STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County

Honorable D. Craig Brown, Circuit Court Judge
Honorable Kristi L. Harrington, Circuit Court Judge

ROSHOD M. BAKER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000657

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

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II. Whether the PCR court erred in denying PCR counsel's motion to amend the PCR application to include an allegation of prosecutorial misconduct where it was not until trial counsel testified at the PCR hearing that PCR counsel learned that the solicitor never notified trial counsel of witness Smith's pending burglary charge, which could have been used to show bias and for impeachment?

III. Whether the PCR court erred in denying PCR counsel's request that the record be left open so that PCR counsel could submit certified records regarding Smith's burglary charge to the PCR court?

STATEMENT OF THE CASE

On May 28, 2002, the Horry County Grand Jury indicted Petitioner Roshod M. Baker[1] for murder, along with co-defendant's Dormaine Baker, Derrick L. Bowens, Ernest Q. Smith, and Telly Manning. App. 34. Roshod and Dormaine Baker were brothers and were cousins with the other three men. App. 81, ll. 2-17; App. 84, ll. 1-5.

On November 13 through 16, 2006, Baker and one of his co-defendants, Telly Manning, appeared for trial before the Honorable Steven H. John. Baker was represented by Johnny Gardner, Manning was represented by Randall Mullins, and the state was represented by assistant solicitor George Debusk, Jr. App. 1.

Troy Riggins was a drug dealer in the Longs area of Horry County, South Carolina. He was found in the front seat of his grey Lincoln at approximately 4:00 p.m. on December 21, 2000, suffering from multiple gunshot wounds. App. 67, l. 13 – 70, l. 18. Riggins died at the hospital. App. 186, ll. 19-21. The forensic pathologist, Dr. Erin Presnell, testified that Riggins suffered seven gunshot wounds, two of which were ultimately fatal. App. 212, l. 12 – 229, l. 11. The parties stipulated that 22.34 grams of cocaine and $1,626 in cash were found in Riggins' pockets. App. 195, l. 20 – 196, l. 4; App. 253, ll. 9-22. Firearms examiner Special Agent Vello Paavel, determined that the two shell casings found in the Lincoln were Winchester 9 millimeter lugers and were both fired by the same gun, though he could not tell from the casings what type of gun fired them. He also examined bullets and bullet fragments collected at Riggins' autopsy and determined that at least two guns were used, one of which was consistent with a .38 special or 357 magnum. App. 258, l. 21 – 259, l. 13; App. 263, l. 10 – 267, l. 21; App. 271, ll. 3-12; App. 274, ll. 10-18.

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1 Petitioner's first name is spelled "Roshod" and "Rashad" on various documents throughout the Appendix.

The only evidence that connected Baker and Manning to the crime was the testimony of Derrick Bowens and Ernest Smith, both of whom were reluctant to admit that they were receiving any benefit for their testimony, specifically dismissal of the murder charges against them. App. 90, ll. 21-23; App. 99, ll. 4-15; App. 110, l. 20 – 113, l. 8; App. 132, l. 7 – 134, l. 1; App. 150, l. 17 – 153, l. 16. Bowens testified that the five men traveled from North Carolina to South Carolina in a Nissan Maxima to do some Christmas shopping at the outlets in Myrtle Beach. App. 80, l. 19 – 84, l. 13. Smith was the last one picked up that afternoon, after which they went to a pool room. As they were leaving, Smith flagged down a grey Lincoln. Bowens testified that Baker and Manning got into the Lincoln to buy drugs. The other three rode in the Maxima and followed the Lincoln to a store parking lot. As Bowens and the other men listened to music in the Maxima, he heard one gun shot. Baker and Manning came back to the car and they drove back to North Carolina. App. 84, l. 14 – 89, l. 25; App. 94, l. 24 – 95, l. 1. Bowens never saw Baker or Manning with a gun that day and they did not discuss anything about what happened afterwards. App. 89, ll. 17-22; App. 90, ll. 15-20; App. 105, ll. 4-22.

