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McDOWELL v. DIXON No. 61328 (4th Cir. (N.C.) June 21, 1988)

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McDOWELL v. DIXON

No. 61328
(4th Cir. (N.C.) June 21, 1988)
(Westlaw, SCT library)

The Fourth Circuit Court of Appeals held that McDowell was denied due process of law at his trial by the nondisclosure of certain exculpatory evidence held by the prosecution and not discoverable by the defendant. Judgment of the district court was reversed with instructions to issue the writ of habeas corpus, unless petitioner be tried anew within such reasonable period as the district court may fix. **Reversed and Remanded.**

FACTS

Petitioner, Robert Henry McDowell, was tried and convicted of first degree murder and felonious assault in the Superior Court of Johnston County, North Carolina in 1979. Petitioner was sentenced to death on the first degree murder conviction and twenty years in prison for the assault conviction.

Sometime after the trial, information came to petitioner's attorneys that the prosecution was in possession of certain exculpatory evidence that had not been disclosed to the defendant, despite a general request for discovery prior to trial. Petitioner claimed that the prosecution violated the principles set out in *Brady v. Maryland*, 373 U.S. 83 (1963). In *Brady*, the U.S. Supreme Court held that the defendant is entitled, upon a general request for discovery, to all exculpatory material pertaining to guilt or punishment which may be in the possession of the prosecution. The exculpatory evidence the court found to have been wrongfully withheld in *McDowell* went to the credibility of one of the victims and other witnesses. Statements made to the police on the night of the incident contained inconsistencies, which could have been used to impeach the prosecution witness.

The second issue petitioner raised went to a jury instruction which was given and alleged to be in violation of a recent U.S. Supreme Court ruling on burden-shifting instructions. *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). The court did not address this issue since the court found the first claim meritorious.

CASE HISTORY

Petitioner pursued postconviction remedies and was granted a new trial by the trial court. The state appealed and the North Carolina Supreme Court vacated the trial court's order and on remand the trial court denied any further relief. *State v. McDowell*, 310 S.E.2d 301 (1984). The Supreme Court of North Carolina declined to review the case. A petition for writ of certiorari was denied by the U.S. Supreme Court. *McDowell v. North Carolina*, _____ U.S. _____, 90 L.Ed.2d 732 (1986). Petitioner then filed for a writ of habeas corpus in the federal district court, which was denied. Petitioner appealed to the Fourth Circuit Court of Appeals which reversed the district court.

HOLDINGS

The court reviewed the *Brady* doctrine stating 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 punishment, irrespective of the good faith or bad faith of the prosecution." The rationale of the rule is not to punish the prosecutor for misconduct but rather to insure the accused is not denied a fair trial.

The *Brady* doctrine, as later restated in *United States v. Agurs*, 427 U.S. 97 (1976), applies in four situations: 1) where the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony, 2) when there has been suppression of specific evidence described in a pretrial request, 3) where the defense makes no pretrial request for exculpatory evidence, or 4) where, lacking specific knowledge of what to request, defense only makes a general request for exculpatory material. In a more recent case, *State v. Bagley*, 473 U.S. 667 (1985), the U.S. Supreme Court reaffirmed its earlier holding that *Brady* material included impeachment evidence.

As explained below, the effect of *Brady* violations is assessed by reference to the importance of the evidence not disclosed. Nevertheless, courts are naturally sympathetic to the plight of a prosecutor who must sift through his files with only case law as a guide to his duty to disclose. *Brady* violations are as a practical matter easier to establish when requested as specifically as possible. Indeed, there is a greater risk that evidence withheld will never be subject to measurement by the *Brady* standard if only a general request has been made.

The test for judging whether a *Brady* violation is harmless error is to look at the quality of the evidence withheld and whether there is a reasonable probability that the outcome would have been different if the evidence had been available. Thus, in a situation where the withheld evidence would create a reasonable doubt, a constitutional error has been committed and the conviction or punishment cannot stand.

In *McDowell* the court held that "McDowell was denied due process of law in his trial by the nondisclosure of evidence." Judgment of the district court was reversed with instructions to issue the writ of habeas corpus, and award a new trial.

APPLICATION TO VIRGINIA

Virginia circuit courts have inherent authority to order discovery beyond that delineated in Rule 3A:11. Due process requirements in death penalty cases may require exercise of that authority. In any event discovery motions should include federal law, including *Brady*, as grounds and should be as specific as possible. (Elizabeth P. Murtagh)