

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Edward W. Miller, Circuit Court Judge

Opinion No. 2014-UP-5232 (S.C. Ct. App. filed 7/9/2014)

08-GS-23-8409 and 11-GS-23-7258A

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S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

CLARENCE WILLIAMS JENKINS,

PETITIONER

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on August 25, 2014.

QUESTIONS PRESENTED

I. Violating Petitioner's state and federal constitutional rights requiring the prosecution prove his guilt beyond a reasonable doubt, the Court of Appeals erred by affirming the trial court's refusal to instruct the jury regarding how to use circumstantial evidence as required pursuant to State v. Logan.

II. The Court of Appeals erred affirming the trial court's decision not to strike the testimony of a prosecution witness, or in the alternative grant a mistrial, where the prosecution failed to disclose material evidence in a timely manner in violation of Petitioner's state and federal constitutional right to due process and a fair trial.

III. The Court of Appeals erred in affirming the trial court's refusal to grant a recess to permit Petitioner to engage the services of an expert to review materials that where the prosecution failed to disclose material evidence in a timely manner in violation of Petitioner's state and federal constitutional right to due process and a fair trial.

STATEMENT OF THE CASE

On November 18, 2008, a Greenville County grand jury indicted Petitioner for murder and kidnapping. R. 316. Petitioner was tried before the Honorable Edward W. Miller and a jury on April 9-13, 2012. Walt Wilkins, Betty Strom, and George Campbell represented the state. John Mauldin, Susannah Ross, Mark McDougal, Conner Mullin, Katherine Creely, and Katherine Williams represented Petitioner. R. 1. The jury found Petitioner guilty as charged. R. 309, lines 16-23. Judge Miller sentenced Petitioner to life in prison on the murder charge. R. 314, lines 1-2; R. 320.

Petitioner filed a timely notice of appeal, which was perfected by the filing of his initial brief on April 1, 2013, and the filing of a reply brief on August 29, 2013. On May 6, 2013, Petitioner's case was argued before the Court of Appeals. On May 21, 2014, the Court of Appeals affirmed Petitioner's convictions and sentences in a published decision. App. 1. On June 5, 2014, Petitioner filed a timely petition for rehearing. App. 14. On July 9, 2014, the Court of Appeals denied the petition for rehearing, but withdrew the previously published opinion and substituted an amended opinion. State v. Jenkins, 408 S.C. 560, 759 S.E.2d 759 (Ct. App. 2014); App. 29. On July 24, 2014, Petitioner filed a second petition for rehearing challenging the amended opinion. App. 43. On August 25, 2014, the Court of Appeals denied Petitioner's second petition for rehearing. App. 57.

This petition for writ of certiorari follows.

STATEMENT OF THE FACTS

On April 7, 2008, the police officers responded to two calls about threatening letters and suspicious packages at two separate locations. Upon arrival at the scenes, the police discovered two trash bags, each containing a severed human foot and severed human hand, and letters. R. 42, line 7 – R. 46, line 23; R. 47, lines 3-15; R. 50, line 5 – R. 53, lines 13; R. 54, lines 7-15. Approximately one week before, one of the responding officers had responded to one of the locations for a suspicious letter. R. 26, lines 3-14. That letter referred to people named “Grace” and “Willie.” R. 26, line 23 – R. 27, line 13. The homeowner at one of the locations informed the police that “Grace” in the letter may refer to Grace Davis. R. 31, lines 21-23

Davis testified that she met Petitioner and his wife, Carmen Jenkins, in August of 2007. She began an intimate relationship with Petitioner and the three moved in together. Shortly thereafter, Petitioner went to jail for driving under suspension. While he was in jail, Davis and Carmen began an intimate relationship and fell in love. When Petitioner was released from jail, the three entered an intimate covenant, which required the reciting and signing of a covenant and the exchange of rings. R. 111, line 5 – R. 115, line 10; R. 120, lines 20-25; R. 122, lines 2-24; R. 123, line 22 – R. 124, line 24; R. 125, line 5 – R. 126, line 13. When Petitioner returned from jail, Carmen confided in Davis that she was in love with her and did not want Petitioner involved in their relationship. R. 139, line 17 – R. 140, line 6.

