

RECEIVED

JAN 06 2022

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
COUNTY OF SUMTER) COURT OF GENERAL SESSIONS

LEVERN MCCRAE)
PETITIONER,)

v.)

TRANSCRIPT OF RECORD
12-CP-45-363

STATE OF SOUTH CAROLINA,)
RESPONDENT.)

June 26, 2018
Kingstree, South Carolina

BEFORE :

THE HONORABLE GEORGE M. MCFADDIN, JR., JUDGE

APPEARANCES:

LANCE BOOZER, ESQ.
Attorney for Applicant

JULIE COLEMAN, ESQ.
Attorney for Respondent

RONNIE A. SABB, ESQ.
Attorney for Ms. Barr

FRANCES B. RAY, RPR
Circuit Court Reporter

INDEX

| | Page |
|--------------------------|------|
| Introduction of the case | 3 |
| Remarks by Mr. McCrea | 6 |
| Remarks by Mr. Sabb | 9 |
| Remarks by Ms. Barr | 12 |

(There were no exhibits submitted.)

1 THE COURT: Ms. Coleman, yes, ma'am.

2 MS. COLEMAN: Good morning, Your Honor.
3 This is Levern McCrae versus the State of South
4 Carolina, docket number 2012-CP-45-363. We are on
5 record today in Kingstree with the PCR action of Mr.
6 McCrea. We had his hearing a couple of weeks ago
7 on, almost a month ago, on June 1st in Sumter
8 County. As part of that hearing, we started the
9 sanctions hearing against Solicitor Kimberly Barr,
10 but we ran out of time and ended up continuing that
11 sanctions hearing until today. So it's a PCR action
12 that the hearing is completed, but we're here today
13 for the sole purpose of the sanctions hearing
14 against Ms. Barr. Kimberly Barr is present today.
15 She's represented by counsel Ronnie Sabb who is also
16 here in the courtroom. Mr. McCrae is present today
17 with his attorney Lance Boozer.

18 THE COURT: All right. Am I correct that
19 the last time we were together we heard from
20 Mr. McCrae during his testimony. Is that right, Mr.
21 Boozer?

22 MR. BOOZER: That's correct, Your Honor,
23 and I gave -- at the beginning of the case when the
24 case was called, we had a few preliminary matters.
25 This was one of those preliminary matters where I

1 recited history of us attempting to get some Rule 5
2 materials from the State and went through all that
3 with the court. I mean, it was at that time I
4 believe that Ms. Barr, she was present, but did not
5 have counsel. And I think at the time she'd
6 indicated she wasn't aware that there may be a
7 sanctions hearing that was being held that day; and
8 so, of course, this Court continued the matter, for
9 lack of a better word, to this term so that we could
10 hear from Ms. Barr in regard to why we didn't
11 receive the discovery at the time.

12 THE COURT: All right. Now Mr. Boozer,
13 out of an abundance of caution, as I said, I recall
14 Mr. McCrae's complaints about the situation when he
15 testified.

16 MR. BOOZER: Correct.

17 THE COURT: Do I need to hear anymore from
18 him today that's not redundant to that?

19 (Attorney Boozer confers with Mr. McCrae.)

20 MR. BOOZER: Your Honor, my client's
21 indicated he does need to address the Court.

22 THE COURT: All right. Is it going to be
23 something new I haven't heard now? Because my -- I
24 have notes from the last hearing.

25 MR. BOOZER: He said, yes, it's going to

1 be something new that you have not heard.

2 THE COURT: All right.

3 MR. BOOZER: If we could swear Mr. McCrae
4 in.

5 THE COURT: Madam clerk or bailiff, one of
6 the bailiffs, please.

7 MR. BOOZER: Your Honor, may we do this
8 from counsel's table?

9 THE COURT: Mr. Sabb, do you have any
10 objection?

11 MR. SABB: I have no objections to that,
12 Your Honor.

13 THE CLERK: Place your left hand on the
14 Bible, raise your right hand.

15 WHEREUPON,

16 **LEVERN MCCREA,**
17 having been duly sworn by the clerk, testified
18 as follows:

19 THE COURT: Thank you, ma'am, for doing
20 that.

21 Mr. Boozer.

22 MR. BOOZER: Thank you, Your Honor. I
23 believe Mr. McCrea has some matters he'd like to
24 address for the Court just regarding sanctions
25 hearing that he says was not brought up at the last

1 term.

