IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2020

No. 20-_____

Larry Durant,

Petitioner,

vs.

State of South Carolina,

Respondent.

PETITION FOR WRIT OF *CERTIORARI* TO
THE SUPREME COURT OF SOUTH CAROLINA

E. Charles Grose, Jr.
Counsel of Record
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
charles@groselawfirm.com

QUESTIONS PRESENTED

I.

The jurors deliberating about Larry Durant's guilt or innocence informed the trial judge they were splint eight to convict, three to acquit, with one juror not deliberating. Addressing the jurors, the trial judge branded the non-deliberating juror "not helpful to the situation at all" because the juror might "ensure that we have a mistrial if you continue to refuse to even vote even if the 11 other folks do reach a unanimous decision." The trial judge also instructed, "So in light of that, let me send you back. However long it is you want to take *this evening*, we'll be here as long as you want to be here. You know, I'll leave it at that." Less than 34 minutes after receiving these instructions, the jurors convicted Larry Durant of second-degree criminal sexual conduct with a minor. Was this instruction unconstitutionally coercive under the Sixth Amendment, *Allen v. United States,* 164 U.S. 492 (1896), and its progeny?

II.

Ulanda McRae testified for the prosecution at Larry Durant's jury trial. Based on a mistake in spelling McRae's last name, the prosecutor informed defense counsel that McRae did not have a criminal history. After trial, defense counsel learned McRae had a criminal history and moved for a new trial, alleging a violation of *Brady v. Maryland,* 373 U.S. 83 (1963). After holding the prosecution violated *Brady,* the Supreme Court of South Carolina held McRae's criminal history was not material under *Brady* and *United States v. Bagley*, 473 U.S. 667, 682 (1985), based on the other evidence presented by the prosecution and without considering the evidence presented by the defense. Did the Supreme Court of South Carolina apply the correct standard of review for materiality of McRae's criminal history when it failed to consider the evidence presented by Larry Durant?

LIST OF PARTIES

Larry Durant and the State of South Carolina are the only parties to this petition.

CORPORATE DISCLOSURE

Larry Durant is a natural person. The respondent is the State of South Carolina. No corporations are parties to this petition.

LIST OF PRIOR PROCEEDINGS

The State of South Carolina charged Larry Durant with second-degree criminal sexual conduct with a minor in the Court of General Sessions for Sumter County. *State v. Durant*, Indictment No. 2014-GS-43-00947. On May 26, 2016, the jurors convicted Durant and the trial judge imposed a sentence of twenty years imprisonment. Appendix (hereinafter "A.") 7, 74-76. On June 8, 2016, the trial judge convened a hearing on Durant's motion for a new trial, which was denied. A. 77-105.

Durant appealed his conviction and sentence to the Court of Appeals of South Carolina. *State v. Durant,* Appellate Case No. 2016-001264. On January 11, 2019, the Supreme Court of South Carolina certified the case for its review pursuant to Rule 204, SCACR. A. 8.

On May 6, 2020, the Supreme Court of South Carolina affirmed Durant's conviction and sentence. *State v. Durant*, 430 S.C. 98, 844 S.E.2d 49 (2020) (Appellate Case No. 2016-001264; Opinion No. 27964). A. 1-6. On July 8, 2020, the court below denied Durant's petition for rehearing and issued the remittitur. A. 10-12.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Federal Cases

State Cases

Constitutional

Statutes

Rules

OPINIONS AND ORDERS

The sentence imposed by the Court of General Sessions for Sumter County is unpublished and reprinted in the appendix. A. 7.

The opinion of the Supreme Court of South Carolina is published at *State v. Durant*, 430 S.C. 98, 844 S.E.2d 49 (2020), and reprinted in the appendix. A. 1-6.

JURISDICTIONAL STATEMENT

The Supreme Court of South Carolina issued its opinion on May 6, 2020. A. 1-6. After receiving an extension of time (A. 9), Durant filed a timely petition for rehearing on June 10, 2020 (A. 133-85). The Supreme Court of South Carolina denied the petition and issued the remittitur on July 8, 2020. A. 10-12.

