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Stevens v. State Petition For Review Dckt. 39218

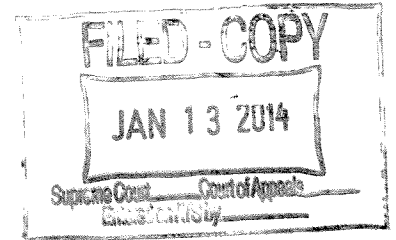
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IN THE SUPREME COURT OF THE STATE OF IDAHO

EDWARD STEVENS,)	
)	
Petitioner-Appellant,)	No. 39218
)	(Ada CV-PC-2009-13971)
)	
v.)	BRIEF IN SUPPORT OF
)	PETITION FOR REHEARING
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

Appellant Edward Stevens submits the following in support of his Petition for Rehearing. Rehearing should be granted because the Court’s ruling regarding the *Brady v. Maryland*, 373 U.S. 83 (1963), cause of action is both contrary to and an unreasonable application of that case and its progeny. The ruling is also based upon an unreasonable determination of fact based upon the record below.

The Court resolved the *Brady* claim as follows:

The district court denied this claim after an evidentiary hearing, finding, in relevant part, that Stevens “failed to prove by a preponderance of the evidence the eyes were removed

post-embalming.” We need not address the district court's factual finding because an examination of the record indicates that this is not an instance where the prosecutor violated her responsibilities under *Brady*. Here, it is clear the mortuary report was not in the prosecutors' (or their agents') possession or control and could not be reasonably imputed to them. Rather, the funeral home (which was clearly not a State agent) had sole possession of the report until well after the trial in 2003 when, responding to an inquiry from the investigator for the public defender's office, the prosecutor requested the funeral home's files and forwarded them to the investigator and defense counsel.

In addition, even assuming the prosecutor or other members of the investigative team knew of the existence of the report and/or of the fact that the eyes were removed post-embalming, the evidence is, on its face, devoid of indications that it was exculpatory. On the record we have before us, there is little to no basis upon which to conclude the prosecutor or other members of the investigative team would or should have had any reason to believe this fact constituted material exculpatory evidence, such that the evidence must be disclosed. The record indicates it was not until Stevens obtained the opinion of several experts during the post-conviction proceedings that any inkling arose indicating the evidence was potentially exculpatory. This is distinguishable from evidence that a prosecutor and/or the investigative team can be reasonably expected to discern as exculpatory—such as a witness's statement identifying an alternate perpetrator than the defendant. Additional analysis, beyond the ken of the prosecutor and investigation team, was necessary in this case to reveal the exculpatory nature of the evidence in question. Under these circumstances, knowledge of the evidentiary significance of the embalming report and/or the timing of the removal of the child's eyes cannot reasonably be imputed to the prosecutor.

Stevens v. State, --- Idaho ---, --- P.3d ---, 2013 WL 6423426*5 (Ct. App. 2013).

The Court, however, errs in four respects and rehearing should be granted to correct those errors.

1. The embalming report is not the withheld evidence.

First, it is not the embalming report which is the exculpatory evidence; it is the fact that the eyes were removed post-embalming. The report documents that the eyes were still present at

the time of the embalming, but it is the fact that the eyes were not removed at autopsy and not removed until after the embalming which is *Brady* evidence. Even if the embalming report did not exist, the prosecution team withheld *Brady* evidence because it was well aware that the eyes were not removed at the autopsy because the pathologist, coroner, deputy coroner and two sheriff deputies were present at the autopsy. In addition, someone from the prosecution team removed the eyes post-embalming, preserved them and arranged for them to be shipped to Dr. Crawford.

