No. S24H0543

IN THE

Supreme Court of Georgia

ROYHEM DEEDS,

Petitioner,

v.

KEVIN SPRAYBERRY, WARDEN,

Respondent.

Brief of the Georgia Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner

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The Georgia Association of Criminal Defense Lawyers (GACDL) submits this brief as *amicus curiae* in support of Royhem Deeds's petition for a certificate of probable cause to appeal (CPC) from the denial of his petition for a writ of habeas corpus, Telfair County Superior Court Case No. 23-CH-008.

INTEREST OF THE AMICUS

A frequent friend of this Court, the Georgia Association of Criminal Defense Lawyers (GACDL) is a domestic nonprofit corporation whose members routinely execute the only office of the court dignified in the Bill of Rights: defending the life and liberty of the accused against the powers of organized society and ensuring the processes of law that they are due. GACDL's membership comprises both public defenders and private counsel. They are united in their dedication to the rule of law, the fair and impartial administration of criminal justice, the improvement of our adversarial system, the reasoned and informed advancement of criminal jurisprudence and procedure, and the preservation and fulfillment of our great constitutional heritage.

Our interest in this case centers on the trial court's erroneous rejection of Deeds's claim under *Brady v. Maryland*, 373 U.S. 83 (1963), based on the suppressed statement's oral nature, rather than reduced to writing. Flatly wrong under this Court's and sister jurisdiction's decisions, the trial court's error provides an ample opportunity for this Court to explicitly hold that *Brady* applies to all evidence, not merely that which gets written down.

VIEWS OF THE AMICUS

Protecting against both federal and state abuse, the Constitution prohibits depriving anyone of life, liberty, or property without due process of law. U.S. CONST., amend. V & XIV, §1. An elastic concept, due process of law has evolved extensively from its origins in *Magna Carta* and its law-of-the-land clause. Over the centuries of growth, its heartwood has always been checking arbitrary power—whether a Plantagenet king, a haughty Parliament, or our own republican government. Recognizing how the titanic power of the state will dwarf the individual, due process's demand of fundamental fairness forbids the prosecution from striking foul blows. Because the government exercises its power only through the People's consent, due process prohibits the government from cheating to win.

In criminal prosecutions, this means the State cannot withhold exculpatory evidence in its possession from the accused. In *Brady v. Maryland*, the U.S. Supreme Court held that government violates due process when it suppresses material exculpatory evidence, regardless of good or bad faith. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Later, the Court extended *Brady* to cover impeachment evidence, *Giglio v. United States*, 405 U.S. 150, 153-54 (1972), and confirmed prosecutors' affirmative duty to disclose. *Kyles v. Whitley*, 514 U.S. 419, 432 (III) (1995) (prosecution has an affirmative duty to

disclose favorable evidence to defense); *United States v. Bagley*, 473 U.S. 667, 682 (1985) (plurality opinion) (prosecution must disclose *Brady* material regardless of whether defendant's request was specific or general). Throughout its history, the U.S. Supreme Court has never limited *Brady* to written or otherwise recorded statements, nor has this Court. Yet in the habeas proceeding below, the trial court held precisely that, based on wholly inapplicable case law. Conflating separate analyses often can turn crystalline waters into a quagmire, especially when it mixes constitutional and non-constitutional claims, and that is the mistake made by the lower court. Because *Brady* has never been cabined to written statements only, because the habeas court's error substantially affected its analysis, and because of the catastrophic implications this ruling would have on constitutional law in Georgia, Amicus asks this Court to grant Deeds's certificate of probable cause to appeal (CPC).

1. The Habeas Court Erred because *Brady* Applies to All Material Evidence in the State's Possession, Not Just What the State Decides to Write Down.

The habeas court rejected Deeds's *Brady* claim because the at-issue oral statement had never been reduced to writing. In purported support of this bold conclusion, the court applied Georgia's statutory discovery law to reject the dictates of *Brady* disclosures. As shown below, that thought process contradicts decisions of this Court and across the country.

(a) The trial court's authority was anything but.

