STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County

William P. Keesley, Circuit Court Judge

DAN WILLIAMS, II,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Did the PCR court err in determining that there was no showing of prosecutorial misconduct where the State made the guilty plea offer contingent upon Petitioner relinquishing his constitutional right to disclosure of the confidential informant's identity when the confidential informant was the sole participant in the drug transaction with Petitioner and was the key witness at Petitioner's trial?

II. Did the PCR court err in finding trial counsel provided effective assistance of counsel where Petitioner did not make a knowing and intelligent decision not to plead guilty when trial counsel failed to discover the confidential informant's identity prior to trial and erroneously advised Petitioner of the confidential informant's race?

STATEMENT

Indictment

On January 30, 2006, Petitioner Dan Williams was indicted by the Lexington County Grand Jury for distribution of crack cocaine, third or subsequent offense. App. 253–254.

Pre-trial

Trial counsel, James Snell, testified at the PCR evidentiary hearing that "*[t]he Solicitor's Office . . . withheld the identity of the* [confidential] *informant who was involved in the [drug transactions with* [Petitioner], *pending* [Petitioner's] *decision whether or not he wanted to accept the plea.*" App. 235, ll. 4-12. (emphasis added). Trial counsel further testified that Petitioner "turned down the [guilty plea] offer and requested that [trial counsel] obtain additional information regarding the confidential informant and his identity." App. 235, l. 4 – 236, l. 3. Additionally, trial counsel testified that he had Petitioner sign a document indicating that he understood the solicitor would "no longer entertain any plea negotiations" if he requested the confidential informant's identity. App. 236, ll. 8-16.

Trial

On April 4, 2007, Petitioner proceeded to trial before the Honorable R. Knox McMahon and a jury. App. 8–195. Petitioner was still represented by James Snell, and the State was represented by Robert Madsen and Christopher Samellas. Judge McMahon conducted a *Blair* hearing and found Petitioner competent to stand trial and to assist in his own defense. App. 23, l. 1 – 27, l. 14; 81, ll. 8-21.

Detective Bass

At trial, Detective Kenneth Travis Bass of the Lexington County Sheriff's Department stated that he paid the confidential informant, Ralph Farmer, to buy drugs from Petitioner on

November 22, 2005. App. 48, l. 7 – 52, l. 25. Detective Bass also stated that he placed an audio transmitting device (a wire) on the CI, and the CI rode in an unmarked vehicle with undercover officer, John Moore, to Petitioner's mobile home. App. 53, l. 24 – 55, l. 10. Detective Bass maintained that after the CI had completed the drug transaction with Petitioner, he recovered the crack-cocaine from Officer Moore and put it in a sealed plastic bag. App. 55, l. 20 – 60, l. 7. Detective Bass also maintained that he had previously used the CI "probably six to ten times" to buy drugs. App. 61, ll. 8-10.

On cross-examination, Detective Bass admitted that he did not witness the drug transaction because he was "half a mile away" from Petitioner's home. App. 64, l. 23 – 65, l. 2. Detective Bass also admitted that he knew the CI had criminal convictions for issuing fraudulent checks. App. 65, ll. 17-19.

Ralph Farmer (Confidential Informant)

Ralph Farmer also testified at trial that he worked as a CI for detectives Bass, Moore, and Koon, of the Lexington County Sheriff's Department. App. 67, ll. 10-20. The CI also testified that he worked as a CI on "[t]wenty or more" cases for Lexington County Sheriff's Department. App. 68, ll. 9-12. The CI further testified that "the target" of the drug transaction was "Bubba Dan," and he identified Petitioner as "Bubba Dan." App. 69, ll. 5-21; 75, ll. 24-25.

Furthermore, the CI then explained how the drug transaction occurred: "I walked straight up to the door . . . [Petitioner] was standing in the door . . . I told him what I wanted . . . He gave [crack-cocaine] to me . . . I gave him the money and turned around and got back in the car" and gave the crack-cocaine to Officer Moore. App. 73, l. 4 – 74, l. 19.

