Capital Defense Journal

Volume 8 | Issue 1 Article 3

Fall 9-1-1995

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FACTS

Six witnesses told New Orleans police that at approximately 2:20 p.m. on September 20, 1984 they saw a young black man accost sixty year old Dolores Dye as she unloaded groceries into the trunk of her red Ford LTD.[1] The assailant reportedly struggled with Dye in the grocery store parking lot before he reached to his waist, drew a revolver, and fired a fatal shot into Dye's left temple. Using Dye's car keys, the attacker drove away in the LTD.[2]

On December 7, 1984, a jury convicted Curtis Lee Kyles of first degree murder of Dolores Dye and sentenced him to death.[3] Kyles' conviction and death sentence were affirmed by the Louisiana Supreme Court on direct appeal despite Kyles' steadfast claim of innocence.[4] Specifically, Kyles maintained that he was framed by the State's informant, Joseph "Beanie" Wallace.

Kyles had been arrested based upon information Beanie supplied to the police. At Beanie's urging, police searched Kyles' apartment and found the murder weapon hidden behind the stove, a homemade holster in a closet, and certain distinctive groceries from the store where Dye shopped.[5] Also based on Beanie's tip, the police had searched Kyles' garbage and found Dye's purse and its contents. Kyles' prints were detected on one of two grocery sales slips found inside the stolen Ford. The State also relied upon the enlargement of a crime scene photograph taken soon after the murder that allegedly depicted Kyles' car in the faint background.[6] This evidence aside, the heart of the State's case against Kyles consisted of eyewitness testimony.[7] Four of the State's six eyewitnesses testified at trial and positively identified Kyles as the gunman in front of the jury.[8]

During state collateral review, Kyles became aware that the State had not disclosed the following evidence: (1) certain inconsistent eyewitness statements and descriptions; (2) a transcript of Beanie's recorded first interview with police; (3) a written statement signed by Beanie after the above police interview; (4) notes taken by the prosecutor during the pre-trial interview with Beanie; (5) a police memorandum directing officers to pick up the defendant's garbage; (6) evidence of Beanie's record of involvement in crimes of this nature; and (7) the police's list of license plate numbers of cars parked in the grocery store lot after the police arrived at the murder scene.[9]

Of critical importance to the defense were the unrevealed statements made by the four witnesses that suggested Kyles was **not** the gunman.[10] In particular, two witnesses supplied accounts contemporaneous to the crime which cast doubt on their trial testimony. One witness had originally claimed that he briefly saw the gunman in the LTD only after the murder, but at trial the witness testified that he observed the preceding struggle. The second witness had first described the gunman as younger, shorter, and less slender than Kyles. Both witnesses also said that the gunman had braids rather than Kyles' "bush" hairstyle. These descriptions of the gunman's physical characteristics better matched Beanie than Kyles.[11]

Beanie's unrevealed interaction with the New Orleans police also was important because the information he provided was critical to the police investigation. Beanie had contacted the police two days after Dye's murder and supplied them with their first lead. In their first meeting, Beanie told police that he had purchased the victim's red Ford LTD for $400 from a man he called "Curtis" at 6:00 p.m. the night after the murder.[12] Beanie claimed that he did not know the car was stolen until his relatives told him that the local media identified the car as belonging to the recent murder victim. During the interview Beanie told the police that he and his "partner"[13] had helped Kyles unload groceries and a woman's brown purse from the LTD's back seat and trunk into the home of Kyles' common-law wife.[14]

Although he appeared to be nervous that he might be implicated in the crime, Beanie was quick to make sure that he would be reimbursed for his $400 expenditure.[15] Once he was reassured that he would be so compensated, Beanie zealously worked to help the police snare Kyles. Indeed, Beanie, who had been in Kyles' apartment after the murder, supplied the police with information about the gun they would find at Kyles' residence; more incredibly, Beanie suggested to police that Kyles might put Dye's purse in the garbage can in front of his home and then supplied the police with the time of Kyles' next garbage pick-up. Beanie also went to the site of the murder with police and alleged that Kyles' car had remained parked in the lot until the day after the murder when he went with Kyles to retrieve it.[16]