This Court has jurisdiction to review this petition, seeking review of the decision of the Supreme Court of South Carolina, pursuant to 28 U.S.C.A. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution, applicable to the State through the Fourteenth Amendment, provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." Question I implicates this Court's opinions in *Allen v. United States,* 164 U.S. 492 (1896), *Jenkins v. United States*, 380 U.S. 445 (1965), and *Lowenfield v. Phelps*, 484 U.S. 231 (1988).

The Fourteenth Amendment to the United States Constitution provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Question II implicates this Court's opinions in *Brady v. Maryland,* 373 U.S. 83 (1963) and *United States v. Bagley*, 473 U.S. 667 (1985).

STATEMENT OF CASE

The Supreme Court of South Carolina summarized:

> [Larry] Durant was the founder and lead pastor at Word International Ministries, a church in Sumter. He is a double amputee below his knees and is legally blind. In 2013, four teenage girls who belonged to the church accused Durant of sexually assaulting them. Two of the girls were cousins, another was a God-sister, and the fourth was a close friend. The State indicted Durant on one count of second-degree criminal sexual conduct with a minor,[1] stemming from an alleged sexual battery against one of the girls, and three counts of third-degree criminal sexual conduct[2] pertaining to conduct with the other three. However, the State only proceeded to trial on one count.[3]

Durant, 430 S.C. at 102, 844 S.E.2d at 50-51 (2020) (footnotes added).

From May 23-26, 2016, the State tried Durant before the Honorable Roger M. Young, Sr. and a jury on one count of second-degree criminal sexual conduct with a minor. "Initially, the jury indicated they were at an impasse and that one juror refused to vote." *Id*., 430 S.C. at 103, 844 S.E.2d at 51. Over Durant's objection, the trial judge "gave an *Allen* charge and added that refusing to vote was not an option." *Id*., 430 S.C. at 103, 844 S.E.2d at 52. "Shortly thereafter, the jury found Durant guilty, and the court sentenced him to 20 years' imprisonment." *Id*., 430 S.C. at 103-04, 844 S.E.2d at 52.

The court below summarized the post-trial events:

---

[1] S.C. Code Ann. § 16-3-655(B).

[2] S.C. Code Ann. § 16-3-654.

[3] The trial judge admitted the testimony of the other women pursuant to Rule 404(b), SCRE, as interpreted by *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009). On the same day it decided *Durant*, the Supreme Court of South Carolina overruled *Wallace* in *State v. Perry*, 430 S.C. 24, 842 S.E.2d 654 (2020), but still affirmed Durant's conviction and sentence under the new framework announced in *Perry.*

> A few hours after sentencing, defense counsel received a call from [Ulanda] McRae's ex-husband inquiring why he did not question McRae about her prior criminal convictions. Defense counsel did not believe McRae had a criminal background because the State previously had disclosed a report from the National Crime Information Center (NCIC) stating she did not have a criminal record. Counsel conducted a [South Carolina Law Enforcement Division public access criminal history] search using her name, date of birth, and social security number, which revealed numerous prior convictions under nine aliases for offenses such as shoplifting, fraudulent checks, and forgery spanning from 1991-2005.
>
> Thereafter, Durant moved for a new trial, arguing the State's case was based entirely on credibility and the State's failure to disclose McRae's record prevented him from impeaching a critical witness or further developing his defense that Johnson stole the residence owned by Durant, thereby creating the need to fabricate the charges against him. The State responded it had run McRae's criminal history using the NCIC under the name "McCrae" rather than the correct spelling. The State argued its failure to disclose McRae's criminal history did not amount to a *Brady* violation because it was unaware she had one and, in any event, it was immaterial to Durant's guilt. Durant disagreed, asserting the State was in possession of the criminal history for *Brady* purposes because it could have run a proper search but failed to do so.
>
> The circuit court found the State was not in possession of the evidence and that it would not have affected the outcome of the trial. While some of McRae's convictions were likely inadmissible, the court noted it may have allowed one or more into evidence that would have been favorable to the defense, but regardless, the case boiled down to whether the jury believed the testimony of the victim and the three other witnesses regarding assaults.

