted if "there are 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 filed a successive PCR Application based on this new evidence in the Greenville County Circuit Court on August 30, 2024. *See* Ex. A, Second Successive PCR ("Application"). As summarized below, the Application meets South Carolina's legal requirements for successive PCR applications, and it presents newly discovered material facts that entitle Owens to a hearing and, ultimately, relief. The Application therefore presents extraordinary circumstances justifying a stay of execution pending adjudication of Owens's PCR application.

Relevant Procedural History

On November 1, 1997, Irene Graves was killed during an armed-robbery shooting at a Speedway convenience store in Greenville, South Carolina. Owens was charged with her murder, alongside three co-defendants: Steven Golden, Nakeo Vance, and Luster Young. Surveillance video from the Speedway shows two unidentifiable, masked assailants. *State v. Owens*, 346 S.C. 637, 646, 552 S.E.2d 745, 750 (S.C. 2001). No physical or forensic evidence connected Owens to the crime scene, and he denied participating. *Id.* at 646–47, 552 S.E.2d 750. With no proof of the shooter's identity, the State relied heavily on the testimony of Golden and

Vance, as well as the testimony of Owens's former girlfriend. *Id.* In February 1999, Owens was convicted and sentenced to death.

This Court twice reversed Owens's death sentences, *State v. Owens*, 346 S.C. 637, 552 S.E.2d 745 (2001); *State v. Owens*, 362 S.C. 175, 607 S.E.2d 78 (2004), before affirming his third death sentence, *State v. Owens*, 378 S.C. 636, 664 S.E.2d 80 (2008). On August 23, 2024, this Court issued an execution notice directing the South Carolina Department of Corrections to set Owens's execution date for September 20, 2024. Execution Notice, *State v. Owens*, No. 1999-011364 (Aug. 23, 2024).

Reasons to Enter a Stay of Execution

Under the rules regarding PCR applications, Owens's allegations must be accepted as true, and he is entitled to an evidentiary hearing unless there are no material facts at issue. *See* S.C. Code Ann. § 17-27-70(c); *Robertson v. State*, 418 S.C. 505, 519, 795 S.E.2d 29, 36 (2016). This motion briefly summarizes, in Sections 1 and 2, the new material facts and the likelihood that they invalidate his conviction and death sentence, and in Section 3, why Owens's Application is timely and the appropriate basis for a successive PCR. This motion does not call upon this Court to decide whether the evidence that has so recently come to light demands a new trial; it simply asks this Court to recognize that the discovery of this evidence and filing of the Application creates "exceptional circumstances warranting the issuance of the stay," *In re Stays of Execution*, 321 S.C. 544, and to grant him the opportunity to litigate these claims in the normal course.

1. **Owens's PCR application presents newly discovered evidence that the State violated Owens's due process rights by failing to disclose a plea agreement with its principal witness and by knowingly using false testimony regarding the agreement.**

Owens's PCR Application is based, first, on the newly discovered facts 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.

Owens and Golden were both facing the death penalty for their roles in the murder of Irene Graves during the robbery of the Speedway convenience store. Mid-way through voir dire in their joint capital trial, Golden changed course and pled guilty as charged to murder, three counts of armed robbery, criminal conspiracy, and possession of a firearm during the commission of a violent crime. *See* Ex. B, Golden Plea Agreement. The plea agreement, signed by Golden and the solicitor Robert Ariail, represented that Golden's plea of guilty to all charges would "subject him to three possible penalties," listed as "death, following a full hearing before the Judge, life imprisonment without parole, or a sentence of a *minimum* of 30 years in prison." *Id*. The agreement stated that the solicitor would "*consider* a recommendation of leniency in the event he pleads guilty and testifies truthfully . . . in accordance with his previous written statement given to the Greenville County Sheriff's Office on November 11, 1997." *Id.* It added that the decision to recommend leniency was "a matter solely in [the solicitor's] discretion and the Defendant ha[d] no specific guarantees." *Id.* As described in more detail below, these were not the true terms of the agreement between Golden and the solicitor's office.

