

STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

**RECEIVED**

MAR 30 2015

Frank W. Addy, Jr., Circuit Court Judge

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**S.C. Supreme Court**

Appellate Case No. 2014-001261  
Lower Court Case No. 2006-CP-32-3862

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TERRANCE V. SMITH, #292962,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI**

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Attorney and Counselor at Law

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**ATTORNEY FOR PETITIONER.**

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## ARGUMENT IN REPLY

**I. The PCR court erred in concluding that defense counsel was not ineffective for failing to question a cooperating co-defendant regarding the potential minimum and maximum sentences that she faced for her charges.**

The Respondent begins its Return by arguing that “Smith primarily relies on the authority of State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012), which was decided long after the 2003 trial.” Return at 12 (footnote omitted). The Respondent appears to contend that defense counsel could not be ineffective for failing to anticipate this Court’s decision in Gracely. See Return at 12 (footnote 5). The Respondent’s argument misses the mark, however, since the Petitioner relied primarily on State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991), and State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002), in arguing that defense counsel was ineffective. See Certiorari Petition at 11 (“Pursuant to Brown and Mizzell, defense counsel had the authority to question Williams regarding the maximum and minimum penalties that she faced on all of her charges.”) The law was well-established at the time of the Petitioner’s trial that the Constitution permitted the Petitioner to cross-examine Williams regarding the minimum and maximum sentences she faced for all of her charges, including the murder charge that was to be dismissed. Consequently, defense counsel’s performance must be measured against this legal backdrop.

The Respondent’s primary focus with regard to this claim is the lack of prejudice to the Petitioner from defense counsel’s failure to cross-examine Williams regarding her potential sentences. Specifically, the Respondent contends that “her credibility ... was thoroughly put at issue” and that the “jury still knew she faced life and extra for the charges she pled to and the prosecution was not pursuing murder or additional attempted armed robbery charges in exchange for her testimony.” Return at 14. Williams’ testimony regarding the maximum penalties, however, was insufficient to convey the minimum penalties that she was avoiding by testifying against the

Petitioner. See Brown, *supra*, 303 S.C. at 171, 399 S.E.2d at 594 (“The fact Bethel was permitted to avoid a mandatory prison term of more than three times the duration she would face on her plea to conspiracy is critical evidence of potential bias that appellant should have been permitted to present to the jury.”) This is particularly true since Williams was able to avoid a thirty-year mandatory minimum sentence and actually received a time served sentence in exchange for her testimony. The jury needed to know that information to fully evaluate her credibility. The PCR court erred in concluding that defense counsel was not ineffective in failing to fully cross-examine Williams about the minimum and maximum penalties for her charges.

With regard to any other arguments advanced by the Respondent as to why this certiorari petition should be denied on these issues, the Petitioner would rely upon his arguments advanced in his certiorari petition.

**II. The PCR court erred in concluding that the prosecution did not commit a Brady violation for failing to disclose the true nature of the cooperating co-defendant's plea agreement with the State.**

In its Return, the Respondent apparently argues that claims brought pursuant to Brady v. Maryland, 373 U.S. 83 (1963), are not cognizable in PCR. See Return at 16-17 (“Further, the issue raised is not cognizable in PCR as it is a direct appeal issue. ... Note Smith does not attempt to raise the issue as after-discovered evidence.”) This argument is flatly incorrect as a matter of law. Free-standing Brady claims may be brought in PCR. See Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006) (“If a Brady violation is found to have occurred, PCR must be granted”); see also Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999) (permitting Brady claims in PCRs challenging guilty pleas). The fact that this claim is raised pursuant to Brady poses no bar to its review by this Court.