Id., 430 S.C. at 104-05, 844 S.E.2d at 52 (internal footnotes omitted).

In his direct appeal to the Supreme Court of South Carolina, Durant raised the following issues:

- After the jurors announced a deadlock, did the trial judge err by giving an *Allen* charge that singled out the sole non-voting juror, directing that juror not to prevent a unanimous verdict, after which the jurors returned a unanimous verdict in less than thirty-four minutes?

- Did the trial judge err by denying Pastor Larry Durant's new trial motion based on a *Brady* violation resulting from the prosecutor not disclosing the prior criminal history of Ulanda McRae when her prior criminal history for dishonesty impeached her credibility?

After filing his briefs, but while his direct appeal was still pending in the court below, Durant submitted supplemental citation letters, pursuant to Rule 208(b)(7), SCACR, calling attention to *Brewster v. Hetzel*, 913 F.3d 1042 (11th Cir. 2019) (jury's guilty verdict for armed robbery was impermissibly coerced, and therefore failure of trial counsel to object and move for mistrial was prejudicial, as would support *habeas corpus* petition), and *State v. Taylor*, 427 S.C. 208, 216, 829 S.E.2d 723, 728 (Ct. App. 2019) (citing *Brewster* and holding trial court did not err in giving deadlocked jury *Allen* charge, but *Allen* charge was coercive). A. 131-32.

The state Supreme Court rejected Durant's *Allen* charge issue, relying on its own precedent, by holding:

> It is apparent the trial court did not err in directing the juror to fulfill the oath he took at the outset of trial, as the court did not urge the jurors to vote in any specific way. Moreover, the court's suggestion that the jurors would have to deliberate for as long as they wanted to be there that evening does not render the charge coercive.

Durant, 430 S.C. at 111, fn. 6, 844 S.E.2d at 55, fn. 6 (2020) (citing *Green v. State*, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002) ("A trial judge has a duty to urge, but not coerce, a jury to reach a verdict."); *Tucker v. Catoe*, 346 S.C. 483, 490, 552 S.E.2d 712, 716 (2001) ("Whether an *Allen* charge is unconstitutionally coercive must be judged in its context and under all the circumstances."); *Johnson v. Sam English Grading, Inc.*, 412 S.C. 433, 454-57, 772 S.E.2d 544, 554-57 (Ct. App. 2015) (holding an *Allen* charge was not improperly coercive where the court instructed the jury on the Friday before Labor Day that they could deliberate into the night, as well as Saturday, or the following Tuesday)).

Regarding the *Brady* issue, the state Supreme Court held, "[T]he evidence was clearly favorable to Durant, as defense counsel could have used it to impeach McRae." *Durant*, 430 S.C. at 107, 844 S.E.2d at 54. After finding a *Brady* violation, the court below held, "Durant cannot demonstrate the evidence was material because there was not a reasonable probability the result of

the proceedings would have been different." *Id*., 430 S.C. at 110, 844 S.E.2d at 55 (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985) ("A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."). In so holding, the state Supreme Court noted "the State presented cumulative evidence in the form of the girls' testimony," and, "[a]s a result, the jury had ample evidence supporting its verdict." *Id*.

On June 10, 2020, Durant petitioned for rehearing. A. 133-85. Regarding the *Allen* charge, he argued "the historical significance of the *Allen* charge," the increased pressure on the non-deliberating juror because "the judge knew the split of the jurors," the trial judge branded the non-deliberating juror "not helpful to the situation at all," the trial judge's threat to hold the jurors "[h]owever long it is you want to take *this evening*," and how quickly the jurors rendered a verdict after the *Allen* charge. A. 142-43.