At some point, Davis’ kids were removed from the home due to the living arrangements. In order to get her kids back, Davis moved out on March 16, 2008. Davis testified that Carmen was very upset about her living. R. 127, line 8 – R. 130, line 1.

Carmen testified pursuant to a plea agreement. Carmen pled guilty to murder and received a fifty-year sentence. Pursuant to her agreement, if she testified on behalf of the prosecution against Petitioner, then the prosecutor would seek a sentence reduction on her behalf. R. 160.

Carmen testified similarly to Davis regarding how the three became involved in a romantic relationship and of her love for Davis. R. 163, line 2 – R. 170, line 15. She also explained the circumstances under which Davis left the relationship. R. 170, lines 18-25; R. 176, line 16 – R. 177, line 14. Carmen claimed Petitioner decided to write letters to entice Davis to return to the relationship. She admitted that she had to assist Petitioner with the letters because he could not spell and did not use a computer well. She testified they mailed approximately seven letters. R. 177, line 15 – R. 185, line 23.

According to Carmen, in early April 2008, Petitioner called her to say he was bringing someone home. He arrived with Mekole Harris. R. 188, line 21 – R. 189, line 8. Carmen testified that she next saw Harris in a bedroom with Petitioner and Harris was naked and in handcuffs. Petitioner purportedly claimed he and Carmen were police officers and were going to arrest Harris for prostitution and possession of crack unless she cooperated with them. Harris agreed to do anything to keep from going to jail again. R. 190, lines 10 - 21.

Petitioner wrote out a script for Harris to read over the phone. Petitioner dialed the numbers for Davis' mother and aunt and forced Harris to say the script into the phone. R. 190, line 23 – R. 194, line 17. Although Harris was handcuffed while at the Jenkins' home, Carmen testified she could have left as long as she carried the chair with her because Carmen and Petitioner did not stay in the same room with her. R. 199, lines 16-23.

On the following Sunday morning, Petitioner allegedly told Carmen to kill Harris. Carmen testified that she attempted to do so with a cord around Harris' neck, but was unable to do so.

Petitioner then took the cord and killed Harris. R. 201, line 22 – R. 203, line 17. Petitioner and Carmen dismembered Harris' body. The two kept her feet and hands in the freezer and wrapped the remaining body parts in trash bags and placed her in a child's play pen. They placed the body in a wooded area, poured gasoline and starter fluid on the body. Carmen set the body afire. R. 206, line 19 – R. 209, line 11.¹ Upon their arrive at home, they removed the body pieces from the freezer and placed one hand, one foot, and one set of toes in each of two bags. R. 209, lines 13-18. They drove to Davis' aunt's house where Carmen left a letter on the aunt's car and the bag of body parts on the porch. Next, they drove to Davis' mother's house where Carmen left the letter in the mailbox and the bag of body parts on the porch. R. 210, line 8 – R. 212, line 18.

Police rolled fingerprint impressions from the severed hands. R. 46, line 24 – R. 47, line 2; R. 55, lines 11-20. A latent fingerprint examiner input the rolled impressions into the computer system, which indicated multiple possible matches. The examiner reviewed the initial returned possible match and concluded the two were indeed a match. The computer system then provided the examiner with the identity of the owner of the fingerprint – Mekole Harris. R. 79, line 14 – R. 82, line 17.

¹ Almost two years after her arrest, Carmen informed the police of the location of Harris' remains in exchange for the prosecutor rescinding the notice of intent to seek death. R. 218, line 25 – R. 219, line 23.