2. The withheld evidence is exculpatory on its face.

Second, the evidence of post-embalming removal is exculpatory on its face. While the Court asserts that “there is little to no basis to conclude the prosecutor or other members of the investigation team would or should have any reason to believe this fact constituted material exculpatory evidence,” *Stevens* at 5, that is not so. To the contrary, the withheld evidence provides a common-sense reason why Dr. Kent did not observe macular folding when he examined the child’s eyes at the hospital when Dr. Crawford observed the folds months later in his post-mortem examination. Two different observations of the same object can be explained in two ways: 1) one of the two observations is inaccurate or 2) the condition of the object has changed between the two observations. That is why car rental agencies have their renters inspect the car prior to leaving the lot so that any damage upon return can be attributed to the renter. The agency assures that the driver agrees upon the condition of the vehicle so that any change observed at the time of return can be attributed to a change in the vehicle’s condition. Here, however, the jury could not know whether Dr. Kent did not observe the folds because they were not present or because his observations were inaccurate. The evidence of post-embalming removal, even without any expert testimony to explain the full importance of that fact, provided an easily understood explanation of why the condition of the eyes had changed. Further, Dr.

Slaughter testified that he consulted with two forensic pathologists and was told to remove the eyes at autopsy. (Petitioner's Exhibit D, Vol. II, p. 378, ln. 1-14; Exhibit X, pg. 40, ln. 3 – pg. 41, ln. 9.) Thus, at least one member of the prosecution team was aware of the importance of the post-embalming removal.

The prosecution team withheld plainly exculpatory evidence when it did not reveal the fact that it did not remove the eyes until after embalming. It knew that Dr. Crawford was going to testify about the presence of macular folds. It knew that Dr. Kent did not see them. It also knew that the condition of the eyes had been altered by the embalming, even if it did not know all the ramifications of the embalming process. Thus, to conclude that the evidence was not plainly exculpatory is an unreasonable determination of the facts upon the record.

3. The question of whether the prosecution team knew the evidence was exculpatory is irrelevant to the *Brady* analysis.

The Court next errs by finding that the *Brady* rule does not apply when the state withholds evidence which it does not realize is exculpatory. 2013 WL 6423426*8, *citing*, *People v. Kirkpatrick*, 650 N.E.2d 267 (Ill. App. 1995). However, that conclusion is foreclosed by *Brady* itself. As this Court has written, “A defendant’s due process rights are violated where the prosecution fails to disclose exculpatory evidence that is material either to guilt or punishment, *irrespective of the good faith or bad faith of the prosecution.*” *State v. Ward*, 135 Idaho 68, 72, 14 P.3d 388, 392 (Ct. App. 2000), *citing* *Brady*, 373 U.S. at 87 (emphasis added). It does not matter if the prosecutor did not disclose due to its good-faith belief the evidence was not exculpatory. “Moreover, under *Brady* an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment. ‘If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the

prosecutor.”” *Strickler*, 527 U.S., at 288, quoting *United States v. Agurs*, 427 U.S. 97, 110 (1976), overruled on other grounds in *United States v. Bagley*, 473 U.S. 667 (1985).

The reason why the good-faith of the prosecutor is not relevant is because *Brady* is intended to provide the defendant with a fair trial, not to punish the prosecutor. “The principle . . . is not punishment of society for the misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when the accused is treated unfairly.” *Brady, supra*. That is why the prosecutor does not even need to be personally aware of the evidence for *Brady* to apply. “In order to comply with *Brady*, . . . ‘the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case[.]’” *Strickler v. Greene*, 527 U.S. 263, 281 (1999), quoting *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995). It does not matter if the prosecutor did not see the exculpatory value of the evidence if the withholding of that evidence deprived the defendant a fair trial, which is undoubtedly the case for Mr. Stevens.

It is noteworthy that this Court is the only court to have ever cited *People v. Kirkpatrick*, for the proposition that the prosecutor must have some knowledge of the withheld evidence’s exculpatory nature. Not only is that rule contrary to the text of *Brady* itself, the case relied upon by the *Fitzpatrick* Court, *United States v. Moore*, 25 F.3d 563 (7th Cir. 1994), does not support its conclusion. *Moore* did not involve a case where the prosecutor was aware of the evidence but did not recognize its exculpatory nature. The prosecutor in *Moore* was simply not aware of the evidence at all. 25 F.3d at 569. (“The district court held a hearing and determined, among other things, that the government did not have possession or knowledge of the information concerning

Ms. Jackson's prior conviction.”). *Moore* has no application to a case where the prosecutor is aware of the evidence but not of its exculpatory nature.

