THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2018-000849

Chazmonte Brown, Petitioner,

v.

State of South Carolina, Respondent.

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Did the PCR Court err in finding Petitioner voluntarily pled guilty by also finding the prosecutors did not violate *Brady v. Maryland* [1] and Petitioner's due process rights when the prosecutors failed to disclose a deal with a material witness and failed to correct false testimony of that witness at trials against Petitioner's co-defendants before and after his plea hearing?

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

STATEMENT OF THE CASE

Arrest / Indictment

On December 15, 2008, the Lake City Police Department arrested Chazmonte Brown (Petitioner) for armed robbery. App. 827 – 828. The Police also arrested Petitioner's co-defendants: Quentin Epps, Montarrio Graham, Latisha Cochran, and Jerry Bush.

On June 4, 2009, the Florence County Grand Jury indicted Petitioner for armed robbery and possession of a weapon during the commission of a violent crime. App. 829 – 830.

Co-Defendant Latisha Cochran's Trial

On October 18, 2010, Petitioner's co-defendant, Latisha Cochran (Cochran), proceeded to trial before the Honorable Michael G. Nettles and a jury. App. 1 – 227. Jesse Cartrette represented Cochran, and Assistant Solicitors Patricia Parr and David Richardson represented the State.

On direct-examination, the State asked co-defendant, Quintin Epps (Epps), "have you been offered anything special to testify here today?" and Epps replied, "No, sir." App. 116, ll. 23-25. The State then emphasized, "You hadn't been offered any sort of special plea deal in order for you to testify here today; is that right?" and Epps again responded, "Right". App. 117, ll. 1-3.

On cross-examination, Cochran's defense counsel asked Epps, "You said you weren't offered anything special to testify today?" and Epps replied, "No, sir." App. 118, ll. 13-15. Cochran's defense counsel then asked, "Isn't it true, though, that you anticipate the possibility of a better deal or you wouldn't be here today?" and Epps reiterated, "No, sir." App. 118, ll. 16-19. Cochran's defense counsel continued this line of questioning; "You [have] been offered no deal?" and Epps again responded, "No, sir." App. 118, ll. 24-25. In the same vein, Epps only

conceded that he hoped to receive a deal from the State for his testimony. App. 119, ll. 1-3; App. 119, l. 24 – 120, l. 2.

Notably, neither of the Assistant Solicitors interjected or clarified co-defendant Epps's responses to these questions. The jury found co-defendant Cochran guilty of armed robbery, and the Trial Court sentenced Cochran to thirteen years imprisonment on October 19, 2010. App. 214, ll. 12-25; App. 226, ll. 10-17.

Petitioner's Plea Hearing After Jury Selection/Opening Statements

On December 15, 2010, Petitioner, along with his co-defendant, Montarrio Graham (Graham), *initially* proceeded to trial before the Honorable Michael G. Nettles and a jury. App. 228 – 291. Karen Parrott represented Petitioner, Scott Floyd represented Graham, and Assistant Solicitors Patricia Parr and David Richardson represented the State. After jury selection and opening statements, co-defendant Epps testified *in camera* that Graham had threatened him indirectly and had directly asked Epps that morning whether he was going to testify. App. 284, l. 6 – 286, 18.

After this *in camera* hearing, Petitioner appeared before Judge Nettles and pled guilty to armed robbery and two counts of distribution of marijuana. App. 291, ll. 3-25; App. 428 – 442. The Plea Court sentenced Petitioner to fifteen years imprisonment for armed robbery and five years imprisonment for each distribution of marijuana conviction. App. 440, ll. 14-25; App. 831. The Court imposed the service of those sentences concurrently. App. 441; App. 831.

Petitioner did not appeal his convictions or sentences.

Co-Defendant Montarrio Graham's Trial

After Petitioner's plea hearing, co-defendant Graham continued with the jury trial. App. 228 – 427. The State asked co-defendant Epps during direct-examination, "have you been

offered any sort of special deal or promise" and Epps replied, "No, sir." App. 326, ll. 12-14. Graham's defense counsel also inquired regarding a deal on cross-examination, "Now you said earlier you had no offer for special treatment, is that right?" and Epps again responded, "Right". App. 343, ll. 12-16. Same as in Cochran's trial, neither of the Assistant Solicitors interjected or clarified Epps's answers to these questions.

The State highlighted in its closing argument, "***[T]his case, a lot of it depends on [the] credibility of the witnesses.***" App. 391, ll. 22-23 (emphasis added). The State further argued in closing: "I submit to you that the Defense will beat up on Quentin Epps during their closing argument because he was the one who's came before the court and testified"; "[W]e know that you have to make that decision as to who to believe"; and "[W]e will submit to you that Mr. Epps is not a quiet [choir] boy . . . or the eagle scout, but that does not take away from his credibility to tell you what happened on that particular night[.]" App. 391, l. 23 – 393, l. 17 (emphasis added). The jury found Graham guilty as charged, and the Trial Court sentenced him to twenty-two years imprisonment. App. 419, ll. 17-25; App. 425, l. 15 – 426, l. 8.

First PCR Application / Return / Evidentiary Hearing

On May 5, 2011, Petitioner filed his *first* application requesting Post-Conviction Relief (PCR), alleging ineffective assistance of counsel. App. 443 – 452. The State filed its Return to the PCR application on July 11, 2011. App. 453 – 457. Petitioner subsequently appeared before the Honorable William H. Seals for an evidentiary hearing on February 3, 2012. App. 458 – 475. Charles T. Brooks, III, represented Petitioner, and Assistant Attorney General David Spencer represented the State. Petitioner and plea counsel, Karen Parrott, testified at the evidentiary hearing.

