
No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Syron Devodney Rogers – PETITIONER
(Your Name)

VS.

Commonwealth of Virginia – RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court of Virginia

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Syron Devodney Rogers
(Your Name)

A.C.C., 1821 Estaline Valley Road
(Address)

Craigsville, Virginia 24430
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Whether the Court of Appeals for the Fourth Circuit erred in determining that the district court did not abuse its discretion and commit reversible error when it found that petitioner's rule 60(b)(6) motion did not state a claim for relief when appellant clearly showed that his motion should be considered due to the extraordinary circumstance exception in order to attain the ends of justice in accordance with this Court's decision in *Brady V. Maryland*, 373 U.S. 83 (1963) and the Fourth Circuit's recent decision in the case of *Juniper v. Zook*, 876 F.3d 551 (4th Cir. 2017) (Citing *Townsend V. Sain*, 372 U.S. 293 (1963)) where the court determined that "the district court reversibly erred in ruling on the merits of petitioner's Brady claim without holding an evidentiary hearing?"

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal court**:

The date on which the United States Court of Appeals decided my case was December 7, 2017.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: December 28, 2017, and a copy of the order denying rehearing appears at Appendix C.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.

A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment of the U. S. Constitution – No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment of the U. S. Constitution – 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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment of the U. S. Constitution – All persons born or naturalized in the United States, and Subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges of 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 it's jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner pled not guilty and proceeded to trial by jury on the murder and firearm charges on May 17-19, 2011. He was represented by Christian Connell, Esq. and the Commonwealth was represented by Paula Bruns, Esq. The jury returned a verdict of guilty to both offenses and recommended a sentence of twelve (12) years on the murder and mandatory three (3) years on the firearm. A final Order was entered May 19, 2011. As a result of these convictions, the Court found him in violation of probation terms previously imposed¹ and sentenced him to a total of five (5) years on the violations on June 12, 2012.

Petitioner appealed his cases. On or about March 2, 2012, well after the Court of Appeals denied the appeal², the Commonwealth, via Ms. Bruns, disclosed information to this counsel, trial counsel, and counsel on a related charge³ certain information which all of the defense counsel deemed exculpatory in nature.⁴ Specifically, the unknown witness [since identified as “witness Dennis Williams”] told the FBI that Brown’s “partner/friend” [Smurf] in the drug business was in Diggs Park to “act as Brown’s enforcer” in the confrontation against Mr. Rogers,⁵

¹ Violation Docket Numbers : CR05-990-03, CR04-4320-02, CR01-325-02

² The Court of Appeals denied the petition for appeal on December 9, 2011, petition for rehearing denied May 18, 2012, and petition refused by the Virginia Supreme Court on November 5, 2012.

³ Petitioner was directly indicted for felon in possession of a firearm in connection with the murder, but that charge was severed for separate trial. Ultimately, the felon in possession charge was nolle prossed pending a decision in this habeas matter.

⁴ See attached Appendix D: March 2, 2012 letter from Paula Bruns to Christian Connell, Jennifer Stanton, and Diane Toscano with 8 pages of attachments.

⁵ See FBI 302 dated 9/30/10 See Appendix D attachment

and that Brown handed his own gun to Smurf “in view of the unknown black male to intimidate him.”⁶

While the Commonwealth originally denied this information was in fact exculpatory, Ms. Bruns admitted before the Honorable John R. Doyle, Jr., that the information she disclosed in March, 2012 was in fact exculpatory.⁷ The substance of the information went directly to impeachment of the Commonwealth’s primary witness in the case, Terrence Brown.

Terrence Brown testified⁸ at the trial in May, 2011, that he had known petitioner since he was about nine years old. (Tr. 172-73). Petitioner was an acquaintance of his [Terrence’s] sister’s Tr. 151. Terrence knew the victim, Udraka Brown, as ‘Smurf’; had known him all his life. Tr. 152. Terrence met with Smurf the afternoon of the shooting and they rode around a bit. Tr. 153 Earlier that same day, Terrence had had words with Rogers over the telephone. Id. The ‘words were in part about Terrence’s sister. Tr. 154-55. Rogers told Terrence to meet him at Rogers’ aunt’s house on Reservoir [Ave] Tr. 155, but Terrence and Smurf did not go. Tr. 156.