The Respondent also argues that this claim is not preserved for appeal because it was not raised to and ruled upon by the PCR court. See Return at 15-16. The allegation was certainly raised to the PCR court by the Petitioner below, as counsel for the Petitioner argued extensively that the failure to disclose the true plea deal constituted a Giglio<sup>1</sup> violation. See App. p. 1306, line 17-p. 1308, line 23; p. 1310, lines 5-22. The Petitioner contends that the PCR court's ruling that “Applicant has failed to show any basis to believe that there were negotiations between Williams and the prosecution other than what was presented at trial” constitutes a ruling on the Brady claim. App. p. 1398. At the outset of the order, the PCR court states that it “has had an opportunity to reflect fully upon the arguments made in the hearing,” so it should have understood the Brady argument that was made by PCR counsel. Accordingly, the Petitioner contends that this issue is preserved for appellate review.

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<sup>1</sup> Giglio v. United States, 405 U.S. 150 (1972).

On a related note, the Respondent contends that “Smith further misrepresents the content of the Rule 59(e) motion to suggest the issue was raised in that motion.” Return at 16. To the extent that the Petitioner was unclear on this issue in his certiorari petition, the Petitioner now agrees with the Respondent that the Brady claim was not raised in the Rule 59(e) motion by counsel below.

With regard to the merits of the claim, the Respondent makes several arguments in an attempt to minimize the issue of the timing of the dismissal of the murder indictment. The Respondent also argues that “Smith erroneously claims the State would prosecute Williams ‘if she didn’t testify to what the prosecutor wanted her to testify to’” and criticizes the Petitioner for his “tone and connotations” pertaining to this argument. Return at 19 (quoting Certiorari Petition at 14). In response, the Petitioner would simply present the testimony of the prosecutor on this issue:

Q: Well, okay, which begs another question. If Wakeisha [sic] Williams had gotten up in that trial and testified materially differently from what you expected her to say, would you have not pressed that murder indictment on Monday?

A: No.

App. p. 1279, lines 20-25. The Petitioner does not know how to characterize this testimony as anything other than the prosecutor’s assertion that he would prosecute Williams for murder if she didn’t testify to what he wanted her to testify to. The Petitioner is certain that the prosecutor believed her trial testimony to be the truth, and that he would have believed that he was rightfully prosecuting her for murder if she refused to tell the truth. However, the fact of the matter is that she would have been prosecuted for murder if she did not testify in a manner consistent with what the prosecutor believed she should have testified to. This information was not conveyed to the jury, and it was critically necessary for the jury to know the exact plea agreement Williams had with the State in order to properly assess her credibility. See Boone v. Paderick, 541 F.2d 447,

451 (4th Cir. 1976) (“[A] promise to recommend leniency (without assurance of it) may be interpreted by the promisee as contingent upon the quality of the evidence produced; the more uncertain the agreement, the greater the incentive to make the testimony pleasing to the promisor.”) Accordingly, the Petitioner respectfully submits that the PCR court erred in denying relief on this claim.

With regard to any other arguments advanced by the Respondent as to why this certiorari petition should be denied on these issues, the Petitioner would rely upon his arguments advanced in his certiorari petition.

**III. The PCR court erred in concluding that defense counsel was not ineffective for failing to request that the jury be charged on self-defense.**