In the early hours of September 23, 1984, Beanie prepared a written statement for police in which he inconsistently alleged both that Kyles removed the brown purse from the front seat of the stolen vehicle when he was unloading the groceries and that Kyles had recovered the brown purse later in the night from the scene of the crime.[17] In his third pre-trial interview, Beanie's story changed again; Beanie told the State's chief prosecutor that he and others helped Kyles retrieve his car from the scene of the crime in the early evening on the date of the murder rather than the next night.[18]

The State also failed to disclose a list of suspect automobiles that tended to discredit the prosecution's theory that it presented to the jury as evidence of Kyles' guilt. In keeping with its theory that the assailant drove his car to the scene of the crime and left it there until some later date, the police took inventory of the license plates of the cars in the grocery store lot shortly after the murder. Although the State alleged that a grainy

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[1] *Kyles v. Whitley*, 115 S.Ct. 1555, 1560 (1995).

[2] *Id.*

[3] The first jury to hear Kyles' case was unable to reach a verdict after four hours of deliberation; the state's case ended in a mistrial. Kyles' conviction was the result of the second trial. *Id.* at 1559-60.

[4] *State v. Kyles*, 513 So. 2d 265 (La. 1987).

[5] *Kyles*, 115 S. Ct. at 1562.

[6] *Id.* at 1563-64.

[7] *Kyles v. Whitley*, 5 F.3d 806, 853 (1993).

[8] *Id.*

[9] *Kyles*, 115 S. Ct. at 1563.

[10] *Id.* at 1569.

[11] *Id.* at 1569-70.

[12] *Id.* at 1561.

[13] The man Beanie referred to as "partner" was later identified as Kyles' brother-in-law, Johnny Burns. *Id.*

[14] *Id.* at 1561-62.

[15] *Id.* at 1562.

[16] *Id.*

[17] *Id.* at 1571.

[18] *Id.*

photograph showed Kyles' car, in fact the list of the cars in the lot indicated that Kyles' car was not at the scene of the crime.[19]

The Supreme Court of Louisiana granted Kyles' petition for the trial court to hold an evidentiary hearing based on the newly discovered evidence.[20] Kyles asserted that the State had an affirmative duty to disclose this favorable evidence pursuant to *Brady v. Maryland*[21] and that there was a "reasonable probability" that the outcome of his trial would have been different had the State disclosed the exculpatory evidence to the defense. In spite of the new evidence, the trial court denied relief and the Louisiana Supreme Court refused to grant discretionary review.[22]

Kyles' petition for federal habeas relief was similarly unsuccessful; both the United States District Court for the Eastern District of Louisiana and the Fifth Circuit Court of Appeals denied his petition. In her dissent from the Fifth Circuit's opinion, however, Judge King wrote: "[f]or the first time in my fourteen years on this court ... I have serious reservations about whether the State has sentenced to death the right man."[23]

HOLDING

The United States Supreme Court granted certiorari to decide whether the Fifth Circuit Court of Appeals used the proper standard to evaluate the defendant's *Brady* claim.[24] The Court held that the *Brady* evaluation turns on the potential cumulative effect of all of the suppressed evidence favorable to the defense.[25] The Court also summarily rejected the State's suggestion that the defendant's failure to request any or all of the exculpatory evidence releases the government from its duty to disclose such evidence.[26]