Petitioner testified that he pled guilty because "I already knew that [the State] was going to put him on the stand and he was going to fabricate, and at the time I knew one of the – one of my

codefendants already had caught time for the same reason, and I didn't want to take those chances." App. 465, ll. 15-19. Petitioner emphasized during direct examination that he involuntarily pled guilty based on the State's witnesses: "Lack of evidence wasn't presented as the victim said he couldn't identify", "[t]hey had nothing that put me there", "[n]o fingerprints, me on camera", [n]othing other than a felon said that I did something with him." App. 466, ll. 19-25.

Plea Counsel testified at the hearing, "***The way that this case was prepared for trial was that [Petitioner] had already had one co-defendant who had been tried and convicted and sentenced and that was Latisha Cochran.***" App. 470, ll. 19-23 (emphasis added). Plea Counsel also testified that "***[t]he second person that was involved in this case was actually Quintin Epps, and he was going to testify against [Petitioner].***" App. 470, l. 23 – 471, l. 1 (emphasis added).

After hearing testimony, the PCR Court denied the application. App. 474, ll. 12-13.

First PCR Order of Dismissal

On June 19, 2012, the PCR Court issued an Order of Dismissal, finding Petitioner failed to prove Plea Counsel provided ineffective assistance of counsel. App. 476 – 480. Specifically, the PCR Court found Petitioner's allegations that "***his plea was involuntary because his co-defendant was going to testify against him and fabricate testimony***" and "***because another co-defendant was convicted at trial and [he] did not want to meet the same fate***" were not credible. App. 478 – 479 (emphasis added). The PCR Court denied the application, and Petitioner subsequently filed a Notice of Appeal on June 25, 2012. App. 479; App. 481 – 482.

Order Granting Post-Conviction Relief to Co-Defendant Montarrio Graham

On November 6, 2012, the Honorable Thomas Russo granted co-defendant Graham's PCR application. App. 485 – 493. Graham's PCR Court provided the following findings of fact:

> For several years, [Graham] has known Quentin Epps. In 2003, [Graham] and Epps were charged as co-defendants in a Burglary.

> For that charge, [Graham] gave a statement to law enforcement implicating Epps. Epps was convicted of the burglary charge.
>
> Several years later, Epps was involved in an armed robbery . . . After the robbery, Quentin Epps was seen using one of the stolen credit cards at Wal-Mart. Police questioned Epps who gave a statement. Epps admitted knowing about the robbery, but he tried to deny any involvement in the robbery claiming he was merely present . . . Epps gave the names of several co-defendants that he claimed were also involved in the robbery. Epps claimed that [Graham] was the man carrying a toy pistol during the robbery. No physical evidence was ever collected linking [Graham] to the crime. Epps, [Graham], and three other co-defendants were charged with armed robbery.
>
> ***Prior to [Graham's] trial the state offered Epps a plea deal in exchange for his testimony against the others. The State promised Epps that they would reduce his armed robbery charge to some other charge if Epps testified against [Graham].*** The State did not inform Epps of what his armed robbery would be reduced to. Nevertheless, ***Epps agreed to testify in order to avoid a mandatory minimum ten year sentence. The State did not disclose this deal to Trial Counsel.*** If Trial Counsel has known about Epps' deal he would have used it to impeach Epps . . . ***Because of the lack of physical evidence, the State's case at trial was primarily based on Epps' testimony.***

App. 486 – 487 (emphasis added). The PCR Court found "***[t]he State never informed the Court or Trial Counsel that Epps had testified untruthfully***" and that, "[s]everal weeks after [Graham's] trial, the State reduced Epps' armed robbery charge to accessory after the fact." App. 488 – 490 (emphasis added). Graham's PCR also found that "[o]n January 24, 2010, Epps pled guilty . . . and received an eighteen month sentence" and that "[Graham] first learned of Epps deal while his appeal was pending." App. 490.

Graham's PCR Court held that he was entitled to a new trial because the State failed to disclose and correct false testimony. App. 491 – 493. Specifically, "***[Graham's] right to due process was clearly violated by the State's failure to correct known false testimony from Epps***" and "***Mr. Anderson [Epps's lawyer] credibly testified that the State had offered to reduce***

Epps's armed robbery charge in exchange for his testimony." App. 492 (emphasis added). Graham's PCR Court also found, "***The State certainly was aware that Epps was giving false testimony because the State had offered Epps the deal he denied.***" App. 492 (emphasis added). The PCR Court further found that "Mr. Floyd [Graham's lawyer] credibly testified that he was unaware of Epps's deal until after the trial." App. 492.

Notably, Graham's PCR Court found that "[he] has clearly established prejudice in this case" because "***[t]he only evidence linking [Graham] to the crime was the testimony of Epps.***" App. 492 (emphasis added). The PCR Court noted the State's emphasis on the credibility of the witnesses in its closing argument and held "***the State's failure to disclose that Epps gave false testimony was not harmless.***" App. 492 (emphasis added). Therefore, Graham's PCR Court held that he was entitled to a new trial pursuant to *Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006), *Napue v. Illinois*, 360 U.S. 264 (1959), and *Giglio v. United States*, 405 U.S. 150 (1972). App. 490 – 493.