Regarding the *Brady* violation, Durant argued the state Supreme Court "did not review the entire record," did not consider evidence presented by Durant, did not "consider the fact that this case turned on the credibility of witnesses," and "did not correctly apply the standard for a *Brady* violation." Durant pointed out *Bagley* modified the holding in *United States v. Agurs,* where this Court observed:

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evince is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

427 U.S. 97, 112-13 (1976). A. 144-46.

On July 8, 2020, the Supreme Court of South Carolina denied Durant's petition for rehearing and issued the remittitur. A. 10-12. This petition for a writ of *certiorari* follows.

REASONS WHY THIS COURT SHOULD GRANT THE WRIT

I.

The jurors deliberating about Larry Durant's guilt or innocence informed the trial judge they were splint eight to convict, three to acquit, with one juror not deliberating. Addressing the jurors, the trial judge branded the non-deliberating juror "not helpful to the situation at all" because the juror might "ensure that we have a mistrial if you continue to refuse to even vote even if the 11 other folks do reach a unanimous decision." The trial judge also instructed, "So in light of that, let me send you back. However long it is you want to take *this evening*, we'll be here as long as you want to be here. You know, I'll leave it at that." Less than 34 minutes after receiving these instructions, the jurors convicted Larry Durant of second-degree criminal sexual conduct with a minor. Was this instruction unconstitutionally coercive under the Sixth Amendment, *Allen v. United States,* 164 U.S. 492 (1896), and its progeny?

Knowing the split of the jurors, the trial judge instructed the jurors to continue deliberating, singled out the non-deliberating juror, admonished the non-deliberating juror to not prevent a unanimous verdict, and threated to hold the jurors until they reached a unanimous verdict. The jurors returned a unanimous verdict in less than thirty-four minutes after hearing this instruction. This instruction deprived Larry Durant of his Sixth Amendment right to have his guilt or innocence determined by jurors free from coercion.

The Sixth Amendment to the United States Constitution guarantees an accused the right to a trial by impartial jurors. The Sixth Amendment is applicable to the states through the Fourteenth Amendment. *E.g. Klopfer v. North Carolina*, 386 U.S. 213 (1967), *Pointer v. Texas*, 380 U.S. 400 (1965), *Gideon v. Wainwright*, 372 U.S. 335 (1963). "The verdict of the jury should represent the opinion of each individual juror." *Allen*, 164 U.S. at 501. A trial court may properly instruct jurors to consider "opinions of each other" and "decide the case if they could conscientiously do so." *Id*. "[J]urors may not be coerced into surrendering views conscientiously held." *Jenkins v. United*

States, 380 U.S. 445, 446 (1965). Determining whether "the jury was improperly coerced requires that [an appellate court] consider the supplemental charge given by the trial court in its context and under all the circumstances." *Lowenfield v. Phelps*, 484 U.S. 231, 237 (1988) (citing *Jenkins,* 380 U.S. at 446).

Brewster reviewed the history of trial courts coercing jurors to reach a verdict. "From the fourteenth through the eighteenth centuries, one method of accelerating unanimity was to prohibit jurors from eating or drinking until they all agreed on a verdict." 913 F.3d at 1046 (citing 3 William Blackstone, Commentaries 375). Judges could "carry" jurors around "the circuit from town to town in a cart. . . . until a judgment bounced out." *Id*. (internal quotations and citations omitted) (citing Blackstone at 376 and *Renico v. Lett*, 559 U.S. 766, 780 (Stevens, J., dissenting)). *Brewster* acknowledged our judicial system has "come a long way and now accept[s] that some jury deliberations will end in deadlock." 913 F.3d at 1047. In *Brewster*, the trial judge gave a "lengthy charge emphasiz[ing] that the jurors had taken an oath to follow the law, which meant they must deliberate more [and] his instructions with the challenge that he had taken his oath seriously and hoped they would do the same." 913 F.3d at 1047. "[W]hen told that the one juror who wouldn't vote to convict was doing crossword puzzles, the judge ordered all the reading materials taken out of the jury room." *Id*. Eighteen minutes later, the jurors returned a guilty verdict. *Id*. *Brewster* observed, "Though the judge addressed his admonitions to the entire jury, the lone holdout must have felt as though they were aimed at her." 913 F.3d at 1055. After all, "the holdout juror was using [crosswords puzzles] to keep holding out" and resist the pressure of the majority jurors. *Id*. 913 F.3d at 1054. *Brewster* held, "the coercive circumstances that led to the verdict undermined the fundamental fairness of the trial and the reliability of the verdict." 913 F.3d at 1056. *Brewster*