2 THE COURT: All right, sir.

3 MR. BOOZER: I'll go ahead and let
4 Mr. McCrae.

5 THE COURT: All right. Mr. McCrea.

6 MR. MCCREA: Good morning, Your Honor.

7 THE COURT: Good morning, sir.

8 MR. MCCREA: Well, the reason we're here
9 today is for the Court to address this blatant
10 disrespect that Solicitor Kimberly Barr has shown
11 the court and the applicant by deliberately
12 disregarding the orders of three different judges to
13 relinquish the applicant's Rule 5 Brady motion
14 towards counsel of record that she ignored with
15 gross negligent in violation of Rule 37(b), failure
16 to comply with order; and rule (e), failure to
17 participate in the farming of a discovery plan and
18 Rule 26(f), discovery conference. Your Honor, in
19 2014, Judge Clifton Newman issued the first order to
20 Solicitor Kimberly Barr and the assistant attorney
21 general. Then in 2015, the late judge Tonya Gee
22 issued the second order, and the third order was
23 issued by Judge Brian Gibson [sic] in 2016. All
24 three judges instructed Solicitor Kimberly Barr and
25 the assistant attorney general to relinquish my Rule

1 5 Brady motion to counsel of record on or before
2 January the 3rd, 2017, that she completely ignored
3 with any regards for the laws of this state and of
4 the United States Constitution. It should be clear
5 to the Court that any state solicitor of any state
6 should be held with a higher standard of the laws,
7 instead of breaking the same law that she swore
8 under oath to upheld, which is clear that Solicitor
9 Kimberly Barr has lost prospective in defending this
10 state or any other state effectively and in no way
11 should the Court give one of his colleagues a free
12 pass to continually break the law and continually
13 violate defendant's due process rights.

14 Brady discovery is one of the most
15 important tools of a criminal defendant's case, and
16 that rule is to protect a defendant's right to a
17 fair trial to prevent a trial from becoming a
18 guessing game or one of ambush. And once a Brady
19 rule violation is established, reversal is required;
20 and for the court to allow Solicitor Kimberly Barr
21 to hand the applicant Brady evidence that was
22 material, exculpatory, and impeaching, the first,
23 second, and third day during the applicant's five
24 day trial was a total miscarriage of justice and an
25 egregious act of prosecutorial misconduct. Your

1 Honor, I truly believe that if I had not addressed
2 this egregious constitutional violation perpetrated
3 against me by Solicitor Kimberly Barr to the Court,
4 that she would still be violating more defendants'
5 due process right. And I'm hoping that the Court
6 would right this wrong of injustice and corruption
7 and fundamental miscarriage of justice took place in
8 my case, and I'm respectfully requesting that the
9 Court hold Solicitor Kimberly Barr in contempt of
10 court and to impose serious sanctions and penalties
11 here today and with the South Carolina Bar
12 Association by suspending her license because she
13 knew the risks before she decided to bend the rules
14 illegally and violate the laws that she swore under
15 oath to uphold. So what's the purpose of the rules
16 of court and the South Carolina statutes and the
17 laws that's been set forth under United States
18 Constitution if no one is following the rules.

19 There is a constitution of order on this
20 land; and if the State of South Carolina is going to
21 take someone's liberty, sentence them to life in
22 prison, then the State of South Carolina has got to
23 do it right under the Fourteenth Amendment of the
24 United States Constitution.

25 In addition, September the 9th, 2011,

1 Solicitor Kimberly Barr was put on notice by all the
2 forensic scientists: Ms. Catherine Leisy, Ms. Vicki
3 Hallman, and the firearm ballistic expert Mr. Tracy
4 Thrower. Under Section 17-28-310 subsection 4, that
5 DNA profile means the results of any testing
6 performed on a DNA sample. All of these results
7 clearly exonerated the applicant from the crime
8 scene after he had submitted a final swab sample to
9 Ms. Catherine Leisy for comparison purposes. Again,
10 Solicitor Kimberly Barr took it upon herself and
11 failed to have the applicant released from custody,
12 which was unprofessional, prejudicial, which is also
13 clear from all of the State's evidence presented
14 during the applicant's trial clearly was legally
15 insufficient to support this guilty verdict I am now
16 facing when the applicant was clearly exonerated
17 through scientific evidence that excluded him from
18 all of the State's evidence against him. Thank you,
19 Your Honor.