On cross-examination, trial counsel indicated that he had not previously met with or spoken to the CI, and the CI confirmed that they had not previously met each other. App. 76, ll. 6-9. The

CI confirmed that, although he had been a CI approximately twenty times, this was his first time testifying in a court. App. 79, ll. 9-16. The CI also admitted that he had been convicted for "three counts of drawing and uttering a fraudulent check." App. 79, ll. 22-25.

Officer Moore

Officer Moore also testified for the State, and stated that he was sitting in the undercover vehicle approximately twenty-five to thirty feet away from the CI, who was standing at the back door of Petitioner's mobile home. App. 96, ll. 1-12. Officer Moore also stated that although it was dark outside, "the lighting from the back porch and the lighting from inside the house illuminated [Petitioner] where [he] could see [Petitioner]." App. 96, l. 22 – 97, l. 1. Officer Moore further stated that the CI returned to the vehicle.

Verdict and Sentence

On April 5, 2007, the jury found Petitioner guilty of distribution of crack cocaine. App. 185, ll. 7-19; 255. Judge McMahon subsequently sentenced Petitioner to twenty-one years imprisonment. App. 192, ll. 4-9; 256. A timely Notice of Appeal was filed on Petitioner's behalf.

Direct Appeal

On July 2, 2008, an *Anders* brief was filed by Wanda Carter of the Office of Appellate Defense on Petitioner's behalf. App. 196–206. The South Carolina Court of Appeals subsequently dismissed Petitioner's direct appeal in an unpublished opinion on October 15, 2009. *State v. Williams*, Op. No. 2009-UP-486, filed on October 15, 2009). App. 207–208.

PCR Application and Hearing

On December 7, 2009, Petitioner filed his PCR application requesting relief. App. 209–213. The State filed its Return on March 4, 2010. App. 214–217. A PCR evidentiary hearing was held at the Lexington County Courthouse before the Honorable William P. Keesley on May 18, 2011.

App. 218–241. Petitioner was represented by Charles T. Brooks, III, and the State was represented by Kaelon May of the South Carolina Attorney General's Office. Petitioner and his trial counsel, James Snell, testified at the evidentiary hearing.

Dan Williams (Petitioner)

At the evidentiary hearing, Petitioner testified that the solicitor offered him a plea deal. App. 225, ll. 4-7. However, Petitioner testified that trial counsel told him, "*[t]he Solicitor won't show you* . . . [who the CI's identity] *unless you take a jury trial.*" App. 225, ll. 9-11. (emphasis added). Petitioner then testified that he explained to trial counsel, "*if I can't see* [the CI], *I'd rather take a jury trial.*" App. 225, ll. 14-15. (emphasis added). Petitioner subsequently argued that trial counsel provided ineffective assistance of counsel for not showing him the discovery. App. 226, ll. 11-14.

Furthermore, Petitioner testified that trial counsel told him the solicitor had "a tape" of Petitioner selling crack-cocaine to a forty year old "black man." App. 225, l. 21 – 227, l. 23. Petitioner also testified at the evidentiary hearing that he told trial counsel that he did not sell crack-cocaine to "a black man." App. 225, l. 25 – 226, l. 2. However, Petitioner testified that he found out at trial the CI was actually "a white man." App. 227, ll. 24-25. Petitioner subsequently testified that disclosure of the CI's identity "would have made a big difference" because, had he known the CI was "a white man," he would have taken the plea offer. App. 225, l. 16 – 228, l. 25. Petitioner also testified that without knowing the identity of the State's main witness, he could not have made an intelligent decision to plead guilty. App. 229, ll. 3-10.

On cross-examination, Petitioner testified that the first time he saw his discovery was at trial. App. 230, ll. 5-20. Petitioner also acknowledged that he was guilty of selling drugs. App. 230, ll. 21-24.

