THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

Appeal from Horry County Court of Common Pleas
The Honorable William H. Seals, Jr. Circuit Court Judge

2020-000517

Domenic Merino, #350098.....Petitioner,

v.

State of South Carolina,.....Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the court err in not finding ineffective assistance of counsel where the State did not disclose all information required pursuant to Rule 5 SCRCrimP until after the expiration of a plea offer and trial counsel failed to argue Rule 5 SCRCrimP in a motion to reinstate the plea offer as a ground for reinstating the plea offer, failed to file a motion to reconsider and failed to argue Rule 5 SCRCrimP in his direct appeal?

STANDARD OF REVIEW

The applicant has the burden of proving the allegations in his PCR application. *Bannister v. State*, 333 S.C. 298, 302, 509 S.E.2d 807, 809 (1998). "A PCR judge's findings will not be upheld if such findings are not supported by probative evidence." *Gallman v. State*, 307 S.C. 273, 277, 414 S.E.2d 780, 782 (1992) (citations omitted). The Court will also defer to the PCR court's findings on matters of credibility. *Simuel v. State,* 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). In contrast, questions of law are reviewed de novo. *Lomax v. State*, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008).

STATEMENT OF THE CASE
Procedural

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Petitioner was indicted at the January 2014 term of the Horry County Grand Jury for burglary, first degree (2014-GS-26-00323) and kidnapping (2014-GS-26-00322). Petitioner was subsequently indicted at the January 2015 term for armed robbery (2015-GS-26-00361). Ralph J. Wilson, Jr., Esquire, represented Petitioner, and Thomas Groom Terrell, III, of the Fifteenth Circuit Solicitor's Office prosecuted the case. On April 20, 2015, Petitioner pled guilty to kidnapping, first degree burglary, and armed robbery before the Honorable Benjamin H. Culbertson, who sentenced Petitioner to concurrent terms of twenty-two years' incarceration for each charge.

Petitioner filed a timely notice of appeal. By order filed October 22, 2015, the South Carolina Court of Appeals dismissed Petitioner's appeal pursuant to Rule 203(d), SCACR. *State v. Merino*, App. Case No. 2015-000958 (Ct. App. Oct. 22, 2015). The Remittitur was issued on November 10, 2015.

On September 19, 2016, Petitioner filed his PCR application *pro se*, raising the following allegations: "Counsel was ineffective in that Counsel failed to investigate. Counsel was ineffective in that he failed to investigate Carl Thomas."[1] Respondent filed a Return and Motion for More Definite Statement on July 10, 2017. Represented by William G. Yarborough III, Esquire, Petitioner amended his application to add the following allegations:

> I. Pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984) Petitioner was denied his Sixth Amendment right to the effective assistance of counsel due to counsel's failure to provide discovery materials under Rule 5.
>
> a. Statements were made by material witnesses that were Rule 5 material that had never been turned over to the Petitioner before trial. Had Petitioner been advised of these statements by counsel prior to the trial, the Petitioner could have had the

[1] Carl Thomas is a codefendant.

opportunity to refute the statements, plan for defense witnesses to refute those statements, and...to enter into a knowingly and voluntarily plea negotiation with the State as a resolution. In the alternative, the Petitioner would have been able to make an informed and voluntary decision and may have continued on with the trial in lieu of entering a guilty plea. *Roscoe v. State*, 345 S.C. 16, 546 S.E.2d 4 I 7 (200I).

b. The State made available a plea offers to the Petitioner concerning each of the charges. The original plea offer was thirteen (13) years. Although the S.C. Code Ann. Section 16-11-311 states the penalty is life imprisonment or not less than fifteen (15) years, again, the Petitioner was made an offer of thirteen (13) years. Based on the negotiation phase, there is no way to ensure that the Petitioner was even remotely capable of entering into any plea voluntarily, knowingly, and intelligently at that point, as is required by *Boykin v. Alabama*, 395 U.S. 238 (1969), and the South Carolina Supreme Court requires that a defendant must be made aware of the nature and [crucial] elements, such as any maximum and minimum penalties and the nature of the constitutional rights being waived. *Pittman v. State*, 337 S.C. 599, 524 S.E.2d 624 (1999); *Dover v. State*, 304 S.C. 433, 405 S.E.2d 391 (1991).

