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December 2, 2013

Daniel E. Shearouse, Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211
Fax: (803) 734-1499

RECEIVED

DEC - 4 2013

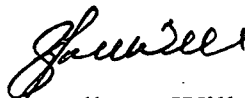
S.C. Supreme Court

Re: George Jackson, 302760 v. State of South Carolina
C.A. No.: 2012-CP-23-4393

Dear Mr. Shearouse,

I am enclosing herewith Appellant's Rule 243(c) statement. It is my understanding that the Court will rule on the appealability of the case under Rule 243 prior to briefing and that the briefing deadline will be in abeyance pending a ruling on the appealability. I am submitting a copy of the Rule 243 statement, the Appellant's affidavit of indigent status and this letter to OID/AD. I will take no further action unless otherwise instructed by this Court of OID/AD.

Sincerely,



J. Falkner Wilkes

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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
COMMON PLEAS COURT
D. Garrison Hill, Circuit Court Judge

Case No. 2012-CP-23-4393

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S.C. Supreme Court

George Jackson, 302760, Appellant,

v.

State of South Carolina, Respondent.

CERTIFICATE

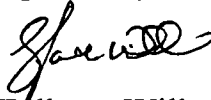
I certify that on December 2, 2013, I served the Appellant's Rule 243(c) explanation of grounds for appeal on the Respondent and others by placing a copy of same in the United States Mail, first class postage prepaid, addressed to counsel of record and others as indicated below, and by facsimile:

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Respectfully submitted,



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Counsel for George Jackson, Applicant

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM GREENVILLE COUNTY
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D. Garrison Hill, Circuit Court Judge

S.C. Supreme Court

Case No. 2012-CP-23-4393

George Jackson, 302760, Appellant,
v.
State of South Carolina, Respondent.

RULE 243 STATEMENT

Pursuant to Rule 243(c) George Jackson submits, as more fully set forth below, that there is an arguable basis for asserting that the determination by the lower court was improper.

ARGUMENT

The Order of Dismissal is based on a finding that the Application in this case is time barred and his action successive. The trial court granted summary judgement as to the statute of limitations. The trial court further dismissed the action as successive on the merits.

I. ERROR IN GRANTING SUMMARY JUDGMENT WHERE THERE ARE MATERIAL FACTS IN QUESTION.

The trial court erred in granting summary judgment as to the statute of limitations where the Appellant submitted evidence at trial that satisfied the elements of S.C. Code Section 17-27-10 (C), which provides that in certain circumstances a claim may be made within one year of the time of discovery by the Appellant:

(C) If the Appellant 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 Appellant* or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

S.C. Code Section 17-27-10 (C) *emphasis added*.

Appellant alleged the applicability of S.C. Code Section 17-27-10 (C) as an exception to the general rule. Evidence at the hearing established discovery of

information not disclosed by the Solicitor or the State prior to the Appellant's guilty plea. Evidence showed that prior to the Appellant's plea his defense counsel filed a detailed discovery request expressly requesting information on outstanding charges or convictions of the confidential informant. The evidence further showed that despite the confidential informant's having pending charges, the State failed to disclose that information to the Appellant prior to his plea. The evidence also showed that the information was not provided subsequent to the Appellant's plea, prior to his previous PCR or habeas corpus action. Because Brady¹ establishes a continuing duty, the State's failure to disclose the information expressly requested by the defense, the statute of limitations can not be applied against the Appellant so long as he filed the present action within one year of the discovery of the State's failure to disclose discoverable information. Summary judgment is only appropriate where there are no material facts in question. In light of the evidence offered at the PCR hearing in this case, summary judgment was inappropriate.

II. ERROR IN ALLOWING STATE TO BENEFIT FROM ITS DISCOVERY VIOLATION.

The Court's dismissal of the Appellant's case based on the successive

¹All references to *Brady* include *Giglio* and other relevant federal case law as cited in the motions for discovery filed by Appellant's defense counsel and which are of record in this case.

nature of the claim is also in error. The Court held that the Appellant failed to present any evidence why he could not have raised the State's failure to comply with Brady in his first PCR. This finding is clearly erroneous where the Appellant testified that he did not raise the claim in his first PCR because he was unaware of the State's Brady violation at that time. The evidence showed that the State never made any disclosure, either before or after the Appellant's plea. As a result, the Appellant can not be held to have waived the claim just because he did not discover it earlier. It is the State's affirmative duty to make discovery disclosures. Allowing the State to violate Brady by failing to disclose information in its control, and then raise a defense that the Appellant didn't discover the Brady violation in time to raise it in the first PCR, simply turns Brady on its head and eviscerates the protections Brady is meant to provide.

