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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Edgefield County

Honorable J. Derham Cole, Circuit Court Judge

FREDERICK DALE HARVEY, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000965

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err in ruling there was no prosecutorial misconduct where the state violated *Brady v. Maryland*, by failing to disclose evidence of the decedent's blood alcohol level to the defense before petitioner pled guilty where petitioner had a viable claim of self-defense and defense of others rendering petitioner's *Alford* plea involuntarily made?

STATEMENT

On September 27, 2012, petitioner was indicted by an Edgefield County grand jury for murder. App. 351. On August 14, 2013, petitioner pled guilty to voluntary manslaughter pursuant to *North Carolina v. Alford*,[1] before the Honorable Thomas A. Russo, Sr. App. 1. W. Greg Seigler represented petitioner, and H. Franklin Young, assistant solicitor, represented the state. App. 1. Judge Russo sentenced petitioner to twenty-five years' imprisonment. App. 39.

Petitioner timely filed an appeal. The South Carolina Court of Appeals filed an order of dismissal on November 8, 2013.

Thereafter, petitioner filed an application for PCR on March 19, 2014. App. 41-48. On February 21, 2018, an evidentiary hearing was held before the Honorable J. Derham Cole. Petitioner was represented by Aimee Zmroczek. Susannah Cole, assistant attorney general, represented the state. App. 54.

On May 22, 2020, Judge Cole signed an order denying PCR. App. 340-50. The court ruled petitioner failed to meet the burden of proving his claim of prosecutorial misconduct. The court found that despite PCR counsel's difficulty obtaining all the discovery materials that would have been turned over to petitioner before his plea, petitioner did not demonstrate that any evidence was suppressed by the state prior to his plea or that the state withheld evidence from petitioner's defense counsel. App. 348-49.

This petition for writ of certiorari follows.

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[1] 400 U.S. 25 (1970)

ARGUMENT

The PCR court erred in ruling there was no prosecutorial misconduct where the state violated *Brady v. Maryland*,[2] by failing to disclose evidence of the decedent's blood alcohol level to the defense before petitioner pled guilty where petitioner had a viable claim of self-defense and defense of others rendering petitioner's *Alford* plea involuntarily made.

Relevant facts

At petitioner's guilty plea pursuant to *Alford*, the state alleged that on August 19, 2012, petitioner shot and killed Marshall Butler at a birthday party. Throughout the evening Butler had been inappropriate with petitioner's girlfriend, Tamekia Miller, resulting in an altercation between Butler and petitioner. App. 15-20. The solicitor told the court that the decedent, Butler, was "very intoxicated" on the night of the incident. The solicitor also said that a witness to the incident said Butler instigated the physical altercation by punching petitioner. App. 18-19.

During mitigation, defense counsel told the court petitioner had no prior criminal record. Defense counsel said that had petitioner gone to trial, he would have raised self-defense, stating that there were multiple witnesses that reported associates of Butler's had been seen with weapons that evening, although admittedly, there was no evidence showing Butler had a weapon. Defense counsel said on the evening of the incident Butler had repeatedly harassed Miller, including groping her. Petitioner confronted Butler and asked him to be respectful of Miller. Petitioner and Miller were leaving the party when Butler punched petitioner. Petitioner felt, and was, physically threatened by Butler that evening and petitioner defended himself and Miller by shooting Butler. App. 22-26.

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2 373 U.S. 83 (1963).

On February 13, 2018, defense counsel Seigler gave his testimony by deposition because he had a conflict on the day the PCR hearing was set. App. 127. At the time Seigler represented petitioner, he was the primary public defender in the tri-county area of Saluda, McCormick, and Edgefield. Seigler testified that while he worked as a public defender he had around seven hundred cases at a time. App. 149-50. Seigler had reviewed petitioner's file in preparation for the deposition but admitted he did not recall many of the details in petitioner's case. App. 133-34; 143.

Seigler recalled petitioner had a potential claim of self-defense and defense of others because the decedent, Butler, had been making unwanted sexual advances towards petitioner's girlfriend, Miller, and Butler was the initial aggressor in the altercation. App. 136-37. Seigler was readying the case for trial including preparing to hire an investigator. However, before Seigler hired an investigator, petitioner pled guilty. App. 137. The state reduced petitioner's charge of murder to voluntary manslaughter and recommended a sentencing cap of twenty-five years. Seigler did not remember whether petitioner understood the terms of the guilty plea but claimed that if he had been worried about petitioner's competency, he would not have allowed him to plead guilty. App. 139.

Seigler acknowledged that, at a guilty plea hearing, it is important that the state accurately represent the facts of the case to the court. App. 160. He declared he would have addressed any inaccuracies in the state's recitation of the facts at the plea hearing if he had been aware of any. App. 161. Although Seigler recalled very little about the specifics of petitioner's case, he testified that he had worked with the solicitor in this case, Young, "many times" and did not know of any instances where the state had not turned over discovery. App. 164-65.