Start with the case the trial court relied upon in reaching its decision, *Simmons v. State*. Order at 10 (citing *Simmons v. State*, 321 Ga. App. 743, 746 (2013)).[1] In *Simmons*, the Court of Appeals held that no *discovery* violation under the *discovery* statute, O.C.G.A. §17-16-7, occurs where the State fails to produce oral statements of their witnesses to the defense, since that statute applies only to written statements. *Simmons*, 321 Ga. App. at 746 (citations omitted). *Simmons* based its ruling on this Court's decision in *Forehand v. State*. *Forehand v. State*, 267 Ga. 254, 255 (1996), overruled on other grounds by *State v. Lane*, 308 Ga. 10 (2020). But central to both cases was the *statutory* obligation to produce discovery, not the *constitutional* obligation to disclose exculpatory evidence: Neither *Simmons* nor *Forehand* even mention *Brady*. See *Forehand*, 267 Ga. at 255; *Simmons*, 321 Ga. App. at 746. Relying on §17-16-7 case law to resolve a *Brady* issue is like interpreting Georgia's self-incrimination paragraph in accord with the statutory self-incrimination bar—a bad idea. See *Ammons v. State*, 315 Ga. 149, 155 (2022) (overruling precedent which conflated statutory self-incrimination protections with Georgia's constitutional privilege).

[1] The trial court's order is found in Appendix A of Deeds's CPC petition, see Application for Certificate of Probable Cause to Appeal, app. A, *Deeds v. Sprayberry*, S24H0543 (filed Jan. 12, 2024).

Rather, the correct analysis for this issue comes from another decision from this Court, *Burgess v. State*. 276 Ga. 185 (2003). In *Burgess*, the defendant argued the State had violated both §17-16-7 and *Brady* when it failed to produce several statements until trial directly implicating the defendant. Id. at 186. In short order, this Court rejected the statutory discovery claim because the statements were never written down, only oral, so §17-16-7 did not apply. Ibid. Only after addressing the statutory concerns did this Court address *Brady*, concluding that "there is no *Brady* violation where, as here, the information sought becomes available to the accused at trial." Id. at 186 (citation and quotation marks omitted); accord *Matter of Lee*, 301 Ga. 74, 77-78 (2017) (collecting cases). In other words, *Brady* applies to oral statements, but is not violated where the statement is revealed at trial. *Burgess*, then, correctly demonstrates how to address someone's claimed violation of §17-16-7 and *Brady*.

Indeed, the Court of Appeals followed the correct analysis in *Chandler v. State*. *Chandler v. State*, 309 Ga. App. 611 (2011). In that case, the defense called the child victim's mother as a witness who testified that her child had repeatedly told her that nothing happened between the child and the defendant, which the mother testified reporting to the State. Id. at 612. In resolving the late disclosure issue, the *Chandler* Court concluded that no discovery violation occurred where the statement was oral and not reduced to

writing, citing *Burgess* for support. *Chandler*, 309 Ga. App. at 613 (citing *Burgess*, 276 Ga. at 186). "As for whether the prosecutor wrongfully withheld the information from the defense under *Brady*," the *Chandler* Court concluded no violation occurred—not because the statements were oral, but since the statements came out in the course of trial. Id. at 613-14. Again, related but separate analyses controlled.

Or consider this Court's decision in *Henley v. State*, involving analogous facts to Deeds's case. *Henley v. State*, 285 Ga. 500 (2009). In *Henley*, a State witness testified at trial that "when he spoke to the police after the incident, he did not tell them the truth about what had happened." Id. at 506. The witness went on to say that although he had not been forthcoming then, he had told the same narrative as his testimony to several officers who had accompanied him to a bond hearing date. Ibid. Again, the defense argued under both §17-16-7 and *Brady*. The *Henley* Court rejected the statutory claim because the statement was not written, only verbal. Id. Only then did this Court turn to *Brady*, concluding that although the witness's statement might have benefitted the defense, the *Brady* claim failed not because it was oral, but because it was not material. Id. at 507. No mention whatsoever of the legal fiction that *Brady* does not apply to oral statements.