Ernest Smith also testified that the original intention that day was to go to the outlets to shop. However, he said that he first wanted to go to Longs to find a man named "Big Mark" and buy a "Big Eight," approximately four ounces of cocaine. App. 119, l. 24 – 123, l. 9; App. 136, ll. 13-24. Smith later changed his testimony to indicate that it was Baker who wanted the "Big Eight." App. 136, l. 25 – 137, l. 2; App. 161, l. 16 – 162, l. 3. He claimed that it was Baker who was talking "to the people in the Lincoln" and that he saw both Baker and Manning put handguns into the front of their pants before they got into the Lincoln. App. 123, l. 10 – 128, l. 8; App. 134, ll. 2-10; App. 153, l. 17 – 156, l. 4; App. 161, ll. 6-15; App. 162, ll. 4-12. While Smith could not "recall" whether

he heard any gunshots, he claimed that when Baker returned to the Maxima, Baker said in angry voice: "Cuz, drive, just drive on the road." App. 129, l. 2 – 130, l. 16.

The solicitor asked Smith on direct examination whether he had ever been arrested or convicted of crimes. App. 131, ll. 15-16. Smith responded "not really" and explained that he was charged a couple of years earlier for having marijuana. App. 131, ll. 17-19. He said: "I got it, you know, throwed [sic] out of court, but **other than that I ain't [sic] been in no kind of trouble**." App. 131, ll. 19-21 (emphasis added). Smith then confirmed that he had actually been arrested with respect to Riggins' death and had an agreement with the solicitor that if he testified "on the truth" that he will not be charged with murder. App. 131, l. 22 – 133, l. 1. Smith admitted on cross-examination that he was currently charged with murder and eventually, though grudgingly, agreed that after his testimony he would no longer be charged with murder. App. 150, l. 17 - 153, l. 16.

The jury returned a verdict of guilty on the charge of murder as to both defendants. App. 377. Judge John sentenced them both to the mandatory minimum term of thirty years. App. 390.

On direct appeal, Baker was represented by appellate defender Katherine Hudgins. App. 392. Hudgins filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), in which she raised the issue of whether the trial judge erred by denying Baker's motion for directed verdict. App. 395. Upon consideration of the record and the brief prepared by counsel, the Court of Appeals dismissed the appeal pursuant to Anders on September 8, 2009. App. 402.

First PCR Application and Hearing (2010-CP-26-7814)

On August 24, 2010, Baker filed an application for post-conviction relief. App. 404. On October 25, 2010, the State filed its Return. App. 411. Baker filed an Amendment to his PCR application on December 29, 2011, through prior PCR counsel, Charles Brooks. App. 416.

On August 26, 2014, the parties appeared before the Honorable Kristi L. Harrington in Horry County. Baker was represented by Tristan Shaffer, and the State was represented by assistant attorney general Joshua Thomas. App. 417 – 420. Shaffer requested a continuance, explaining that he had not had sufficient time to prepare for the case, having been appointed to represent Baker on May 30, 2014, but moving offices such that he did not communicate with Baker until July 2014. App. 421, l. 1 – 422, l. 6. Shaffer explained that he had just recently become aware of a new claim involving the failure to cross-examine Ernest Smith regarding pending charges, which was the strongest allegation to pursue on PCR. App. 422, l. 7 – 425, l. 17; App. 426, ll. 12-20. The assistant attorney general said that he was prepared to go forward on the new allegations but would "leave it to the Court's discretion." App. 425, l. 18 – 427, l. 11. Judge Harrington initially denied the request for continuance but changed her mind after learning that Shaffer had only met Baker briefly that same day. App. 426, ll. 21-23.; App. 430, l. 1 – 433, l. 3. Judge Harrington continued the hearing until later that week. App. 433, l. 12 – 435, l. 7.

Baker's case was recalled on August 28, 2014, in Georgetown County. App. 436. Shaffer indicated that one of the allegations on which he intended to present evidence was "failure to cross-examine . . . on pending charges." App. 440, ll. 17-19. Baker and his trial attorney, Johnny Gardner, testified at the evidentiary hearing. Baker said that Smith's pending burglary charge never came up at trial. App. 451, ll. 6-25. Baker was not aware that Smith has been arrested for burglary a month before he testified at Baker's trial. App. 452, ll. 1-3; App. 455, l. 5 – 456, l. 5. Trial counsel Johnny Gardner testified that he was likewise unaware that Smith had been charged with burglary a month prior to the trial. He explained that when Shaffer asked him about it previously he was confused and thought he was referring to Telly Manning. App. 467, ll. 1-5; App. 467, ll. 8-22. Even so, Gardner testified that it "would [not] have made a difference in [his] mind." App. 467, ll.

5-7; App. 467, l. 24 – 468, l. 25. While Gardner did not specifically recall the solicitor asking Smith if he had ever been arrested, he agreed that such a question would have opened the door to questions regarding the burglary arrest and that he would have "most likely" used it for impeachment had he known about it. App. 469, l. 1 – 470, l. 9.