Terrence described Rogers’ car as coming down Melon Street first and parking before they did, “acting like he was stopping for us.” Tr. 161-2, 175. In describing his reaction to seeing this, Terrence stated, “[i]f we would have saw him

⁶ Id.

⁷ See 4/3/12 Transcript at 14 Appendix E

⁸ Brown’s testimony was on day one of the trial, May 17, 2011. All transcript references regarding Terrence Brown’s testimony are to that specific transcript.

which we did, we would have kept going, but we weren't going to stop for him, but he pulled over like that; so therefore, we jumped out of the car." Tr. 161 Terrence and Smurf got out of their car, leaving it running, because they did not expect to be there very long. Tr. 183. Rogers got out of his car and started walking towards them. Rogers and Terrence were having words again. Tr. 162. Smurf said "F you" to Rogers (Tr. 163) to which Rogers allegedly replied, "That nigga can come, too." Tr. 164 Smurf and Rogers were about four feet apart, getting into each other's faces. Tr. 176-77. He described their verbal assault on each other as "an altercation"; Terrence thought it would escalate into a fight. Tr. 178. Terrence did not see Rogers or Smurf with a weapon. Tr. 164, 176, 177.

Terrence told Smurf to "come on: and not to worry about Rogers. Tr. 166. He turned to leave and "that's when the shot go off because I'm going back to the car." Tr. 166-67. Terrence did not see Rogers with a gun wither during the shooting or as Rogers was getting back in the car. Tr. 167. Right after Smurf had been shot, Terrence left the scene in the victim's car and took it back to his [Smurf's] family. Tr. 183-84. He saw Rogers walk to his [Rogers'] car and leave immediately. Tr. 184. The reason Terrence left the scene and did not talk to the police right away is because he wanted "to have a clear mind to think exactly what to do." Tr. 185.

Trial Counsel for Petitioner, Christian Connell, wrote to Ms. Bruns on July 19, 2012, outlining the defendant's position as to the late disclosure of the

information.⁹ On information and belief, Ms. Bruns did not respond to Mr. Connell's inquiry. Approximately one year later, on March 1, 2013, Ms. Bruns called and emailed Jennifer T. Stanton appellate counsel for Petitioner that she had gone so far as to interview witness Dennis Williams, the witness who provided the originally disclosed exculpatory information, with FBI Agent Ashby. She outlined in the email that,

In a very general summary, Williams advised he sold to Brown, Brown said he went with the victim to Diggs Park and they met with Petitioner regarding drugs, Agent Ashby described, in a very general way, Williams was selling drugs, the agent/investigators did surveillance and witnessed Williams selling to Brown, Brown giving over to his car to his girlfriend with the drugs in the car, Brown was arrested. Williams and Brown had been involved in drug transactions. This is the case that prosecution began against Terrence Brown with the file being prosecuted by Bill Carrow. Esq., was nolle prossed here and is the same case Brown was prosecuted on in federal court and is currently severing a sentence.¹⁰

To further compound the violation of petitioner's Due Process rights, Ms. Bruns provided additional information on April 11, 2013 in an email¹¹ that she had re-interviewed Terrence Brown who now claimed he saw petitioner with a gun in his pocket, and that he never saw Smurf with a gun. Brown now claims petitioner "had his gun out," and now maintains that what he [Terrence Brown] testified to at trial "was not true."

After the denial of his appeals petitioner filed a timely petition for writ of habeas corpus in the state court requesting discovery and an evidentiary hearing for

⁹ See attached letter from Christian Connell to Paula Bruns dated July 19, 2012 at Appendix F

¹⁰ Copy attached at Appendix G

¹¹ See attached April 11, 2013 email from Paula Bruns at Appendix H

permission to obtain a complete copy of the Commonwealth's file on Terrence Brown, and the FBI file on Terrance Brown and Dennis Williams, as well as permit interrogatories and/ or depositions of Paula Bruns, Esq., William Carrow, Esq., and the Task Force and FBI agents involved in the Dennis Williams and Terrance Brown federal files.