ARGUMENT

I. Violating Petitioner's state and federal constitutional rights requiring the prosecution prove his guilt beyond a reasonable doubt, the Court of Appeals erred by affirming the trial court's refusal to instruct the jury regarding how to use circumstantial evidence as required pursuant to *State v. Logan*.

Relevant facts

At the conclusion of the case, Petitioner requested multiple jury instructions. R. 272, lines 20-21; R. 324. Among the instructions requested was a charge regarding circumstantial evidence. Specifically, Petitioner requested:

When the state relies on circumstantial evidence, you may not convict a defendant unless every circumstance relied on by the state is proven beyond a reasonable doubt, and all of the circumstances so proven are consistent with each other and, taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. It is not sufficient that the circumstances create a probability, even if it is a strong one. If, assuming the circumstances are true, there is a reasonable hypothesis which does not include the guilt of the accused the proof has failed.

Petitioner cited *State v. Edwards*, 298 S.C. 272, 379 S.E.2d 888 (1989) to support his request for the specific circumstantial evidence charge. Court's #4 (Request #10); R. 273, lines 5-6; R. 273, lines 11-20. The prosecutor objected to Petitioner's request. R. 275, lines 4-7. The judge ruled: "*State vs. Cherry*² clears that up." R. 275, line 8.

Concerning direct and circumstantial evidence, the judge charged the jury as follows:

Now, there are two types of evidence which are generally presented during a trial. And they are known as direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who claims to have actual knowledge of a fact, such as an eyewitness. It is evidence which immediately establishes the main fact sought to be proven. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of the main fact. It is evidence which immediately

² 361 S.C. 588, 606 S.E.2d 475 (2004).

establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or observation. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all of the evidence in the case. After weighing all of the evidence, if you are not convinced of the guilt of the Defendant beyond a reasonable doubt, then you should find the Defendant not guilty.

R. 281, line 10 – R. 282, line 5. At the conclusion of the jury instructions, Petitioner renewed his exception to the instruction concerning circumstantial evidence. R. 289, lines 2-4.

The jury began deliberations at 4:45 p.m. on April 12, 2012. R. 290, lines 13-14. By 6:15 p.m., the jury sent a note with two questions. R. 291, lines 10-11; R. 292, lines 5-9. At 8:47 p.m., the jury sent a note expressing its inability to arrive at unanimous verdicts: “we have deliberated and are unable to reach a unanimous verdict. ... P.S. we have reached a unanimous decision on one charge.” R. 296, lines 14-18; R. 328. The judge decided to send the jurors home for the evening. R. 300, lines 17-21. The jurors left at 9:13 p.m. R. 302, lines 18-19.

The jurors returned to court at 9:22 a.m. on April 13, 2012. R. 306, lines 3-4. At that time, the judge instructed the jurors pursuant to Allen v. United States, 164 U.S. 492 (1896). R. 306, line 5 – R. 308, line 8. The jury resumed deliberations at 9:28 a.m. R. 308, lines 24-25. Just over an hour later, at 10:45 a.m., the jury returned guilty verdicts. R. 309, lines 6-10.

Discussion

While Petitioner’s case was pending on appeal, this Court issued its decision in State v. Logan, 405 S.C. 83, 99, 747 S.E.2d 444, 452 (2013). This Court explained that although a trial court may instruct a jury concerning circumstantial evidence as defined in Grippon³ and Cherry,⁴

³ State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997).

⁴ State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004).

the trial court “should provide” an instruction guiding the jury on how to analyze circumstantial evidence, in addition to a proper reasonable doubt instruction, when requested to do so by a defendant. The approved charge provides jurors with much-needed guidance in analyzing circumstantial evidence:

There are two types of evidence which are generally presented during a trial – direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.

Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the state relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant’s behavior as suspicious, the proof has failed.

The state has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the state regardless of whether the state relies on direct evidence, circumstantial evidence, or some combination of the two.