c. Pursuant to *Evitts v. Lucey*, 469 U.S. 387 (1985), "a defendant is constitutionally entitled to the effective assistance of appellate counsel." Petitioner will show that his direct appeal was abandoned. Petitioner will show that he was deprived of his constitutional right to appeal as a direct correlation to counsel's deficient performance and that the Petitioner was unquestionably prejudiced by that deficiency. *Gilchrist v. State*, 364 S.C. 173, 612 S.E.2d 702 (2005).

Respondent filed an Amended Return and Partial Motion to Dismiss on April 16, 2018. An evidentiary hearing was held before the Honorable William G. Seals, Jr. on October 8, 2019. William G. Yarborough III, Esquire represented Petitioner. Assistant Attorney General Johnny E. James, Jr. appeared for Respondent. Judge Seals denied the PCR Application by Order dated January 7, 2019[2] and filed on January 15, 2020.

This petition follows.

[2] The 2019 date is clearly a scriveners error and should be 2020.

Factual

Petitioner was charged with several offenses along with several other individuals[3] in connection with a drug-related robbery in Horry County on September 4, 2013. (App. pp. 207 – 208). At the joint plea hearing of Petitioner and Codefendants Saitta and Cooper, the State maintained that the group had formulated a plan to rob Christopher Kapalka, a well-known drug dealer in the area.[4] Kapalka was then living with his girlfriend Brittany and her grandmother, Katy Smith, at Smith's home. The group's plan was to meet up with Kapalka on the false premise that they wished to buy drugs from him. When the group subsequently could not reach Kapalka by phone, a decision was made to go by his house. The group saw no cars parked in the driveway and thus believing no one was home, they decided to break in instead of the initial plan through a side door. The group wore masks and carried guns as they made their way through the home. Unbeknownst to them, Smith was home in bed at the time. The group panicked upon finding a terrified Ms. Smith in her bedroom. The State asserted that the group tied her up and brought her room to room, demanding "'Where's the money? Where's the money?'". They took approximately $220.00 from Ms. Smith's purse, a TV, a rifle, and an Xbox from the house. At the plea hearing, the defendants disputed as to whom came up with the ultimate idea to break in, as well as whom was present and actually entered the home. The group was quickly apprehended and arrested, and except for Codefendant Martin,[5] Petitioner and the rest of the group were all charged with first-degree burglary, kidnapping, and armed robbery. (App. p. 106; pp. 164 – 167). Ralph J. Wilson, Jr., Esquire,[6] represented Petitioner. Horry County Assistant Solicitor Thomas Groom Terrell, III prosecuted the case.

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[3] Including Kyla Saitta, Shannon De Vante Cooper, Paige Martin, and Carl Thomas.
[4] Kalpalka was subsequently charged with drug offenses.
[5] Codefendant Martin was charged with burglary.
[6] Hereinafter referred to as "Counsel".

Codefendant Thomas began cooperating with law enforcement their group's arrest. In his assistance to law enforcement, Thomas made a recorded statement to investigators on July 23, 2014 that detailed the events as well as the individual involvement and relative roles of Petitioner and the other codefendants. Co-defendant Thomas had not previously made any statement to law enforcement since the group's arrest in September 2013. Codefendants Martin and Saitta had also made statements to law enforcement; however, neither statement even placed Petitioner at the scene. Codefendant Thomas's charges were dismissed as *nolle prosequi*.

A month or so later in August 2014, the State extended a plea offer to Petitioner in which he would plead guilty to kidnapping in exchange for a thirteen (13) year sentencing recommendation by the State, as well as the dismissal of all of his other charges. (App. p. 131). The State extended similar offers to Codefendants Saitta and Cooper. Applicant's plea offer expired in February 2015 and his case was set for joint trial with Codefendants Saitta, Cooper, and Martin.