James Snell (Trial Counsel)

At the evidentiary hearing, trial counsel maintained that at the time of the plea offer, he provided Petitioner with "the standard paper discovery." App. 234, l. 22 – 235, l. 3. However, trial counsel testified that "*[t]he Solicitor's Office . . . withheld the identity of the* [confidential] *informant who was involved in the* [drug transactions with Petitioner], *pending* [Petitioner's] *decision whether or not he wanted to accept the plea* [offer] on the basis that once the informant's identity was revealed, they were concerned, number one, that is personal safety may be jeopardized; and, number two, his usefulness to law enforcement in further operations would be jeopardized." App. 235, ll. 4-12. (emphasis added).

Furthermore, trial counsel testified that Petitioner "turned down the [plea] offer and requested that [he] obtain additional information regarding the confidential informant and his identity."[1] App. 235, l. 25 – 236, l. 3. Trial counsel also stated that Petitioner "*understood that by requesting that information . . . the policy of the Solicitor's Office would be that they would pull all offers off the table, and he would be going to trial.*" App. 236, ll. 3-16. (emphasis added). Trial counsel noted that he "had concerns regarding [Petitioner's] . . . understanding of his case" because he faced life without parole and did not accept the plea offer. App. 236, ll. 17-23.

On cross-examination, trial counsel stated that he filed the "standard discovery motions" and had "at least 20 meetings" with Petitioner about his case. App. 238, ll. 16-17. Trial counsel also stated that prior to trial he spoke to "one of the police officers involved in the case," who he thought was "the main investigating officer." App. 239, ll. 7-15. Trial counsel further noted that Petitioner did not provide him with any possible defense witnesses. App. 239, ll. 11-14.

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[1] Trial counsel testified that he had Petitioner sign a document indicating that he understood the solicitor would "*no longer entertain any plea negotiations*" if he requested the confidential informant's identity. App. 236, ll. 8-16. (emphasis added).

Order of Dismissal

On July 1, 2011, Judge Keesley found in his Order of Dismissal that Petitioner failed to prove trial counsel provided ineffective assistance of counsel or prosecutorial misconduct and denied Petitioner PCR relief. App. 242 – 250. Judge Keesley also found that Petitioner "failed to directly address his claim of ineffective assistance of counsel due to the alleged false testimony of a witness and counsel's supposed knowledge of such." App. 246. However, Judge Keesley determined that the "major assertion presented at the PCR hearing was that trial counsel was ineffective in failing to share and review the discovery with [Petitioner], *thereby preventing* [him] *from making a knowing and intelligent decision about whether to accept a plea bargain that was offered by the State.*" App. 246. (emphasis added).

Ineffective Assistance of Counsel

Judge Keesley found that *"[i]t was made clear to the* [Petitioner] *and counsel that, if the State had to disclose the name of the confidential informant, there would be no plea bargain and* [Petitioner's] *cases would be called for trial.*" App. 246. (emphasis added). Judge Keesley also noted that the "State informed counsel and [Petitioner], that the State wanted to be able to use that confidential informant for other transactions." App. 246.

Judge Keesley acknowledged that "the State may be compelled to reveal an informant's identity where the informant is either an active participant in a criminal transaction or a material witness to the question of the defendant's guilt or innocence and cited *State v. Batson*, 261 S.C. 128, 198 S.E.2d. 517 (1973). App. 247. Judge Keesley further indicated that "the trial court must balance the public's interest in perpetuating the flow of vital information to law enforcement officials against the right of the individual to prepare his defense" and cited *State v. Bultron*, 318 S.C. 323, 457 S.E.2d 616 (Ct. App. 1995). App. 247.

Judge Keesley found that, "*[e]xcept for the identity of the confidential informant,* [Petitioner] *could not point to any specific matters counsel failed to discover such that there is a reasonable probability the result of the proceeding would have been different*" and that Petitioner "was properly advised of the facts and circumstances surrounding his case, such that [Petitioner] *was able to make a knowing and intelligent decision whether to accept the State's plea offer.*" App. 248. (emphasis added).