Ultimately petitioner was not allowed to develop the facts necessary to prove his Brady claim and his state-post conviction remedies were unsuccessful. Petitioner then filed a Petition for Writ of Habeas under 28 U.S.C. § 2254, challenging the legality of his confinement. In relevant part, petitioner argued that state prosecutors violated his right under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose a witness statement that he considers exculpatory. The Court referred his petition and the Defendant's Motion to Dismiss the Petition to a Magistrate Judge. The Magistrate Judge issued a Report and Recommendation that recommended the Court deny the Petition and grant Defendant's Motion to Dismiss. On January 26, 2015, the Court issued an Order adopting and approving the Magistrate Judge's findings, thereby denying the Petition, granting Defendant's Motion to Dismiss, and denying a certificate of appealability. See *Rogers v. Clarke* (Rogers Final Order), No. 2:14-cv-310, 2015 WL 11110948, *1-3 (E.D. Va. Jan. 26, 2015). The Clerk entered Judgment that same day. ECF no. 34. Rogers thereafter sought a certificate of appealability from the United States Court of

Appeals for the Fourth Circuit, which denied his request. See *Rogers v. Clarke*, F. App'x 90, 90 (4th Cir. June 19, 2015)

Petitioner then moved for relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure from the Judgment entered against him in the District Court asserting that he fit into the “extraordinary circumstances” category which allows the District Court to revisit its previous decision because the prior decision was clearly erroneous and would work manifest injustice. This was denied on March 21, 2017. Petitioner then sought an appeal of this decision in the Fourth Circuit Court of Appeals. This appeal was denied on November 20, 2017. Petitioner afterwards sought a Rehearing En Banc which was denied on December 28, 2017. Petitioner now proceeds to this Honorable Court with a Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

- I. THE COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED IN DETERMINING THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION AND COMMIT REVERSIBLE ERROR WHEN IT FOUND THAT APPELLANT'S RULE 60(B)(6) MOTION DID NOT STATE A CLAIM FOR RELIEF AFTER APPELLANT CLEARLY SHOWED THAT HIS MOTION SHOULD BE CONSIDERED DUE TO THE EXTRAORDINARY CIRCUMSTANCE EXCEPTION IN ORDER TO ATTAIN THE ENDS OF JUSTICE IN ACCORDANCE WITH THIS COURT'S DECISION IN *BRADY V. MARYLAND*, 373 U.S. 83 (1963) AND THE FOURTH CIRCUIT'S RECENT DECISION IN THE CASE OF *JUNIPER V. ZOOK*, 876 F.3D 551 (4TH CIR. 2017) (CITING *TOWNSEND V. SAIN*, 372 U.S. 293 (1963)) WHERE THE COURT DETERMINED THAT "THE DISTRICT COURT REVERSIBLY ERRED IN RULING ON THE MERITS OF PETITIONER'S BRADY CLAIM WITHOUT HOLDING AN EVIDENTIARY HEARING?"

The holding of the courts below that petitioner's claim failed to show a reversible error is in square conflict with the decisions of this court found in the case of *Brady V. Maryland*, 373 U.S. 83 (1963), where the Supreme Court of the United States has held that "the suppression 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."

The decision of the lower courts is also in Conflict with fundamental due process as well as the Fourth Circuits own decision in the case of *Juniper V. Zook*, 876 F.3d 551 (4th Cir. 2017), (Citing *Townsend V. Sain*, 372 U.S. 293 (1963)) where the court determined that "the district court reversibly erred in ruling on the merits of petitioner's Brady claim without holding an evidentiary hearing.

The case at hand presents a fundamental question of *Townsend v. Sain*, 372 U.S. 293, 313, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963) where it was held that, "A petitioner who has diligently pursued his habeas corpus claim in state court is entitled to an evidentiary hearing in federal court, on facts not previously developed in the state court proceedings, if the facts alleged would entitle him to relief, and if he satisfies one of the six factors enumerated by the Supreme Court."

The question presented is of great importance to the public because it affects the fairness of the judicial process in the entire United States. Guidance on the questions is also of great importance to the judiciary in light of those petitioner's that are denied evidentiary hearings in violation of the Fourteenth Amendment. In addition, the question is of great importance to petitioners because it affects their ability to receive fair decisions in proceedings that may result in months or years of continued incarceration.

The Fourth Circuit concluded that there was no reversible error found in petitioner's appeal from the disposition of his Motion for Relief filed in the lower District Court, but clearly the state court's decision in this case is contrary to the clearly established federal law of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and is based on an unreasonable determination of the facts in light of the evidence.