The Court then clarified the nature and scope of the prosecution's duty under this cumulative Brady standard. First, the Court held that the prosecutor's affirmative duty to disclose *Brady* evidence cannot depend on each piece of evidence viewed in isolation, but turns on the potential cumulative effect of the evidence.[27] Second, the Court charged the prosecution to use its discretion to gauge accurately the likely net effect of the evidence; the prosecutor must disclose evidence when there is a "reasonable probability" that the result of the proceeding might hinge upon the disclosure of that evidence.[28] Third, the Court held that each individual prosecutor, in executing this responsibility, has a corresponding affirmative duty to learn of any exculpatory evidence known to others acting on the government's behalf.[29] Finally, the Court also made clear that *Brady* evidence includes evidence bearing on the thoroughness and good faith of the police investigation.[30]

Upon reviewing the undisclosed evidence in Kyles' case, the Supreme Court concluded that the Fifth Circuit Court of Appeals had not correctly taken into account the cumulative approach to materiality required by *Brady*. Emphasizing that *Brady* materiality does not turn on proof that the defendant would have been acquitted,[31] the Court declared that the "touchstone of materiality" is whether the defendant received a fair trial resulting in a verdict worthy of confidence.[32] The Court found that the evidence in question undermined its confidence in the verdict and granted Kyles a new trial.[33]

ANALYSIS/APPLICATION IN VIRGINIA

At the outset of its opinion, the United States Supreme Court reaffirmed the heightened standard of scrutiny for capital cases.[34] Much to the dissent's chagrin, the Court delved into a record of complex facts and reversed the Fifth Circuit even though the Fifth Circuit had purported to apply the very standard that the Supreme Court relied upon to reverse the conviction.[35] Although such fact-intensive review by the Supreme Court is not likely to become commonplace, the Court's opinion appears intended to add a strong new dimension to *Brady/Bagley* materiality.

Evaluation of a *Brady* claim continues to be guided by the materiality of the evidence as that term is defined in *United States v. Bagley*.[36] That is, evidence becomes material when it becomes reasonably probable that its suppression will affect the result of the trial.[37] In *Kyles v. Whitley*, however, the Supreme Court stressed that the *Bagley* materiality standard was not intended to operate in a vacuum where each piece of evidence is evaluated in isolation.[38] Rather, the cumulative approach is essential to materiality analysis because individual pieces of evidence accumulate and lend subtle meaning to the facts as a whole.

Kyles requires prosecutors to disclose both requested and unrequested favorable evidence "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'"[39] Rejecting the State's suggestion that the prosecutor should be held to some lesser standard because of the difficulty of such an evaluation, the Court treated the prosecutor's discretionary power as a privilege rather than a handicap.[40] Because the prosecution must now plan for the possibility that the police might not disclose all of its *Brady* evidence, and yet the prosecution remains responsible for it, *Kyles* should increase the amount of information that

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[19] *Id.* at 1573-74.

[20] *Id.* at 1560.

[21] 373 U.S. 83 (1963).

[22] *State ex. rel. Kyles v. Butler*, 566 So. 2d 386 (La. 1990).

[23] *Kyles v. Whitley*, 5 F.3d at 820.

[24] *Kyles*, 115 S. Ct. at 1560.

[25] *Id.* at 1567.

[26] *Id.* at 1565 (referring to its decision in *United States v. Agurs*, 427 U.S. 97 (1976)).

[27] *Id.* at 1567.

[28] *Id.*

[29] *Id.* at 1567-68.

[30] *Id.* at 1569 n.13.

[31] *Id.* at 1574.

[32] *Id.* at 1566.

[33] *Id.* at 1560.

[34] *Id.* (The Court cited to *Burger v. Kemp*, 483 U.S. 776 (1987) for the proposition that the court's duty to search for constitutional error is enhanced when the defendant faces capital punishment).

[35] The Court, however, thought that it was unclear whether the majority of the lower court properly assessed the cumulative effect of evidence or whether it erred by making a series of independent materiality evaluations. "There is room to debate whether the two judges in the majority in the Court of Appeals made an assessment of the cumulative effect of the evidence." *Id.* at 1569.

[36] 473 U.S. 667 (1985).