Additionally, Judge Keesley found that Petitioner "failed to prove that trial counsel told [Petitioner] the confidential informant was black" and that even if trial counsel did tell Petitioner the confidential informant was black, "*there is no indication that trial counsel was repeating something different than what he had been told and there is no evidence that the allegedly incorrect information was anything other than a mistake.*" App. 249. (emphasis added).

Due Process Violation

Furthermore, Judge Keesley found that "*the State was acting within its province in withholding disclosure of the informant's identity in exchange for the plea bargain*" and that "*there has been no showing of prosecutorial misconduct.*" App. 249. (emphasis added).

This petition for a writ of certiorari follows.

ARGUMENT

I. The PCR court erred in determining that there was no showing of prosecutorial misconduct because the State made the guilty plea offer contingent upon Petitioner relinquishing his constitutional right to disclosure of the confidential informant's identity when the confidential informant was the sole participant in the drug transaction with Petitioner and was the key witness at Petitioner's trial.

The State engaged in deliberate prosecutorial misconduct because the solicitor made the guilty plea offer contingent upon Petitioner relinquishing his constitutional right to disclosure of the CI's identity when the CI was the *sole participant* in the drug transaction with Petitioner and was the key witness at Petitioner's trial. App. 225, ll. 4-15; 235, l. 4 – 236, l. 23; *See State v. Craig*, 267 S.C. 262, 265, 227 S.E.2d 306, 308 (1976) (finding "[a]s a general rule, conduct of the prosecutor calculated to arouse prejudice against the accused, and to prevent him from having a fair trial will not be tolerated."). Accordingly, the PCR court erred in determining that there was no showing of prosecutorial misconduct. App. 242–250; *See State v. Quattlebaum,* 338 S.C. 441, 449, 527 S.E.2d 105, 109 (2000) (finding deliberate prosecutorial misconduct raises an irrebuttable presumption of prejudice); *see also* Rules 3.4 and 3.8 of Rule 407, SCACR.[2]

Furthermore, on March 1, 2004, Chief Justice Jean Hoefer Toal stated in her Memorandum to "All Solicitors" that "*it is unethical to premise a plea agreement on the defendant relinquishing the right to discovery in criminal cases.*" (emphasis added). Furthermore, "[t]his practice is going to *have adverse consequences in the future with claims of ineffective assistance of counsel* based on a claim that the plea was not voluntary because the applicant did not have access to the solicitor's file." (emphasis added). Chief Justice Toal

[2] Petitioner recognizes that in *State v. Inman*, n. 18. Op. No. 27081, 2011 WL 6821079 (S.C. Dec. 28, 2011), *reh'g denied*, (Jan. 25, 2012), this Court held that the irrebuttal presumption of prejudice only applies when the prosecutorial misconduct affects the attorney-client privilege. However, it is clear beyond cavil that the Order of Chief Justice Toal from 2004 was blatantly disregarded during this 2006 case.

instructed: "*any solicitors who are currently pursuing this practice to stop immediately.*" (emphasis added).

This Court's decision in *Gibson v. State*, 334 S.C. 515, 514 S.E.2d 320 (1999) provides a general framework from which to provide Petitioner PCR relief. In *Gibson*, 334 S.C. at 523-24, 514 S.E.2d at 324, this Court held that when the State withholds *Brady* material prior to the entry of a defendant's guilty plea, a defendant is able to challenge the knowing, voluntary, and intelligent waiver his constitutional trial rights. *See generally Brady v. Maryland*, 373 U.S. 83 (1963). This Court also established in *Gibson* the standard for deciding the materiality of a *Brady* violation in the context of a guilty plea: "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.