Id. The Court of Appeals correctly determined that Logan applied retroactively; however, the Court of Appeals erred in affirming of the trial court’s denial of Petitioner’s request to instruct the jury as provided in Edwards and reverse his case for a proper instruction to the jury governing circumstantial evidence.

The Court of Appeals offered two reasons to support its denial of relief. First, the Court concluded that because Petitioner requested the instruction pursuant to Edwards, supra, which included language that the circumstantial evidence must point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis, and this Court had cautioned against such language, the trial court did not err. While this Court cautioned that requiring a jury to inquire as to other reasonable hypotheses other than a defendant’s guilt was “perilously close to shifting the

burden of proof from the state to the defendant,” this Court did not find the language did in fact shift the burden. In Grippon, 327 S.C. at 84, 489 S.E.2d at 464, then-Justice Toal wrote in her concurring opinion that “[t]he language concerning the necessity that the circumstantial evidence ‘point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis’ does not shift the burden of proof to the defendant.” Additionally, a defendant who requested such a charge could not complain about the charge on appeal. Finally, Petitioner simply could not know what language, if any, the Supreme Court would approve in Logan. Petitioner is not clairvoyant.

In the Court of Appeals’ second reason for denying Petitioner relief on this issue, the Court concluded that any error in the omission of language from the Logan charge was harmless beyond a reasonable doubt because the trial court’s instruction as a whole, properly conveyed the applicable law. The Court relied upon the trial court’s reasonable doubt instruction to the jury to make this finding. However, the Logan Court made clear that the clarifying instruction concerning circumstantial evidence should be given in addition to a proper reasonable doubt charge.

Clear, cogent, and concise instructions directing the jury on how to analyze the circumstantial evidence before it was necessary in Petitioner’s case. The testimony of Petitioner’s co-defendant concerning Petitioner’s direct involvement provided a greater impetus for the judge to instruct the jury concerning evaluating circumstantial evidence. Quite obviously, the state’s evidence pointed to the co-defendant’s guilt in the murder and kidnaping of Harris. It was the co-defendant who had prepared letters to the family of their ex-girlfriend and delivered the portions of Harris’ body to family members of their ex-girlfriend in an effort to intimidate her. In fact, much of the state’s the evidence pointed to the co-defendant’s guilt to the exclusion of Petitioner. Further, the co-defendant testified against Petitioner pursuant to a plea agreement in which she received a

fifty-year sentence, rather than the death penalty, with the promise that the prosecutor would seek a reduction in her sentence if she continued to cooperate.

Despite the co-defendant's testimony, the jury struggled with its verdict. On the first day of deliberations, the jury was out for over four hours. During that time, the jury expressed its inability to reach a unanimous decision. R. 290, lines 13-14; R. 291, lines 10-11; R. 292, lines 5-9; R. 296, lines 14-18; R. 302, lines 18-19; R. 328. The following day, the judge instructed the jurors pursuant to Allen v. United States, 164 U.S. 492 (1896). R. 306, line 5 – R. 308, line 8. The jury resumed deliberations at 9:28 a.m. R. 308, lines 24-25. Just over an hour later, at 10:45 a.m., the jury returned guilty verdicts. R. 309, lines 6-10.

Without question, a proper evaluation of circumstantial evidence requires connection of collateral facts to reach a conclusion, which is not required for evaluating direct evidence. The jury struggled with the evidence before it as demonstrated by the length of time the jury deliberated, the questions posed to the trial court, the jury being deadlocked, and the necessity of the judge giving an Allen charge despite the direct evidence against Petitioner. What the jury required was the proper framework and foundation for analyzing the circumstantial evidence presented by the prosecution in order to render a true and just verdict.

II. The Court of Appeals erred affirming the trial court's decision not to strike the testimony of a prosecution witness, or in the alternative grant a mistrial, where the prosecution failed to disclose material evidence in a timely manner in violation of Petitioner's state and federal constitutional right to due process and a fair trial.

