

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County  
D. Garrison Hill, Circuit Court Judge  
\_\_\_\_\_

**RECEIVED**

JUN 17 2014

**S.C. SUPREME COURT**

GEORGE JACKSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002467  
\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

BENJAMIN JOHN TRIPP  
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INDEX

INDEX ..... 1

ISSUE PRESENTED ..... 2

STATEMENT ..... 3

ARGUMENT ..... 8

CONCLUSION ..... 11

## ISSUE PRESENTED

Whether the record supported the trial court's findings both that Petitioner's successive PCR claim was impermissibly delayed and that the after-discovered impeachment evidence of criminal charges against the State's key witness was immaterial where Petitioner presented uncontroverted evidence that his plea counsel specifically requested notice of any charges against the informant, where the State had the information in its possession but did not disclose it, and where Petitioner did not discover the charges until years after his plea?

## STATEMENT

The State alleged that on December 18, 2002, Petitioner George Dean Jackson, Jr. delivered over 28 grams of cocaine to a confidential informant with the Greenville County Sheriff's Office and that on March 27, 2003, near the same location, he distributed over 100 grams of cocaine to the informant. Officers had several telephone recordings of conversations between Petitioner and the informant as well as inculpatory statements from Petitioner. App. 16, line 17—App. 17, line 22.

On October 21, 2003, the Greenville County Grand Jury indicted Petitioner on one count of trafficking cocaine more than 100 grams and one count of trafficking cocaine more than 28 grams. App. 149-154. According to Petitioner's counsel, the solicitor "would not go any better than fifteen years" in negotiating a plea bargain. App. 18, lines 1-3. Therefore, on June 15, 2004, Petitioner appeared at a plea hearing before The Honorable W. Edward Miller. James H. Price represented Petitioner and Rachel List represented the State. App. 1. Based on a plea deal, Petitioner pled to two charges of trafficking cocaine more than 28 grams with recommended concurrent sentences of fifteen years of incarceration. App. 7, line 21—App. 11, line 17.

However, at the time of the plea, neither Petitioner nor counsel knew that on June 1, 2003, the confidential informant was arrested in an incident for which he was later charged with assault and battery with intent to kill. Additionally, on October 14, 2003, the informant was found in possession of a pistol with an obliterated serial number, for which he was also indicted. Further, during his arrest for the latter offense, police found evidence with which to indict him for trafficking cocaine. The informant eventually pled guilty to all three charges. App. 122-130.

On November 7, 2005, Petitioner filed his first application for post-conviction relief, alleging, inter alia, ineffective assistance of counsel and failure to obtain *Brady*<sup>1</sup> discovery material. Petitioner appeared at an evidentiary hearing on April 18, 2006 before The Honorable James E. Lockemy. The PCR court dismissed Petitioner's claim by order dated May 19, 2006. The South Carolina Supreme Court denied Petitioner's petition for writ of certiorari by order dated March 6, 2008. App. 28-29;

On July 6, 2012, Petitioner filed another application for post-conviction relief alleging that within the previous year, Petitioner discovered the charges against the informant. He further alleged that the State never disclosed the charges although he made a request therefor. App. 20—27; App. 39.

On February 13, 2013, the State filed a return and motion to dismiss arguing the application was filed outside of the time limits set forth in the Uniform Post-Conviction Procedure Act<sup>2</sup> and was impermissibly successive to a previous application. App. 28-34. On February 25, 2013, the PCR court issued a conditional order of dismissal, explaining that it would dismiss the application unless Petitioner provided specific factual and legal reasons why it should not. App. 39-44.

On March 7, 2013, Petitioner filed a reply to the State's motion arguing that he was entitled to prove at an evidentiary hearing that he filed the application within one year of discovering the alleged failure by the State to provide the *Brady* materials. App. 35-37. On March 15, 2013, submitted a motion and reply to the conditional order of dismissal. App. 49-51.

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<sup>1</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>2</sup> S.C. Code Ann. § 17-27-10 et seq.

On June 8, 2003, Petitioner attended an evidentiary hearing before The Honorable D. Garrison Hill. J. Falkner Wilkes represented Petitioner and Karen C. Ratigan represented the State. App. 52. Petitioner testified that he filed the PCR application within one year of discovering the undisclosed charges, which occurred upon consulting with Counsel Wilkes. App. 60, lines 1-7.

Petitioner also called plea counsel and introduced into evidence four documents separately requesting *Brady* discovery, a cover letter, and a certificate of service, all dated March 5, 2004. Petitioner then introduced a cover letter from the State responding to the requests, including a list enumerating each document produced, and a certificate of service, both of which were dated March 15, 2004. App. 63, line 25—App. 65, line 14; App. 81, 14-17; App. 100-115; App. 116-118.