It was not until a trial-status conference on March 23, 2015 that Counsel and the other attorneys learned for the first time that Codefendant Thomas had made a recorded statement to law enforcement back in July 2014. Counsel thereafter filed a motion to enforce the previous plea offer of 13 years or in the alternative, preclude the State from using the Thomas statement against Petitioner at trial. (App. pp. 201 – 203; p. 137, lines 13-17)Counsel for Codefendants Cooper and Saitta filed similar motions.

Petitioner's motion to enforce the plea offer was heard before the Honorable Benjamin H. Culbertson amongst other pre-trial motions at the start of the joint trial on April 20, 2015. (App. pp. 131 – 160). In sum, Counsel argued the State had wrongfully withheld the Thomas statement from the defense until the near eve of trial and the defense was prejudiced as a result on several different

fronts. Counsel first argued that the Thomas statement was *Brady*[7] material and thus it should have been timely disclosed because Thomas was under the influence of drugs at the time, which made the statement impeachable and tended to prove he was not credible. (App. p. 132). It was the State's position that the statement was rather incriminating, containing nothing that would be exculpatory to Petitioner, and was not impeaching. (App. pp. 146 – 147). Solicitor Terrell argued that anything in the statement that would otherwise be discoverable did not establish a discovery violation because "these Defendants would already have knowledge of that because they were there." (App. p. 148). Solicitor Terrell asserted he had not only complied, but even exceeded the expectations of *Brady* and Rule 5 in this case in that that the statement had been promptly turned over to *Thomas's* attorney and need not have be turned over to any other defendant until after Thomas testified because Thomas was a witness for the State. (App. pp. 149 – 150). Solicitor Terrell claimed he nonetheless went ahead and made the defendants' attorneys aware of the statement at the status conference in March despite the lack of obligation to do so because he was not trying to hide anything and foresaw that this would create conflict. (App. pp. 149 – 150). However, he subsequently stated that the delay may have been an oversight and also pointed out to Judge Culbertson that he had not given the State a deadline to disclose discovery as trial approached. (App. pp. 146, lines 19-20; pp. 154 – 155).

Counsel's motion to enforce the plea agreement also characterized the State's actions as violating the "urgent" and ethical duty to turn over discovery in a timely fashion so as not to cause undue prejudice to Petitioner. (App. pp. 136 – 137; p. 131). Counsel argued that as the that the State's failure to timely disclose prevented him from making an adequate assessment of the State's case and deprived the defense of the opportunity, ability, and time to meaningfully prepare a trial defense and strategy. Specifically, delaying disclosure until barely two weeks before trial left no

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

time to investigate the claims Thomas made, to meaningfully confer with his client, or develop a different or updated strategy or defense in light of the statement's impact on the totality of the State's evidence. (App. p. 131 – 133). The perhaps most significant direct result caused by the failure to timely disclose was that it deprived Counsel of making an informed professional opinion as his advocate on the merits of his case. In turn, Counsel was unable to intelligently, adequately advise Petitioner on the decision of whether to proceed to trial or plead guilty:

> The Prosecutor in this matter withheld that evidence until March 30th of this year, and they've had it for nine months beforehand, and during that time [] I am advising my client...I'm telling him certain things about the status of his case and we're working on case strategy, we're working on whether or not he should plead guilty [ ].

(App. p. 131, ln. 17-24). Counsel presented former Chief Justice Jean Toal's memorandum as additional support for his argument, which admonishes prosecutors about premising plea agreements based upon incomplete discovery. (App. pp. 134 – 137). In line with this admonishment, Counsel stressed repeatedly that the State's improper handling of discovery rendered him as ineffective as Petitioner's advocate: "Then on top of all that, too, I have a question about PCR. I am concerned about that. It goes to the effectiveness that I have for my client...it's difficult to be effective as a lawyer if you don't have all of the discovery when you issue a *Brady* motion to the Prosecutor's office...I think it is ineffective of me based on what the Prosecutor did [] by not turning it over, it makes me ineffective because I can't tell him, 'Look, you need to consider doing X,Y,Z." (App. pp. 132 – 133; pp. 137). He argued that Petitioner consequently had been deprived of making an informed and intelligent decision on whether to proceed to trial or plead guilty, either "straight up" or pursuant to some to some agreement. Petitioner was thus prejudiced as a direct result of the State's actions, in that he unknowingly rejected a favorable plea offer. (App. pp. 132 – 137). Counsel also believed it constituted a violation of the responsibility of "fair dealing" for the State withhold the Thomas statement throughout the duration of negotiations all the while