20 THE COURT: Thank you, Mr. McCrae.

21 Mr. Sabb.

22 MR. SABB: Thank you, Your Honor. May it
23 please the Court. Judge, I would simply say as it
24 relates to the comments made by Mr. McCrae, that we
25 believe fully in the principles that he articulated.

1 That is sound doctrine. That is the rule of law as
2 relates to the law. We think where the confusion
3 sets in is the skewing of the facts. Judge, I would
4 just urge at this point you simply hear from
5 Ms. Barr as it relates to the timeline, what was
6 going on, all of those kinds of things, on this
7 issue of whether or not there was a willful attempt
8 to disobey an order of the court. Now, Judge, I
9 will be candid with you, when Mr. McCrea goes back
10 to 2011, there is much that we would like to say and
11 challenge a lot of what he said. We resist the
12 temptation of doing that, and instead, will focus
13 narrowly on the issue as relates to what occurred
14 posttrial.

15 The last point I want to make, Judge,
16 before you hear from Ms. Barr, if the Court fully
17 examines this court order of Judge Gee — Your
18 Honor, there is no timeline indicated in the court
19 order as relates to a willful violation. Having
20 said that, we want the Court to know that we believe
21 in full disclosure. The entire time I was a
22 solicitor in this office for 20 years, we had an
23 open file policy as relates to any defense counsel;
24 and I will challenge any member of the Williamsburg
25 County bar or any other bar as relates to the

1 practice of this Solicitor's Office of when it came
2 to sharing Brady material. And so, Judge, I know
3 that that is a hard and fast rule that this office
4 has maintained over the years. Having said those
5 things, Judge, we would urge at this point that the
6 Court allow attorney Kimberly Barr to address the
7 Court.

8 THE COURT: Yes, sir. Did you want her to
9 appear as a witness? I know she's an officer of the
10 court but...

11 MR. SABB: Judge, we would certainly have
12 no problems with her being sworn.

13 THE COURT: Okay.

14 MR. SABB: We'd have no problems as
15 relates to her and simply addressing the Court from
16 counsel's table just as we extended the courtesy to
17 Mr. McCrae.

18 THE COURT: All right. Mr. Boozer, is
19 that acceptable?

20 MR. BOOZER: Judge, that's certainly
21 acceptable to me. I anticipated that's how we would
22 go had she been present before Judge Gibbons
23 previously just to provide her explanation and then
24 leave it up to the Court.

25 THE COURT: All right. And so there are

1 no concerns at a later date about the oath factor, I
2 would ask that she be put under oath, although she's
3 an officer of the Court.

4 MR. BOOZER: Thank you, Your Honor.

5 MS. BARR: Your Honor, do you want me to
6 stay here?

7 THE COURT: I don't mind. Mr. McCrae
8 remained where he was.

9 Mr. Boozer, is that acceptable?

10 MR. BOOZER: Yes, sir, Your Honor.

11 WHEREUPON,

12 **KIMBERLY BARR,**

13 having been duly sworn by the clerk, testified
14 as follows:

15 MS. BARR: Good morning, Your Honor.

16 THE COURT: Good morning, Ma'am.

17 MS. BARR: Judge, just by way of
18 background regarding the disclosure of material to
19 Mr. McCrea in preparation of trial, I would like to
20 kind of just track when items were submitted. Your
21 Honor, as you may know, oftentimes when we initially
22 disclose Rule 5 material to a defendant or his
23 counsel we disclose material as it comes into the
24 office and so this case, as is typical with any
25 serious case, oftentimes we don't have a lot of the

1 SLED analysis reports in and there are things that
2 are not available to us at the initial disclosure
3 Rule 5 material. Judge, my records — and I'll be
4 happy to provide defense counsel and the Court
5 copies of those — but my records reflect that the
6 initial Rule 5 disclosure was made to the defendant
7 by virtue of his then counsel of record Cezar
8 McKnight on October the 5th, and it included some
9 SLED reports, some statements. I indicated to
10 counsel at that time that we had photographs of the
11 crime scene and autopsy available for inspection.

