North Carolina Criminal Law Blog

Discovery of Officers' Text Messages

January 8, 2018 **Jeff Welty**
<https://nccriminallaw.sog.unc.edu/author/welty/>

More than a trillion <https://www.statista.com/chart/12109/sms-volume-in-the-united-states/> text messages are sent each year in the United States alone. Some of these messages are work-related communications from law enforcement officers to fellow officers, witnesses, prosecutors, and others. Which, if any, of these messages are discoverable? How should officers preserve discoverable messages? Must prosecutors ask for officers' text messages before providing discovery to the defense? This post begins to address these questions.

Statutory discovery. G.S. 15A-903 generally requires "[t]he State to make available to the defendant the complete files of all law enforcement agencies . . . involved in the investigation of the crimes committed." The term "file" includes witness statements, officers' notes, and "any other matter or evidence obtained during the investigation."

Some work-related text messages sent by officers are likely part of the "file." For example, a text message may memorialize a witness statement, such as a message from one officer to another stating, "I talked to the alibi witness and she said she wasn't with the defendant on the night of the crime." *Cf. United States v. Suarez*, 2010 WL 4226524 (D.N.J. Oct. 10, 2010) (unpublished) (ruling that text messages between officers and cooperating witnesses were witness statements subject to discovery and were "fertile ground for cross examination"; the government's failure to preserve and produce the messages justified an adverse inference instruction). Other text messages may function as notes, as when an officer texts a colleague, "I went to the convenience store next door to the crime scene but it doesn't have a surveillance camera." Furthermore, although the statutory definition of "file" doesn't expressly refer to correspondence, the list of items included in the file isn't exhaustive and it seems to me that substantive correspondence about the investigation, whether by letter, email, or text message, may be part of the file. For example, one officer texts another, "We are severely understaffed on the Jones case, we will not be able to do a timely and complete neighborhood canvas with only four officers and we may lose out on important leads," I suspect that many judges would rule that the message is part of the case file. *Cf. State v. Dorman*, 225 N.C. App. 599 (2013) (noting that a superior court judge had ruled that certain emails between an officer, a medical examiner, and a victim's advocate were discoverable, and assuming but not deciding that the judge's determination was correct).

On the other hand, some work-related text messages are administrative in nature and don't seem to be part of the "file." For example, if an officer texts a prosecutor to say, "I'm running 5 minutes late for our meeting," I don't think the letter or the spirit of the discovery statutes require that message to be preserved and turned over. Unfortunately, the line between substantive and administrative messages is fuzzy. Suppose an officer investigating an assault texts her supervisor, "I'm going to look into the suspect's gang connection." That's arguably administrative: it simply lets the supervisor know what the officer plans to do next, without describing any facts or evidence. But what if (1) there turns out to be no gang connection, (2) the defendant is actually an honor student and sings in his church choir, and (3) the defense is that the police focused on the defendant because of his race, and rushed to judgment based on biased assumptions and prejudices? Then the fact that the officer was eager to pursue a non-existent "gang connection" might be significant. The standard advice for officers and prosecutors confronting gray areas is to err on the side of caution. Until we have case law that offers guidance about what's discoverable and what's not, that advice is probably wise.

Brady/Giglio. Some text messages will implicate *Brady* or *Giglio*, such as a text message from an officer to a prosecutor saying, "Our star witness has serious mental health problems," or a message from a crime scene technician to an officer saying, "I found a dozen prints at the scene but none of them match your suspect." In such a case, the information contained in the text message would need to be produced regardless of statutory discovery obligations.

Information memorialized in formal reports. Presumably, the contents of most substantive text messages will eventually be memorialized in formal reports. Is it sufficient if the defense gets a report from the crime scene technician saying that the prints at the scene don't match the suspect but doesn't get the original message from the technician to the officer? I think that would satisfy *Brady*, since *Brady* is concerned the disclosure of the information itself. But I am not sure that it would satisfy the statutory discovery provisions. If the original text message was part of the file, it seems to me that it would remain so even if a report is filed later that covers the same territory. Of course, if the original message and the report are consistent, the defendant would not be prejudiced by receiving only the report. *Cf. State v. Rush*, 178 N.C. App. 235 (2006) (unpublished) (an officer made field notes, then used the field notes to prepare a formal report; in discovery, the State produced the report, but not the notes; under these circumstances, even "[p]resuming" that a discovery violation took place, the trial judge did not abuse his discretion when he declined to sanction the State). But if the report omits or minimizes information contained in the text message, the defendant would be prejudiced if denied the opportunity to explore the inconsistency.

Duties of officers and prosecutors. Our discovery statutes put the onus on officers to provide their complete files to prosecutors in a timely way. G.S. 15A-903(c). Based on the discussion above, officers may be obligated to give prosecutors at least some of their work-related text messages.

What about prosecutors? Must a prosecutor affirmatively request discoverable text messages from an officers, or may the prosecutor assume that if none are provided, then none exist (beyond any discoverable text messages to which the prosecutor is a party, of course)? The statutory discovery provisions are not crystal clear regarding the extent of a prosecutor's duty to seek out discoverable information beyond what officers provide. However, G.S. 15A-910(c) does say that when a court is considering "whether to impose personal sanctions for untimely disclosure . . . courts . . . shall presume that prosecuting attorneys . . . have acted in good faith if they have made a reasonably diligent inquiry of [investigative agencies] and disclosed the responsive materials." Furthermore, as to *Brady* material, the State is obligated to disclose evidence "known only to police investigators and not to the prosecutor." *Kyles v. Whitley*, 514 U.S. 419 (1995). Therefore, a conscientious prosecutor preparing to provide discovery to a defendant may choose to ask the investigating officer whether he or she is in possession of any text messages that might be discoverable, especially if the prosecutor knows that the officer is prone to communicate via text message. (Likewise, a conscientious defense attorney preparing a discovery request may wish to reference text messages in the request.)

Retention obligations apart from discovery. Compliance with discovery obligations is not the only reason an officer might choose to retain text messages. Agency policy may direct that the officer retain certain communications, and the **records retention schedules promulgated by the Department of Cultural and Natural Resources** <https://archives.ncdcr.gov/government/retention-schedules> might come into play. State records retention rules are outside my expertise, but my colleagues who work in the area of state and local government law can assist interested parties in exploring those issues.

How to preserve pertinent text messages. If an officer's text message is discoverable, one way to preserve it would be for the officer to take a screenshot of the message and then email the screenshot to himself or herself, or to the prosecutor handling the case. If readers are aware of a better solution, please say so. Screenshots are overinclusive in that they may mix discoverable messages with messages that are purely social or otherwise non-discoverable, and underinclusive in that they may not contain important metadata associated with the original messages. Courts do not yet seem fully attuned to the fact that text messages are not designed to be organized and retained permanently. *See United States v. Olivares*, 843 F.3d 752 (8th Cir. 2016) (defendant "requested all of the text messages exchanged between [an officer] and his confidential informant [but the] government was unable to produce the text messages because it failed to download or save them"; defendant argued on appeal that this constituted bad faith destruction of potentially exculpatory evidence; absent evidence of bad faith, the reviewing court rejected the argument; however, the court stated that it "recognize[d] [the defendant's] concern" and suggested that "[w]ith the simplicity and efficiency of modern electronic storage capacity, one could imagine a policy where inculpatory materials and potentially relevant materials created or made available in proximity to the inculpatory materials are easily saved for review").

No obligation to send text messages. With some exceptions, the discovery statutes apply to existing materials and "impose[] no duty on the State to create or continue to develop documentation concerning an investigation." *Dorman*, *supra*. In general, then, officers may avoid discovery considerations by choosing not to use text messages to engage in substantive case-related communications. At least **one U.S. Attorney's office** <https://www.justice.gov/sites/default/files/usao/pages/attachments/2015/04/01/can_discovery_policy.pdf> recommends doing exactly that:

> [S]ubstantive case-related communications may contain discoverable information . . . . [Prosecutors] should take special care to avoid creating electronic communications (including e-mails and text messages) and voice mails that contain information that may be subject to discovery [and] should also instruct the agents working on their cases to abide by the same rule. In addition, [prosecutors] and agents should not engage in substantive case discussions in e-mails, text messages, or other forms of electronic communication with witnesses or potential witnesses of any kind. As a general rule, e-mails and text messages between [prosecutors], between [prosecutors] and agents, between agents, and between witnesses and government personnel should be limited to scheduling or other procedural matters.

I imagine that some readers will view that approach as prudent and others will view it as underhanded.

What's the practice? I'd be interested to hear how officers, prosecutors, and others are handling text messages. My sense, based on the questions I've had about this topic and on the lack of North Carolina appellate cases about it, is that only a few officers and prosecutors are retaining and producing text messages, and that any defense complaints about that have not yet had much traction with the courts. But my sense could be wrong, or incomplete, so I would welcome comments or emails about this issue.

5 thoughts on "Discovery of Officers' Text Messages"

RichieM

January 9, 2018 at 3:59 PM <https://nccriminallaw.sog.unc.edu/discovery-officers-text-messages/#comment-161829>

For a prosecutor to order police to keep from making a of their actions to keep it from discovery is no different than one burglar telling another ” Don’t leave any fingerprints behind “. All the police need is another way to circumvent discovery obligations in order to make sure we keep releasing innocent victims 20 years after a bad conviction. Look at the Bundy trial out West, scuttled because prosecutors blatantly hid evidence, with the police fully involved of course, in an effort to convict at any cost. Officers personal phones should be included so that they do not use them for monkey business while leaving an issued phone pristine. Since the police and prosecutors cannot be trusted to fully disclose evidence that goes against them, vigilance is needed. Who is watching the watchers?

Reply

G

January 9, 2018 at 6:42 PM <https://nccriminallaw.sog.unc.edu/discovery-officers-text-messages/#comment-161830>

“Officers personal phones should be included so that they do not use them for monkey business…”. When you let me look at all of your personal emails, texts, pictures and Facebook profiles, I’ll let you see mine 🙂 When you put the shoe on the other foot, it doesn’t sound so good, does it? What kind of conspiracy kook are you? Yes, I maintain a personal as well as business phone for my privacy and not “to circumvent discovery”. I only do business on the business phone and everything on my phone is personal. What communications I have with my wife and family are none of your or anyone else’s business. Just because I am an officer, it doesn’t mean I forfeit my constitutional rights. And as a side note, Monkey Business was the name of a certain liberal’s boat, for those of us old enough to remember such things!

Reply

Jon

January 10, 2018 at 10:46 AM

<https://nccriminallaw.sog.unc.edu/discovery-officers-text-messages/#comment-161832>

As a LEO, I believe in the Discovery Laws. However, there are cases that information that has no bearing on a case is submitted for Discovery, or a sly defense attorney tries to use a statement against an officer that has nothing to do with the investigation or the arrest. Everyone knows that the “system” is rigged to benefit the accused, the laws and processes are surely put in place to assist the accused. I believe the system would work better if ALL the lawyers are held to the same standard. But we all know that is not the case.

Reply

RichieM

January 16, 2018 at 7:52 AM

<https://nccriminallaw.sog.unc.edu/discovery-officers-text-messages/#comment-161859>

Who decides what has no bearing on a case, you or the prosecutor? That is why we see so many Brady violations. If the system was rigged to benefit the accused, we would see far fewer convictions. If all attorneys were held to the same standard (for prosecutors that means absolute immunity) there would be far more aggressive defenses mounted, guaranteed. The system barely provides protection for defendants rights as it is; any lessening would mean even more injustices. The police believe that ALL accused are guilty no matter what, and prosecutors , instead of seeking justice, only seek convictions and act as the agent for police no matter how flimsy the charges. Without vigorous defense counsel protecting the accused our courts would be nothing more than kangaroo courts, star chambers that feed the school to prison pipeline with fresh meat for the grinder. Sorry, but the police are partisan and cannot be trusted. Neither can prosecutors; too many proven horror stories have been documented to diminish our protections.

Reply

John Towler

January 11, 2018 at 11:25 AM

<https://nccriminallaw.sog.unc.edu/discovery-officers-text-messages/#comment-161841>

As far as preserving text messages, it may be easier to simply forward the message to an email and then print it. You avoid some of the overinclusiveness in that way.

Reply

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PENNSYLVANIA v. RITCHIE: DEFENDANT'S RIGHT TO THIRD PARTY CONFIDENTIAL RECORDS

Jessica Smith, UNC School of Government (September, 2014)

Contents

I. The *Ritchie* Decision

In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the United States Supreme Court held that the defendant had a due process right to have a judge conduct an in camera review of a child protective services agency file on the victim to determine whether it contained favorable and material evidence, and if so, to turn it over to the defense. *Id.* at 58-60. In that case, defendant Ritchie was charged with rape and other crimes committed against his daughter. During pretrial discovery, Ritchie issued a subpoena seeking access to the agency's file related to the charges against him, as well as certain records that he claimed were compiled a year earlier when the agency investigated a separate report that Ritchie's children were being abused. Ritchie argued that the file "might contain the names of favorable witnesses, as well as other, unspecified exculpatory evidence." *Id* at 44. The agency refused to comply with the subpoena, claiming that the records were privileged under state law. The relevant state statute provided that information obtained during an agency investigation was confidential, but could be disclosed pursuant to a court order. Acknowledging that he had not reviewed the entire agency file, the trial court denied Ritchie's request for disclosure. Ritchie was convicted and he appealed. As noted, the Court held that Ritchie had a due process right to have the trial court review the file in camera and disclose to him any favorable, material evidence. Noting that "the public interest in protecting this type of sensitive information is strong," the Court declined to find that "this interest necessarily prevents disclosure in all circumstances." *Id.* at 57. In this respect the Court noted that the state statute did not grant the agency "absolute authority to shield its files from all eyes," *id.*, and it expressly declined to address whether the case would have been decided differently had the state statute "protected the [agency's] files from disclosure to *anyone*, including law-enforcement and judicial personnel." *Id.* at 57 n.14. Though finding that Ritchie had a right to have the trial court conduct an in camera review, the Court expressly rejected his argument that he had a constitutional right to examine all of the confidential information in the file and present arguments in favor of disclosure. *Id.* at 59-60. Recognizing that the "eye of an advocate may be helpful" in identifying favorable and material evidence, *id.* at 59, the Court concluded that full disclosure to defense counsel would "sacrifice unnecessarily the Commonwealth's compelling interest in protecting its child-abuse information." *Id.* at 60. Thus, it endorsed a rule requiring in camera review by the trial court.

II. Application to Third-Party Records Generally

In North Carolina, *Ritchie* issues arise most frequently in child sexual abuses cases where the defendant seeks to obtain the type of agency records at issue in *Ritchie*. *See, e.g.*, State v. Tadeja, 191 N.C. App. 439, 449-50 (2008) (child sex case where the defendant sought Department of Social Services (DSS) records); State v. Johnson, 165 N.C. App. 854, 856-59 (2004) (same); State v. McGill, 141 N.C. App. 98, 101-03 (2000) (same); State v. Bailey, 89 N.C. App. 212, 222 (1988) (same). However, the courts have applied *Ritchie* to a variety of confidential records in possession of third parties, including government agencies and private parties. *See, e.g.*, Love v. Johnson, 57 F.3d 1305, 1313-14 (4th Cir. 1995) (victim's files at a medical center, county mental health department, and county DSS); State v. Johnson, 145 N.C. App. 51, 54 (2001) (public school records); State v. Henderson, 155 N.C. App. 719, 728-29 (2003) (school records); State v. Taylor, 178 N.C. App. 395, 407-08 (2006) (school records); State v. Bradley, 179 N.C. App. 551, 553 (2006) (Duke University Health Systems records); State v. Jarrett, 137 N.C. App. 256, 266 (2000) (hospital records). As the Fourth Circuit stated in one such case, "[t]he '*Brady*' right, as recognized and implemented in *Ritchie*, is not limited to information in the actual possession of the prosecutor and certainly extends to any in the possession of state agencies subject to judicial control." *Love*, 57 F.3d at 1314.

III. How the Issue Gets to the Trial Judge

The case law illustrates the variety of ways that a defendant's request for in camera review of a third party's confidential records may come to the trial judge. In some cases, the issue is brought to the judge's attention because defense counsel has issued a subpoena to the third party, which has declined to provide the requested information. *See, e.g.*, State v. Johnson, 165 N.C. App. 854, 854 (2004) (the defendant filed a subpoena for DSS records and DSS refused to provide the file); Love v. Johnson, 57 F.3d 1305, 1308 (4th Cir. 1995) (the defendant issued subpoenas for the victim's files at a medical center, county mental health department, and county DSS). In other cases, defense counsel may move for a court order requiring the third party to produce the documents for in camera review by the trial court. And in still other cases, the defendant may move for a court order requiring the third-party to turn the records over to defense counsel to review as an officer of the court. In support of such a motion, defense counsel may assert that he or she is in a better position than the judge to determine what evidence is favorable and material to the defense. The trial judge should exercise caution with regard to such a motion. As noted above, *Ritchie* rejected the defendant's argument that he had a constitutional right to full review of the file. *Ritchie,* 480 U.S. at 59-60. If the trial judge grants such a motion, the judge may wish to prohibit counsel from disclosing any evidence in the file without a court order. In any event, such a procedure is not permitted with respect to DSS records; the trial court *must* conduct any in camera review of DSS records. G.S. 7B-302(a1)(4) (trial court must conduct an in camera review before releasing DSS records).

Sometimes the defendant will file a *Ritchie* motion ex parte. No published North Carolina appellate case has addressed whether such a procedure is permissible. The North Carolina Supreme Court has held that ex parte motions are proper with respect to defense requests for experts in non-capital cases. *See* State v. Ballard, 333 N.C. 515, 519 (1993); State v. Bates, 333 N.C. 523, 526-28 (1993). The rationale that applies in that context may lend some support to an ex parte *Ritchie* request, although the situations certainly differ.

IV. Defendant's Burden for In Camera Review: "Some Plausible Showing"

Under *Ritchie,* the defendant "may not require the trial court to search through the . . . file without first establishing a basis for his claim that it contains material evidence." *Ritchie,* 480 U.S. at 58 n.15. The *Ritchie* opinion suggests that the defendant "must at least make some plausible showing of how [the evidence is] both material and favorable to his defense." *Id.* (quoting United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982)); *see also* Love v. Johnson, 57 F.3d 1305, 1315 (4th Cir. 1995) (*Ritchie* requires a "plausible showing" that the evidence exists and is material and favorable; this standard cannot be "avoided by drawing on state-law requirements of specificity of subpoenas which may be—and undoubtedly are—considerably more stringent"). Although the "some plausible showing" standard repeats in the case law, other terms are used to articulate the relevant standard, including "substantial basis." State v. Johnson, 165 N.C. App. 854, 855 (2004) (the defendant must show that he or she has a "substantial basis for believing such evidence is material" (quotation omitted)). However, because "an accused cannot possibly know, but may only suspect, that particular information exists which meets these requirements, he is not required, in order to invoke the right, to make a particular showing of the exact information sought and how it is material and favorable." *Love*, 57 F.3d at 1313; *see also Johnson*, 165 N.C. App. at 855 ("Although asking defendant to affirmatively establish that a piece of evidence not in his possession is material might be a circular impossibility, [we] at least require[] him to have a substantial basis for believing such evidence is material." (quotation omitted)). And in fact, the standard is not terribly strenuous. In *Ritchie* the defendant made the requisite showing simply by arguing "'that he was entitled to the information because the file might contain the names of favorable witnesses, as well as other, unspecified exculpatory evidence.'" *Love*, 57 F.3d at 1313 (quoting *Ritchie,* 480 U.S. at 44). For a case where the defendant's showing "went considerably beyond the meager showing held sufficient in *Ritchie,*" see *Love*, 57 F.3d 1305 (with respect to mental health records, defendant represented to court that victim was receiving psychiatric care because of incidents of "bizarre behavior"; with respect to DSS records, defendant asserted that victim had been removed from her mother's custody because mother refused to believe her allegations).

A. Favorable

Evidence is "favorable" "when it tends substantively to negate guilt" or when it "tends to impeach the credibility of a key witness for the prosecution." *Love*, 57 F.3d at 1313 (so interpreting the *Ritchie* rule and citing Giglio v. United States, 405 U.S. 150, 154 (1972)); *see also Johnson*, 165 N.C. App. at 858 (the trial court erred by failing to disclose evidence in a DSS record that was favorable; the evidence "provide[d] an alternative explanation for [the victim's] abuse"); State v. McGill, 141 N.C. App. 98, 102-03 (2000) ("'Favorable' evidence includes evidence which tends to exculpate the accused, as well as 'any evidence adversely affecting the credibility of the government's witnesses'"; going on to conclude that the defendant was denied favorable evidence that false accusations were made against him which could have been used to impeach the credibility of the State's key witnesses (quotation omitted)); State v. Henderson, 155 N.C. App. 719, 728 (2003) (quoting same from *McGill*).

B. Material

Evidence is "material" "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different"; "[a] 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Ritchie,* 480 U.S. at 57 (quotation omitted); *see also Love*, 57 F.3d at 1313 (quoting *Ritchie*); *McGill*, 141 N.C. App. at 103. *Compare*

McGill, 141 N.C. App. at 103 (2000) (evidence in DSS records that false accusations were made against the defendant and that could have been used to impeach the credibility of the State's key witnesses was material), State v. Martinez, 212 N.C. App. 661, 666 (2011) (trial court erred by failing to disclose material exculpatory evidence that could have been used to impeach the State's witnesses), *and* State v. Johnson, 165 N.C. App. 854, 858-59 (2004) (evidence in DSS record that provided an alternative explanation for the victim's abuse was material), *with* State v. Bradley, 179 N.C. App. 551, 557-58 (2006) (the defendant "failed to satisfy the threshold requirement of materiality" where the defendant argued that he intended to use the records to impeach the credibility of one of the State's 404(b) witnesses; the court concluded that the defendant would not have been able to impeach the witness with extrinsic evidence and noted that the witness was only one of three 404(b) witnesses offered by the State).

V. In Camera Review, Order and Sealing of Evidence

If the defendant makes the required showing, the defendant "does not become entitled to direct access to the information to determine for himself its materiality and favorability." Love v. Johnson, 57 F.3d 1305, 1313 (4th Cir. 1995) (citing *Ritchie*). Rather, the defendant has the right "to have the information he has sufficiently identified submitted to the trial court for in camera inspection and a properly reviewable judicial determination made whether any portions meet the 'material' and 'favorable' requirements for compulsory disclosure. *Id*. (citing *Ritchie*). Once the defendant makes the required showing, the court must engage in an in camera review. State v. Kelly, 118 N.C. App. 589, 594 (1995) (trial court's failure to conduct an in camera review was error).

If the court determines that there is favorable, material evidence in the records, the court should so find by written order and should provide the relevant evidence to the defendant. If the trial court conducts an in camera review but denies the defendant's request, in whole or in part, the trial court should so find by written order, seal the undisclosed evidence, and place it in the record for appellate review. *See, e.g.*, *Johnson*, 165 N.C. App. at 855-56; State v. McGill, 141 N.C. App. 98, 101 (2000). Sample language for the court's order is provided in the Appendix below.

Appendix: Sample Language for Court Orders

Sample Language Granting Defendant's Request for In Camera Review

Defendant has moved for in camera review of [*identify the confidential records at issue*] maintained by [*identify the third party that maintains the records*]. Under *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the defendant has a due process right to have the trial court conduct an in camera review of confidential third party records to determine whether they contain favorable and material evidence. To trigger the right to an in camera review, the defendant need only make some plausible showing of how the evidence in question is both material and favorable to his or her defense. In this case the defendant asserts that the evidence is material and favorable because [*summarize the defendant's argument*]. The court finds that the defendant has made the requisite showing and hereby orders [*identify the third party that maintains the records*] to produce [*identify the confidential records at issue*] to the court under seal for in camera review and further order.

Sample Language for Order after In Camera Review

Pursuant to *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), this court by order dated [*insert date*] ordered [*identify the third party that maintains the records*] to produce under seal [*identify the confidential records at issue*] for an in camera review by the court. Having conducted the required in camera review, the court finds the defendant is entitled to portions of the [*identify the confidential records at issue*] that contain favorable, material evidence. Copies of those portions of the records that contain such evidence are attached to this order. The court finds that the remainder of the records produced by [*identify the third party that maintains the records*] do not contain favorable, material evidence. Copies of those records shall be retained by the Clerk, sealed for appellate review.

Love v. Johnson

United States Court of Appeals for the Fourth Circuit

March 11, 1994, Argued ; June 22, 1995, Decided

No. 92-7080

Reporter
57 F.3d 1305 *; 1995 U.S. App. LEXIS 15495 **

REGINALD JEROME LOVE, Petitioner-Appellant, v. AARON JOHNSON, Secretary of Correction; LACY THORNBURG, Attorney General, Respondents-Appellees.

Prior History: [1]** Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Malcolm J. Howard, District Judge. (CA-92-189-HC).

Counsel: ARGUED: Paul MacAllister Green, NORTH CAROLINA PRISONER LEGAL SERVICES, INC., Raleigh, North Carolina, for Appellant.

Clarence Joe DelForge, III, Assistant Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees.

ON BRIEF: Linda B. Weisel, NORTH CAROLINA PRISONER LEGAL SERVICES, INC., Raleigh, North Carolina, for Appellant.

Michael F. Easley, Attorney General of North Carolina, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees.

Judges: Before MURNAGHAN and HAMILTON, Circuit Judges, and PHILLIPS, Senior Circuit Judge. Senior Judge Phillips wrote the opinion in which Judge Murnaghan and Judge Hamilton joined.

Opinion by: PHILLIPS

Opinion

[*1306] OPINION

PHILLIPS, Senior Circuit Judge:

Reginald Jerome Love appeals the dismissal of a petition for writ of habeas corpus challenging his state conviction on charges of first degree rape, first degree sex offense, and taking indecent liberties with a minor. Love claims that he was denied access to **[*1307]** evidence in violation **[**2]** of rights guaranteed by the *Sixth* and *Fourteenth Amendments*. Because Love made a plausible showing that sufficiently identified state agency records might contain evidence that was material and favorable to his defense, the state court's refusal to inspect the identified records *in camera* and to seal any not disclosed for appellate review, violated Love's constitutional right to such a procedure. Accordingly, we vacate the United States District Court's dismissal of Love's petition and remand to that court for further proceedings.

I

In March 1989, the alleged victim, then a nine year-old girl ("the minor"), wrote a note to her mother indicating in explicit detail that she had been sexually abused by the petitioner, Reginald Jerome Love who, at the time, was her mother's live-in boyfriend. The couple, along with the minor, two other of the mother's children, and the minor's grandmother shared an apartment in Raleigh, North Carolina.

In the evening of the day her mother read her note, the minor, her mother, and Love discussed it. According to the minor, Love denied subjecting her to such abuse, but suggested that she be taken to see a doctor, and her mother, after first objecting, **[**3]** agreed. J.A. 239. Several days later, the minor was taken by her mother to Wake Medical Center where she was interviewed by Kimberly Crews, a counselor, and then examined by Dr. Denise Everette. A contemporaneous report of the interview prepared by Ms. Crews indicated that the minor first denied that Love had abused her but then described in detail an episode of sexual abuse by Love on March 18, 1989, that included sexual intercourse. Dr. Everette's contemporaneous report of her examination indicated discovery of healed hymenal lacerations. It also contained a marginal notation of an earlier medical examination of the minor on October 24, 1988 related to a menstrual period lasting three days and a complaint of pain upon urination for a week. Following Dr. Everette's examination, the minor repeated her accusation to a school counselor, to a Department of Social Services (DSS) staff member, and to a Raleigh police detective.

In May 1989, Love was indicted for one count of first degree rape, one count of first degree sexual offense and one count of taking indecent liberties with a minor. All of the offenses charged were alleged to have occurred on March 18, 1989, the date of the minor's **[**4]** note to her mother.

As the trial approached, Love's attorney focused his efforts on obtaining evidence to support the theory that Love was an innocent man falsely accused by a young girl who was emotionally disturbed for other reasons than his conduct. To that end, he"considered it of central importance to expose every weakness in [the minor]'s credibility, and to provide the jury with a convincing explanation for her false accusation." J.A. 77.

In pre-trial discovery, the state district attorney's office voluntarily produced the report of Dr. Everette's physical examination, the report of counselor Crews' interview, and the police report of the March 18th incident.

Believing that other possibly exculpatory material existed, Love's counsel filed in Wake County Superior Court a "Motion for Discovery [*Brady v. Maryland*]." J.A. 27. Among other things, the motion requested that "the State provide the Defendant with . . . the alleged victim's entire medical record maintained at Wake Medical Center . . . the alleged victim's entire file maintained by the Wake County Mental Health Department . . . [and] the alleged victim's entire file maintained by the Wake County Department **[**5]** of Social Services." J.A. 29. On the same day, Love's counsel also filed a"Motion for Early Disclosure of Statements of the State's Prosecuting Witnesses." J.A. 31-33.

A week later, on May 17, 1989, Superior Court Judge Donald W. Stephens presided over a hearing on these motions. At the hearing, Love's counsel, seeking to demonstrate Love's entitlement to the requested records, made several representations to the court. First, he asserted that before the date of the alleged incident, the minor had been receiving psychiatric care and counseling at the Wake Mental Health Center, presumably because of several incidents of bizarre **[*1308]** behavior, including attempts to set fires in her residence. He also asserted that the minor was presently receiving counseling at the DSS, which had taken her from her mother's custody because of the mother's original refusal to believe the child's assertions, and that the defense was entitled to all exculpatory statements made to DSS officials by the mother. J.A. 108-09. Although the state prosecutor's response characterized defense counsel's assertions as being only "allegations," she did not dispute their factual accuracy and indeed volunteered that the minor **[**6]** was "on Ritalin" because of hyperactivity and had been the subject of a recent civil proceeding which had involved a medical witness. J.A. 110-11. The prosecutor's position was essentially that her office, hence the state, had voluntarily provided defense counsel with all exculpatory statements in its possession; that her office had in its possession no reports respecting the minor's psychiatric care; and that the state therefore had provided all that it was required by law to provide. J.A. 110-12. Defense counsel then reasserted his belief that some reports concerning the minor's "treatment for mental health problems" necessarily existed and were "readily available to the state or the [DSS]." J.A. 112.

Judge Stephens then ruled from the bench on the defense motion for production of *Brady* materials. He first noted that "the [state] District Attorney has the obligation to provide what the District Attorney has, and if the District Attorney has no such reports then I can't enter an order compelling disclosure which they do not have." J.A. 112. The judge then suggested to Love's counsel an alternative means of obtaining the information: "subpoena these people you think are involved **[**7]** to trial, along with a subpoena duces tecum to bring their records. If they object, I'll have a hearing and see whether or not I will require them to disclose that to you." J.A. 112.

He then expanded on this ruling:

> If the State has not obtained or provided this information to you prior to trial, you subpoena these people, they bring in records. I will require that they at least disclose those to the Court. After examination, [if] I think you're entitled to them, and I'll provide them to you. If it appears then that you need additional time, I'll allow your motion to continue the case. If it appears then that you need additional expert assistance, I'll consider your motion for additional expert assistance.
>
> . . .
>
> I don't do any thing until I see what we're dealing with. If the State wants to avoid some of those hurdles and the possibility of continuance, maybe they'll get the reports and see what's there; if not, we'll deal with it at the time it's called for trial.
>
> . . .
>
> There may not be anything there. There may not even be any reports. We'll just have to wait and see, okay?

J.A. 113.

On June 7 and 12, 1989, Love's **[**8]** counsel then issued six subpoenas to, respectively:

> (1) Faye Suggs, Medical Records Custodian of Wake Medical Center, to appear and testify and to produce the "complete medical file of [the minor] .. . , including all reports, tests, lab results and examinations."
>
> (2) Counselor Kim Crews at Wake Medical Center, to appear and testify and to produce "all tapes, notes and records regarding your interview(s) with [the minor]."
>
> (3) Pearl Alston, Medical Records Custodian of the Wake County Mental Health Center, to appear to testify and to produce "the complete medical file of [the minor]."
>
> (4) Dr. Edward Morris of the Wake County Mental Health Center, to appear to testify and to produce "all records, files and reports concerning [the minor]."
>
> (5) Cheryl Passarrelli of the Wake County DSS, to appear to testify and to produce "all [DSS] Records relating to [the minor] . . . including but not limited to: Any written reports made by anyone connected with this case; all reports of conversations between . . . [Love], child's natural parents, foster **[*1309]** parents, the child and any member of the [DSS]; reports made to any law **[**9]** enforcement agency or medical provider."
>
> (6) Betty Cannon, Custodian of School Records for Wake County Public Schools, to appear and testify and to produce "the entire student file of [the minor]."

J.A. 34-44.

The return date on all the subpoenas was the scheduled trial date, June 19, 1989. In the interval, no person or agency named in the subpoenas objected to compliance, so that no pre-trial hearing on any of the subpoenas was required.

When the case came on for trial as scheduled, another superior court judge, Judge I. Beverly Lake, Jr., had been assigned to conduct the trial. It is obvious from the state court record that he did not have the benefit of a transcript of the proceedings before Judge Stephens or direct knowledge of those proceedings from any other source, and that he knew from the file only that a *Brady* motion had been "ruled upon" by Judge Stephens. J.A. 163. In consequence, when the matter was raised along with other motions at the call of the case, Judge Lake could only reconstruct what had earlier occurred from the sketchy and sometimes conflicting accounts of counsel. *See* J.A. 158-84. Confusion inevitably resulted that has made precise **[**10]** recon struction and evaluation of what then transpired before Judge Lake difficult for all the courts reviewing those proceedings. Certain critical aspects, sufficient for decision in this case, can, however, be summarized.

The matter of the *Brady* motion and the follow-up subpoenas was introduced by defense counsel. He advised the court that he had issued subpoenas for production of the minor's "entire medical file from Wake Medical Center [and] her records from the Wake County Public School and also the records from the Wake County Mental Health Department;" that he believed the prosecutor had the subpoenaed materials but did not intend to turn them over to the defense; and that the defense was entitled to review them in advance of trial. J.A. 158-59. He indicated an understanding that the prosecutor would move to quash the subpoenas and asked that the court either direct the prosecutor to turn over the subpoenaed material or allow him to be heard on the state's motion to quash. J.A. 159. In response, the prosecutor confirmed an "intent" to move to quash"*the* subpoena." J.A. 159 (emphasis added). She then identified "the" subpoena to which she referred as only that one issued **[**11]** to the medical records custodian of the Wake County Mental Health Center, and indicated that she, the prosecutor, had in her possession certain records mailed in by that custodian in response to the subpoena, but that she had not yet reviewed them. She then referred to state law which, she asserted, might make some of those subpoenaed records subject to a psychologist-patient privilege. J.A. 159-61. Significantly, however, she then indicated that the privilege was a qualified one which might, in appropriate cases, be overridden by court order. J.A. 161. And she suggested, without reference to Judge Stephens' specific promise of an *in camera* inspection of any records produced by subpoenas duces tecum, that this was the "appropriate route" for the court to take, and that if such an inspection revealed "exculpatory information . . . it should be turned over to [the defendant]." J.A. 161-62. Defense counsel then pressed the need for access to these Mental Health Center records in advance of trial in order to see if a court-appointed psychiatrist might be needed to help prepare Love's defense. J.A. 164-66. In response, the prosecutor asserted a recollection--incorrect in fact and **[**12]** disputed by defense counsel--that Judge Stephens had indicated that any questions of entitlement of the defense to expert assistance should be dealt with "during the course of trial" when the state called as wit ness "the psychologist who had some contact with the child." J.A. 167.

At this point, with no formal motion respecting the subpoenas for Wake County Mental Health Center records or any other having been made, discussion shifted confusedly to Wake Medical Center records. Laboriously, the court was made aware, in colloquy with counsel, of the earlier voluntary **[*1310]** disclosure to defense counsel of the reports of Counselor Crews and Dr. Everette concerning their interviews of the minor in March of 1989. Defense counsel then pointed out that he had subpoenaed all the Medical Center records, and explained his need of them, specifically pointing to the marginal notation on Dr. Everette's March 1989 notes of her medical examination that suggested an earlier medical admission that might have involved injury to the minor's genital area. J.A. 171-72. The prosecutor then denied any knowledge as to whether that subpoena had been served, J.A. 177; denied having in her possession any records **[**13]** subpoenaed from any agency other than those of the Wake Medical Center that were earlier voluntarily disclosed to defense counsel, J.A. 183-84; and repeated her contention that any questions concerning medical records involving the minor should be dealt with at trial in connection with the examination of the state's witnesses rather than in advance of trial. J.A. 175-76. At this point, it is plain from the state court record that the trial judge was badly confused as to the number of subpoenas that had been issued; the identity of the agencies whose records had been subpoenaed; which, if any, of the subpoenas had been served; which, if any, of those served had been honored by the production of subpoenaed materials on the designated return date; and who, if anyone, had possession of any records produced other than those of the Wake County Mental Health Department which the prosecutor indicated were then in her possession. J.A. 163, 169, 174, 177-79. In this state of confusion, defense counsel, who understandably had assumed throughout that, because there had been no objections or motions to quash any of his subpoenas, the materials were then available to the court, sought repeatedly **[**14]** to bring this to the court's attention and to emphasize his need for access to all the materials in advance of trial. J.A. 158, 159, 165, 168-69, 177. His efforts were, however, unsuccessful. Whether, in fact, any records other than those of the Wake Mental Health Center were actually produced in response to the subpoenas is not revealed by the record. It is plain, however, that the trial judge never sought to determine whether any other materials had been produced and were available for his inspection and that he did not inspect any of those that were known to have been produced. It is further plain that the only subpoena which the judge inspected was that issued to the Wake Mental Health Center that had produced the records that remained throughout in the prosecutor's possession.

This general state of confusion and uncertainty led finally to an equally confused series of specific rulings whose result was the actual (or assumed) quashing of all the subpoenas.

Focusing on the subpoena issued to the Wake Mental Health Department, the only one ever inspected, the judge inquired of the prosecutor whether her motion was to quash it. When she answered in the affirmative, the judge ruled **[**15]** from the bench that "after reviewing the subpoena I believe it's overbroad in asking for the complete medical file in matters relevant to trial. . . . So, the court is going to allow the Motion to Quash the subpoena ordering the complete medical file of the victim." J.A. 178-79. When defense counsel, picking up on the reference to "medical file," immediately inquired whether the ruling pertained to the subpoenas to "Wake Medical Center or Wake Mental Health Center or Department of Social Services or . . . Kim Crews," the court as immediately revealed its confusion about the subject of the specific subpoena on which it had ruled. J.A. 179. The prosecutor, sensing the court's confusion and her opportunity, quickly interceded, pointing out that it was the subpoena to"Mental Health," but then sought to amend the quashal motion to "read the quashing of all of the medical information as it relates to instances not involving the specific case that is presently before the Court." J.A. 179.

Resisting the obvious drift of matters, defense counsel again pointed out that more subpoenas than that to the Mental Health Center had been issued, and again sought to explain his need for access to the **[**16]** materials identified in them in order to prepare for trial. J.A. 180, 182. He succeeded only in getting the court's attention to his specific need for access to any medical records that might relate to the earlier medical examination **[*1311]** of the minor in October of 1988 that was suggested in Dr. Everette's notes of her March 1989 examination. J.A. 179-181. When the prosecutor then renewed her motion to quash "all of" the subpoenas on the grounds that "they are not relevant, specula tive," the judge then again ruled from the bench:"I'm going to allow the Motion to Quash the subpoena [sic] with the exception of the medical records of the Wake Medical Center . . . as they relate to the examination of the victim in October of 1988." J.A. 182-83. Later, concluding the hearing on this matter, the judge stated: "With that exception then, the Motion to Quash the four [sic] separate . . . subpoenas duces tecum are allowed." J.A. 184.

Following this hearing, the prosecutor obtained the minor's Wake Medical Center records for the month of October, 1988, from Dr. Everette and delivered copies to defense counsel and to the court immediately before trial commenced. J.A. 189. Instead of a report **[**17]** of menstrual bleeding and pain upon urination on October 24, 1988, as Dr. Everette's notation had suggested, the records revealed a hospital emergency room admission on October 10, 1988, in which the minor had complained of injuries to her knee and to her genital area from a fall during play at school. J.A. 189-90. The report did not indicate the results of any genital examination that may have been performed. J.A. 190.

At the ensuing trial, the minor, her mother, her grandmother, an investigating police officer, Counselor Crews, Dr. Everette, and Dr. Robert Kratz testified as state's witnesses. The minor testified in detail that Love had sexually abused her as charged in the indictment. The investigating police officer and Counselor Crews testified that the minor had stated to each of them in their respective investigative interviews that Love had sexually abused her on the occasion charged, though Crews conceded that the minor had first denied that any abuse occurred. Dr. Everette gave it as her medical opinion, based on her interview and physical examination of the minor and the medical history of which she was aware that she "exhibited certain characteristics of a child who had **[**18]** been sexually abused" and that the healed hymenal lacerations disclosed by her physical examination were consistent with the occurrence of sexual abuse as described by the minor. J.A. 419-20. Dr. Robert Kratz, who examined the minor upon her emergency hospital admission on October 10, 1988, testified as to that event. He confirmed that the minor had then reported to intake personnel that she had received a playground injury to both her knee and to her genital area, but stated that because she had not mentioned any genital injury to him, he made no examination of that area. Love's defense consisted of his own testimonial denial of the charged incident, and cross-examination of the state's witnesses designed to impeach the minor's general and specific credibility and to emphasize the physical implausibility of her account of the charged incidents having occurred undetected just down the hall from her grandmother's open-door room. Defense counsel was able to elicit from the minor concessions of her animosity, "hate," toward Love that pre-dated the charged incident; of her advanced sexual awareness; and of her treatment by prescription drug for hyperactivity. This supplemented earlier **[**19]** testimony elicited by the prosecutor on direct examination in which the minor had conceded attention-seeking episodes of bizarre behavior on her part--shaving her eyebrows, setting fires in her residence--that were followed by psychiatric counseling. No records concerning her conceded counseling at Wake Mental Health Center or her custody by the Department of Social

Services (the subject of two of the quashed subpoenas) were introduced. Testifying in his own behalf, Love denied any sexual encounter with the minor at any time. He claimed her account was simply false and attributed it to her animosity and resentment of his relationship with her mother.