knowing that it would have significant ramifications on the decision to plead guilty or go to trial. (App. pp. 136 – 137; p. 131).

In light of the resulting prejudice to Petitioner, Counsel requested that the court in the alternative preclude from using the statement at the detriment of his client. Judge Culbertson denied the request made in the alternative, Petitioner's motion to enforce the plea offer of 13 years, and the codefendants' motions on the same ground. (App. p. 137). Judge Culbertson then ordered that the court would proceed to jury selection after a 50-minute recess. (App. p. 158 – 159). The decision for Petitioner to plead guilty was reached during this recess. Along with Codefendants Cooper and Saitta, Petitioner pleaded guilty to all three (3) charges without a recommendation from the State or negotiation. (App. p. 166; pp. 204 – 206). Judge Culbertson sentenced Petitioner to concurrent terms of twenty-two (22) years incarceration for each charge. (App. pp. 204 – 206).

Petitioner filed a timely notice of appeal. By order filed October 22, 2015, the South Carolina Court of Appeals dismissed Petitioner's appeal pursuant to Rule 203(d), SCACR. *State v. Merino*, App. Case No. 2015-000958 (Ct. App. Oct. 22, 2015). The Remittitur was issued on November 10, 2015.

Petitioner filed a PCR application *pro se* on September 19, 2016, in which he raised the following allegations: "Counsel was ineffective in that Counsel failed to investigate. Counsel was ineffective in that he failed to investigate Carl Thomas." (App. pp. 45 – 54). Respondent filed a Return and Motion for More Definite Statement on July 10, 2017. (App. pp. 39 – 44). Petitioner later retained the undersigned, William G. Yarborough III, Esquire, and amended his PCR application to add the following allegations:

I. Pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984) Applicant was denied his Sixth Amendment right to the effective assistance of counsel due to counsel's failure to provide discovery materials under Rule 5.

a. Statements were made by material witnesses that were Rule 5 material that had never been turned over to the Applicant before trial. Had Applicant

been advised of these statements by counsel prior to trial, Applicant could have had the opportunity to refute the statements, plan for defense witnesses to refute those statements, and...to enter into a knowing and voluntary plea negotiation with the State as a resolution.
In the alternative, the Applicant would have been able to make an informed and voluntary decision and may have continued on with the trial in lieu of entering a guilty plea. *Roscoe v. State*, 345 S.C. 16, 546 S.E.2d 4 (200I).

b. The State made available a plea offers to the Applicant concerning each of the charges. The original plea offer was thirteen (13) years. Although the S.C. Code Ann. Section 16-11-311 states the penalty is life imprisonment or not less than fifteen (15) years, again, the Applicant was made an offer of thirteen (13) years. Based on the negotiation phase, there is no way to ensure that the Applicant was even remotely capable of entering into any plea voluntarily, knowingly, and intelligently at that point, as is required by *Boykin v. Alabama*, 395 U.S. 238 (1969), and the South Carolina Supreme Court requires that a defendant must be made aware of the nature and [crucial] elements, such as any maximum and minimum penalties and the nature of the constitutional rights being waived. *Pittman v. State*, 337 S.C. 599, 524 S.E.2d 624 (1999); *Dover v. State*, 304 S.C. 433, 405 S.E.2d 391 (1991).

c. Pursuant to *Evitts v. Lucey*, 469 U.S. 387 (1985), "a defendant is constitutionally entitled to the effective assistance of appellate counsel." Applicant will show that his direct appeal was abandoned. Applicant will show that he was deprived of his constitutional right to appeal as a direct correlation to counsel's deficient performance and that the Applicant was unquestionably prejudiced by that deficiency. *Gilchrist v. State*, 364 S.C. 173, 612 S.E.2d 702 (2005).