Relevant facts

During a pretrial motion hearing regarding the testimony of an expert witness concerning latent fingerprint examination, Petitioner explained to the court that he had received only conclusory statements contained within reports from the prosecution. The reports essentially stated that "fingerprint examination was done and that it was verified by Captain Kellet." R. 2, lines 18-22. The one-page reports provided no information to allow Petitioner to understand the type of examination done. R. 2, lines 22-25. The prosecution explained "our latent experts, they don't do a lengthy report stating, specifically, what ridge matches what ridge." Instead, the report only indicates whether the unknown print matches a known print. R. 3, lines 21-24. The prosecutor further explained he "triple checked. There's no reports other than the conclusory statements that were given to defense counsel that these knowns match these prints." R. 4, lines 7-10. When Petitioner requested copies of the prints that were consulted in making the verification, the prosecutor explained the fingerprint cards would be available that day. He further stated "If they want to get their own expert while we're trying the case or something, I'm not sure, but they're read and available, all the latents are." R. 4, line 17 – R. 4, line 4. The prosecutor assured the court he would check "to see if there's any notes" relating to the fingerprint analysis. R. 6, lines 19-21.

In light of Petitioner's objections to the expert's testimony, the court conducted an in camera hearing. Jackie Kellet, employed by the Greenville Department of Public Safety forensic division, testified she entered the unknown print from the severed hand into the Automated Fingerprint

Identification System (AFIS). The computer system provided her with a list of potential matches. Kellet printed the card of the person AFIS said the unknown belonged to and used a magnifying glass to visually examining the points to verify the result. R. 61, lines 19-20; R. 65, line 15-12; R. 68, lines 1-11. Kellet testified she made no notes while making the comparison. R. 65, lines 13-25; R. 71, lines 10-13. Other than issuing a report, Kellet made no record of her work. R. 72, lines 1-24.

Kellet then testified before the jury. On direct examination, her testimony tracked her in camera testimony. R. 77, line 8 –R. 84, line 25. On cross-examination, Kellet testified that on a typical day, a latent print examiner may “do 500 to 1000 comparisons a day, easy.” R. 86, lines 17-25. She reiterated she made no notes of her comparisons. R. 87, lines 1-3. Petitioner then realized Kellet had a file in her hand and asked to examine its contents, which the judge permitted. R. 87, lines 8-11. Upon review of the file, Petitioner realized at least three documents had not been produced in discovery – “an AFIS report or a screen shot, an automated fingerprint identification worksheet and what looks to be a latent handprint.” R. 88, lines 9-17.

The trial judge explained he was “disturbed that the state ha[d] not produced these documents after all the lengthy hearings and discussions.” R. 89, lines 6-11. Petitioner reviewed the materials quickly and explained it appeared to be “a series of points of comparison on the screen shot ... [with] at least, two impressions that one looks to be identified, one looks to be the latent.” Petitioner informed the judge that having the materials would have provided him an opportunity to “raise some questions for cross-examination to support our objection.” R. 89, lines 12-20. The prosecutor claimed that after Petitioner “filed motions regarding the fingerprint analysis, point by point analysis [he] called Captain Kellet and conferred with her regarding what she had in her file.” Thereafter, he told Petitioner “there may be some AFIS stuff in there, that’s all I know.” He further

claimed Petitioner “didn’t want it.” R. 89, line 23 – R. 90, line 11. The judge ordered a ten-minute break. R. 90, lines 15-17.

After the break, Petitioner explained that the AFIS report provided at least sixteen respondents, or possible matches, with associated scores. Kellet’s testimony indicated she found a match with the first respondent. According to the undisclosed document, the first respondent had a score of 5595 and the second respondent had a score of 5415. Therefore, the second respondent was very close in score to the first. Petitioner explained “[h]ad we had this and had we been able to work with an expert in identifying the actual proximity of number one and number two and even number three, we could have, I think much more effectively cross-examined this witness.” R. 90, line 22 – R. 91, line 22. Petitioner further expressed the difficulty of trying to show prejudice based upon the prosecution’s failure to produce the document within a short amount of time, especially when the document relates to scientific expert testimony. Petitioner moved to strike the testimony of Kellet or grant a mistrial. R. 92, line 1 – R. 94, line 25.