The jury found Love guilty as charged. He was sentenced to two concurrent life terms on the two principal charges and to a five-year term on the third.

On his direct appeal in the state court system, Love's convictions were affirmed by the North Carolina Court of Appeals. *State v. Love, 100 N.C. App. 226, 395 S.E.2d 429 (N.C. App. **[*1312]** 1990)*. The court rejected Love's claim of a federal constitutional violation in the failure of the trial court to conduct an *in camera* inspection of the subpoenaed records. The court thought that because "the trial court's **[**20]** concern was the overbreadth of the subpoena [sic] and, to an extent, the lack of any showing of materiality (with the exception of the October 1988 medical report)," rather than any claim of state evidentiary privilege, *Pennsylvania v. Ritchie, 480 U.S. 39, 94 L. Ed. 2d 40, 107 S. Ct. 989 (1987)*, which in a comparable sex-abuse case upheld a defendant's right to *in camera* inspection over a claim of state evidentiary privilege, was not controlling. *Id. at 432*. The North Carolina Supreme Court denied discretionary review without opinion. *State v. Love, 328 N.C. 95, 402 S.E.2d 423 (1991)*. Love then sought federal habeas corpus relief under *28 U.S.C. § 2254* in the United States District Court, claiming a constitutional violation in the refusal of the state trial court to conduct an *in camera* inspection of the subpoenaed records to determine their possibly exculpatory nature. He relied principally, as he had on his direct appeal, on *Ritchie* as determinative of the right claimed and of its violation. On cross-motions for summary judgment, and without any evidentiary hearing, the district court rejected the claim of constitutional violation and dismissed the petition.

Addressing *Ritchie's* applicability **[**21]** to the case, the district court rejected its applicability, opining in critical part:

> In *Ritchie* the Court struck a due process balance which required the state to give the documents in its possession to the judge for his *in camera* review, notwithstanding the state confidentiality law. In the present case, the parties disagree over whether the subpoenaed documents were in the possession of the state. Assuming that they were, however, the state satisfied its obligations under *Ritchie* by offering to give them to the judge for his *in camera* review. Unlike *Ritchie*, the petitioner in the present case was denied access to the documents not because the state tried to withhold them but because the trial judge determined that the petitioner's subpoenas were overbroad.
>
> There is nothing in *Ritchie* which suggests that the trial judge was obligated to review the subpoenaed documents *in camera* after determining that the subpoenas were overbroad. Instead, the petitioner's attorney should have drafted additional, narrower subpoenas or made some other more specific request for the documents.

J.A. 91-92. On this basis, the court concluded that the **[**22]** state court did not violate any federal constitutional right in declining to inspect the subpoenaed materials *in camera* or to seal them for appellate review, and dismissed the petition.

This appeal followed. II

Love's claim of constitutional violation is, as it was in the state courts and in the United States District Court, that he was improperly denied access to possibly material evidence favorable to his defense by the state court's quashing of his various subpoenas duces tecum without having conducted any *in camera* inspection of the subpoenaed materials. He locates the source of the right violated in the *Due Process Clause of the Fourteenth Amendment* and (through incorporation) in the Compulsory Process Clause of the *Sixth Amendment*.

We agree that he properly invoked such a constitutional right and that it was violated as he claims. Supreme Court precedent locates the right he invoked in both sources, but identifies the Due Process Clause as the appropriate, necessarily broader, source for evaluating the type claim made by Love. *See Pennsylvania v. Ritchie, 480 U.S. 39, 56, 94 L. Ed. 2d 40, 107 S. Ct. 989 (1987)*.

Ritchie applied the Due Process Clause to find a violation in a situation indistinguishable **[**23]** in any material respect from that presented in this case. There, as here, a state-court defendant charged with rape and related sexual offenses of a minor (there his natural daughter) issued a subpoena duces tecum to obtain records of a state agency charged with investigating cases of suspected child abuse as they pertained to the alleged victim. **[*1313]** There, as here, a state trial judge, without inspecting the records produced by the agency, declined, there on grounds of statutory confidentiality, to order their disclosure. The Supreme Court, drawing on the line of cases including *United States v. Bagley, 473 U.S. 667, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985)*; *United States v. Valenzuela-Bernal, 458 U.S. 858, 73 L. Ed. 2d 1193, 102 S. Ct. 3440 (1982)*; *United States v. Agurs, 427 U.S. 97, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976)*; and *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*, that have defined the constitutional right of criminal defendants to disclosure of exculpatory evidence in the government's possession, found that right violated in the case before it.

The basic constitutional right recognized in *Ritchie* is the wellestablished right of an accused to disclosure of evidence in the prosecuting government's possession that "is both favorable to the accused and material to guilt **[**24]** or punishment." *Ritchie, 480 U.S. at 57*. In recognizing the right's applicability to the case before it, the Court pointed out that evidence is "material" in the required sense "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" and that "[a] 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id*. (citing *Bagley, 473 U.S. at 682* (opinion of Blackmun, J.)). Evidence may be"favorable" in the required sense not only when it tends substantively to negate guilt but also when it tends to impeach the credibility of a key witness for the prosecution. *Giglio v. United States, 405 U.S. 150, 154, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972)*; *see Jean v. Rice, 945 F.2d 82, 87 (4th Cir. 1991)*. When, as in *Ritchie* and in the instant case, an accused cannot possibly know, but may only suspect, that particular information exists which meets these requirements, he is not required, in order to invoke the right, to make a particular showing of the exact information sought and how it is material and favorable. Instead, he need only at that stage"at least make some plausible **[**25]** showing" that it does exist and how it would be "both material and favorable to his defense." *Ritchie, 480 U.S. at 58 n.18*. Upon making such a showing, the accused does not become entitled to direct access to the information to determine for himself its materiality and favorability. *Id. at 59, 60*. Rather, he does become entitled, in order to secure the basic right, to have the information he has sufficiently identified submitted to the trial court for *in camera* inspection and a properly reviewable judicial determination made whether any portions meet the "material" and "favorable" requirements for compulsory disclosure. *Id. at 60*.

In *Ritchie*, the accused was held to have made the requisite showing when, at a trial court hearing on his motion to compel compliance with his subpoena for agency records, he simply"argued that he was entitled to the information because the file might contain the names of favorable witnesses, as well as other, unspecified exculpatory evidence." *Id. at 44*. Given the context of the case and the nature of the charges, this was enough, the Court held, to make"Ritchie . . . entitled to know whether the [agency] file contains information **[**26]** that may have changed the outcome of his trial had it been disclosed," *id. at 61*, not by personal inspection, but by *in camera* judicial inspection to make a reviewable discretionary determination of his right to disclosure. *Id. at 58, 60*.

In the instant case, Love's showing far exceeded that held sufficient by the *Ritchie* Court. His showing actually first, and sufficiently, occurred on the hearing before Judge Stephens on Love's pre-trial motion for discovery of "*Brady* material." At that hearing, Love's counsel identified, as had his written motion, three state agencies-the Wake County Medical Center, the Wake County Mental Health Department, and the Wake County Department of Social Services-whose records, he argued, might contain material evidence favorable to Love's defense. And he went considerably beyond the meager showing held sufficient in *Ritchie* to demonstrate how and why they might so **[*1314]** qualify in view of the alleged victim's undisputed involvement with each agency.

As our account of the state court proceedings reveals, much concerning the records happened thereafter, but so far as the constitutional issue is concerned, it was largely irrelevant misadventure **[**27]** that culminated in the violation of a right earlier invoked. Love's "showing" before Judge Stephens was sufficient to trigger the right to *in camera* inspection of the records at that point, and needed nothing further. Judge Stephens in fact seems to have recognized this. He promised such an inspection, but chose to require that the records sought be obtained via

subpoena duces tecum. His stated reason for doing so--that the state was required to disclose only information in the prosecutor's possession--was almost certainly erroneous as a legal proposition. The "*Brady*" right, as recognized and implemented in *Ritchie*, is not limited to information in the actual possession of the prosecutor and certainly extends to any in the possession of state agencies subject to judicial control. *See* Ritchie, 480 U.S. at 44 n.4 (pointing out that agency records held subject to *in camera* inspection were not in prosecutor's possession).

Be that as it may, the fact that Judge Stephens chose--perhaps in a wise exercise of prudence--to proceed in this way rather than by directly ordering state officials to produce the records for his inspection could not alter Love's right to inspection **[**28]** already invoked. And the fact that Love then followed the prescribed procedure by issuing subpoenas to the agencies earlier identified in his discovery motion (plus additional ones to the Wake County Public Schools and to Counselor Crews individually) could not affect or waive the right. *See* Ritchie, 480 U.S. at 43-4 (right invoked in first instance by motion to compel compliance with subpoena to agency rather than by *Brady* discovery-motion). It is clear--and ironic--that had Judge Stephens remained in the case and followed through on his stated intention, Love's constitutional right to have the records judicially inspected to determine his right to access would have been fully protected. Unfortunately, because of sheer mischance and considerable obfuscation--whether or not deliberate--by the state prosecutor, the right simply fell through the cracks in the pre-trial proceedings before the different judge assigned to try the case. Without recapitulating our account of those proceedings and attempting to locate the exact point at which Judge Stephens' adequately protective plan for proceeding went awry, it suffices to say that the right was flatly violated by the ultimate quashing **[**29]** of all of Love's subpoenas--whatever the reason that prompted the ruling. The consequence was that Love was put to trial without any judicial inspection having been undertaken to determine whether the records he had appropriately identified might contain material evidence favorable to his defense. Just as that constituted constitutional error requiring remedy in Ritchie, *see* id. at 58, so it did here.

The district court seemed to recognize *Ritchie* 's general authority in the matter at issue but thought it distinguishable because in the instant case the state prosecutor had offered to submit for *in camera* inspection such subpoenaed materials as "were in the possession of the state," [1] **[**30]** and **[*1315]** this, the court thought, "satisfied its obligations under *Ritchie*." J.A. 92. On this view, the refusal of the state trial judge then to inspect--because the subpoenas were"overbroad" [2]--was of no constitutional significance.

This cannot be right. The constitutional obligation imposed by *Ritchie* is one imposed upon the state, which means upon the judge as well as all other state actors involved in the process of insuring *in camera* inspection of evidence sufficiently shown, under *Ritchie*, to be subject to that inspection. If inspection is effectively denied by any actor in the chain, including the judge as final actor, the fact that some **[**31]** other actors in the chain may have discharged their portion of the obligation cannot insulate a violation further on. Neither can the obligation of the

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[1] As our account of the state court proceedings reveals, it is not at all clear just what materials such an offer of submission actually included. As the record indicates, the state trial judge never determined--or made inquiry as to--how many of the subpoenaed materials had actually been produced and were immediately available for his inspection were he inclined to inspect them. The state prosecutor relentlessly disclaimed any knowledge as to which of the subpoenas other than that served on the Wake Mental Health Center had been obeyed by production of materials, or indeed whether any others had been served. Whether this involved deliberate dissembling or equally surprising ignorance of those important facts is, however, irrelevant to the issue. The upshot is that, whatever the nature of the offer of submission, the state trial judge quashed all the subpoenas without determining or seeking to determine which had been honored, and, indeed without inspecting any but that served on the Wake County Mental Health Center. As the district court observed from its review of the state court proceedings: "There was confusion in the trial court regarding the number of subpoenas which the prosecutor was moving to quash . . . [and] the number of subpoenas quashed and the basis for quashing them." J.A. 86 (district court's order dismissing petition).

[2] As indicated in note 1, *supra*, there remains confusion on the state court record as to the actual basis for the order quashing all the subpoenas. The district court concluded, recognizing the difficulty, that all were quashed as "overbroad." J.A. 87. The district court then thought that this raised only a question whether, under state law, the overbreadth ruling was an abuse of discretion and held, applying state law, that it was not. J.A. 89-90. This, of course, was not the issue raised by Love's constitutional challenge, and the mere fact that a quashal might have been proper under state law would not be dispositive of the quite different constitutional issue.

judge, as final actor in the process, be avoided by drawing on state-law requirements of specificity of subpoenas which may be--and undoubtedly are--considerably more stringent than the merely "plausible showing" which, under *Ritchie* suffices to require *in camera* inspection. *See* Ritchie, 480 U.S. at 58 n.15.

III

The state seeks to avoid application of the rule we apply on the now practically inevitable claim that to do so would violate the "newrule" prohibition of Teague v. Lane, 489 U.S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989), and its progeny. There is no merit to this claim; indeed, it borders on the frivolous. The rule applied is narrowly and only that laid down by the Supreme Court of the United States in *Ritchie*, a case decided well over two years before the state court ruling that is challenged in Love's petition. Because of the stark similarities between *Ritchie* and the instant case, the *Ritchie* rule's application here could not be con sidered "new" because of its application to a novel factual setting. *See* Butler v. McKellar, **[**32]** 494 U.S. 407, 414-15, 108 L. Ed. 2d 347, 110 S. Ct. 1212 (1990). The clearest indication that it is not a "new rule" in the sense contemplated by *Teague* is that the North Carolina courts have demonstrably been fully aware of it and its imperatives from the outset of its specific announcement in *Ritchie*. *See*, *e.g.*, State v. Bailey, 89 N.C. App. 212, 365 S.E.2d 651, 657 (N.C. App. 1988) (recognizing *Ritchie*'s authority and on its basis conducting appellate *in camera* review of agency records sufficiently identified by "plausible showing" by accused).

IV

There remains the problem of remedy for the violation we have found clearly established on our *de novo* review of the district court's judgment dismissing the petition. The right so far denied Love is, as we have shown, only the right to have an *in camera* judicial inspection made of those records and materials "plausibly shown" by Love to meet *Ritchie*'s requirements. These are all the records originally identified by Love to Judge Stephens at the hearing on Love's pretrial motion for discovery of *Brady* materials and later made the subject of subpoenas duces tecum. Specifically, they are the complete medical file of the minor maintained by the **[**33]** Wake Medical Center as of June 19, 1989; [3] the complete medical file and reports concerning the minor maintained by the Wake County Mental Health Center as of June 19, 1989; all records related to the **[*1316]** minor maintained by the Wake County Department of Social Services as of June 19, 1989; and all tapes, notes and records concerning Counselor Kim Crews' interview with the minor in March 1988. [4] Not subject to *in camera* inspec tion are the public school records of the minor as subpoenaed from the custodian of those records; Love has never made to any judicial officer the required showing of how these records might be material and favorable to his defense.

[34]** We might provide the required remedy at this stage by either of two means. We could defer remedy, or direct that the writ now issue conditioned in either event upon the state's provision of a proper *in camera* inspection of the records identified, followed by a properly reviewable determination whether any portions qualified for disclosure to the accused as material and favorable to his defense, and for a new trial if they were determined to be so.

Alternatively, we could remand to the district court with directions to secure the identified records, employing such coercive processes as are necessary, to make the reviewable determination required by *Ritchie*, and to then take whatever further remedial or other action that might be required by virtue of the inspection. *See* 28 U.S.C. § 2243 ("as law and justice require").

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[3] Some, but possibly not all, of Wake Medical Center's records were voluntarily turned over to the defense well in advance of trial. *See* Part I, *supra*. These obviously need not be subjected now to inspection for materiality and favorability, having already been directly disclosed to the accused.

[4] These records, though possibly included in Wake Medical Center records, were separately identified as records subject to inspection because of the sensitive character of Counselor Crews' interview of the minor immediately after the charged incident. If they exist, they should be included in the inspection. The fact that Counselor Crews testified and was subject to cross-examination at trial does not avoid that necessity, though it could well affect the assessment of their materiality.

Courts of Appeals, dealing with comparable situations, have gone both routes. *See*, *e.g.*, *Miller v. Dugger, 820 F.2d 1135 (11th Cir. 1987)* (remand to federal district court for *in camera* inspection of secret grand jury testimony); *Exline v. Gunter, 985 F.2d 487 (10th Cir. 1993)* (federal habeas corpus proceeding held in abeyance to allow **[**35]** state trial court to review agency files *in camera*).

For reasons well-illustrated in the awkward unfolding of the *Exline* procedure, which resulted in a United States District Court directly reviewing the state trial court's materiality determination with no intervening state court appellate review, *see id . at 491*, we opt for the latter course.

Accordingly, we will vacate the judgment of the district court dismissing the petition, and remand to that court for further proceedings as now instructed.

The court should secure the materials we have identified as those to which the petitioner has sufficiently shown a right to *in camera* inspection, either by voluntary production by the state or by such processes of the court as are required. The court should then inspect the materials *in camera* and make the determination required by *Ritchie*, sealing the materials inspected for such appellate review as may be required. The court should then take such remedial or other action as is required by its determination. If the court determines that the agency records we have identified contain information that probably would have changed the outcome of Love's trial, the writ **[**36]** should issue, either absolutely or conditioned upon the state's providing a new trial, as the district court deems proper. If the materials contain no such information or if the nondisclosure was harmless beyond a reasonable doubt, the court will be free to reinstate its dismissal of the petition. *See Ritchie, 480 U.S. at 58* (directing comparable remedial proceedings in remanding to state court on direct appeal).

SO ORDERED

STATE OF NORTH CAROLINA

COUNTY OF ALAMANCE

FILED

2023 FEB 14 A 9:10

ALAMANCE CO., C.S.C.

BY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 19 CRS 53740-42, 1257

STATE OF NORTH CAROLINA)
)
v.)
)
HYQUAN PARKER,)
Defendant.)

REQUEST FOR SPECIFIC DISCOVERY

NOW COMES Defendant, by and through counsel, pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article I §§ 19, 23 and 27 of the North Carolina Constitution; N.C.G.S. § 15A-902 et al.; and respectfully requests the State to provide the following specific items of discovery[1]:

1) Any law enforcement files, including but not limited to the Department of Public Safety Security Risk Group intelligence, related to the gang affiliations of Jason Williams AKA "Bundy", Kaseem Peterson AKA "A-1", Tyrone Nelson AKA "Terrible" AKA "TJ", Andre Owens AKA "Pistol", Takira Thorpe AKA "Bug" AKA "Thug", DeAntonio Rhodes AKA "Ye-Yo", and Gerald Buchanan.

2) In-car camera recordings of the following officer[2]: Arcos (5672) from page LEO 38.

3) Video of non-custodial interview of Jasmine Woodard by Det. A. Smith (4607) that took place on July 1, 2019, from page LEO 33.

[1] Where possible, undersigned counsel has included the page numbers of the discovery where the requested evidence was referenced.

[2] Where possible, undersigned counsel has included the badge/identification numbers of the respective law enforcement officers in parentheses.

4) A sketch depicting the location of a firearm and the surrounding area as measured and described by CSI S.R. Barringer (5021), from page LEO 83.

5) Any and all body worn camera video from Det. J.F. Theriault (5579), to the extent that it exists, from page LEO 119.

6) The entire video surveillance seized from the main office of Pate Homes and "submitted into evidence" by Off. A.A. Shockley (5605), from page LEO 59.

7) The entire video surveillance reviewed by Officer Ashworth (32669) referenced on page LEO 51.

8) The entire video surveillance seized from Burlington Housing Authority.[3]

9) All labs from the N.C. State Crime Lab concerning this case including, but not limited to, lab numbers T201907112-2 and T201907112-3.

10) All EMS reports, including all EMS reports of treatment of the defendant and of the alleged victims on June 30, 2019.

11) Any and all written body-worn camera policies from the Burlington Police Department.

12) Any and all 911 calls from June 30, 2019, requesting assistance or providing information in this case.

13) Any and all ATF and/or U.S. Marshall reports for federal officers who responded to the crime scene or provided assistance in this investigation.

14) Any and all Homeland Security reports concerning the download of the defendant's cell phone in this case.

[3] Undersigned counsel has received clips of this video, but Officer Notes (without page numbers) provided in discovery indicate that investigators seized video beginning at 5:00 am on the day of the crime.

15) Any and all ATF print-outs, reports, or searches concerning the SKS assault rifle recovered in this case.

Respectfully submitted, this the 14th day of February, 2023.

Robert Singagliese
123 W. Main St., Ste. 601
Durham, NC 27701
NC Bar # 38706
(919) 354-7220

Lamar Proctor
123 W. Main St., Ste. 601
Durham, NC 27701
NC Bar # 32541
(919) 354-7220

ATTORNEYS FOR HYQUAN PARKER

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing **Motion** by hand delivery upon the office of:

Sean Boone
District Attorney
212 W. Elm St.
Graham, NC 27253

This the 14th day of February, 2023.

Lamar F. Proctor, Jr.

STATE OF NORTH CAROLINA

COUNTY OF ALAMANCE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 19 CRS 53740-42, 1257

STATE OF NORTH CAROLINA

v.

HYQUAN PARKER,
Defendant.

REQUEST FOR SPECIFIC DISCOVERY AND ALTERNATIVE MOTION TO COMPEL

NOW COMES the defendant in the above-entitled matter, who, through his attorneys and pursuant to N.C.G.S. §§ 15A-903 et seq. and 15A-910, Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972), United States v. Bagley, 473 U.S. 667 (1985) and Cone v. Bell, 556 U.S. 449 (2009); the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; and Article I, Sections 19, 23, and 27 of the North Carolina Constitution, requests this Court issue an Order that the State provide complete discovery in this matter. Mr. Parker respectfully requests the State to provide the following specific items of discovery and alternatively asks the Court to compel such discovery.

1) We continue to request that all materials from federal cooperating agencies be provided. Previous discovery production suggests that there is additional material available from the ATF (regarding firearms examination, including NIBIN entries and hits) and the FBI (regarding a cell phone extraction) that has not previously been provided.
2) We request the following materials from investigating law enforcement agencies, to wit the Department of Public Safety and the Department of Adult Corrections:

a) All documentation, communications, and information concerning Victim Compensation Services Claims 19-72537 and 19-72538 (and any other VCS claim arising out of Burlington Police Department OCA# 2019-04309);

b) All written communication (and reduction to writing of all verbal communication) between Victim Compensation Services personnel and the Burlington Police Department (including but not limited to Det. Braja) concerning the same OCA# or concerning Hyquan Parker, Kaseem Peterson, Jason Williams, or Tyrone Nelson;

c) All disciplinary records concerning Freeman Ireland (OPUS #0606396)

d) Copies of all attachments to any and all disciplinary reports for Mr. Parker's alleged SRG status;

e) Copies of all DPS and DAC policies concerning the release of information to criminal defense attorneys, district attorneys, and release in response to court orders;

f) Copies of all internal DPS and DAC correspondence concerning the release of information to the Alamance County District Attorney's Office, the Office of the Capital Defender, Lamar Proctor, Robert Singagliese, or Christine Malumphy concerning this case;

g) Copies of all internal DPS and DAC investigations into any alleged excessive use of force by any DPS or DAC personnel against Mr. Hyquan Parker;

h) Video or photographs (including clear versions of all previously provided photographs) attached to any of Mr. Parker's disciplinary records;

i) Copies of all documents pertaining to the investigation of a disciplinary incident that occurred on December 27, 2016, at Lanesboro Correctional Institution, including any witness statements (including DC138B forms), any video or photographic evidence, any medical evidence, any OSHA claims or worker's compensation claims filed by employees as a result of the incident;

j) Electronic rounds concerning any time that Mr. Parker was in solitary confinement; and

k) Any other records in possession of either agency concerning Mr. Parker or that would tend to be exculpatory or mitigating as to Mr. Parker (including but not limited evidence that would tend to undercut witness statements against Mr. Parker).

3) We request all handwritten notes from all officers, including but not limited to Officers Annunziata, Arcos, Baulding, Comer, Griffin, Hardy, Harris, Hazelwood, Hines, Houck, Hudson, Moore, Pacheco-Matias, Scotton, Shockley, Snow, and Wright.

Accordingly, Mr. Parker requests the following relief:

1) An order compelling all outstanding discovery from the State;
2) An order setting a deadline for all outstanding discovery from the State, including a provision that precludes the use of such discovery against Mr. Parker if provided after that date and a provision that allows for this matter to be continued if new discovery

requires significant investigation or follow-up by the defense where such discovery is or may be exculpatory; and

3) A hearing on this matter.

Respectfully submitted, this the 2nd day of July, 2024.

Robert A. Singagliese
Bar No. 38706
Assistant Capital Defender
123 W. Main St., Ste. 601
Durham, North Carolina 27701
(919) 354-7220

Christine Malumphy
Bar No. 45001
Assistant Capital Defender
123 W. Main St., Ste. 601
Durham, North Carolina 27701
(919) 354-7220

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing by File and Serve through e-Courts and by e-mail to Alamance County District Attorney H. Sean Boone (haley.s.boone@nccourts.org).

This the 2nd day of July, 2024.

Christine Malumphy
Bar No. 45001
Assistant Capital Defender
123 W. Main St., Ste. 601
Durham, North Carolina 27701
(919) 354-7220

[redacted]

NOW COMES the defendant in the above-entitled matter, who, through his attorneys and pursuant to N.C.G.S. §§ 15A-903 *et seq* and 15A-910, Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972), United States v. Bagley, 473 U.S. 667 (1985) and Cone v. Bell, 556 U.S. 449 (2009); the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; and Article I, Sections 19, 23, and 27 of the North Carolina Constitution requests this Court issue an Order that the District Attorney [redacted] produce and/or disclose to counsel for the Defendant all of the below listed items previously requested by the Defendant in written form on August 16, 2023, including but not limited to the following specific items, which Defendant has requested and have not been provided:

1. Provide any and all personnel records of [redacted] Firearms Examiner Kelby Glass, including but not limited to training and disciplinary records, proficiency testing results, quality assurance records, records concerning any non-conformities and any corrective actions taken concerning Forensic Firearms Examiner Kelby Glass;

2. Provide any and all personnel records of [redacted] Firearms Examiner Eugene Bishop, including but not limited to training and disciplinary records, proficiency testing results, quality assurance records, records concerning any non-conformities and any corrective actions taken concerning Forensic Firearms Examiner Eugene Bishop; and

3. Copy of letter from Leslie Cooley Dismukes, North Carolina Department of Justice Criminal Bureau Chief or any member of the North Carolina Department of Justice to the District Attorney [redacted] regarding Eugene Bishop.

WHEREFORE, the Defendant respectfully moves the Court for an Order compelling the State to disclose the aforementioned documents and things within a reasonable time, and for all other just and proper relief.

Respectfully submitted this the 28th day of August, 2023.

Emily Byrum
Assistant Capital Defender
401 Chestnut Street, Suite I
Wilmington, NC 28401
(910) 343-5385

Christine Malumphy
Assistant Capital Defender
123 W. Main St., Ste. 601
Durham, North Carolina 27701
(919) 354-7220

CERTIFICATE OF SERVICE

The undersigned attorney does hereby certify that he/she caused to be served a copy of

[redacted]

This the 28th day of August, 2023.

Emily J. Byrum
Assistant Capital Defender
401 Chestnut Street, Suite I
Wilmington, NC 28401
Phone: (910) 343-5385

Attorney for the Defendant

[redacted]

NOW COMES the defendant in the above-entitled matter, who, through his attorneys and pursuant to N.C.G.S. §§ 15A-903 *et seq* and 15A-910, Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972), United States v. Bagley, 473 U.S. 667 (1985) and Cone v. Bell, 556 U.S. 449 (2009); the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; and Article I, Sections 19, 23, and 27 of the North Carolina Constitution requests this Court issue an Order that the District Attorney [redacted] produce and/or disclose to counsel for the Defendant all of the below listed items previously requested by the Defendant in written form on August 1, 2023, including but not limited to the following specific items, which Defendant has requested and have not been provided:

1. All information in the possession of any law enforcement agency, including any "Gang Intelligence" or similar units, concerning the State's witnesses and [redacted];

2. All texts and email from law enforcement officers from the investigation in this case, including correspondence with or among members of the District Attorney's Office, the [redacted] Sheriff's Office, the [redacted] Sheriff's Office, the State Bureau of Investigation, or the Department of Public Safety (State Highway Patrol);

3. All texts and emails between the members of the District Attorney's Office of [redacted] of the District Attorney's Office of [redacted] or the United States Attorney's Office regarding [redacted];

4. All texts and emails between current or former members of the District Attorney's Office of [redacted] and any lawyer or member of a lawyer's office representing any of the State's witnesses r[redacted] their testimony, and prosecution of their cases;

5. Complete file from the [redacted] Police Department regarding the gun allegedly stolen and subsequently recovered in [redacted] County ([redacted]);

6. All texts and emails between current or former members of the District Attorney's Office of [redacted] and any doctor, psychologist, employee or official at Central Regional Hospital or Cherry Hospital regarding [redacted] his case;

7. A summary of all phone conversations between current or former members of the District Attorney's Office of [redacted] and any employee or official at Central Regional Hospital [redacted] or this case, where the conversation reflects information not contained in previously provided reports or the information provided suggests that [redacted] suffers from any lack of capacity, mental illness, mental defect, or intellectual limitation;

8. A summary of all conversations and copies of all text messages and emails between current or former members of the District Attorney's Office of [redacted] and any consulting expert in this case who has provided an opinion that is exculpatory in that it is consistent with the findings of any defense expert, or suggests that [redacted] suffers from any lack of capacity, mental defect, or intellectual limitation;

9. The raw data for the phone extractions provided in this case;

10. K9 Certifications for the K9 officer who was used during the traffic stop of [redacted]

11. A recording of the interview of [redacted];

12. Detective [redacted] reports;

13. Correspondence between [redacted] and District Attorney's Office regarding [redacted];

14. All discovery for [redacted] conviction;

15. Updated criminal histories for all the State's witnesses;

16. Any information in law enforcement files about a reference to [redacted]" found

on page 49 of the discovery in this case;

17. Confirm whether the Defense has been provided all of the jail phone calls that are part of the investigatory file and/or investigators have listened to; and

18. Explain the significance of "[redacted]" to this case.

The Defendant would further request an Order from this Honorable Superior Court directing the Sheriff of [redacted] County Jail to allow undersigned counsel to tour the [redacted] County Jail to view the block and cells occupied by state witness [redacted] and the Defendant were housed, and allow undersigned counsel to take photographs of same.

WHEREFORE, the Defendant respectfully moves the Court for an Order compelling the State to disclose the aforementioned documents and things within a reasonable time, for an Order directing the Sheriff of [redacted] to allow defense counsel to tour portions of [redacted] County Jail within a reasonable time, and for all other just and proper relief.

Respectfully submitted this the 16th day of August, 2023.

Emily Byrum
Assistant Capital Defender
401 Chestnut Street, Suite I
Wilmington, NC 28401
(910) 343-5385

Christine Malumphy
Assistant Capital Defender
123 W. Main St., Ste. 601
Durham, North Carolina 27701
(919) 354-7220

CERTIFICATE OF SERVICE

The undersigned attorney does hereby certify that he/she caused to be served a copy of this [redacted]

[redacted]

This the 16th day of August, 2023.

Emily J. Byrum
Assistant Capital Defender
401 Chestnut Street, Suite I
Wilmington, NC 28401
Phone: (910) 343-5385

Attorney for the Defendant

STATE OF NORTH CAROLINA

COUNTY OF ALAMANCE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 19 CRS 53740-42, 1257

STATE OF NORTH CAROLINA

v.

HYQUAN PARKER,
Defendant.

SUPPLEMENTAL MOTION TO DISMISS FOR DESTRUCTION OF EVIDENCE AND MOTION FOR SANCTIONS

COMES NOW Defendant, Hyquan Parker, by and through counsel, and hereby moves this Honorable Court, pursuant to the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article 1 §§ 19, 23, and 27 of the North Carolina Constitution, N.C.G.S. §15A-954(a)(4), N.C.G.S §§15A-903 and 910, N.C.G.S. §§ 8C-1, Rules 106, 401, and 403, Brady v. Maryland, 373 U.S. 83 (1963), California v. Trombetta, 467 U.S. 479 (1984), Kyles v. Whitley, 514 U.S. 419 (1995), State v. Williams, 362 N.C. 628 (2008), State v. Absher, No. COA 09-1426 (Oct. 5, 2010) (unpublished, copy attached hereto), State v. Knoll, 322 N.C. 535 (1988), and their progeny, and other related statutes and case law for sanctions for the State's failure to preserve and produce significant material evidence in this case. Mr. Parker asks that this motion be considered in light of his previously filed Motion to Dismiss for Destruction of Evidence (BHA Video), filed May 28, 2024, and in the shadow of other irregularities surrounding the production of discoverable material in this case. In support of the foregoing Motion, Mr. Parker shows unto the Court as follows:

OVERVIEW

1. Mr. Parker is charged with three counts of first-degree murder, one count of possession of firearm by felon, and violent habitual felon status. The decedents in this case are Tyrone Nelson, Kaseem Peterson, and Jason Williams.
2. The State would prefer that Mr. Parker receive the death penalty.

THE STATE'S THEORY AND SUMMARY OF EVIDENCE

3. The State has provided some discovery to Mr. Parker and has described generally for the Court the evidence against him.
4. The State's theory of the case appears to be that Andre Owens, a friend of the decedents, drove Mr. Parker from Durham to Burlington on June 30, 2019, the day of the shooting.
5. Mr. Owens, Takira Renae Thorpe, Mr. Parker, and the decedents were together for much of the day, with their activities centered around 15 Perry Circle.
6. Video from the day would have shown various parties' comings and goings, including when Mr. Parker arrived on scene, when the other parties arrived and left, whether any other crimes took place at or around Perry Circle (as suggested by the transportation and wielding of an assault rifle by one of the decedents), Mr. Parker's demeanor throughout the day, and interactions among the witnesses, decedents, and Mr. Parker.
7. A Facebook Live video created by Mr. Williams shows Mr. Parker, the decedents, some of the witnesses, and unknown potential witnesses hanging out in the parking lot at Perry Circle.[1] According to Mr. Owens and Ms. Thorpe, there was no tension in the group prior to the shooting, though Mr. Parker seemed a little "off." See Defendant's Exhibit 8/8/24 #1, "TAKIRA" at 5:21 p.m.

[1] This video was provided to the Defense on August 23, 2024.

8. The Perry Circle apartment was maintained by Pate Homes and the Burlington Housing Authority and rented by Jasmine Woodard, Mr. Williams' girlfriend. Ms. Woodard lived at the home with several others, including her young son, Tracy Holly (her mother), Mr. Nelson, and Mr. Williams. Ms. Thorpe may have also lived at the apartment.
9. Ms. Woodard and Ms. Holly came in and out of the apartment that day according to their accounts (which would be corroborated or impeached by surveillance video).
10. Around 8 p.m., a few minutes after Mr. Owens and Ms. Thorpe left the apartment to go to a convenience store, the State contends that Mr. Parker picked up the decedents' rifle and shot the three decedents.
11. Ms. Woodard is the *only* eye-witness who would attempt to give an account of what happened downstairs at 15 Perry Circle around the time of the shooting.
12. She has stated, in various iterations, that while cooking supper she overheard one of the decedents shout a warning that there was a bullet in the gun, that Mr. Parker then threatened her with the gun, that she ran upstairs, that she heard several shots, and that she saw Mr. Parker going toward the back door of the apartment. Ms. Woodard then called 911.
13. Ms. Holly was also present in the apartment and gave a different account from the time of the shooting. She told Officer Smith that Ms. Woodard brought food to her upstairs and that a few minutes passed before they both heard gunshots. Ms. Holly never lost sight of Ms. Woodard between being brought the food and hearing the gunshots. When asked to identify the potential shooter in a show-up of Mr. Parker, Ms. Holly stated that Mr. Parker was not the man who had been hanging out in the apartment and that the man was someone with "red dreds."

14. The State will likely present another Facebook Live video, allegedly created by Mr. Parker shortly before the shooting, which the State will contend shows Mr. Parker in the living room with the decedents. The State downloaded or ripped a copy of the Facebook Live video early in their investigation, obtained a copy from Facebook, and made a copy of the video by having one officer use his body camera to take a video of it playing on a computer screen. See Defendant's Exhibit 8/8/24 #1, "moore 1046."
15. The State's evidence in this case will likely include video surveillance footage from the Burlington Housing Authority ("BHA") which the State will contend shows Mr. Parker with the decedents' gun leaving the scene of the shooting shortly after it happened.
16. Mr. Parker did not make significant inculpatory statements and no witnesses claim he confessed to the shootings.
17. The State will present other evidence that they contend shows Mr. Parker fired a gun at the time of the shooting, including gun shot residue and shell casings alleged to be consistent with the rifle recovered from near where Mr. Parker ran after the shooting.
18. When investigators arrived on scene, all three decedents were dead. Gerald Buchanan, a friend of the decedents', and Ms. Woodard were present in the apartment. At one point, Mr. Buchanan was going through Mr. Peterson's pockets.
19. Evidence tends to show that Mr. Williams is a high-ranking gang member and he, Mr. Owens, Ms. Thorpe, and Mr. Buchanan were engaged in a spate of robberies during 2019 across several counties. They primarily stole guns and other valuables.
20. Some witnesses interviewed by officers pointed to the apartment next door, 13 Perry Circle, as a location where guns and drugs were stored for use by Mr. Williams and his cohort.

21. Nearly everyone involved in the case, including all three decedents, most of the witnesses, and Mr. Parker are presumed to be Crip gang members. However, none of the evidence suggests that this alleged crime was motivated by a gang rivalry. Indeed, as recently as last month, the State has made clear that a theory of motive is "still being developed." Transcript of Proceedings, July 3, 2024, at 8.

PROCEDURAL HISTORY

22. On July 1, 2019, Mr. Parker was formally charged with three counts of first degree murder.
23. On July 2, Assistant Capital Defender Lamar Proctor was provisionally appointed to Mr. Parker's case.
24. By July 11 at the latest, the District Attorney for Alamance County, Sean Boone, had decided that this matter would be capital. By that date, Sergeant Braja had been briefed on the importance of documenting a capital case, as demonstrated by multiple statements he made that day to witnesses.
25. First, Sergeant Braja was on the phone with Mr. Owens and explained that he was "tasked by the District Attorney's Office" to talk to witnesses, and that it was important to do so quickly because "we got this hearing coming up . . . the DA is going to state that he's going to do a capital case on him." Sergeant Braja went on to explain that "this is going to be a capital case. They are going to want everything sealed up. . . . You know how court systems are, bro, especially with capital cases. . . [his attorneys] are going to try to say that he's crazy. . . ." Defendant's Exhibit 8/8/24 , "snow 1046."
26. Second, later the same day to Ms. Woodard, Sergeant Braja explained that "the DA is going to say it's going to be a death penalty case" at the Rule 24 hearing and that

Sergeant Braja understood that he needed to get "every video" and "every report" to Mr. Parker's "two attorneys by the end of the month," July 2019. Defendant's Exhibit 8/8/24 #1, "TRACY JASMINE", at 2:11:41.

27. On July 17, Mr. Proctor filed a Request for Discovery and Motion to Preserve Evidence.
28. On July 22, this case was declared capital and the Motion to Preserve Evidence was allowed.
29. On September 3, October 8, November 13, 2019, and January 7, 2020, Mr. Proctor asked the State for discovery by email.
30. On November 13, 2019, Mr. Boone indicated that he had not received discovery, but nonetheless hoped to try Mr. Parker's case in 2020.
31. In January 2020, dozens of body-worn and in-car cameras were provided, along with various reports, notes from officers, and some electronic evidence from seized devices.
32. On May 17, 2022, Mr. Proctor notified the State that several items were missing from the discovery, including a recording of a July 1 interview with Ms. Woodard conducted by Detectives Smith and Snow. The State was also notified that significant footage from BHA was missing.
33. Mr. Parker filed a number of additional discovery requests in 2023 and 2024. Among the material specifically requested were the notes and communications from various officers.
34. In recent discovery productions, the State has provided documents showing that written Burlington Police Department policies include (as reflected in the attached copies of such policies):
    a. That body cameras shall not be muted;
    b. That recordings shall be retained;

c. That digital evidence shall be maintained in a manner consistent with the "NCSBI Evidence Manual for the collection of computer equipment"[2]; and

d. That all evidence will be submitted to the evidence unit with only evidence unit officers having access to such evidence.

UNPRESERVED EVIDENCE

I. Jasmine Woodard July 1, 2019, Interview

35. Ms. Woodard was interviewed at length twice in this case. The first interview was on June 30, 2019. That interview was conducted by Detectives Floyd and Thierault at BPD. Jasmine was interviewed with her friend present. This interview was recorded and provided to the defense.

36. Ms. Woodard was then interviewed on July 1, 2019, by Detectives Snow and Smith at the police station in a room with recording equipment. During that interview, according to the testimony of Detective Smith and representations by the District Attorney, neither Detective took significant notes. See Defendant's Exhibit 8/8/24 #22; Transcript of Proceedings, August 8-9, 2024, at 170.

37. Ms. Woodard was also interviewed briefly on the scene on June 30 and at the police station on July 11. These interactions were all, for the most part, recorded on body cameras or on surveillance cameras at the police station. These recordings have been provided to the defense.

38. A recording of the July 1 interview was specifically requested by Mr. Proctor on May 17, 2022. This email was attached to the previous motion to dismiss and Mr. Parker requests that such emails be accepted as evidence in this motion.

[2] This manual has not been provided to the defense, though the District Attorney has provided State Crime Lab procedures.

39. On January 19, 2023, Sergeant Braja told the District Attorney, "[t]hat video was not included in our hard files or lists. It is not in the video server. Best I can tell that video was never recorded." Defendant's Exhibit 8/8/24 #8.

40. On January 20, 2023, Mr. Boone responded to Mr. Proctor that Sergeant Braja had spoken to Detective Smith who said that he did not have a copy of the July 1 Woodard interview recording. See email correspondence attached to prior Motion to Dismiss.

41. At the July 3, 2024, the Court ordered the State to respond in writing to the discovery request for the July 1 Woodard interview recording. On July 29, 2024, Mr. Boone and Assistant District Attorney Elizabeth Olivier signed a document that was ultimately filed with the Court and which stated that the July 1 Woodard Interview video "was not originally recorded and does not exist."