12 The second Rule 5 disclosure was made to
13 the defendant by way of his counsel Hank Anderson at
14 that time on June the 13th of 2011, and it included
15 additional transcribed statements and other SLED
16 reports. Another supplemental Rule 5 disclosure was
17 made to Mr. Anderson on behalf of the defendant on
18 August the 11th of 2011 which included supplemental
19 reports and photographs of some of the items that
20 were seized into evidence, as well as a disk
21 containing autopsy and crime scene photos.

22 Another Rule 5 disclosure was made to
23 Mr. Anderson on August the 17th of 2011. Another
24 Rule 5 disclosure was made to the defendant on
25 September the 20th directly because Mr. Anderson had

1 been relieved as his counsel by that time. Another
2 Rule 5 disclosure -- and these are additional
3 documents; they're not the same documents over and
4 over. But another Rule 5 disclosure was made
5 directly to Mr. McCrea at the Florence County
6 Detention Center on September the 27th of 2011. He
7 had -- Mr. McCrae had written to the Solicitor's
8 Office demanding certain documents that were related
9 and unrelated to this case, and I responded to him
10 and included additional discovery material per his
11 request on October the 7th of 2011. Additional
12 discovery material was provided directly to the
13 defendant, I hand delivered to him on October
14 the 12th. Those included SLED reports. And of
15 course, Rule 5 disclosure was made per Judge
16 Gibbons' order to Mr. Boozer on December the 9th of
17 2016. And Judge, it does not appear that any
18 additional disclosure was made to Mr. Boozer as PCR
19 counsel that was separate apart from matters that
20 were disclosed to the defendant or his counsel prior
21 to trial.

22 Judge, by way of background and
23 explanation, I can tell you that between, sometime
24 between June and December of 2016, I received a copy
25 of the order requiring the State to disclose Rule 5

1 material to Mr. Boozer. I do not have an
2 independent recollection of when I received that
3 order; I'll be candid with the Court. During this
4 time in the summer of 2016 — I believe it was
5 July 2016 — I was prosecuting a murder trial that
6 took a week to prosecute. My co-counsel, my
7 assistant solicitor fell ill that week, and so I
8 tried the case on my own. The normal schedule of
9 criminal court during this time was we had court one
10 week each month and so typically we were either in
11 court or preparing to go to court. I worked at the
12 Solicitor's Office as a part-time prosecutor for
13 probably 11 or 12 years by that point, and I was
14 also employed as an — in private practice as well.

15 And so, shortly after I received the
16 order, — and I'm presuming that it came from
17 Mr. Boozer — my cocounsel Julie Swilley who was an
18 assistant solicitor here, resigned from the
19 Solicitor's Office so we had a staff turnover.
20 Warren Anderson, who is the current solicitor who
21 succeeded me, was kind enough to come from Clarendon
22 County during terms of court to assist because we
23 had lost a full-time solicitor. So during the span
24 of all of that is when the request or the order
25 would have come in from defense counsel, and I do

1 recall talking to Mr. Boozer and telling him that I
2 will get the discovery material to him as soon as
3 possible. Judge, I was offering this by way of
4 explanation.

5 Because of the seriousness of this case
6 and the volume of the Solicitor's file, it required
7 me to look personally through the discovery material
8 in order to provide it to defense counsel. The file
9 was rather voluminous. There were supplemental
10 reports and different items of evidence that had to
11 be redacted to alleviate the disclosure of
12 confidential information and so it was in no short
13 terms, a time monster that I could not delegate to a
14 staff member simply respond to discovery because
15 obviously the sensitive nature of the case and the
16 volume of the case, it required me to review it and
17 that was a substantial task in and of itself. And
18 just, quite frankly, during this time frame time was
19 an essential element that I just quite frankly did
20 not have. I had already decided based on the fact
21 that my then boss had offered me a partnership in
22 our firm to resign from the Solicitor's Office so I
23 was winding down my role in the Solicitor's Office
24 during this time. We were getting a new solicitor
25 to come in. We lost an assistant solicitor so it

1 was just a matter of having the time to dedicate to
2 copying this material.