***Johnson* Petition for Writ of Certiorari to Review Petitioner's First PCR Action / Order**

On November 14, 2012, Appellate Defender Robert Pachak filed a Petition for Writ of Certiorari pursuant to *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988), arguing Petitioner involuntarily pled guilty. App. 494 – 503.

On February 7, 2013, this Court denied the Petition and issued a Remittitur on February 25, 2013. App. 504 – 505.

Second PCR Application / Return and Motion to Dismiss / Conditional Order of Dismissal

On April 8, 2013, Petitioner filed a *second* PCR application, alleging after-discovered evidence and prosecutorial misconduct (2013-CP-21-00925). App. 625 – 630. Specifically, Petitioner argued that he "***discovered in November 2012 that Brady information was not***

disclosed to [him]" and that the "***Prosecutor did not disclose my co-defendant's deal.***" App. 627 (emphasis added). The State filed its Return and Motion to Dismiss on August 15, 2013, arguing Petitioner was successive, barred by the statute of limitations, and failed to satisfy a claim of after-discovered evidence. App. 631 – 636.

On August 19, 2013, the Honorable D. Craig Brown issued a Conditional Order of Dismissal. App. 637 – 642. Specifically, the PCR Court found Petitioner's application successive, untimely, and failed to state a claim of after-discovered evidence.

Petitioner's *Pro se* Response / *Pro se* Motion for Judgment on the Pleadings

On September 18, 2013, Petitioner mailed a *pro se* response to the Florence County Clerk of Court, explaining that he did not know about the existence of the after-discovered evidence until November 1, 2012 and that the application is not successive or barred by the statute of limitations. App. 643. Petitioner further argued he "was hindered due to institutional lockdowns from sending this letter within 20 days of receiving [the] notice". App. 643. Petitioner also enclosed a letter that he received from Tristan Shaffer, Esq., notifying him about the after-discovered evidence issue and potential basis for requesting a new trial. App. 644.

On July 11, 2014, Petitioner filed a *Pro Se* Motion for Judgment on the Pleadings, requesting an evidentiary hearing on these issues. App. 645 – 649.

Petitioner's Motion to Limit the State's Argument Based on Collateral Estoppel

On May 20, 2016, Petitioner, by and through counsel, submitted a Motion to Limit the State's Argument Based on Collateral Estoppel. App. 650 – 655. Specifically, Petitioner "move[d] to preclude the State from arguing Quentin Epps did not have a plea deal with the prosecution prior to testifying" based on the doctrine of collateral estoppel. App. 650. Petitioner noted, "In an order dated November 2, 2012, Judge Russo granted Graham's PCR pursuant to

Napue v. Illinois, 360 U.S. 264 (1959) and *Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006)." App. 654. Petitioner further noted, "***[o]n December 6, 2012, Graham was informed that the State would not appeal Judge Russo's decision.***" App. 654 (emphasis added).

Petitioner argued that the Order granting Graham's PCR application precluded the State from re-litigating the issue of whether Quintin Epps made a deal with the State to testify against Petitioner and his co-defendants. App. 654 – 655. Specifically, the State had a full opportunity to cross-examine Hank Anderson [Epps's lawyer], to call their own witnesses, and to appeal Judge Russo's Order. App. 655. Petitioner further noted, "Since Judge Russo granted Graham's PCR solely based on the prosecutorial misconduct [issue], his finding that Epps had a deal was necessary to the prior judgment." App. 655.

Second Evidentiary Hearing

On June 2, 2016, Petitioner appeared before the Honorable Jocelyn Newman for an evidentiary hearing. App. 656 – 676. Tristan Shaffer represented Petitioner, and Assistant Attorney General Croom Hunter represented the State. The State moved for a dismissal, arguing Petitioner's PCR application is successive, untimely, and failed to state a claim of after-discovered evidence. App. 659, ll. 22-25. The State focused on Petitioner's decision to plead guilty prior to Epps's testimony at Graham's trial and the after-discovered evidence test set forth in *Jamison v. State*, 410 S.C. 456, 765 S.E.2d 123 (2014). App. 669, l. 13 – 671, l. 12; App. 674.

PCR Counsel argued that *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2013), *Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006), and Section 17-27-45(c) of the South Carolina Code of Laws allowed Petitioner to file a second PCR application. App. 662, l. 1 – 663, l. 5; App. 671, ll. 13-19. PCR Counsel further explained that Petitioner is "raising a claim of a *Brady* violation" and that "[Petitioner] didn't know about that until . . . Mr. Graham won his PCR." App. 663, ll.

6-17; App. 668, l. 2 – 669, l. 10.

Judge Newman took the matter under advisement and instructed PCR Counsel to submit the relevant portions of Cochran's trial transcript and any other relevant case law for the Court's review. App. 675, ll. 7-14.

Order Granting Petitioner's Motion to Limit the State's Argument Based on Collateral Estoppel / Order Granting Respondent's Motion to Dismiss (Second Order of Dismissal)

On September 19, 2016, the Honorable Jocelyn Newman granted Petitioner's Motion to Limit the State's Argument based on Collateral Estoppel via a form order. App. 677 – 678.

On December 28, 2016, Judge Newman granted Respondent's Motion to Dismiss. App. 688 – 695. Notably, the Court examined ***"the Order Granting PCR in the Montarrio Graham case; the transcript of the trial of State of South Carolina v. Montarrio Graham; and the transcript of the trial of State of South Carolina v. Latisha Cochran***." App. 688 (emphasis added).