At the PCR hearing, PCR counsel amended petitioner's application to include a allegation of prosecutorial misconduct. App. 58. Petitioner testified that Greg Seigler was appointed as his attorney. App. 61. Petitioner stated that he did receive discovery in his case, however, he never saw the results of testing performed by SLED or any other agency. App. 64. On the night of the incident, petitioner said that Butler had been incessantly harassing his girlfriend, Miller, including physically touching her and kissing her. Petitioner asked Butler to be respectful of Miller and Butler responded, "fuck you." Petitioner disengaged from the conversation but kept an eye on Butler throughout the evening. Petitioner noticed Butler's friends seemingly trying to calm Butler down across the room. Later petitioner saw Butler and another man pointing at him and the other man lifted his shirt to reveal a pistol in his waist band. At that point petitioner found Miller so that they could leave the party. On their way out, Butler brushed up against petitioner and grabbed Miller in a sexual way. Petitioner again asked Butler to stop harassing Miller. Butler punched him, knocking him to the ground, and when petitioner stood up, he fired a shot at Butler and left the party. App. 65-71.

Petitioner testified that he should have gone to trial instead of pleading guilty pursuant to *Alford* because he did not do anything wrong in defending himself and Miller that night. App. 71-72. However, petitioner testified that he was told by defense counsel Seigler that there was no self-defense in South Carolina and that he should take a guilty plea because Butler's family wanted him to go to prison for life. App. 72. Petitioner, on the advice of Seigler, believed that if he did not accept the state's plea offer, reducing the charge of murder to voluntary manslaughter with a sentence cap of twenty-five years' imprisonment, that he would go to prison for life. App. 74. Petitioner insisted that "every time" he spoke with defense counsel he told him he wanted to go to trial and he would have gone to trial had he had all the evidence in his case. App. 77; 79.

The state called the solicitor who handled petitioner's case, Henry Franklin Young. Young testified regarding the facts of the case, stating Butler was very drunk at the party, was bothering Miller, hit petitioner in the face and petitioner shot him. App. 92-93. Young said that he and defense counsel discussed the level of Butler's intoxication that evening and the fact that ocular fluid taken from Butler at the autopsy showed his blood alcohol content was above .30. Young stated that he believed Butler's level of intoxication was important because it demonstrated that Butler's punch to petitioner was "feeble" and had "no real impact." App. 96-97. Young claimed that he disclosed evidence of Butler's blood alcohol level to defense counsel and provided him a copy of the report. Young declared that this issue was "key to the case," because of the fact that petitioner was able to separate himself from Butler after a "weak blow," and stepped back to shoot Butler twice. PCR counsel asked Young if he had a copy of the blood toxicology report, and Young responded that the report was part of the case file he received in preparation for this hearing. App. 110.

PCR counsel informed the court she was not provided any toxicology or lab reports in this case. App. 110-11. PCR counsel expressed frustration that the state had not provided her all of the discovery in petitioner's case because petitioner's main allegation on PCR was that he did not have sufficient information to make the decision to plead guilty, rendering his *Alford* plea unintelligently made due to counsel's failure to investigate. PCR counsel contended that a big issue was this discussion of Butler's blood alcohol level. PCR counsel stated that when she subpoenaed the file from defense counsel, there were things missing from the file. PCR counsel got a discovery order so that she could get the solicitor's file and noticed this information was also missing from that file. PCR counsel averred that it was impossible to demonstrate on PCR

what defense counsel should have investigated with incomplete discovery and requested a continuance in the case. App. 112-13.

The assistant attorney general admitted she knew PCR counsel was looking for the blood alcohol content report and that, although she did not have the report in her file, she had discussed the report with Young prior to the PCR hearing. In their conversation, Young revealed that he remembered having discussed the report with Seigler prior to petitioner's guilty plea. The assistant attorney general insisted that, even though she did not recall seeing the report, it must have been turned over to PCR counsel. Young interjected stating that after he received notice that he would be testifying at petitioner's PCR hearing, he went by the sheriff's office and asked the investigating officer in petitioner's case to send him anything he might still have on the case and that was likely source of the blood alcohol report. App. 115-16.

The state opposed a continuance in petitioner's case, arguing Young could testify as to what was disclosed to defense counsel at the time but also concedeing she did not know why the report was not turned over for the PCR hearing. App. 116.

The court explained the request for continuance was based on what the state "failed to do, not upon what the applicant's lawyer has failed to do." The court also stated the report was relevant because Young had testified about the report and produced it during the hearing. App. 117. The court further clarified that, regardless of whether it was the state's fault, it was the state's obligation to be sure all of the discovery was in PCR counsel's possession. Ultimately, the court decided the remainder of Young's testimony would be taken by deposition. App. 123-24.

On August 3, 2018, Young finished his testimony by deposition in this case. App. 171. Young maintained Butler's blood alcohol level "played a big role" in the case because it revealed

Butler's physical inability to hurt petitioner. App. 183-84. Young insisted he and Seigler had a conversation regarding Butler's blood alcohol level and that he "absolutely" gave Seigler a copy of the report. However, Young could not give a reason why the report was not in his file or in the file sent to PCR counsel. App. 181-83. Young also acknowledged that, the fact that Butler was the aggressor, harassing Miller and confronting petitioner both verbally and physically, would have been problematic for the state at trial. App. 216.