[37] According to *Bagley*, a different verdict is "reasonably probable" when the state's suppression "undermines confidence in the outcome of the trial." 473 U.S. at 678.

[38] *Kyles*, 115 S. Ct. at 1567.

[39] *Id.* at 1565 (citing *Bagley*, 473 U.S. at 682).

[40] Louisiana asked for "a certain amount of leeway in making a judgment call," claiming that the process was too difficult for the prosecutor to be held strictly accountable. *Id.* at 1568 (quoting the Transcript of Oral Argument at 33).

the defense will receive from the prosecution.[41] As the Court anticipated in its opinion, "a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence."[42]

Kyles' broad mandate creates the opportunity to make a number of narrowly tailored requests for disclosure that will pressure the prosecution to step up its own investigation and preserve *Brady* issues for appeal. The following five devices are designed to take advantage of *Kyles*' language and can easily be incorporated into standard discovery requests.

1. A defense discovery motion should directly request any and all evidence that alone *or in conjunction* with other evidence of any character may cast doubt upon the defendant's guilt.

The defense's general tactic after *Kyles* is to ask the prosecution to disclose **all** variations of exculpatory evidence. Because evidence is interactive, one piece of evidence may act conjunctively with another piece of evidence to produce this exculpatory effect. By asking for evidence that acts "alone or in conjunction with other evidence," the defense may reap the full benefits of the cumulative approach emphasized in *Kyles*.[43]

2. A defense discovery motion should directly request any and all exculpatory evidence in the possession of the prosecution, including all exculpatory information gathered by any formal or informal state or federal investigation.

Kyles makes clear that the prosecutor must account for all Commonwealth actors and any exculpatory evidence gathered by those actors in order to fulfill its responsibility: "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[44] In order to target all possible lines of communication flowing to the prosecutor, defense attorneys in their discovery motions should request such information from all law enforcement actors.

3. A defense discovery motion should directly request any and all information that alone or in conjunction with other evidence calls into question the credibility of the government's case, including but not limited to information that indicates that the testimony of a prosecution witness is inconsistent with other information in the government's actual or constructive possession.

Information that calls into question the credibility of any prosecution participant is obviously useful to the defense. Accordingly, defense attorneys should require prosecutors to reveal if the testimony of two or more prosecution witnesses is inconsistent. Similarly, evidence that a witness made inconsistent statements or was formerly unable to recall information or identify the defendant is exculpatory. Again, *Kyles*' fact pattern and holding make it absolutely clear that even if a lone inconsistency may not be "materially" exculpatory, it may reach that level if viewed in the context of other potentially exculpatory information.

4. A defense discovery motion should directly request any evidence that the defense may use, alone or in conjunction with other evidence, that bears on the character or quality of the police investigation; specifically, the discovery motion should request any evidence of other informants, leads, and suspects, including but not limited to evidence that the police did not pursue certain leads or suspects.

The *Kyles* Court specifically stated that the prosecution has a duty to disclose material exculpatory evidence that the defense might use to attack the character and substance of the Commonwealth's investigation. In short, evidence of shoddy policework can be exculpatory evidence for the defendant.[45]

There are any number of ways defense counsel can induce disclosure of mistake or bad faith in a police investigation. Requests are best directed at evidence regarding other potential or actual suspects, leads and informants that the police were aware of, and prior inconsistent statements or identifications. As the *Kyles* Court suggests, evidence that police did **not** pursue certain suspects or leads directly relates to the quality of the investigation and may be exculpatory to the defense.[46]

5. A defense discovery motion should directly request any evidence that alone or in conjunction with other evidence may be exculpatory in arguing for a sentence less than death, including but not limited to information concerning the Commonwealth's theory of vileness or future dangerousness, including unadjudicated acts.