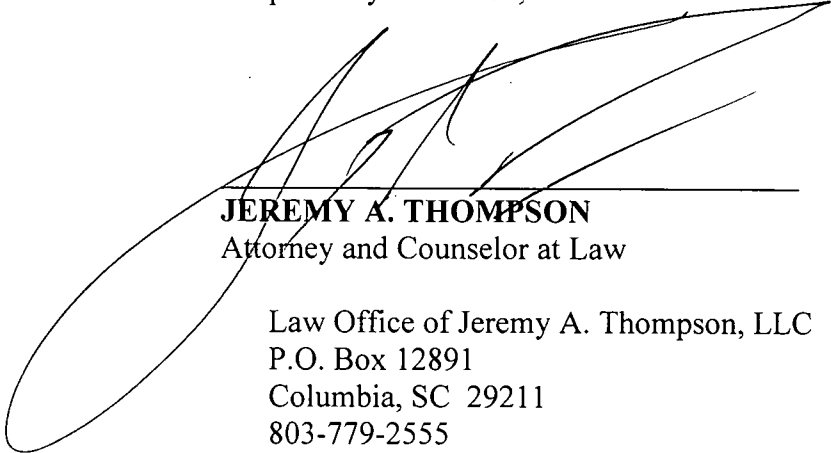
The Respondent contends that the Petitioner was not prejudiced by the trial court's failure to charge the jury on self-defense because the jury was charged on the law of mere presence. See Return at 22-24. Specifically, the Respondent argues that "Smith's mere presence [defense] is broader than Collins' self-defense case based on Collins' testimony alone." Return at 22. The Petitioner submits that this argument is legally incorrect. It is not simply a matter of the jury believing or disbelieving Collins, and the defenses of self-defense and mere presence overlapping, as the Respondent asserts. Self-defense, when raised, must be disproven beyond a reasonable doubt by the State. See generally State v. Bixby, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010). Without the self-defense charge, the jury could not convict the Petitioner without finding that the State had proven: (1) the elements of each offense; and (2) that the Petitioner was acting in concert with Collins. With the self-defense charge, the jury could not convict the Petitioner without finding that the State had: (1) disproven one of the elements of self-defense; (2) proven the elements of each offense; and (3) proven that the Petitioner was acting in concert with Collins. Consequently, the presence of self-defense would have raised an extra threshold for the State to cross before the jury could convict either Collins or the Petitioner. The absence of this extra threshold was prejudicial to the Petitioner, and defense counsel's failure to request that the jury be charged on self-defense constituted ineffective assistance of counsel.

With regard to any other arguments advanced by the Respondent as to why this certiorari petition should be denied on this issue, the Petitioner would rely upon his arguments advanced in his certiorari petition.

CONCLUSION

For the reasons stated, the Petitioner asks this Court to grant the petition and to allow full briefing on these issues.

Respectfully submitted,



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**ATTORNEY FOR PETITIONER.**

This 26<sup>th</sup> day of March, 2015.

**RECEIVED**

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STATE OF SOUTH CAROLINA  
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TERRANCE V. SMITH, #292962,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,


RESPONDENT.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that one copy of the Reply to Return to Petition for Writ of Certiorari in the above-entitled case has been served upon opposing counsel, David A. Spencer, Assistant Deputy Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, by depositing in the U.S. mail with proper postage, this 26<sup>th</sup> day of March, 2015.

  
**JEREMY A. THOMPSON**  
ATTORNEY FOR THE PETITIONER

SWORN TO BEFORE me this 26<sup>th</sup> day  
of March, 2015.

  
(L.S.)  
Notary Public for South Carolina  
My Commission Expires: 7/10/2022



LAW OFFICE OF  
**JEREMY A. THOMPSON**  
LLC

March 26, 2015

**RECEIVED**

MAR 30 2015

**S.C. Supreme Court**

The Honorable Daniel E. Shearouse  
Clerk, Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211-1330

RE: Terrance V. Smith, #292962 v. State of South Carolina; 2006-CP-32-3862  
Appellate Case Number: 2014-001261

Dear Mr. Shearouse:

Enclosed please find the original and seven copies of the Reply to Return to Petition for Writ of Certiorari. I would appreciate your filing the original and six copies of the reply, clocking the extra copy, and returning the clocked copy to me in the enclosed self-addressed, stamped envelope. With my thanks for the Court's assistance in this matter, and my best regards, I am,

Yours sincerely,

Jeremy A. Thompson  
Attorney and Counselor at Law

JAT/  
Enclosures

cc: David A. Spencer, Assistant Deputy Attorney General (w/ enclosure)  
Terrance V. Smith, #292962 (w/ enclosure)  
Rashell Archie (w/ enclosure)