Discussion

The PCR court erred ruling there was no discovery violation where the state failed to disclose key evidence of the decedent's level of intoxication prior to petitioner's guilty plea pursuant to *Alford,* rendering petitioner's guilty plea involuntarily made.

A defendant who pleads guilty usually may not later raise independent claims of constitutional violations. *See Rivers v. Strickland*, 264 S.C. 121, 124, 213 S.E.2d 97, 98 (1975) (stating "[t]he general rule is that a plea of guilty, voluntarily and understandingly made, constitutes a waiver of nonjurisdictional defects and defenses, including claims of violation of constitutional rights prior to the plea"). However, "a defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case." *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir.1995); *accord Gustine v. State*, 325 S.C. 123, 127–28, 480 S.E.2d 444, 446 (1997) ("waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences").

In *State v. Gibson*, the Court found:

> When a defendant lacks knowledge of material evidence in the prosecution's possession, their waiver of constitutional rights cannot be deemed knowing and voluntary. *Sanchez*, 50 F.3d at 1453; *accord White v. United States*, 858 F.2d 416, 420–22 (8th

> Cir.1988) (adopting same principle); *Miller v. Angliker*, 848 F.2d 1312, 1319–20 (2d Cir.1988) (adopting same principle); *Royal v. Netherland*, 4 F.Supp.2d 540, 566 (E.D.Va.1998) (stating same principle); *New York v. Burney*, 169 Misc.2d 436, 642 N.Y.S.2d 990, 992 (Sup.Ct.1996) (collecting cases and noting the federal trend permitting defendants to pursue such claims even though *Brady* and its progeny do not address the withholding of Brady material prior to the entry of a guilty plea).

Gibson v. State, 334 S.C. 515, 523–26, 514 S.E.2d 320, 324–25 (1999).

"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*. Here, petitioner testified that if he had received all the discovery in his case, including the blood alcohol report, he would have gone to trial and not pled guilty. Additionally, the solicitor, Young, testified more than once that the evidence of Butler's blood alcohol content was key in this case.

"The government's obligation to make such disclosures [of *Brady* material] is pertinent not only to an accused's preparation for trial but also to his determination of whether or not to plead guilty. The defendant is entitled to make that decision with full awareness of favorable material evidence known to the government." *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir.1998). A *Brady* claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. *Kyles v. Whitley*, 514 U.S. 419, 432–42 (1995); *Brady*, 373 U.S. at 87, 83; *State v. Von Dohlen*, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996).

Here, petitioner's case falls into the third of the three distinct categories of *Brady* violations identified by the Supreme Court in *United States v. Agurs*, 427 U.S. 97, 96 (1976). Those categories are (1) cases that include nondisclosed evidence of perjured testimony about

which the prosecutor knew or should have known, (2) cases in which the defendant specifically requested the nondisclosed evidence, and (3) cases in which the defendant made no request or only a general request for *Brady* material. *Id*. at 103–107.

In "specific request" and "general- or no-request" situations, "favorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonably probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different . . . A reasonable probability of a different result is accordingly shown when the Government's evidentiary suppression undermines confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U.S. at 432–36 (internal quotes omitted); *accord State v. Von Dohlen*, 322 S.C. at 241, 471 S.E.2d at 693.

In applying the *Brady* analysis to this case, first, the withheld evidence was favorable to petitioner because it supported clear evidence that Butler was the aggressor where petitioner had a potential claim of self-defense and defense of others. All the testimony at PCR, as well as the recitation of facts given by the state at petitioner's plea hearing, supports the assertion that Butler was the aggressor in the incident. Second, the blood alcohol report was in the possession of and known to Young, the solicitor. Neither the assistant attorney general nor PCR counsel had the report, however, Young had the report at the PCR hearing. Third, Young suppressed the blood alcohol report in failing to disclose it to the defense as is evident by the report being absent from both the state's file and defense counsel's file.

At the plea hearing and at PCR, Young characterized Butler's level of intoxication as demonstrating that Butler was less of a threat to petitioner because he was so drunk. However, the reverse could also be true. Butler in a drunken rage at being rejected by Miller and confronted by petitioner was likely less rational and more dangerous. Had petitioner known

about this evidence, it is probable petitioner would have chosen to stand trial instead of pleading guilty pursuant to *Alford*. Petitioner testified at PCR that, but for counsel's advice, he would have gone to trial because he was acting in self-defense and defense of Miller when he shot Butler. It is uncontested in the record that Butler's blood alcohol level was a key issue in the case. Thus, it stands to reason, that had defense counsel been aware, prior to the guilty plea, of the evidence of Butler's level of intoxication, he would have advised petitioner to go to trial and raise the issue of self-defense and defense of others.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on the issue.

s/ Sarah E. Shipe
Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of February, 2021.