Judge Newman found Petitioner's second PCR application barred as successive because the discovery of Epps's perjured testimony "could have and should have been raised in his first Application for PCR." App. 692. Judge Newman also found the second PCR application barred as beyond the statute of limitations because "the instant action was not filed until April 8, 2013[.]" App. 693. Judge Newman further found the second PCR application "has not shown this 'newly discovered evidence' warrants a new PCR hearing or trial[.]" App. 694.

Petitioner's First Motion to Alter or Amend / Return

On January 20, 2017, Petitioner submitted the *first* Motion to Alter or Amend pursuant to Rule 59(e), SCRCP. App. 698 – 700. Petitioner addressed the following issues and argued: (1) The Court failed to adequately rule on the *Brady* violation claim without an evidentiary hearing, citing *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2013); (2) Petitioner's second application

was not successive because he was unaware of the *Brady* violation until after the denial of his first application, citing S.C. Code § 17-27-90; (3) Petitioner's second application was not barred by the statute of limitations because he was unaware of the *Brady* violation until after the denial of his first PCR application, citing S.C. Code § 17-27-45(c) and arguing the State's own improper actions in failing to disclose the plea offer caused the delay; and (4) Petitioner's second application is appropriate because of the after-discovered evidence regarding the *Brady* violation, citing *Riddle v. Ozmint*, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006) (finding "[i]f a *Brady* violation is found to have occurred, PCR must be granted."). App. 699 – 700.

On February 8, 2017, the State filed its Return to the Motion to Alter or Amend. App. 701 – 704.

Order Granting Petitioner's First Motion to Alter or Amend

On April 20, 2017, the Honorable Jocelyn Newman granted Petitioner's Motion to Alter or Amend and ordered Respondent to schedule an evidentiary hearing on the matter. App. 705 – 706. Notably, Judge Newman limited the scope of the hearing to Petitioner's allegations of a *Brady* violation. App. 705.

Third Evidentiary Hearing

On August 30, 2017, Petitioner appeared before the Honorable Thomas Russo for an evidentiary hearing. App. 707 – 798. Tristan Shaffer represented Petitioner, and Assistant Attorney General Lindsey McCallister represented the State. The following witnesses testified at the evidentiary hearing: Plea Counsel, Karen Parrott (App. 714 – 735); Petitioner (App. 737 – 741); Prosecuting Solicitor, David Richardson (App. 742 – 752); and Quentin Epps's lawyer, Hank Anderson (App. 757 – 762).

Petitioner marked the transcript and order granting co-defendant Graham's PCR application

as Court's exhibit number one, and the State entered co-defendant Cochran's trial transcript into evidence as State's exhibit number one. App. 716, ll. 1-22; App. 762, l. 6 – 763, l. 2. After hearing testimony and arguments, Judge Russo took the matter under advisement to review transcripts and applicable case law. App. 797, ll. 15-18.

Third Order of Dismissal

On December 11, 2017, the Honorable Thomas Russo denied Petitioner's *second* application for post-conviction relief. App. 799 – 809. The Court examined "***the Order Granting PCR in the Montarrio Graham case; and the transcript of the PCR evidentiary hearing of Latisha Cochran.***" App. 802 (emphasis added); App. 506 – 624.

Judge Russo found that "the State was under no obligation to make a detailed disclosure of the specifics of its agreement with Epps." App. 807. Judge Russo noted Plea Counsel testified at the evidentiary hearing that she "was aware of the existence of some type of agreement and had the opportunity to advise [Petitioner] of this prior to the start of his trial[.]" App. 807. Consequently, Judge Russo held that "the nondisclosed information – that the State would reduce Epps's charge to some unspecified lesser-included offense or a lesser sentence – was not material under *Brady*." App. 807.

Judge Russo also found that "[Petitioner's] case is distinguishable from that of his codefendant Graham" because "Graham proceeded to trial, where Epps testified he had no deal *at all* with the State." App. 807 (emphasis in original). Judge Russo noted, "[t]he constitutional violation in Graham's case was the State's failure to correct the false testimony as to the very existence of a deal." App. 807.

Judge Russo further found that "the disclosure of any specifics regarding the agreement between Epps and the State would have been of limited impeachment value at [Petitioner's]

trial", citing *United States v. Ruiz*, 536 U.S. 622, 628-29 (2002), *State v. Cheeseboro*, 346 S.C. 526, 553-54, 552 S.E.2d 300, 314-15 (2001), and *Duncan v. State*, 281 S.C. 435, 439, 315 S.E.2d 809, 811 (1984). App. 807 – 808. Judge Russo noted, "[Petitioner's] testimony at the evidentiary hearing indicates it was not just the testimony of Epps that influenced [his] decision to stop his trial and plead guilty[.]" App. 808.