Petitioner argued at Ground Three of his Federal habeas corpus petition that he was denied due process because the Williams Statement was not disclosed at trial in time for his counsel to properly address the argument, subpoena necessary

witnesses, and prepare for cross-examination. Petitioner does not agree with the Magistrate Judge's report and recommendation that the Prosecutor did not have a duty to disclose Williams Statement and that Williams Statement is not material, and therefore does not fall under the standard of Brady and Bagley.

First, the District Court Magistrate stated that the state prosecutor did not have a duty to discover statements made to federal investigators. Petitioner disagrees. An "individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). The Magistrate's determination is presumably because the federal authorities did not have any direct involvement with the charges against petitioner, and because Terrence Brown's case went through the federal courts after his matter was nolle prossed at the state level. Herein lies another dispute of fact which demands an evidentiary hearing.

This District Court was in an abuse of its discretion to not conduct an evidentiary hearing when the facts are in dispute and the hearing is needed to resolve any conflicts in the facts and evidence. Petitioner submitted affidavits from his counselors which would support the need for an evidentiary hearing. (*See affidavit of Christian Connell as Appendix I and affidavit of Dian Toscono as Appendix J*). The motions for an Evidentiary Hearing and Discovery which were dismissed by the Magistrate in this case are clearly needed for petitioner to prove

his claim, and the Fourth Circuit was in clear error for finding that petitioner's claim had no merit.

Respondent agrees that knowledge will be imputed to the prosecutor where the impeaching evidence is known to other members of the "prosecution team." This includes information known to other prosecutors in the same office. It also includes information in hands of the police or other investigative agencies involved in the prosecution. *Kyles v. Whitley*, 514 U.S. at 437-38(police); *Endicott*, 869 F.2d at 455-56 (Knowledge of promises made by Bureau of Alcohol, Tobacco and Firearm agents to witness is imputed to prosecutor, even though prosecutor may have been unaware of the promises, because the investigative officers were "part of the prosecution"); *United States v. Steel*, 759 F.2d 706, 714 (9th Cir. 1985) (knowledge of information held by F.B.I. imputed to prosecutor because investigative officer were also part of the prosecution); *United States v. Butler*, 567 F.2d 885, 889-91 (9th Cir. 1978) (government is responsible for non-disclosure by D.E.A. agents because they are arm of the prosecutor"). The concept has been extended to knowledge held by an agency "interested in the prosecution." See e.g., *United States v. Wood*, 57 F.3d 733 (9th Cir. 1995) (in prosecution for conspiracy to defraud Food and Drug Administration, prosecutor was require to disclose information known to FDA even though unknown to prosecutor because, as agency interested in the prosecution, FDA was "part of the prosecution" for Brady purposes).

Petitioner asserts that on information and belief, based on conversations his counsel has had with the F.B. I. that (a) there was likely a Task Force Agent involved in the Terrence Brown federal prosecution who was also a full-time Norfolk police official, and (b) that knowledge of the intricacies of the federal agency case against Terrence Brown was relayed to William Carrow, Esq. and/or other prosecutors of the Norfolk Commonwealth's Attorney's office which would in fact impute knowledge to Paula Bruns, the prosecutor in this case, as she was employed by the very same office. Too, and part because the state criminal case against Terrence Brown was nolle prossed on the very day he testified in the petitioner trial, it defies belief that Mr. Carrow and Ms. Bruns failed to discuss the connections between the Brown and petitioner cases or that Brown was the State's primary witness against petitioner.¹²

It is petitioner's contention that the officers/detectives involved in Terrence Brown's state prosecution were involved in the federal prosecution as well, either as a task force agent, or as witnesses in the federal prosecution. Regardless, those officers/detectives would still be members of the Norfolk Police Department, an agency which was directly involved in the prosecution of the petitioner. Those officers would reasonably have known of Brown's statement in connection with

¹² United States v. Zuno-Acre, 44 F.3d 1420, 1427 (9th Cir. 1995) (the prosecutor is "deemed to have knowledge of and access to anything in the custody or control of any federal agency participating in the same investigation of the defendant"); See also "DREAM TEAM OR EVIDENTIARY NIGHTMARE? DEFINING WHEN A GOVERNMENT AGENCY IS APRT OF THE PROSECUTION TEAM," Carol Gordon Rapaport, 9 Suffolk J. Trial & App. Adv. 81 (2004) citing 22A C.J.S. Criminal Law §489, at 70 (1989 & Supp. 2002) (extending disclosure to agencies participating in investigation and reporting to prosecution).