On cross-examination, Gardner testified that he did not recall ever seeing a warrant or indictment related to Smith's burglary charge. App. 475, ll. 11-20. He contended that he had asked Smith about the deal for the murder charge and said that absent the solicitor opening the door, it would have been improper to raise the pending charge. App. 475, l. 21 – 476, l. 1. However, on re-direct Gardner confirmed that if the solicitor opened the door, he would have brought up the burglary charge. App. 477, ll. 3-6.

Following Gardner's testimony, Shaffer requested leave to orally amend the application pursuant to Rule 15, SCRCP, to include a due process violation for prosecutorial misconduct and failure to disclose Brady material. He asked Judge Harrington to take judicial notice of the public index, which indicated that Smith was arrested for burglary a month prior to the trial. App. 478, ll. 3-18. Shaffer explained that when he spoke with Gardner on Tuesday of that week, Gardner indicated that he knew about the charge. It was not until Gardner testified at the PCR hearing that Gardner said he had misunderstood Shaffer's question and thought he was referring to Telly Manning's arrest before the trial. App. 478, l. 19 – 479, l. 5; App. 480, l. 24 – 481, l. 18. The assistant attorney general stated that he was unsure if there was actually a burglary charge against Smith, stating that neither he nor Gardner had seen a warrant or indictment for the charge. App. 480, ll. 7-14. He further argued:

> Secondly, you know, if you want to amend to include something along those lines, I think a little bit more notice is proper. I mean, this is clearly something that he's known about since Monday. If I had known that we were going to switch this failure to cross examine to a claim that the solicitor should have disclosed it, I could have found the solicitor, tracked him down, and brought him in. It's just a little late in the game for that, Your Honor.

App. 480, ll. 15-23.

Judge Harrington allowed Shaffer to recall Gardner. App. 480, l. 19-21. Gardner testified that in his mind there was only one "co-defendant" – Telly Manning, who he thought Shaffer was referring to when he asked him about a codefendant being charged with burglary. App. 482, l. 3 – 483, l. 2. Gardner said that he did not look at the public index printout that Shaffer showed him, saying that it is "not reliable" and "not accepted by any court in any land." App. 483, ll. 3-11. However, Gardner agreed that he told Shaffer that he was aware that the codefendant had been arrested and had been to trial a month before. App. 483, ll. 12-15.

Shaffer asked the PCR judge to allow him to get a certified conviction from the Clerk's Office in Horry County and submit it to the court the following day. App. 483, l. 23 – 484, l. 11. He explained:

> The other thing I would say in my defense is that based off our discussion whenever I showed him [Gardner] a piece of paper that said Ernest Smith and I said, do you know that the codefendant had been arrested a month beforehand -- and showed him the piece of paper that showed the date of the arrest – that when he said, yeah, I knew about that, that was a reasonable basis for me to assume that there was not a prosecutorial misconduct or a *Brady* issue involving this conviction, that it was merely a failure to cross examine involving that conviction. I discussed that, the record, on Monday, as well.

App. 484, l. 15 – 485, l. 1. Judge Harrington denied Shaffer's motion to amend the pleadings, ruling:

> I specifically asked, prior to beginning today's hearing that we passed in order for you to speak with your client, from Horry County to today, and scheduled it at your convenience.

> I am denying your motion. This is an old case. You should have had this prepared earlier in the week. Deny your motion to amend.
>
> I believe you have presented enough that -- and it is in accordance with the applicant's position.

App. 485, ll. 2-12.

Order of Dismissal (2010-CP-26-7814)

On November 19, 2014, Judge Harrington filed an Order of Dismissal denying Baker's PCR application. App. 488. The Court found that "trial counsel conducted a proper investigation, adequately conferred with Applicant, and was thoroughly competent in his representation." App. 493. With respect to the failure to cross-examine Smith regarding his pending burglary arrest, the Court ruled:

> The Court finds Applicant failed to meet his burden of proof to demonstrate trial counsel ineffective for failing to cross-examine Smith on any pending charges. Applicant asserted that the trial was delayed because. Smith was incarcerated. However, testimony showed that the delay was actually due to Manning's incarceration. Trial counsel testified he was not aware of any burglary charges against Smith at the time of trial. Furthermore, Applicant admitted to being in Smith's presence the weekend before trial began. Applicant had ample opportunity to provide trial counsel information about Smith's alleged pending charges before trial.
>
> The Court finds Applicant failed to show he was prejudiced by trial counsel not further cross-examining Smith. Applicant presented no probative evidence, other than his own testimony, to prove Smith had a pending burglary charge at the time of trial. *Jackson v. State,* 329 S.C. 345, 349, 495 S.E.2d 768, 770 (1998). The record indicates trial counsel and Manning's attorney thoroughly impeached Smith regarding his involvement in the murder as well as his plea bargain with the State. In light of this thorough cross-examination, further questioning about a burglary charge would have been merely cumulative to trial counsel's impeachment during cross-examination. *Id.* at 351, 495 S.E.2d at 771 (no prejudice where testimony could not have provided additional information to jury).

App. 493 – 494.

Second PCR Application and Hearing (2015-CP-26-0475)

On January 21, 2015, Baker filed a second PCR application requesting a belated appeal of his PCR claims. App. 498. On May 29, 2015, the State filed its Return. App. 513.

On February 11, 2016, a hearing was held before the Honorable D. Craig Brown. Baker was represented by James Falk, and the state was represented by assistant attorney general Jessica Kinard. App. 518. Based on PCR counsel Shaffer's stipulation that he was ineffective in failing to file an appeal from the first PCR court's order, the state consented to an Austin[2] appeal. App. 519 – 520.

Order Granting Belated PCR Appeal Pursuant to Austin (2015-CP-26-0475)

On March 14, 2016, Judge Brown issued an Order granting Baker an appeal pursuant to Austin. App. 573 – 577. Baker filed a timely Notice of Appeal.

This petition for writ of certiorari follows. Additionally, Baker is simultaneously filing his petition for writ of certiorari pursuant to Austin.

[2] Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

ARGUMENT

I. The PCR court erred in finding that trial counsel rendered effective assistance of counsel where trial counsel failed to investigate and cross-examine witness Smith regarding his pending burglary charge, which could have been used for impeachment and to show bias.

Introduction

Roshod Baker waited four years to finally have his PCR allegations heard at an evidentiary hearing. The strongest allegation raised at his PCR hearing was that trial counsel failed to cross-examine the State's witness, Ernest Smith, regarding a pending burglary charge that he was arrested for just one month prior to the trial. The PCR hearing was delayed an additional two days so that PCR counsel Tristan Shaffer could prepare for this newly discovered allegation. App. 421, l. 1 – 434, l. 24. However, when trial counsel Gardner testified at the PCR hearing, he said that he misunderstood Shaffer's inquiry earlier in the week to relate to a pre-trial arrest involving Telly Manning. Now understanding that it was Ernest Smith to whom Shaffer was referring, Gardner denied any knowledge of a burglary arrest. App. 467, l. 5 – 470, l. 9; App. 475, l. 11 – 477, l. 6. Shaffer moved to amend the PCR application to conform to the evidence pursuant to Rule 15(b), SCRCP. Shaffer admitted that he had intended to rely on Gardner's admission that the pending charge was known to him, so he also requested one day to submit certified records from the Clerk's Office to the PCR court. App. 478, l. 3 – 479, l. 5; App. 480, l. 24 – 481, l. 18; App. 483, l. 23 – 485, l. 1.

As an initial matter, the PCR court erred in ruling that Baker failed to prove deficiency and prejudice with respect to the failure to investigate and cross-examine Smith on the pending charge. There was no evidence that Baker knew of the pending Horry County charge against Smith and the responsibility to discover such information rested upon trial counsel. See App.

493 – 494. Additionally, to the extent that the failure to cross-examine was the result of prosecutorial misconduct, the PCR court erred in denying Shaffer's request to amend the application where a brief continuance could have been had to allow the state to defend against the allegation. The PCR court also erred in failing to either take judicial notice of the public index record regarding Smith's burglary charge or allowing Shaffer to provide certified records regarding the charge to the court. See App. 485, ll. 2-12; App. 490.

Right to Effective Assistance of Counsel

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. CONST. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668).

First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). "Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The United States Supreme Court specifically ruled that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id. Moreover, the Court ruled that: "The ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." Id. at 696 (emphasis added).