(App. pp. 30 – 38).

Respondent filed an Amended Return and Partial Motion to Dismiss on April 16, 2018. (App. pp. 19 – 29). An evidentiary hearing was held before the Honorable William H. Seals, Jr. on October 8, 2019. William G. Yarborough III, Esquire represented Applicant. Assistant Attorney General Johnny E. James, Jr. appeared for Respondent. Applicant testified on his own behalf. Counsel was also present and testified. Judge Seals dismissed Petitioner's PCR application. (App. pp. 1- 18). This appeal follows.

ARGUMENT

The PCR court erred in not finding ineffective assistance of counsel where the State did not disclose all information required pursuant to Rule 5 SCRCrimP until after the expiration of a plea offer and trial counsel failed to argue Rule 5 SCRCrimP in a motion to reinstate the plea offer as a ground for reinstating the plea offer failed to file a motion to reconsider and failed to argue Rule 5 SCRCrimP in he direct appeal.

I.

Plea Counsel was ineffective in only arguing a violation of Brady and not of Rule 5 when the State violated discovery rules and its obligations to disclose when it suppressed discovery material to Petitioner's defense and decision-making. Plea Counsel did attempt to rectify the discovery violation by trying to reinitiate plea negotiations and moved to enforce the previous plea offer, however the grounds for his motion to enforce the plea offer were erroneous. The Thomas statement was not *Brady* material. The *Brady* rule requires the prosecution to disclose evidence that is: 1) in its possession; 2) favorable to the accused; and 3) material to guilt or punishment, including impeachment. *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (1985); *United States v. Agurs*, 427 U.S. 97 (1976). A "*Brady* 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." *Gibson v. State*, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). "This rule applies to impeachment evidence as well as exculpatory evidence." *Id. See also State v. Gathers*, 295 S.C. 476, 481, 369 S.E.2d 140, 143 (1988) ("In determining the materiality of nondisclosed evidence, this [c]ourt will consider it in the context of the entire record."). The Thomas statement was incriminating rather than exculpatory given that it placed Petitioner at the scene, detailed his involvement in the offenses, and corroborated circumstantial evidence. Plea Counsel's argument that the statement was *Brady* material because Thomas was under the influence of drugs at the time was of no merit. Plea Counsel had essentially argued that the statement was not just impeaching, but that its impeachment value by virtue of

Thomas's intoxication was to such a degree that renders the statement exculpatory. Although the State has a duty to turnover impeachment evidence under *Brady*, its delayed disclosure did not violate due process under *Brady*, specifically. *See generally, State v. Hill*, 68 S.C. 649, 655 630 S.E.2d 274, 277 (2004) ("*Brady* provides a bright-line rule for the disclosure requirements necessary to guarantee that a criminal defendant receives due process."). *See also Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (holding the 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.").

However, the State's suppression of the Thomas statement instead constitutes as a violation of Rule 5. Rule 5 provides, relevant parts:

> Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant; and
>
> The prosecution shall respond to the defendant's request for disclosure no later than thirty (30) days after the request is made, or within such other time as may be ordered by the court.

Rules 5(a)(1)(C) and 5(a)(3), SCRCrimP. *See also State v. Kennerly*, 331 S.C. 442,453-54, 503 S.E.2d 214, 219-20 (Ct. App. 1998) ("Despite the different underpinnings of *Brady* and Rule 5, each has the same goal of ensuring the criminal defendant's right to a fair trial. Neither is designed 'to displace the adversary system as the primary means by which truth is uncovered, but [rather] to ensure that a miscarriage of justice does not occur.'") (quoting authorities omitted). Once a Rule 5 violation is presented, reversal is required where the defendant suffered prejudice from the violation. *State v. Trotter*, 322 S.C. 537, 473 S.E.2d 452 (1996). The definition of "material" for purposes of Rule 5 is the same as the definition as in the *Brady* context. *See Fradella v. Town of*