Owens's trial attorneys made a request under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), and Rule 5 of the South Carolina Rules of Criminal Procedure for any information concerning plea negotiations and agreements between Owens's co-defendants and the solicitor's

office. *See* Ex. C, Rollins Affidavit; Ex. D, Transcript of Feb. 9, 1999, at 1337. The solicitor's office provided Golden's written plea agreement falsely representing that the death penalty and life without parole were still possible sentences for Golden. *See* Ex. C, Rollins Affidavit.

Golden testified, in accordance with his written statement, that he and Owens robbed the Speedway together, and both carried firearms, but that it was Owens who shot Graves during the robbery. *See Owens*, 346 S.C. at 646, 552 S.E.2d 750; 1999 Transcript at 2238–2407. The assistant solicitor who examined Golden emphasized that his plea agreement did not prevent him from being sentenced to death:

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16  DIRECT EXAM CONTINUED BY MS. REESE:
17  Q.     MR. GOLDEN, UNDER THE TERMS OF THIS AGREEMENT,
18  DO YOU UNDERSTAND THAT YOU COULD GET THE DEATH
19  PENALTY?
20  A.     YES, MA'AM.
21  Q.     HAVE ANY GUARANTEES BEEN MADE TO YOU?
22  A.     NO, MA'AM.
23  Q.     HAVE ANY PROMISES AS TO WHAT IN FACT YOU WILL
24  GET AS YOUR SENTENCE BEEN MADE TO YOU?
25  A.     NO, MA'AM.
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1999 Transcript at 2387. Then, in closing argument of the guilt phase, the solicitor emphasized that the jury could credit Golden's testimony because "he acknowledged he might get life without parole and he may still be tried before this judge for the death penalty." 1999 Transcript at 2899.

Golden recently disclosed that the solicitor in fact made him a concrete promise: that he would not receive a death sentence or life without parole if he testified that Owens was the

shooter. Golden signed an affidavit on August 22, 2024—the day before the current execution notice issued for Owens—explaining that there was an unwritten agreement, intentionally hidden by the Solicitor's Office, taking the death penalty and life without parole off the table in exchange for Golden's testimony. As Golden explains: "My written plea agreement said the death penalty and life without parole were still possible outcomes and there were no specific guarantees about what my sentence would be. That wasn't true. We had a verbal agreement that I would not get the death penalty or life without parole." Ex. E, Golden Affidavit. Golden declares that he gave false testimony about his agreement with the State, not only with the solicitor's knowledge, but also at the solicitor's instruction: "The prosecutor told me to answer that way." *Id.*

Other evidence corroborates Golden's account of the secret plea agreement. Richard Vieth, Golden's defense attorney at the 1999 trial, memorialized the State's true offer in a contemporaneous writing. As Vieth explained on the record, the writing came about because Golden was considering declining the State's offer, against Vieth's advice. Ex. F, Transcript of Feb. 11, 1999, at 1807–08. Vieth therefore drafted an affidavit for Golden to sign, intending to guard against any future accusation of ineffective assistance of counsel. *Id.* The affidavit—written just before Golden decided to accept the State's offer and plead guilty—explained the details of the plea agreement: "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, Vieth Affidavit.

The trial court authorized the solicitor's failure to disclose the secret deal to Owens's attorneys. The solicitor's office had a copy of the unsigned affidavit drafted by Vieth. Ex. D,

Transcript of Feb. 9, 1999, at 1340. Owens's trial attorneys requested it, explaining that defense counsel was "entitled to every iota of evidence that relates to the existence of and the terms of a plea agreement by Golden in this case." *Id.* at 1338. The trial judge put the affidavit under seal and reviewed it in-camera to determine whether Owens had a right to review it under *Brady v. Maryland*. *Id*. at 1345. The court ultimately denied Owens's *Brady* motion, concluding that the affidavit was privileged, that it did not contain "the type of thing that would lend it to impeachment," and that for *Brady* purposes "it could not serve any benefit, would therefore not be prejudicial to the defendant." Ex. F, Transcript of Feb. 11, 1999, at 1815. As described below, this was a manifest error of law: the solicitor's office had a duty under *Brady* to disclose the true terms of its agreement with Golden.