Because the disparity between the Commonwealth's resources and the defendant's resources continues into the sentencing phase of a trial, defense attorneys must remember to utilize *Brady* requests for the entirety of the Commonwealth's case. If the suppressed evidence is material to the defendant's punishment, the prosecutor has a duty to disclose the evidence under *Brady*.[47] Accordingly, the defense should submit a complete battery of *Brady* requests to obtain information bearing on the defendant's sentence as well as the defendant's guilt.

Notably, the defense must ask for any exculpatory evidence that contradicts the Commonwealth's theory of vileness or future dangerousness. Because in Virginia the Commonwealth is allowed to introduce prior bad acts, even unadjudicated crimes, it is critical that *Brady* requests specifically demand all exculpatory information pertaining to those acts, including other suspects and leads.[48]

Kyles is a warning to all prosecutors. The Court engaged in a fact-bound inquiry in order to emphasize the prosecution's duty to reveal all *Brady* evidence to the defense. Outraged by the prosecution's negligence

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[41] Making the prosecutor accountable for all *Brady* evidence associated with the government's case narrows the prosecutor's margin of error. Because appellate review may reveal new information (formerly unknown to the prosecutor) about the police investigation, and because the prosecutor must take into account exculpatory evidence that may later come to light, the prosecutor's motivation to reveal all exculpatory evidence from the beginning is enhanced.

[42] *Kyles*, 115 S. Ct. at 1568.

[43] The *Kyles* Court concluded that the suppressed exculpatory evidence "would not have functioned as mere isolated bits of good luck for Kyles. [The evidentiary items'] combined force in attacking the process by which the police gathered evidence and assembled the case would have complemented, and have been complemented by, the testimony actually offered by Kyles's friends and family to show that Beanie had framed Kyles." *Id.* at 1573 n.19.

[44] *Id.* at 1567.

[45] *Id.* at 1569-70 n.13.

[46] *Id.*

[47] 373 U.S. at 87.

[48] That this type of demand might be crucial to the defense's case at sentencing can be seen in *Gray v. Thompson*, 58 F.3d 59 (4th Cir. 1995). In *Gray*, the Commonwealth introduced an unadjudicated murder as evidence at sentencing without revealing that the prime murder suspect was initially someone other than the defendant. *See* case summary of *Gray*, Capital Defense Digest, this issue.

in *Kyles*, the Court sent a strong message to prosecutors that they have a duty to err on the side of disclosure.[49] *Kyles'* broad reprimand to the prosecution provides wonderful language to support defense requests for disclosure. The Court's eager appropriation of the Fifth Circuit dissent should also inspire defense attorneys; capturing the attention of one judge, even in dissent, can be an essential tool in later obtaining a new trial for your client.

Summary and analysis by:
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[49] The Court supports the notion that prosecutors in doubt should lean toward disclosure by citing to *United States v. Agurs*, 427 U.S. at 108, and justifies that burden by claiming that it is the only way to create an equitable balance at trial. *Kyles*, 115 S. Ct. at 1568.

TUGGLE v. NETHERLAND

1995 WL 630932 (U.S.)
United States Supreme Court

FACTS

Lem Davis Tuggle was convicted in 1984 of capital murder committed during or subsequent to the rape of Ms. Jessie Geneva Havens.[1] He was sentenced to death after the jury found the Commonwealth had proven both future dangerousness and vileness.[2] The Supreme Court of Virginia affirmed the conviction and sentence.[3] In 1985, the United States Supreme Court vacated his sentence and remanded the case to the Supreme Court of Virginia for reconsideration in light of *Ake v. Oklahoma*.[4] *Ake* held that when the prosecution presents psychiatric evidence of the defendant's future dangerousness at the sentencing phase, due process requires that the defendant be provided an independent psychiatrist to assist in the defense.[5]

On remand, the Supreme Court of Virginia held that the trial court had indeed violated *Ake* (Tuggle II) by denying Tuggle an independent psychiatrist to rebut the prosecution's psychiatric evidence as to future dangerousness during the sentencing phase.[6] Nonetheless, the Court upheld Tuggle's conviction and sentence, concluding that because the vileness factor was separately found by the jury in addition to future dangerousness, the vileness factor alone was sufficient to sustain the sentence under Virginia law.[7]

Tuggle again petitioned for certiorari to the United States Supreme Court; this time he was denied.[8] A subsequent petition for state habeas relief was denied, as was his third petition for certiorari to the United States Supreme Court.[9] Tuggle then petitioned for federal habeas relief to the District Court for the Western District of Virginia, raising ten allegations.