In response, the prosecutor countered

we didn’t focus on anything regarding AFIS because we were [not] introducing anything regarding AFIS and it wasn’t evidence of anything. It was an investigative tool used to get them a potential comparison. So it wasn’t something that we even imagined would be anything that they would want. Given the fact, they knew it was run through AFIS.

R. 95, lines 18-24. He further argued Petitioner was not prejudiced by the failure to disclose. Specifically he said “the only thing on there that they didn’t have access to was a list of 20 people that the computer program had a report on. If they wanted the report on those folks, they could have asked for it.” R. 96, lines 1-6.

The trial judge expressed his concern that the prosecutor previously claimed in prior discovery conference that he had “given them everything” and “that [was] not the case.” The judge

further expressed that Petitioner had found “a touch point, which has potential for prejudice.” He admonished the prosecutor “even though the prosecution may have not [found] a document to be relevant, you have a different mindset than the defense. So it is important to produce all of the documents.” R. 96, lines 7-18.⁵ The judge also demonstrated concern for Petitioner’s predicament in being asked to articulate prejudice as a result of the prosecutor’s failure to disclose “on the spot.” R. 96, lines 19-21. Nevertheless, the judge found the failure to disclose did not rise to the level of requiring striking of the testimony or the granting of a mistrial. R. 97, lines 1-10. The undisclosed documents were made a court’s exhibit. R. 99, line 14 – R. 100, line 24; Court’s Exhibit #3.

Discussion

South Carolina has a system of discovery and disclosure requirements in addition to the requirements of the United States Constitution. Rule 5(a)(1)(C) of the South Carolina Rules of Criminal Procedure provides

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.

Additionally, Rule 5(a)(1)(D) provides

Upon request of a defendant the prosecution shall permit the defendant to inspect and copy any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution, and which are material to the preparation of the defense or are intended for use by the prosecution as evidence in chief at the trial.

⁵ The judge later explained that the prosecutor does not have the “mindset” of the defense and may not view the same documents with the same level of importance as the defense as a result. He further stated that if Petitioner had the documents, they may have been able to hire an expert to dispute Kellet’s finding. R. 97, line 19 – R. 98, line 7.

The Court of Appeals remarked that “[t]he requirements of Rule 5 ... are judicially created discovery mechanisms for use in criminal proceedings.” State v. Kennerly, 331 S.C. 442, 503 S.E.2d 214 (Ct. App. 1998). When a trial judge determines the prosecution violated Rule 5, the judge may fashion the proper remedy. The Rule itself explains that if a party failed to comply with the rule, the court “may prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.” Rule 5(d)(2), SCRCrimP. The Kennerly Court explained the definition of “material” as used in Rule 5 is the same as the definition used in the context of violations and obligations pursuant to Brady v. Maryland, 373 U.S. 83 (1963). Kennerly, 331 S.C. 453, 503 S.E.2d at 220. Thus, evidence is material for purposes of Rule 5 “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” United States v. Bagley, 473 U.S. 667, 682 (1985).

As explained by the Court of Appeals, the goal of Rule 5 is to ensure a criminal defendant’s right to a fair trial. Further, the role of a prosecutor is to be a minister of justice, not the representative of an ordinary party. As the representative of the sovereign, the prosecutor’s interest in a criminal prosecution is not to win, but to see that justice is done. Kennerly, 331 S.C. 454, 503 S.E.2d at 220.

The prudent prosecutor will resolve doubtful questions in favor of disclosure. This is as it should be. Such disclosures will serve to justify trust in the prosecutor as the representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done. And it will tend to preserve the criminal trial, as distinct from the prosecutor’s private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.