3 A number of photographs that at one point
4 we had in the Solicitor's Office, we introduced them
5 into evidence so I didn't have the physical
6 photographs of the items that we introduced into
7 evidence anymore so we were trying to obviously get
8 extra copies of those, and so it's just a monumental
9 feat and we were not able due to restrictions to get
10 that to the defendant in what I can see to be a
11 timely fashion. But it certainly was not
12 intentional. All of the information that I
13 disclosed to Mr. Boozer as PCR counsel was documents
14 the defendant already had in his possession by
15 virtue of the prior State disclosure.

16 THE COURT: Yes, ma'am.

17 Mr. Sabb, anything else you want to add or
18 ask?

19 MR. SABB: Judge, I think she covers it
20 and I guess the take away that we would urge from
21 the Court, Judge, is that we've always taken these
22 kinds of situations seriously, understanding that we
23 have a role in the justice system and that as the
24 defendant indicated, due process is the hallmark of
25 our system. And so, Judge, we would just share with

1 the Court that there were no willful actions on the
2 part of the State withholding evidence. At the end
3 of the day all of the information was shared, though
4 we concede not as timely as it should have been; but
5 there were exigent circumstances, we believe, that
6 at least gives the Court a basis, bird's eye view,
7 as to all that was happening at that time. And so,
8 Judge, we would simply urge the Court in light of
9 the fact that there was no time, deadline set in the
10 court's order for the Court to find that there was
11 no willful conduct on behalf of Ms. Barr. Thank
12 you.

13 THE COURT: Mr. Boozer, anything you want
14 to say in passing?

15 (Attorney Boozer confers with Mr. McCrea.)

16 MR. BOOZER: Your Honor, my client just
17 wants me to point out that there was a deadline that
18 Judge Gibbons imposed. I understand I think
19 Mr. Sabb is talking about Judge Gee's order not
20 having a deadline, but Mr. McCrae wants to point out
21 that there was a deadline in Judge Gibbons' order
22 for disclosure that — for Rule 5 materials.

23 THE COURT: Yes, sir.

24 MR. BOOZER: So I just add that for his
25 behalf.

1 THE COURT: Yes, sir.

2 MR. SABB: And Judge, I would just share
3 with the Court that that deadline was adhered to.
4 She fully complied with that deadline and that's why
5 I didn't address it.

6 THE COURT: Yes, sir. All right. As I
7 stated earlier in our last meeting in this matter, I
8 took lots of notes about the PCR issue and the
9 sanctions issue. I've taken lots today. I, as you
10 well know probably by now, I don't like to issue
11 rushed rulings. Both parties here today, Ms. Barr
12 and Mr. McCrae, are entitled to fair ruling. I try
13 to be fair, although I'm mindful that fairness is
14 like justice perceived and beauty perceived; it
15 depends on who wants to describe it. But I will get
16 a ruling on this soon. It will be — my usual
17 method is to email it to you, Mr. Boozer,
18 Ms. Coleman, Mr. Sabb.

19 MR. SABB: Yes, sir, Your Honor.

20 THE COURT: I thank all of you for your
21 patience very much. And I also want to thank the
22 Department of Corrections for yet again helping us
23 with this matter. Thank you very much.

24

25 * * * END OF REQUESTED TRANSCRIPT OF RECORD * * *

C E R T I F I C A T E O F R E P O R T E R

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE)

I, FRANCES B. RAY, Registered Professional Reporter (RPR), court reporter for the State of South Carolina, Third Judicial Circuit, do hereby certify that the foregoing proceeding is a stenographic report and was transcribed through computer-aided transcription; that the foregoing transcript contains a true record of the proceedings.

I further certify that I am neither counsel for, nor related to nor employed by any of the parties connected to the action, nor am I financially interested in the action.

Witness my hand at Florence, South Carolina, this 8th day of December, 2021.

Frances B. Ray

FRANCES B. RAY, RPR