A claim based on *Brady* and *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763 (1972), succeeds when "the evidence at issue is: 1) favorable to the accused; 2) in the possession of or known to the prosecution; 3) suppressed by the prosecution; and 4) material to the defendant's guilt or punishment." *State v. Durant*, 430 S.C. 98, 107, 844 S.E.2d 49, 53 (2020). For *Brady* purposes, materiality is established "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (citing *United States v. Bagley,* 473 U.S. 667, 682 (1985)).

Under the case law of this Court and the Supreme Court of the United States, the true nature of the State's deal with Golden was favorable evidence subject to disclosure under *Brady*. Decades before Owens's trial, the Supreme Court held in *Giglio* that impeachment evidence falls under the *Brady* rule. 405 U.S. at 154, 92 S. Ct. 766 (holding that the failure to disclose a promise made to a key government witness violates a defendant's due process rights). In *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375 (1985), the Supreme Court considered a case in

which the prosecution promised its witnesses the "possibility of reward" if their testimony helped convict the defendant. The witnesses were not given firm promises or deals, but merely a possibility of favorable treatment. *Id.* at 683. The Court found this arrangement gave the witnesses a personal stake in the defendant's conviction and thereby created an incentive to testify falsely, and was therefore favorable evidence subject to disclosure under *Brady* and *Giglio*. *Id*.

This Court's recent decision in *State v. Brown*, 441 S.C. 464, 894 S.E.2d 525 (2023), demonstrates that the solicitor's suppression of its deal with Golden was reversible error. In that case, as here, a co-defendant testified against the accused as a prosecution witness. *Id.* at 468, 894 S.E.2d 527. During that trial—also like Owens's case—the co-defendant testified that the State did not make him any promises for cooperation. *Id.* Brown's counsel later discovered that the State extended plea offers to the co-defendant after engaging in extensive negotiations. *Id.* The co-defendant had accepted the State's offer to testify in exchange for a sentence of thirteen years, but later breached the agreement because he believed he could get a better deal. *Id.* at 468–69, 894 S.E.2d 527. This Court first decided that the plea negotiations between the co-defendant and the State were favorable impeachment evidence that should have been disclosed: "The lack of a written document did not negate the existence of a deal nor the strong evidence of [the co-defendant's] belief that he would be treated favorably if he cooperated with the State." *Id*. at 475, 894 S.E.2d 530. The false testimony was also material, because the undisclosed negotiations "supplied the incentive to provide biased testimony." *Id.* at 476, 894 S.E. 2d 531.

Under *Giglio* and *Brown*, the solicitor's failures to disclose Golden's deal was material for purposes of *Brady*. Here, as in *Brown*, "[n]o forensic evidence connected [Owens] to the crime scene." *Owens*, 346 S.C. at 647, 552 S.E.2d 750. Golden was the only eyewitness who

identified Owens as Irene Graves's shooter. He was also the only person who identified Owens on the surveillance video from the Speedway. The jury was led to believe that Golden's plea agreement gave him "no specific guarantees," and that the solicitor had promised nothing more than to exercise his "discretion" to "consider a recommendation of leniency." Ex. B, Golden Plea Agreement. The jury also believed that Golden still faced the death penalty and life in prison without parole at the time of his testimony. 1999 Transcript at 2387. Had the jury known that, in exchange for testifying that Owens was the shooter, Golden was avoiding the possibility of spending his life in prison or being executed, it might not have credited Golden's testimony. As in *Brown*, the undisclosed assurances that Golden would receive a term of years provided the "incentive to provide biased testimony." *Brown*, 441 S.C. at 476, 894 S.E.2d 531. There is therefore "a reasonable probability the jury would have decided differently" had the side deal been disclosed. *Id*.