Mount Pleasant, 325 S.C. 469, 482 S.E.2d 53 (Ct. App. 1997). "Materiality of evidence is determined based on the reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense." *Porter v. State*, 368 S.C. 378, 384, 629 S.E.2d 353, 356 (2006) (citing *Kennerly,* 331 S.C. at 453, 503 S.E.2d at 220)). *See also State v. Jones*, 325 S.C. 310, 320, 479 S.E.2d 517, 522 (Ct. App. 1996). *Cf. Kennerly*, 331 S.C. at 453-54, 503 S.E.2d at 220 ("Information is not deemed 'material' if the defense discovers the information in time to adequately use it at trial."). The Thomas statement is rather Rule 5 material because the State intended to use it against Petitioner at trial and the incriminating statement had significant implications on preparation of Petitioner's defense. Further, it is apparent that the State agreed that the Thomas Statement was discoverable by its production of the document. The State's failure to disclose the Thomas Statement within the 30 days required by Rule 5(a)(3) SCRCrimP eliminated Petitioner's options because it was "detailed" and "devastating" to Petitioner's case in that it destroyed the alibi defense they had prepared for the last year or so. (Appendix Page 26 Lines 6-9). The State had failed to disclose it until so close to trial and after all plea offers had been withdrawn. As per Plea Counsel's testimony, had the statement been timely disclosed, it would have completely changed his attitude on the strength of the State's evidence and his opinion on the 13 year plea offer, and he would have consequently advised Petitioner against trial and to consider accepting the 13 year plea offer. Petitioner likewise testified that he would have accepted the plea offer of 13 years had he been able to fully assess the strength of State's case and weigh his options accordingly. *See Gibson, supra. See generally, Brady v. United States*, 397 U.S. 742, 756 (1970). ("Often the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted.").

The State defended the suppression of the Thomas Statement stating that there was no violation of Rule 5 because the Thomas Statement had been turned over at least a month prior to trial. (Appendix Page 62 Lines 2-6). The State failed to note or make any argument about the failure to produce the statement within the 30 days required by Rule 5(a)(3) SCRCrimP. The State's assertions are dubious given the failure to disclose the Thomas Statement for almost a year. Regardless, this exception to the State's discovery obligations is not absolute and provides no justification for the suppression of the Thomas Statement here. South Carolina courts have repeatedly held that disclosure of such discovery may be required where the person making the statement is participant in, or a material witness to an offense. *See e.g., State v.,* 302 S.C. 75, 76-77, 393 S.E.2d 918, 919 (1990); *State v. Humphries*, 354 S.C. 87, 90, 579 S.E.2d 613, 614-15 (2003); *State v. Shupper*, 263 S.C. 53, 207 S.E.2d 799 (1974); *State v. Diamond*, 280 S.C. 296, 299, 312 S.E.2d 550, 551-52 (1984) ("Public policy considerations for nondisclosure are absent when the statement is made by an open participant in the criminal transaction). In *State v. Blyther*, the Court of Appeals noted that the disclosure may be required particularly where the informer is the only witness to, or the only other participant besides the defendant in a criminal transaction. 287 S.C. 31, 33, 336 S.E.2d 151, 152-53 (Ct. App. 1985). Hence, the privilege was inapplicable because Thomas was an active participant in the offense by driving Petitioner and other codefendants to the scene and was clearly became a material witness to the State's case as early as 9 months before the case was set for trial in April 2015.