Petitioner's Second Motion to Alter or Amend

On January 8, 2018, Petitioner filed a *second* Motion to Alter or Amend pursuant to Rule 59(e), SCRCP. App. 810 – 815. Petitioner argued the following in support of the motion:

(1) "[A]t most Trial Counsel testified that she made the assumption that Epps had a deal" and "there is a significant difference in the impeachment value of [a] suspected deal and a deal that was disclosed" (App. 810);

(2) The evidence in the record does not support the Court's finding that "'the nondisclosed information . . . was not material under *Brady*'" (App. 811);

(3) The Prosecutor's "failure to disclose the promise of non-specific consideration is material" because "[t]he Court was provided prior testimony of Solicitor Patricia Parr during the Cochran PCR" who "indicated that Epps had been promised some help and consideration for his testimony" and because attorney "Anderson [Epps's lawyer] testified that Mrs. Parr indicated that the armed robbery would be dropped in exchange for his testimony" when "the case against [Petitioner] was entirely based on Epps's credibility" (App. 811);

(4) "Montarrio Graham's PCR was based on the *Napue* violation and the *Brady* violation";

(5) "There is no evidence in the record indicating that Trial [Plea] Counsel had anything more than suspicion that there was a deal in place." (App. 811 – 812);

(6) "Epps was promised that he would not be pleading to Armed Robbery with a mandatory minimum ten year sentence" and attorney "Anderson testified that his client [Epps] was told that the Armed Robbery would be reduced" (App. 812);

(7) "The State had a duty to disclose the deal with Epps" because "Epps was told that the state would be dropping the armed robbery and allowing him to plea to something else in exchange for his testimony" (App. 812);

(8) "[T]he record indicates that he [Petitioner] would have proceeded with his trial had he known about Epps' deal" (App. 812);

(9) "[T]he Court's reliance on *United States v. Ruiz*, 536 U.S. 622, 122 S.Ct. 2450 (2002) is misplaced based on the following arguments:

(a) "*Ruiz* is factually distinguishable" because "[Petitioner's] trial had begun; therefore, *Giglio* should control this case";

(b) "The reasoning of the *Ruiz* [opinion] does not apply . . . because [Petitioner] had a greater knowledge of the prosecution's case at the time he pled; therefore, the duty to disclose impeachment information was a constitutional violation" because "[Petitioner] testified that he pled after realizing that the State had transported Epps to testify";

(c) "The reasoning in *Ruiz* was based in part on the burden of requiring the prosecution to uncover and disclose impeachment information in advance of trial" when "the State had already tried one of [Petitioner's] codefendants" and had begun Petitioner's trial;

(d) "The Supreme Court reasoning in *Ruiz* is partially dependent on the safeguards provided under Rule 11 of the Federal Rules of Criminal Procedure and under Ruiz's written plea agreement" when "[Petitioner] did not have a written plea agreement."

App. 812 – 814.

Order Granting in Part and Denying in Part Petitioner's Motion to Alter or Amend

On April 4, 2018, the Honorable Thomas Russo granted in part and denied in part Petitioner's motion to alter or amend, finding it necessary to issue an amended order to clarify findings of fact and conclusions of law. App. 816.

Amended Order of Dismissal (Fourth Order of Dismissal)

On April 4, 2018, the Honorable Thomas Russo issued an Amended Order of Dismissal, denying Petitioner's second PCR application. App. 817 – 826. The PCR Court noted the following "Relevant Testimony from [the] PCR hearing":

> ***[Petitioner] testified he had planned to go to trial until the day it began, when he found out Epps and another inmate would testify against him, and he was afraid they would fabricate their testimony.*** [Petitioner] testified that up until that point, he did not believe Epps would be present at trial. [Petitioner] testified that he did not find out about Epps' agreement with the State until 2012, at which time he filed this PCR action. ***[Petitioner] testified that if he had known about Epps' deal at the time of trial, he would have proceeded with trial, and he would have wanted his attorney to cross-examine Epps about the agreement.***
>
> ***Counsel . . . testified there was no physical evidence against Petitioner. Counsel testified [Petitioner] began asking her about a plea during jury selection on the morning of trial . . . Counsel testified she was never specifically told Epps had a deal***, and she did not confirm he received one until much later. Counsel testified that, in her experience, co-defendants often testify against one another, and the standard practice in Florence County is for the Solicitor to agree to 'help' the testifying codefendant; however, there is generally no specific deal made as to a sentence. Counsel further testified that she knew in advance Epps was going to testify, and she discussed it with [Petitioner] the morning of trial. . . .
>
> ***Hank Anderson, Epps's defense attorney, . . . testified it was his belief after the meeting that the State would reduce Epps's charge to something other than armed robbery so Epps could avoid the ten year mandatory minimum sentence.***

App. 819 – 821 (emphasis added).

Judge Russo found that [Petitioner's] case is distinguishable from *Napue*, which, in turn, distinguishes it from Graham's PCR action. App. 822. Judge Russo noted, "The constitutional violation in Graham's case was the State's failure to disclose its deal with Epps *as well as* the State's failure to correct the false testimony at trial as to the very existence of a deal" when "[Petitioner's] case was resolved by a guilty plea shortly after the jury had been struck; no testimony was ever taken." App. 823 (emphasis in original).

Judge Russo also found that "[Petitioner's] case is also distinguishable from *Gibson* because of the nature of the nondisclosed information in that case." App. 823. Specifically, in Petitioner's case, "the nature of the nondisclosed information was the existence of a deal between Epps and the State" and "[Plea Counsel] operated under the assumption that Epps had made some type of agreement with the State in exchange for his testimony[.]" App. 823 – 824.

Judge Russo further found that "the disclosure of any specifics regarding the agreement between Epps and the State would have been of limited impeachment value at [Petitioner's] trial", citing *United States v. Ruiz*, 536 U.S. 622 (2002). App. 825. Judge Russo noted, "During Graham's trial, Epps was thoroughly cross-examined as to the benefit he could receive from testifying for the State and was impeached on his potential bias." App. 825.