The Court has misapplied *Brady* by creating a new requirement that the defendant prove that the prosecutor knew or should have known of the exculpatory value of the withheld evidence. Until now, there were only three essential components of a true *Brady* violation: 1) the evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; 2) the evidence must have been suppressed by the state, either willfully or inadvertently; and 3) prejudice must have ensued. *Strickler v. Greene*, 527 U.S. at 281–82. No requirement that the exculpatory nature of the evidence be apparent to the prosecution exists under *Brady*. All that is actually required is a showing that the evidence would have been favorable to the accused. That showing was made by Mr. Stevens.

Kirkpatrick is an outlier case, inconsistent with the text and purpose of *Brady* and a case which no court – save this one – has relied upon in the nine years since its publication. It is also contrary to the well-established line of Idaho cases which follow *Brady*'s holding that the good-faith of the prosecutor is irrelevant. See, e.g., *Ward, supra*. (Perhaps the above is why the state did not even cite to *Kirkpatrick* in its brief.) Thus, this Court should grant rehearing to reconsider the case without reliance upon the erroneous ruling in *Kirkpatrick*.

4. The withheld evidence is also impeaching.

It is long-established that the duty under *Brady* “encompasses impeachment evidence as well as exculpatory evidence,” *Strickler*, 527 U.S. at 280, citing *United States v. Bagley*, 473 U.S., at 676. And a serious break in the chain of custody for the eyes is plainly impeachment material. The evidence is also impeaching because it undermines Dr. Crawford’s testimony about the macular folds because the eyes were not in the same condition as when Dr. Kent

examined them *in situ*. As noted above, Dr. Slaughter had been informed by two forensic pathologists that the eyes should be removed at the time of the autopsy. So, he knew that the failure to follow recommended medical protocol was impeaching. Further, no specialized medical knowledge was required for the members of the prosecution team to know the post-embalming removal of the eyes was a procedural error which the defense was entitled to bring to the jury's attention in order to attack Dr. Crawford's testimony. This Court, however, failed to address the fact that the evidence was plainly impeaching under *Brady*. Thus, even if the Court was correct in concluding the evidence was not clearly exculpatory and consequently there was no duty to disclose such evidence, this Court still erred in denying the *Brady* claim because the evidence was impeaching.

5. Conclusion.

Brady was violated in this case because: 1) the prosecution team was in possession of the knowledge that the eyes had not been removed at the autopsy but rather had been removed post-embalming, triggering the prosecutor's duty to disclose (even if the state was not aware of the exculpatory value of the evidence); 2) the evidence was exculpatory on its face because it provided an explanation as to why Dr. Kent did not see the macular folds when the child was alive when Dr. Crawford saw them post mortem; but even if it were not exculpatory or its exculpatory value was not apparent, 3) the evidence was obviously impeaching and was still required to be disclosed. The Court's conclusion that the embalming report need not have been disclosed because it was not in the possession of the prosecution team misses the *Brady* issue entirely. The embalming report is not the evidence which was withheld. Its conclusion that the evidence of the post-embalming removal was not plainly exculpatory is an unreasonable determination of facts of the case. Its conclusion that the prosecutor must know about the

exculpatory value is contrary to *Brady*. And its failure to even consider that the evidence was impeaching is contrary to controlling Supreme Court precedent post-*Brady*. Accordingly, rehearing should be granted.

Respectfully submitted this 13th day of January, 2014.

A handwritten signature in black ink, appearing to read "Dennis Benjamin", written over a horizontal line.

Dennis Benjamin
Attorney for Edward Stevens

CERTIFICATE OF SERVICE

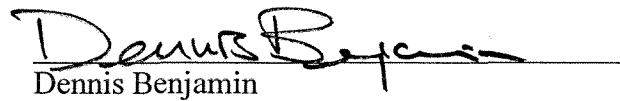
I CERTIFY that on January 13, 2014, I caused a true and correct copy of the foregoing document to be:

mailed

hand delivered

faxed

to: Kenneth K. Jorgensen
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Criminal Law Division
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Dennis Benjamin