The State violated Owens's due process rights not only by failing to disclose the existence of a deal, but also by knowingly presenting Golden's false testimony concerning his plea agreement. The seminal case *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173 (1959), concerns a set of facts strikingly similar to those at issue here. In that case, the petitioner's co-defendant, who was the principal prosecution witness, falsely testified that he had been promised no consideration for his testimony, and the prosecutor failed to correct the false testimony. *Id.* at 265, 79 S. Ct. 1175. The Supreme Court held that the knowing use of false testimony in a criminal case violates due process, whether the prosecutor solicits the false testimony or simply "allows it to go uncorrected when it appears." *Id*. at 269, 79 S. Ct. 1177. The Court went on to hold that the principle that a state may not knowingly use false testimony to procure a criminal conviction applies even when the false testimony "goes only to the credibility of a witness,"

because “[t]he jury’s estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant’s life or liberty may depend.” *Id.* at 269, 79 S. Ct. 1177. Under *Napue*, a conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury’s verdict. *See Bagley*, 473 U.S. at 679 n.9. Here, that likelihood is established for all the reasons described above, and because “a key witness’s reliability is always material.” *Brown*, 441 S.C. at 470.[2]

[2] The revelation of the secret plea deal with Golden suggests that the solicitor’s office likely hid another plea deal from Owens’s counsel. At Owen’s 1999 trial, his second co-defendant, Nakeo Vance, also testified as a prosecution witness. *See State v. Owens*, 346 S.C. at 647, 552 S.E.2d 750. At the time of Vance’s testimony, he was held on pending charges allegedly committed with Owens, including armed robbery and accessory after the fact to murder, and he had not yet pled guilty. He testified that he was guilty of all crimes charged, but that he had received no promises of consideration in exchange for his testimony. According to Vance, he chose to testify because he was “doing the right thing.” 1999 Transcript at 2674. In closing argument, the solicitor emphasized: “He is guilty, he admits his guilt . . . And they couldn’t impeach him. They couldn’t find anything to suggest that Nakeo Vance was lying . . . because he doesn’t have—he doesn’t have a plea agreement, he says he is guilty, he doesn’t have any interest in any of these.” 1999 Transcript at 2905–06.

One week after Owens was sentenced to death, bail was set for Vance, with the consent of the solicitor’s office. Ex. H, Vance Bail Form. Two weeks after that, Vance pled guilty to accessory to murder and accessory to armed robbery. At the recommendation of the solicitor’s office, Vance received a non-jail sentence and his other charges were dismissed. Ex. I, Vance Plea Agreement; Ex. J, Vance Verdict Forms. This evidence suggests that the Solicitor’s Office, in violation of Owens’s due process rights, also suppressed an agreement with Vance, in violation of *Brady v. Maryland* and its progeny, and knowingly failed to correct Vance’s false testimony about the agreement, in violation of *Napue v. Illinois*.

2. Owens's PCR application presents newly discovered evidence that Owens was forced to wear an electronic shock device that was visible to jurors during his 1999 trial, in violation of his state and federal constitutional rights.

The second new material fact underlying Owens's PCR application is that Owens was forced to wear an electronic stun device that was visible to jurors during his 1999 trial.[3] Although Owens and his attorneys knew that he was wearing the stun device, it was not until August 3, 2024, that a juror from the 1999 trial told Owens's current counsel that she saw the stun device and understood what it was. As described below, because Owens was wearing visible restraints at trial, and the trial court failed to articulate on the record the particular reasons the restraints were necessary, his rights to due process, to be present, to effective assistance of counsel, and to the presumption of innocence were violated and his conviction must be vacated. U.S. Const. amends. VI, VIII, XIV, S.C. Const. art. I, §§ 3 and 14.