The reasoning for the consistency in these cases is plain: *Brady* requires that prosecutors "disclose *all* evidence favorable to the defendant" that is

material to guilt or punishment. *Henley*, 285 Ga. at 506 (citation omitted). To conclude that *Brady* does not apply to oral statements needlessly, improperly, and dangerously conflates statutory discovery rules with a constitutional mandate. But this courts cannot do.

Of course, while their progression of reasoning seems persuasive,[2] neither *Henley* nor *Burgess* appear to address whether *Brady* applies to oral statements generally, rather than merely resolving the appeals. Litigants tread on thin ice when they seek to read into court decisions answers to questions neither raised nor briefed. See *Walker v. State*, 290 Ga. 696, 700 (2012) ("[D]icta does not bind this Court in a later case where the point is actually presented for decision."); but see *Rivers v. Brown*, 200 Ga. 49, 52 (1945) ("An adjudication on any point within the issues presented by the case cannot be considered a dictum; and this rule applies as to all pertinent questions, although only incidentally involved, which are presented and decided in the regular course of the consideration of the case[.]") (citation omitted). Although Amicus believe the *Brady* conclusions discussed above are compelled by those cases, in similar circumstances this Court has "look[ed] to

[2] Cf. *Deal v. Coleman*, 294 Ga. 170, 171 n.7 (2013) (chastising lower courts which "jump[] straight to the constitutional question" instead of "resolv[ing] the statutory question first.")

rulings from other jurisdictions for guidance" on how they addressed similar situations. *Lee v. Smith*, 307 Ga. 815, 823 (2020).

(b) Sister jurisdictions agree that Brady *applies to oral statements.*

Both states and federal circuits have held that *Brady* applies to oral statements. Though denying relief on other grounds like materiality, courts across the country agree that *Brady* and its progeny apply to oral exculpatory evidence the same as when it is recorded or written.

Federally, courts have applied *Brady* to oral statements for decades. One of the first courts was the old Fifth Circuit, which applied *Brady* to oral agreements in *United States v. Joseph*, 533 F.2d 282 (5th Cir. 1976).[3] On appeal, the defendant argued that the Government failed to comply with *Brady* by not providing the oral agreements between the Government and several informants. Again, the Government argued that "the oral agreement with the informants was not *Brady* material," and again the appellate court rejected the argument. *Joseph*, 533 F.2d at 286. Considering how a *written* agreement with the informants would fall well within *Brady*, the *Joseph* Court found it "would be incongruous to hold that an oral agreement falls outside the scope of *Brady*, a written agreement within." Id. Noting that agreements with the Government

[3] See *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc) (holding all Fifth Circuit precedent pre-Eleventh Circuit's creation retains its binding authority).

on drug cases are usually oral in nature, rather than written, the *Joseph* Court concluded that *Brady* "should not be circumvented by excluding an oral agreement which, if written, would be governed by the *Brady* mandate." Id. (citation omitted).

In the new millennium, the Second Circuit addressed the issue in *United States v. Rodriguez*. 496 F.3d 221 (2d Cir. 2007). There, the defendant was convicted in a multi-defendant drug prosecution where the government's case rested largely on two cooperating witnesses. At trial, one of the witnesses testified that she "had lied 'about everything' during her initial interviews with investigators." Id. at 222. Arguing on appeal violations of the Jencks Act (a federal discovery statute)[4] and *Brady*, the *Rodriguez* Court took a familiar approach: First, it addressed (and rejected) the Jencks Act argument because that statute applies to tangible statements, not oral. *Rodriguez*, 496 F.3d at 224. Although agreeing that absent any memorialization of oral statements no Jencks Act violation occurred, the *Rodriguez* Court flatly rejected that *Brady* does not apply to oral statements. Id. at 226. Recognizing that *Brady* and progeny find constitutional root in due process's insistence on fundamental fairness to defendants and finality in judgments, the Court held that "[t]he obligation to disclose information covered by [*Brady* and progeny] exists

[4] See 18 U.S.C. §3500.

without regard to whether that information has been recorded in tangible form." Id. at 226 (footnote omitted).