Discussion

The PCR court found that trial counsel was not ineffective in failing to investigate Baker's case or in failing to cross-examine Smith regarding the pending burglary charge. App. 493 – 494. That ruling was based, at least in part, on inaccurate factual findings. Baker never testified that the trial was delayed because of Smith's incarceration. App. 493. Rather, Baker said that Gardner had **not** ever told him about the trial being delayed because Ernest had been arrested for a burglary. App. 455, ll. 5-11. That question from Shaffer was obviously elicited based on his prior conversation with trial counsel, at which time Gardner had told Shaffer that the co-defendant, referring in his mind to Manning, had another charge that delayed the trial. App. 479, ll. 3-21. Further, though Smith had recently come home from prison for a burglary, Baker was not aware of the pending burglary charge in Horry County from a month prior to the trial. App. 452, ll. 1-3; App. 455, l. 12 – 456, l. 5. Thus, the PCR court's findings that "Applicant admitted to being in Smith's presence the weekend before trial began" and "had ample opportunity to provide trial counsel information about Smith's alleged pending charges before trial" ignore the fact that Baker was unaware of the nature or jurisdiction of Smith's burglary charge. App. 493.

Moreover, the PCR judge's findings ignore the real problem, which is that trial counsel had a responsibility to know about Smith's pending charges. Counsel has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. Strickland, 466 U.S. 668, 691, 104 S.Ct. 2052 (1984). Even if Gardner had a "personal animus towards the public index" he could have at the very least examined it as a starting point to obtaining more formal documentation about Smith's pending charges. See App. 483, ll. 3-11. It was not Baker's responsibility to investigate the criminal records of the witnesses.

With regard to prejudice, the PCR court relied upon Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998), in support of its ruling that there was no probative evidence that Smith actually had a pending burglary charge at the time of trial. Notably, trial counsel in Jackson admitted that his failure to investigate the criminal records of the victims was an error. 329 S.C. at 349, 495 S.E.2d at 770. Our Supreme Court agreed that **"a reasonable attorney would have concluded a background investigation of the victims and witnesses was necessary."** Id. (emphasis added). However, the Jackson court found that there was no probative evidence to support the finding of prejudice because "[t]he only 'evidence' that either the victims or eyewitnesses had criminal records were statements and questions by respondent's PCR counsel that one of the victims was incarcerated in another state at the time of respondent's trial and respondent's testimony that he knew this victim was in jail." Id. "Respondent failed to substantiate this allegation with any probative evidence." Id.

As will be discussed more fully *infra*, in Issue III, PCR counsel Shaffer was under the impression that trial counsel would confirm that pending burglary charge based on his conversation with him two days prior to the evidentiary hearing. When the trial attorney's

testimony differed, he asked the trial judge to either take judicial notice of the public index or allow him to supplement the record by providing certified documents to the Court the next day. While Judge Harrington denied the motion to amend the pleadings to include an allegation of prosecutorial misconduct, she stated: "I believe you have presented enough that -- and it is in accordance with the applicant's position." App. 485, ll. 11-13.

Rule 201(b), SCRE, provides": "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or **(2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.**" (emphasis added). "A court shall take judicial notice if requested by a party and supplied with the necessary information." Rule 201(d), SCRE. "Judicial notice may be taken at **any stage** of the proceeding." Rule 201(f), SCRE (emphasis added). Here, it was well within the power of the PCR court, *just as it is within the power of this Court*, to take judicial notice that the Horry County public index reflects that in case number I749627, Ernest Quandre Smith was arrested on October 13, 2006 and ultimately pled guilty to third degree burglary and was sentenced to five years suspended to three years probation. Further, to the extent that the PCR court was not satisfied with the public index record, Smith's prior charges were verifiable with the Clerk's Office. Shaffer's request to hold the record open to provide the certified documents within twenty-four hours was not unreasonable, especially when the Court set the date for proposed orders to be submitted for over two weeks after the hearing. See App. 485, l. 23 – 486, l. 13.

Lastly, the PCR court erred in finding that cross-examination regarding the burglary would have been "cumulative" to the impeachment of Smith regarding his plea bargain on the murder charge. App. 493 – 494. The Sixth Amendment rights to notice, confrontation, and

compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994) (quoting State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 402 (1986)). The Sixth Amendment is applicable to the states through the Fourteenth Amendment. See Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065 (1965).

A defendant has the right to cross-examine a witness concerning bias under the Confrontation Clause. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105 (1974); State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991). "'On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality' of the witness." State v. Brewington, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976) (quoting 98 C.J.S. *Witnesses* § 560a (1957)); see Rule 608(c), SCRE ("Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced."). A criminal defendant may show a violation of the Confrontation Clause "by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" Delaware v. Van Arsdall, 475 U.S. 673, 680, 106 S.Ct. 1431, 1436 (1986).