42. Detective Smith conducted a number of other interviews during the investigation. He testified that he does not have a photographic memory and that his practice was to record interviews and then to review the recording in order to write his summary. This practice is amply supported in the record, as discussed in the next several paragraphs. He confirmed that the dates on his report reflect the date the report was actually written. Transcript of Proceedings, August 8-9, 2024, at 171-82.

43. On July 11, Detective Smith interviewed Tracy Holly. Detective Smith stated in his summary (admitted as Defendant's Exhibit 8/8/24 #7) that the interview was recorded, and a recording was ultimately provided to the defense (admitted as Defendant's Exhibit 8/8/24 #1, "TRACY JASMINE"). His summary was dated September 3, 2019, and Detective Smith confirmed in his testimony that his report from the July 11 interview was

written on September 3 and that his summary was based on listening to the recorded interview. Id.

44. On July 1, Detective Smith interviewed Marshel Peterson. Detective Smith stated in his summary (admitted as Defendant's Exhibit 8/8/24 #23) that the interview was recorded, and a recording was ultimately provided to the defense (admitted as Defendant's Exhibit 8/8/24 #1, "ash 1105"). His summary was dated September 6, 2019, and Detective Smith confirmed in his testimony that his report from the July 1 interview was written on September 6 and that his summary was based on listening to the recorded interview. Id.
45. On July 8, Detective Smith interviewed Takira Thorpe. Detective Smith stated in his summary (admitted as Defendant's Exhibit 8/8/24 #5) that the interview was recorded, and a recording was made and ultimately provided to the defense (admitted as Defendant's Exhibit 8/8/24 #1, "TAKIRA"). His summary was dated October 30, 2019, and Detective Smith confirmed in his testimony that his report from the July 8 interview was written on October 30 and that his summary was based on listening to the recorded interview. Id.
46. Each of these interview recordings contain material information that is not found in Detective Smith's corresponding summary. See Appendix A, attached hereto.
47. As with all of Detective Smith's other interviews, the July 1 interview with Ms. Woodard was video recorded. The July 1 summary (admitted as Defendant's Exhibit 8/8/24 #25) states that the interview was "video (audio) recorded". The summary is dated August 26, 2019, and Officer Smith confirmed that that was the date the summary was written. Transcript of Proceedings, August 8-9, 2024, at 184.

48. Officer Smith's testimony indicates that he *could not* have written that report nearly two months after the date the interview was conducted without a recording. He testified that there *was* a recording and that he had notified Sergeant Braja that a recording was made. Id. at 184, 193.

49. In four weeks since the August hearing, the State has not modified or retracted its representation that no recording was made. See N.C. Rules Prof. Conduct, Rule 3.3(a)(1).

50. The July 1 interview contained material, useful, and exculpatory content.

51. First, the recording would certainly be used to impeach Ms. Woodard.

52. For example, Jasmine denies that she knew the "other two" people in the apartment aside from Mr. Parker and the three decedents. But later in the interview she admits knowing Andre Owens, who was one of the two people. Additionally, other evidence suggests that the other person, Ms. Thorpe, used to *live* at the residence with Ms. Woodard. In other words, less than twenty-four hours after her boyfriend was killed, she was dishonest with the police about who was in the apartment with her boyfriend minutes before the shooting.

53. Similarly, Ms. Woodard in the July 1 interview states she did not think the gun was kept in the house and in a prior interview had implied she did not know much about guns. However, then she describes the gun as similar to an AK, and several other witnesses describe the gun as being kept consistently in the apartment.

54. Additionally, Ms. Woodard's timeline of the events around the actual shooting is inconsistent across her statements, with different details and omissions in each iteration. Having a verbatim version of her statement on July 1 is critical to establish those and any other inconsistencies.

55. Second, the recording would be used to demonstrate and emphasize exculpatory and mitigating information. In the interview, Ms. Woodard describes Mr. Parker shaking while holding the gun, she describes the friendly interactions between Mr. Parker and the decedents, and she describes the criminal and gang relationships of the decedents that could help show that there would be no reason for Mr. Parker to have a gang-related motive for the crime. Given the nature of the relationships between Mr. Parker and the decedents, lack of motive would be material at both phases of the trial, should a second phase be required. Having Ms. Woodard's contemporaneous description of this information in her own words would be useful and exculpatory.

56. By necessity, there is a degree of speculation as to the usefulness of missing evidence. After all, the Defense will never see or hear this recording. However, Appendix A shows that there is *significant* material and exculpatory information in *each* of Detective Smith's other recorded interviews, information that did not make it into his summaries. There is no reason to doubt that the July 1 recording would have contained similarly useful and exculpatory information.

57. The State has implied that the existence of the June 30 Woodard interview renders the destruction of the video in this case harmless. However, Detective Smith's summary makes clear that different topics were covered in the July 1 interview. Also, given that every time Ms. Woodard has told the story there have been material inconsistencies, the defense should have had the opportunity to review and compare the two interviews.

58. An analogy to Williams, 362 N.C. 628, is apposite. In Williams, which is discussed at length in the previously filed motion, it seems clear that the trial court *could* have ordered the creation of a similar or identical poster to make a nearly the same point as the

original. But the Court's holding in Williams is an acknowledgement that the substitution of similar evidence is no replacement for the original.

59. The State should not benefit, in its argument on this motion or in the trial, from its destruction of the evidence discussed herein. The Court should not entertain arguments or speculation that the lost evidence was unimportant, inculpatory, or redundant – to do so would reward the State for its misdeeds and missteps to the detriment of Mr. Parker who is on trial for his life.

II. Officers' Notes, Communications, and Original Log

60. The response to the shooting on June 30, 2019, involved multiple police agencies and dozens of officers, many of whom were operating body-worn cameras and/or taking notes.

61. Officers' notes and communication are plainly part of the State's investigation file, and discovery was requested early and often by the defense in this case.[3] Some officers' notes were provided in various discovery releases during the pendency of this case. After a request for text messages and other communications, some emails and some text messages from 2023 and 2024 were provided to defense counsel in July 2024. After a specific request for a copy of the "GroupMe" communications among officers, that conversation was provided to the defense in August 2024.

62. The Court held a motions hearing on July 3, 2024, and there was discussion of officers' notes and communications. The Court directed the State to provide an explanation in writing regarding whether any further notes or communications could be provided.

[3] The defense is, of course, not required to make such specific requests. See G.S. § 15A-902(a). But the defense's diligence may be a factor in determining the appropriateness and degree of sanctions. United States v. Bagley, 473 U.S. 667, 682-83 (1985).

63. On July 29, 2024, the State filed a written response which stated that texts and emails had been "provided to the defense."

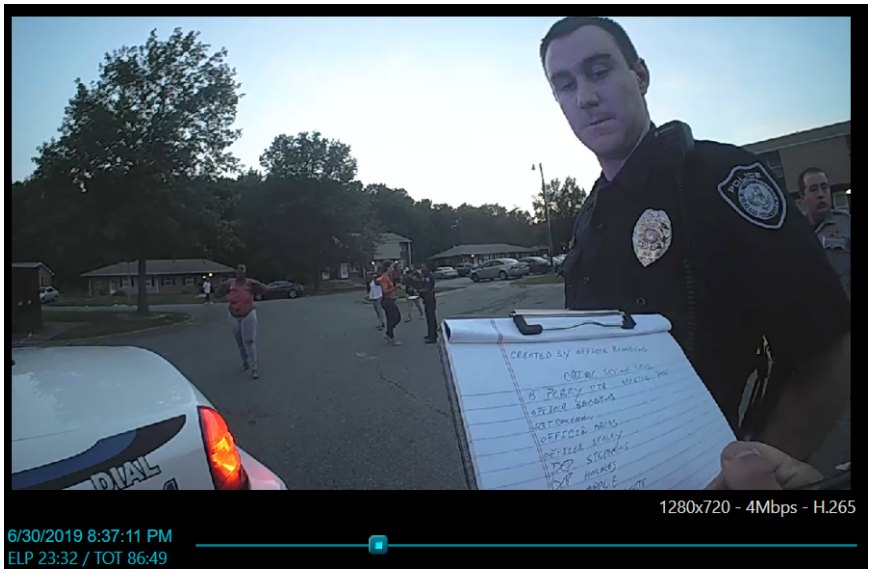
64. The response further stated that any handwritten crime scene log did "not exist" and was "transposed to the form in the case file."

65. Regarding notes taken by officers at the scene, the response stated, that the State had "nothing additional" to provide.

66. On August 8 and 9, 2024, a second hearing was held. At the hearing, officers described their investigatory actions on and shortly after June 30, 2019. Their testimony and admitted exhibits demonstrated that substantial communications, notes, and the original crime scene log were created but have been lost or destroyed.

Handwritten Crime Scene Log

67. A handwritten crime scene log was clearly created. Former Officer Phillip Baulding testified that he began the crime scene log after being one of the first officers on the scene. However, when he realized that Officer Hardy had been tasked with completing the log, he handed the log he started over to Officer Hardy. Transcript of Proceedings, August 8-9, 2024, at 324. This can all be seen on the body camera footage that is included on Defendant's Exhibit 8/8/24 #1, a flash drive with several recordings on it.



Defendant's Exhibit 8/8/24 #1, "BWC Baulding 814" at 8:37 pm.

68. Officer Hardy testified that he transposed the handwritten log to a type-written log which was provided in discovery. Defendant's Exhibit 8/8/24 #31. However, he also testified that he would likely have followed BPD's policy on turning in notes and would not have thrown away the original log. Transcript of Proceedings, August 8-9, 2024, at 292-295.

69. Burlington Police Department policy, as described by Officer Hardy, required that officers place a physical copy of their notes in an envelope and turn them in to an inbox where they then become part of the case file. Id.

70. On his body camera, Officer Hardy can be heard telling one Alamance County Sheriff's Deputy that he "might have missed one or two" on the list and the Sheriff's deputy informed him of some of the deputies who had been in and out of the scene. Defendant's Exhibit 8/8/24 #1, "Hardy 842" at approximately 9:23:45.

71. A woman named Ebony Tyson was allowed to enter the crime scene and can only barely be seen on the various body camera recordings. Her apartment is listed as 13 Perry Circle.

72. In an interview a few days later, Keisha Thorpe, mother of Takira Thorpe, suggested to officers that Apartment 13 was where guns and drugs were stored by the decedents and witnesses, and she stated that she understood that Ms. Tyson had entered the crime scene to secret away guns and drugs belonging to Mr. Williams and the other decedents and witnesses. See Defendant's Exhibit 8/8/24 #1, "K THORPE" at 6:40.

73. A handwritten log, especially if there were any scrivener's errors in the creation of the typed log, would shed more light on the activities around the crime scene, help provide the names of officers who may have interacted with Ms. Tyson, and would show edits to the list that clearly occurred throughout the evening.

74. Officer Hardy's body camera sheds some light on these questions; that recording is included in its entirety on Defendant's Exhibit 8/8/24 #1. However, that recording did not cover all of Officer Hardy's time on scene and is only about 90 minutes long.

Electronic Communications Among Officers and Between Officers and Witnesses

75. Several officers at the August 2024 hearing testified that there was texting about the case throughout the night of June 30, 2019, and later in the investigation. Transcript of Proceedings, August 8-9, 2024, at 53-54 (Sgt. Braja), 159 (Asst. Chief Wright), 201 (Lt. Kology), 290-91 (former Ofc. Hardy).

76. Such testimony is corroborated by body camera footage. Officers are seen frequently with phones sharing images and appearing to send text messages throughout the course of the investigation. The screenshots below are by no means an exhaustion of the examples available.

77. Here, for example, Officer Staley shows Lieutenant Kology an image:

Defendant's Exhibit 8/8/24 #1, "BWC staley 810" at 10:50 pm.

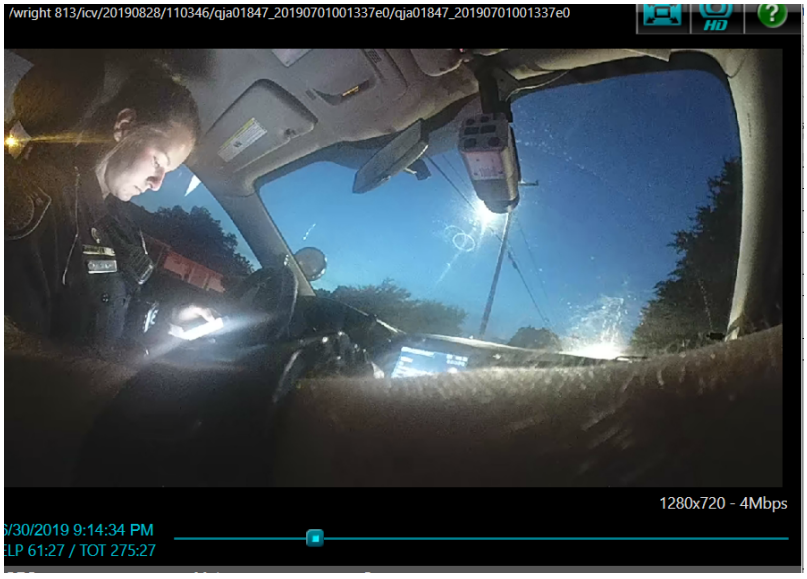
78. Similarly, this unknown high-ranking officer appears to be texting:

Defendant's Exhibit 8/8/24 #1, "hudson" at 9:41 pm.

79. Similarly, Officer Hardy was sending text messages during the investigation, as he admitted during the hearing and is evident from his body camera:

Defendant's Exhibit 8/8/24 #1, "hardy 842"at 9:29 pm.

80. The body cameras are replete with recordings of officers reviewing their phones and appearing to check and send text messages:



Defendant's Exhibit 8/8/24 #1, "wright 813" at 9:14:34 pm.

81. It is clear that officers also texted with witnesses as well. Five years after Mr. Parker requested discovery in this case, on July 26, 2024, the State provided an audio interview

with an unnamed aunt of decedent Mr. Nelson. On this recording, Officer Smith can be heard telling the witness "I am texting you right now." Defendant's Exhibit 8/8/24 #1, "BRAJA 07-03-19 14h11 (1)_Provided 7-26-24," at 6:13 minutes.

82. Detective Smith similarly referred to text messages back and forth between him and Ms. Woodard. Defendant's Exhibit 8/8/24 #1, "TRACY JASMINE" at 1:06:30.

83. Further, officers routinely throughout the investigation, provided witnesses with their cell phone numbers, suggesting additional text contact with witnesses.

84. Communications between officers and witnesses have obvious utility to the defense; especially, where, as with Mr. Nelson's aunt, the nature of the police follow-up with the witness would shape the ability of the defense to locate and question the witness.

85. Communications among the officers would show the manner in which the investigation unfolded, the timing of when leads were developed, and may provide more information on how investigators came to be aware of the decedents' criminal histories and social media activities, which appear in reports largely out of context.

86. Such communications are also exculpatory. A recurring theme in the case is that the police had extensive knowledge of the decedents in this case and very quickly came up to speed on their misdeeds. This appears in snippets in the discovery, but there clearly was some gathering and sharing of information about the decedents' criminal histories, gang ties, and other information that could shed light on potential motivations in this case and bolster Mr. Parker's defense and/or his mitigation.

87. Nonetheless, the only text messages provided to the defense were from 2023 and 2024, concerning attempts to respond to discovery requests rather than the substance of the investigation. The only communications from early in the investigation were an

assortment of emails from Sergeant Braja and a short group text chat through the "GroupMe" application.

Officers' Notes

88. It is also apparent from testimony and discovery provided that a number of notes taken by officers on and shortly after June 30, 2019, are now irretrievably lost or destroyed.

89. Although the State proclaimed on July 26 that there were "no additional" notes to be provided, one officer showed up with his notes after being subpoenaed by the defense to the August hearing. Assistant Chief T. Wright provided notes that he remembered he had written only when he was subpoenaed to come to court and decided to watch his body camera footage. Transcript of Proceedings, August 8-9, 2024, at 150-51.

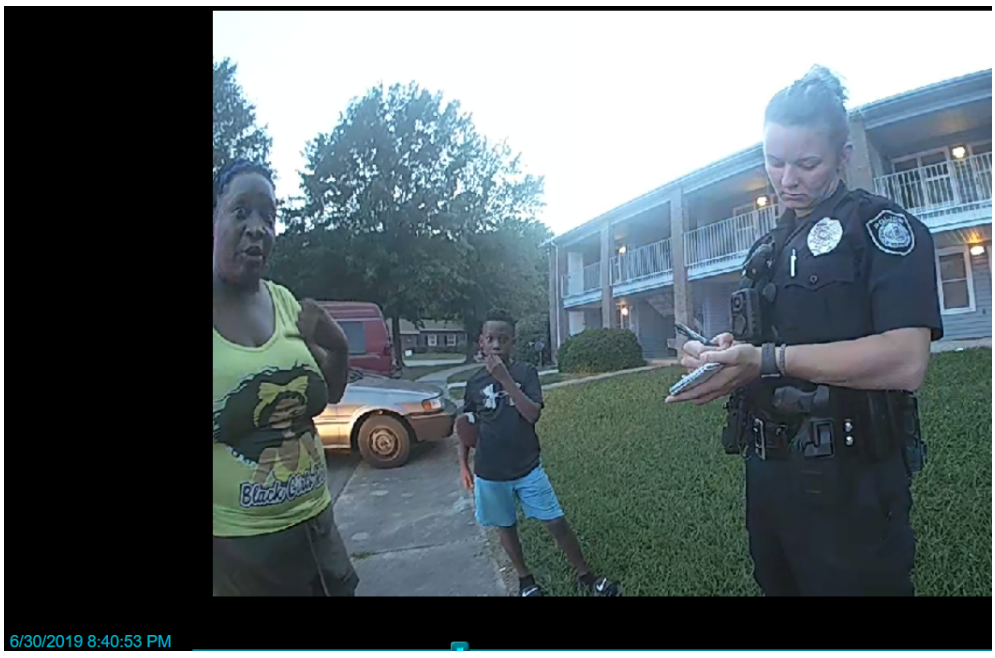
90. Lieutenant Wright's notes were produced only because body camera footage showed him actively taking notes, and the notes were still available.

91. Other officers agreed, upon seeing body camera footage, that they too had been taking notes. Several stated that they would have turned in the notes for inclusion in the case file.

92. Officer Cousin, who did not prepare a report in this case but wore a body camera, agreed that she took notes, including when talking to witnesses. Transcript of Proceedings, August 8-9, 2024, at 237. Her notes have not been provided.

Defendant's Exhibit 8/8/24 #1, "2019-04309 06-30-19 821pm BW Cousin" at 8:57 pm.

93. Officer Raven Baulding (nee Hazelwood and hereinafter "Officer Hazelwood" to distinguish her from her husband) agreed that she wrote information on a notepad, including when talking to witnesses. Transcript of Proceedings, August 8-9, 2024, at 224. Her notes have not been provided.



Defendant's Exhibit 8/8/24 #1, "2019-04309 06-30-19 821pm BW Cousin" at 8:40:53.

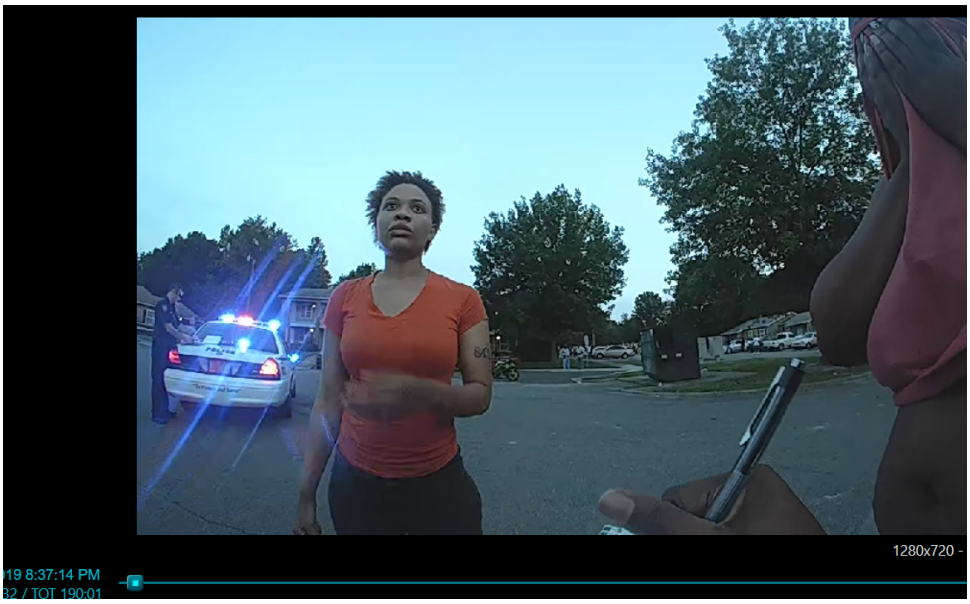
94. Officer Houck agreed that he took notes for Officer Sauer during the investigation of the crime scene. Such notes were provided. However, he also took other notes, including when talking to witnesses. Transcript of Proceedings, August 8-9, 2024, at 286. These notes have not been provided.

Defendant's Exhibit 8/8/24 #1, "houck 1132" at 11:37:02 pm.

95. Officer W. Wright agreed that he took notes, including when talking to witnesses. Transcript of Proceedings, August 8-9, 2024, at 276-77. His notes have not been provided.

Defendant's Exhibit 8/8/24 #1, "wright 813" at 8:58:05.

96. Officer Hudson agreed that she took notes, including when talking to witnesses. Transcript of Proceedings, August 8-9, 2024, at 233. Her notes have not been provided.



Defendant's Exhibit 8/8/24 #1, "hudson" at 8:37:14 pm.

97. Each of these officers submitted body camera footage that covered portions of their time at the scene, for some of them substantial portions, but each of these officers was at the

scene *longer* than their body cameras were actively recording. Additionally, as discussed below, most officers muted their body cameras at points.

98. Some officers had no body camera, and some even wrote no report, despite being actively engaged in the investigation. For these officers, receipt of their notes is critical to know what aspects of the investigation they participated in and what leads they developed.

99. For example, Lieutenant Kology was in command and oversaw the arrest of Mr. Parker, the handling of the crime scenes, and appears to have been actively researching people involved in the case at the crime scene.

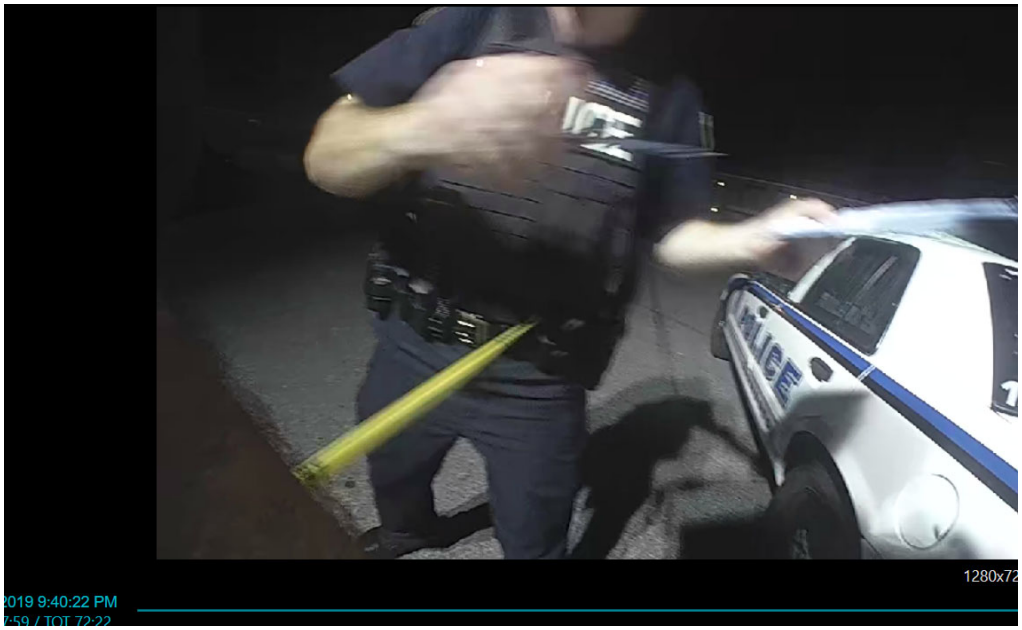
100. Here, Lt. Kology and another officer work on their computers while at the scene, presumably accessing information and communicating it to other investigators:

Defendant's Exhibit 8/8/24 #1, "BWC Staley" at 10:08:47 pm

101. Here, Lt. Kology is dropping off to Officer Hardy's care a clipboard with a notepad with a great deal of handwriting on the top page.

Defendant's Exhibit 8/8/24 #1, "hardy 842" at 9:38:45.

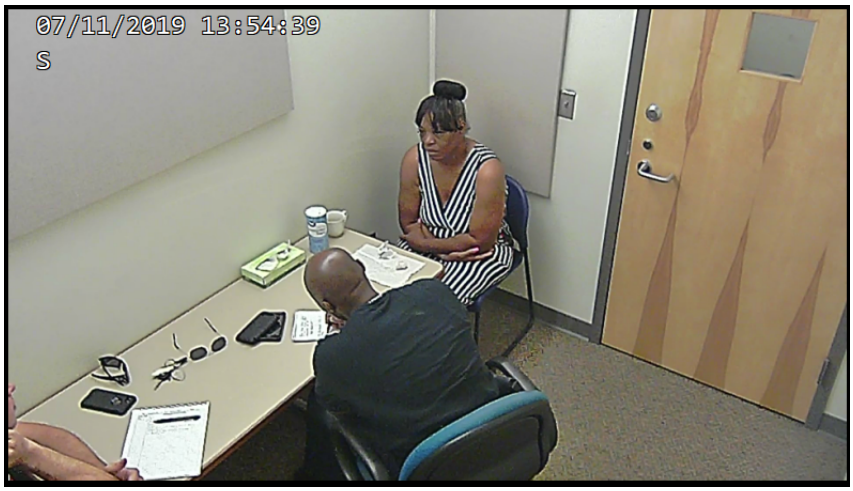
102. Lieutenant Kology returned to the scene and then retrieved his notes from Officer Hardy.



Defendat's Exhibit 8/8/24 #1, "Hardy 842" at 9:40:22 pm.

103. While on the stand, Lt. Kology equivocated about whether he had made notes; the body camera footage strongly suggests that he did.

104. In some cases, officers seem to have preserved part of their notes but not all of them. For example, Detective Smith provided a very short page of notes (submitted as Defendant's Exhibit 8/8/24 #22 during the hearing) but appears to be taking other notes that have not been provided in his interview with Ms. Holly:



Defendant's Exhibit 8/8/24 #1, "TRACY JASMINE"

105. It is important to note that the testimony provided at the August hearing is merely the tip of the iceberg. These officers were subpoenaed by the defense because it was obvious from other discovery that, despite the State's prevarication to the contrary, these officers had made notes. It remains unknown and entirely unclear how many other officers took notes at the scene, whether officers took other notes or collected other documentary evidence that did not make it to the file, and whether the notes provided for individual officers are complete.

106. What is entirely clear is that, contrary to established policy, documents were created (either on paper or in text chains) and were allowed to be destroyed in spite of BPD's full knowledge that this was a capital case and that the collection and retention of evidence was paramount.

107. The cumulative loss of the handwritten log, notes, and other communications suggests a pattern and practice of failure to preserve documentary evidence.

III. Muting of Body-worn Cameras

108. The Burlington Police Department has a clear policy regarding the use of body cameras – body cameras are not to be muted.

109. The policy states in relevant part: "Audio microphones shall be placed in the "on" position during the entire incident. Microphones should never be muted during [digital recording system] activation." Defendant's Exhibit 8/8/24 # 27 at 4.

110. Officers on the stand, including the lead investigator, and the District Attorney suggested that this might not have been the policy in July 2019; however, subsequent discovery productions included the policy created in 2016 which has the same policy.

111. Additionally, an email from a commander emphasized in September 2019 that anyone muting a body camera was in violation of the policy. This email is attached hereto.

112. It appears that the reason officers *were* muting their body cameras was to prevent defense attorneys from scrutinizing their work. In September 2019, then-Lieutenant T. Wright explained to the Assistant Chief of Operations that muting body cameras was needed to prevent preservation of material that would "just lead[] to another thing for the defense to attack."

113. A BPD meeting two days later emphasized that such action was an unacceptable violation of policy. The notes from this meeting are attached hereto.

114. Indeed, some officers admitted that this was the policy or at least that they understood they were not to mute their body cameras. Transcript of Proceedings, August 8-9, 2024, at 24 (Ofc. Griffin), 232 (Officer Hudson).

115. In spite of this policy, many officers muted their body cameras.

116. Among the officers muting their body cameras were:

a. Officer Hazelwood: One of her body camera recordings was muted while she spoke to Mr. Parker and discussed performing a GSR test on him. Her other body camera recording was muted for almost the entire duration of the recording, including when talking with civilians at the scene. Defendant's Exhibit 8/8/24 #1, "hazelwood 918" and "hazelwood 821."

b. Officer Moore: His body camera also provided a view of GSR test attempt by Officer Hazelwood, but he muted his audio as well during that interaction. Defendant's Exhibit 8/8/24 #1, "moore 815."

c. Detective Floyd's body camera is muted while talking to witnesses, including part of the time that he is speaking with Jasmine Woodard. Defendant's Exhibit 8/8/24 #1, "Interview Jasmine Woodard."

d. Officer Staley: His body camera is muted, including when talking with civilians at the scene. Defendant's Exhibit 8/8/24 #1, "BWC Staley 810."

e. Lieutenant Wright's body camera, which was only operating for a short period of time, is muted at times when he speaks with other officers. Defendant's Exhibit 8/8/24 #1, "T Wright BWC."

f. Officer Wright's body camera is muted for approximately 20 minutes while discussing possible motives for the suspect in the case. Id.

g. Officer Cousin's body camera is muted for several minutes while talking to other officers. Defendant's Exhibit 8/8/24 #1, "J Cousin BWC."

117. In her report regarding the attempt to perform a GSR test on Mr. Parker, Officer Hazelwood recounts that Mr. Parker spoke to her, telling her "he knew his rights" and that he wrote with "both" hands. He then refused to open his fists and wouldn't allow the test to be conducted. Defendant's Exhibit 8/8/24 #26.

118. This version of events cannot be corroborated or undermined by either Officer Hazelwood's or Officer Moore's muted body camera.

119. The numerous civilian witnesses who are interviewed often go unidentified because of muted body cameras. These are now potential witnesses that the defense has no way of locating.

120. As with the missing communications, muting discussions among officers further has undermined defense knowledge of the case and created an unacceptable information asymmetry. In context, one of the topics of conversation among officers appears to have been information known about the decedents and witnesses – information that could have been used by the Defense to help illuminate the relationships among the personalities in this case.

IV. BHA Surveillance Video

121. Information concerning the unpreserved BHA video is summarized in Mr. Parker's prior Motion to Dismiss for Destruction of Evidence (BHA Video).

122. In addition to the facts already alleged in the prior motion and incorporated herein, the August hearing demonstrated that BPD had significant control over the BHA video.

123. Both Officer Ashworth and Sergeant Shockley testified that they were left with the BHA video system and allowed to view whatever video they chose and that they were in control of the system. Transcript of Proceedings, August 8-9, 2024, at 134-136, 240-242.

124. Sergeant Shockley further testified that BHA would obtain, preserve, and provide video data on behalf of BPD. Transcript of Proceedings, August 8-9, 2024, at 33-36.

125. This is consistent with what the defense investigator learned when speaking with the people who maintained the BHA video system. See attached Affidavit of Bob Boykin.

126. The Executive Director of BHA explained that BHA video may be viewed by the police at any time, and the system is such that BPD is able to view BHA video from the police station.

127. Another BHA employee explained that the video system records over old footage and that, by 2023 when it had become clear that all of the footage had not been released in discovery, the footage from June 30, 2019 was no longer available.

128. Finally, an employee with Security Consulting, Inc. ("SCI"), Ron Davis, explained that SCI had a contract to maintain the video surveillance system.

129. Mr. Davis was working with SCI in 2019 and states that he personally extracted the relevant footage from the SCI hard drives and provided such footage to the police upon their request.

130. It seems possible based on the testimony from Detectives Braja, Ashworth, and Shockley, that the 5 a.m. to 2 p.m. BHA footage was never downloaded for BPD.

131. However, lack of clear memory by the officers and lack of fidelity to appropriate evidentiary procedures muddies the waters on this question.

132. Text communications among officers strongly suggest that, as recently as June 2024, no one with BPD could precisely say *where* the original data download from BHA/SCI was or where the alleged "working copy" that Sergeant Shockley created was saved. Defendant's Exhibit 8/8/24 #14.

133. The text exchange between Sergeant Shockley and Sergeant Braja reflects confusion. The two go back and forth about possible locations of the original data (the "homicide box", the "CID computer", etc.). Eventually, after Sergeant Braja sends Sergeant Shockley a screen shot of material on a hard drive that Sergeant Braja had been using for electronic data from several cases ("Braja hard drive"), the two officers appear to settle on the conclusion that the original data was most likely downloaded to the Braja hard drive.

134. The statements by Mr. Davis and Sergeant Shockley's original report suggest that the material was downloaded by Mr. Davis and then picked up by Sergeant Shockley, but it does not describe on what device this transfer was made. There is no suggestion that BPD provided the hard drive or that Sergeant Braja was involved at all with the creation of the drive.

135. Sergeant Shockley states in his report that the drive (whichever drive it was) would be put into evidence. At the hearing, Sergeant Shockley stated he did not put it into evidence and it became clear that the drive was never put into evidence.

136. Sergeant Shockley stated he was not sure where the hard drive was and thought it was with the DA or in evidence; later in his testimony he said he was "certain" that the

drive was the one in possession of Sergeant Braja. Transcript of Proceedings, August 8-9, 2024, at 253, 255.

137. In any case, to date, the original data is not stored in evidence.

138. The working copy that Sergeant Shockley made was saved to a computer, but as his testimony clarified at the hearing, that copy was deleted when more space was needed on the computer. Transcript of Proceedings, August 8-9, 2024, at 43.

139. Sergeant Shockley's and Sergeant Braja's testimony notwithstanding, their text messages make clear that neither officer knew for certain whether the Braja hard drive contains all of the data provided by BHA/SCI to BPD and whether that was the original downloaded data or another "working copy."

140. In any case, whether or not the 5 a.m. to 2 p.m. footage was ever downloaded and then lost or was simply reviewed and examined by Detective Ashworth, the State obtained information from the video evidence and did not preserve it.

141. The obvious utility, exculpatory value, and mitigating value of the BHA footage are explained in the prior motion.

142. The bad faith of the State is exacerbated by its failure to appropriately place the electronic evidence into a secure evidence room, such that the Court could be certain that the electronic evidence is in its original *complete* format.

ARGUMENT

143. Mr. Parker incorporates by reference the argument and authority provided in his previously filed Motion to Dismiss (BHA Video).

144. In addition to the explanation therein, State v. Taylor outlines the two ways in which dismissal may be appropriate where evidence is lost or destroyed. 268 N.C. App.

455 (2019) (unpublished) (copy attached hereto). Further, dismissal is also appropriate as a discovery sanction. State v. Adams, 67 N.C. App. 116 (1984). Finally, although neither suppression of evidence nor declaring this case non-capital can do justice in light of the outlined violations, these specific alternative sanctions could mitigate some of the prejudice in this case. Other remedies are not up to the task of ensuring a fair trial for Mr. Parker.

I. Dismissal is required due to destruction of exculpatory evidence or interference with Defendant's right to investigate, regardless of bad faith.

145. "[T]he State's destruction of material, favorable evidence to the Defendant, and its admission that the evidence could not be produced, warrant the conclusion that any trial commenced against the Defendant would not comport with our notions of due process" and as a result, "Defendant's constitutional rights were flagrantly violated." State v. Williams, 362 N.C. 628, 639 (2008). Dismissal is appropriate in such cases "irrespective of the good or bad faith of the prosecution." Id. at 636.

146. Exculpatory evidence, particularly at this stage, includes evidence that *could* either confirm or undermine the credibility of the State's witnesses; Mr. Parker need not prove that the evidence would be unequivocally or definitively favorable to him. Our Court of Appeals, in discussing the exculpatory nature of the selectively preserved video in State v. Absher, described the exculpatory nature of the material in the following terms:

> "[t]he original video *might* have confirmed [the Officers'] testimony or impeached it. . . . The original video *might* have explained the discrepancy [among witnesses' testimony]. . . . Moreover, the trial court's findings support its conclusion that the missing video segments were material and were favorable to his defense. The video

> would have provided better images of defendant Absher's injuries and *might* have provided evidence demonstrating his impaired mental state. In addition, the video *could* have been used to impeach some of the State's witnesses."

No. COA 09-1426 at 18-21(emphasis added).

147. The exculpatory or mitigating value of the evidence lost in this case is discussed above, and it should be considered cumulatively. See State v. Canady, 355 N.C. 242, 246 (2002) (giving a condemned defendant a new trial on the basis of cumulative constitutional violations). The accumulation of prejudice in this case is not linear; it is exponential. Information the State failed to retain included videos that would have shown witnesses the Defense could interview, notes that could have led to other leads that the police abandoned, and potentially conduct by Mr. Parker that could have been shown to experts who may have had an opinion on his mental state at the time of the offense. Moreover, where one form of evidence was lost (e.g., the Woodard video), it sometimes makes it difficult to even figure out what other evidence has been lost (e.g., the information shared by Ms. Woodard from her phone with Detective Snow). And the multiple instances of failures to follow policy, failure to preserve useful information, and the tendency to cover up such failures rather than own up to them strongly suggest that more evidence is lost than can ever be known.

148. The capital nature of this case expands vastly what could be considered "exculpatory" due to the broad definition of mitigation adopted by the United States Supreme Court and our capital punishment statute. Mitigating evidence is any reason arising from the evidence to choose life. See 15A-2000(f)(9). Indeed, mitigation is "potentially infinite." Ayers v. Belmontes, 549 U.S. 7, 34 (2006)

149. Thus, evidence that might be irrelevant to the first phase could be exculpatory in the second phase as either mitigation or to rebut circumstances that might push a jury toward the death penalty. This would be true of evidence regarding relationships among the actors in this case, the presumed motive of Mr. Parker, Mr. Parker's level of impairment, the description of the heinousness of the alleged crime, and any number of other factors that would have been elucidated by the unpreserved evidence.

150. But even if the lost evidence were not directly exculpatory, dismissal is still appropriate because the State's failure to preserve evidence and information undermined Mr. Parker's right to procure evidence and conduct his own investigation. State v. Knoll emphasizes that where the State's failure to honor its statutory and constitutional obligations interferes with a defendant's ability to gather evidence, dismissal is the only appropriate remedy. 322 N.C. 535, 547-48 (1988) ("The lost opportunities . . . constitute prejudice to the defendants in these cases. That the deprivations occurred through the inadvertence rather than the wrongful purpose of the magistrate renders them no less prejudicial."); see also State v. Hill, 277 N.C. 547 (1971) ("Before we could say that defendant was not prejudiced by the refusal of the jailer to permit his attorney to see him we would have to assume both the infallibility and credibility of the State's witnesses as well as the certitude of their tests. . . . [W]hen an officer's blunder deprives a defendant of his only opportunity to obtain evidence which might prove his innocence, the State will not be heard to say that such evidence did not exist. Defendant has been deprived of a fundamental right which the constitution guarantees to every person charged with crime. For that reason the prosecution against him must be dismissed."); State v.

Ferguson, 90 N.C. App. 513, 519 (1988) (requiring the trial court to consider a motion to dismiss under Article 1, section 23 of the North Carolina constitution).

151. In Knoll, the defendants appealing their cases all had blood alcohol concentrations that would be defined by statute as *grossly* impaired. Mr. Knoll blew a .30, which is staggeringly drunk. Id. at 538. Even in the face of such overwhelming evidence of impairment and even where the defense's "lost opportunity" likely would have yielded *inculpatory* evidence of appreciable impairment, the Court found that dismissal was appropriate. Claims of overwhelming evidence of guilt and protests that the defense has not shown that evidence would be exculpatory thus do not undermine Mr. Parker's claim.

152. Mr. Parker's statutory and Constitutional rights (and this Court's prior order) required the retention and provision of information and evidence that was instead destroyed. The failure to preserve such evidence has directly interfered with the Defense investigation, particularly as to evidence of his relationships with the decedents and witnesses and his unusual (potentially impaired) behavior leading up to the crime.

153. Additionally, while the burden is usually on the Defendant to show that destroyed evidence is exculpatory, it is appropriate for the Court to place the burden instead on the State where, as here, the State had a duty to maintain the evidence. Such shifting of the burden is appropriate to prevent the State from benefiting in this motion from its wrongful destruction of information it had a duty to maintain. See, e.g., Nayokpuk v. United States, 848 F. Supp. 2d 1030 (D. Alaska 2012) (burden-shifting in negligence cases is an appropriate response to destruction of evidence in one party's control); Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946) (superseded by statute) (shifting part of the burden in wage theft cases from employees to employers where

employers fail to maintain appropriate records); State v. Benton, 136 Ohio App. 3d 801 (2000) (holding that shifting the burden in a motion to dismiss is appropriate where state had a duty to maintain evidence and destroyed it in a routine fashion); State v. Benson, 152 Ohio App. 3d 495 (2003) (shifting the burden in a motion to dismiss where the State was ordered to maintain evidence and failed to do so).

154. The State's duty to maintain the evidence discussed herein is plain under our discovery statutes and the Brady line of cases from our courts.

155. With respect to the BHA video, it should be noted that the discovery statute defines investigatory agencies to include "any . . . private entity that obtains information on behalf of a law enforcement agency" and therefore includes BHA/SCI. G.S. § 15A-903(1)(b1). Thus, not only was it improper for the State to fail to produce the video that Detective Ashworth watched, it was also improper for them to fail to produce the video from 2 p.m. to 6 p.m.

156. The prosecutor in this matter has previously suggested that certain evidence (e.g., the BHA video) was not "collected" and therefore the investigators had no duty to preserve such evidence.