The *Rodriguez* court does not stand alone. In *United States v. Casas*, 425 F.3d 23 (1st Cir. 2005), the First Circuit confronted a case where prosecutors did not memorialize cooperation agreements with informants. After multiple witnesses in one trial disclosed on cross-examination their cooperation agreements, the prosecution belatedly conceded their existence when confronted by the trial judge. Id. at 42. Despite being chastised by the judge, and despite being specifically instructed to consult with its office and staff and turn over any agreements, the prosecutor did not turn over all of them. On appeal, the *Casas* court did not approve: "The *Brady* rule applies to evidence affecting key witnesses' credibility," the court held, which includes the verbal agreements between the Government and cooperating witnesses. Id. at 43. Though it found the error harmless in light of the expanded cross-examination afforded the defense at trial and the trial judge's specific instruction to the jury about *Brady* material, the *Casas* court "strongly condemn[ed] the prosecution's failure to correct the statement or to disclose the existence of a cooperation agreement" as required. *Casas*, 425 F.3d at 44.

Sister states agree. In the Alabama case *Savage v. State*, 600 So.2d 405 (Ala. 1992), investigators had spoken to several witnesses who told them the defendant had killed the victim in self-defense; at trial, however, both

witnesses painted the defendant as the aggressor. After the contradictory statements came to light in sentencing, the defendant moved for a new trial under *Brady*. Again, the State sought to justify its error by claiming *Brady* did not apply to oral statements. Id. at 408. Reversing, the *Savage* Court agreed that the oral statements, known by the investigator, fell clearly within *Brady*. As for the oral vs. written statement, the court stressed that "*any* statement, whether oral or written, bearing upon the issue of self-defense was clearly material to this case, and we decline to engage in semantics to justify suppression of material evidence that is favorable to the defendant." Id.

Or take a gander at *Flores v. State*, from the Texas Court of Appeals. *Flores v. State*, 940 S.W.2d 189 (Tex. Ct. App. 1996). In a murder case where the defendant killed her roommate during an argument, one of the first eyewitnesses on the scene gave a written statement to the police. The day before trial, during her interview with the prosecutor, the witness gave additional details supporting the defendant's self-defense claim;[5] the prosecutor never disclosed this information to the defense. On appeal, the Texas court held the prosecutor's non-disclosure of those oral statements fell

[5] See *Flores*, 940 S.W.2d at 190 ("[The witness] told the prosecutor that she heard Flores yelling, 'Debbie, what are you doing? Don't do it! Don't do it!' [The witness] said Flores just kept saying, 'Don't! Don't! No! No!'").

within *Brady*, rejected the State's argument it did not need to disclose the statements, and reversed the murder conviction. Id. at 191-92.

Arkansas also explicitly, and correctly, applies *Brady* to oral statements. In *Strobbe v. State*, 752 S.W.2d 29 (Ark. 1988), the defendant was tried and convicted for murder, based on the prosecution's main witness (and only eyewitness). The witness had given three statements which had been produced, at first denying any involvement but then claiming he had been at the scene, but had not participated in the killing. During the second day of jury selection, the witness told the prosecutor that he had helped place the victim in the defendant's car before the murder; the prosecutor made no mention of this to the defense. Although the witness's new information came out during his cross-examination, only after the trial did the prosecution admit that it knew of the change prior to trial. On appeal, the State again sought to excuse its misconduct by claiming it did not have to produce oral statements under *Brady*. *Strobbe*, 752 S.W.2d at 31. The court dismissed the argument, finding "the impeachment evidence that [the witness] was in fact a participant in the crime falls within the realm of information subject to discovery and the rule enunciated" in *Brady*. Id. at 32. Because the defense boiled down to the lone eyewitness's credibility, the *Strobbe* court reversed the conviction. Id.

Courts across the country have routinely recognized that *Brady* applies to oral statements. In *State v. Whitten*, the Maine high court addressed a

statutory discovery/*Brady* claim. *State v. Whitten*, 499 A.2d 161 (Me. 1985). Mirroring this Court in *Burgess* and *Henley*, the *Whitten* Court first concluded that no statutory violation occurred because the statements were oral, falling outside the statute's scope. Id. at 162. Only then did it move onto *Brady*, finding it did not apply to the oral statements at issue because they were inculpatory, not exculpatory. Id. at 162-63. Similarly, the California Supreme Court in *People v. Verdugo* addressed oral statements in a *Brady* violation claim, concluding that the statements did not qualify only because they were disclosed during trial. *People v. Verdugo*, 236 P.3d 1035, 1054 (Cal. 2010). And at the start of the new millennium, New York's intermediate appellate court directly held *Brady* required disclosure of a witness's oral statements to investigators when those statements were exculpatory. *People v. Demand*, 702 N.Y.S.2d 441, 444 (N.Y. App. Div. 2000).