Finally, Judge Russo found "[Petitioner's] testimony at the evidentiary hearing indicates it was not just the testimony of Epps that influenced [Petitioner's] decision to stop his trial and plead guilty; [Petitioner] testified there was a second witness present to testify against him, which also influenced his decision." Therefore, Judge Russo found "that the 'Epps deal' is not material under *Brady*." App. 825.

This petition for writ of certiorari follows.

ARGUMENT

THE PCR COURT ERRED IN FINDING PETITIONER VOLUNTARILY PLED GUILTY BY ALSO FINDING THE PROSECUTORS DID NOT VIOLATE *BRADY v. MARYLAND* AND PETITIONER'S DUE PROCESS RIGHTS WHEN THE PROSECUTORS FAILED TO DISCLOSE A DEAL WITH A MATERIAL WITNESS AND FAILED TO CORRECT FALSE TESTIMONY OF THAT WITNESS AT TRIALS AGAINST PETITIONER'S CO-DEFENDANTS BEFORE AND AFTER HIS PLEA HEARING.

The Supreme Court of the United States has held, "Guilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results." *Brady v. United States*, 397 U.S. 742, 758, 90 S.Ct. 1463, 1474 (1970). An unsound result occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. *See Boykin v. Alabama*, 395 U.S. 238 (1969); *see also Berry v. State*, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009) (finding the difference "between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea.").

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." *Suber v. State,* 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). Specifically, "the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." *Holden v. State*, 393 S.C. 565, 572-74, 713 S.E.2d 611, 612-15 (2011).

"[A] defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case." *Gibson v. State*, 334 S.C. 515, 523, 514 S.E.2d 320, 324 (1999) (quotation citation omitted). "When a defendant lacks knowledge of material evidence in the prosecution's possession, the waiver of constitutional rights cannot be deemed knowing and voluntary." *Gibson*, 334 S.C. at 523, 514 S.E.2d at 324 (citing *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995)). Consequently, "[t]he 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", and a "defendant is entitled to make that decision with full awareness of favorable material evidence known to the government." *Gibson*, 334 S.C. at 523-524, 514 S.E.2d at 324 (quotation citation omitted).

In *Gibson v. State*, this Court held that an applicant "may challenge the voluntary nature of his guilty plea in a PCR action by asserting an alleged *Brady* violation." *Id.* at 523-524, 514 S.E.2d at 324 (citing *Carter v. State*, 329 S.C. 355, 495 S.E.2d 773 (1998)). "A *Brady* claim is based upon the requirement of due process" and "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. *Id.* (citing *Kyles v. Whitley*, 514 U.S. 419 (1995); *Brady v. Maryland*, 373 U.S. 83 (1963); and *State v. Von Dohlen*, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996)). Additionally, "***[t]his rule applies to impeachment evidence as well as exculpatory evidence.***" *Id.* (citing *United States v. Bagley*, 473 U.S. 667, 676 (1985) (emphasis added)).

This Court has recognized that there are three distinct categories of *Brady* violations: "(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.*, 334 S.C. at 524-525, 514 S.E.2d at 324-325 (citing *United States v. Agurs*, 427 U.S. 97, 103-107 (1976)). Notably, the *Gibson* Court found that "***[a] defendant who alleges a Brady violation in the first category, the prosecutor's use of perjured testimony, must clear a lower hurdle in proving materiality***" and noted that "***a conviction obtained by the knowing use of perjured testimony is fundamentally unfair***, and must be set aside if there is any reasonable

likelihood that the false testimony could have affected the outcome of the jury." *Id.*, 334 S.C. at 524-525 n. 4, 514 S.E.2d at 324-325 n. 4 (citing *United States v. Bagley*, 473 U.S. at 678)).

The *Gibson* Court adopted the standard applied by other courts for deciding the materiality of a *Brady* violation in the context of a guilty plea, "which essentially is the same standard that is applied in the context of a trial: ***A Brady violation is material when there is a reasonable probability that, but for the government's failure to disclose Brady evidence, the defendant would have refused to plead guilty and gone to trial.***" *Id.* at 525, 514 S.E.2d at 325 (citations omitted) (emphasis added). The *Gibson* Court further noted that "[t]he overriding theme of the *Brady* cases is the emphasis the Supreme Court has placed on the prosecutor's responsibility for fair play" and reiterated that "the prudent prosecutor will resolve doubtful questions in favor of disclosure." *Id.* (citing *Kyles v. Whitley*, 514 U.S. at 439-40 (quotes omitted) and *Berger v. United States*, 295 U.S. 78, 88 (1935)).

Discussion

In this case, the PCR Court erred in finding the prosecutors did not violate *Brady v. Maryland*, 373 U.S. 83 (1963) and Petitioner's due process rights. App. 817 – 826. Specifically, Petitioner is challenging the voluntary nature of his guilty plea in a PCR action by asserting a *Brady* violation. App. 625 – 630; App. 810 – 815. *See Gibson v. State*, 334 S.C. 515, 514 S.E.2d 320 (1999). Petitioner has presented evidence in the first category of *Brady* violations noted in *Gibson*: "[C]ases that include nondisclosed evidence of perjured testimony about which the prosecutor knew or should have known[.]" *Id.*, 334 S.C. at 524-525, 514 S.E.2d at 324-325 (citation omitted). App. 485 – 493; App. 819 – 821. Based on the testimony and arguments presented at the evidentiary hearings, Petitioner has satisfied the *Brady* analysis set forth in *Gibson*, 334 S.C. at 523-524, 514 S.E.2d at 324. *See Kyles v. Whitley*, 514 U.S. 419 (1995);

Brady v. Maryland, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); and *State v. Von Dohlen*, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996).