157. It is correct that the police have no duty to stray from their primary investigation and go searching for exculpatory evidence. State v. Chavis, 141 N.C. App. 553, 561 (2003) (where investigators had never reviewed witness' mental health records, they had no duty to collect them); State v. Foushee, 234 N.C. App. 71 (2014) (where investigators had never viewed surveillance video, they had no duty to collect it).

158. However, this does not equate with saying the State had no duty to collect information that it learns and uses in its investigation. Unlike in Chavis and Foushee,

investigators in this case viewed or obtained extensive surveillance video and chose not to preserve it. The State had the benefit of this information in their investigation, and Mr. Parker is deprived of it.

159. The ease with which the State collected and preserved Mr. Parker's Facebook Live video by simply taking a video of the video and the fact of the State's unfettered access to the BHA video and the willingness of BHA/SCI to download any video for them make clear the vacuousness of any distinction between uncollected and unpreserved evidence. While the State isn't required to collect every fiber at a crime scene or interview everyone who may have information about a crime, where the State *uses* such evidence in its interviews and could easily preserve the evidence, the failure to do so is no different than physical collection and destruction of evidence. See United States v. Yevakpor, 419 F. Supp. 2d 242 (N.D.N.Y. 2006) (discussing at length the consciousness and deliberation that goes into the selective retention of surveillance video).

160. In fact, any rule allowing the selective retention of some footage and failure to preserve other footage invites abuse. Investigators, cognizant that no duty has arisen, would be unfettered by Brady and our discovery statute. A rule that allows such gaming of important constitutional and statutory rights is lawless.

II. Dismissal is required due to destruction of potentially useful evidence, in light of bad faith.

161. The Court should also dismiss this case under Arizona v. Youngblood, 488 U.S. 51 (1988). Youngblood stands for the proposition that due process requires the dismissal of a case where speculatively useful evidence is destroyed due to the bad faith of State actors.

162. Evidence of bad faith in this case is manifold. First, from the outset, the State's investigators acted in violation of numerous Burlington Police Department policies, including the requirement that body cameras record all audio and not be muted, directives surrounding the collection and retention of evidence, and unwritten but apparently well-established procedures for the depositing of notes and documents in the case file. Violations of policy may amount to bad faith. See Taylor, 268 N.C. App. at 455 (determining in contrast to the dissent that a bad faith finding was possible and remanding to a trial court where Trooper failed to follow policy); see also United States v. Elliot, 83 F. Supp. 2d 637, 647 (E.D. Va. 1999) (discussing at length the violations of policy that weighed in favor of a finding of bad faith and a shift in the burden regarding whether unpreserved evidence was exculpatory).

163. BPD directives aside, failure of BPD to appropriately preserve all information obtained during the investigation runs afoul of clearly established constitutional rules (as outlined in the cases cited above) and the repeated violation of these norms strongly suggests bad faith. The strength of this claim for bad faith is enhanced by the fact that the investigators were well aware that Mr. Parker would ultimately face the death penalty if convicted. Sergeant Braja's statements indicated that he knew well the importance of a complete investigatory record in this case in particular.

164. Second, the lack of candor by investigators and the District Attorney and Assistant District Attorney in this case supports a finding of bad faith. See Napue v. Illinois, 360 U.S. 264, 269-70 (1959) ("A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . . That the district attorney's

silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."); see also State v. Benson, 152 Ohio App. 3d 495 (2003) (evasive and dishonest statements as to whether evidence existed support a finding of bad faith); Stuart v. State, 127 Idaho 806 (1995) (concealment suggests bad faith).

165. Officer Smith testified, under oath and consistent with the evidence and common sense, that his July 1 interview of Jasmine Woodard was recorded. He testified that he would not have been able to write his report nearly two months later without the recorded interview. He also testified that when Sergeant Braja, the lead detective who sat behind counsel for the State during the entire evidentiary hearing on August 8-9, 2024, asked him about the interview, Officer Smith told Sergeant Braja that it was recorded. Nevertheless, the State communicated to the defense several times in the last five years that the interview was not recorded. Further, counsel for the State filed a document with the Court on July 26, 2024, asserting that the interview "was not originally recorded and does not exist."

166. Other officers gave statements that were inconsistent with the representations of each other or with established policies (for example, officers who claimed that muting was acceptable policy) and other officers gave statements that were simply inconsistent with the evidence (for example, Sergeant Shockley's claims of "certainty" around the Braja hard drive). Officers (such as Assistant Chief Wright) were evasive on the stand, and the prosecutors were deliberately vague at times in describing the original existence or non-existence of evidence (for example, in their signed statement regarding whether officers took notes at the scene).

167. Indeed, the District Attorney's office has yet to correct its material misstatements made to this Court regarding discovery, specifically whether the July 1 Woodard interview existed. Lesser conduct in a capital case has resulted in a defense attorney being sentenced to 30 days in jail. See e.g., Trial Court Order, In re Geoffrion, Dare Co. docketed on appeal as P23-730 (holding in contempt a defense attorney who *corrected* a non-material misstatement of fact and sentencing the attorney to thirty days in jail).[4] Uncorrected misstatements by both prosecutors in this case, in addition to risking being contemptuous, may also be criminal under G.S. §15A-903(d).

168. The Court could also find bad faith because a *reasonable* officer would know that evidence of inconsistent statements by witnesses, evidence of a defendant's impairment (particularly in a capital case), and evidence concerning the relationship among the defendant and the decedents that could explain or dispel potential motives are exculpatory. This knowledge supports such a finding. State v. Banks, 125 N.C. App. 681 (1997).

169. Although Sergeant Braja testified that he has received no training on capital cases, a reasonable officer is imputed with knowledge of binding case law, City of Tahlequah v. Bond, 595 U.S. 9, 14 (2021), which would include our general statutes and capital cases defining the scope of mitigation.

170. Finally, the pattern of destroyed evidence or unpreserved information suggests that the State was determined to simplify this case. Although the State has never settled on a motive, the material destroyed frequently concerned evidence that would have clarified the relationships among the witnesses, decedents, and Mr. Parker. Such

[4] Mr. Parker is not requesting such action against the prosecutors in this case.

relationships could support a first-phase defense (self-defense based on very reasonable fear of the decedents) and would support any number of second-phase mitigators. The State attempts to re-cast failure to preserve information in this case as investigators' determination that such evidence was not *relevant*. To the contrary, it appears merely that such evidence was not *helpful to the State.* As one court wisely put it when describing selective preservation of video evidence, "[the court] does not believe that the investigatory agency would delete material that was beneficial to the Government's case." Yevakpor, 419 F. Supp. 2d at 247.

III. Dismissal is appropriate as a discovery sanction.

171. Dismissal is an appropriate sanction under our discovery statutes where there is some prejudice. Though the remedy has been called "extreme", it may be used where discovery violations impede a defendant's ability to get a fair trial. State v. Adams, 67 N.C. App. 116 (1984) (trial court acted within discretion in dismissing charges for prosecution's failure to comply timely with court order requiring statutory discovery).

172. In Adams, there was no claim that the failure of the State to comply in a timely fashion with the Court's discovery order deprived the defendant of any exculpatory evidence; indeed, in that case no evidence was destroyed. The prejudice in that case was simply that the State had deprived the defense of the ability to confer timely about the case with their client who had intellectual limitations.

173. The prejudice in Mr. Parker's case is far more severe than that in Adams. The Court in this case has set no discovery timeline, so the defense has routinely had to absorb more discovery (including as recently as the last two weeks) to review with Mr.

Parker, who, like Mr. Adams, suffers from cognitive limitations. Moreover, the failure to preserve evidence in this case has, as discussed above, impeded Mr. Parker's investigation and prevented him from presenting exculpatory or potentially useful evidence to the jury.

174. Unlike in Adams, where a continuance and other sanctions at trial likely could have remedied the discovery violations, in this case, only dismissal can prevent Mr. Parker from being subject to an unfair trial. Dismissal in this case is appropriate in light of the centrality of the unpreserved evidence to this case and the flagrancy of the statutory and constitutional violations.

IV. Suppression of certain evidence is appropriate as a discovery sanction.

175. Another remedy that would at least mitigate the prejudice in this case is exclusion of any evidence where Mr. Parker's ability to meet, rebut, or investigate such evidence has been impeded by the State's failure to preserve related evidence.

176. This remedy is permissible by our discovery statute and is required under certain circumstances. State v. James, 182 N.C. App. 698, 702 (2007) (trial court excluded witness statement produced by State after discovery deadline set by trial court); State v. Banks, 125 N.C. App. 681 (1997) (as sanction for failure to preserve evidence, trial court prohibited State from calling witness to testify about evidence, stripped prosecution of two peremptory challenges, and allowed defendant right to final argument before jury), aff'd *per curiam*, 347 N.C. 390 (1997); see also Elliot, 83 F. Supp. 2d at 649 (holding that suppression was appropriate constitutional response to destruction of evidence where the evidence could have been inculpatory or exculpatory); Yevakpor, 419 F. Supp. 2d at

246 (Rule of Completeness would require the whole video to be played so exclusion would have been appropriate)

177. Mr. Parker specifically requests:

a. Exclusion of the testimony of any officer who can be shown to have not provided their complete notes in this case; and

b. Exclusion of the testimony of any officer who muted their body camera while on scene; and

c. Exclusion of the testimony of any witness whose statements, all or in part, were lost due to the muting of a body camera; and

d. Exclusion of any statements by Officer Hazelwood or Officer Moore regarding Mr. Parker's cooperation or lack thereof with the GSR test and exclusion of any statement made by Mr. Parker during this interaction, see G.S. § 15A-211;

e. Exclusion of any GSR analysis; and

f. Exclusion of the testimony of Jasmine Woodard; and

g. Exclusion of any BHA video, see Yevakpor, 419 F. Supp. 2d at 252.

178. Exclusion of evidence is at best an incomplete remedy as it fails to adequately address the loss of investigative opportunities which underly fundamental strategic decisions such as which defense will be put forward.

V. Removing the option of a death sentence is a necessary sanction.

179. As discussed at length in Mr. Parker's previously filed Motion to Provide Exceptional Safeguards to Ensure Reliable Outcome (filed May 28, 2024), capital cases are different, which compels an additional remedy in this case: declaring that the State may not have its preferred sentence of death.

180. Taking away the option of a death sentence is not an extreme remedy and does not require a finding of bad faith. See State v. Defoe, 364 N.C. 29 (2010) (declaring a case non-capital may be a remedy for violation of Rule 24).

181. There is nothing about this case (or any case) that uniquely requires the imposition of the death penalty. See Woodson v. North Carolina, 428 U.S. 280, 304-05 (1976) (holding unconstitutional North Carolina's mandatory death penalty statute).

182. There are multiple instances where our Superior Courts have removed the option of the death penalty.

183. In State v. Bellamy, Iredell County Sup. Ct. No. 05 CRS 4713-17, the court precluded death in a double homicide where the District Attorney had unknowingly denied the existence of notes by various officers from an agency outside its control but, during the trial, numerous documents and notes were found that were exculpatory or potentially useful. The court declared a mistrial and ruled that the State, upon retrial, would not be allowed to seek the death penalty. The Court specifically found that there had been no bad faith by the local law enforcement or by the District Attorney. The court made no finding that Mr. Bellamy's future trial would be tainted by prejudice, but it nonetheless found that Mr. Bellamy could not face the death penalty in his subsequent trial. The order from this case is attached hereto.

184. In State v. Kennedy, Davidson County Sup. Ct. No. 11 CRS 57791 (Aug. 27, 2015), the Court had entered a discovery order that all concessions to co-defendants or witnesses should be turned over by the District Attorney to the defense counsel. At a bond hearing for a co-defendant/witness, the District Attorney did not agree to a lower bond but did laud the witness's cooperation which resulted in a substantial bond

reduction. Such inducement was never communicated to the defense and the trial commenced. The court in Kennedy found the State's actions to be willful, allowed the co-defendant/witness to testify but removed the option of the death penalty, even though by the time the witness testified, the defense could impeach with evidence concerning the bond hearing. A partial transcript from this case is attached hereto.

185. In State v. Montgomery, Mecklenburg County Superior Court No. 07 CRS 215042, 07 CRS 215044, a case involving the murder of *two police officers*, an investigating officer was found to have destroyed some of his original notes, although the State pointed out that the notes were not likely exculpatory and that the conducted interviews were available on video in other formats. See partial transcript of State v. Montgomery at 216-17 (attached hereto). Indeed, the notes were re-copied and only the original had been destroyed. Id. at 249. The Court, having doubts that the notes were a perfect copy of the originals, declined to dismiss the case but determined that a mere spoliation instruction was not sufficient and removed the option of the death penalty.

186. The violations in this case should be viewed for their aggregate effect, in terms of the constitutional analysis, determinations regarding good faith or lack thereof, and selection of the appropriate sanction. Standing alone some of these discovery issues may warrant lesser sanctions, but cumulatively the failures of the State to provide its complete file and the complete body of evidence it relied upon in constructing its case undermines the reliability of any potential trial in this case. See Canady, 335 N.C. 242 (cumulative errors including discovery violations warranted new trial, not merely a new sentencing hearing, in a capital case).

187. Not only does this Court have the discretion to enter an order removing the death penalty as a mild sanction for the State's actions, it is required to do so. Because "death is a punishment different from all other sanctions in kind rather than degree," it is imperative that a jury in a capital case be apprised of all "circumstances of the offense together with the character and propensities of the offender." Woodson v. North Carolina, 428 U.S. 280, 304-05 (1976). Lack of complete discovery, destruction of evidence, and false assertions about destroyed evidence render any sentencing verdict in this case unreliable and in violation of our statutes, our State constitution, and the United States Constitution.

188. This remedy, along with the exclusion of the evidence listed above, would mitigate some but not all of the prejudice presented by the State's failure to preserve evidence.

VI. Other sanctions will not remedy the statutory and constitutional violations in this case.

189. Other sanctions in this case may be issued by the Court in its discretion. Spoliation instructions, loss by the State of peremptory strikes, opportunities for the defense to depose witnesses, or a continuance might mitigate certain aspects of the prejudice in this matter but cannot ensure a fair trial for Mr. Parker.

190. For example, a spoliation instruction regarding the July 1 Woodard interview video is likely to fall on deaf ears in the face of her live testimony. The video would provide nuance that would go much farther than a generic spoliation instruction and cross-examination. The video would reveal the degree of her deviations, omissions, and additions from her previous statement, her tone and demeanor would either be convincing or unconvincing, and specific information could be used during cross-examination.

191. Additionally, an instruction does nothing to replicate the lost opportunity to investigate any leads or arguments that could have been made based on information available in the video. Particularly under the standard set in Knoll, Mr. Parker's defense has been prejudiced by the loss or destruction of the video in a manner that simply cannot be remedied with a jury instruction.

192. A continuance combined with allowing detailed depositions of State's witnesses would likely generate more evidence for this motion or evidence of other discovery violations and might provide some time for Mr. Parker to follow up on new leads generated from such depositions, but the loss of contemporaneously generated evidence from the time of the crime means that anything obtained from this point on, even testimony, will be stale and is not an appropriate substitute for the lost evidence.

193. Remedies that directly try to re-set the scales during trial including precluding the State from peremptorily striking jurors would come closer to alleviating the disadvantage at which the State's actions have left Mr. Parker. However, without the unpreserved evidence to put in front of such a jury, Mr. Parker's trial will not be fair.

WHEREFORE, Mr. Parker requests the following relief:

1. That Mr. Parker be allowed to incorporate by reference previously adduced evidence in this case at prior hearings, that the Court accept the evidence attached to this motion, and that the Court accept additional evidence if necessary at a hearing on this motion; and
2. That if the Court is disinclined to allow this motion, that the Court consider a continuance in order for Mr. Parker to adequately investigate the degree of deviation from policy (as the State has not provided all applicable policies), the routine and procedure for the retention of video evidence (the State has been unwilling or unable to provide testimony

about who administers the system and the Defense has not had the time or resources to investigate such issues), the credibility of claims made by BPD officers including Sergeant Braja's statement that he kept his hard drive "with [him] only" for the past five years (the Defense has not had the time or resources to investigate this claim), and to fully review the recently provided discovery for other possible evidence in support of this motion; and

3. That all charges be dismissed with prejudice for violation of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article 1 §§ 19, 23, and 27 of the North Carolina Constitution; N.C.G.S. §15A-954(4); N.C.G.S §15A-903 and 910, due to the failure to preserve material and exculpatory evidence, and the failure to comply with a preservation order; and
4. That the State be precluded from presenting evidence listed in paragraph 177 of this motion; and
5. That the optional sentence of death be precluded in the above-captioned matters; and
6. For such other and further relief to which the Defendant may be entitled and which the Court may deem just and proper.

Respectfully submitted, this the 6th day of September, 2024.

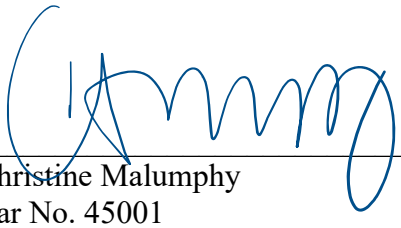
Robert A. Singagliese
Bar No. 38706
Assistant Capital Defender
123 W. Main St., Ste. 601
Durham, North Carolina 27701
(919) 354-7220

Christine Malumphy
Bar No. 45001
Assistant Capital Defender
123 W. Main St., Ste. 601
Durham, North Carolina 27701
(919) 354-7220

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing by File and Serve through e-Courts and by e-mail to Alamance County District Attorney H. Sean Boone (haley.s.boone@nccourts.org).

This the 6th day of September, 2024.



Christine Malumphy
Bar No. 45001
Assistant Capital Defender
123 W. Main St., Ste. 601
Durham, North Carolina 27701
(919) 354-7220

STATE OF NORTH CAROLINA

COUNTY OF DARE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NOs. 20CRS19-32

STATE OF NORTH CAROLINA

v.

WISEZAH BUCKMAN,
Defendant.

MOTION TO COMPEL DISCOVERY FROM DEPARTMENT OF PUBLIC SAFETY AND MOTION FOR SANCTIONS

COMES NOW Defendant, Wisezah Buckman, by and through counsel, and hereby moves this Honorable Court, pursuant to the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article 1 §§ 19, 23, and 27 of the North Carolina Constitution, N.C.G.S. §15A-954(a)(4), N.C.G.S §§15A-903, 910, Brady v. Maryland, 373 U.S. 83 (1963), Arizona v. Youngblood, 488 U.S. 51 (1988), Kyles v. Whitley, 514 U.S. 419 (1995), and their progeny, for an Order dismissing all of the above-captioned charges against Mr. Buckman for the failure of the State of North Carolina to produce, and their deliberate dissimulation regarding, exculpatory evidence. Mr. Buckman's constitutional rights have been flagrantly violated and there is no way to ensure a fair trial for Mr. Buckman given that the State has actively concealed exculpatory material. In support of the foregoing Motion, Mr. Buckman would show unto the Court as follows:

FACTS

1. On October 12, 2017, Wisezah Buckman was alleged to have been involved in an escape attempt.

2. After being treated for injuries allegedly related the escape attempt, Mr. Buckman was transferred to Polk Correctional Institution (now Granville Correctional Institution) and housed in the HCON unit.
3. On November 6, 2017, Mr. Buckman requested all discovery from the State of North Carolina.
4. On October 21, 2019, co-defendant Mikel Brady was convicted of four counts of first degree murder, among other things.
5. On October 28, 2019, Mr. Brady was sentenced to death.
6. In late 2019 and early 2020, Defense counsel corresponded with Jodi Harrison, general counsel for DPS, and with Terence Steed, an assistant attorney general working with DPS. See Attached Communications at 1-14.
7. Counsel asked for information about Mr. Buckman's housing and provided an explanation for why this information is exculpatory should this case reach a sentencing hearing. Specifically, counsel pointed out that the ability of Mr. Buckman to claim that he will be securely housed was highly exculpatory (as both mitigation and as a rebuttal to implied future dangerousness). See id.
8. Counsel was told by Mr. Steed that there were "no plans" for housing Mr. Buckman. See Attached Communications at 8.
9. According to Mr. Steed, he was told this by DPS counsel, Ms. Harrison. See id.
10. On January 29, 2020, defense counsel filed a motion for discovery on the question of where Mr. Buckman would be housed ("Motion for Order to Provide Certain Department of Public Safety Records").

11. Defense counsel provided Ms. Harrison a copy of the motion. See Attached Communication at 12.

12. Mr. Steed ultimately appeared in Court on February 27, 2020, to argue the motion as well as address another DPS-related issue.

13. The motion posited that there was a plan in place for Mr. Buckman's housing somewhere other than Polk Correctional or Death Row.

14. The Court asked Mr. Steed, "has a plan already been formulated for this Mr. Buckman?" He responded, "No, Your Honor." Transcript of Proceedings, February 27, 2020 (Feb. 2020 Transcript) at 44.

15. Mr. Steed went on to explain that it was not a "plan" because there was no file created for Mr. Buckman and there had been no acceptance of Mr. Buckman's transfer by the Bureau of Prisons. He stated, it "is a process that can't begin . . . until after the trial is complete." Id. at 44-45.

16. Undersigned counsel further expressed concern that there could be a plan in place even if the formal processes had not begun. The Court did not question DPS counsel further. Id.

17. The Court did, however, order that DPS provide the name of a person in a decision-making capacity who could be interviewed about the plan. DPS provided the name of the commissioner of prisons, Todd Ishee. Id. at 47.

18. On September 13, 2021, Mr. Ishee was interviewed by undersigned counsel along with counsel for co-defendant Mr. Jonathan Monk, along with an investigator from Mr. Buckman's team and an intern from Mr. Monk's team. See McGough Affidavit attached hereto.

19. Mr. Ishee repeatedly and forcefully denied any preliminary action or meaningful conversations concerning Mr. Buckman's housing (or Mr. Brady's for that matter). Id.
20. Mr. Ishee stated that the decision to transfer Mikel Brady out of state was not made before the jury's guilt-innocence decision. Id.
21. Mr. Ishee indicated that the first contact with BOP took place after Mr. Brady's conviction. Id.
22. Mr. Ishee indicated that he was not aware that Mr. Brady would be sent to Florence, Colorado's Supermax facility ("the Supermax"). Id.
23. The Supermax is widely considered the most secure facility in the civilized world and is considered to be one of the harshest prisons in which to serve a sentence.[1]
24. Mr. Ishee denied that a decision had been made by DPS to try to send any of the other Pasquotank defendants out of state. Id.
25. Mr. Ishee indicated that, when BOP asked if there would be any more defendants transferred, he stated "no" because there had not been a guilt-innocence decision in those cases. Id.
26. Mr. Ishee claimed that he had only had "short and light" conversations about the other Pasquotank defendants and stated that DPS had not reached out to any other jurisdiction regarding the co-defendants.
27. Mr. Ishee claimed he did not have a goal of sending the co-defendants out of state. Id.
28. Multiple lawyers were present with Mr. Ishee during his interview, including DPS general counsel Ms. Harrison and at least one attorney from the Attorney General's office.

[1] CBS Boston, "Former Warden Says Death is Better Than Life at Supermax" April 21, 2015, available at www.cbsnews.com/boston/news/i-team-former-warden-says-death-is-better-than-life-in-supermax/ (with additional full interview available at www.youtube.com/watch?v=HM854gQJi7s). See additional interview with the former warden of the Supermax here: https://www.youtube.com/watch?v=JavUyM8lA6w.

29. Ms. Harrison agreed that DPS could, if provided a court order, provide the defense with the paperwork associated with Mikel Brady's transfer.

30. Upon receipt of such an order, undersigned counsel requested the file from Ms. Harrison on January 31, 2022. Undersigned counsel sent follow-up requests for the records on March 8, March 17, and March 29. See Attached Communications at 17-23.

31. On April 13, 2022, Ms. Harrison forwarded a file to undersigned counsel. See Attached Communications at 24.

32. Included in the file is an undated email from DPS employee John Beatty to another employee Sarah Cobb. An image of this email is pasted below:

33. Also in the file is a faxed form dated October 30, 2019, signed by Sarah Cobb, suggesting that Mr. Brady was the "first of four" to be transferred to BOP. A picture from this document is pasted below.

NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY

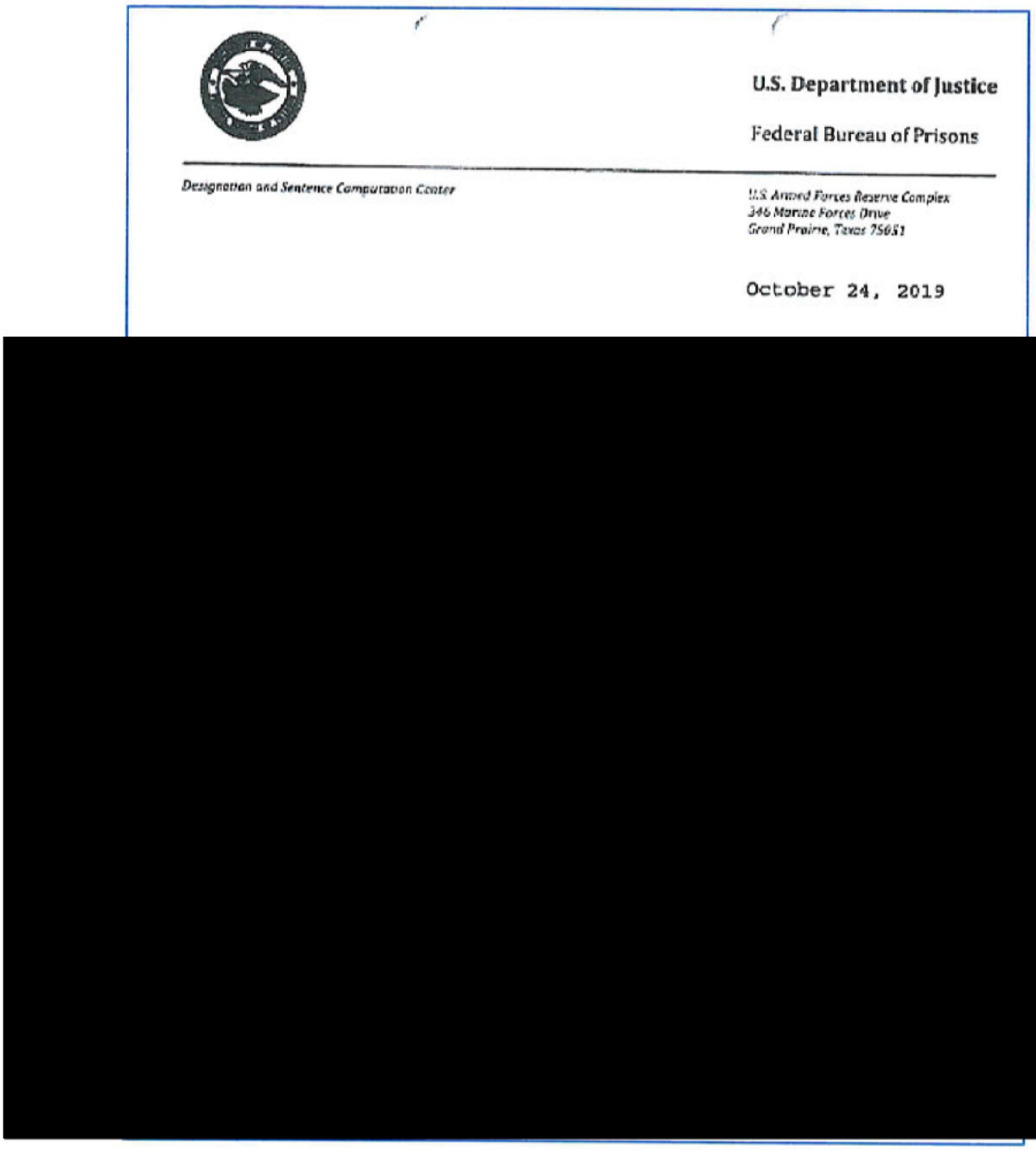
DIVISION OF ADULT CORRECTION

PRISONS

Interstate Corrections Compact

[redacted]

34. On October 24, 2019, Mr. Brady was accepted for transfer and would ultimately be sent to Big Sandy, just as predicted in Mr. Beatty's email. A picture of the document memorializing this transfer is pasted below.



U.S. Department of Justice

Federal Bureau of Prisons

Designation and Sentence Computation Center

U.S. Armed Forces Reserve Complex
346 Marine Forces Drive
Grand Prairie, Texas 75051

October 24, 2019

[redacted]

35. Subsequent to this receipt of the interagency transfer file, undersigned counsel sent several follow-up questions, including asking for a dated copy of Mr. Beatty's email and any additional email correspondence. Undersigned counsel sent follow up requests on April 27 and May 23. See Attached Communications at 24-26.

36. Ms. Harrison responded that the original email was dated October 23, 2019[2] and that she was not sure how the date was removed in the creation of the document provided in April. See Attached Communications at 27.

ARGUMENT

37. Brady material includes any and all evidence "favorable to the accused" which is relevant to Mr. Buckman's guilt *or punishment*. See 373 U.S. at 87 (1963).

38. The prosecutors in this case had "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case." Kyles v. Whitley, 514 U.S. 419, 437 (1995); see also State v. Bates, 348 N.C. 29 (1998) (Brady obligates prosecution to obtain information from agencies involved in investigation).

39. The good faith of the individual prosecutors is no defense where the prosecution fails to make diligent inquiry about the evidence, or the evidence is suppressed by another state actor aiding the prosecution. See State v. Smith, 337 N.C. 658 (1994) (prosecution deemed to have knowledge of information in possession of investigating agencies); see also Youngblood v. West Virginia, 547 U.S. 867 (2006) (per curiam) (remanding to allow state court to address Brady issue where officer suppressed exculpatory evidence); United States v. Perdomo, 929 F.2d 967 (3d Cir. 1991) (prosecutors have obligation to make thorough inquiry of all agencies that had potential connection with the witnesses); Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964) (prosecutor's lack of knowledge did not excuse failure by police to reveal information).

[2] It is concerning that this plan was in place before Mr. Brady's sentencing. The plan, which would have been highly exculpatory for Mr. Brady, was not shared with Mr. Brady's lawyers or the jurors who ultimately sentenced him to death.

40. The apparent conscious and repeated acts of suppression and dissimulation by the Department of Public Safety are a particularly insidious and disturbing violation of the absolute baseline obligation of the State of North Carolina when it seeks to prosecute a person, let alone put that person to death. See Defendant's Memorandum of Support for Motion for Orders and Procedural Safeguards, filed on July 28, 2022.

41. The social and legal contract that has allowed the State of North Carolina, and other governmental entities, to continue utilizing capital punishment is based on the assumption that the entity seeking execution will provide *more* reliability and *more* fairness than in a typical prosecution. See Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (death is a permissible punishment due to heightened reliability standards).

42. In this case, the Department of Public Safety engaged in conduct that may rise to a criminal level. See, e.g., 15A-903(d); State v. Taylor, 212 N.C. App. 238, 245-46 (2011) (Obstruction of justice is the commission of "an act that prevented, obstructed, impeded or hindered public or legal justice," which if done "with deceit and intent to defraud" is a Class H felony).

43. If Mr. Buckman is sentenced to death, the Department of Public Safety will be allowed to kill him, with the blessing of the law. This is untenable and outrageous.

44. The sanctions in this case should reflect the pattern of conduct that is discussed in additional detail in Mr. Buckman's Motion to Dismiss for Destruction of Exculpatory Evidence previously filed on April 21, 2022. The recent revelations discussed herein support a finding of bad faith in that motion. The pattern outlined therein supports more serious sanctions in this motion.

45. It is appropriate to dismiss this case altogether under G.S. § 15A-954(a)(4) as Mr. Buckman's rights have been flagrantly violated and there has been irreparable prejudice.

46. Defense counsel has spent nearly three years trying to extract this simple information from the Department of Public Safety. At this point, we have wasted hours of time (that should have been spent preparing for trial and conducting a thorough mitigation investigation) attempting to get information we were entitled to receive the instant it was created.

47. At this point, there is no way for the Court to trust that DPS or the State is an honest broker in this case. There is simply no way for Mr. Buckman to receive a fair trial at the hands of the State.

48. It is appropriate for the Court to dismiss this action because Mr. Buckman should not be forced to be in the custody of an agency who has actively interfered with his defense.

49. It is appropriate for the Court to dismiss this case under G.S. § 15A-910 as a sanction for a discovery violation. Dismissal should not be routinely granted as a discovery sanction and the Court should make every effort to outline the prejudice warranting dismissal. State v. Dorman, 225 N.C. App. 599 (2013). Such prejudice is patently clear here for the reasons explained above and in the related Motion to Dismiss.

50. Pursuant to the discovery statute, the Court may also issue "other appropriate orders" as sanctions. It is more than appropriate for this Court to enter an order declaring the case non-capital.

51. Factors to consider in determining whether a sanction is appropriate includes the importance of the evidence, the existence of bad faith, and prejudice to trial preparation. See State v. Jones, 296 N.C. 75 (1978) (motion for appropriate relief granted and new trial ordered for prosecution's failure to turn over critical lab report); State v. McClintick, 315

N.C. 649, 662 (1986) (trial judge "expressed his displeasure with state's tactics" and took several curative actions); State v. Jones, 295 N.C. 345 (1978) (court implied that failure of the defendant to explain how suppression of exculpatory evidence impeded trial prep was basis for denial of sanctions).

52. The importance of this evidence cannot be overstated. As discussed from the beginning, in Mr. Buckman's Motion for Order for Production of Certain Department of Public Safety Records, the threat that Mikel Brady posed to corrections officer in the future was a recurring theme in the prosecution's arguments. It is a reasonable inference that such an argument will be deployed against Mr. Buckman.

53. Even if a prosecutor does not breathe a word about future dangerousness, studies suggest that this is the most important factor for jurors considering death. See M. Sandys, H.C. Pruss & S.M. Walsh, "Aggravation and Mitigation: Findings and Implications" 37 J. Psychiatry and L. 189, 207, 225 (2009) ("[J]urors report future dangerousness concerns as not only a major part of deliberations, but as having a significant impact on their voting decisions, even when the prosecution made little to no mention of this issue."); J.H. Blume, S.P. Garvey, & S.L. Johnson, "Future Dangerousness in Capital Cases: Always 'At Issue'", 86 Cornell L. Rev 397 (2001) (discussing overwhelming evidence suggesting that even when prosecutors do not mention future dangerousness, it is an overarching and overriding concern of jurors).

54. It is indisputable that, particularly in a prison killing, incarceration at the most secure prison in the United States is a mitigating factor. See, e.g., "Special Verdict Form," United States v. Con-Ui Crim. No. 3:CR-13-123 (M.D. Penn., July 11, 2017) (Copy of one page of the verdict sheet including conditions of confinement mitigator attached hereto).

Additionally, Mr. Buckman may proffer in mitigation that he will be subject to extreme conditions of confinement which ought to satisfy even the most retributivist goals.

55. The Supreme Court has recognized the obvious point that future behavior in prison is a subject for mitigation. See Skipper v. South Carolina, 476 U.S. 1 (1986).

56. Bad faith is clearly established by the pattern of DPS conduct and the statements made by DPS officials that were knowingly false which have actively interfered with the preparation of Mr. Buckman's defense. See State v. Williams, 362 N.C. 628, 638-39 (2008) (emphasizing that the Court may give effect to Brady violations pre-trial).

57. Finally, trial preparation is irrevocably hindered as counsel has already sunk innumerable hours into attempting to extract information from DPS and, given the recent revelations, must continue to do so given the likelihood that DPS has suppressed (or destroyed) other exculpatory information.

58. Both the Motion to Dismiss statute and the Discovery statute provide a basis for dismissal, or at least rendering this case non-capital. However, the justness of such sanctions is grounded in the aforementioned provisions of the North Carolina and United States Constitutions.

59. Certainly, the Eighth Amendment to the United States Constitution and Article 1, Section 27 of the North Carolina Constitution both have a requirement of heightened reliability in death cases that simply can no longer be satisfied in this case.

WHEREFORE, Mr. Buckman respectfully prays unto this Honorable Court for the following relief:

1. That all charges be dismissed with prejudice for the violation of Mr. Buckman's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States

Constitution, Article 1 §§ 19, 23, and 27 of the North Carolina Constitution, due to the willful suppression of exculpatory evidence;

2. That the Court consider whether it has the power to place Mr. Buckman in the custody of an agency other than the Department of Public Safety for the remainder of his sentence out of Mecklenburg County.
3. That the State be precluded from seeking death in the above-captioned matters for the violation of Mr. Buckman's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article 1 §§ 19, 23, and 27 of the North Carolina Constitution, due to suppression of exculpatory evidence and the cumulative constitutional violations to which it has subjected Mr. Buckman;
4. That the State be precluded from arguing, implying, suggesting, hinting, or inviting the inference in any way that Mr. Buckman will have the power to injure another human being for the rest of his life;
5. That the Court provide any jury with the mandatory mitigator that Mr. Buckman will be completely incapacitated and unable to hurt another human being for the rest of his life at the Supermax;
6. That the Court issue an Order that the Department of Public Safety allow *any* of its officials or employees to be deposed under oath by Mr. Buckman;
7. That the Court Order the production of any and all communications among DPS officials or between DPS officials and any other agency, including the Bureau of Prisons and the North Carolina Department of Justice, regarding the custody of Wisezah Buckman or his co-defendants or regarding the alleged escape attempt (subject to claims of privilege to be detailed in a privilege log);

8. That the Court continue this matter indefinitely until the material already provided by DPS and material that will be provided in the future can be adequately examined and used for investigation purposes by the defense;
9. That the Court hold a hearing on this motion with sufficient notice for witnesses to be subpoenaed;
10. For such other and further relief to which Mr. Buckman may be entitled and which the Court may deem just and proper.

Respectfully submitted, this the 28th day of July, 2022.

Raymond Tarlton
Tarlton Law, PLLC
PO Box 91624
Raleigh, NC 27675
(919) 390-1278 ext. 1000

Christine Malumphy
Assistant Capital Defender
123 W. Main St., Ste. 601
Durham, North Carolina 27701
(919) 354-7220

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing by United States Mail to Mr. Jeff Cruden and Ms. Alexis Massengill, Assistant District Attorneys, 200 E. Colonial Ave. Elizabeth City NC 27909.

This the 20th day of July, 2022.

Christine Malumphy
Bar No. 45001
Assistant Capital Defender
123 W. Main St., Ste. 601
Durham, North Carolina 27701
(919) 354-7220

State v. Canady

Supreme Court of North Carolina

December 11, 2001, Heard In the Supreme Court ; March 7, 2002, Filed

No. 115A00

Reporter
355 N.C. 242 *; 559 S.E.2d 762 **; 2002 N.C. LEXIS 176 ***

STATE OF NORTH CAROLINA v. CARLOS CANADY

Prior History: **[***1]** Appeal as of right pursuant to *N.C.G.S. § 7A-27(a)* from a judgment imposing a sentence of death entered by Hudson, J., on 22 November 1999 in Superior Court, Robeson County, upon a jury verdict finding defendant guilty of first-degree murder. On 28 March 2001, the Supreme Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of additional judgments.

Disposition: Reversed and remanded for new trial.

Counsel: Roy Cooper, Attorney General, by Joan M. Cunningham, Assistant Attorney General, and William P. Hart, Special Deputy Attorney General, for the State.

Center for Death Penalty Litigation, by Jonathan E. Broun, for defendant-appellant.

Judges: WAINWRIGHT

Opinion by: WAINWRIGHT

Opinion

[*244] **[**763]** WAINWRIGHT, Justice.

On 3 March 1997, Carlos Canady (defendant) was indicted for the murders of Hiram and Michael Burns, one count of second- degree burglary, one count of robbery with a dangerous weapon, and one count of conspiracy to commit armed robbery. Defendant was tried capitally, and the jury found him guilty of first- degree murder of **[*245]** Hiram Burns on a theory of lying in wait and guilty of first-degree murder of Michael Burns under the felony murder rule. Defendant was also found guilty of the other charges. **[***2]** In the death of Hiram Burns, the jury recommended and the trial judge sentenced defendant to death. In the death of Michael Burns, the jury recommended and the trial judge sentenced defendant to life imprisonment. The jury also found defendant guilty of the remaining charges, and the trial court sentenced defendant to consecutive terms of imprisonment.

Evidence presented at trial showed Hiram Burns (Hiram) and his son, Michael Burns (Michael), lived in Rennert, North Carolina. Michael had severe brain damage. On Sunday, 13 December 1992, the victims' dead bodies were found in their home. Each had died from gunshot wounds.

In 1996, an inmate at Pender County Correctional Unit told police defendant and a young man, eventually identified as Lacoma Locklear (Lacoma), were involved in the murders. Lacoma, who was only fourteen years old in 1992, testified that on 12 December 1992 he and defendant went to Rennert because defendant said he knew a man who ran a store there and they could rob the man. Lacoma said he and defendant entered the man's house through a

window. Defendant was carrying a rifle. A few minutes later, a man entered the house, and Lacoma heard three shots from the bathroom **[***3]** where defendant was. The man fell to the floor, and Lacoma heard two more shots. Lacoma stated that after the shooting defendant grabbed a brown paper bag from the man on the floor, and Lacoma and defendant ran out **[**764]** the front door. The bag fell and tore, and Lacoma could see it contained money. Lacoma stated defendant threw the rifle off the Kirby Bridge. Investigators subsequently found a Universal .30-caliber Carbine semiautomatic rifle near the Kirby Bridge in the Lumber River at the point Lacoma indicated.

Defendant presented evidence that Lacoma told several people he and defendant did not kill the Burnses. Lacoma said, among other things, "Me and Carlos ain't killed nobody," and "We hadn't done a thing." Two witnesses, Steve Jones (Steve) and Paladin Jones (Paladin), testified Billy Ray Jones (Billy Ray) told them he killed the Burnses. Steve testified Billy Ray told him details of the crime including who helped him, how they got in the window, and that Hiram had a money bag in his hands when he entered the house. Paladin testified that he heard Billy Ray describe details of the murders and that Billy Ray went to Paladin's house the night before the murders took **[*246]** place to borrow **[***4]** a gun which Paladin refused to lend. On rebuttal, the State called Billy Ray, who denied committing the murders.