In State v. Mizzell, 349 S.C. 326, 331-32, 563 S.E.2d 315, 318 (2002), this Court held that the trial court erred in excluding evidence of the potential sentence that the testifying co-defendant, Steele, faced if convicted in the same incident. In determining that the error was not harmless, the Court noted that Steele was only the witness to testify as an eyewitness to Mizzell's burglary of the home and that there was no physical evidence placing Mizzell at the

scene. 349 S.C. at 333-34, 563 S.E.2d at 319. In State v. Sims, 348 S.C. 16, 23-26, 558 S.E.2d 518, 522-24 (2002), it was error to exclude reference to the specific crimes for which the witness had pending charges, though this Court found the error harmless because the State's case against appellant was strong without resorting to that witness' testimony. Specifically, Sim's fingerprints were on the headboard of the victim's bed and he made incriminating statements to his mother and police. 348 S.C. at 26, 558 S.E.2d at 524. Here, Smith's testimony was the only evidence that Baker and Manning were armed when they entered Riggin's Lincoln and there was no physical evidence to connect them to the scene. As such, his additional motive of securing a favorable recommendation in his pending burglary case was necessary information for the jury in determining Smith's credibility. Trial counsel's used of Smith's pending murder charge and agreement with the solicitor to show motive to lie and bias, while important, does not render additional evidence of bias cumulative. It was not as if he could only impeach Smith about one area of bias and not the other. Rather, Gardner should have explored **all potential bias**.

Additionally, the solicitor specifically asked Smith whether he had ever been arrested or convicted of crimes during his direct examination. App. 131, ll. 15-16. Had Garnder properly investigated the case and known about the pending burglary charge, he could have impeached Smith after he responded that his only prior charges were for marijuana and Riggins' murder. See App. 131, l. 17 – 133, l. 1; Rule 607, SCRE ("The credibility of a witness may be attacked by any party, including the party calling the witness.") At that point, the jury would have learned that Smith lied on the stand, calling into question how seriously he took his oath to tell the truth.

Therefore, the PCR court erred in finding that trial counsel provided effective assistance of counsel. Baker is accordingly entitled to a new trial.

II. The PCR court erred in denying PCR counsel's motion to amend the PCR application to include an allegation of prosecutorial misconduct where it was not until trial counsel testified at the PCR hearing that PCR counsel learned that the solicitor never notified trial counsel of witness Smith's pending burglary charge, which could have been used to show bias and for impeachment.

When the testimony at the PCR hearing revealed that trial counsel was unaware of witness Smith's pending burglary charge, PCR counsel moved to amend the pleadings to include allegations of prosecutorial misconduct for failure to disclose the pending charges to defense counsel. App. 478, l. 3 – 479, l. 5; App. 480, l. 24 – 481, l. 18; App. 484, l. 15 – 485, l. 1. Trial counsel Gardner confirmed that when he told PCR counsel that he was aware of the co-defendant's pending charge, he was referring to Telly Manning. He was unaware of any burglary charge related to Ernest Smith. App. 467, ll. 1-22; App. 482, l. 3 – 483, l. 15. The assistant attorney general objected to any amendment, arguing that PCR counsel failed to prove there actually was a pending burglary charge against Smith and that he "could" have called the solicitor as a witness were he aware of a claim of prosecutorial misconduct. App. 480, ll. 15-23. Judge Harrington denied the motion, ruling that PCR counsel should have been prepared. App. 485, ll. 2-12.

Rule 15(b), SCRCP, provides the following with respect to amendments to conform to the evidence:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, **the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall upon motion grant a continuance reasonably necessary to enable the**

> **objecting party to meet such evidence.** Upon allowing any such amendment or evidence the Court shall state in the record the reason or reasons for allowing the amendment or evidence. In the event the Court should try issues not raised by the pleadings, it shall state in the record all such issues tried and the reason therefor.

(emphasis added). **The circuit court is to freely grant leave to amend when justice requires and there is no prejudice to any other party.** Rule 15, SCRCP; Foggie v. CSX Transp., Inc., 313 S.C. 98, 431 S.E.2d 587 (1993). A motion to amend is addressed to the sound discretion of the trial judge, and **the party opposing the motion has the burden of establishing prejudice.** Id. Amendments to conform to the proof should be liberally allowed when no prejudice to the opposing party will result. Soil & Material Eng'rs, Inc. v. Folly Assoc., 293 S.C. 498, 361 S.E.2d 779 (Ct. App. 1987).