A. The State was Required by Due Process to Disclose the CI's Identity Prior to Trial

Furthermore, "[a] *Brady* claim is based upon the requirement of due process," and a *Brady* violation occurs when: "(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." *Gibson*, 334 S.C. at 524, 514 S.E.2d at 324 (citing *Kyles v. Whitley,* 514 U.S. 419, 432-42 (1995); *Brady,* 373 U.S. at 87; *State v. Von Dohlen,* 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996)). The same rationale behind the four-prong *Brady* test should be applied in this case because this analysis will determine when the State is required by due process to disclose the CI's identity. The four-prong test is applied as follows.

i. The CI's Identity was Vital in Petitioner's Decision Not to Plead Guilty

In this case, Petitioner testified at the PCR evidentiary hearing that he told trial counsel, "*if I can't see* [any] *evidence, I'd rather take a jury trial.*" App. 225, ll. 14-15. (emphasis added).

Petitioner also testified at the evidentiary hearing that trial counsel told Petitioner the solicitor had "a tape" of him selling crack-cocaine to a forty year old "black man." App. 225, l. 21 – 227, l. 23. Petitioner further testified that he then explained to trial counsel he did not sell crack-cocaine to "a black man" and that he found out at trial the CI was actually "a white man." App. 225, l. 25 – 227, l. 25.

Furthermore, trial counsel testified that Petitioner "turned down the [guilty plea] offer and requested that [trial counsel] obtain additional information regarding the confidential informant and his identity." App. 235, l. 4 – 236, l. 3. Petitioner also testified that disclosure of the CI's identity "would have made a big difference" because, had he known the CI was a white man, he would have taken the plea offer. App. 225, l. 16 – 228, l. 25. Accordingly, the CI's identity was vital to Petitioner's decision not to plead guilty. *See Gibson*, 334 S.C. at 524, 514 S.E.2d at 324 (citing *Kyles,* 514 U.S. at 432-42; *Brady,* 373 U.S. at 87; *Von Dohlen,* 322 S.C. at 241, 471 S.E.2d at 693).

ii. The Solicitor Knew the CI's Identity

Moreover, the solicitor knew the CI's identity prior to trial for three reasons. First, both trial counsel and Petitioner testified at the evidentiary hearing that the solicitor made the guilty plea offer contingent upon Petitioner relinquishing his constitutional right to disclosure of the CI's identity. App. 225, ll. 4-15; 235, ll. 4-12. Second, the CI testified at Petitioner's trial as the State's key witness. App. 66, l. 15 – 80, l. 9. Finally, the CI's identity was legally imputed to the solicitor. *See Kyles*, 514 U.S. at 437 (finding "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police."); *see also Von Dohlen*, 322 S.C. at 240, 471 S.E.2d at 693 (finding information known to investigative agencies may be imputable to prosecutor). Accordingly, the solicitor knew or

should have known the CI's identity prior to trial. *See Gibson*, 334 S.C. at 524, 514 S.E.2d at 324.

iii. The Solicitor Deliberately Suppressed the CI's Identity

Trial counsel testified at the evidentiary hearing that "[t]he Solicitor's Office . . . withheld the identity of the informant who was involved in the controlled buys, pending [Petitioner's] decision whether or not he wanted to accept the plea." App. 235, ll. 4-12. Petitioner's testimony at the evidentiary hearing corroborated that the solicitor was forcing him to make a unconstitutional choice. App. 225, l. 4 – 229, l. 10. Accordingly, the solicitor deliberately suppressed the disclosure of the CI's identity. *See State v. Quattlebaum*, 338 S.C. at 450, 527 S.E.2d at 110 (provides that this Court "will not tolerate deliberate prosecutorial misconduct which threatens rights fundamental to liberty and justice"); *see also State v. Craig*, 267 S.C. at 265, 227 S.E.2d at 308 (provides that "[a]s a general rule, conduct of the prosecutor calculated to arouse prejudice against the accused, and to prevent him from having a fair trial will not be tolerated").

iv. Petitioner was Entitled to Disclosure of the Confidential Informant's Identity