Defendant assigns error to several of the trial court's rulings. We agree with defendant that the trial court's rulings on at least four specific issues were erroneous. Although none of the trial court's errors, when considered in isolation, were necessarily sufficiently prejudicial to require a new trial, the cumulative effect of the errors created sufficient prejudice to deny defendant a fair trial. Accordingly, a new trial is required.

First, defendant assigns error to the trial court's allowance of testimony from Detective James Carter concerning information he received from a prison inmate about the murders. Carter testified his investigation included an interview with prison inmate George Blackwell. According to Carter, Blackwell said another inmate, Woody Butler, told Blackwell defendant and another young man killed the victims. Defendant argued at trial this testimony constituted inadmissible hearsay because it was offered for "the truth of the matter asserted." The State argued the testimony was not offered for its truth, but to show the witness's conduct after **[***5]** he received the information. The trial court overruled defendant's objection and instructed the jury as follows:

COURT: All right, members of the jury, this witness is going to relate to you conversations that he had with another person.

The State is not offering the substance of that conversation for the truthfulness of what the other person asserted, but to explain to you what this witness, Mr. Carter, did as a result of receiving that information.

You should consider it for that reason, and that reason, only.

Following the trial court's instruction, Carter testified before the jury under direct examination by the State as follows:

Q. What, if anything, did George Blackwell tell you when you met with him at the Pender Correctional Institute?

MS. BIGGS [defense counsel]: Objection, Judge.

COURT: Overruled.

. . . .

A. Okay. George told me --

[*247] MS. BIGGS: Objection for the record, please.

COURT: Overruled.

A. -- a boy in prison with him, named Woody Butler, had been talking to him about a man and his son that had been killed in Rennert.

George knew -- George told us he knew who killed Hiram and his son. And he said George wanted to talk to me.

Myself and Detective Donald **[***6]** Britt went to the Pender County Correctional Institute to talk with George Blackwell. At 10:30 a.m., myself and Detective Donald Britt talked to George Blackwell in the chapel.

George told us that Woody Butler told him --

MS. BIGGS: Objection, Judge. It has exceeded the question.

COURT: Overruled.

Q. What did George Blackwell tell you in the chapel there at the prison?

[765]** A. That a young guy, he didn't know the young guy's name, and Carlos Canady had killed the man and his son in Rennert.

George went on to say that Woody Butler told him --

MS. BIGGS: Objection, Judge. Now it's double hearsay.

COURT: Overruled.

Q. What else did Mr. Blackwell tell you?

A. He went on to say that the man and the boy -- George said that Woody said Carlos and the young guy went to the man's house and broke into --

MS. BIGGS: Objection, Judge. This exceeds the scope of voir dire.

COURT: Overruled.

A. -- broke into the house through a window. Carlos had a rifle --

MS. BIGGS: Objection. Judge, we want to be heard, please.

COURT: Mr. Deputy, if you'll take the jury to the deliberation room.

[*248] At this point, outside the jury's presence, defendant argued Carter's testimony was irrelevant and was merely **[***7]** an attempt to get before the jury inadmissible hearsay and to avoid putting George Blackwell or Woody Butler on the stand. Defendant also argued Carter's testimony was double or triple hearsay, and its prejudicial effects far outweighed any probative value. Defendant further argued Carter could explain his subsequent conduct without going into the details of Blackwell's statement. The trial court overruled defendant's objection, and the State's examination continued in the jury's presence:

Q. Detective Carter, what did George Blackwell tell you about information he had relating to the murders of Hiram and Michael Burns?

MS. BIGGS [defense counsel]: Objection.

COURT: Overruled.

A. George told us that the -- Carlos and the young guy went into the house, went into the bedroom. Carlos -- the young guy went into the bedroom with a bat and Carlos went into the bathroom with a rifle.

When the man came down the hall and started in the bedroom where the young guy was, Carlos said, "I couldn't let the man go into the --

MS. BIGGS: Objection.

COURT: Overruled.

A. -- where the young guy was with the bat," and that's when he shot them.

Carlos took the money bag and ran and dropped most **[***8]** of -- some of the money in the yard.

The State correctly asserts a statement is not hearsay if it is offered for a purpose other than to prove the truth of the matter asserted. *See* N.C.G.S. § 8C-1, Rule 801(c) (1999); *State v. Braxton, 352 N.C. 158, 190, 531 S.E.2d 428, 447 (2000)*, *cert. denied*, *531 U.S. 1130, 148 L. Ed. 2d 797, 121 S. Ct. 890 (2001)*. A statement which explains a person's subsequent conduct is an example of such admissible nonhearsay. *State v. Anthony, 354 N.C. 372, 404, 555 S.E.2d 557, 579 (2001)*; *State v. Golphin, 352 N.C. 364, 440, 533 S.E.2d 168, 219 (2000)*, *cert. denied*, ___ U.S. ___, *149 L. Ed. 2d 305 (2001)*.

[*249] In the present case, however, Detective Carter's testimony provided more than a mere explanation of his subsequent actions. Carter provided details contained in Blackwell's statement including how defendant broke into the victims' house through a window, went into the bathroom with a rifle, shot one of the victims, and fled with a bag of money. Moreover, the State relied upon Carter's recitation of Blackwell's detailed statement during **[***9]** the State's closing argument. The State argued:

So he [Carter] goes and interviews George Blackwell. And Mrs. Biggs kept referring to this as hearsay, as hearsay. Hearsay is evidence that doesn't come in.

MS. BIGGS [defense counsel]: Objection, that's not the law.

THE COURT: Overruled.

MR. BRITT [prosecutor]: James Carter and Donnie Britt went to Pender County, to the prison there where they interviewed George Blackwell. George Blackwell told them he had gotten the information that Carlos Canady had committed those murders. Carlos Canady and a young boy had broken into the house; that Carlos went in there with a rifle; that the young boy went in there with a baseball bat. And they laid in wait. They were going there to rob the **[**766]** man when he came home; and on the way out, they lost some of the money.

This portion of the State's closing argument confirms that the State did not use Carter's statement merely as an explanation of subsequent actions. Instead, the State relied on Carter's testimony as substantive evidence of the details of the murders and to imply defendant had given a detailed confession of his alleged crimes. By using Carter's testimony in this manner, the State **[***10]** undoubtedly sought to prove the truth of the matter asserted. Accordingly, the testimony at issue was inadmissible hearsay. Moreover, despite the trial court's provision of a limiting instruction, we hold Detective Carter's testimony went so far beyond the confines of this instruction that the jury could not reasonably have restricted its attention to any nonhearsay elements in Carter's testimony. *See* *State v. Austin, 285 N.C. 364, 367, 204 S.E.2d 675, 677 (1974)*.

The trial court's error relating to Detective Carter's testimony was not limited to the portions of testimony outlined above. Rather, the error was greatly compounded when the trial court denied **[*250]** defendant the opportunity to fully cross-examine Carter concerning portions of his testimony.

During his cross-examination of Carter, defendant tried to ask several questions to undermine the credibility of Blackwell's information:

Q. Did you go talk with Woody Butler?

A. I didn't, but some of the other officers did.

Q. And based on Woody Butler's statement, or based on the information that you understand was taken from Woody Butler, that he never gave George Blackwell that information --

MR. BRITT [prosecutor]: **[***11]** Objection. Move to strike. Would like to be heard.

The State argued these questions solicited inadmissible hearsay. Defendant argued the State had been permitted to ask Carter about statements Butler made to Blackwell, and so it was appropriate for defendant to inquire if Carter

talked with Butler and if Butler denied making the statements at issue. After the trial court denied defendant the opportunity to continue this line of questioning, defendant made the following offer of proof:

Q. Mr. Carter, based on the information that you received from these officers that Woody Butler had denied any knowledge of this incident where he supposedly told George Blackwell this information, did you at any time go talk with George Blackwell after that?

A. No, no, I didn't.

Q. To your knowledge, did any of the other officers ever go talk with John Blackwell -- excuse me, George Blackwell again?

A. Yes.

. . . .

Q. Now, George Blackwell is serving -- is it a life sentence as a habitual felon?

A. I don't know.

Q. Did you investigate what his motives for telling you this is [sic] or investigate the source of information he received it from?

[*251] A. I don't have anything in my notes about that.

[*12]** Q. Did you even determine if he was in custody or incarcerated at the time the murders happened, or where he was living during that period of time, if he wasn't?

A. No.

. . . .

Q. Did you find out where George Blackwell was from?

A. I knew Blackwell had lived in the Saddletree community at one time. I knew that.

Q. So you knew he had a connection to Robeson County and could have had information about these murders from other sources?

A. Yes.

At this point, the trial court sustained the State's objection and stated defendant was trying to admit hearsay.

After a thorough review, we hold defendant's proposed questions were designed to impeach the segment of Carter's testimony that provided details of defendant's alleged crimes. Once the trial court permitted Carter to testify on direct examination to these **[**767]** details, the trial court should have permitted defendant to present any evidence that would have been proper to impeach Butler or Blackwell if either of them had testified. *See* *N.C.G.S. § 8C-1, Rule 806* (1999). Accordingly, because the questions defendant proposed would have been proper if Butler or Blackwell had testified, the trial **[***13]** court erred in failing to allow defendant's questions.

Additionally, during the State's examination, Carter was permitted to testify about the statements Butler made to Blackwell in order to explain Carter's subsequent actions. As such, defendant's proposed cross-examination questions also appear proper to determine whether Carter's subsequent investigation included an examination of Blackwell's motive for implicating defendant and Blackwell's other potential sources of information.

Accordingly, we conclude the trial court not only erred in permitting the State to admit details of the murders via hearsay testimony from Carter, but also erred in denying defendant an opportunity to properly cross-examine Carter concerning these details.

[*252] Defendant further contends the trial court erred when it failed to require the State to disclose names of informants with material, exculpatory information that someone other than defendant committed the offenses. We agree with defendant that this potentially exculpatory evidence was material to his defense. This suppression, combined with defendant's other assignments of error, constituted reversible error and denied defendant a fair trial.

Defendant **[***14]** filed multiple motions to require the State to disclose various exculpatory materials. In one motion, defendant specifically requested that the State provide the name of an informant who implicated five other people as being involved in the murders and indicated where the murder weapon could be found. The trial court denied defendant's motion. The trial court also denied a defense motion to disclose "the name[] and address of the subject who was brought back from Mississippi by [police] who made the statements about Thompkins being the 'big man' and had arranged the murders."

In *Brady v. Maryland*, the United States Supreme Court held "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 faith or bad faith of the prosecution." *373 U.S. 83, 87, 10 L. Ed. 2d 215, 218, 83 S. Ct. 1194 (1963)*. "Favorable evidence is material if there is a 'reasonable probability' that its disclosure to the defense would result in a different outcome in the jury's deliberation." *State v. Strickland, 346 N.C. 443, 456, 488 S.E.2d 194, 202 (1997)*, **[***15]** *cert. denied*, *522 U.S. 1078, 139 L. Ed. 2d 757, 118 S. Ct. 858 (1998)*. The determination of the materiality of evidence must be made by examining the record as a whole. *State v. Howard, 334 N.C. 602, 605, 433 S.E.2d 742, 744 (1993)*. The State has not satisfied its duty to disclose unless the information was provided in a manner allowing defendant "to make effective use of the evidence." *State v. Taylor, 344 N.C. 31, 50, 473 S.E.2d 596, 607 (1996)*.

Here, defendant had neither the name of the informant who gave the State information about the five individuals nor the name of the subject brought back from Mississippi by police. Defendant thus could not effectively use that information at trial. Defendant needed access to these individuals to interview them and develop leads. There is a reasonable probability that if defendant had access to informants who had names of others involved in the murders, such information could have swayed the jury to reach a different outcome. **[*253]** Defendant had a right to this information in a timely manner so he could effectively use it.

Our confidence in the outcome of this case is undermined by defendant's **[***16]** inability to interview witnesses with potentially exculpatory information. Accordingly, we hold suppression of this information was error.

In another assignment of error, defendant contends his constitutional rights were violated when the trial court allowed an expert to testify without allowing defendant an opportunity to examine the expert's testing procedure and data. We agree. Considered in isolation, this error may not be sufficiently prejudicial to warrant a new trial, but taken in conjunction with defendant's other **[**768]** assignments of error, it constitutes reversible error.

The State's firearms expert, State Bureau of Investigation Agent Al Langley, testified concerning a gun found in the Lumber River over three years after the crimes occurred. According to Langley, the gun appeared to be the murder weapon. The gun was test-fired, and the spent bullets were compared to those found at the scene.

On defendant's motion, the trial court ordered the State to turn over the test-fired bullets and "underlying data examinations." The State was unable to locate the shells. Defendant requested that the State either retest the gun and provide defendant with the new tested shells or that testimony **[***17]** from the State's firearms expert be excluded. The trial court did not order the State to retest the gun but allowed the State's expert to testify.

A defendant in a criminal proceeding has the constitutional right to confront his accusers and the witnesses against him. U.S. Const. amend. VI; *N.C. Const. art. I, §§ 19*, *23* (2000). This includes the right to prepare and present a defense. *State v. Graves, 251 N.C. 550, 557, 112 S.E.2d 85, 91 (1960)*. This constitutional right "'ensures the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.'" *State v. Brewington, 352 N.C. 489, 507, 532 S.E.2d 496, 507 (2000)*, (quoting *Maryland v. Craig, 497 U.S. 836, 845, 111 L. Ed. 2d 666, 678, 110 S. Ct. 3157 (1990)*), *cert. denied*, *531 U.S. 1165, 148 L. Ed. 2d 992 (2001)*.

In the present case, defendant was not afforded the opportunity to rigorously test the State's firearms evidence, thus interfering with defendant's right to present a full defense. Therefore, we agree with **[*254]** defendant that the trial court erred in neither **[***18]** suppressing the testimony of the State's firearms expert nor ordering the State to retest the weapon. When viewed with the other erroneous actions of the trial court, a new trial is required.

In conclusion, while defendant's trial was riddled with errors, we decline to address every potential error as these errors are unlikely to recur at a new trial. We conclude that the errors outlined above, taken as a whole, deprived defendant of his due process right to a fair trial free from prejudicial error.

For the foregoing reasons, we conclude the trial court's errors were prejudicial to defendant's right to a fair trial and defendant is entitled to a new trial.

NEW TRIAL.

State v. Adams

Court of Appeals of North Carolina

February 7, 1984, Heard in the Court of Appeals ; March 6, 1984, Filed

No. 832SC802

Reporter
67 N.C. App. 116 *; 312 S.E.2d 498 **; 1984 N.C. App. LEXIS 2983 ***

STATE OF NORTH CAROLINA v. BOBBY MITCHELL ADAMS

Prior History: [*1]** Appeal by the State from *Beaty, Judge*. Order entered 3 March 1983 in Superior Court, Beaufort County.

Disposition: Affirmed.

Syllabus

Pursuant to G.S. 15A-1445(a)(1), the State appeals from an order dismissing criminal charges, "for failure of the State to provide items subject to discovery."

Counsel: *Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General John F. Maddrey, for the State, appellant*.

Charles M. Vincent and Stephen R. Ward for defendant appellee.

Judges: Willis P. Whichard, Judge, wrote the opinion. Judges Gerald Arnold and Charles L. Becton concur.

Opinion by: WHICHARD

Opinion

[*117] [498]** The issue is whether the court abused its **[***3]** discretion in dismissing criminal charges **[**499]** against defendant upon the State's failure to comply with an order for discovery. We hold that it did not.

Defendant was charged with assault with a deadly weapon upon a law enforcement officer, resisting a public officer, and failing to stop for a blue light and siren. On 18 June 1982 he filed a request for voluntary discovery. Following the State's failure timely to respond, on 8 July 1982 he filed a motion for discovery. *See* G.S. 15A-902(a).

On 12 January 1983 this motion came on for hearing before Judge Giles Clark. Defense counsel represented that he had "not received any response whatsoever" to the request or the motion. **[*118]** The assistant district attorney did not indicate the contrary. Judge Clark stated that defendant appeared entitled to everything he had requested, and ordered that the State furnish the items sought within ten days.

On 1 March 1983 defendant moved to dismiss the charges due to prosecutorial misconduct. *See* G.S. 15A-909 to -910. The motion alleged that Judge Clark's order "ha[d] been completely disregarded and no discovery ha[d] been provided as ordered by the Court." At **[***4]** a 3 March 1983 hearing on the motion before Judge Beaty, defense counsel represented that the State had disregarded Judge Clark's order. He called to the court's attention the allegation in his motion "that matters of discovery in the Second Prosecutorial District are systematically disregarded in that [items sought to be discovered] are not furnished the defense attorneys." He also called to the court's attention the defendant's low I.Q. and illiteracy, both of which evidence in the record clearly established. He then stated:

> [I]n this particular case, with this man's illiteracy and with his I.Q. the way it is, the fact that so much time has gone by without any discovery being furnished, puts defense counsel in the posture of not being able to effectively represent this man because you're dealing with someone as time goes by you can't undo . . . you can't put in his mind and talk to him and deal with him about facts and events as they might have occurred at that time; that they [the State] are aware of his mental situation and of his illiteracy and by denying, or by refusing to comply with the Orders of the Court, even if they were to come up and say, "here's your **[***5]** discovery," I don't know that I could go back and sit down with this man now that so much time has passed and put these things back together.
> . . .
>
> [Y]ou have discretion as to what you can do in this matter, and what we're asking for is a dismissal . . . . [B]ecause they have disregarded this Order, . . . it wouldn't be unusual to dismiss, especially with the fact situation as it is with [the defendant] in this condition. In other words, just to give us the information now, and I've got to go back with him with **[*119]** his mind . . . or being retarded, and try to piece together events which happened last May, I don't believe we can do it.

In response the assistant district attorney acknowledged the existence of Judge Clark's order. He indicated that he had verbally told defense counsel there were no written or oral statements by the defendant "other than the statements that were made to the officer during the process of the crime being committed, the res gestae." He did not even argue, however, that the State had formally complied with the request for discovery of defendant's statements or had complied, either formally or informally, with other aspects of **[***6]** the discovery order.

After hearing defense counsel and the assistant district attorney, Judge Beaty requested that the record show that the file contained both a request for voluntary discovery and a motion for discovery filed by defendant; that Judge Clark had ordered the State to "provide discovery as requested by the defendant"; and that "as of this date discovery has not been provided pursuant to Judge Clark's Order." He then stated: "Based upon the above findings in this case as applied to the facts of this case, the Court orders that the matters of State of **[**500]** North Carolina versus Bobby Mitchell Adams . . . be dismissed." He subsequently entered a written order of dismissal.

The State contends the court abused its discretion in imposing the sanction of dismissal, because this sanction "was not contemplated by the Legislature and was inappropriate under the particular circumstances of this case." When this matter was before the trial court, the statute entitled "Regulation of discovery -- failure to comply" read as follows:

> If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an **[***7]** order issued pursuant to this Article, the court in addition to exercising its contempt powers may
>
> (1) Order the party to permit the discovery or inspection, or
>
> (2) Grant a continuance or recess, or
>
> **[*120]** (3) Prohibit the party from introducing evidence not disclosed, or
>
> (4) Enter other appropriate orders.

G.S. 15A-910 (1978). Dismissal of charges was not an expressly authorized sanction, and was permissible, if at all, under the rubric of "other appropriate orders."

The legislature has since amended the statute to allow the court, in addition to the foregoing, to:

(3a) Declare a mistrial, or

(3b) Dismiss the charge, with or without prejudice . . . . Act of August 26, 1983, ch. 6 § 3, 1983 N.C. Ex. Sess. Laws --- (effective upon ratification). The sanction of dismissal thus has now been expressly authorized.

Our Supreme Court has stated:

> "An amendment to an act may be resorted to for the discovery of the legislative intention in the enactment amended, as where the act amended is ambiguous." . . . "Whereas it is logical to conclude that an amendment to an unambiguous statute indicates the intent to change the law, no such **[***8]** inference arises when the legislature amends an ambiguous provision." In such case, the purpose of the variation may be "to clarify that which was previously doubtful."

Taylor v. Crisp, 286 N.C. 488, 496-97, 212 S.E. 2d 381, 386-87 (1975). We believe clarification was the purpose of the 1983 amendment to *G.S. 15A-910*. It thus should not be construed to have changed the law so as to permit a previously prohibited sanction, but rather to have made explicit a previously implicit intent that the sanction of dismissal be among those which could be implemented by "other appropriate orders."

We thus reject the argument that when the order in question was entered dismissal was not a sanction contemplated by the legislature. We hold that dismissal was then and is now a permissible sanction for failure to comply with criminal discovery orders.

[*121] "Which sanction, if any, is the appropriate response to a party's failure to comply with a discovery order is entirely within the sound discretion of the trial court. [Its] decision . . . will not be reversed absent a showing of abuse of that discretion." *State v. Alston, 307 N.C. 321, 330, 298 S.E. 2d 631, 639 (1983)*; **[***9]** *see also State v. Brown, 306 N.C. 151, 168, 293 S.E. 2d 569, 580 (1982)*; *State v. Dukes, 305 N.C. 387, 390, 289 S.E. 2d 561, 562-63 (1982)*. The statute "gives the judge broad and flexible powers to rectify the situation if a party fails to comply with discovery orders." *G.S. 15A-910* official commentary.

Dismissal of charges is an "extreme sanction" which should not be routinely imposed. *See United States v. Sarcinelli, 667 F. 2d 5, 7 (5th Cir. 1982)*. Here, however, Judge Clark's order to permit discovery was clear and unequivocal. It afforded the State ten days for compliance. The motion to dismiss for noncompliance was heard and determined fifty days later. At that time the assistant district attorney asserted only that the State had verbally responded to defense counsel regarding the portion of the order on statements given by defendant. He did not assert that the State had complied in any way with the other portions of the order, or that it had **[**501]** formally complied with the portion regarding defendant's statements.

Further, the record clearly establishes that defendant is mentally retarded and illiterate. In view of proceedings which occurred before **[***10]** the hearing on the motion to dismiss, and of the materials in the case file, the district attorney's office could hardly have been unaware of this. Defense counsel argued that defendant's retarded and illiterate state rendered the long delay in obtaining discovery severely prejudicial to counsel's ability to confer with his client and to secure his client's assistance in his own defense. He contended that the State's noncompliance thus impacted significantly upon his ability to represent his client effectively. The validity and persuasiveness of defense counsel's argument in light of the circumstances presented was for the trial court, in the exercise of its discretion, to determine.

The court made findings only as to defendant's request for voluntary discovery and motion for discovery, Judge Clark's order for discovery, and the State's noncompliance with that order. In addition to such findings, orders dismissing charges for **[*122]** noncompliance with discovery orders preferably should contain findings which detail the perceived prejudice to the defendant which justifies the extreme sanction imposed. *See United States v. Sarcinelli, supra, 667 F. 2d at 7*. The perceived **[***11]** prejudice in this case, and its potentially irreparable nature, is apparent, however; and the failure to make such findings here thus does not merit reversal or remand.

Under the circumstances presented, we decline to hold that the trial court abused its discretion in dismissing the charges for the State's failure to comply with the order for discovery. The order of dismissal is thus

Affirmed.

State v. Johnson

Supreme Court of North Carolina

October 5, 2021, Heard in the Supreme Court; December 17, 2021, Filed

No. 420A20

Reporter
379 N.C. 629 *; 2021-NCSC-165 **; 866 S.E.2d 725 ***; 2021 N.C. LEXIS 1278 ****

STATE OF NORTH CAROLINA v. DMARLO LEVONNE FAULK JOHNSON

Disposition: AFFIRMED IN PART AND REVERSED IN PART.

Counsel: **[****1]** Joshua H. Stein, Attorney General, by Zachary K. Dunn, Assistant Attorney General, for the State-appellee.

Marilyn G. Ozer for defendant-appellant.

Judges: BARRINGER, Justice. Justice BERGER did not participate in the consideration or decision of this case.

Opinion by: BARRINGER

Opinion

[*629] **[***726]** Appeal pursuant to *N.C.G.S. § 7A-30(2)* from the decision of a divided panel of the Court of Appeals, *273 N.C. App. 358, 846 S.E.2d 843 (2020)*, finding no error after appeal from a judgment entered on 12 May 2017 by Judge Rebecca W. Holt in Superior Court, Durham County.

BARRINGER, Justice.

[P1]** In this case, we address whether the trial court committed constitutional error when it denied defendant's motion to continue. The motion to continue was based on the State's disclosure on the eve of trial that it **[*630]** planned to use select phone calls of over 800 recorded calls made by defendant from jail **[***727]** (the calls). Previously, the State had informed defense counsel that it did not intend to introduce any of the calls and that the State had ceased reviewing the calls. We conclude that on the record before us, the trial court erred. However, the error was harmless beyond a reasonable doubt as to one of defendant's convictions, first-degree murder. The jury found defendant guilty of first-degree murder under **[****2]** the felony murder rule with assault with a firearm on a government official as the underlying felony. Because the calls were admitted as rebuttal evidence to defendant's evidence of lack of specific intent, there can be no prejudice as a matter of law to the conviction of a general-intent crime. In this case, the general-intent crime is assault with a firearm on a government official. Therefore, there is no prejudice to a felony murder conviction premised on that general-intent crime. Accordingly, we affirm that conviction, and we only order the trial court to vacate the judgment of and order a new trial on the conviction dependent on a finding of specific intent, robbery with a dangerous weapon.

I. Background

[P2]** Armed with a handgun, defendant robbed a gas station, shot the gas station attendant, and pointed a firearm at law enforcement on 4 July 2015. The gas station attendant died. The grand jury indicted defendant for robbery with a dangerous weapon, assault with a firearm on a government official, and murder. While defendant's actions were recorded by a security camera and he was apprehended fleeing the gas station, defendant's state of mind was disputed. Defendant through his counsel **[****3]** filed notice of three defenses: (1) mental infirmity and insanity under *N.C.G.S. § 15A-959(a)*, (2) mental infirmity and diminished capacity under *N.C.G.S. § 15A-959(b)*, and (3) voluntary intoxication.

[P3]** Relevant to this appeal, on 12 April 2017, the State gave defense counsel a compact disc (CD) with 335 calls made by defendant from jail. A day later, the State gave notice to defendant of its intent to offer hearsay evidence from a witness, concerning statements made by the victim about a confrontation with defendant.

[P4]** Defense counsel asked defendant's investigator to review the calls. However, the investigator for defendant could not open the contents of the CD that contained the calls. Accordingly, defense counsel contacted and informed the district attorney's office that they could not open the contents of the CD. On 18 April 2017, defense counsel followed up with the State by email. In that email, defense counsel informed and inquired of the State as follows: "I will not have time to listen to [the calls] and do **[*631]** not think I have anyone in my office that can assist. Please let me know if there are any calls which you believe are somehow relevant to your case." The State responded as follows:

> I had requested the calls once [the **[****4]** State's] Inv[estigator] informed me that there were issues securing [the appearance of a witness who encountered defendant in the gas station]. . . . I haven't listen[ed] to most of them, but it is clear that [defendant] indicates that he will not talk on the phone about certain matters and will only talk in person. At this time[,] I do not intend to use any of those calls, and I am no longer requesting anyone to continue listening to the calls.

Essentially, the State had obtained the calls to assess whether defendant knew of or had sought to intimidate the witness who encountered defendant in the gas station, but the State decided that reviewing the calls would not be helpful and stopped listening to the calls.

[P5]** That same day, the State provided a new CD of the 335 calls to defense counsel, which defendant's investigator could open. Given the State's response and the fact that it was less than a week before trial, defense counsel and defendant's investigator "dropped listening" to the calls. Defense counsel and defendant's investigator instead spent a considerable part of the week before trial trying to locate the witness identified in the State's 13 April 2017 notice.

[P6]** On 20 April 2017, **[****5]** the State gave notice to defendant of its intent to offer hearsay evidence from another witness, the gas station owner. That same day, the State filed an amended version of the 13 April 2017 notice **[***728]** and included an exhibit containing the substance of the witness's statements.

[P7]** Also on 20 April 2017, the State provided defense counsel with a CD of 545 additional calls made by defendant from jail. Defense counsel emailed the State about these calls, and the State responded, without qualification, "I do not intend to introduce any of the jail calls." The State had obtained these calls to see if defendant's girlfriend said anything during the calls which may have been helpful to the State's case. Based on the State's representation, defense counsel did not ask anyone to help him listen to the calls. April 20 was also the last day defendant's investigator was at work before the trial commenced because the investigator had contracted pneumonia. On 21 April 2017, defense counsel filed an objection to the State's offering of hearsay evidence.

[*632] **[**P8]** At 5:50 p.m. on 23 April 2017, the State emailed defense counsel stating as follows:

> [I]t occurred to us that there are recordings of the [d]efendant on **[****6]** [the day he met with defendant's expert, Dr. George Corvin], although not with Dr. Corvin. The recordings are of the jail calls. We have listened to some jail calls and decided that they are relevant material to his state of mind as well as his memory of the night of the murder.

The prosecutor also identified that the calls were "from August 12-August 14, 2015" and were "numbered 251-274."

[P9]** The next day, 24 April 2017, the matter was called for trial. Defense counsel moved for a continuance to afford him time to review the calls and deal with how they might affect the testimony of defendant's two experts. Defense counsel had not been able to listen to the twenty-three calls identified by the State. Defense counsel argued that defendant's rights would be violated under the *Fifth*, *Sixth*, and *Fourteenth Amendments of the United States Constitution* and *Article I, Sections Nineteen* and *Twenty-Three of the North Carolina Constitution*, specifically defendant's rights to due process, effective assistance of counsel, and confrontation of witnesses. Defense counsel also tendered into the record for the trial court's consideration the emails between defense counsel and the State, as summarized herein, and the CDs containing the over 800 calls.

[P10]** The trial court denied the motion to continue. **[****7]** [1] After the denial of the motion to continue, defense counsel further requested that he be given a day or a half-day after the completion of jury selection but before opening statements to listen to the four hours of calls identified by the State and to speak with his experts. Defense counsel indicated that he had spoken to his experts and they would make themselves available.

[P11]** After jury selection was completed on Friday, 28 April 2017, defense counsel, at around 11:30 a.m., renewed his request for a continuance. Defense counsel asked the trial court to delay opening statements until Monday to afford him the rest of the day and the weekend to review the calls and talk with his experts. Defense counsel argued that he had not had the time to listen to all twenty-three calls, had yet to understand them, and would be compelled to make an opening statement without **[*633]** knowledge of material rebuttal evidence. The trial court denied the request, and the State and defense counsel proceeded to present their respective opening statements.

[P12]** Ultimately, defendant was convicted of first-degree murder under the felony murder rule with the underlying felony being assault with a firearm on a government official, **[****8]** robbery with a dangerous weapon, and assault with a firearm on a government official. The trial court imposed a term of life without parole for first-degree murder and a consecutive term of 60 months to 84 months for robbery with a dangerous weapon. The trial court arrested judgment on assault with a firearm on a government official.

[P13]** On appeal, a divided panel of the Court of Appeals concluded that the trial court committed no reversible error. *State v. Johnson, 273 N.C. App. 358, 367, 846 S.E.2d 843 (2020)*. The Court of Appeals held that **[***729]** regardless of the standard of review, any error by the trial court in not allowing the motion to continue was not prejudicial to the felony murder conviction because the underlying felony was a "general[-]intent" crime, and the calls were admitted to rebut testimony from defendant's expert concerning defendant's diminished capacity. *Id. at 361-63*. The Court of Appeals also concluded that the denial of the motion to continue was not an error. *Id. at 363, 366-67*. The dissent disagreed, contending that the majority failed to apply the correct standard of review for addressing a motion to continue based on a constitutional right and that under the correct standard, defendant is entitled to a new trial. *Id. at 367-68* (Stroud, J., dissenting). Defendant appealed **[****9]** as of right based on the dissent.

II. Standard of Review

[P14]** A ruling on a motion to continue is addressed to the sound discretion of the trial court and reviewed on appeal for abuse of discretion unless the motion "raises a constitutional issue." *State v. Searles, 304 N.C. 149, 153, 282 S.E.2d 430 (1981)*. If the motion raises a constitutional issue, "the trial court's action upon it involves a question of law which is fully reviewable by an examination of the particular circumstances of each case." *Id.* However, regardless of the nature of the motion to continue, whether constitutional or not, a denial of a motion to continue is "grounds for a new trial only upon a showing by [the] defendant that the denial was erroneous and that [ ]his case was prejudiced thereby." *Id.*

[P15]** "If the defendant shows that the time allowed his counsel to prepare for trial was constitutionally inadequate, he is entitled to a new trial unless the State shows that the error was harmless beyond a reasonable

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[1] The trial court orally ruled on the motion to continue. No order with findings of fact or conclusions of law was entered.

doubt." State v. Tunstall, 334 N.C. 320, 329, 432 S.E.2d 331 (1993); *see* N.C.G.S. § 15A-1443(b) **[*634]** (2019) ("A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, **[****10]** that the error was harmless.").

III. Analysis

[P16]** Defendant's motion to continue raised a constitutional issue, requiring de novo review by this Court. As set forth herein, exercising our judgment anew, we conclude the trial court erred by denying the motion to continue. Defendant had constitutionally inadequate time to address the calls. Yet, the trial court's constitutional error was harmless beyond a reasonable doubt as to defendant's conviction of first-degree murder under the felony murder rule with the underlying felony being assault with a firearm on a government official. The calls were admitted as rebuttal evidence to defendant's evidence of lack of specific intent. However, the offense of assault with a firearm on a government official does not require a defendant to have a specific intent. It is a general-intent crime. Therefore, there can be no prejudice from the denial of the motion to continue as a matter of law to the conviction of assault with a firearm on a government official or felony murder resulting therefrom, because the calls were not relevant to any element of these crimes.

A. Constitutional adequacy of time to prepare for trial

[P17]** As defendant's request for a continuance **[****11]** before the trial court raised a constitutional issue, we review de novo the constitutional issue. The constitutional guarantees of assistance of counsel and confrontation of one's accusers and adverse witnesses implicitly provide that "an accused and his counsel shall have a reasonable time to investigate, prepare[,] and present his defense." State v. Rogers, 352 N.C. 119, 124, 529 S.E.2d 671 (2000) (quoting State v. McFadden, 292 N.C. 609, 616, 234 S.E.2d 742 (1977)). "To establish a constitutional violation, a defendant must show that he did not have [adequate] time to confer with counsel and to investigate, prepare[,] and present his defense." Tunstall, 334 N.C. at 329. "To demonstrate that the time allowed was inadequate, the defendant must show 'how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the **[***730]** denial of his motion.'" *Id.* (quoting State v. Covington, 317 N.C. 127, 130, 343 S.E.2d 524 (1986)). What constitutes inadequate time "must be determined upon the basis of the circumstances of each case." *Id.* (quoting State v. Harris, 290 N.C. 681, 687, 228 S.E.2d 437 (1976)).

[P18]** Exercising our judgment anew, we conclude that the trial court erred by denying defendant's motion to continue because defendant **[*635]** showed the trial court that he did not have reasonable time to address the calls, that he would have been better prepared had the continuance been granted, and that he was **[****12]** materially prejudiced by the denial of his motion.[2] In other words, defendant demonstrated to the trial court that the time allowed his counsel to prepare his defense was constitutionally inadequate.

[P19]** We first recognize that the time available to defense counsel to address the calls was limited. Defense counsel informed the trial court and tendered into the record the calls and the emails reflecting that defense counsel received notice at 5:50 p.m. the night before jury selection started that the State intended to use twenty-three of the calls—after the State had indicated that it was not using any of the calls and defense counsel and investigator had stopped reviewing them. Under these unique circumstances, where defense counsel relied on the State's representations, one of which was unqualified, and was reasonably preoccupied with other filings by the State and preparation for trial, we consider the relevant date and time for our analysis to be when the State informed defense

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[2] Here, defense counsel showed the trial court that he would be better prepared if the continuance had been granted and counsel's actual performance supports defendant's claim of material prejudice. Accordingly, we do not conclude or hold that prejudice could be presumed in this matter. *See* United States v. Cronic, 466 U.S. 648, 662, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) ("[O]nly when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial."); State v. Rogers, 352 N.C. 119, 126, 529 S.E.2d 671 (2000).

counsel that the State intended to use the twenty-three calls. Thus, this case is unlike *Tunstall*, where "defendant's counsel had at least three days between notification of [two oral] statements [made by defendant **[****13]** to law enforcement] and the beginning of jury selection in the defendant's trial in which to investigate the circumstances under which the statements were made." *Id. at 332*.

[P20]** Further, defendant's sole counsel only had the early mornings of and the late evenings of five days to listen to the calls and assess their impact on defendant's defense before making his opening statement to the jury. During the day, defense counsel was in court for the pretrial proceedings and jury selection for this case and unable to listen to the 3 hours and 53 minutes of the identified twenty-three calls or any other of the more than 800 calls. Defendant's investigator was also unavailable due to pneumonia.

[P21]** We also find defendant's showing in support of his position that he would have been better prepared for trial both sufficient and compelling. Defense counsel indicated to the trial court on 28 April 2017 that **[*636]** with a delay of opening statements until the next business day, Monday, he could listen to all twenty-three calls,[3] determine their implication on defendant's defense, and then consult with his expert. Defense counsel specifically identified that he would speak to defendant's expert, Dr. Corvin, over the weekend **[****14]** to discuss the calls and their implication. The State had isolated these calls specifically to rebut Dr. Corvin's testimony and defendant's sole defense that he was incapable of forming the intent to commit the charged crimes. The twenty-three calls were communications made by defendant the day before, the day of, and the day after Dr. Corvin first met with defendant on 13 August 2015, and Dr. Corvin noted unusual behaviors relevant to his opinions.[4]

[P22]** Finally, defendant has met his burden to show that he was prejudiced by the denial of the motion to continue. Defendant argues **[***731]** that the denial of the motion to continue impaired defense counsel's ability to give an "accurate forecast of his expert testimony and his anticipated response to the [S]tate's use of [the] calls" in his opening statement. Under the circumstances of this case and upon review of defense counsel's actual performance at trial, we agree.[5] As defendant identified, the calls were intended to undermine defendant's only defense to the charge of robbery with a dangerous weapon—his state of mind as impacted by his mental health and consumption of impairing substances. And this defense was complicated and involved experts.

[P23]** **[****15]** Examining defense counsel's actual performance, the opening statement of defense counsel also reflects a vagueness regarding the evidence from defendant's experts. The opening statement concerned testimony about the impact of mental health conditions generally rather than specific details concerning defendant, even though Dr. Corvin ultimately testified as an expert in forensic psychiatry that the combination of bipolar disorder, an intellectual disability, and intoxication, which he found defendant to have on 4 July 2015 at the time of the alleged crimes, rendered defendant without the ability to form specific intent. Robbery with a dangerous weapon is a specific-intent offense, requiring the State to prove that defendant had the intent to steal. *State v. Smith, 268 N.C. 167, 169, 150 S.E.2d 194 (1966)*. Further, even though defendant had retained and noticed **[*637]** two mental health experts, Dr. Corvin and Dr. Jennifer Sapia, the opening statement did not refer to experts. Instead, the singular, expert, was used. Thus, at the time of opening statements, defense counsel's ability to provide meaningful adversarial testing of the State's case against defendant concerning the robbery with a dangerous weapon charge was compromised by the inadequacy of time afforded him to prepare his defense.[6] *Cf.* *United States v. Cronic, 466*

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[3] The State ultimately decided to tender as rebuttal evidence only nine of the twenty-three calls. The State did not notify defendant of this until 8 May 2017, which was after opening statements were made.

[4] Dr. Corvin also met with defendant on 20 April 2016.

[5] However, as addressed in section B of this opinion, this error was not prejudicial as a matter of law to the conviction of first-degree murder under the felony murder rule.

[6] Notably, the jury found defendant not guilty of the other charged specific-intent offense—first-degree murder based on malice, premeditation, and deliberation. *See* *State v. Chapman, 359 N.C. 328, 374, 611 S.E.2d 794 (2005)* ("Specific intent to kill is an essential element of first[-]degree murder, but it is also a necessary constituent of the elements of premeditation and deliberation." (cleaned up)). Thus, this is not a case where the evidence was overwhelming in the favor of the State concerning defendant's state of mind. Therefore, an impact on defense counsel's opening statement could have been prejudicial.

U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) ("When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred." (footnote omitted)). Thus, we are persuaded that the impact of the denial of the motion to continue was material and prejudicial.

[P24]** Ultimately, what amount of time is constitutionally adequate or constitutionally inadequate depends on the circumstances of the case and requires a case-by-case assessment. Here, the assessment of the circumstances leads to our holding that the amount of time afforded defendant was constitutionally **[****16]** inadequate. Hence, we conclude that defendant has shown that the trial court committed constitutional error by denying defendant's justifiable request for delay in his motion to continue.[7]

B. Harmless error

[P25]** Since we conclude from our de novo review of the constitutional issue in defendant's request for a continuance that the trial court erred, the State bears the burden of showing that the error was harmless beyond a reasonable doubt. However, any error by the trial court was harmless beyond a reasonable doubt as a matter of law regarding the conviction of first-degree murder **[***732]** based on the felony murder rule because there **[*638]** was no factual dispute regarding whether or not defendant committed the offense—the evidence supporting his conviction was uncontroverted[8]—and the admitted evidence that solely addressed defendant's mental state was entirely irrelevant to this offense given that the legal elements of this conviction do not require anything more than general intent. *See* Johnson, 273 N.C. App. at 361-63. In this matter, the underlying felony supporting the jury's felony murder conviction—assault with a firearm on a government official—is a "general-intent offense." State v. Page, 346 N.C. 689, 700, 488 S.E.2d 225 (1997) (holding the offense of assault with a firearm on a **[****17]** government official is a general-intent offense). A felony murder conviction requires no intent other than the intent necessary to secure conviction of the underlying felony. State v. Richardson, 341 N.C. 658, 666-67, 462 S.E.2d 492 (1995). Accordingly, defendant's conviction of first-degree murder under the felony murder rule with the underlying felony being assault with a firearm on a government official is also a general-intent offense.