The trial court has allowed the effect of the State's Brady violation to be the essence of its own defense. The trial court's ruling therefore is akin to allowing one with unclean hands to benefit from its own acts. The trial court's ruling as to there being no evidence as to why the Appellant could not bring the claim in his first PCR is therefore unsupported by the record.

In its analysis the trial court has included a finding that the information discovered would not have changed the outcome of the case. In doing so the court

has misperceived the Appellant's claim. Here the Appellant has alleged that had the State properly complied with discovery and disclosed the pending charges and subsequent convictions of the confidential informant, it would have changed the Appellant's decision to waive his right to a jury trial. The trial court failed to adequately address this issue. Appellant timely filed a motion under Rule 59 to request a ruling. The issue has therefore been properly preserved for this Court's review.

III. ERROR IN APPLYING THE TEST OF MATERIALITY.

The trial court's ruling failed to properly apply the law as to the issue of materiality. The underlying question as to materiality turns not on the Court's weighing of the evidence, but rather on whether the Appellant would have elected to go to trial had the State made the required disclosure.

In this case the Appellant established a specific request for impeachment information on the confidential informant. This Court ruled that disclosure was required, but that the information would not be material to guilt or punishment. In this case the testimony of the informant was an essential part of the State's case. Evidence that the informant had multiple arrests for drug offenses during the pendency of the Appellant's case, is critical impeachment evidence. Had the State

properly disclosed this information to the Appellant, the Appellant would have proceeded to trial instead of pleading guilty.

In Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999), the Court held that "[a] *Brady* violation is material when there is a reasonable probability that, but for the government's failure to disclose *Brady* evidence, the defendant would have refused to plead guilty and gone to trial." Id. at 525, 514 S.E.2d at 325 (citations omitted). Hyman v. State, 397 S.C. 35 (2012). Here the record shows that the Appellant would not have waived his right to trial had the State complied with *Brady* and disclosed the impeachment evidence.

Because the Appellant has challenged the voluntary nature of his guilty plea in a PCR action by asserting an alleged *Brady* violation, the materialness test is met when the record shows the Appellant would have otherwise gone to trial.

IV. ERROR IN APPLYING BAR AS TO TIME AND SUCCESSIVE NATURE OF THE APPLICATION.

The Court's ruling on the statutory bar to the cause of action fails to take into consideration that the claim arises out of a discovery (*Brady, Giglio*) violation. The State's failure to properly disclose the evidence at issue was a constitutional violation of the Appellant's rights. The information was not

otherwise known to the defense and the defense made a specific request for the information which the State ignored. *Brady* imposes an ongoing duty to disclose.

The record showed that defense counsel did not know of the informant's arrests or pending charges, and would have no way of knowing unless it was properly disclosed. Furthermore, defense counsel testified that he relied on the lack of a response to his *Brady* request as an indication that no such impeachment evidence existed. The Court's ruling in this case sets a precedence that it is unreasonable for the defense to rely on the State's compliance with constitutional mandates. This Court has removed the obligation of the State under *Brady* and placed an unreasonable burden on defendants, requiring them to search out information which the State controls. Establishing the failure of the State to comply with *Brady* should toll the statute as to the bringing of an action for post conviction relief.

The record shows that the Appellant filed this action within a year of discovering the *Brady* violation. In such circumstances a claim may be made within one year of the time of discovery by the Appellant:

(C) If the Appellant 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 Appellant or after the date when the facts could have been

ascertained by the exercise of reasonable diligence.

S.C. Code Section 17-27-10 (C). As a result, the trial court's application of a bar to the Appellant's claims was in error.

CONCLUSION

Based on the foregoing, there is a basis sufficient under Rule 243 to allow the undersigned to appeal from the decision of the trial court and for this Court to allow Appellant to file a Petition for Writ of Certiorari.

Respectfully submitted,



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