In *State v. Batson*, 261 S.C. 128, 134-36, 198 S.E.2d 517, 520-21 (1973), this Court held that a request to disclose the identity of a CI "should be made prior to the commencement of the trial" and "the burden is on the accused to show facts and circumstances giving rise to an exception to the privilege of disclosure." The United States Supreme Court has recognized that "[w]here the disclosure of an informer's identity . . . is relevant and helpful to the defense of an accused, or is essential to a fair determination of a case, the privilege must give way." *Roviaro v. United States,* 353 U.S. 53 (1957) (reversing conviction where the informant and defendant were the sole participants, and the government refused to reveal the informant's identity); *Cf. State v. Burns*, 294 S.C. 338, 368, 364 S.E.2d 465 (1988) (finding defendant must be afforded a reasonable

opportunity to locate the informant after the identity is revealed); *State v. Hinson*, 293 S.C. 406, 361 S.E.2d 120 (1987) (finding the prosecution must "reveal the deal" between the State and a witness before trial regarding impeachment information).

Furthermore, this Court has held that "[p]ublic policy considerations for nondisclosure of an informant's identity are absent where the informant openly participates in the criminal transaction." *State v. Diamond*, 280 S.C. 296, 299, 312 S.E.2d 550, 551 (1984); *See McLawhorn v. North Carolina,* 484 F.2d 1 (4th Cir.1973) (finding disclosure is required where an informant is an actual participant, particularly where he sets up the criminal transaction); *see also State v. Blyther*, 287 S.C. 31, 33, 336 S.E.2d 151, 152-53 (Ct. App. 1985) (finding "where . . . the informant is either a material witness to the crime or directly participates in it, disclosure may be required, particularly where, in a drug related crime, he is the only witness to the transaction other than the buyer and the defendant"). (internal citation omitted).

In this case, the State had an obligation to disclose the CI's identity: (1) Petitioner requested disclosure of the CI's identity prior to trial; (2) the CI was the sole participant in the drug transaction for which Petitioner was arrested; and (3) the CI was a material witness. App. 48, l. 7 – 97, l. 1; 235, l. 25 – 236, l. 3; *See Roviaro v. United States,* 353 U.S. 53; *see also Batson*, 261 S.C. at 136, 198 S.E.2d at 521; *Diamond*, 280 S.C. at 299, 312 S.E.2d at 551; *Blyther*, 287 S.C. at 33, 336 S.E.2d at 152-53; *Cf. Giglio v. United States*, 405 U.S. 150, 154 (1972) (finding "when the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within the general rule [of *Brady*]") (internal quotations omitted); *compare with United States v. Ruiz*, 536 U.S. 622 (2002) (distinguishable from this case because the confidential informant did not participate in or witness a hand-to-hand drug transaction and involved a separate issue).

v. Disclosure of the CI's Identity was Required Prior to Trial

Moreover, "while the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Lounds*, 380 S.C. 454, 460, 670 S.C. 646, 649 (2008) (internal quotations omitted). "In assessing the reasonableness of an attorney's investigation, . . . a[n appellate] court must not only consider the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527 (2003); *See McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) (finding "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State").

Returning to *Gibson*, 334 S.C. at 523, 514 S.E.2d at 324, this Court noted that "a defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case." (citation omitted). The *Gibson* Court further noted that "[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 . . . The defendant is entitled to make that decision with full awareness of favorable material evidence known to the government." *Gibson* at 524, 514 S.E.2d at 324 (quotation omitted). *See generally* Rule 5(a)(1)(C), SCCrimP, (requiring the State to disclose all evidence it plans to introduce at trial and all evidence necessary for a defendant to prepare his defense).