Both this Court and sister jurisdictions agree that oral statements fall within *Brady*. For the trial court to conclude that *Brady* does not apply because the statements were not written debases the Constitution and the Great Writ into semantic squabbling. This Court should grant the Application to correct the habeas court's incorrect and dangerous ruling.

2. This Court should Grant Deeds's CPC to Make Plain that *Brady* Applies to *All* Exculpatory Evidence, Regardless of whether the State Decides to Memorialize It.

This Court should grant Deeds's CPC both to clarify the related, but separate analyses for statutory discovery/*Brady* violations and to emphasize the importance of *Brady*. As this Court recently noted, one reason for granting a CPC is the "need to establish precedent on an issue[.]" *Redmon v. Johnson*, 302 Ga. 763, 767 (2018) (per curiam). Here, that need exists for this Court to affirmatively hold that *Brady* applies to *all* exculpatory evidence, not just what the State decides to memorialize. And the habeas court's error infected its entire analysis: In analyzing the *Brady* claim, the court erroneously concluded the statement was neither within the State's possession nor was it suppressed, both because no one reduced the oral statement to writing. See Order at 9, 12. Clarifying that *Brady* applies to all evidence, not merely that which someone wrote down, would serve to promote *Brady*'s purpose—ensuring the government's desire to strike hard blows does not lead it to foul ones. See *Berger v. United States*, 295 U.S. 78, 88 (1935) ("[The prosecuting attorney] may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.")

Relatedly, the unsupportable erosion of *Brady* "presents an issue of great concern, gravity, or importance to the public[.]" *Redmon*, 302 Ga. at 767. Limiting *Brady* to memorialized statements flouts due process protections. If

the government can circumvent *Brady* by not writing down exculpatory information, it incentivizes bad actors to curate what they memorialize—whether a witness's contradiction in story, a change in opinion, or an undiscovered kernel of information. Due process mandates the disclosure of *all* exculpatory evidence, not merely what those actively engaged in law enforcement may think is exculpatory, and based on that assessment, may decide to or not to write down. The potential for abuse means the abuse will occur; with government, it is no slippery slope, but entropy.

Until recently, trial courts apparently thought themselves not bound by Court of Appeals precedent with which they disagreed. See *Esposito v. State*, 315 Ga. 223, 226-27 (2022). Until recently, some prosecutors thought that they did not have to keep their promises not to proceed with death sentences. See *State v. Fed. Defender Program, Inc.*, 315 Ga. 319 (2022); id. at 355-56 (Bethel, J., concurring). And the last few years has shown that some people in criminal law believe that proof beyond a reasonable doubt meant less than 51% certain, see *Debelbot v. State*, 305 Ga. 534, 543-44 (2019), or that custodial defendants could not invoke their self-incrimination rights before officers read the *Miranda*[6] warnings. See *Davidson v. State*, 304 Ga. 460, 467 (2018). In each

[6] *Miranda v. Arizona*, 384 U.S. 436 (1966).

case, this Court had to step in and course-correct, clarifying that the rule of law deserves more than mere gamesmanship. Such is the case here.

CONCLUSION

"[I]n safeguarding the liberty of the citizen against deprivation" through state action, due process promotes those "fundamental conceptions of justice" which undergird our society. *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). When prosecutors hide material exculpatory evidence, they act as more than "an architect of a proceeding that does not comport with standards of justice[.]" *Brady*, 373 U.S. at 88. They sap the very foundations of our society, tunnelling beneath the bastions of justice to undermine us all.

GACDL joins Royhem Deeds in asking this Court grant review.

This submission does not exceed the word count imposed by Rule 20.

Respectfully submitted this 22nd day of January, 2024.

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