First, the *Brady* evidence was favorable to Petitioner. Specifically, the prosecutors failed to disclose the deal allowing co-defendant Epps to avoid a mandatory minimum sentence of ten years imprisonment in exchange for his testimony against his co-defendants and failed to correct Epps's false testimony at co-defendant Cochran's trial that he did not have a deal. App. 485 – 493; App. 819 – 821. Notably, Cochran's trial occurred prior to Petitioner's plea hearing, Petitioner was aware of Cochran's conviction, and Petitioner knew Epps was going to testify against him. App. 1 – 227; App. 465, ll. 15-19; App. 466, ll. 19-25; App. 470, l. 19 – 471, l. 1; App. 478 – 479; App. 737 – 741; App. 819 – 821. *See Gibson*, 334 S.C. at 523, 514 S.E.2d at 324 (finding "a defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case."). Therefore, disclosure of this evidence would have undermined Epps's credibility as a material witness against Petitioner, and the prosecutor admitted in Graham's closing argument that this case was dependent on the credibility of the State's witnesses and even highlighted Epps's credibility as a key witness. App. 391, l. 22 – 393, l. 17.

Second, the *Brady* evidence was in possession of and known to the prosecutors. Judge Russo granted co-defendant Graham's PCR application and found that "***the State certainly was aware that Epps was giving false testimony because the State had offered Epps the deal he denied.***" App. 492 (emphasis added). In PCR Court's Amended Order of Dismissal, Judge Russo noted that "Epps's defense attorney, . . . testified it was his belief after the meeting that the State [prosecutors] would reduce Epps's charge to something other than armed robbery so Epps could avoid the ten year mandatory minimum sentence." App. 821. *See also State v. Quattlebaum*,

338 S.C. 441, 527 S.E.2d 105 (2000) (noting our judicial system relies upon the integrity of the participants.).

Third, the prosecutors suppressed the *Brady* evidence by failing to reveal it. Specifically, Judge Russo granted co-defendant Graham's PCR application by finding that "***the State did not disclose this deal to Trial Counsel***" *and that* "***[t]he State never informed the Court or Trial Counsel that Epps had testified untruthfully.***" App. 487 – 488. *See Giglio v. United States*, 405 U.S. 150 (1972) (finding due process requires the disclosure of any promise of leniency even if it was not specific and "a prosecutor's deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice."); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("The principle that a State may not use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty does not cease to apply merely because the false testimony goes to the credibility of the witness."); and *Riddle v. Ozmint*, 369 S.C. 39, 48, 631 S.E.2d 70, 75 (2006) (finding "[t]he failure to correct false evidence is as reprehensible as its presentation.") (citation omitted)).

Finally, the PCR Court erred in finding the *Brady* evidence was not material. App. 825. Based on the favorable nature of the suppressed *Brady* evidence and Petitioner's testimony at the evidentiary hearings, there is a reasonable probability that, had the prosecutors disclosed this evidence, Petitioner would have chosen to proceed with the trial instead of pleading guilty and the result would have been different. App. 465, l. 15 – 471, l. 1; App. 737 – 741; App. 819 – 821. *See Gibson*, 334 S.C. at 524-525 n. 4, 514 S.E.2d at 324-325 n. 4 (noting "***[a] defendant who alleges a Brady violation in the first category, the prosecutor's use of perjured testimony, must clear a lower hurdle in proving materiality***") (citation omitted); *see also Riddle*, 369 S.C. at 44-45, 631 S.E.2d at 73 (finding "[t]he question is not whether petitioner would more likely have

been acquitted had this evidence been disclosed, but whether, without this impeachment evidence, he received a fair trial 'resulting in a verdict worthy of confidence.'") (quoting *Kyles v. Whitley*, 514 U.S. at 434)).

Furthermore, Petitioner initially proceeded to trial and did not plead guilty until after jury selection and opening statements. App. 228 – 291. Petitioner knew that Cochran had been found guilty and Epps was at the courthouse ready to testify against him. App. 284 – 286; App. 465, l. 15 – 471, l. 1. Same as in *Gibson*, instead of merely hoping to challenge Epps's credibility through cross-examination, Petitioner would have known about Epps's deal and false testimony and "could have challenged the prosecutor's effort to [call Epps as a witness for] impermissible solicitation of perjured testimony." *Gibson*, 334 S.C. at 527, 514 S.E.2d at 326.

Judge Russo's findings in Petitioner's PCR action are inconsistent with his findings in co-defendant Graham's PCR action. App. 485 – 493; App. 817 – 826. Specifically, the PCR Court erred in finding no constitutional violation occurred in Petitioner's PCR action based on Petitioner's decision to plead guilty versus going to trial with co-defendant Graham. App. 822 – 823. Petitioner did not plead guilty until after the jury was sworn; therefore, the prosecutors had an unequivocal duty to disclose the deal with Epps and his false testimony in co-defendant Cochran's trial. *See Giglio*, 405 U.S. 150. Additionally, Graham's PCR Order was based on the *Napue* violation and the *Brady* violation. App. 485 – 493.