In this case, both Petitioner and his trial counsel were adversely affected by the solicitor's deliberate decision to make the guilty plea offer contingent upon Petitioner relinquishing his

constitutional right to disclosure of the CI's identity. Specifically, the solicitor's unconstitutional ultimatum prevented trial counsel from performing his duty to interview potential witnesses and to conduct a reasonable investigation. *See Wiggins*, 539 U.S. at 527; *see also Lounds*, 380 S.C. at 460, 670 S.C. at 649; *McKnight*, 378 S.C. at 46, 661 S.E.2d at 360. The forbidden choice that the solicitor improperly forced upon Petitioner also prevented him from making a knowing, voluntary, and intelligent decision not to waive his constitutional trial rights. *Cf. Gibson*, 334 S.C. at 523, 514 S.E.2d at 324; *State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980) (finding the record must reflect that the defendant freely and intelligently waived his constitutional trial rights and had a full understanding of the consequences of the plea).

Accordingly, the State was required by due process to disclose the CI's identity prior to trial because the CI's identity constituted material discovery necessary for the preparation of Petitioner's defense and for him to "freely and intelligently" decide to plead guilty or to invoke his constitutional right to trial. *See generally Gibson*, 334 S.C. 515, 514 S.E.2d 320; *Roviaro,* 353 U.S. 53; *Diamond*, 280 S.C. at 299, 312 S.E.2d at 551; *Quattlebaum,* 338 S.C. 441, 527 S.E.2d 105.

B. The State's Unconstitutional Ultimatum Equates to Deliberate Prosecutorial Misconduct

In *State v. Thrift*, 312 S.C. 282, 440 S.E.2d 341, 346 (1994), this Court held:

> [T]he South Carolina Constitution [Article V, §24] and South Carolina case law [citations omitted] place the unfettered discretion to prosecute solely in the prosecutor's hands. . . The Judicial Branch is not empowered to infringe on the exercise of this prosecutorial discretion; however, on occasion, it is necessary to review and interpret the results of the prosecutor's actions.

Additionally, "[p]rosecutors are ministers of justice and . . . are held to the highest standards of professional ethics[;]" therefore, this Court "will not tolerate deliberate prosecutorial misconduct

which threatens rights fundamental to liberty and justice." *Quattlebaum*, 338 S.C. at 450, 527 S.E.2d at 110. *Cf. Gibson v. State*, 334 S.C. 515, 514 S.E.2d at 327 (emphasis added) (finding "the prudent prosecutor will resolve doubtful questions in favor of disclosure . . . . Such disclosures will serve to justify trust in the prosecutor as the representative . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done"); *State v. Inman*, n. 18. Op. No. 27081, 2011 WL 6821079 (S.C. Dec. 28, 2011), *reh'g denied*, (Jan. 25, 2012) (noting "this Court is concerned with the 'win at all costs' attitude that appears to permeate the Solicitor's office").

In this case, from the quasi-judicial role as a minister of justice, the solicitor deliberately committed prosecutorial misconduct by making the guilty plea offer contingent upon Petitioner relinquishing his constitutional right to disclosure of the CI's identity when the CI was the sole participant in the drug transaction with Petitioner and was the key witness at Petitioner's trial. App. 48, l. 7 – 97, l. 1; 225, l. 4 – 236, l. 16; *See Craig*, 267 S.C. at 265, 227 S.E.2d at 308 (1976) (finding "[a]s a general rule, conduct of the prosecutor calculated to arouse prejudice against the accused, and to prevent him from having a fair trial will not be tolerated"); *see also In re Richland County Magistrate's Court*, 389 S.C. 408, 411, 699 S.E.2d 161, 163 (2010) (finding a prosecutor "occupies a quasi-judicial position, whose sanctions and traditions he should preserve . . . [i]n carrying out his duty, the prosecutor independently decides whether to prosecute, decides what evidence to submit to the court, and negotiates the State's position in plea bargaining"). This is because the unconstitutional ultimatum "threatens rights fundamental to liberty and justice."

Therefore, the PCR court erred in determining that there was no showing of prosecutorial misconduct. App. 242–250.