that investigation. The prosecutor had a duty to investigate and disclose as their knowledge is legally imputed to her as well as any other member of her office.¹³

The court abused its discretion in stating that it would not impute the knowledge of the DEA agent to the prosecutor and the newly discovered evidence is immaterial. In *United States v. Sutton*, 542 F.2d 1239, 1241 (4th Cir. 1976) it states: “What the [FBI agent] knew must be imputed to the prosecutor”. See also, *Boone v. Paderick*, 541 F.2d 447 (4th Cir. Sept. 13, 1976) (“The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the state’s Attorney, were guilty of the nondisclosure”). *U.S. v. Aviles-Colon*, 536 F.3d 1,20 (1st Cir. 2008) (“ DEA report favorable to an accused because they contradicted testimony of government witnesses”).

The DEA report is favorable to the petitioner because it undermines the confidence on the Prosecution’s theory of the case. The Prosecution theory of the case was that neither Terrence Brown nor Udraka Brown had a gun on their possession and there was no struggle. The Commonwealth put defendant statement on in their case in chief. In that, the Commonwealth played Petitioner’s taped police interrogation at trial. In his taped interview, Petitioner said that Terrence Brown had the gun, which he gave to Udraka Brown, a/k/a Smurf, and that the gun accidentally went off while struggling with Smurf over the gun. The report shows that Terrence had a gun which he gave to Udraka and there was a struggle, and

¹³ On information and belief, William Carrow was the prosecutor at the state level of the case against Terrence Brown.

shows Udraka was the aggressor. Thus, in the hands of competent defense counsel, the evidence could have been used to either cast reasonable doubt on the Prosecution's theory of the case, establish a defense strategy, or competent defense counsel could have used the DEA report and other suppressed items to impeach Terrence Brown on the stand, thus calling into question the credibility of another government witness. (See *affidavit of trial counsel Christian Connell as Appendix D*). When considering the cumulative effect of all of the suppressed evidence, the jury would have been able to consider a properly impeached key witness (Terrence) combined with direct evidence implicating an alternative theory of the case as well as other evidence impeaching the corroborating witnesses' version of events at trial. The fact that the jury was never presented with this information undermines confidence in the trial verdict. See (*Wolfe v. Clarke*, 819 F. Supp. 2d 538 (E.D. Va. 2011)). See also (*Wolfe v. Clarke*, 691 F.3d 410 (4th Cir. 2012)). See (*Wolfe v. Clarke*, 718 F3. 277 (C.A. 4(Va.) 2013)).

Second, the Magistrate states that the Williams statement was not material. In *Brady v. Maryland*, the United States Supreme Court established that “the suppression 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 or bad faith of the prosecution.” 373 U.S. 83, 87 (1963). For a court to find a Brady violation, it must determine that evidence was (1) favorable to accused, (2) suppressed by prosecution, either willfully or

inadvertently, and (3) material. Evidence that is favorable to accused, as required to establish Brady violation, includes both exculpatory, whether requested by accused or not, and impeachment evidence.

In analyzing materiality, as required to establish a Brady violation, courts must determine whether there is "reasonable probability" that the result of a proceeding would have been different if evidence had been disclosed. Showing that evidence is "material," as required to establish Brady violation, does not require demonstration by preponderance that disclosure of suppressed evidence would have resulted ultimately in the defendant's acquittal; rather, defendant can fulfill materiality standard by showing that cumulative effect of suppressed evidence could reasonably be taken to put whole case in such different light as to undermine confidence in verdict. Non-disclosure of evidence in criminal prosecution affecting credibility violates due process when reliability of given witness may well be determinative of guilt or innocence.

The Supreme Court has held that both the withholding of exculpatory evidence from a criminal defendant by a prosecutor and the knowing use of false testimony violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See *Brady v. Maryland*, 373 U.S. 83, 86, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Giglio v. United States*, 405 U.S. 150, 153-55, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). "[T]he suppression 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, 83 S.Ct. 1194. "Evidence is 'exculpatory' and 'favorable' if it 'may make the difference between conviction and acquittal' had it been 'disclosed and used effectively.' " *United States v. Wilson*, 624 F.3d 640, 661 (4th Cir.2010) (citing *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)).