[P26]** General-intent offenses are offense**s** "which only require the doing of some act." State v. Jones, 339 N.C. 114, 148, 451 S.E.2d 826 (1994). In contrast, specific-intent offenses are offenses "which have as an essential element a specific intent that a result be reached." *Id.* Thus, any evidence in this case[9] supporting or negating that defendant was incapable of forming intent at the time of the crime is not relevant to a general-intent offense. *See id.* (holding intoxication defense is not available for general-intent offense); Page, 346 N.C. at 700 (holding diminished-capacity defense is not available for a general-intent offense).

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[7] The Supreme Court of the United States has recognized that the amount of time the government spends investigating a case or the number of documents that the government reviews is not necessarily relevant to the constitutional adequacy of defense counsel's preparation time. Cronic, 466 U.S. at 663. Here, the State intended to use twenty-three calls recorded on the day of, the day before, and the day after Dr. Corvin first met with defendant as rebuttal evidence. Therefore, especially in this context, our holding that the trial court erred by not granting a continuance until Monday for opening statements in no way endorses the contention that effective assistance of counsel necessitates review of all the calls.

[8] In fact, in both the opening statement and closing argument at trial, defense counsel did not contest any element of the offenses charged except intent. His sole defense was that defendant did not act with the requisite intent because of his diminished capacity from a mixture of a manic bipolar episode, mental disability, alcohol intoxication, and cocaine digestion. Later at the jury charge conference, defense counsel acknowledged that a diminished capacity argument was unavailable with respect to the general intent charges. Nevertheless, he still argued that the jury should receive an instruction that they could consider the facts allegedly demonstrating diminished capacity in connection with the knowledge element of the general intent crime.

[9] The jury was not instructed on the defense of insanity, and defense counsel did not argue that defendant was legally insane.

[P27]** Here, the calls were introduced as rebuttal evidence to the testimony of defendant's expert, Dr. Corvin, who opined on defendant's mental health diagnosis and capacity to form intent for the purposes of defendant's defense. As a matter of law, Dr. Corvin's testimony **[****18]** and the State's rebuttal evidence of the calls are irrelevant to the assault with a firearm on a government official conviction and resulting felony murder conviction. **[*639]** Therefore, we conclude that the trial court's error in denying the motion to continue for defense counsel to review the calls and consult with the experts was harmless beyond a reasonable doubt as to the conviction of felony murder based on the underlying felony of assault with a firearm on a government official conviction. We hold that defendant is entitled to a new trial only on the charge of robbery with a dangerous weapon.

IV. Conclusion

[P28]** For the reasons set forth herein, we conclude that the Court of Appeals erred as the trial court committed constitutional error by denying the motion to continue. However, the error by the trial court was harmless beyond a reasonable doubt as a matter of law to the conviction of first-degree murder under the felony murder rule where the underlying felony was a general-intent crime. Therefore, we affirm in part and reverse in part the decision of the Court of Appeals and direct the trial court to vacate the judgment as to the robbery with a dangerous weapon conviction for a new trial. **[****19]**

AFFIRMED IN PART AND REVERSED IN PART.

Justice BERGER did not participate in the consideration or decision of this case.

NO. COA09-1426

NORTH CAROLINA COURT OF APPEALS

Filed: 5 October 2010

STATE OF NORTH CAROLINA

v. Wilkes County
No. 07 CRS 053968
07 CRS 053969

PAUL DOUGLAS ABSHER JR.
and GEORGIA LOGAN MINTON,

Defendants.

Appeal by the State from order entered 3 September 2009 by Judge Carl R. Fox in Wilkes County Superior Court. Heard in the Court of Appeals 29 April 2010.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Morrow, Alexander, & Porter PLLC, by John C. Vermitsky, for defendants.

ELMORE, Judge.

The State appeals from an order dismissing, with prejudice, charges of assault on a government official and resisting a public officer against Paul Douglas Absher, Jr. (defendant Absher), and the charge of resisting a public officer against Georgia L. Minton (defendant Minton). We affirm.

Background

The following facts are undisputed: On the night of 19-20 September 2007, defendant Absher was involved in an altercation with the Wilkes County Sheriff's Department (Sheriff's Department) and the Wilkesboro Police Department (Police Department). As a result of this altercation, defendant Absher "allegedly suffered serious injuries including a fractured skull, lacerations, a serious brain injury and bleeding on the brain, a collapsed lung[,] and other life threatening injuries." For his part in the altercation, defendant was charged with assault on a government official and resisting and delaying an officer in the performance of his duties. Both defendants were tried for these offenses in district court, and defendant Absher was found guilty of both; defendant Minton was found guilty only of resisting and delaying an officer. Defendants appealed their convictions to the Superior Court Division of Wilkes County for a trial *de novo*.

Before trial, defense counsel filed a motion to dismiss the charges based on loss and destruction of exculpatory evidence by the State. According to the motion, when defendant Absher was arrested, he was brought to the intake center and then was shackled to a chair and assaulted by law enforcement officers. The intake center's closed circuit television video feed recorded all of these events. On 1 October 2007, defense counsel sent letters to the Sheriff's Department and the Wilkes County District Attorney's Office. Those letters stated, in relevant part:

> It is my understanding that your office is in possession of several videotapes and unfinished reports regarding the incident that led to my client's injuries on 9/20/07.

> It is my understanding that among these reports and videos is a videotape of my client which was taken while he was detained by the Wilkes County Sheriff's office for a period of about 30-40 minutes prior to his admission to Wilkes General Hospital.
>
> This letter represents the formal request and demand of our office that said materials be made available for inspection at a mutually convenient time and location. In the alternative, should your office not wish to cooperate with this request, please take this letter as our office's formal demand that all such materials be preserved and not taped over, destroyed, or altered in any way. Please confirm the receipt of this letter no later than Friday October 5, 2007.

Defense counsel followed these letters with a request for voluntary disclosure and written request for *Brady* material. Specifically, defendant sought the State's permission to allow his attorney to "inspect and copy . . . motion pictures . . . which are within the possession, custody, or control of the State, . . . [s]pecifically including but not limited to, all videos of the defendant at the time he was being held by the Wilkes County Sheriff's office in a holding cell prior to hospitalization." (Emphasis removed.)

On 9 October 2007, an assistant district attorney responded to defense counsel's letter and request. In his letter, he stated that "[t]he rules of pre-trial discovery in criminal cases only apply to cases within the original jurisdiction of the Superior Court . . . . There are no rules requiring pre-trial discovery for cases within the original jurisdiction of the District Court, such as [defendant's] case." He further explained, "Our office does not

generally maintain files or other evidence for offenses charged as misdemeanors."

On 23 October 27, defense counsel sent a subpoena to the Sheriff's Department requesting "[a]ll Sheriff Department reports, video's [*sic*] of the Defendant, Paul Absher, Jr., and any other documents related to the arrest and injuries that Mr. Absher sustained on September 20, 2007." In response, the Sheriff's Department produced reports by two deputies. On 25 July 2008, defendant sent another subpoena to the Sheriff's Department asking it to "forward to [his attorney] any and all video recordings from the intake of the jail facility pertaining to the incident of September 19, 2007, which formed the basis of [defendant's charges.]" On 15 August 2008, defense counsel sent an identical subpoena to the Wilkes County Emergency Management Department (Emergency Management Department).

According to the motion to dismiss, Suzanne Hamby from the Emergency Management Department responded to the subpoena by calling defense counsel. During this phone call, defense counsel learned that the original video had been destroyed, a "new video" had been created, and the "new video" was in the possession of the Sheriff's Department. The motion to dismiss described the creation of the new video as follows:

> [T]he Wilkes County Sheriff's Department took affirmative steps to ensure that the video in its original form was erased and modified into a "new video" which consisted of a series of photographs which were put together into a type of "flipbook" of what occurred on that evening. After selectively choosing what images to include in this "new video" the

> Sheriff's Department ordered the old video to be destroyed and took possession of the new video.

When the case was called to trial on 27 July 2009, the court first addressed the motion to dismiss in a pretrial hearing, which it granted after hearing both sides' arguments and the testimony of six State's witnesses. The trial court entered its order dismissing both defendants' charges on 3 August 2009. The State now appeals.

ARGUMENTS

We note at the outset that the State directs all of its arguments toward defendant Absher, rather than both defendants. However, both defendants have appealed. Because the State addresses defendant Absher in its arguments and defendants' brief responds in kind, we also primarily address the arguments as they apply to defendant Absher. We address defendant Minter's appeal in section III below.

I. Motion to Dismiss.

The State first argues that the trial court erred by dismissing the prosecution against defendants because the trial court's findings of fact and conclusions of law were unsupported and erroneous. The trial court's order contained thirty-nine findings of fact and seven conclusions of law, most of which the State now challenges on appeal. Specifically, the State challenges findings of fact 3, 6, 7, 8, 13, 14, 15, 17, 18, 21, 24, 26, 27,

28, 29, 35, 36, 37, 38, and 39 and conclusions of law 4, 5, 6, and 7.

General Statute section 15A-954(a)(4) governs a criminal defendant's motion to dismiss if he alleges that his "constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." N.C. Gen. Stat. § 15A-954(a)(4) (2009). If, on the defendant's motion, a trial court makes a determination that such a violation has occurred, it must dismiss the charges against the defendant. *Id.*

> In reviewing a trial judge's findings of fact, we are strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law. Even if evidence is conflicting, the trial judge is in the best position to resolve the conflict. The decision that defendant has met the statutory requirements of N.C.G.S. § 15A-954(a)(4) and is entitled to a dismissal of the charge against him is a conclusion of law. Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

State v. Williams, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quotations and citations omitted).

A. Findings of Fact

1. Finding of fact 3. We begin our analysis with finding of fact 3. The finding states:

> The intake facility was subject to video surveillance by way of a DVR system maintained by the Wilkes County Government by and through the Wilkes County Sheriff's department in conjunction with the Wilkes County Emergency Management Department. This DVR was located in both the Wilkes County Courthouse as well as in the office of Suzanne Hamby, the Director of the Emergency Management Department of Wilkes County.

The State argues that there was no evidence that the video system was "maintained" by the Sheriff's Department; the State alleges that the system was owned by the county and maintained by the Emergency Management Department. We disagree.

In her deposition, Hamby testified that the videos at the intake facility recorded simultaneously to two DVRs — one located in the intake facility and the second located in Hamby's office. She explained that this back-up recording took place in her office because the U.S. Department of Homeland Security had provided money to the Emergency Management Department to upgrade cameras in various locations around the county. She explained that after the Emergency Management Department "got the money with the Homeland Security, we just — we — they needed a backup place, and that's just where it was put was in my office because we got the grant money to do it, and that's all I know." When asked, she confirmed that "[s]upervising the intake facility and the sheriff's department is not part of [her] responsibility of [her] department." When asked who was "directed and tasked with supervising that intake facility recording," she responded, "I would say the sheriff's — it's under the sheriff." Accordingly, we hold that finding of fact 3 is supported by competent evidence.

2. Findings of fact 6 and 7. The State next challenges findings of fact 6 and 7, which state:

> 6. According to the testimony of James Brian Griffith, the third party security vendor who installed and maintains the security system, this system was installed on the computers of several Wilkes County Sheriff's deputies and could be accessed by any individual with the Wilkes County Sheriff's Department via any county computer if the individual had both a password and IP (Internet Protocol) address which was provided by Mr. Griffith.
>
> 7. The installation of this password and IP address could be completed by Mr. Griffith in less than 5 minutes.

The State argues that findings of fact 6 and 7 are not supported by competent evidence because there was no evidence that "any more than one deputy had on his computer access to the video feed." We disagree.

During the hearing, Griffith testified that Hamby's "backup system" was not a true back-up system, but instead Hamby had "the IP addresses and the program downloaded on her computer, which will allow her, through the internet or through the county network, to access and to connect to the digital video records over here in the Breathalyzer room." Griffith explained that "anywhere in the county, with the proper software, you can reach and read and do every function that the recorder is capable of." When asked if Hamby's office was the only office with that capability, Griffith replied:

> Well, originally, whenever I installed it, I installed it in Mr. Huffman's office and a deputy that was across from him, and I showed them how to operate the system. And from that point, the software was disseminated further,

> and there was a couple other deputies that got a hold of it. I know they downloaded it on their computers.
>
> Suzanne wanted it on her computer so in case there was ever, you know, something like a hostage situation or something like that, that she would have the capability and access to it to — to use at her disposal.

When asked how long it would take to install the software necessary to connect to the digital video records, Griffith responded, "Three minutes or less." Accordingly, we hold that findings of fact 6 and 7 are supported by competent evidence.

3. Finding of fact 8. The State next challenges finding of fact 8, which states:

> On October 1, 2007, while this video was still in its original form and unmodified, counsel for the Defendants sent a letter to the Wilkes County Sheriff's Department as well as the Wilkes County District Attorney's Office asking both agencies to preserve all video images of the intake center and incident in question and specifically requesting that these images not be taped over, destroyed or altered in any way due to their exculpatory value.

The State argues that neither letter made any mention of the exculpatory value of the alleged evidence. We acknowledge that neither letter used the phrase "exculpatory value," but defense counsel's meaning was plain when he wrote that the requested video related to the incident "which led to [his] client's injuries," that the video showed defendant Absher, and that the video "was taken while [defendant Absher] was detained . . . for a period of about 30-40 minutes prior to his admission to Wilkes General

Hospital." Accordingly, we hold that finding of fact 8 was supported by competent evidence.

4. Findings of fact 13, 14, and 15. The State next challenges findings of fact 13, 14, and 15, which state:

> 13. Despite the letter to the Sheriff, Chief Deputy Chris Shue[1] made no mention to Ms. Hamby of the need to preserve the video in its original form or the letter received from this office and instead agreed to have a third party agent (Mr. James Brian Griffith) review the video and use it to create a new video that only maintained what Mr. Griffith determined in his sole discretion to be the "points of contact" between the Defendant and members of the Wilkes County Sheriff's Office.
>
> 14. At Chief Deputy Shue's direction and with his consent, Ms. Hamby called Mr. James Brian Griffith, owner of Griffith Security. Mr. Griffith looked at the video and determined that it contained between 7 and 9 gigabytes of information. Mr. Griffith talked with Suzanne Hamby and together along with Chief Deputy Shue they determined that it would be appropriate to modify the video to only preserve the portions where the officers were in physical contact with the Defendant Absher.
>
> 15. At Ms. Hamby and Chief Deputy Shue's direction, Mr. Griffith then created a new video. Mr. Griffith created a new video using this method, removing all of the images where Mr. Absher was purportedly in a room alone or where Mr. Griffith determined in his own discretion that there was no "physical contact" between Mr. Absher and the deputies involved. In doing this, Mr. Griffith admittedly failed to download scenes where Mr. Absher was visible on camera in a room alone for some extended period of time and at least 2 minutes and 34 seconds where Mr. Absher was in a room with 2-3 deputies and two paramedics.

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[1] The order misspells Chief Deputy Shew's name throughout. For ease of reading, we have not indicated each mistake.

The State argues that no evidence was presented that only "points of contact" were saved at the direction of Chief Deputy Chris Shew. We disagree. During her deposition, Hamby testified that she first learned of the video in question when Chief Deputy Shew called her and asked to view the video of a particular day and time, which corresponded to the time that defendant Absher was in custody. Chief Deputy Shew watched the video, but he did not ask her to do anything further with the video. When Hamby was eventually asked to copy the video, she and Griffith did not copy the entire video; instead, they only copied the frames that showed "somebody had their hands on" defendant Absher. She confirmed that Griffith "changed the video from it's [*sic*] original form to the form where it only had hands-on contact points per his discretion."

However, Hamby's testimony was inconsistent as to whether the Sheriff's Department asked Hamby and Griffith to edit the video. During her deposition, she testified that Griffith decided to edit the video because the full video would have "crashed the system." During that exchange, she stated that she did not communicate that decision with the Sheriff's Department, but also that the Sheriff's Department had never informed her that it needed the entire video. Later during the deposition, she testified that "Mr. Shue [*sic*] might have said to do the hands-on thing if we could have because of it crashing my system." She also testified that she informed Chief Deputy Shew that Griffith was only copying those parts of the video that showed "hands on" defendant Absher, and that she informed Chief Deputy Shew of this fact *before* her department

copied over the original, complete video. During the hearing, defense counsel reviewed this deposition testimony with Hamby while she was on the stand. Defense counsel asked, "So at the time . . . Chief Deputy Shew asked you to preserve only contact hands-on points and was told that's what you had done and said that it was okay, there was still an original version that he could have asked you to copy in its entirety; correct?" Hamby responded, "Yes, sir. As far as I know, that original was still on the view playback." Accordingly, we hold that findings of fact 13, 14, and 15 are supported by competent evidence.

5. Findings of fact 17 and 18. The State next challenges findings of fact 17 and 18, which state:

> 18. Neither Chief Deputy Shue, nor Ms. Suzanne Hamby ever asked Mr. Griffith to maintain the entire unmodified video on a memory stick of this type or by any other means despite receiving the letter sent by counsel for defendant on October 1, 2007.
>
> 19. This modified video removed a sufficient amount of video data to shorten the video from its original 8 gigabytes to less than 750 megabytes, less than one-tenth of the original size of the video. This shortened video was submitted for review to Major Greg Minton of the Wilkes County Sheriff's Department who picked up the video and then according to his testimony did not look at it.

The State argues that there was no evidence that downloading the entire video would be "simple or cheap" or that the Sheriff's Department had the ability to do so in 2007. Neither of the challenged findings of fact states that downloading the entire video would have been either simple or cheap; they merely state that neither Chief Deputy Shew nor Hamby asked Griffith to copy the

entire video. Accordingly, the State's challenge to these findings of fact fails.

6. Finding of fact 21. The State next challenges finding of fact 21, which states, "At no time did any member of the Wilkes County Sheriff's Department make any attempt to go onto a county computer and download or preserve the entire video on a hard drive or other device."

The State argues that "there was no evidence presented, aside from speculative questions, that anyone in the [Sheriff's Department] had the actual, rather than theoretical, capability and knowledge to burn or copy any of the video." As set out above, Griffith testified that several deputies had access to the computer software necessary to access the video feed. Moreover, the State does not argue that the finding itself is not supported by competent evidence; it merely argues that had a member of the Sheriff's Department attempted to download or preserve the entire video, there was no evidence to indicate that he would succeed in such an attempt. Accordingly, the State's challenge to this finding of fact fails.

7. Finding of fact 24. The State next challenges finding of fact 24, which states, "Major Minton testified that in the 4th and 5th gaps of 9 minutes and 3 seconds long and 6 minutes and 3 seconds long, Defendant Absher was clearly visible and that these videos would have been the closest and clearest images and best opportunity to view any injuries that were visible on Mr. Absher's person."

The State argues that there was no evidence that the missing video "would have been the closest and clearest images" of defendant Absher or the "best opportunity" to view his injuries because Major Minton never saw the entire video "and had no idea what the missing portions might contain." We disagree. During the hearing, defense counsel asked Major Minton about several stills from the video that showed defendant Absher's injuries. Major Minton concurred with counsel that the images were "not real clear." Defense counsel asked if Major Minton knew "if there [was] a better picture of those injuries on the period of time that were not kept or maintained." Major Minton responded, "No, sir," and agreed with defense counsel's next question, "Because we have no way of knowing that?" Defense counsel then asked about a particular section of the video, and the following colloquy ensued:

> Q. Now, in the picture, the first time there is a nine-minute break between 11:24 and 11:33, he is in a cell with the door shut?
>
> A. Yes, sir.
>
> Q. Okay. He's pretty close on that camera picture, isn't it?
>
> A. Yes.
>
> Q. And he is farther away every time he is taken out of that room?
>
> A. From that angle, yes, sir, but then another angle picks him up.
>
> Q. But on the other angle, there is people around him all the time; correct?
>
> A. Yes, sir.

> Q. Okay. So in that nine minutes we have the closest view of him of any of these pictures; correct?
>
> A. Yes.
>
> Q. And that's gone?
>
> A. Yes.

Major Minton's testimony indicates that he reached his conclusion about the "closest view" of defendant by inferring that the same camera and camera angle captured defendant during the nine missing minutes. Given the clarity and closeness of the other images captured by that particular camera and camera angle, Major Minton inferred that the clarity and closeness would have been similar during the missing nine minutes of video. This inference is proper, and it supports the challenged finding. Accordingly, we hold that finding of fact 24 is supported by competent evidence.

8. Findings of fact 27 and 28. The State next challenges findings of fact 27 and 28, which state:

> 27. After this video was modified on or about October 20th 2007 and while the video was still available for download in its original unmodified form Ms. Hamby discussed the shortening of the video with Chief Deputy Shue who made no objection to this modification.
>
> 28. Despite having this conversation with Ms. Hamby, and despite both the Sheriff Department's receipt of the letter dated October 1, 2007, Chief Deputy Shue approved the modified video and took no steps to preserve the original video.

The State argues that Chief Deputy Shew testified that he did not know about or approve the modified video, and Hamby testified that any misunderstanding to that respect was a miscommunication.

As explained above in our analysis of findings of fact 13, 14, and 15, competent evidence supports both finding 27 and finding 28.

9. Finding of fact 29. The State next challenges finding of fact 29, which states, "Prior to the modification of this video, a Brady Motion was filed on October 3, 2007. This motion requested all potentially exculpatory evidence including the video in its original form." The State argues that the "motion" was actually a voluntary request for disclosure and it did not specifically request "the video in its original form."

We agree that the *Brady* "motion" was a voluntary request for disclosure, and it appears that defense counsel sent the request to the District Attorney's Office, but did not file it with the court. However, the form is irrelevant; as the U.S. Supreme Court has explained, a *Brady* claim may arise "where the Government failed to accede to a defense request for disclosure of some specific kind of exculpatory evidence," *or* "where the Government failed to volunteer exculpatory evidence never requested, or requested only in a general way." *Kyles v. Whitley*, 514 U.S. 419, 433, 131 L. Ed. 2d 490, 505 (1995) (citations omitted). The government has a duty to volunteer exculpatory evidence even when it is not specifically requested "when suppression of the evidence would be 'of sufficient significance to result in the denial of the defendant's right to a fair trial.'" *Id.* We conclude that, in this case, the trial court's inapt use of the word "motion" does not render the finding of fact unsupported by competent evidence.

We also agree that the voluntary request for disclosure does not specify that the video be "in its original form," but that is a reasonable inference. Defense counsel specifically asked for "all videos of the defendant at the time he was being held by the Wilkes County Sheriff's office in a holding cell prior to hospitalization." "All videos" of defendant during that time period does not mean a redacted or truncated version of the existing videos, especially without any means for defendant to verify that the missing portions were not exculpatory. Accordingly, we hold that finding of fact 29 is supported by competent evidence.

10. Findings of fact 35, 36, 37, 38, and 39. The State next challenges findings of fact 35 through 39, which state:

> 35. This video could have provided videographic evidence of Mr. Absher's injuries and could have served to contradict the testimony of the deputies as to Mr. Absher's conduct on the night in question.
>
> 36. Specifically, Lieutenant Harold Martin testified that at the intake center he punched Defendant Absher in the stomach because he was being violent and aggressive, that Mr. Absher broke free of a handcuff while he was placed on a medical gurney, and that Mr. Absher tipped over the gurney violently and then fell to the ground and had to be picked up by the deputies at the intake.
>
> 37. Upon viewing the modified video at the hearing, Major Minton testified that none of these events were shown on the video portion where Mr. Absher was transferred to the gurney or on any other portion of the video.
>
> 38. These images and/or events do not appear on the video, which was produced by the Wilkes County Sheriff's Department contrary to the testimony of Lieutenant Martin.

> 39) When asked if the fact that these events were not on the video meant that they had not occurred both Lieutenant Martin and Major Minton relied on the erased portions of the videotape to explain why they would not say that these actions had not occurred.

The State argues that "there was absolutely no evidence produced by counsel that the missing portions could have 'served to contradict the testimony' of any State's witness." We disagree. The trial judge watched the modified video, which did not show defendant Absher breaking free of a handcuff, tipping a gurney over, or falling to the ground. Both Major Minton and Lieutenant Harold Martin testified that the modified video did not show these events, although Lieutenant Martin testified that they occurred. The original video might have confirmed their testimony or impeached it. Lieutenant Martin also testified that he did not see any injuries on defendant Absher's face while he was at the intake center. A paramedic examined defendant Absher five minutes later and noted swelling, contusions, bleeding, a fractured skull, and two black eyes. As discussed above, Major Minton testified that the clearest views of defendant's injuries had not been included on the modified video. The original video might have explained the discrepancy between Lieutenant Martin's observations and the

paramedic's.[2] Accordingly, we hold that the challenged findings of fact are supported by competent evidence.

B. Conclusions of Law

Having determined that the challenged findings of fact are supported by competent evidence, we now turn to the challenged conclusions of law. Specifically, the State argues that conclusions of law 4, 5, 6, and 7 are not supported by the findings of fact. We disagree.

1. Conclusion of law 4: Irreparable prejudice. The State argues that the trial court improperly concluded that,

> due to the destruction or failure of the Wilkes County Sheriff's Department to provide this evidence which is material and exculpatory in nature, the Defendant's rights pursuant to the Constitution of the United States and the North Carolina Constitution have been flagrantly violated and there is such irreparable prejudice to the Defendants' preparation of their case that there is no remedy but to dismiss the prosecution.

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[2]The injuries sustained by defendant Absher were quite serious; although he was initially transported to Wilkes Regional Hospital, that hospital did not have the facilities to treat him, so he was transported to Baptist Hospital in Winston-Salem, where he spent ten days in a medically induced coma. Defense counsel planned to introduce evidence that defendant Absher sustained the kind of traumatic head injury that causes subarachnoid hemorrhages. Defense counsel explained that his expert would testify that subarachnoid hemorrhages often cause posttraumatic amnesia, which can last from thirty minutes to four hours, "and during that period of time an individual can walk and talk and have their basic fight or flight responses but ha[ve] no ability to recognize or perceive persons for who they are, whether they are officers, whether they're persons of authority, and has no ability to form a requisite intent to assault anyone."

When a defendant makes numerous requests for "specific items of evidence that were favorable to him and material to his defense, but the State failed to provide the evidence, destroyed it, and then stated it could not be produced," a flagrant violation of the defendant's constitutional rights has occurred. *Williams*, 362 N.C. at 636, 669 S.E.2d at 296. Here, defendant Absher made numerous requests to see the video showing his time at the intake center followed by numerous requests for copies of that video. The State failed to provide the complete video, instead creating a modified copy that excluded twenty-four minutes and seventeen seconds of the original video. The State destroyed the original video, which rendered producing the original video impossible. Thus, a flagrant violation of defendant's constitutional rights occurred.

Irreparable prejudice occurs when a defendant is "denied material evidence favorable to his defense." *Id.*, 362 N.C. at 639, 669 S.E.2d at 298. "As the party moving for dismissal, defendant has the burden of showing irreparable prejudice to the preparation of his case." *Id.* A defendant can meet this burden by demonstrating that the situation cannot be remedied "by ordering or permitting [the] defendant to re-create an item of evidence he did not originally create and for which he does not possess the raw materials." *Id.* at 639, 669 S.E.2d at 299. Here, it is undisputed that defendant Absher never had access to the original video; it cannot be recreated by the State, much less by him. Moreover, the trial court's findings support its conclusion that the missing video segments were material and were favorable to his defense.

The video would have provided better images of defendant Absher's injuries and might have provided evidence demonstrating his impaired mental state. In addition, the video could have been used to impeach some of the State's witnesses. Accordingly, we hold that this conclusion of law is supported by the findings of fact.

2. Conclusion of law 5: *Arizona v. Youngblood*. The State next challenges the trial court's conclusion that the "destruction of evidence violated *Arizona v. Youngblood* in that the evidence was destroyed in bad faith by the Wilkes County Sheriff's Department." We hold that *Arizona v. Youngblood* is not applicable, so no showing of bad faith was required.

In *Arizona v. Youngblood*, the U.S. Supreme Court held that the police's "failure to preserve potentially useful evidence" only constitutes a due process violation if the defendant "can show bad faith on the part of the police." *Ariz. v. Youngblood*, 488 U.S. 51, 57-58, 102 L. Ed. 2d 281, 289 (1988). This rule applies only to "potentially useful evidence," not to "material exculpatory evidence," which does not require a showing of bad faith in order to constitute a due process violation. *Id.* Here, we have already concluded that the missing evidence was material exculpatory evidence, not merely "potentially useful" evidence. Indeed, the trial court had concluded in the previous conclusion of law, discussed above, that the evidence was "material and exculpatory in nature." Accordingly, the *Arizona v. Youngblood* standard does not apply, and defendant Absher was not required to make a showing of bad faith.

3. Conclusion of law 6: *Brady v. Maryland*. The State next challenges the trial court's conclusion that

> [t]his destruction of evidence also violated Brady v. Maryland because the videotapes and images would have been admissible at trial for impeachment purposes during the defendants' cross examination of the State's witnesses, tended to show that the defendant was the subject of a conspiracy to conceal the vicious beating of Defendant Absher and the violation of his federal civil rights, tended to show the physical extent of his injuries in support of his claim of automatism or inability to form the requisite mens rea necessary to commit this crime, and/or tended to prove the partial or complete defense of self defense against the assault charge. This violation of Brady v. Maryland requires dismissal of the charges against both defendants.

Specifically, the State argues that defendant failed to establish that the evidence was favorable to the defense or otherwise "material" to the outcome of the trial. We disagree.

Our Supreme Court explained that, in *Brady v. Maryland*,

> the Supreme Court of the United States determined that the Due Process Clause of the Fourteenth Amendment to the United States Constitution required in state criminal cases "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 faith or bad faith of the prosecution." [*Brady*, 373 U.S. 83, 87 (1963)] (citing U.S. Const. amend. XIV, § 1). Evidence favorable to an accused can be either impeachment evidence or exculpatory evidence. "Evidence is considered 'material' if there is a 'reasonable probability' of a different result had the evidence been disclosed." *State v. Berry*, 356 N.C. 490, 517, 573 S.E.2d 132, 149 (2002) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434, 131 L. Ed. 2d 490 (1995)). Materiality does not require a "demonstration by a preponderance that disclosure of the suppressed evidence would have resulted

> ultimately in the defendant's acquittal." *Kyles*, 514 U.S. at 434 (citation omitted).

Williams, 362 N.C. at 636, 669 S.E.2d at 296 (additional quotations and citations omitted). Instead, the defendant "must show that the government's suppression of evidence would undermine confidence in the outcome of the trial." *Id.* (quotations and citation omitted).

Here, the trial court found as fact that the "video could have provided videographic evidence of Mr. Absher's injuries and could have served to contradict the testimony of the Deputies as to Mr. Absher's conduct on the night in question." This evidence would have supported defendant Absher's argument that he lacked the *mens rea* to commit the offense charged, and it also would have provided impeachment evidence against the deputies. *See also id.*, 362 N.C. at 637, 669 S.E.2d at 297 ("The evidence also would have tended to prove the partial or complete defense of self-defense against the assault charge, because proof of the injuries sustained at the Union County Jail would have tended to show that defendant was not the aggressor."). Accordingly, the trial court properly concluded that the evidence was material, and this conclusion is supported by the trial court's findings of fact. The trial court properly concluded that the State's suppression of this material evidence violated due process as explained in *Brady*.

4. Conclusion of law 7: *State v. Williams*. The State next challenges the trial court's conclusion that "the destruction of this evidence violated *State v. Williams* and requires dismissal of the charges against both defendants." In *Williams*, the Supreme Court applied N.C. Gen. Stat. § 15A-954(a)(4), which requires a

finding of "such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution," N.C. Gen. Stat. § 15A-954(a)(4) (2009), in addition to a flagrant constitutional violation before a trial court can grant a criminal defendant's motion to dismiss. *Williams*, 362 N.C. at 639, 669 S.E.2d at 298. As the Supreme Court noted, this requirement stemmed from "*State v. Hill*, in which the defendant was charged with drunken driving, but was not allowed to immediately meet with counsel or witnesses who could have observed him 'with reference to his alleged intoxication.'" *Id.* (quoting *State v. Hill*, 277 N.C. 547, 553, 178 S.E.2d 462, 466 (1971). In *Williams*, the Supreme Court found its "concern in *Hill* regarding the irreparable prejudice to the defendant's ability to 'obtain evidence which might prove his innocence" analogous to its concern for the "defendant regarding the effect of his being denied material evidence favorable to his defense." *Id.* (quoting *Hill*, 277 N.C. at 553, 178 S.E.2d at 466). In *Williams*, the defendant made the necessary showing of irreparable prejudice because competent evidence demonstrated that he was never in possession or control of the original photographic evidence at issue, so the court could not remedy the situation by "ordering or permitting [the] defendant to re-create an item of evidence he did not originally create and for which he does not possess the raw materials." *Id.* at 639, 669 S.E.2d at 299. Here, as in *Williams*, defendant Absher was never in possession or control of the videographic evidence at issue, so the court could not remedy the

situation by ordering or permitting defendant Absher to re-create the missing video. Accordingly, we find support for the trial court's conclusion that the State violated *Williams*, which required dismissal of the charges against defendant Absher.

C. Discovery Violation

The State argues that defendant waived his statutory right to discovery by failing to file a motion for discovery or motion to compel, and by failing to secure an order from the trial court ordering discovery. This argument lacks merit.

Defendant's failure to move to compel pursuant to our discovery rules did not affect his right to *Brady* material. As explained in subsection I.A.9 above, with respect to *Brady* material, the State's affirmative duty to disclose exculpatory or impeachment evidence exists even when a defendant does not act under the rules of discovery.

D. Improper Burden

The State argues that the trial court "predetermined the case and improperly put the burden on the State to convince him not to grant defendants' motion to dismiss" by presuming "bad faith on the part of the State." The State bases this argument on the following statements made by Judge Fox after defense counsel summarized its evidence and arguments at the beginning of the pretrial hearing:

> THE COURT: Okay. Mr. [Prosecutor], I'll hear from you, but let me say this and let me say this before you start. Given what I read here, two things; one, I realize that some

> things are done — sometimes the Prosecutor's job is sort of like that of a mortician, all the damage has been done and all you are trying to do is put your best face on it, but let me say this before you start, I am not persuaded by any arguments given with regard to discovery with regard to this.
>
> The question is whether there was some hardships [*sic*] that was going to be imposed based upon the preservation of this - this evidence or whether there was something - that it was - there was some notice that wasn't received or someone was not aware. But this Court is abundantly aware that - I mean, I don't - I don't for a second presume necessarily bad faith on someone's — anyone's part, generally speaking. But on the other hand, I also don't think evidence generally disappears because it has nothing unfavorable to disclose. So given those parameters, why don't you tell me why I shouldn't allow this motion to dismiss.

"As the movant, defendant bears the burden of showing the flagrant constitutional violation and of showing irreparable prejudice to the preparation of his case." *State v. Williams*, 362 N.C. at 634, 669 S.E.2d at 295. As explained above, a defendant need not show bad faith on the part of the State if he shows that the State possessed "specific items of evidence that were favorable to him and material to his defense, but the State failed to provide the evidence, destroyed it, and then stated it could not be produced[.]" *Id.*, 362 N.C. at 636, 669 S.E.2d at 296.

Here, Judge Fox had reviewed defendant Absher's motion to dismiss and its attendant exhibits. These materials showed a flagrant constitutional violation and irreparable prejudice to the preparation of his case. Judge Fox's statements demonstrate that he acknowledged this showing by defendant Absher and sought

rebuttal by the State. Moreover, Judge Fox's thorough findings demonstrate that defendant Absher met his burden of showing a flagrant constitutional violation and irreparable prejudice to the preparation of his case. We read Judge Fox's statement that he was "not persuaded by any arguments given with regard to discovery" as a response to the State's assertion that defendant Absher's failure to file a motion to compel negated the State's duty to disclose exculpatory or impeachment material under *Brady*. As discussed above, defendant Absher's failure to file a motion to compel did not affect his rights under *Brady*.

II. Consideration of Outside Matters

The State argues that Judge Fox improperly considered matters that arose in an unrelated case. The State asserts that Judge Fox "was swayed by the happenings of another case set before him in Wilkes County on that day." The State bases this argument on a statement by Judge Fox that referenced an earlier case in which a juror had contact with one of the bailiffs but later denied the contact when Judge Fox asked about it. When asked again, the juror admitted that he and the bailiff had made contact, but that he had not thought it was "that big a deal," so did not disclose it to the court. Judge Fox concluded, "[H]e was willing to be untruthful to the Court in open court about what had transpired, and I'm sure part of it was so that he didn't get the deputy in trouble. That's not lost on this Court."

Having read the context of those statements, it appears that Judge Fox used this story to illustrate how a few seemingly minor transgressions could snowball into a very serious problem. We see no evidence that Judge Fox improperly considered the other matter when deciding this case, but instead used the incident to express how disturbed he was by the government's actions in this matter.

III. Defendant Minton

The trial court's order, as well as both sets of briefs, focused on defendant Absher's role in this matter. However, both defendants appealed. In its brief, the State's arguments address only defendant Absher until the thirty-fifth page of its brief, which contains a single paragraph addressing defendant Minton's appeal. The essence of the State's argument, such as it is, is that defendant Minton was not affected by the State's destruction of the video because she was not in the video. We disagree. As discussed above, the video could have been used as impeachment evidence against several of the deputies involved in defendants' arrests. The loss of this impeachment evidence affected defendant Minton's constitutional rights as well as defendant Absher's. Accordingly, we affirm the order dismissing the charges against defendant Minton.

IV. Conclusion

Accordingly, we affirm the order of the trial court with respect to both defendants.

Affirmed.

Judges BRYANT and BEASLEY concur.

Report per Rule 30(e).

State v. Williams

Supreme Court of North Carolina

October 13, 2008, Heard in the Supreme Court; December 12, 2008, Filed

No. 256A08

Reporter
362 N.C. 628 *; 669 S.E.2d 290 **; 2008 N.C. LEXIS 978 ***

STATE OF NORTH CAROLINA v. THEODORE JERRY WILLIAMS

Prior History: *State v. Williams, 660 S.E.2d 189, 2008 N.C. App. LEXIS 856 (N.C. Ct. App., 2008)*

Disposition: [*1]** AFFIRMED.

Counsel: Roy Cooper, Attorney General, by Derrick C. Mertz, Assistant Attorney General, for the State-appellant.

Richard E. Jester for defendant-appellee.

Judges: BRADY, Justice.

Opinion by: BRADY

Opinion

[292] [*629]** Appeal pursuant to *N.C.G.S. § 7A-30(2)* from the decision of a divided panel of the *Court of Appeals, N.C. App. , 660 S.E.2d 189 (2008)*, affirming an order entered 18 January 2007 by Judge James E. Hardin in Superior Court, Union County. Heard in the Supreme Court 13 October 2008.

BRADY, Justice.

This case requires us to decide whether dismissal of a criminal charge against defendant was appropriate under *N.C.G.S. § 15A-954(a)(4)*. In a pretrial hearing, the State admitted to the existence, possession, and destruction of material evidence favorable to defendant and acknowledged that it was impossible to produce the evidence at that time or, by implication, at any future trial. Based on these circumstances, we conclude that the State flagrantly violated defendant's constitutional rights and irreparably prejudiced the preparation of his defense. Accordingly, we find the requirements of *N.C.G.S. § 15A-954(a)(4)* satisfied and affirm the Court of Appeals.

BACKGROUND

Theodore Jerry Williams (defendant) was arrested and **[***2]** placed in the Stanly County Detention Center on 17 November 2003 on charges unrelated to the present matter. During February and March 2004 and while in custody in Stanly County, defendant initiated actions in various courts naming an assistant district attorney for Stanly County, the Stanly County Sheriff, and the Stanly County Commissioners for alleged civil rights violations.

After filing these actions, defendant was transferred to the Union County Jail on 19 April 2004. Even though defendant made numerous requests, he received neither the paperwork authorizing nor an explanation for his transfer. Less than twenty-four hours after his arrival at the Union County Jail, defendant was charged with misdemeanor assault on a government official at that facility. The State alleged that defendant punched Union County Sheriff's Deputy Brad Moseley when Deputy Moseley attempted to remove defendant from a holding cell. Defendant denied the allegation and testified that in the early morning hours of 20 April 2004, he was maced and beaten by multiple officers at the Union County Jail, where he sustained severe injuries, **[*630]** including a broken arm. Defendant testified he was then transferred back **[***3]** to the Stanly County **[**293]** Detention Center midday on 20 April 2004, and photographs were taken of him at that time for reprocessing purposes. The photographs showed the bruises and wounds defendant sustained at the Union County Jail.

Defendant further testified that after the events of 20 April 2004 and while he was being held in Stanly County, two individuals, one of whom was defendant's attorney, informed defendant of a poster they had seen on a wall in the offices of the District Attorney for the Twentieth Prosecutorial District, which included Stanly and Union Counties at the time. The poster contained two photographs of defendant. The first depicted defendant without any injuries as he appeared when processed into the Stanly County Detention Center on 17 November 2003, with a caption stating: "Before he sued the D.A.'s office." The second photograph depicted the injured defendant as he appeared when processed back into the Stanly County Detention Center on 20 April 2004, with a caption stating: "After he sued the D.A.'s office." Defendant testified that after viewing the poster, his attorney began making requests and serving subpoenas to obtain the poster and the photographs used to **[***4]** create the poster. However, defendant never received any of the requested items. At a pretrial hearing in Stanly County on 11 July 2005 concerning charges in that jurisdiction, Assistant District Attorney Stephen Higdon (ADA Higdon) admitted to the existence of the poster, its removal and destruction, and the impossibility of producing it or the original photographs that appeared on the poster.

After defendant was indicted for having attained habitual felon status, the Union County Grand Jury returned a superseding true bill of indictment on 30 October 2006, charging defendant with felony assault on a government officer or employee. Proceeding *pro se,* on 28 November 2006, defendant filed a Motion to Dismiss for Prosecutorial Misconduct and *Brady* [1] Violation, in accordance with *N.C.G.S. § 15A-954*. A hearing was held on the motion on 18 January 2007. Defendant testified that he helped fill out and serve the subpoenas and that the poster existed at the time the initial subpoenas were served. The State declined to cross-examine or otherwise rebut defendant's evidence and presented no evidence of its own. Instead, the State opposed defendant's motion solely on legal grounds.