The PCR Court also erred in finding Petitioner's PCR action is distinguishable from *Gibson v. State*. App. 823 – 825. Plea Counsel testified that she assumed Epps had a deal but "was never specifically told that Epps had a deal." App. 820. There is a critical difference between the impeachment value of a suspected deal and deal that is disclosed to the defense. Notably, there is no competent evidence in the record proving that Plea Counsel had anything

more than a suspicion of the prosecutor's deal with Epps. *See Gibson*, 334 S.C. at 523, 514 S.E.2d at 324 (holding "[w]hen a defendant lacks knowledge of material evidence in the prosecution's possession, the waiver of constitutional rights cannot be deemed knowing and voluntary.").

The PCR Court erred in finding that the disclosure of the deal between the prosecutors and Epps would have been of limited impeachment value at Petitioner's trial. App. 825. Specifically, "[t]he impeachment value of this [suppressed evidence] is clear" and is inconsistent with the PCR Court's decision to grant Graham's PCR application. App. 817 – 826. *Riddle*, 369 S.C. at 45, 631 S.E.2d at 74. At a minimum, Petitioner could have impeached Epps's testimony in front of the jury and moved for a mistrial (and to strike testimony if overruled). Notably, the collective impact of the undisclosed evidence is undeniable based on Cochran and Graham's convictions. *See Riddle*, 369 S.C. at 46, 631 S.E.2d at 74 (noting "[w]hen determining whether the suppression of more than one item of evidence was material under *Brady*, we consider the collective impact of the undisclosed evidence.") (citing *Kyles*, 514 U.S. at 436)).

The PCR Court further erred in relying on *United States v. Ruiz*, 536 U.S. 622 (2002) in support of its finding that the disclosure of the prosecutor's deal with Epps would have been of limited impeachment value. App. 825. Specifically, the rationale of the PCR Court is misplaced based on the following arguments presented in Petitioner's Motion to Alter or Amend:

(a) "*Ruiz* is factually distinguishable" because "[Petitioner's] trial had begun; therefore, *Giglio* should control this case";

(b) "The reasoning of the *Ruiz* [opinion] does not apply . . . because [Petitioner] had a greater knowledge of the prosecution's case at the time he pled; therefore, the duty to disclose impeachment information was a constitutional violation" because "[Petitioner] testified that he

pled after realizing that the State had transported Epps to testify";

(c) "The reasoning in *Ruiz* was based in part on the burden of requiring the prosecution to uncover and disclose impeachment information in advance of trial" when "the State had already tried one of [Petitioner's] codefendants" and had begun Petitioner's trial;

(d) "The Supreme Court reasoning in *Ruiz* is partially dependent on the safeguards provided under Rule 11 of the Federal Rules of Criminal Procedure and under Ruiz's written plea agreement" when "[Petitioner] did not have a written plea agreement."

App. 812 – 814.

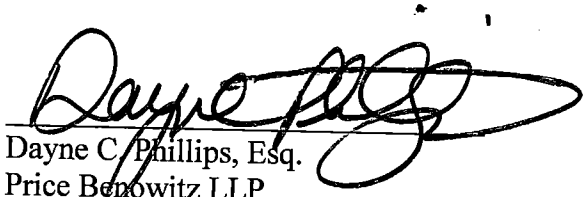
This Court has noted that a *Brady* violation is one type of prosecutorial misconduct, and "when a *Brady* violation is found, it is unnecessary for the judge to make an additional ruling on prosecutorial misconduct unless the prosecutor engaged in other types of misconduct not related to the *Brady* violation." *Gibson*, 334 S.C. at 528-529 n. 6, 514 S.E.2d at 327 n.6. Accordingly, Petitioner is not presenting any additional case law regarding the prosecutorial misconduct allegation.

The PCR Court erred in finding the prosecutors did not violate *Brady v. Maryland* and Petitioner's due process rights when the prosecutors failed to disclose a deal with Epps, a material witness, and failed to correct Epps's false testimony at trials against Petitioner's co-defendants, Cochran and Graham, before and after his plea hearing. Petitioner has been incarcerated since December 15, 2009, based on the South Carolina Department of Corrections website. Therefore, the PCR Court erred in finding Petitioner knowingly, voluntarily, and intelligently pled guilty. App. 817 – 826. *See Boykin*, 395 U.S. 238.

CONCLUSION

Based on the foregoing reasons, Petitioner Chazmonte Brown respectfully requests that this Court grant his Petition for Writ of Certiorari to allow full briefing on the issue presented.

Respectfully submitted,



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January 16, 2019

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
JAN 16 2019
S.C. SUPREME COURT

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2018-000849

Chazmonte Brown, Petitioner,

v.

State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

The undersigned Counsel certifies that a true copy of the Petition for Writ of Certiorari and Appendix (Volumes I and II) in this appeal have been served on Respondent, Assistant Attorney General Lindsey A. McCallister, at 1000 Assembly Street, Room 519, Columbia, SC 29201, on this 16th Day of January 2019.

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January 16, 2019

SWORN TO BEFORE ME this Sixteenth Day of January 2019

_____(L.S.)
Notary Public for South Carolina

My Commission Expires: My Commission Expires June 12, 2027

KENNETH WHITMIRE
NOTARY
PUBLIC
SOUTH CAROLINA