Owens's trial counsel, John Rollins, attests that a court employee brought him and Owens into a side room of the courthouse just before trial began for a demonstration of the stun device. Ex. C, Rollins Affidavit. The court employee laid the device on the floor so that Rollins and Owens could see it clearly. *Id.* He then pressed the remote-control button to activate the device, which immediately lit up. *Id.* According to Rollins, it "looked like blue plasma flowing across the device" and "there was an odor of something burning." *Id.* The court employee then told Owens that, if he misbehaved in court, the device would be activated and that is what would happen to him. *Id.*

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[3] "A stun belt is a belt used to restrain prisoners, often in courtrooms . . . ." *Stephenson v. Neal*, 865 F.3d 956, 958 (7th Cir. 2017). The use of a stun device requires an officer to be "authorized to send an electric shock to a box on the stun belt that contains electrical wires," and can serve to disable the prisoner. *Id.*

At the time, Rollins believed that no jurors saw the stun device or were aware that Owens was wearing one. Newly acquired evidence, not previously discoverable with due diligence of counsel, reveals that at least one 1999 juror saw the stun device under Owens's clothes and understood what it was. Ex. K, Juror Affidavit.

As Owens's experience with the court employee demonstrates, the use of the devices depends on the defendant's constant fear of excruciating pain, not to mention humiliation. One manufacturer of such a device makes this point in its marketing materials: "After all, if you were wearing a contraption around your waist that by the mere push of a button in someone else's hand, could make you defecate or urinate yourself, what would you do from the psychological standpoint?"[4] These effects of wearing a stun device during trial compromise a defendant's critical rights, including his right to be present, to assist in his own defense, and to communicate with counsel.

Courts around the country have concluded that wearing a stun device during trial—even when it is not visible—is inherently prejudicial, just like wearing shackles. In *United States v. Durham*, 287 F.3d 1297 (11th Cir. 2002), for example, the Eleventh Circuit Court of Appeals compared stun devices to shackles to determine the constitutional requirements for their use on criminal defendants. It noted that a "problem with this [stun] device is the adverse impact it can have on a defendant's Sixth Amendment and due process rights to be present at trial and to participate in his defense." *Durham*, 287 F.3d at 1305–06. A "defendant is likely to concentrate on doing everything he can to prevent the belt from being activated, and is thus less likely to participate fully in his defense at trial." *Id.* Moreover, "[t]he fear of receiving a painful and

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[4] Claire Schaeffer-Duffy, NAT. CATHOLIC REP., *Use of Electro-Shock Devices Increases*, https://natcath.org/NCR_Online/archives2/2000d/120800/120800d.htm.

humiliating shock for any gesture that could be perceived as threatening likely chills a defendant's inclination to make any movements during trial—including those movements necessary for effective communication with counsel." *Id.* at 1305. The court therefore concluded that "a decision to use a stun belt must be subjected to at least the same close judicial scrutiny required for the imposition of other physical restraints." *Id.* at 1306 (internal quotation omitted). *See also Stephenson,* 865 F.3d at 958–59 (vacating Stephenson's death sentence due in part to the fact that "a stun belt can compromise a defendant's participation in a trial because it 'relies on the continuous fear of what might happen if the belt is activated for its effectiveness.'")

This case presents an even more egregious set of facts than *Durham*. In that case, there was no indication that the stun device was visible to jurors. Here, Owens's trial rights were doubly burdened: not only did he sit through trial afraid of being electrocuted, but he also faced the long-recognized constitutional deprivations associated with wearing visible physical restraints before a jury. The United States Supreme Court summarized those concerns in *Deck v. Missouri*, 544 U.S. at 626, 125 S. Ct. 2010. Analyzing Blackstone, the Supreme Court observed that "[t]he law has long forbidden routine use of visible shackles during the guilt phase." *Id.* at 626, 125 S. Ct. 2010. It explained that the use of visible restraints compromises the presumption of innocence, and also interferes with a defendant's ability to participate in his own defense and to communicate with counsel. *Id.* at 630–31, 125 S. Ct. 2013. It further observed that the use of physical restraints in front of jurors undermines the "courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment." *Id.* at 631, 125 S. Ct. 2013.