The fourth discovery request, entitled “Motion for Disclosure of Impeaching Information and Memorandum of Law,” listed the following:

2. Any and all records and information revealing **prior misconduct or bad acts attributed to the witness.**
3. Any and all consideration or **promises of consideration given to or on behalf of the witness** or expected or hoped for by the witness. . . .
4. Any and all threats, express or implied, made against the witness, criminal prosecutions, investigations, or **potential prosecutions pending or which could be brought against the witness**, any probationary, parole or deferred prosecution status of the witness . . .
- . . .
8. Any and all records and/or **information which arguably could be helpful or useful to the defense in impeaching** or otherwise detracting from the probative force of the government’s evidence or which arguably could lead to such records or information.

9. The same records and information requested in items 1 through 8 above with respect to each non-witness whose statements are offered into evidence.

App. 108-109 (emphases added). The request then featured a lengthy legal discussion explaining Petitioner's right to receive the requested information from the state. App. 109-114.

After examining the materials, plea counsel stated, "From looking at [Petitioner's] file . . . and looking at the State's file and talking with Ms. Ratigan, . . . I do not recall any information about the informant being arrested . . . ." App. 65, lines 21-25. He then testified with conviction that having the information would have helped him in negotiating a better plea deal:

Q: Mr. Price, . . . tell me if those charges are the type of charges that would have been beneficial in your defense of the case had you known about them?

A: You know, they, certainly, would have been beneficial as far as my negotiations with the prosecutor. I can't really say how beneficial as far as trial is concerned.

App. 66, line 24—App. 67, line 4.

Q: Given that . . . Mr. Jackson had a confession, given that there were audiotapes of the buy, given that he had some priors, in your opinion, would knowing the prior offenses of the CI have changed the outcome of the case . . . ?

A: It could very possibly have gotten Mr. Jackson a better deal as far as a plea offer. As far as trial is concerned, . . . that is speculative. . . . I would have still had a tough road [sic] to hoe in light of the confession that he gave. But absolutely it would have helped me as far as negotiating with the Solicitor as far as a potential plea is concerned.

App. 70, line 21—App. 71, line 8.

Although Rachel List no longer worked at the Solicitor's office at the time of the PCR hearing, a current Solicitor, Kathryn McCall, appeared with the office's file from Petitioner's criminal case. When asked whether she could show anything in the discovery responses that

indicated the informant's charges, she responded, "No. This is just our standard response with the Code Five and all those things that go with that." App. 80, lines 9-25; App. 82, lines 12-15. She also stated that based on her office's policy, plea counsel would not have been told about any charges against the informant. App. 83, 4-8.

At the conclusion of the presentation of evidence, counsel for Petitioner argued to the PCR judge that the case was unique because plea counsel did not only make a general request for materials under *Brady* or Rule 5, SCRCrimP,<sup>3</sup> but he made a specific request for information relating to any charges against the informant. Because the State made a responded with a packet of numerous documents relevant to the case but not including the impeaching evidence, plea counsel reasonably believed and relied on the representation that the informant had no charges. App. 84, line 9—App. 85, line 3.

On August 14, 2013, the PCR judge issued a final order of dismissal concluding that Petitioner's claim should be dismissed for three reasons. First, the application was outside of the time limits of section 17-27-45(a) of the Uniform Post-Conviction Procedure Act. Second, the claim was impermissibly successive to a previous application under *Land v. State*, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980) and code section 17-27-90. App. 132-141. Third, considering that the informant's charges arose after the alleged drug sales along with the facts that Petitioner made a confession and that audio recordings of the sales existed, the prosecution of the informant was not material under *Brady* because no reasonable probability existed that Petitioner's case would have been different had the prosecution been disclosed. App. 134-139.

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<sup>3</sup> Rule 5, SCRCrimP addresses "Disclosure in Criminal Cases."

## ARGUMENT

**The evidence does not support the PCR court's dismissal of Petitioner's successive claim based on the State's *Brady* violation in concealing impeachment evidence because the testimony of Petitioner's plea counsel showed the concealment resulted in a bargain Petitioner would not have taken had he known of the evidence, and the concealment prevented Petitioner from making the claim any earlier than he did.**

The evidence does not support the PCR court's dismissal of Petitioner's successive claim based on the State's *Brady* violation in concealing impeachment evidence because the testimony of Petitioner's plea counsel showed the concealment resulted in a bargain Petitioner would not have taken had he known of the evidence, and the concealment prevented Petitioner from making the claim any earlier than he did. The Uniform Post-Conviction Procedure Act provides that any person who has been convicted of a crime in violation of the Federal Constitution, South Carolina Constitution, or laws of South Carolina may seek relief through a PCR proceeding. S.C. Code Ann. § 17-27-20. A defendant may challenge his guilty plea in a PCR action based on a *Brady* violation. *See generally Gibson v. State*, 334 S.C. 515, 514 S.E.2d 320 (1999). A person must file the application for relief within one year of the conviction or final decision on appeal. S.C. Code Ann. § 17-27-45(a). However, a person asserting that newly discovered evidence requires vacation of his conviction may file an application "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." S.C. Code Ann. § 17-27-45(b). A person is not entitled to post-conviction relief if the ground asserted was not properly raised or was knowingly and voluntarily waived in the original proceeding or in a prior PCR proceeding. S.C. Code Ann. § 17-27-90. Thus, a successive PCR applicant bears "the burden of proving that a new ground for relief could not have been raised in the previous application." *Land v. State*, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980).