The timing of the motion to amend is important. In Harvey v. Strickland, 350 S.C. 303, 313-14, 566 S.E.2d 529, 535 (2002), this Court found no abuse of discretion in the trial court's refusal of the amendment where the jury was in the process of deliberating at the time counsel moved to amend. Here, the motion to amend was made immediately after Shaffer had completed the presentation of the Petitioner's second witness, whose testimony on the stand was different than what they had discussed two days prior, necessitating the amendment. App. 478, ll. 1-9; App. 485, ll. 17-18. Again, it is notable that the PCR judge did not issue her ruling that day, instead giving the parties until September 15, 2014, over two weeks after the hearing, to submit proposed orders. App. 485, l. 23 – 486, l. 13. The Order of Dismissal itself was not signed until October 8, 2014, and filed on November 19, 2014. App. 488; App. 497.

Regarding prejudice to the opposing party, the Court of Appeals explained in Soil & Material Eng'rs, Inc. v. Folly Assoc.:

> In considering potential prejudice to the opposing party, the court should consider whether the opposing party has had the opportunity to prepare for the issue now being raised formally. **The court should grant a continuance if prejudice can be eliminated or substantially minimized by a continuance so that the opposing party can meet the evidence.** An amendment to conform to proof provides the opposing party with no just cause to complain if the opposing party is afforded full opportunity to introduce testimony bearing on the subject of the amendment. The question of allowing an amendment to pleadings to conform to proof, however, is addressed to the sound discretion of the trial judge whose decision will not be disturbed absent an abuse of discretion.

293 S.C. at 501, 361 S.E.2d at 781 (Ct. App. 1987) (internal citations and quotations omitted) (emphasis added). In finding an abuse of discretion in Folly Assoc., the Court ruled: "**Simply because an amendment to conform to proof was made late in the trial affords no basis for holding that the amendment comes too late.** Rather, as the rule makes clear, the question is one of prejudice to the opposing party." Id. (emphasis added). There, the trial judge made no finding of prejudice and the objecting party made no showing of any prejudice. Id. In the present case, the assistant attorney general argued that he if he had known that there was an allegation of prosecutorial misconduct, he "could have found the solicitor, tracked him down, and brought him in. It's just a little late in the game for that, Your Honor." App. 480, ll. 18-23. Certainly, a brief continuance could have been granted for the assistant attorney general to contact assistant solicitor Debusk and present his testimony, eliminating any prejudice to the state.

Importantly, **the PCR judge's ruling did not mention prejudice at all.** Instead, Judge Harrington focused on the brief continuance that she had allowed Shafer earlier in the week, telling him that she had scheduled the new hearing date at his convenience. App. 485, ll. 2-7. She further ruled: "I am denying your motion. This is an old case. You should have had this prepared earlier in the week. Deny your motion to amend." App. 485, ll. 8-10. However, a review of the PCR transcript reveals that Shaffer had spoken with the trial counsel Gardner on

Tuesday, following the Court's granting of the continuance. Gardner did not reveal to Shaffer that he was testimony was going to differ from their discussion until it was on the stand at the PCR hearing. App. 467, ll. 1-22. As such, PCR counsel had no idea that the allegation to be raised was potentially one of prosecutorial misconduct. See Brady v. Maryland, 373 U.S. 83, 87 (1963) "[S]uppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); see also State v. Hinson, 293 S.C. 406, 408, 361 S.E.2d 120 (1987) ("When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of a promise of immunity made to that witness is a violation of due process.").

The prosecutor's duty to disclose exculpatory evidence is applicable even in the absence of a request for the information. United States v. Agurs, 427 U.S. 97, 110–11 (1976). Brady encompasses evidence known to police investigators, even if not known to the prosecutor. Kyles v. Whitley, 514 U.S. 419, 438 (1995). To successfully show a Brady violation, a petitioner must establish three things. First, "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching." Strickler v. Greene, 527 U.S. 263, 281–82 (1999). Second, the evidence must have been willfully or inadvertently suppressed by the state. Id. at 282; see also United States v. Stokes, 261 F.3d 496, 502 (4th Cir.2001). Finally, prejudice against a petitioner must have resulted (i.e., the evidence at issue was "material"). Strickler, 527 U.S. at 282; see also Stokes, 261 F.3d at 502. Evidence is considered "material" and thus subject to Brady disclosure "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985).