Riddle v. Ozmint, 369 S.C. 39, 46, 631 S.E.2d 70, 74 (2006). Similarly, the Rules of Professional Conduct impose certain duties upon prosecutors. Specifically, the Rules require a prosecutor “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to

negate the guilty of the accused or mitigates the offense.” Rule 3.8(e), SCACR. The special duties imposed upon prosecutors are due to the prosecutor’s “responsibility of a minister of justice and not simply that of an advocate.” Thus, the prosecutor has “specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.” Rule 3.8, cmt. 1, SCACR.

“The Brady disclosure rule requires the prosecution to provide to the defendant any evidence in the prosecution’s possession that may be favorable to the accused and material to guilt or punishment.” Hyman v. State, 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012) (citing Brady, supra). “[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted in the defendant’s acquittal.” Kyles v. Whitley, 514 U.S. 419, 434 (1995). It is enough that it undermines confidence in the verdict. Id. at 435.

Brady requires that prosecutors fully disclose to the accused all exculpatory evidence in their possession. United States Supreme Court decisions have elaborated the Brady obligations to include (1) the duty to disclose impeachment evidence, (2) favorable evidence in the absence of a request by the accused, and (3) evidence in the possession of persons or organizations. See Giglio v. United States, 405 U.S. 150 (1972); United States v. Agurs, 427 U.S. 97 (1976); Kyles, supra. Material must be disclosed “when prejudice to the accused ensures . . . [and where] the nondisclosure [is] so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.” Strickler v. Greene, 527 U.S. 263, 281-82 (1999).

The trial judge erred in failing to strike Kellet’s testimony or grant a mistrial based upon the prosecution’s withholding of material evidence. As explained by trial counsel and admitted by the prosecution, the prosecutor failed to disclose at least three documents contained within the

fingerprint examiner's file. Those three documents included one showing the possible matches returned via AFIS. This evidence was necessary to impeach Kellet concerning her failure to examine more than one respondent print, the quality of the prints produced, and the likelihood that other respondent prints possessed the same unique identifying characteristics as the latent print. Additionally, given an opportunity, Petitioner may have obtained an expert to challenge Kellet's finding altogether based upon the AFIS results.

The Court of Appeals found that Petitioner suffered no unfair prejudice as a result of the trial court's failure to strike the witness' testimony, grant a mistrial, or grant a recess to permit Petitioner to obtain the assistance of an expert to evaluate the undisclosed evidence. Thus, it appears the Court found the prosecution failed to disclose material evidence as required by Rule 5 of the South Carolina Rules of Criminal Procedure and Brady v. Maryland, 373 U.S. 83 (1963), but determined that Petitioner's proposed remedies – striking of testimony, granting of a mistrial, or a recess – were properly denied under an abuse of discretion standard. Although Petitioner agrees with the Court's holding that the prosecution suppressed material evidence that was subject to disclosure pursuant to our rules, Petitioner strongly disagrees with the language in the opinion requiring Petitioner to do more than he did – make the request.

The Court of Appeals relied upon representations made to the trial court from the prosecutor regarding the discovery of the prints. Specifically, the prosecutor claimed he had “called Captain Kellet and conferred with her regarding what she had in her file.” Then, the prosecutor told defense counsel “there may be some AFIS stuff in there, that's all I know.” The prosecutor claimed defense counsel “didn't want it,” despite the defense's multiple requests for discovery on this subject. Additionally, the prosecutor claimed the items had “been available in latents for four years now.” The prosecutor was unaware of the existence of the documents “until he filed a motion making an

issue with it.” R. 89, line 25 – R. 90, line 10. The prosecutor further argued that the defense was aware the prints had been run through AFIS for four years due to a report that the prosecution provided. Finally, the prosecutor claimed that defense counsel “had been to P&E” with a prosecution representative on two occasions and had been offered the opportunity to “go to latents.” R. 95, lines 1-13. The prosecutor saw no evidentiary value in the AFIS screenshot. He admitted “the only thing on there that they didn’t have access to was a list of twenty people that the computer program had a report on.” Inexplicably, the prosecutor claimed that if Petitioner “wanted the report on those folks, they could have asked for it.” Of course, the report with the list of twenty people was the very report not disclosed to Petitioner. R. 95, line 14 – R. 96, line 6.