[*631] The salient portions of the trial judge's findings of fact from the hearing include the following:

> 4) That on April the 19th of 2004 the Defendant was transported to Union County . . . .
>
> . . . .
>
> 6) The Defendant alleges that he was assaulted by various officers and members of the Union County Jail. . . . That on April the 20th, 2004, the Defendant was photographed by the staff of the Stanly County Jail . . .
>
> 7) That the photograph of the Defendant made on April 20th, 2004, showed the Defendant's condition during a time relevant to the subject prosecution.
>
> 8) That in May of 2004, Detention Officer Becky Green of the Stanly County Sheriff's Office went on an unrelated matter to the Stanly County office of the District Attorney for the 20th Prosecutorial District, that while in the office Ms. Green saw a poster which contained two photographs of the Defendant. One photograph . . . was made when the Defendant was processed into **[***6]** the jail on November 17th of 2003, with a caption saying, in quotation, "Before suing the District Attorney's office," closed quotation, and a second photograph . . . that was made when the Defendant was processed back into the Stanly County Jail between April 19th and

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[1] Referring to **[***5]** *Brady v. Maryland,* in which the United States Supreme Court 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." *373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*.

> 20th of 2004, which showed the Defendant's injuries and was captioned, quotation, "After he sued the District Attorney's office" . . . .
>
> 9) That during proceedings regarding this case and upon the request of the Defendant for discovery and disclosure that [ADA] Higdon stated in open court **[**294]** that the poster had been destroyed and was not available, and that the subject photographs originally taken at the Stanly County Jail were not available as well.

Based on these findings of fact, the trial judge concluded the following as a matter of law:

> 1) That the photographs of the Defendant made during his processing into the Stanly County Jail on November 17th of 2003 and again between April the 19th and 20th of 2004 are relevant and material to the defense of the subject prosecution.
>
> **[*632]** 2) That the poster of the photographs described herein was willfully destroyed and not made available to the Defendant although the Defendant made a **[***7]** valid and timely request for same.
>
> 3) That the original photographs described herein have not been made available and as represented by the State of North Carolina are unavailable to the Defendant, even though implicitly requested by the Defendant.
>
> 4) That due to the destruction or failure of the State to provide this evidence, which is material and may be exculpatory in nature, the Defendant's rights pursuant to the Constitution of the United States and the North Carolina Constitution have been flagrantly violated and there is such irreparable prejudice to the Defendant's preparation of his case that there is no remedy but to dismiss the prosecution.

The State timely appealed to the Court of Appeals, where a majority affirmed the trial court's ruling. *State v. Williams, N.C. App. , , 660 S.E.2d 189, 190 (2008)*. The dissenting judge at the Court of Appeals argued that finding of fact number nine was not supported by competent evidence and that the trial judge's conclusions of law were erroneous. *Id. at , 660 S.E.2d at 196-97* (Tyson, J., dissenting). The State timely appealed to this Court based on the dissent.

ANALYSIS

In reviewing a trial judge's findings of fact, we are "strictly **[***8]** limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)* (citations omitted). Even if "evidence is conflicting," the trial judge is in the best position to "resolve the conflict." *State v. Smith, 278 N.C. 36, 41, 178 S.E.2d 597, 601*, *cert. denied, 403 U.S. 934, 91 S. Ct. 2266, 29 L. Ed. 2d 715 (1971)*. The decision that defendant has met the statutory requirements of *N.C.G.S. § 15A-954(a)(4)* and is entitled to a dismissal of the charge against him is a conclusion of law. "Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *Carolina Power & Light Co. v. City of Asheville, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004)* (citing *Humphries v. City of Jacksonville, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980)*). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment" for that of **[*633]** the lower tribunal. *In re Appeal of The Greens of Pine Glen Ltd. P'ship, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)* **[***9]** (citing *Mann Media, Inc. v. Randolph Cty. Planning Bd., 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002)*.

I. FINDING OF FACT NUMBER NINE IS SUPPORTED BY COMPETENT EVIDENCE

The trial judge's order does not falter on finding of fact number nine. That finding of fact states:

> That during proceedings regarding this case and upon the request of the Defendant for discovery and disclosure that [ADA] Higdon stated in open court that the poster had been destroyed and was not available, and that the subject photographs originally taken at the Stanly County Jail were not available as well.

The trial judge found defendant's testimony to be credible. Moreover, defendant's evidence was uncontroverted in that the State offered no evidence and no witnesses at the hearing on 18 January 2007; the State made only a

legal argument against the motion to dismiss. Although much of the evidence **[**295]** was ambiguous and the sequence of events was never entirely clarified, the trial court's consideration is limited to the evidence actually presented and matters as to which the court takes judicial notice. Here, an examination of the record shows that the trial judge had several pieces of competent evidence before him to support **[***10]** finding of fact number nine. Defendant testified that his attorney began requesting copies of the poster and pictures after first viewing the poster. Without objection by the State, defendant stated that the poster existed when subpoenas were initially served. One subpoena included in the record was issued to Assistant District Attorneys Nicholas Vlahos and Stephen Higdon dated 31 May 2005. The subpoena ordered ADAs Vlahos and Higdon to appear and testify on 6 June 2005 and to produce the poster or the computer hard drive used to create the poster. After this subpoena was served, a pretrial hearing was conducted on 11 July 2005 in Stanly County concerning several cases against defendant in that jurisdiction. The transcript from that hearing was admitted into evidence before the trial judge in the instant matter. During the 11 July 2005 hearing, ADA Higdon confirmed that the poster did exist, but that it had been "removed" and "destroyed." ADA Higdon made this admission in response to defendant's request for the evidence. The State offered no evidence that the poster was already destroyed before defendant requested it.

[*634] As to the unavailability of the subject photographs, defendant clearly **[***11]** testified that he did not have the photographs used in the poster and that he never personally saw the poster. Conversely, the State contended for the first time on appeal that defendant and his former counsel admitted to possessing copies of the photographs used in the poster.

On this point, the transcripts reflect that defendant's former counsel stated he had a Stanly County Sheriff's Office booking report with defendant's picture on it. This booking report, however, was never offered as evidence by either side, and furthermore, a former officer of the Stanly County Sheriff's Office, Becky Green, saw the poster and testified that it was "like a mug shot from the jail" but "larger than what the mug shots are." Ms. Green testified that each photograph on the poster was about four by six inches in size. Additionally, the State highlights that defendant appears to have possessed a *side view* photograph of himself when questioning a witness on 18 January 2007. However, the poster in question contained a front view of defendant's face and not a side view. The Court of Appeals majority pointed out that ADA Higdon represented on 11 July 2005 that the actual "photographs" used for the poster **[***12]** "had been 'given to [Assistant District Attorney Nicholas] Vlahos' and had been 'destroyed.'" *State v. Williams, N.C. App. at , 660 S.E.2d at 193* (brackets in original). Regardless, defendant's unrebutted testimony to the trial judge was that he never possessed copies of the photographs.

Based on this evidence, the trial court's finding of fact number nine was supported by competent evidence and is binding on appeal. *See* *Cooke, 306 N.C. at 134, 291 S.E.2d at 619*.

II. THERE IS NO REMEDY BUT TO DISMISS THE PROSECUTION

N.C.G.S. § 15A-954(a)(4) requires that upon a defendant's motion, the trial court "must dismiss the charges stated in a criminal pleading if it determines that . . [a] defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." As the movant, defendant bears the burden of showing the flagrant constitutional violation and of showing irreparable prejudice to the preparation of his case. This statutory provision "contemplates drastic relief," such that "a motion to dismiss under its terms should be granted sparingly." *State v. Joyner, 295 N.C. 55, 59, 243 S.E.2d 367, 370 (1978)*.

[*635] *Section 15A-954(a)(4)* **[***13]** was "intended to embody the holding of this Court in *State v. Hill." Id.* (citing Official Commentary to *N.C.G.S. § 15A-954*). In *Hill,* this Court concluded that the defendant's pretrial motion to dismiss should have been allowed because the defendant was denied his constitutional **[**296]** rights to counsel and to obtain witnesses on his behalf. *277 N.C. 547, 552-54, 178 S.E.2d 462, 465-66 (1971)*. The denial of the defendant's rights to counsel and to obtain witnesses was particularly egregious because it deprived the defendant in *Hill* of the "only opportunity to obtain evidence which might prove his innocence." *Id. at 555, 178 S.E.2d at 467*.

We share a similar concern in the instant case regarding defendant's ability to secure material and favorable evidence.

A. Flagrant Violation of Constitutional Rights

The trial judge concluded that the State violated defendant's rights under the United States and North Carolina Constitutions. The making and public display of this poster was unprofessional behavior. [2] "[T]he citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law . . . and who approaches his task with humility." Robert **[***14]** H. Jackson, *The Federal Prosecutor, in* 31 J. Am. Inst. of Crim. L. & Criminology 3, 6 (1940-41) [hereinafter *The Federal Prosecutor]* (address delivered by the then Attorney General of the United States at the Second Annual Conference of U.S. Attorneys on 1 April 1940 in Washington, D.C.). [3] The mere making of the poster, however, is not a **[*636]** violation of defendant's constitutional rights for purposes of his motion under *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*. The flagrant violation of defendant's constitutional rights is found in that on numerous occasions defendant requested specific items of evidence that were favorable to him and material to his defense, but the State failed to provide that evidence, destroyed it, and then stated it could not be produced.

In *Brady,* the Supreme Court of the United States determined that the *Due Process Clause of the Fourteenth Amendment to the United States Constitution* **[***16]** required in state criminal cases "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 faith or bad faith of the prosecution." *Id. at 87* (citing U.S. Const. amend. XIV, § 1). Evidence favorable to an accused can be either impeachment evidence or exculpatory evidence. *United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)*. "Evidence is considered 'material' if there is a 'reasonable probability' of a different result had the evidence been disclosed." *State v. Berry, 356 N.C. 490, 517, 573 S.E.2d 132, 149 (2002)* (quoting *Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995))*. Materiality does not require a "demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles, 514 U.S. at 434* (citation omitted). Rather, defendant must show that the government's suppression of evidence would "'undermine[] confidence in the outcome of the trial.'" *Id.* (quoting *Bagley, 473 U.S. at 678*).

[297]** Although *Brady* does not require that a defendant make a specific request for favorable and material evidence, **[***17]** *see id. at 433* (citing *Bagley and United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976))*, the record indicates that on numerous occasions preceding the 11 July 2005 hearing, defendant requested specific items of material evidence favorable to his defense. Moreover, public records show subpoenas

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[2] After hearing the evidence, the trial judge, the Honorable James E. Hardin, commented:

I've been in the system now in one form or another since 1979. I spent more than twenty years in the D.A.'s office; I filled five different positions, eleven and a half years as the [elected] D.A. Frankly, if I had two assistants that put together a photographic array like this and made a poster and posted it on the wall making fun of a defendant, **[***15]** even if they can't stand him, they would have had a real problem with me. I got a real problem with this poster . . . . There's no excuse for that. We're going to treat people with dignity and respect even if they're charged with crimes. That's the right thing to do and I think frankly, as prosecutors, we're held to that responsibility ethically, morally and legally.

> During oral argument, counsel for the State firmly acknowledged how "inappropriate" it was that this poster had been made and displayed.

[3] The making and public display of this poster bring to mind the comments of former United States Attorney General and former United States Supreme Court Justice Robert H. Jackson: "While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst." *The Federal Prosecutor* at 3. A prosecutor "can have no better asset than to have his profession recognize that his attitude toward those who feel his power has been dispassionate, reasonable and just." *Id.* at 4.

seeking this evidence dated 20 September 2004, 31 May 2005, 27 January 2006, and 20 February 2006. [4] The subpoenas order that the poster or the computer hard drive used to create the poster be produced. **[*637]** Yet, defendant never received the requested evidence because the State. destroyed it.

Additionally, the evidence was favorable **[***18]** to defendant. As to the assault charge, the evidence would have been admissible at trial for impeachment purposes during defendant's cross-examination of the State's witnesses. Moreover, defendant alleged in his motion that since 19 April 2004, he had been "the victim of a vicious conspiracy between Stanly and Union County Law Enforcement and Prosecutors . . . to retaliate against [him] for the filing of a civil rights complaint in Stanly County Superior Court . . . and a civil rights complaint in the United States District Court." The poster and photographs were certainly relevant to defendant's theory of this conspiracy against him. The evidence also would have tended to prove the partial or complete defense of self-defense against the assault charge, because proof of the injuries sustained at the Union County Jail would have tended to show that defendant was not the aggressor. Therefore, defendant established that the "constitutional duty" of producing this evidence was "triggered." *See* Kyles, 514 U.S. at 434.

Moreover, the evidence was material. In its absence, we cannot say that defendant would receive a fair trial "resulting in a verdict worthy of confidence." *Id.* By demonstrating **[***19]** the value of the evidence for impeachment purposes and to show self-defense, defendant has raised the reasonable probability that confidence in the outcome of a guilty verdict at trial would be undermined because "the favorable evidence could reasonably be taken to put the whole case in such a different light." Kyles, 514 U.S. at 435; *see* Bagley, 473 U.S. at 678; Berry, 356 N.C. at 517, 573 S.E.2d at 149. Thus, "the constitutional duty" to produce the evidence in the instant matter was "triggered by the potential impact of favorable but undisclosed evidence." Kyles, 514 U.S. at 434. "[T]he prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." Id. at 438.

Relying on State v. Hunt, 339 N.C. 622, 657, 457 S.E.2d 276, 296 (1994), State v. Alston, 307 N.C. 321, 337, 298 S.E.2d 631, 642 (1983), and State v. Hardy, 293 N.C. 105, 127, 235 S.E.2d 828, 841 (1977), the State argues that *Brady* is inapposite to the instant matter because *Brady* only requires the State to turn over evidence at trial. We disagree for purposes of the instant matter. At its most fundamental level, the due process principle *Brady* and its **[***20]** progeny protect is concerned with the "avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials **[*638]** are fair; our system of the administration of justice suffers when any accused is treated unfairly." Brady, 373 U.S. at 87; *see* Bagley, 473 U.S. at 675 (The prosecutor's duty is "to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial."). The question is whether in the absence of the suppressed evidence a defendant receives a fair trial, "understood as a trial resulting in a verdict worthy of **[**298]** confidence." Kyles, 514 U.S. at 434.

> Every person charged with a crime has an absolute right to a fair trial. By this it is meant that he is entitled to a trial before an impartial judge and an unprejudiced jury in keeping with substantive and procedural due process requirements of the Fourteenth Amendment. It is the duty of both the court and the prosecuting attorney to see that this right is sustained.

State v. Britt, 288 N.C. 699, 710, 220 S.E.2d 283, 290 (1975) (citations omitted).

Here, ADA Higdon stated that the evidence had been "destroyed" and that he "cannot produce something **[***21]** that does not exist." Accordingly, we conclude that when the State makes *a pretrial* admission to the existence and destruction of evidence requested by the accused which is favorable to him and material to his guilt or punishment, and when the State further discloses that it is impossible to produce the evidence at that time or, by

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[4] While the September 2004, January 2006, and February 2006 subpoenas do not appear to be included as part of the record in the case *sub judice,* they are part of the record in another action arising out of Stanly County. State v. Williams, 186 N.C. App. 233, 650 S.E.2d 607 (2007). We take judicial notice of these subpoenas in accordance with our practice of taking "judicial notice of the public records of other courts within the state judicial system." State v. Thompson, 349 N.C. 483, 497, 508 S.E.2d 277, 286 (1998) (citing Alpine Motors Corp. v. Hagwood, 233 N.C. 57, 62 S.E.2d 518 (1950)).

implication, at trial, then in the interest of judicial economy, the trial judge does not need to await a trial and verdict before deciding that a due process violation exists. The violation is already apparent, and any subsequent trial would be fundamentally unfair to defendant. As the Court in *Brady* recognized,

> [a] prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice . . . .

373 U.S. at 87-88. If the architecture of injustice is apparent, then the trial judge does not need to allow the prosecution to design the trial any further. [5]

[*639] Indeed, the statute under which we are granting relief contemplates injuries occurring pretrial, during defendant's *"preparation of his* case." *N.C.G.S. § 15A-954(a)(4)* (2007) (emphasis added). The statute is the procedural mechanism that allows us to give effect to the *Brady* violation before a trial begins. Finally, we note again that *section 15A-954(a)(4)* was intended to embody the holding in *State v. Hill,* in which this Court held that the trial judge should have allowed the defendant's *pretrial* motion to dismiss based on the deprivation of the defendant's constitutional rights. *See 277 N.C. at 550, 556, 178 S.E.2d at 464, 467*.

In sum, the State's destruction of material, favorable evidence to defendant, and its admission that the evidence could not be produced, warrant the conclusion that any trial commenced against defendant would not comport with our notions of due **[***23]** process. Defendant's constitutional rights were flagrantly violated.

B. Irreparable Prejudice

Besides a flagrant constitutional violation, to grant defendant relief we must also find "such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." *N.C.G.S. § 15A-954(a)(4)*. This requirement also derives from *State v. Hill,* in which the defendant was charged with drunken driving, but was not allowed to immediately meet with counsel or witnesses who could have observed him "with reference to his alleged intoxication." *277 N.C. at 553, 178 S.E.2d at 466*. This Court's concern in *Hill* regarding the irreparable prejudice to the defendant's ability to "obtain evidence which might prove his innocence," *id. at 555, 178 S.E.2d at 467*, is analogous to our concern for defendant regarding the effect of his being denied material evidence favorable to his defense.

As the party moving for dismissal, defendant has the burden of showing irreparable prejudice to the preparation of his case. Defendant has met his burden in two ways. First, competent evidence supports the trial judge's conclusion that defendant never possessed the original photographs **[***24]** from which **[**299]** the poster was made. Consequently, we cannot remedy this situation by ordering or permitting defendant to re-create an item of evidence he did not originally create and for which he does not possess the raw materials. The State ardently contends that defendant can reproduce the poster, but has offered no evidence to support this claim. Based on defendant's testimony, the evidence before the trial judge was that defendant could not re-create the evidence. Therefore, as this Court said in *Hill,* we **[*640]** cannot "[u]nder these circumstances . . . assume that which is incapable of proof." *Id. at 554, 178 S.E.2d at 466*.

Second, defendant has demonstrated the futility of relying on witness testimony to prove the contents of the poster. Several of defendant's subpoenas called for ADA Nicholas Vlahos, an alleged creator of the poster, to appear with the poster *and testify,* but Mr. Vlahos never did either. Additionally, defendant presented the transcript of a trial in Stanly County on unrelated charges, during which defendant attempted to question a witness regarding the existence and contents of the poster. At every turn, the State objected to the questions, and the trial judge

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[5] Ensuring that justice is done is not only the goal of this Court, but **[***22]** it is ultimately an interest of the State itself. *See Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935)*. The State of North Carolina "'wins its point whenever justice is done its citizens in the courts.'" *See Brady, 373 U.S. at 87* (quoting an inscription on the walls of the United States Department of Justice building).

sustained **[***25]** the objections. Thus, the record reflects that any attempt to introduce witness testimony about the poster at a trial in the instant case would likely be similarly unfruitful. Based on defendant's uncontroverted evidence, the unavoidable conclusion is that he was irreparably prejudiced in the preparation of his case because of the State's destruction of material, favorable evidence.

CONCLUSION

Beyond the unprofessional nature of this poster, we are satisfied that defendant has met the elements of *N.C.G.S. § 15A-954(a)(4)*. We conclude that no other remedy exists but for the assault charge against defendant to be dismissed. Accordingly, we affirm the Court of Appeals.

AFFIRMED.

End of Document

State v. Taylor

Court of Appeals of North Carolina

June 5, 2019, Heard in the Court of Appeals; November 19, 2019, Filed

No. COA18-1242

Reporter
268 N.C. App. 455 *; 836 S.E.2d 658 **; 2019 N.C. App. LEXIS 963 ***; 2019 WL 6124503

STATE OF NORTH CAROLINA v. BRANDISS TAYLOR

Notice: PURSUANT TO RULE 32(b), NORTH CAROLINA RULES OF APPELLATE PROCEDURE, THIS DECISION IS NOT FINAL UNTIL EXPIRATION OF THE TWENTY-ONE DAY REHEARING PERIOD.

Prior History: **[***1]** Wayne County, No. 16 CRS 55186.

Disposition: VACATED AND REMANDED.

Counsel: Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Strickland Agner Pittman, by Dustin B. Pittman, for defendant-appellee.

Judges: HAMPSON, Judge. Judge BERGER dissents in a separate opinion. Judge DIETZ concurs.

Opinion by: HAMPSON

Opinion

[*456] **[**659]** Appeal by State from Order entered 12 June 2018 by Judge Phyllis M. Gorham in Wayne County Superior Court. Heard in the Court of Appeals 5 June 2019.

HAMPSON, Judge.

Factual and Procedural Background

The State appeals from the trial court's Order granting Defendant's Motion to Dismiss Based on Loss and Destruction of Exculpatory Evidence (Motion to Dismiss). The Record tends to show the following:

On 27 November 2016, Brandiss Taylor (Defendant) was arrested and given a citation for Impaired Driving and Failure to Maintain Lane Control. On 4 December 2017, a Wayne County Grand Jury returned an Indictment charging Defendant with Habitual Impaired Driving, Driving While License Revoked, and Driving Left of Center. On 25 April 2018, Defendant filed her Motion to Dismiss, which came on for a hearing in Wayne County Superior Court on 11 June 2018. At the beginning of this hearing, both the State **[***2]** and Defendant stipulated to the following Factual Allegations from Defendant's Motion to Dismiss:

1. On 27 November 2016 at approximately 1:20 A.M., Trooper Adam J. Hostinsky of the North Carolina Highway Patrol [(Trooper Hostinsky)] observed a truck merge onto U.S. 117 South from a parking area;

2. The truck made a number of maneuvers that alerted [Trooper Hostinsky] to its presence and he began to follow. [Trooper Hostinsky] noted varying speeds, failure to maintain lane and the truck drive left of the center line twice with sharp corrections back. In [Trooper Hostinsky's] words "it appeared the driver may be lost or unsure of where they are going;"

[*457] 3. Based on those observed traffic violations, [Trooper Hostinsky] conducted a traffic stop on the truck and it pulled to the side of the road and the "truck was put into park while still travelling about 15 MPH;"
4. When [Trooper Hostinsky] approached the truck, he found two people sitting on the passenger side of the truck, [Defendant] and another individual named Roy Lee;

5. [Trooper Hostinsky] indicates in his written notes that he identified [Defendant] as the driver and that he "saw the driver make their way to the passenger side of **[***3]** the vehicle" after the traffic stop was conducted;
6. [Defendant] has from the very beginning denied driving the truck that night and has maintained that throughout the life of this case;
7. As early as 28 November 2016, Trooper Hostinsky notes that [Defendant] was being considered for the felony charge of Habitual Impaired Driving;
8. On 16 December 2016, less than 30 days after the initial DWI charge was filed, agents of the Office of the District Attorney began requesting certified copies of records of prior convictions of [Defendant], presumably to prepare an indictment for Felony Habitual Impaired Driving; . . . .

9. On 29 December 2016, thirty-two (32) days after the traffic stop was conducted, Trooper Hostinsky submitted his investigative file to the Office of the District Attorney and certified his compliance with *N.C. Gen. Stat. § 15A-501(6)* in gathering "all materials and information acquired in the course of all felony investigations;" . . . .
10. On 28 July 2017, [defense counsel] filed a "Request for Voluntary Discovery (Alternative Motion to Compel Discovery) in a Driving While Impaired Case; . . . .

11. Even though the investigative file was submitted some seven months before the request, discovery was **[***4]** not released to [defense counsel] until 6 December **[**660]** 2017 as [defense counsel] has been informed multiple times **[*458]** by Assistant District Attorneys and their staff that "discovery does not exist in district court" especially as it relates to Driving While Impaired offenses;
12. In the request for discovery, Defendant makes specific request for any and all video including Dash Camera and Body Camera footage;
13. The case was submitted to the Grand Jury in December 2017 and a true bill of indictment was returned for Felony Habitual Impaired Driving;
14. [Defense counsel] made additional request of the State for the Dash Camera footage in January of 2018;
15. [Defense counsel] was informed in February 2018 that the video had been deleted from the "local server" and the Highway Patrol was attempting to locate it from other sources;
16. [Defense counsel] was informed in March of 2018 that the video had been "purged" and was not available for release;
17. Upon information and belief, it is the policy of the North Carolina Highway Patrol to only download and release dash camera footage upon request of the Office of the District Attorney;

18. Upon information and belief, it is the policy of the North Carolina **[***5]** Highway Patrol to maintain video for ninety (90) days following its creation unless such a request is made;
19. Upon information and belief, the Office of the District Attorney was notified of this policy and the existence of this video while it was still in existence, at least prior to 3 February 2017, and failed to take adequate steps to ensure its preservation.

After hearing testimony from Trooper Hostinsky and arguments from the State and defense counsel, the trial court took the matter under advisement. On 12 June 2018, the trial court entered its Order granting Defendant's Motion to Dismiss. In this Order, the trial court concluded that the dash camera footage was relevant, "material[,] and exculpatory in nature" and that the State's failure to provide this evidence flagrantly violated Defendant's constitutional rights and caused **[*459]** irreparable prejudice to Defendant. Based on this conclusion, the trial court

dismissed the charges against Defendant pursuant to N.C. Gen. Stat. § 15A-954(a)(4). On 14 June 2018, the State timely filed Notice of Appeal. *See* N.C. Gen. Stat. § 15A-1445(a)(1) (2017) (allowing the State to appeal "[w]hen there has been a decision . . . dismissing criminal charges as to one or more counts").

Issue

The sole issue on appeal **[***6]** is whether the trial court erred by concluding the destruction of the dash camera footage violated Defendant's *Brady* protections,[1] requiring dismissal of the charges against Defendant.

Analysis

I. Standard of Review

In reviewing a trial court's grant of a criminal defendant's motion to dismiss, we are "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." State v. Williams, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted). We, however, review a trial court's conclusions of law de novo. *See* State v. Biber, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citations omitted).

II. Motion to Dismiss

Section 15A-954(a)(4) of our General Statutes requires a trial court to dismiss criminal charges where a "defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." N.C. Gen. Stat. § 15A-954(a)(4) (2017). Defendant has "the burden of showing the flagrant constitutional violation and of showing irreparable prejudice to the preparation of his case." **[**661]** Williams, 362 N.C. at 634, 669 S.E.2d at 295. Because this Statute "contemplates drastic relief," **[***7]** our Supreme Court has cautioned that "a motion to dismiss under its terms should be granted sparingly." *Id.* (citation and quotation marks omitted).

"Whether a failure to make evidence available to a defendant violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution **[*460]** depends in part on the nature of the evidence at issue." State v. Taylor, 362 N.C. 514, 525, 669 S.E.2d 239, 252 (2008) (citation omitted). In *Brady*, the United States Supreme Court held that "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." 373 U.S. at 87, 10 L. Ed. 2d at 218 (emphasis added). However, "when the evidence is only *potentially useful* or when no more can be said of the evidence than that it could have been subjected to tests, the results of which might have exonerated the defendant, the state's failure to preserve the evidence does not violate the defendant's constitutional rights unless the defendant shows bad faith on the part of the state." Taylor, 362 N.C. at 525, 669 S.E.2d at 253 (emphasis added) (alteration, citations, and quotation marks omitted).

Here, the trial court concluded the destruction of the dash camera footage constituted a *Brady* violation, requiring dismissal of Defendant's charges. **[***8]** In reaching this conclusion, the trial court determined the dash camera footage was "material and exculpatory in nature[.]" However, the trial court made no findings concerning what the dash camera footage would have shown and, on this record, could not have made such a finding because there is no actual record of what it may have shown. Rather, the dash camera footage was only "potentially useful" to

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[1] *See* Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

Defendant, which requires Defendant to establish bad faith on the part of the State in order to show a constitutional violation. *Id.* (citations and quotation marks omitted); *see* State v. Dorman, 225 N.C. App. 599, 621, 737 S.E.2d 452, 466-67 (2013) (holding bones of the alleged victim that were destroyed prior to the defendant being able to examine them made it "speculative to evaluate to what degree, if at all, those bones would have been material and favorable to [the defendant's] case . . . [and thus the defendant] cannot meet his burden of demonstrating the evidence was actually, as opposed to potentially, material and favorable to his defense"). Therefore, because the dash camera footage was not exculpatory but rather only *potentially* exculpatory, the trial court erred by applying the *Brady* analysis and by concluding its destruction warranted dismissal, **[***9]** irrespective of bad faith on the part of the State. *See* Taylor, 362 N.C. at 525, 669 S.E.2d at 253 (citations omitted).

Instead, the trial court was required to assess whether or not the footage was destroyed in bad faith. Here, because the trial court perceived the destruction of the dash camera footage to constitute a *Brady* violation, the trial court made no findings or conclusions relating to whether the State's destruction of the dash camera footage was in bad **[*461]** faith. Therefore, because the trial court erroneously based its ruling on the dash camera footage, in fact, being exculpatory and thus controlled by *Brady*, we remand the matter to the trial court for a determination of whether, on these facts, the State's destruction of the footage was done in bad faith. *See* State v. Young, 368 N.C. 188, 215, 775 S.E.2d 291, 309 (2015) ("According to well-established North Carolina law, where a ruling is based upon a misapprehension of the applicable law, the cause will be remanded in order that the matter may be considered in its true legal light." (alteration, citation, and quotation marks omitted)).

Conclusion

Accordingly, for the foregoing reasons, we vacate the trial court's Order and remand this matter for a determination of whether bad faith existed on the part of the State in failing **[***10]** to preserve the dash camera footage.

VACATED AND REMANDED.

[662]** Judge DIETZ concurs.

Judge BERGER dissents in a separate opinion.

Dissent by: BERGER

Dissent

BERGER, Judge, dissenting in separate opinion.

I respectfully dissent because we should take the additional step of reversing the trial court's order.

Section 15A-954(a)(4) of the North Carolina General Statutes requires a trial court to dismiss criminal charges where a "defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." N.C. Gen. Stat. § 15A-954(a)(4) (2017). The "defendant bears the burden of showing the flagrant constitutional violation and of showing irreparable prejudice to the preparation of his case. This statutory provision contemplates drastic relief, such that a motion to dismiss under its terms should be granted sparingly. " State v. Williams, 362 N.C. 628, 634, 669 S.E.2d 290, 295 (2008) (citation and quotation marks omitted).

In *Brady v. Maryland*, the Supreme Court 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, irrespective of the good faith or bad faith of **[*462]** the prosecution." 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). However, the Supreme Court subsequently clarified **[***11]** that "the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material . . . which might have

exonerated the defendant." *Arizona v. Youngblood, 488 U.S. 51, 57, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)*. "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id. at 58*. "However, evidence of bad faith standing alone, even if supported by competent evidence, is not sufficient to support a dismissal under *N.C. Gen. Stat. § 15A-954(a)(4)*." *State v. Hamilton, N.C. App. , , 822 S.E.2d 548, 552 (2018)* (citation and quotation marks omitted), *review dismissed*, *372 N.C. 697, 830 S.E.2d 822 (2019)*, and *review denied*, *372 N.C. 697, 830 S.E.2d 824 (2019)*. Thus, a defendant must demonstrate not only that the State's failure to preserve potentially exculpatory evidence was done in bad faith, but also that he was irreparably prejudiced in the preparation of his case in order to show a violation of due process sufficient to justify dismissal.

In *State v. Hamilton*, this Court analyzed a similar issue to the present action. In *Hamilton*, the Macon County Sheriff's Department received a drug trafficking tip that contained specific information identifying the individuals and vehicles involved. *Id. at , 822 S.E.2d at 550*. After locating one of the aforementioned vehicles, the officer stopped the vehicle for failing **[***12]** to stop at a stop sign and conducted a free air sniff of the car with a K9 unit. *Id. at , 822 S.E.2d at 550*. The K9 unit alerted on the vehicle and the occupants of the vehicle were arrested with more than two pounds of methamphetamine in their possession. *Id. at , 822 S.E.2d at 550*. The officer asked the occupants if they would assist in proving that the defendant was involved in the drug trafficking, and the occupants agreed. *Id. at , 822 S.E.2d at 550*. The officer attempted to record the phone call between the defendant and the occupants, however, no audio was captured because the officer was not familiar with the new equipment. *Id. at , 822 S.E.2d at 551*. At trial, the defendant filed a motion to dismiss which was denied, and on appeal, the defendant argued that the trial court erred in denying the motion to dismiss because the State failed to preserve and disclose the audio recording. *Id. at , 822 S.E.2d at 551*. This Court affirmed the trial court's denial and found no bad faith on behalf of the State because the defendant (1) "had the opportunity to question [the occupant] about his phone call with [d]efendant," (2) "cross-examine [the officer] about destruction of the blank audio recording, and argue the significance of the blank audio recording to the jury," and (3) the defendant "failed to show bad faith **[***13]** on the part of [the officer]." *Id. at , 822 S.E.2d at 552*.

[*463] **[**663]** Here, Defendant had the opportunity to cross-examine Trooper Hostinsky about the loss of the dash camera footage and argue its significance to the jury. Further, Defendant failed to make a showing that Trooper Hostinsky exercised bad faith in failing to preserve the dash camera footage. At trial, Trooper Hostinsky testified to his understanding of the dash camera recording system as follows:

> [Trooper Hostinsky]. So at the initial point in time, this is a newer technology for the highway patrol, we were given training by a WatchGuard company representative, he told us that the way the cameras were to be set up was that if we tagged, tagged the videos, whether it be a warning stop, a stop for speeding, seatbelts, et cetera, that it would be a 90 day retention schedule on the server. He said there were four events that which we tagged it would remain on the server for three years. As I was initially understanding it, the four events for the three year retention schedule was anything involving a pursuit, an emergency response, a use of force, or a driving while impaired offense.
>
> [The State]. And since that time have you come to understand something different **[***14]** about the retention policy?
> [Trooper Hostinsky]. Yes, sir.
> [The State]. Could you describe that for the Court?
> [Trooper Hostinsky]. Just earlier this year after speaking with our technical services units I learned that the only incidences that are saved for the three year period is a chase or a use of force. The emergency response and the driving while impaired are actually just a 90 day retention schedule.
> [The State]. And, and how did you mark this video?
> [Trooper Hostinsky]. As a DWI.
> [The State]. Okay. And so, per your knowledge, how long was this video retained?
> [Trooper Hostinsky]. I, I assumed the video would be available for three years at the time of the incident. . . .
> [The State]. Okay. And when did you first speak to the Wayne County DA's office about this video?
>
> **[*464]** [Trooper Hostinsky]. The, the earliest recollection I have of it was either January or February of this year, of 2018.

[The State]. Okay. And could you just sort of briefly summarize what that was for the Court?

[Trooper Hostinsky]. I was reached out to by Ms. Tracy Moore asking how she could get a copy of the video, I told her just simply go to the district office and ask one of the sergeants to pull it from the server and **[***15]** burn it onto a DVR. I was contacted after that, told that the video was not available, so I began to personally reach out to my sergeant when I was located here. He said he could not locate the video. I then called our technical services unit in Raleigh and got ahold of the gentleman who runs the WatchGuard platform for us, and after going back and forth with him, he attempted to locate it, and the video was not available on either the main server or any of their redundancy servers.

. . . .

[The State]. Did anyone at the DA'S office ever tell you to delete this video?

[Trooper Hostinsky]. Absolutely not.

[The State]. Did you ever take any action to delete this video?

[Trooper Hostinsky]. No, sir.

[The State]. Did you ever . . . did you ever specifically choose not to take an action because you had an intention to deprive the Defendant of the video in this case?

[Trooper Hostinsky]. No, sir.

[The State]. Are you aware of such an intention on the part of anybody else in the DA's office or in law enforcement?

[Trooper Hostinsky]. No, sir.

From this testimony, it is apparent that Trooper Hostinsky was given conflicting information regarding the dash camera recording system, and he was simply operating **[***16]** under a misunderstanding about how the new system worked. As in *Hamilton*, there is no evidence in the record **[*465]** that Trooper Hostinsky deleted the dash camera footage in bad faith. Rather, the testimony at the suppression **[**664]** hearing tends to show that he made a mistake because he was using a new recording system without adequate training.

Defendant failed to demonstrate bad faith on the part of Trooper Hostinsky or the prosecutor at the hearing. This is plainly evident because the trial court did not make a finding that either Trooper Hostinsky or the prosecutor acted in bad faith. Because the evidence presented could not support a finding of bad faith, Defendant cannot satisfy *Youngblood* and has failed to show irreparable prejudice. The trial court's order of dismissal should be reversed.

State v. Hill

Supreme Court of North Carolina

January 20, 1971, Filed

No. 63

Reporter
277 N.C. 547 *; 178 S.E.2d 462 **; 1971 N.C. LEXIS 1052 ***

STATE OF NORTH CAROLINA v. CHARLES G. HILL III

Prior History: **[***1]** On *certiorari* to review the decision of the Court of Appeals reported in 9 N.C. App. 279, 176 S.E. 2d 41, which found no error in the trial before *Johnston, J.*, at the 19 January 1970 Session of the Superior Court of Forsyth. Defendant appeals a conviction under G.S. 20-138.

Defendant was first tried in the Municipal Court of the City of Winston-Salem upon a charge that on or about 14 March 1968 he unlawfully operated a motor vehicle on a public street of Winston-Salem while under the influence of intoxicating liquor. Upon his conviction he appealed to the Superior Court. There, when the case was called for trial, defendant moved (1) that the prosecution be dismissed because he had been denied counsel at a critical stage of the proceedings; and (2) that a motion picture of him, together with its sound tract, and the results of a breathalyzer test be suppresesd because made while he was under illegal arrest. Judge Johnston conducted a *voir dire* and overruled both motions. The evidence adduced on *voir dire* will be discussed in the opinion.

The State's evidence which was before the jury tended to show: At approximately 10:45 p.m. on 13 March 1968, W. E. Stroupe, **[***2]** accompanied by Wayne Stafford, was driving his automobile on Reynolda Road, a four-lane street in Winston-Salem. The weather was clear and the street well lighted. As Stroupe came over a hill he saw an unlighted Lincoln Continental approaching him from the opposite direction. The vehicle was swerving "broadside" from left to right. In an effort to avoid a collision Stroupe stopped his automobile at the right curb, but notwithstanding the approaching car struck it at the left front door. Defendant Hill appeared from the rear of his vehicle and said repeatedly, "I don't think I hit you, but if I did I am sorry." Stroupe testified that he was so incensed by the collision that he feared to get close to defendant. Therefore, he did not smell his breath, and he could not say how he walked. Wayne Stafford also testified that he did not observe Hill walk, smell his breath, or have any conversation with him.

At 10:47 p.m. Police Officer G. E. Tierney, Jr., arrived at the scene and began an investigation. Defendant told the officer "that he was operating the 1964 Lincoln Continental." According to Tierney's testimony: Defendant's speech was slow; he staggered; his face was red. The **[***3]** odor of alcohol was on his breath and, in his opinion, defendant was under the influence of an intoxicating beverage to the extent that his mental and physical faculties were appreciably impaired.

Although he had not seen defendant operate the motor vehicle Tierney arrested him for drunken driving. After advising him of his constitutional right to counsel and to remain silent, Tierney took defendant to the Forsyth County Jail.

Defendant was again advised of his rights at the jail. When asked if he wanted a lawyer he replied that he was all right and didn't need one. He was then "filmed," and his answers to "certain questions" were recorded. After that procedure defendant was asked if he would take the breathalyzer test. He consented, and the test was administered at approximately 11:45 p.m. It "indicated a reading between .23 and .24%." Immediately thereafter a

warrant charging defendant with drunken driving was served upon him. The film, which was introduced in evidence, showed that defendant "sort of staggered and he was slow talking and his writing on the board was impaired."

Defendant offered no evidence before the jury. His motion for nonsuit was overruled. The jury **[***4]** returned a verdict of guilty as charged in the warrant, and from the judgment that he pay a fine of $ 100.00 and the costs defendant appealed. The Court of Appeals found no error in the trial, and we allowed *certiorari*.

Disposition: Reversed.

Counsel: *Attorney General Robert Morgan, Assistant Attorneys General William W. Melvin and T. Buie Costen for the State*.

Craige, Brawley by Alvin A. Thomas and C. Thomas Ross for defendant appellant.

Judges: Sharp, Justice. Justice Moore did not participate in the consideration or decision of this case. Justice Huskins dissenting. Justice Lake dissenting.

Opinion by: SHARP

Opinion

[*550] **[**464]** Defendant assigns as error the court's denial of his pretrial motions. At the *voir dire* which Judge Johnston conducted upon these motions the evidence for the State tended to show: Officer Tierney, who arrested defendant at the scene of the collision, did not at any time see him drive his automobile. Defendant was taken to jail, filmed, and given the breathalyzer test before a warrant charging him with drunken driving was served upon him. While the film was being made, and during the breathalyzer test, only police officers and employees of the police department were present. As soon as these procedures had been accomplished Tierney permitted defendant to telephone his attorney, and he was present when defendant **[***8]** made the phone call.

Defendant testified: He was arrested about 10:30 p.m. and after his arrest he requested counsel. At no time did he say he did not want an attorney. He was "finally permitted to call a lawyer a little after midnight. . . . They only offered (him) the right to make a telephone call one time." He immediately called his attorney, William T. Graham, "and he was supposed to come down." Mr. Graham is defendant's brother-in-law and has represented him for the past eight years.