Although Plea Counsel raised a vague equitable and fairness argument in support of his motion, he failed to present the 30 days time requirement or the upset of the balance between Petitioner's constitutional rights and the public policy objectives in the State invoking this exception to its discovery violations. The established test balances "the public's interest in perpetuating the flow of vital information to law enforcement officials, against the right of an individual to prepare

his defense", "depend[ing] on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *State v. Bultron*, 318 S.C. 323, 330, 457 S.E.2d 616, 620 (Ct. App. 1995); *Roviaro v. United States*, 353 U.S. 53, 62 (1957). The withholding of the statement for almost a year prior to trial and past the expiration of any plea offer surpasses the interests of the State in this matter; the State did not even attempt to provide any explanation as to which State or public interest the suppression of the statement for 9 months served. The ultimate result of the suppression of the Thomas statement in hindering Petitioner from making complete decisions on how to handle his case and trial defense preparation, as well as foreclosing any fair opportunity for Petitioner to make an informed decision as to whether to proceed to trial or accept the plea offer before it expired epitomizes the principle grounded in fundamental fairness and due process that "the privilege of nondisclosure must give way to the rights of the accused" where the withheld information is "relevant and helpful to the defense or *is essential for a fair determination of the State's case against the accused.*" *Hayward*, 302 S.C. at 76-77, 393 S.E.2d at 919. *See also Gibson v. State*, 334 S.C. 515, 514 S.E.2d 320 (1999) ("[A] defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case."). Plea Counsel was deficient and ineffective for failing to challenge the Rule 5 violations on these grounds because the exception served no purpose that would legitimize the State's noncompliance with its discovery violations.

Plea Counsel's vague argument on fairness and equitable grounds was also deficient and ineffective because the Courts of this state as well as the Fourth Circuit have held that there is no implied obligation of good faith and fair dealing in a plea agreement. Counsel regardless failed to present the applicable relevant law in support of his motion, including the State's position that the Thomas Statement was not otherwise discoverable to anyone but Thomas himself. See *State v. Geer*, 391 S.C. 179, 705 S.E.2d 441 (Ct. App. 2010)(holding the State did not violate Rule 5 for

failing to disclose an audio-tape that captured a codefendant's conversation with officers the night of he and Geer's arrest because Geer had not actually made a Rule 5 request or demonstrate how it was material to preparation of his defense, and the State had not planned to use it in its case in chief; but was otherwise discoverable).

Here, the Petitioner was prejudiced in that the Thomas Statement was material within the meaning of Rule 5 and there is a reasonable probably that the proceedings would have been different had the Thomas statement been disclosed within the 30 days required. The ultimate result of the State's actions was Petitioner's uninformed rejection of a much more favorable plea offer. Both Plea Counsel and Petitioner testified that the State's failure to timely disclose "100 percent" negatively impacted Petitioner in both the defense they had been preparing for almost a year and Petitioner's decision to plea or go to trial. (Appendix Page 31 Lines 9-13 and Page 53 Lines 5-8). Petitioner similarly testified numerous times the State's failure to timely disclose materially affected the way in which he handled his case and stated he would have accepted the 13 year offer. (Appendix Page 52 Lines 17-19). *See State v. Lawton*, 382 S.C. 122, 127-28, 675 S.E.2d 454, 457 (Ct. App. 2009) (reversing the defendant's conviction due to a Rule 5 violation in the failure to disclose a letter he had written that implied his version of the events was untrue because *disclosure of the letter likely would have affected his decision-making* on testifying) (italics added); *Cf. State v. Wilkins*, 310 S.C. 81, 84, 425 S.E.2d 68, 70 (Ct. App. 1992) ("Wilkins' Rule 5 argument fails because he can show no prejudice caused by the State's delay in complying with his discovery request....*[He] was in no different position on the date of disclosure than he would have been had disclosure been timely made.*") (italics added). Petitioner testified that although there was a gap of about a month between the receiving Thomas statement and learning Martin would testify for the State, Petitioner still wanted to accept the prior 13 year offer rather than proceed to trial. *Cf. Smith v. State*, 369 S.C. 135, 138-39, 631 S.E.2d 260, 261-62 (2006) (defendant would have satisfied the