thus recognized the Sixth Amendment allows a juror to cease deliberating to protect a consciously held view from the pressure of the majority jurors.

The facts set forth herein support this claim and, by this specific reference, the facts raised elsewhere in this petition relevant to this claim are fully incorporated herein.

Durant's jurors began deliberating at 2:16 p.m. At 5:11 p.m., the trial judge announced "something different" had occurred and summarized a note from the jurors:

> Your Honor, after two hours and 45 minutes, presumably, and it says the vote is after four attempts, and it tells me what the break is between guilty and not guilty, but the unusual thing is they have one juror who will not vote….
>
> I've never had that. And I don't know how to deal with that other than bring them in, give them an *Alle*n charge, ask them to try and tell them not voting is just not an option. They need to vote guilty or not guilty, but not voting doesn't do anything. I'm completely open to suggestions on it. It's such a baffling thing, I'm almost certain that it would be unique.

A. 88-90.

The State suggested substituting one of the alternate jurors for the juror refusing to vote, but the trial judge already had discharged the alternates. Defense counsel objected to the trial judge giving an *Allen* charge because "there's case law that suggest[s] that it may unfairly target the minority juror." A. 91. The jurors returned to the courtroom at 5:15 p.m., and the trial judge gave an *Allen* charge which concluded with the following admonition:

> Now, I don't know who the person is, and I'm not asking who the person is that won't vote, but that's really not helpful to the situation at all. All that will do is ensure that we have a mistrial if you continue to refuse to even vote even if the 11 other folks do reach a unanimous decision. So that's not a helpful process and really under the process we have, we need all 12 people to vote. I don't care how you vote, but it really does – it really is necessary for you to vote in order for us to have a verdict. Whether it's guilty or not guilty, it's got to be unanimous one way or the other. So we do need you to participate whoever this person is at this point is saying I'm not voting.

> So in light of that, let me send you back. However long it is you want to take this evening, we'll be here as long as you want to be here. You know, I'll leave it at that.
>
> And Mr. Foreman, go ahead and send your jury back and see what you can come up with.

A. 92-95.

The jury resumed deliberations at 5:21 p.m. The jurors returned to the courtroom at 5:55 p.m.—only thirty-four minutes after they were previously sent out to resume deliberations—with a verdict finding Durant guilty of second-degree criminal sexual conduct with a minor. A. 95-96.

During sentencing, the trial judge observed:

> Well, the charges in this case were really unlike any I've heard before. The evidence that the State presented was compelling. The defense made a strong case. And the jury chose to believe the young ladies.

A. 75. The trial judge then sentenced Durant to twenty years imprisonment, the maximum sentence allowed by S.C. Code Ann. § 16-3-655(B). A. 7, 97-98.

Here, the decision of the state Supreme Court is contrary to this Court's opinions in *Allen*, *Jenkins*, and *Lowenfield* for four reasons.

First, the trial judge knew the jurors were split eight to three for conviction, with one juror not deliberating. A. 88. "Pressure on jurors, especially on holdout jurors, is increased when the instructions to keep trying to reach unanimity come from a judge who knows how split the jury is and in which direction." *Brewster,* 913 F.3d 1054-55. The nonvoting juror, no doubt, understood who the trial judge was addressing.