Under *Brady*, the State has a duty to disclose evidence that is favorable to the defendant. *State v. Frazier*, 394 S.C. 213, 223, 715 S.E.2d 650, 655 (Ct. App. 2011) (citing *Brady v. Maryland*, 373 U.S. 83 (1963)). “The burden is on the solicitor to disclose material evidence which is exculpatory or impeaching.” *Riddle v. Ozmint*, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006). “The suppression by the [State] of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment.” *Brady*, 373 U.S. at 87. “A defendant asserting a *Brady* violation must demonstrate that the evidence (1) is favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused’s guilt or innocence or was impeaching. *Riddle* at 39, 631 S.E.2d at 73.

In this case, the uncontroverted evidence presented at trial established that the delay in filing the present PCR claim was excusable under the Uniform PCR Act. When Petitioner pled guilty on October 21, 2003, he was unaware of the informant’s charges. He testified that he filed the present PCR application within one year of discovering the undisclosed charges upon talking with counselor Wilkes. The State did not challenge this claim by competing evidence or cross-examination.

Petitioner also could not have previously discovered the charges by the exercise of reasonable diligence. Petitioner’s former plea counsel exercised due diligence by specifically requesting notice of the charges under standard *Brady* procedures. The solicitor gave no notice of the charges even though she had the duty and resources to do so. She thereby made a representation to plea counsel that no charges existed. Thus, Petitioner was not obligated by reasonable diligence to continuously search for undisclosed evidence after his plea—particularly considering he has since been in prison—but he was entitled to reasonably rely on the

representation. The solicitor's de facto suppression of the information was an inherent violation of Petitioner's due process, and to hold that he should have remedied the violation solely by his own efforts would negate the due process right ab initio.

Similarly, the uncontroverted evidence established that Petitioner's successive PCR application was excusable. As stated above, because Petitioner exercised reasonable diligence in discovering the informant's charges, he could not reasonably have been required to assert the undisclosed charges as a ground for relief at the filing of his first PCR application. Additionally, Petitioner's lack of actual and constructive knowledge of the charges means he could not have knowingly and voluntarily waived the grounds in the first PCR proceeding.

Finally, the record does not support the PCR judge's finding that the knowledge of the informant's charges was immaterial for purposes of a *Brady* violation. According to Petitioner's counsel firmly refused to recommend sentence less than fifteen years in exchange for a plea. Plea counsel expressly testified that knowing of the informant's charges "certainly would have been beneficial as far as . . . negotiations" and "absolutely . . . would have me as far as negotiating with the Solicitor as far as a potential plea is concerned." Further, plea counsel specifically testified that the knowledge would have been helpful even in light of Petitioner's statements to police and the audiotapes of the sales. His testimony was particularly credible because plea counsel was at the same time brutally honest about the lack of help that the charges could have posed at a trial. Moreover, the State again neither presented evidence to contradict this testimony nor undermined its credibility on cross-examination.

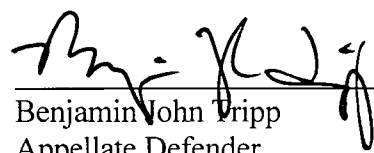
The order of dismissal stated that the impeaching value of the charges was low because the underlying bad acts and their subsequent prosecution appeared after Petitioner's offenses. This conclusion is unfounded because plea counsel understood all along when the informant's

charges arose, yet he still averred the information would have helped negotiations. Further, the value of the charges was not strictly evidentiary. The informant was charged with and pled to serious and violent charges of assault and battery with intent to kill, possession of a pistol with an obliterated serial number, and trafficking cocaine. Plea counsel would have exposed and dissected the charges at trial. This prospect would have affected the solicitor's decision to publicly prosecute justice on behalf of the State by way of seedy and incongruous resources and infirm decision-making. Thus, all circumstances considered, plea counsel's credible testimony and the other evidence presented can support no other finding than that plea counsel's learning of the charges would have resulted in Petitioner's rejection of the fifteen year recommendation and election to go to trial unless the solicitor lowered the recommended sentence from fifteen years.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner George Jackson's petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,

  
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Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of June, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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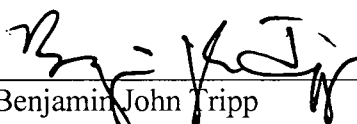
RESPONDENT

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CERTIFICATE OF SERVICE

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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 13th day of June, 2014.

  
\_\_\_\_\_  
Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 13th day  
of June, 2014.

  
\_\_\_\_\_  
(L.S.)

Notary Public for South Carolina  
My Commission Expires: July 24, 2022.