burden to prove ineffective assistance of counsel had he sufficiently stated he would not have pleaded guilty but for counsel's misadvise, although he had so alleged in his PCR application, because the State had offered no evidence to the contrary); *see also Id.* ("This Court, in *Jackson* and *Alexander*, held that the undisputed testimony of a PCR Petitioner is sufficient to warrant relief.") (citing *Jackson v. State*, 342 S.C. 95, 535 S.E.2d 926 (2000); *Alexander v. State*, 303 S.C. 539, 402 S.E.2d 484 (1991)).The resulting prejudice is further apparent in the difference in sentence length between the 22 years Petitioner received as opposed to the 13 year plea offer previously extended and unintelligently rejected. *See Davie v. State,* 381 S.C. 601, 614, 675 S.E.2d 416, 423 *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018); (concluding the difference in the sentence received and the sentence proposed by the uncommunicated and unknowingly rejected plea offer was proof of prejudice); *Bell v. State*, 410 S.C. 436, 443, 765 S.E.2d 4, 7-8 (Ct. App. 2014) ("In this case, trial counsel testified the [uncommunicated and unknowingly rejected] plea offer was for ten years imprisonment. Bell was sentenced to twenty years' imprisonment. The difference is evidence of his prejudice.").

The Petitioner was also prejudiced by Plea Counsel's failure to file a motion to reconsider the sentence based on Co-Defendant Saitta's success in her motion to reconsider. In light of the impact on Plea Counsel's advisement and Petitioner's decision-making, as well as the difference in length between sentences, there is a reasonable probability the outcome would have been different had Plea Counsel moved to reconsider the sentence and made the Rule 5 arguments above.

II.

Plea Counsel was also ineffective in the failure to sufficiently advise Petitioner on the process for an appeal from a guilty plea, including the failure to sufficiently explain the showing of an arguable basis required of Petitioner to submit to the Court of Appeals pursuant to Rule 203(d)(1)(B)(iv), SCACR ("If the appeal is from a guilty plea...a written explanation showing that

there is an issue which can be reviewed on appeal...If an issue was not raised to and ruled on by the lower court, the explanation shall include argument and citation to legal authority showing how this issue can be reviewed on appeal. If the appellant fails to make a sufficient showing, the notice of appeal may be dismissed.").

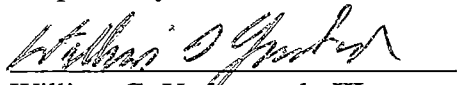
Plea Counsel only filed a notice of appeal with a factual summary of the lower court proceedings citing *Brady* as the basis for the motion to enforce the prior plea offer. As per the Court's instruction, Plea Counsel thereafter sent the summary and a letter to Petitioner informing him that he now must send a statement of "any arguable basis that there are issues preserved for appeal" from a guilty plea to the Court of Appeals in accordance with the mandates cited herein. (Appendix Page 54 Line 14 though Page 55 Line 7). Petitioner's appeal was consequently dismissed because of non-compliance with the procedures outlined in Rule 203(d)(1)(B)(iv).

Plea Counsel was ineffective for failing to sufficiently advise Petitioner as to the showing he must make to the Court in order to receive direct appeal review of the issue. Plea Counsel's duty to file a notice of appeal upon Petitioner's request to do so encompasses the obligation to sufficiently advise Petitioner on the process when counsel does not perfect the appeal. Petitioner did not knowingly waive his right to appeal, and there were preserved issues cognizant for appeal in Petitioner's case. Petitioner is thus entitled to relief pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). *See also generally, Hayes v. Warden, Lee Correctional Inst.*, 2015 WL 3767532, C/A No. 4:14–cv–3778–RMG–TER at *1 (D.S.C. May 28, 2015) (granting habeas relief because counsel failed to file this explanation and failed to adequately inform the petitioner how to file the explanation himself, which resulted in the dismissal of the petitioner's appeal; thereby depriving the petitioner of both his right to the effective assistance of appellate counsel and his right to a direct appeal).

CONCLUSION

Based on the above argument, appellant's petition for a Writ of Certiorari to this court should be granted.

Respectfully submitted,



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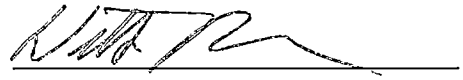
June 8, 2020

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Petition of Petitioner complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive information in Appellant Court Filings."

Respectfully submitted,



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