Second, the trial judge branded the nonvoting juror "not helpful to the situation at all" because the juror might "ensure that we have a mistrial if you continue to refuse to even vote even if the 11 other folks do reach a unanimous decision." The trial judge thus instructed the nonvoting juror to vote with the majority. The juror singled out by this instruction is similarly situated to the

non-deliberating juror in *Brewster*, 913 F.3d at 1047 ("when told that the one juror who wouldn't vote to convict was doing crossword puzzles, the judge ordered all the reading materials taken out of the jury room").

Third, thirty-four minutes after the *Allen* charge, the jurors returned a verdict finding Durant guilty of second-degree criminal sexual conduct with a minor. A. 95-96. *Cf. Brewster*, 913 F.3d at 056 ("The final circumstance contributing to our conclusion that the verdict was coerced is how quickly the jury unanimously agreed on a verdict after the court's last instruction and action. A verdict of conviction 'bounced out' of the jury room only 34 minutes after the last instruction from the judge" and 18 minutes after removing reading materials.).

Fourth, the trial judge instructed, "So in light of that, let me send you back. However long it is you want to take *this evening*, we'll be here as long as you want to be here. You know, I'll leave it at that." A. 95 (emphasis added). When the trial court gave this instruction, the judge knew the jurors had made four unsuccessful attempts to reach a verdict. A. 88. The trial judge did not offer the jurors dinner, an opportunity to resume deliberations on a later date, or anything else for the comfort of the jurors.[4] *Cf. Brewster*, 913 F.3d at 1046 ("one method of accelerating unanimity was to prohibit jurors from eating or drinking until they all agreed on a verdict.")

This Court, accordingly, should grant the writ and consider whether the trial court's *Allen* charge was unconstitutionally coercive.

[4] Thus, Durant's case is distinguishable from *Johnson v. Sam English Grading, Inc.,* a case relied on by the court below, where the trial judge made provisions for the jurors' comfort. 412 S.C. 433, 457, 772 S.E.2d 544, 556 (Ct. App. 2015) ("The trial court's statement about ordering dinner and about his wife being out of town were not coercive. Additionally, the trial court was not going to force the jury to come back on Saturday; he also offered the option of Tuesday.").

II.

Ulanda McRae testified for the prosecution at Larry Durant's jury trial. Based on a mistake in spelling McRae's last name, the prosecutor informed defense counsel that McRae did not have a criminal history. After trial, defense counsel learned McRae had a criminal history and moved for a new trial, alleging a violation of *Brady v. Maryland,* 373 U.S. 83 (1963). After holding the prosecution violated *Brady,* the Supreme Court of South Carolina held McRae's criminal history was not material under *Brady* and *United States v. Bagley*, 473 U.S. 667, 682 (1985), based on the other evidence presented by the prosecution and without considering the evidence presented by the defense. Did the Supreme Court of South Carolina apply the correct standard of review for materiality of McRae's criminal history when it failed to consider the evidence presented by Larry Durant?

The prosecutor withheld Ulanda McRae's criminal history.[5] Trial counsel discovered McRae's criminal history after the trial. During the hearing on Larry Durant's motion for a new trial, the trial judge stated the court would have admitted at least one of McRae's convictions, as impeachment, pursuant to Rule 609, SCRE. Withholding McRae's criminal history denied Durant his due process right to evidence that impeached McRae's credibility, thereby undermining confidence in the jury's verdict.

"[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. Due process requires the prosecution to disclose impeachment evidence. *E.g. Giglio v. United States*, 405 U.S. 150, 92 (1972). "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue v. Illinois,* 360 U.S. 264, 269 (1959). A due process violation may result from the prosecution's "failure to assist

[5] Durant never alleged the prosecution intentionally withheld McRae's criminal history. In finding a *Brady* violation, the Supreme Court of South Carolina correctly concluded, "[W]hether the prosecution acted in good or bad faith is irrelevant in determining whether a *Brady* violation occurred." *Durant*, 430 S.C. at 107, 844 S.E.2d at 54 (citing *Brady*, 373 U.S. at 87).

the defense by disclosing information that might have been helpful in conducting the cross-examination." *Bagley*, 473 U.S. at 678. "[A]constitutional error occurs, and the conviction must be reversed, only if the evidence is material." *Id*. "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id*. at 682. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id*. The withheld evidence "must be evaluated in the context of the entire record." *Agurs,* 427 U.S. at 113.