The district court granted relief. The court found, *inter alia*, that (1) the Supreme Court of Virginia had erred in upholding Tuggle's death sentence after striking future dangerousness as an aggravating circumstance and (2) the vileness instruction was unconstitutionally vague.[10] As a result, the court vacated the sentence and ordered that Tuggle be retried within six months.[11] The Commonwealth appealed.

The Fourth Circuit reversed the district court. It found that the United States Supreme Court's ruling in *Zant v. Stephens*[12] allowed Tuggle's sentence to stand upon a finding of vileness after future dangerousness had been thrown out under *Ake*.[13] It agreed with the Supreme Court of Virginia that under *Zant v. Stephens*, the *Ake* error did not invalidate the jury's finding of vileness.[14] Hence, it concluded that the vileness finding was sufficient to support Tuggle's death sentence and reversed the district court's grant of habeas relief on this ground.[15]

Tuggle again petitioned to the United States Supreme Court. The Court granted certiorari and reversed the Fourth Circuit.

HOLDING

The United States Supreme Court ruled that the Fourth Circuit had misinterpreted *Zant v. Stephens*. The Court explained that while *Zant* did hold that the invalidation of one aggravating circumstance "does not necessarily **require** setting aside a death penalty,"[16] *Zant* does not support the proposition that "the existence of a valid aggravator always excuses a constitutional error in the admission or exclusion of evidence."[17] Where a jury has heard "materially inaccurate evidence," *Zant* does not apply to support a death sentence.[18] Because the jury in Tuggle's case had heard inadmissible evidence which could have affected their ultimate decision to impose death, the Court vacated the Fourth Circuit's judgment.[19] The Court remanded to the lower courts for consideration of whether a harmless-error analysis were applicable.[20]

[1] Va. Code Ann. § 18.2-31(5) (Supp. 1995).

[2] Va. Code Ann. § 19.2-264.2 (1995).

[3] *Tuggle v. Commonwealth*, 228 Va. 493, 323 S.E.2d 539 (1984) *(Tuggle I)*.

[4] 470 U.S. 68 (1985).

[5] *Id.* at 83.

[6] *Tuggle v. Commonwealth*, 230 Va. 99, 334 S.E.2d 838 (1985) *(Tuggle II)*.

[7] *Id.* at 108-11, 334 S.E.2d at 844-46.

[8] *Tuggle v. Virginia*, 478 U.S. 1010 (1986).

[9] *Tuggle v. Bair*, 503 U.S. 989 (1992).

[10] *Tuggle v. Thompson*, 57 F.3d 1356, 1361 (4th Cir. 1995).

[11] *Id.*

[12] 462 U.S. 862 (1983).

[13] *Tuggle*, 57 F.3d at 1374.

[14] *Id.*

[15] *Id.* For the Foruth Circuit's analysis in reversing the district court's finding that the vileness instruction was too vague, *see* case summary of *Tuggle v. Thompson*, Capital Defense Digest, this issue.

[16] *Tuggle v. Netherland*, No. 95-6016, 1995 WL 630932, at *2 (U.S. Oct. 30, 1995) (per curiam) (emphasis in the original).

[17] *Id.*

[18] *Id.* The court cited the holding of *Johnson v. Mississippi*, 486 U.S. 578 (1988) for this proposition.

[19] *Id.*

[20] *Id.*