Although the prosecutor made these representations during the trial, the Court of Appeals neglected to view those representations through the lens of the totality of the facts and circumstances. The prosecutor repeatedly told the defense and the trial judge that the prosecution had given the defense “everything.” There were no caveats or exceptions. The prosecutor stated repeatedly and without equivocation that the defense had been provided with everything. When Kellet testified in camera, she stated there was nothing else to give the defense. Not once did Kellet mention the AFIS printouts. Not once did the prosecutor correct the representation on the record that the AFIS printouts existed. Not once did Kellet refer to the AFIS printouts during her in camera testimony. There was simply no way for Petitioner to know of the existence of the discoverable items. Further, there was no onus on Petitioner to learn of the existence of the discoverable items. The Court of Appeals erred in relying upon the prosecutor’s representations after the suppression had come to light without including in the analysis the representations made by the prosecutor and its witness prior to the revelation of the suppressed documents.

The trial judge erred in failing to strike Kellet's testimony or grant a mistrial based upon the prosecution's withholding of material evidence. As explained by trial counsel and admitted by the prosecution, the prosecutor failed to disclose at least three documents contained within the fingerprint examiner's file. Those three documents included one showing the possible matches returned via AFIS. This evidence was necessary to impeach Kellet concerning her failure to examine more than one respondent print, the quality of the prints produced, and the likelihood that other respondent prints possessed the same unique identifying characteristics as the latent print. Additionally, given an opportunity, Petitioner may have obtained an expert to challenge Kellet's finding altogether based upon the AFIS results.

III. The Court of Appeals erred in affirming the trial court's refusal to grant a recess to permit Petitioner to engage the services of an expert to review materials that where the prosecution failed to disclose material evidence in a timely manner in violation of Petitioner's state and federal constitutional right to due process and a fair trial.

Relevant facts

Petitioner incorporates by reference the relevant facts discussed in Issue II, supra. After the judge denied Petitioner's request to strike Kellet's testimony or in the alternative grant a mistrial, Petitioner requested the court delay the trial to permit Petitioner to engage the services of an expert to examine the undisclosed records. R. 98, lines 10-23. The judge denied the request stating, "you can have those examined and you can pursue that without delaying the trial." He acknowledged that Kellet testified she only examined the first respondent, and Petitioner may be able to present an expert to "attack the credibility" of Kellet by testifying "it's a better practice to examine the top two or three," and that such "might be of some benefit." R. 98, line 25 – R. 99, line 13.

Discussion

Petitioner incorporates by reference the law and analysis presented in Issue II, supra. At a minimum, the court should have granted Petitioner a long recess or short continuance in order to acquire the assistance of an expert qualified to evaluate the withheld information. The court's failure to do so violated Petitioner's right to a fair trial and due process of law.

CONCLUSION

Petitioner respectfully requests this Court grant the writ of certiorari and order full briefing on the issues presented.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER.

This 24th day of September, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Edward W. Miller, Circuit Court Judge

Opinion No. 2014-UP-5232 (S.C. Ct. App. filed 7/9/2014)
08-GS-23-8409 and 11-GS-23-7258A

THE STATE,

RESPONDENT,

V.

CLARENCE WILLIAMS JENKINS,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Mr. Clarence Williams Jenkins #323856, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, and the S.C. Court of Appeals, this 24th day of September, 2014.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 24th day
of September, 2014.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022