The facts set forth herein support this claim and, by this specific reference, the facts raised elsewhere in this petition relevant to this claim are fully incorporated herein.

Prior to trial, Durant requested disclosure of "favorable material" pursuant to *Brady, Giglio,* and *Napue*, including any criminal histories of prosecution witnesses. A. 13-17. The prosecution's evidence at trial consisted of the four "girls," Lizzy Johnson, and Ulanda McRae. *Durant*, 430 S.C. at 103, 844 S.E.2d at 51. McRae "is one of the girls' mother" and "the daughter of Lizzy Johnson." *Id*. "Durant previously dated" Johnson. *Id*. At trial,

> Durant contended that Johnson, who lived in a property purportedly owned by Durant around the time the allegations surfaced, forged a deed conveying that property to Johnson sometime earlier. When the allegations arose, a deed was recorded conveying the property back to Durant. The defense believed these fraudulent transfers served as a motive to fabricate the girls' allegations of sexual abuse. Defense counsel also stressed the lack of DNA, the fact that Durant was a double amputee and legally blind, suffered from erectile dysfunction, and had a chronic sexually transmitted disease that none of the alleged victims contracted.

Id. Durant also presented testimony from Myer Mack (A. 30-53) and Elvin Vaughn (A. 53-64), which is not mentioned in the state Supreme Court's opinion, to demonstrate it is extremely improbable that the alleged sexual abuse occurred. The court below agreed "with the trial court that McRae's conviction for obtaining a signature under false pretenses likely would have been admissible. *Durant*, 430 S.C. at 110, 844 S.E.2d at 55.

McRae's importance to the prosecution flowed from her claim she overheard two of the girls discussing Durant's sexual abuse. A. 22-24. While Durant's defense included the property dispute with Johnson, it also relied on a conspiracy between Johnson, McRae, and the girls to fabricate the allegations of sexual abuse. McRae, Johnson, and all four girls knew each other. During closing arguments, the prosecution relied on the credibility of McRae overhearing the "accidental disclosure." A. 70-71.

The Supreme Court of South Carolina did not consider McRae's criminal history "in the context of the entire record." *Agurs,* 427 U.S. at 113. Rather, the court below focused on the prosecution's case when it held, "[T]he State presented cumulative evidence in the form of the girls' testimony," meaning "the jury had ample evidence supporting its verdict." *Durant*, 430 S.C. at 110, 844 S.E.2d at 55. In passing, the court below noted that Durant "never suggested that McRae—as opposed to Johnson—forged the deed." *Id*. As seen, Durant's defense was not based on an allegation that McRae forged the deed. Rather, his defense was based on Johnson, McRae, and the girls conspiring to present false testimony.

The Court below should have examined the entire record, including Durant's evidence, to determine whether "there is a reasonable probability that, had [McRae's criminal record] been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, at 682. Durant strongly contested the state's evidence, but the Supreme Court of South Carolina did not consider McRae's criminal history in the context of any of this evidence. The trial judge's observation that the "defense made a strong case" but "the jury chose to believe the young ladies" is evidence McRae's criminal history, if known to the jurors, would have changed the result of the proceedings. A. 97. That the jurors remained deadlocked after four votes is additional evidence

McRae's criminal history, if known to the jurors, would have changed the result of the proceedings. A. 88.

This Court should grant the writ and consider whether the court below applied the proper test for materiality of a *Brady* violation. If this Court concludes the Supreme Court of South Carolina did not apply the proper test for materiality of a *Brady* violation, then this Court should remand to the court below to apply the proper test.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and consider the issues.

Respectfully submitted,

By /s/*E. Charles Grose, Jr.*
E. Charles Grose, Jr.
Counsel of Record
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
charles@groselawfirm.com

Counsel for Petitioner Larry Durant

October 6, 2020.