For a court to find a Brady violation, it must determine that the evidence was 1) favorable to the accused, 2) suppressed by the prosecution (either willfully or inadvertently), and 3) material. *Banks v. Dretke*, 540 U.S. 668, 691, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004). Evidence that is favorable to the accused includes both exculpatory (whether requested by defendant or not) and impeachment evidence. *Id.*; See *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (holding that the Brady rule includes impeachment evidence).

In analyzing materiality, courts must determine whether there is a "reasonable probability" that the result of the proceeding would have been different if the evidence had been disclosed. *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (duty of disclosure extends to evidence in the possession of the entire prosecution team, which includes investigative and other government agencies) see also *Strickler v. Green*, 527 U.S. 263, 275, n. 12 (1999) (prosecutor has constructive knowledge of all favorable evidence known to those acting on the government's behalf, even if no actual knowledge of materials, an

even if materials are in the file of another jurisdiction's prosecutor). This showing "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Id.* (citing *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). Rather, a petitioner can fulfill the materiality standard by showing that the cumulative effect of the suppressed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435-437, 115 S.Ct. 1555.

In this case, petitioner diligently pursued his habeas claim in state court and requested an evidentiary hearing at that phase which was denied. "A petitioner who has diligently pursued his habeas corpus claim in state court is entitled to an evidentiary hearing in federal court, on facts not previously developed in the state court proceedings, if the facts alleged would entitle him to relief, and if he satisfies one of the six factors enumerated by the Supreme Court in *Townsend v. Sain*, 372 U.S. 293, 313, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963)."

A petitioner diligently has pursued his habeas claim in state court if he "made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." *Id.* at 589 (quoting *Williams (Michael) v. Taylor*, 529 U.S. 420, 435, 120 S. Ct. 1479, 146 L.Ed.2d 435 (2000)). ("At a minimum, a diligent petitioner must 'seek an evidentiary hearing in state court in the manner prescribed by state law.' " *Id.* (quoting *Williams*, 529 U.S. at

437, 120 S.Ct. 1479)). “Importantly, ... in determining whether a petitioner has been diligent, the question is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts.” *Wolfe v. Johnson*, 565 F.3d 140, 167 (4th Cir. 2009) (“*Wolfe I*”) (internal quotation marks omitted). *Juniper v. Zook*, 876 F.3d 563-876 (C.A.4 (Va.) 2017)

The information provided by the Commonwealth so late after trial is clearly, and admittedly exculpatory. The Commonwealth so stated on the record. To claim now that the information is not exculpatory is not only irrational and unsubstantiated, but begs the question, “If the Commonwealth didn’t believe the information to be exculpatory in the first instance, then which disclose in at all, much less nearly a year post-trial?” As if that is not enough, then why go to all the trouble to go interview the witness who provided the information well before trial to some law enforcement entity, with an FBI Agent, and then disclose that further conversation nearly two years after the trial?

The petitioner has established that the information is material in that it would have aided in his defense by virtue of the fact that trial counsel would have been better prepared at trial to confront and cross examine the witness(es) against petitioner, and to subpoena additional witnesses on his behalf. The information provided out of time, but now in hand, would have gone directly to the guilt or innocence of the accused and to impeachment of the Commonwealth’s primary witness against petitioner. Given what is now known about the complete lack of

credibility of Terrence Brown, and his own recantation of his trial testimony, petitioner has also shown that a reasonable probability or likelihood exist that the... disclosure would have resulted in a different outcome at trial.

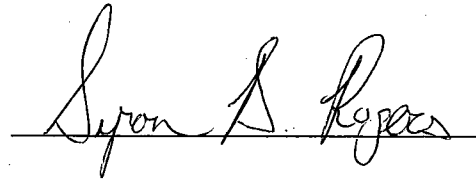
To remedy this grave constitutional error Petitioner asks the Court to remand this case back to the United States District Court, and order an evidentiary hearing in accordance with *Townsend V. Sain*, 372 U.S. 293 (1963), and the recent Fourth Circuit decision of *Juniper v. Zook*, 876 F.3d 551 (4th Cir. 2017) so that the ends of justice may be satisfied.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: March 22, 2018

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Syon L. Rogers", written over a horizontal line.