Since jurors saw the stun device on Owens and understood what it was, at the very least, the longstanding procedural requirements regarding the use of visible restraints in a criminal courtroom applied. This Court recently summarized those safeguards, which were in effect at the time of Owens's 1999 trial. *See State v. Heyward*, 441 S.C. 484, 895 S.E.2d 658 (2023). When "unusual visible security measures in jury cases are to be employed," the trial court must "state for the record, out of the presence of the jury, the reasons therefor and give counsel an opportunity to comment thereon, as well as to persuade him that such measures are unnecessary." *Heyward*, 441 S.C. at 493 (quoting *United States v. Samuel*, 431 F.2d 610 (4th Cir. 1970)). Confronted with the use of visible shackles on a criminal defendant, this Court observed that "a defendant in a criminal trial may not be required to wear handcuffs, leg shackles, or other restraints in the presence of the jury unless the trial court makes specific findings on the record as to the particular reasons the restraints are necessary." *Id.* at 493.

The case law also makes clear that the trial court must take "precautions to minimize any prejudice the restraints might have caused." *State v. Tucker*, 320 S.C. 206, 209, 464 S.E.2d 105, 107 (1995); *see also Heyward*, 441 S.C. at 493, 895 S.E.2d 663 ("If the court finds restraints are necessary, it must make every reasonable effort to ensure the restraints are not visible to the jury.").

Even setting aside the special concerns with stun devices, there can be no doubt that these longstanding requirements regarding visible physical restraints were not followed at Owens's trial. The trial court did not make a determination of special need or balance courtroom security against the effects of the device; indeed, the trial court made no specific findings on the record as to whether or why a stun device was necessary. By failing to engage in this mandatory process, the trial court appears to have impermissibly delegated its authority to law enforcement. *See*

Samuel, 431 F.2d at 615 (observing that the determination regarding the use of physical restraints may not be delegated to custodial law enforcement). And, given the jurors' ability to view the device, the trial court also appears to have failed to take adequate precautions to ensure that the jury was unaware of the stun device. Thus, in the present case, as in *Heyward*, "the trial court made no effort whatsoever to assess whether the" stun device was "necessary, nor to ensure the jury could not see" it. *Id.* at 494.

Because visible restraints on a criminal defendant are "inherently prejudicial," 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." *Heyward*, 441 S.C. at 505, 895 S.E.2d 669 (quoting *Deck*, 544 U.S. at 635, 125 S. Ct. 2015); *see also Wrinkles v. Buss*, 537 F.3d 804, 815 (7th Cir. 2008) (holding that a defendant can demonstrate prejudice by showing that jurors were aware that he was wearing an electronic stun device). This is true because visible restraints "will often have negative effects that 'cannot be shown from a trial transcript.'" *Deck,* 544 U.S. at 623, 125 S. Ct. 2009 (quoting *Riggins v. Nevada*, 504 U.S. 127, 137, 112 S. Ct. 1810 (1992)). In other words, it is irrelevant whether—had the trial court undertaken the proper analysis—it would have nevertheless chosen to use the stun device on Owens. "Rather, the error 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 669–70 (internal quotations and alterations omitted).

In this case, there is no way to know whether the visible stun device affected the jury's verdict, and Owens's conviction must therefore be vacated. This Court's decision in *Heyward* demonstrates the kind of showing the State must make in order to prove that a due process

violation caused by visible restraints was harmless error. There, Heyward's DNA was found under the victim's fingernails and on her neck, and a DNA expert explained that the likelihood that the DNA belonged to someone else was one in 21,000,000,000,000,000,000. *Heyward*, 441 S.C. at 506, 895 S.E.2d 670. Based on that "overwhelming evidence such that no other rational conclusion could be reached except that he is guilty," this Court found that the shackling did not contribute to the verdict. *Id.* This case could not be more different. As discussed above, "[n]o forensic evidence connected [Owens] to the crime scene." *Owens*, 346 S.C. at 647, 552 S.E.2d 750. Instead, the State's case depended on the testimony of Owens's co-defendants, which is especially unreliable given the newly discovered evidence of the State's secret dealmaking discussed above. The "exceptional circumstances" of a juror's recent acknowledgment that she saw Owens wearing a stun device and knew what it was therefore merit a stay per *In re Stays of Execution*, 321 S.C. 544, while the lower courts adjudicate this claim.