Mr. Graham testified that he received a telephone call from defendant a few minutes after midnight, and he talked to both him and Officer Tierney. The officer told Graham that defendant had been charged with drunken driving, and he could take him home if he would come to the jail. Mr. Graham went immediately to the jail, arranged defendant's bond, and requested the jailer, Deputy Sheriff Weldon Keyser, to release his client to him. The jailer refused because of "the four-hour rule." In **[*551]** response to Graham's request for an explanation of that rule, Keyser said, "Well we can't let the man out until he has been locked up for four hours." The attorney protested that defendant's bond **[***9]** had been posted and that the arresting officer had told him he could take defendant home. The jailer's reply was, "Well, I am running this jail and you are not going to get him out of here until the four hours are up." After Graham's further efforts, which included a call to Winston-Salem's Chief of Police, had failed to secure defendant's release on bond, he requested permission to see his client. The jailer's response was, "The son of a bitch is so **[**465]** drunk he can't stand up. . . . You are not going to see him, git." Graham "got, and that was the end of it." Defendant was released about 7:00 a.m. the following morning.

At the conclusion of the *voir dire*, Judge Johnston denied defendant's motion upon findings (a) that defendant was arrested without a warrant by an officer who had not seen him operating a motor vehicle on the occasion in question; (b) that defendant was not "arrested falsely"; (c) that defendant voluntarily submitted to the breathalyzer

test and "was photographed by the police officers at that point"; and (d) that defendant was not at any time denied the right to counsel. Judge Johnston's finding that defendant was not "arrested falsely" was clearly **[***10]** intended to be a ruling that he was not illegally arrested. As such it was erroneous.

N. C. Gen. Stats. § 15-41 provides: "A peace officer may without warrant arrest a person:

"(1) When the person to be arrested has committed a felony or misdemeanor *in the presence* of the officer, or when the officer has reasonable ground to believe that the person to be arrested has committed a felony or misdemeanor *in his presence*." (Emphasis added.)

All the State's evidence tends to show that when Officer Tierney arrived at the scene he had reasonable grounds to believe that defendant had committed the offense of operating a motor vehicle on a public highway while under the influence of an intoxicant. Notwithstanding, under G.S. 15-41 the arrest was illegal because defendant had not operated the vehicle in the officer's presence. "[T]he rule is that where the right and power of arrest without warrant is regulated by statute, an arrest without warrant except as authorized by statute is illegal." **[*552]** *State v. Mobley, 240 N.C. 476, 480, 83 S.E. 2d 100, 103*. That defendant might have been legally arrested without a warrant for public drunkenness is beside the point; he was **[***11]** not arrested for that offense.

The Attorney General concedes that defendant's arrest was illegal. However, citing *State v. Moore, 275 N.C. 141, 166 S.E. 2d 53*, he contends that the illegal arrest did not *ipso facto* render the questioned evidence incompetent, since there were no oppressive circumstances surrounding the arrest. He argues that defendant voluntarily consented to the breathalyzer test and did not object to being photographed, and -- since the sound motion picture was not made a part of the case on appeal -- that the exception to its admission in evidence is not presented. These contentions are not without merit. However, because we base our decision upon the denial of defendant's motion to dismiss, we will not discuss further the motion to suppress evidence.

Both the state and federal constitutions declare that in *all* criminal prosecutions an accused has the right to have counsel for his defense and to obtain witnesses in his behalf. *U. S. Const. amend. VI*; *N.C. Const. art. I § 23*. In pertinent part the specific language of the North Carolina Constitution is that "every person charged with crime has the right . . . to confront the accusers and witnesses **[***12]** with other testimony and to have counsel for defense. . . ." To implement these constitutional rights the General Assembly enacted G.S. 15-47, which provides in pertinent part: "Upon the arrest, detention, or deprivation of the liberties of any person by an officer in this State with or without warrant, it shall be the duty of the officer making the arrest . . . to permit the person so arrested to communicate with counsel and friends *immediately, and the right of such person to communicate with counsel and friends shall not be denied*."

Under these constitutional and statutory provisions a defendant's communication and contacts with the outside world are not limited to receiving professional advice from his attorney. He is, of **[**466]** course, entitled to counsel at every critical stage of the proceedings against him. *Gasque v. State, 271 N.C. 323, 156 S.E. 2d 740*. He is also entitled to consult with friends and relatives and to have them make observations of his person. The right to communicate with counsel and friends necessarily includes the right of access to them.

[*553] Justice Higgins called attention to the provisions of G.S. 15-47, in *State v. Wheeler [***13] , 249 N.C. 187, 192-193, 105 S.E. 2d 615, 620*. He said: "The rights of communication go with the man into the jail, and reasonable opportunity to exercise them must be afforded by the restraining authorities. . . . The denial of an opportunity to exercise a right is a denial of the right." One who is detained by police officers under a charge of driving while under the influence of an intoxicant has the same constitutional and statutory rights as any other accused. *State v. Morris, 275 N.C. 50, 165 S.E. 2d 245*.

All the evidence in this case tends to show (1) that defendant was not "permitted" to telephone his attorney until after the breathalyzer testing and photographic procedures were completed and the warrant was served; (2) that he called Mr. Graham, his attorney and brother-in-law, who came to the jail; (3) that Mr. Graham's request to see his client and relative was peremptorily and categatorically denied; and (4) that from the time defendant was arrested

about 11:00 p.m. until he was released about 7:00 a.m. the following morning only law enforcement officers had seen or had access to him.

When one is taken into police custody for an offense of which intoxication is an **[***14]** essential element, time is of the essence. Intoxication does not last. Ordinarily a drunken man will "sleep it off" in a few hours. Thus, if one accused of driving while intoxicated is to have witnesses for his defense, he must have access to his counsel, friends, relatives, or some disinterested person within a relatively short time after his arrest. The statute says he is entitled to communicate with them *immediately*, and this is true whether he is arrested at 2:00 in the morning or 2:00 in the afternoon.

Defendant's guilt or innocence depends upon whether he was intoxicated at the time of his arrest. His condition then was the crucial and decisive fact to be proven. Permission to communicate with counsel and friends is of no avail if those who come to the jail in response to a prisoner's call are not permitted to see for themselves whether he is intoxicated. In this factual situation, the right of a defendant to communicate with counsel and friends implies, at the very least, the right to have them see him, observe and examine him, with reference to his alleged intoxication. The fact that Mr. Graham was defendant's lawyer, **[*554]** as well as his friend, did not **[***15]** impair his right to observe defendant at this critical time.

The evidence in this case will support no conclusion other than that defendant was denied his constitutional and statutory right to communicate with both counsel and friends at a time when the denial deprived him of any opportunity to confront the State's witnesses with other testimony. Under these circumstances, to say that the denial was not prejudicial is to assume that which is incapable of proof. Decisions from other jurisdictions, discussed below, support this conclusion.

City of Tacoma v. Heater, 67 Wash. 2d 733, 409 P. 2d 867, involved a situation practically identical with the one we consider. In that case the defendant was arrested for driving while intoxicated. Upon arrival at the jail he requested permission to telephone his attorney. His repeated requests were refused because police department regulations authorized officers to deny a person charged with an offense involving intoxication the right to use the telephone for four hours. The jury found the defendant guilty as charged.

[467]** In reviewing his conviction the Supreme Court of Washington said, "This issue to be determined on this appeal **[***16]** is: Is the denial of a request for permission to contact counsel as soon as a person is charged with a crime involving the element of intoxication, the denial of a constitutional right resulting in irreparable prejudice to his defense?" *Id. at 735, 409 P. 2d at 869*. In answering the question Yes, the Court said that a critical stage had been reached in the defendant's case when, immediately after the officers had interrogated the defendant and conducted their test for sobriety, they charged him with the offense. The rationale was that the denial of counsel at this point made it impossible for defendant to have disinterested witnesses observe his condition and to obtain a blood test by a doctor -- the only means by which defendant might have proved his innocence. "The evidence of intoxication dissipates with the passage of time. The 4-hour rule imposed by the police regulation recognizes that after 4 hours a person under the influence of intoxicating liquor will have reached a state of sobriety so that he is safe to be released, and may use a telephone. . . . It will not do to say that a person who is denied an opportunity to secure the most convincing kind of evidence has been **[***17]** deprived of a constitutional **[*555]** right but that such deprivation did not harm him. . . ." *Id. at 739, 740, 409 P. 2d at 871*. "Under the 'critical stage' rule, the denial to the defendant of the assistance of his attorney after the officers had conducted their test and questioning, violated his constitutional right to have counsel and due process, and any conviction obtained thereafter was void." *Id. at 741, 409 P. 2d at 872*.

The opinion in *City of Tacoma* collects the pertinent decisions. We approve the Washington court's exposition and that of the Supreme Court of Appeals of Virginia in *Winston v. Commonwealth, 188 Va. 386, 49 S.E. 2d 611*, one of the cases cited in *Tacoma*. In *Winston*, the defendant was arrested for driving while intoxicated and jailed for nearly five hours before he was taken before a judicial officer authorized to issue warrants and fix bail. The applicable Virginia statute required that he be taken "forthwith." In reversing the defendant's conviction and dismissing the prosecution the Supreme Court of Appeals of Virginia pointed out that as a result of his illegal detention the defendant had been forever deprived of material evidence **[***18]** which *might* have supported his claim of

innocence; that after the lapse of the time during which he was held in jail a physical examination and blood test would have been useless. The court said: "[W]here, as here, the effect of the failure of the arresting officer and of the custodian of the arrested person to perform their respective duties is such as to deprive a person of the constitutional right to call for evidence in his favor, his subsequent conviction lacks the required due process of law and cannot stand." *Id. at 396, 49 S.E. 2d at 616*.

Before we could say that defendant was not prejudiced by the refusal of the jailer to permit his attorney to see him we would have to assume both the infallibility and credibility of the State's witnesses as well as the certitude of their tests. Even if the assumption be true in this case, it will not always be so. However, the rule we now formulate will be uniformly applicable hereafter. It may well be that here "the criminal is to go free because the constable blundered." *People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587*. Notwithstanding, when an officer's blunder deprives a defendant of his only opportunity to obtain **[***19]** evidence which might prove his innocence, the State will not be heard to say that such evidence did not exist. *In re Newbern, 175 Cal. App. 2d 862, 1 Cal. Rptr. 80*. Defendant has **[*556]** been deprived of a fundamental right which the constitution guarantees to every person charged with crime. For that reason the prosecution against him must be dismissed.

Reversed.

Dissent by: HUSKINS; LAKE

Dissent

Justice Huskins dissenting:

Defendant was convicted of drunken driving. Upon the facts in this record his guilt is so obvious that reasonable men, women or children could not arrive at a different conclusion. Therefore, unless his rights have been prejudicially violated, amounting to a denial of due process, his conviction should be sustained.

The record shows: (1) Officer Tierney arrived on the scene *two minutes* after defendant had driven his 1964 Lincoln Continental into the Stroupe vehicle, which Mr. Stroupe had stopped at the right curb on a *four-lane street* in an effort to avoid the collision; (2) defendant told the officer he was driving the Lincoln, a fact already known to Mr. Stroupe; (3) defendant's speech was slow, his face was red, the odor of alcohol was on his **[***20]** breath, he staggered when he walked -- in short, he was drunk; (4) the officer arrested him without a warrant for drunken driving, advised him of his rights, took him to the Forsyth County Jail and again advised him of his rights, whereupon he stated that he was all right and didn't need a lawyer; (5) defendant then consented to take the Breathalyzer test and it "indicated a reading between . **[**469]** 23% and .24%"; (6) immediately thereafter defendant was served with a warrant charging him with drunken driving; (7) a few minutes after midnight defendant telephoned his lawyer who went to the jail and arranged bond, but the jailer refused to release defendant until he sobered up and also refused to allow counsel to see defendant, stating that "the s.o.b. is so drunk he can't stand up"; (8) at his trial defendant did not testify and *offered no evidence*; (9) defendant makes no attack whatsoever on the accuracy of the Breathalyzer test and makes no contention that the test was improperly administered; (10) defendant contends, but does not reveal in what way, the failure to permit counsel to talk to him at midnight prejudiced his defense.

[*557] On the facts outlined, I am **[***21]** unwilling to "let the criminal go free because the constable blundered." The determinative question is not whether defendant was denied access to his counsel at a critical stage of the proceeding against him. Rather, the question is whether denial of temporary access to counsel prejudiced this defendant in the preparation and trial of his case? *Coleman v. Alabama, 399 U.S. 1, 26 L. Ed. 2d 387, 90 S.Ct. 1999 (1970)*. I say not. Admittedly, defendant's constitutional right to counsel was violated by an arrogant, overbearing jailer whose discharge might well serve the orderly administration of criminal justice. Even so, every violation of a constitutional right is not prejudicial. Some constitutional errors are deemed harmless in the setting of a particular case, not requiring the automatic reversal of a conviction, when the court can declare a belief that it was

harmless beyond a reasonable doubt. *Chapman v. California, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S.Ct. 824 (1967)*; *Harrington v. California, 395 U.S. 250, 23 L. Ed. 2d 284, 89 S.Ct. 1726 (1969)*; *Coleman v. Alabama, supra*; *State v. Brinson, 277 N.C. 286, 177 S.E. 2d 398 (1970)*. See: Note, Harmless Constitutional **[***22]** Error: A Reappraisal, 83 Harv. L. Rev. 814 (1970).

In fashioning a harmless error rule in *Chapman*, the Court said: "We prefer the approach of this Court in deciding what was harmless error in our recent case of *Fahy v. Connecticut, 375 U.S. 85, 11 L. Ed. 2d 171, 84 S.Ct. 229*. There we said: 'The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'" In *Coleman v. Alabama, supra*, defendant was not provided counsel at his preliminary hearing and, in remanding the case to the state court to determine whether defendant had been prejudiced by the absence of counsel, the Court said: "The test to be applied is whether the denial of counsel at the preliminary hearing was harmless error under *Chapman v. California*. . . ." Applying that test to the facts in this case, I see no *reasonable possibility* that temporary exclusion of defendant's counsel on the night in question could have contributed even remotely to his conviction. Under statutory law of this State, .10% alcoholic content in the blood raises a legal presumption that the person is under the influence of intoxicants. *G.S. 20-139.1*. Here, **[***23]** in the face of an unchallenged Breathalyzer reading of .23% to .24% alcoholic content in defendant's blood, corroborated by slow speech, a red face, alcoholic breath and a staggered gait, it **[*558]** is not perceived how denial of access to "midnight counsel" was prejudicial in the slightest degree. He had access to counsel from 7 a.m. the following morning until his trial was completed in Forsyth Superior Court in January 1970 -- twenty-two months later! Had his lawyer been admitted, he would have seen only a client with a red face, a thick tongue, smelling of alcohol, too drunk to stand, and probably half asleep. Had his lawyer called a doctor and other witnesses, their eyes would have fallen upon the same cheerful sight. How, then, did the jailer's blunder deprive this defendant of "his only opportunity to obtain evidence which might prove his *innocence?*" (Emphasis ours) The truth is, it did not. I believe it was harmless beyond a reasonable doubt, and defendant's conviction should stand. **[**470]** Where an officer's conduct does not adversely affect the outcome of a trial and does not result in a miscarriage of justice, courts should not reverse just to penalize **[***24]** erring authorities.

In the following cases, even though the defendant's right to consult with his counsel had been delayed or denied, the appellate court held that in the absence of evidence that such misconduct on the part of the authorities adversely affected the outcome of the trial or resulted in a miscarriage of justice, defendant's conviction should stand: *Welk v. State, 99 Tex. Crim. 235, 265 S.W. 914 (1924)*; *Ellis v. State, 149 Tex. Crim. 583, 197 S.W. 2d 351 (1946)*; *Sims v. State, 194 Ark. 702, 109 S.W. 2d 668 (1937)*; *Guerin v. Commonwealth, 339 Mass. 731, 162 N.E. 2d 38 (1959)*. Accord: *Coleman v. Alabama, supra*; *Vanater v. Boles, Warden, 377 F. 2d 898 (1967)*; *State v. Youngblood, 217 So. 2d 98 (Fla. 1968)*. See Annotation: Right to Counsel -- Communication, *5 A.L.R. 3d 1360 (1966)*.

It is significant that after defendant had freely consulted with his counsel for twenty-two months, and after he and his counsel had heard the State's evidence during the trial, defendant has never claimed that he did, in fact, have a defense to the charge against him, or that, had he been permitted to see his counsel on the night of his arrest, he could have presented **[***25]** evidence tending to prove his innocence. He just elected to try the jailer instead.

"The basic purpose of a trial is the determination of truth. . . ." *Tehan v. Shott, 382 U.S. 406, 15 L. Ed. 2d 453, 86 S.Ct. 459 (1966)*. The truth has been determined in this case by the verdict of the jury. Yet the majority permits defendant to use the Constitution not as a shield against injustice but as **[*559]** a sword to avoid the penalty of the law. Such rigid application of constitutional principles is inappropriate in this instance and encourages the vicious habit of drunken driving which has become all too prevalent throughout the State. "There is danger that the criminal law will be brought into contempt -- that discredit will even touch the great immunities assured by the Fourteenth Amendment -- if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free." *Snyder v. Massachusetts, 291 U.S. 97, 78 L. Ed. 674, 54 S.Ct. 330, 90 A.L.R. 575 (1934)*.

For these reasons I respectfully dissent from the majority view and vote to affirm the well-reasoned opinion of Chief **[***26]** Judge Mallard in the Court of Appeals upholding defendant's conviction.

[468]** Justice Lake dissenting:

In my view the defendant's constitutional right to counsel has not been violated. At the time his lawyer was at the jail, no police interrogation of the defendant was in progress or contemplated. No such interrogation followed. This distinguishes the present case from *Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L. Ed. 2d 977*. No lineup for identification, no legal proceeding, such as a preliminary hearing, or other step in the prosecution was being conducted or in preparation. The attorney was not denied access to any such proceeding. I am aware of no previous decision of this Court or of the Supreme Court of the United States which extends the constitutional right of counsel to the right of unlimited jail visitation by counsel at 2 o'clock in the morning, irrespective of the desires of other inmates of the jail to sleep. The defendant was released some five or six hours later.

What this defendant lost by the act of the jailer was not the opportunity for legal advice or counselling but the opportunity to be inspected by a person, not part of the law enforcement **[***27]** personnel, during the period when his drunkenness or sobriety could most readily be determined. For this purpose, a doctor, minister, plumber or school teacher would have served as well as a lawyer. The jailer's denial of such inspection has nothing to do with the constitutional right to counsel. I am aware of no previous decision by this Court or by the Supreme Court **[*560]** of the United States extending the Fourteenth Amendment, or any other provision of the Federal or State Constitution, so far as to require a drunk driver to be set free, and rendered immune to prosecution for his offense, merely because a rude and unaccommodating jailer denied some friend or relative the right to visit his jail cell at 2 a.m. to smell his breath.

This defendant was permitted to telephone his lawyer and did so. Had the lawyer, as a result of that conversation, believed that the defendant was as sober as a judge ought to be and was being framed by the police and the other driver in an automobile accident, it is obvious that, when the jailer denied the lawyer the opportunity to see him, the telephones of the solicitor, the chief of police or sheriff and the mayor would have been immediately **[***28]** and insistently ringing. No such suggestion appears in this record. This record leaves no reasonable doubt but that the defendant was exceedingly drunk. It is clear that, as the opinion of Justice Huskins demonstrates, his defense at his trial was not prejudiced by the inability of his lawyer to confer with him in the jail.

State v. Knoll

Supreme Court of North Carolina

September 11, 1987, Heard in the Supreme Court ; June 30, 1988, Filed

Nos. 119PA87, 120PA87, 121PA87

Reporter
322 N.C. 535 *; 369 S.E.2d 558 **; 1988 N.C. LEXIS 474 ***

STATE OF NORTH CAROLINA v. CRAIG RAYMOND KNOLL; STATE OF NORTH CAROLINA v. SAMSON WARREN, JR.; STATE OF NORTH CAROLINA v. BENNIE GARLAND HICKS

Prior History: [*1]** On discretionary review pursuant to N.C.G.S. § 7A-31 of three unanimous decisions of the Court of Appeals reversing orders entered in the Superior Court, Wake County, by *Farmer, J.*, on 19 February 1986 affirming the dismissal of driving while impaired charges by judges in the district court division in each of the cases and remanding each of the same for trial. State v. Hicks, 84 N.C. App. 237, 352 S.E. 2d 275 (1987); State v. Knoll, 84 N.C. App. 228, 352 S.E. 2d 463 (1987); State v. Warren, 84 N.C. App. 235, 352 S.E. 2d 276 (1987).

Disposition: Reversed.

Counsel: *Lacy H. Thornburg, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, and Linda Anne Morris, Associate Attorney General, for the State*.

Crumpler & Scherer, by Sally H. Scherer and William B. Crumpler, for defendant-appellants.

Judges: Meyer, Justice

Opinion by: [*3]** MEYER

Opinion

[*536] [559]** Defendant in each of these consolidated cases was charged with driving while impaired (DWI) in violation of N.C.G.S. § 20-138.1. Each defendant thereafter made a pretrial motion in Wake County District Court to dismiss the charge against him for violation of certain statutory and constitutional rights. The presiding judge in each case made findings of fact and conclusions of law and granted the motion to dismiss. The State appealed in all three cases to the Superior Court, Wake County, and because of the common questions of law involved, the State's appeals were consolidated for hearing.

At a hearing in Wake County Superior Court, Judge Robert L. Farmer adopted the findings and conclusions of the district court judges, made additional findings and conclusions, and affirmed the dismissals entered by the judges in the district court division. The State appealed, and the Court of Appeals reversed the judgments of the superior court and remanded all three cases for trial. We granted discretionary review in all three cases on 5 May 1987, and upon motion of the State (with consent of defendants), the cases were consolidated for briefing and oral argument. **[***4]** Concluding, as we do, that the Court of Appeals erred in reversing the judgments entered by the trial judge in each of the three cases, we reverse.

Before reviewing the three cases individually, we note, by way of background, the general obligations of the magistrate in such cases. Upon a defendant's arrest for DWI, the magistrate is obligated to inform him of the charges against him, of his right to communicate with counsel and friends, and of the general circumstances under which he may secure his release. *N.C.G.S. § 15A-511(b)* (1983). A defendant may be confined or otherwise **[*537]** secured if he is so unruly as to disrupt and impede the proceedings, becomes unconscious, is grossly intoxicated, or is otherwise unable to understand the procedural rights afforded by the initial appearance before the magistrate. *N.C.G.S. § 15A-511(a)(3)* (1983).

The magistrate must also determine conditions for pretrial release of the defendant, *N.C.G.S. § 15A-533(b)* (1983), by adhering to one of the following courses: (1) release the defendant on his written promise to appear; (2) release the defendant upon his execution of an unsecured appearance bond; (3) place the defendant in the custody **[***5]** of a designated person or organization; or (4) require the execution of an appearance bond in a specified amount secured by a cash deposit of the full amount of the bond, by a mortgage, or by at least one solvent surety, *N.C.G.S. § 15A-534(a)* **[**560]** (1983). In determining the particular pretrial condition to impose, the magistrate must take into account the nature and circumstances of the offense charged, the weight of the evidence against the defendant, whether the defendant is intoxicated to such a degree that he would be endangered by being released without supervision, and any other evidence relevant to the issue of pretrial release. *N.C.G.S. § 15A-534(c)* (1983). We now proceed to review the three cases *seriatim*.

Knoll Case

David Knoll was stopped by Officer T. C. Dunn of the Raleigh Police Department on South Saunders Street in Raleigh at 1:15 p.m. on 17 April 1984 and charged with driving while impaired. He was taken to the Wake County Courthouse, where he was administered an intoxilyzer test at 2:31 p.m. The results of the analysis showed defendant to have an alcohol concentration of 0.30. He was taken before a magistrate who set bond at $ 300.00. Between 4:00 p.m. **[***6]** and 5:00 p.m., Knoll asked several times to be allowed to telephone his father. He was allowed to make the call at about 5:00 p.m. Defendant's father stated that the magistrate informed him over the phone that his son could not be released until 11:00 p.m. and that, as a result, he did not go to the police station immediately but, rather, posted his son's $ 300.00 bail later that night at 11:00 p.m.

At a hearing on defendant's Motion to Dismiss, the trial judge made, inter alia, the following findings of fact:

> **[*538]** 4. After taking the intoxilyzer test, the defendant appeared with Officer Dunn before a magistrate who formally charged the defendant with driving while impaired. The magistrate asked the defendant no questions about his family ties, employment, financial resources, length of residence in the community, record of convictions, or any other matter relating to conditions that would affect a bond in his case. . . .
> . . . .
>
> 6. When the defendant was placed in jail, he let the jailer know that he would like to call his father at 4:00 P.M. when he knew his father would be home. He reasonably believed that his father would be the best person to call to come get him **[***7]** and to make arrangements for his bond. He made several requests of the jail staff to be allowed to call his father before and around 4:00 P.M., but it was shortly after 5:00 P.M. before he was given an opportunity to make a phone call. He did call his father and inform him of his situation, including the amount of the bond.
>
> 7. . . . Mr. Knoll introduced himself to the magistrate on the phone and specifically identified himself as the defendant's father and stated that he wanted to come get his son. The magistrate responded that he could not come and get the defendant until 11:00 P.M. Mr. Knoll made it clear that he would like to get his son out right then, that he did not want him to have to stay in jail, and that he could come right away and post his bond. The magistrate responded, "The subject is not debatable." Therefore, Mr. Knoll waited until 11:00 P.M. to secure his son's release, and he posted a cash bond for him. . . . It appeared to Mr. Knoll when he talked with his son on the phone that his son was oriented and coherent and not noticeably impaired in either his manner of speech

or in the substance of what he said. He detected nothing in talking with him on the phone **[***8]** that would indicate that the defendant would cause any problem if he were released immediately to Mr. Knoll's custody.

8. . . . [Mr. Knoll] was an appropriate person to take custody of his son when he talked with the magistrate at approximately 5:00 P.M., and it was not reasonable for the magistrate **[*539]** to deny him any opportunity to secure his son's release forthwith. Because the magistrate made it clear to Mr. Knoll that he could not get his son out of jail before 11:00 P.M., Mr. Knoll reasonably assumed nothing else could be done at that time. He therefore made no further efforts to obtain his sons's [sic] release before 11:00 P.M.

[561]** Warren Case

On Thursday, 29 March 1984, at 10:11 p.m., defendant Samson Warren, Jr., was operating his 1981 Ford truck on Dan Allen Drive near Yarboro Drive on or near the campus of North Carolina State University (NCSU). Officer Scaringelli of the NCSU Campus Police stopped the defendant and later charged him with DWI.

The defendant was taken to the Wake County Courthouse and was administered an intoxilyzer test at 11:08 p.m. The results of this test showed that defendant had an alcohol concentration of 0.25. The defendant was **[***9]** brought before a magistrate, and a secured bond of $ 500.00 was set.

A Dr. Martin, the head of the Computer Science Department at NCSU, and his son had arrived at the magistrate's office between 11:00 p.m. and 11:30 p.m. while the defendant was in the intoxilyzer room. They spoke with the defendant and observed his condition. Dr. Martin had on his person $ 300.00 and was willing to assume responsibility for the defendant. The magistrate informed Dr. Martin that the defendant would have to go to jail until 6:00 the following morning in order to sober up.

John Green Lewis, III, also went to the Wake County Courthouse that night to attempt to secure the defendant's release. Mr. Lewis arrived at the courthouse between 1:00 a.m. and 1:30 a.m. on Friday, 30 March 1984, and was informed that a release was not possible until 6:00 a.m. that morning. Mr. Lewis had on his person some $ 200.00 to post bond for the defendant. He made no further attempt to secure the defendant's release upon learning that release was not imminent and did not request to see Warren.

At approximately 2:00 a.m., the defendant was committed to the Wake County Jail. He was released at about 8:00 a.m. when Dr. **[***10]** Martin posted bond for him.

[*540] At the hearing on defendant's Motion to Dismiss, the trial judge made, inter alia, the following findings of fact:

3. Officer Scaringelli brought the defendant to the Wake County Courthouse and processed him in a routine manner, including administration of an intoxilyzer test. While the defendant and Officer Scaringelli were in the room used for administration of chemical tests in DWI cases in the basement of the Wake County Courthouse, Dr. Donald C. Martin and his nineteen year old son arrived at the magistrate's office to offer assistance to the defendant. They arrived between 11:00 P.M. and 11:30 P.M. after Dr. Martin had been notified of the defendant's arrest, and they informed the magistrate of their purpose.

4. After taking the intoxilyzer test, the defendant appeared with Officer Scaringelli before the magistrate shortly before 11:30 P.M. The magistrate formally charged the defendant with driving while impaired and transporting spirituous liquor in his vehicle. The magistrate did not advise the defendant concerning his right of communication with counsel and friends. . . .

. . . .

6. Dr. Martin and his son were sober, responsible **[***11]** adults who were willing and able to assume responsibility for the defendant for as long as required. Further, they could have arranged his pretrial release within a short period of time if permitted by the magistrate. Dr. Martin had some $ 300.00 on his person, which would have been more than adequate to secure the defendant's appearance in court. The magistrate was aware of these circumstances or should have been aware of them, and he nevertheless committed the defendant to the Wake County Jail notwithstanding the ability and willingness of Dr. Martin and his son to assist

the defendant in gaining pretrial release immediately. The magistrate stated that the defendant would have to remain in the jail until 6:00 o'clock the following morning. Mr. Warren was committed to the jail at approximately 11:30 P.M. Dr. Martin and his son left since the magistrate made his intention clear. Dr. Martin arranged the release of the defendant at about 8:00 o'clock the following morning.

[*541] **[**562]** 7. Between 1:00 A.M. and 1:30 A.M. on Friday, March 30, John G. Lewis, III and a friend arrived at the Wake County Courthouse to confirm the arrest of the defendant and to try to arrange for his **[***12]** release on bond. They approached the magistrate and were told that Mr. Warren was in jail. When they inquired about his bond, they were told something to the effect that he could not be released until around 6:00 o'clock that morning. Mr. Lewis and his friend had about $ 200.00 between them to apply toward his bond and could have arranged if necessary for additional funds or for the services of a bondsman in order to obtain the release of the defendant. Mr. Lewis and his friend were sober, responsible adults and were willing and able to assume responsibility for the defendant as long as required. They left when advised by the magistrate that the defendant could not be released until 6:00 o'clock that morning.

Hicks Case

Defendant Hicks was arrested for driving while impaired at 12:45 a.m. on 28 April 1984 in or near Knightdale by Officer Dail of the Knightdale Police Department. He was taken to the Wake County Courthouse; was given an intoxilyzer test, which indicated an alcohol concentration of 0.18; and was taken before a magistrate. Defendant was allowed to call his wife at their home in Wendell at 1:30 a.m., but she did not have a vehicle at the time and could **[***13]** not come to the courthouse to pick him up. When he was charged with DWI, he was not allowed to post his own $ 200.00 bond, though he had on his person over $ 2,000 in cash. Defendant remained in jail until 6:00 a.m. that morning.

At a hearing on Hicks' Motion to Dismiss, the trial judge made, inter alia, the following findings of fact:

4. After taking the intoxilyzer test, the defendant appeared with Officer Dail before a magistrate who formally charged the defendant with driving while impaired. From what the court can determine from the available records and evidence, the magistrate apparently did not inform the defendant concerning his rights about communication with counsel and friends and apparently asked neither him nor the arresting officer any questions about matters that would affect the bond in this case. . . .

[*542] 5. When he advised the defendant that his bond was $ 200.00, the magistrate asked him if he had any money. The defendant responded that he did have enough money on him to post a $ 200.00 bond and showed him at least $ 200.00. In fact, he then had some $ 2,200.00 on his person. . . . [T]he magistrate committed the defendant to jail apparently based **[***14]** upon the inability of the defendant's wife to come pick him up at that time. The time of commitment was between 1:45 A.M. and 2:00 A.M. and the defendant remained in jail thereafter until about 6:00 A.M. the same morning.

. . . .

7. Had the defendant been released immediately upon posting bond for himself, he could have caught a taxi to go home and could have been in the presence of his wife within a short period of time, probably within 30 mintues [sic] considering the distance between Raleigh and Wendell. Too, there were others that he could have gone to see and have observe his condition had he chosen to do so, and they could have been possible witnesses for him. Moreover, he would have had the opportunity upon release to secure further chemical testing in an attempt to gather evidence in his behalf as to his alcohol concentration.

In each of the three cases, the trial judge made specific findings to the effect that the defendant created no disturbance and was cooperative and polite; that there was no clear and convincing evidence that, if he were released, he would create a threat of physical injury to himself or others or of damage to property; and that therefore **[***15]** the defendant should have been released.

While a magistrate may refuse to release one who is intoxicated to such a degree that he would be endangered by being released **[**563]** "without supervision," here it is quite clear that such was not the situation in any of the three

cases. In the case of Knoll, whose intoxilyzer reading was 0.30, and in the case of Warren, whose reading was 0.25, neither would have been released "without supervision" but into the custody of appropriate people who were seeking their release. In the case of Hicks, whose reading was 0.18 and whose wife was temporarily unavailable to pick him up, he could have, by the use of a taxi, been in the presence of his wife within a short period of time.

With only insignificant variations in the three judgments, the specific finding in each case was substantially as follows:

> **[*543]** At no time . . . did the defendant create any disturbance. He cooperated as required during his processing and was polite. His condition was not such to suggest that he would create problems of any kind if released without commitment to jail. There was no clear and convincing evidence that any impairment of his mental or physical faculties **[***16]** presented a danger, if he were released, of physical injury to himself or others or damage to property, and there was no apparent reason for him not to be released forthwith in accordance with Article 26 of Chapter 15A of the General Statutes.

Also *in each of the three cases*, the trial judge found that the defendant's confinement was at a time crucial to his ability to gather evidence and have witnesses to his condition at the time. This finding in each case reads substantially as follows:

> The defendant's confinement in jail came at a crucial time when he could have gathered evidence in his behalf by having friends or others who he could have contacted observe him and form opinions as to his condition. That opportunity to gather evidence was lost because of his commitment to jail and because of his not being informed properly by the officials processing him of his various rights. The defendant has been seriously prejudiced in preparing his defense because of his commitment to jail, which was unnecessary and contrary to standards of pretrial release. . . . To assume that his lost opportunity to gather evidence in his behalf was not prejudicial is to assume that which **[***17]** is incapable of proof. The Court cannot assume the infallability [sic] and credibility of the State's witnesses or the certitude of their tests.

It is to be noted further that *in each of the three cases* the trial judge found that the magistrate failed to carry out his responsibilities regarding pretrial release under N.C.G.S. §§ 15A-511(b), -533(b), and -534(c). The trial judge found in each of the cases substantially as follows:

> [T]he magistrate failed to inform the defendant of the circumstances under which he could secure pretrial release as required by G.S. 15A-511(b). Further, the magistrate failed to determine conditions of pretrial release in accordance with G.S. 15A-533(b) and by [-]534(c).

[*544] It is quite clear that the magistrates involved in these particular cases were on special notice of each defendant's right to be released upon meeting certain conditions. In the findings of fact *in each of the three cases*, this finding was made:

> The Honorable James H. Pou Bailey and the Honorable George F. Bason by joint order dated January 11, 1978, have required in Wake County that "a defendant being held for public intoxication or driving under **[***18]** the influence must be released as soon as the defendant is able to meet a magistrate's conditions of pretrial release."

With regard to this standing order, the trial judge *in each of these three cases* made a specific finding of fact that "[t]he magistrate did not carry out the spirit and intent of this requirement adequately."

Finally, the trial judge *in each of the three cases* made the following conclusions of law:

> 1. The facts of this case demonstrate that the defendant has been deprived of certain constitutional and statutory rights as claimed in his Motion to Dismiss . . . . Such deprivation has prejudiced him in the preparation of his defense and has resulted in an unwarranted **[**564]** loss of liberty for a significant period of time. . . .

2. The only effective remedy for the violations of the defendant's rights is dismissal of the driving while impaired charge that led to his confinement.

In reversing the dismissal of the DWI charges and remanding the cases for trial, the Court of Appeals agreed with the findings of the trial judge in each case that the magistrate failed to inform defendant of the circumstances under which he could secure his pretrial release **[***19]** as required by N.C.G.S. § 15A-511(b)(3); that the magistrate failed to determine conditions of pretrial release in accordance with N.C.G.S. §§ 15A-533(b) and -534(c); and that, but for these statutory deprivations, each defendant could have secured his release from jail and could have had access to friends and family.

The Court of Appeals further concluded that the *per se* prejudice rule of State v. Hill, 277 N.C. 547, 178 S.E. 2d 462 (1971), **[*545]** does not apply when a person is charged under N.C.G.S. § 20-138.1(a)(2) with driving "[a]fter having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.10 or more." *See* N.C.G.S. § 20-138.1(a)(2) (1983). The panel below further concluded in each case that the district court therefore erred in applying the *per se* prejudice rule of *Hill* and that, though each defendant had been substantially deprived of his statutory rights, the evidence in each case was insufficient to support the trial judge's finding of prejudice and was therefore inadequate to support the dismissal of the case.

We agree with the Court of Appeals that application **[***20]** of a *per se* prejudice rule as set out in *Hill* is inappropriate in cases involving a violation of N.C.G.S. § 20-138.1(a)(2) (driving with an alcohol concentration of 0.10 or more). As the Court of Appeals correctly stated in its opinion below:

> Because of the change in North Carolina's driving while intoxicated laws, denial of access is no longer inherently prejudicial to a defendant's ability to gather evidence in support of his innocence in every driving while impaired case. While denial of access was clearly prejudicial in *Hill*, under the current 0.10 statute, a defendant's only opportunity to obtain evidence is not lost automatically when he is detained, and improperly denied access to friends and family. Prejudice may or may not occur since a chemical analysis result of 0.10 or more is sufficient, on its face, to convict.

State v. Knoll, 84 N.C. App. 228, 233, 352 S.E. 2d 463, 466. We therefore agree with the Court of Appeals that, in those cases arising under N.C.G.S. § 20-138.1(a)(2), prejudice will not be assumed to accompany a violation of defendant's statutory rights, but rather, defendant must make a showing that he **[***21]** was prejudiced in order to gain relief.

Having so stated, we hasten to add that, in the view of the Court, each of the defendants in these cases made a sufficient showing of a substantial statutory violation and of the prejudice arising therefrom to warrant relief. More precisely, we conclude that the findings of the district court in each case were in no way challenged, that the evidence presented in each case was adequate to support the finding of fact that the defendant was prejudiced, and that this finding in turn supports the trial judge's **[*546]** conclusion that defendant was irreparably prejudiced. Accordingly, we reverse the decision below.

The Court of Appeals correctly concluded that there are three statutes that are applicable to the issue of whether there was a substantial violation of defendant's statutory right of access to counsel and friends. First, N.C.G.S. § 15A-511(b) states:

> (b) Statement by the Magistrate. -- The magistrate must inform the defendant of:
>
> (1) The charges against him;
>
> (2) His right to communicate with counsel and friends; and
>
> (3) The general circumstances under which he may secure release under the provisions of Article 26, **[***22]** Bail.

[565]** Second, N.C.G.S. § 15A-533(b) reads in applicable part as follows:

> (b) A defendant charged with a noncapital offense must have conditions of pretrial release determined, in accordance with G.S. 15A-534.

Third, N.C.G.S. § 15A-534(c) provides in pertinent part the following:

> (c) In determining which conditions of release to impose, the judicial official must, on the basis of available information, take into account the nature and circumstances of the offense charged; the weight of the evidence against the defendant; . . . whether the defendant is intoxicated to such a degree that he would be endangered by being released without supervision; . . . and any other evidence relevant to the issue of pretrial release.

The Court of Appeals also correctly concluded (1) that the trial judge properly found in each case that the magistrate failed to inform the defendant of the circumstances under which he could secure his pretrial release and failed to determine conditions of pretrial release and (2) that, but for these failures and the resulting deprivation of his statutory rights, each defendant could have secured his release from jail and could have had access **[***23]** to friends and family.

[*547] These findings, supported by the evidence of record, and indeed unchallenged by any evidence to the contrary, are conclusive on appeal. Fast v. Gulley, 271 N.C. 208, 155 S.E. 2d 507 (1967). Thus, as the Court of Appeals recognized, it is established in this case that each defendant was substantially deprived of his rights. The panel below erroneously concluded, however, that the substantial deprivation of defendants' statutory rights did not result in prejudice to them. In effect, the Court of Appeals concluded that each trial judge's findings did not support his conclusion that the substantial deprivation of each defendant's rights "prejudiced him in the preparation of his defense and has resulted in an unwarranted loss of liberty for a significant period of time" and that "[t]he only effective remedy for the violations of the defendant's rights is dismissal of the driving while impaired charge that led to his confinement." It is in this latter conclusion that the panel below erred.

We find that the trial judges' conclusions of prejudice are amply supported by the unchallenged findings, which are themselves amply **[***24]** supported by the evidence. The Court of Appeals itself, in its opinion below, stated that a defendant in a case such as this

> must show that "lost evidence or testimony would have been helpful to his defense, that the evidence would have been significant, and that the evidence or testimony was lost" as a result of the statutory deprivations of which he complains.

State v. Knoll, 84 N.C. App. 228, 234, 352 S.E. 2d 463, 466 (1987) (quoting State v. Dietz, 289 N.C. 488, 493, 223 S.E. 2d 357, 360 (1976)). Such was exactly the situation in the three cases now before us, and the several trial judges correctly so found.

Each defendant's confinement in jail indeed came during the crucial period in which he could have gathered evidence in his behalf by having friends and family observe him and form opinions as to his condition following arrest. This opportunity to gather evidence and to prepare a case in his own defense was lost to each defendant as a direct result of a lack of information during processing as to numerous important rights and because of the commitment to jail. The lost opportunities, in all three **[***25]** cases, to secure independent proof of sobriety, and the lost chance, in one of the cases, to secure a second test for blood alcohol content **[*548]** constitute prejudice to the defendants in these cases. That the deprivations occurred through the inadvertence rather than the wrongful purpose of the magistrate renders them no less prejudicial. State v. Graves, 251 N.C. 550, 112 S.E. 2d 85 (1960).

Accordingly, the decision of the Court of Appeals is reversed, and the cases are remanded to the Court of Appeals for further remand to the Superior Court, Wake County, **[**566]** for reinstatement of the judgment of dismissal in each of the cases.

Reversed.

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