II. The PCR court erred in finding trial counsel provided effective assistance of counsel because Petitioner did not make a knowing and intelligent decision not to plead guilty when trial counsel failed to discover the confidential informant's identity prior to trial and erroneously advised Petitioner of the confidential informant's race?

Petitioner did not make "a knowing and intelligent decision" not to plead guilty when trial counsel failed to discover the CI's identity prior to trial and erroneously advised Petitioner of the confidential informant's race. App. 225, l. 21 – 229, l. 10; 248; *See Strickland*, 466 U.S. at 691 (finding "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations necessary"); *Alexander v. State*, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991) (finding constitutionally defective performance is found when defense counsel offers erroneous advice concerning an issue that is central to the defendant's decision to plead guilty); *see also Lounds*, 380 S.C. at 460, 670 S.C. at 649 (finding "while the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." (internal quotations omitted). Thus, the PCR court erred in finding trial counsel provided effective assistance of counsel. App. 242–250; *See Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the standard for ineffective assistance of counsel claims).

To establish ineffective assistance of counsel, the Petitioner must satisfy the two-prong test set forth in *Strickland*, 466 U.S. 668. "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Cherry v. State,* 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). "The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the presumption

that counsel was effective in order to receive relief." *Id.* at 118, 386 S.E.2d at 625 (internal citations omitted).

Therefore, where ineffective assistance of counsel is alleged as a ground for PCR relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon 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 692).

Deficient Performance

In this case, trial counsel's performance was constitutionally deficient for two reasons. First, trial counsel erroneously advised Petitioner that the CI the solicitor had "a tape" of Petitioner selling crack-cocaine to a forty year old "black man." App. 225, l. 21 – 227, l. 23. To his detriment, Petitioner found out at trial that the CI was actually "a white man." App. 227, ll. 24-25. *See Alexander*, 303 S.C. at 542, 402 S.E.2d at 485. Second, trial counsel failed to discover the CI's identity prior to trial, so there was no way for Petitioner to know whether he sold drug the CI drugs. *See Wiggins v. Smith*, 539 U.S. 510, 527 (2003) (finding "[i]n assessing the reasonableness of an attorney's investigation, . . . a court must not only consider the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further").

Prejudice

As to prejudice, Petitioner testified that had he known the CI was "a white man," he would have taken the plea offer. App. 225, l. 16 – 228, l. 25; *See Alexander*, 303 S.C. at 542, 402 S.E.2d at 485. Petitioner testified that without knowing the identity of the State's main witness, he did not knowingly and intelligently decide not to plead guilty. App. 229, ll. 3-10; *See McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) (finding "[a] criminal defense attorney has the duty

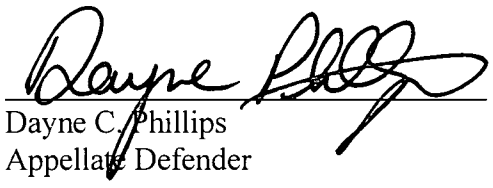
to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State"). Accordingly, there is a reasonable probability that had trial counsel discovered the CI's identity prior to trial and did not misadvise Petitioner as the CI's race, Petitioner would have pleaded guilty instead of going to trial. *See Cherry,* 300 S.C. 115, 386 S.E.2d 624.

Therefore, the PCR court erred in finding that trial counsel provided effective assistance of counsel. App. 242–250; *See Strickland v. Washington*, 466 U.S. 668; *see also Butler v. State*, 286 S.C. at 442, 334 S.E.2d at 814.

CONCLUSION

Based on the foregoing reasons, Dan William's petition for writ of certiorari should be granted in order to allow full briefing on the issue.

Respectfully submitted,



Dayne C. Phillips
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of January, 2012.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County

William P. Keesley, Circuit Court Judge

DAN WILLIAMS, II,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Kaelon E. May, Esquire this 30th day of January, 2012.

Dayne C. Phillips
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 30th day
of January, 2012.

(L.S.)
Notary Public for South Carolina

My Commission Expires: June 21, 2020