3. Owens is entitled to a hearing on his successive PCR application.

On August 30, 2024, Owens filed in the Greenville County Circuit Court a PCR Application alleging the claims outlined above. Ex. A, Second Successive PCR Application. Dismissal of a PCR application without a hearing is appropriate only when "(1) it is apparent on the face of the application that there is no need for a hearing to develop any facts, and (2) the applicant is not entitled to relief." *Robertson*, 418 S.C. at 519, 795 S.E.2d 36. "When considering the State's motion for summary dismissal, where no evidentiary hearing has been held, 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). For all the reasons discussed in Sections 1 and 2, Owens's Application presents facts that, when taken as true, establish prejudicial violations of his state and federal constitutional rights.

Owens's Application is also timely. A PCR application must ordinarily be filed within one year after conviction or, if a direct appeal is taken, one year after the remittitur is sent to the trial court. S.C. Code Ann. § 17–27–45(A). But the PCR statute codifies an exception to this rule: 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 statute of limitations is "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." S.C. Code Ann. § 17-27-45(C).

As detailed above, the claims regarding the State's suppression of its agreement with Golden could not have been raised in Owens's original PCR application because the State flouted its obligation to disclose its actual agreement with Golden and knowingly solicited false testimony to cover it up. Ex. E, Golden Affidavit. Owens's counsel in his original PCR proceedings interviewed Golden, but Golden did not disclose the existence of the true agreement until his recent conversation with current counsel. *See* Ex. A, Second Successive Application; Ex. C, Rollins Affidavit; Ex. L, Paavola Affidavit. As for the claim regarding the stun device, trial counsel believed the stun device was invisible, Ex. C, Rollins Affidavit, and PCR counsel was unable to discover that jurors saw it despite the exercise of due diligence in interviewing jurors from the 1999 trial, Ex. L, Paavola Affidavit. It was not until this month that a 1999 juror disclosed to current counsel that she saw the stun device and knew what it was. Ex. K, Juror Affidavit. The claims in Owens's Application are therefore timely.

Owens's Application also meets an exception to the ordinary prohibition on bringing a successive PCR application. Normally, all grounds for relief must be raised in a single PCR proceeding. *See* S.C. Code Ann. § 17-27-90. But the PCR statute allows a successive PCR

application raising "a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application." S.C. Code Ann. § 17-27-90. If an applicant could not, despite the exercise of due diligence, discover the material facts underlying a claim in time to raise the claim in the original PCR proceedings, that is a "sufficient reason" to raise the claim in a successive application. *See McCoy*, 401 S.C. at 370, 737 S.E.2d 627. For all the reasons described above, Owens meets that standard. *See* Ex. A, Second Successive Application; Ex. L, Paavola Affidavit.

This Court's decision in *McCoy v. State* demonstrates that Owens is entitled to a hearing on his PCR application. 401 S.C. 363, 737 S.E.2d 623. In that case, the applicant brought a successive PCR application alleging juror misconduct that he did not discover until after his original PCR application was dismissed. *Id.* at 366, 737 S.E.2d 625. The PCR court summarily dismissed the application, finding it untimely and improperly successive. *Id.* at 368, 737 S.E.2d 626. This Court reversed. It made clear that, "[w]here an applicant alleges facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR applications and 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.22 626. At the very least, a genuine issue of material fact exists as to whether Owens's claims are timely under Section 17-27-45(C) and properly raised in a successive application under Section 17-27-90, and Owens is therefore entitled to an evidentiary hearing about whether he is allowed to proceed.

Because these claims satisfy the procedural requirements for a successive PCR application, and—for all the reasons discussed in Sections 1 and 2—allege facts that, if proven, entitle Owens to post-conviction relief, his Application will survive summary disposition. There

are therefore "exceptional circumstances warranting the issuance of the stay," and this Court should stay Owens's execution to allow the Application to be adjudicated in the normal course. *In re Stays of Execution in Capital Cases*, 321 S.C. at 548, 471 S.E.2d at 142.

Conclusion

Owens asks the Court to vacate the August 23 execution notice and direct the Clerk of Court not to issue another execution notice while Owens's Application for Post-Conviction Relief remains pending.

Respectfully submitted on this, the 30th of August, 2024,

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