As discussed *supra* in Issue I, Smith's pending charges were relevant both to show bias and for impeachment after he only admitted to arrests for marijuana and the murder charge when asked by the solicitor. Notably, it was the solicitor who asked Smith if he had ever been arrested. App. 131, ll. 15-16. The solicitor knew or should have known about the pending burglary charge since it was from the same solicitor's office, Horry County. Even if the solicitor did not have a duty to disclose the records for all of his witnesses prior to the trial, he had a duty to rectify the false testimony that he elicited on direct examination. See Rule 3.3, RPC, Rule 407 SCACR; Riddle v. Ozmint, 369 S.C. 39, 47-48, 631 S.E.2d 70, 75 (2006) ("A prosecutor's deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice. The failure to correct false evidence is as reprehensible as its presentation." (internal quotations and citations omitted)). The prejudice to Baker is directly related to the import of Smith's testimony, which was by far the most damaging to Baker. Given the absence of any physical evidence, Smith's additional incentive to engage in biased testimony against Baker in order to obtain a future recommendation of leniency was of extreme import to the defense. Additionally, Smith's failure to disclose his recent arrest when asked about any prior arrests on direct examination would have shown that he had already lied, even if by omission, to the jury.

Therefore, the PCR court erred in denying Petitioner's request to amend the pleadings to conform to the evidence. The denial was not based on any finding of prejudice to the state, and such prejudice could have been cured with a brief continuance. This Court should accordingly reverse the judgment of the PCR court and remand this case for a new evidentiary hearing.

III. The PCR court erred in denying PCR counsel's request that the record be left open so that PCR counsel could submit certified records regarding Smith's burglary charge to the PCR court.

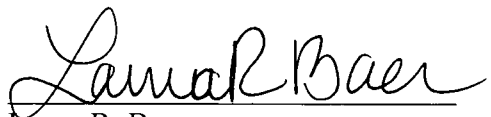
This Court has consistently held that "a PCR applicant is entitled to one full bite at the apple." Brannon v. State, 345 S.C. 437, 440 n. 1, 548 S.E.2d 866, 867 n. 1 (2001). As discussed *supra*, in Issue I, the PCR court could and should have taken judicial notice of the public index records related to Smith. Rule 201(b), SCRE. However, to the extent that judicial notice of the public index was not proper, the PCR court should have allowed PCR counsel Shaffer to supplement the record with certified documents from the Clerk's office regarding Smith's burglary charge. In fact, had the PCR court allowed the Rule 15 amendment and ordered a brief continuance for the state to defend against the allegation of prosecutorial misconduct, the certified records could have been submitted at that subsequent hearing.

It is important that trial counsel Gardner had originally told Shaffer that he knew about the co-defendant's pending charge, leading Shaffer to believe that he would provide testimony regarding Smith's burglary charge. However, on the stand, Gardner explained that he misunderstood Shaffer's question and thought he was discussing the co-defendant at trial, Telly Manning. Gardner was a not a lay witness whose testimony one might anticipate could change suddenly on the stand. Gardner had been a practicing attorney for twenty-three years at the time of the PCR hearing. App. 481, ll. 3-7. Thus, Shaffer's belief that Gardner would testify consistently with their pre-hearing discussion was not unreasonable. The PCR hearing transcript reflects that Gardner likely did not realize the miscommunication until he sat in the courtroom and listened to Baker's testimony. As such, he did not have any opportunity to warn Shaffer that his testimony was going to change until he was sitting in the witness box. App. 467, ll. 1-22; App. 482, l. 3 – 483, l. 15. While the PCR court was understandably interested in bringing to

conclusion a PCR case that had been pending for four years, it is notable that the parties were given a little over two weeks to submit proposed orders and the Order of Dismissal was not actually signed until almost two months after the hearing. App. 485, l. 23 – 486, l. 13; App. 497. Thus, under the facts of this case, the PCR judge abused her discretion in denying Shaffer's request to supplement the record with the certified records regarding Smith's burglary charge. This Court should accordingly reverse the judgment of the PCR court and remand this case for a new evidentiary hearing.

CONCLUSION

Based on the foregoing, Petitioner Roshod Baker respectfully requests that this Court grant the petition for writ of certiorari and allow further briefing on the issues raised herein.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of November, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable D. Craig Brown, Circuit Court Judge
Honorable Kristi L. Harrington, Circuit Court Judge

ROSHOD M. BAKER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Caitlin Hastings, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Roshod Montrell Baker, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 23rd day of November, 2016.

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 23rd day of November, 2016.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022