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Strickler v, Greene 119 S. Ct. 1936 (1999)

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I. Facts

On January 5, 1990, two men, later identified as Tommy David Strickler ("Strickler") and Ronald Henderson ("Henderson"), abducted nineteen-year-old Leanne Whitlock ("Whitlock") from the parking lot of Valley Mall in Harrisonburg, Virginia. Eight days later, Whitlock's body was discovered on a farm in Augusta County along with Henderson's wallet and Caucasian hairs, three of which were likely Strickler's.[1] A jury in the Augusta County Circuit Court convicted Strickler of robbery, abduction, and capital murder for the death of Whitlock.[2] The jury recommended a death sentence.[3]

Anne Stoltzfus ("Stoltzfus") was the only eyewitness to the abduction to testify at trial. She testified that she twice encountered Strickler, Henderson, and a blond woman in the Valley Mall on January 5, 1990, and that she witnessed them abduct Whitlock in the parking lot. She first spoke to police a week and a half after the incident. Stoltzfus claimed to remember the three because she had seen them first in a music store, where she noticed Strickler's impatient demeanor, and later walking through the mall, where the blond woman bumped into her. She further testified that she had "an exceptionally good memory."[4]

Stoltzfus testified that she saw the three in the parking lot about forty-five minutes after seeing them in the mall. She claimed that she witnessed Strickler bang on the window of a blue Mercury Lynx driven by a woman she later identified as Whitlock. Stoltzfus testified that Strickler then jumped into Whitlock's car and, after a brief struggle, Henderson and the blond woman got into the back seat of the car. She stated that she then pulled her car parallel to the Mercury, got out and asked Whitlock if she were okay. Whitlock mouthed something that Stoltzfus was unable to comprehend. Nevertheless, Stoltzfus started to drive away. As she was leaving, she realized that Whitlock had mouthed the word "help."[5] Stolt-

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1. Strickler v. Greene, 119 S. Ct. 1936, 1942-46, 1954 & n.41 (1999). Strickler was executed by lethal injection on July 21, 1999.
2. *Id.* at 1946.
3. *Id.*
4. *Id.* at 1943-44.
5. Strickler v. Commonwealth, 404 S.E.2d 227, 230 (Va. 1991).

zfus's daughter supposedly wrote down the license plate number of the Mercury. Stoltzfus did not report the incident to police.[6]

Following his conviction, death sentence, and appeal to the Supreme Court of Virginia, new counsel represented Strickler in state habeas corpus proceedings.[7] Strickler based his petition on an ineffective assistance of counsel claim, alleging in part that his trial counsel's failure to file a motion under *Brady v. Maryland*[8] invalidated his conviction.[9] Strickler was denied relief in the state proceedings.[10]

Strickler then filed a petition for a writ of habeas corpus in the Eastern District of Virginia.[11] During discovery, the court entered an order granting Strickler the right to examine and copy all of the police and prosecution files in the case.[12] This order led to Strickler's discovery of the "Stoltzfus materials." The "Stoltzfus materials" consisted of letters written by Stoltzfus to Detective Danny Claytor ("Claytor") of the Harrisonburg Police Department and Claytor's notes from an interview with Stoltzfus.[13] There are eight exhibits in question. These materials were kept in the Harrisonburg Police Department files.[14] There was a dispute between the parties as to whether defense counsel saw three of the eight exhibits which the prosecutor maintained were in his open file, available for inspection.[15] The prosecutor claimed that he never saw the other five exhibits until after the trial.[16] Lead defense counsel claimed he never saw the documents, and co-counsel remembered the information contained in the materials, but could not recall

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6. *Strickler*, 119 S. Ct. at 1943. This is not the only time that Stoltzfus has failed to report information about a murder case to police. Thirty years ago, she claims to have heard a woman scream as she was stabbed to death. She also claims that someone confessed to her that he committed a murder. Stoltzfus did not call the police either time. Frank Green, *Pharmacist's Brushes With Murder Continue, Testimony at Issue in Slaying Appeal*, RICHMOND TIMES-DISPATCH, February 21, 1999, at A1.

7. *Strickler*, 119 S. Ct. at 1946.

8. 373 U.S. 83 (1963).

9. *Strickler*, 119 S. Ct at 1946. *See* Brady v. Maryland, 373 U.S. 83 (1963).

10. *Strickler*, 119 S.Ct. at 1946; *Strickler*, 452 S.E.2d at 648.

11. *Strickler*, 119 S. Ct. at 1946.

12. *Id.* at 1947. The record does not discuss the factual basis on which the District Court entered this order. The Supreme Court notes that it is not clear that Strickler was entitled to such discovery. *Id.* at 1951 & n.28.

13. *Id.* at 1944.

14. Strickler v. Pruett, Nos. 97-29, 97-30, 1998 WL 340420, at *7 (4th Cir. June 17, 1998). This is an unpublished opinion which is referenced in the "Table of Decisions Without Reported Opinions" at 149 F.3d 1170 (4th Cir. 1998).

15. *Id.* Prosecutor Lee Ervin stated that exhibits two, seven and eight were disclosed to the defense pursuant to his open file policy. A subpoena issued by the federal district court revealed that these exhibits were in the custody of the Augusta County Commonwealth's Attorney's office. At trial, Strickler did not request to examine the police files. *Id.*

16. *Strickler*, 119 S. Ct. at 1945.

seeing the documents. The "Stoltzfus materials" cast grave doubt on Stoltzfus's vivid trial testimony.[17] Based on the discovery of that evidence, Strickler raised a direct claim that his conviction was invalid because the prosecution had failed to provide him with this evidence as required under *Brady*.[18]

The five exhibits, which the parties agreed were not in the prosecutor's file, consisted of three letters from Stoltzfus to Claytor, Claytor's notes after his first interview with Stoltzfus, and an exhibit entitled "observations," which included a summary of the abduction. The documents disclose that Stoltzfus initially did not recall being at the mall and that she had a "very vague memory" of the abduction.[19] Additionally, Claytor's notes revealed that Stoltzfus initially could not identify Strickler, Henderson, or Whitlock from a photo lineup. Further, exhibit six revealed that Stoltzfus visited Whitlock's boyfriend and looked at current photos of Whitlock. Her trial testimony made no mention of that meeting.[20]

The District Court for the Eastern District of Virginia granted Strickler's motion for summary judgment on his *Brady* claim.[21] The court found that the failure to disclose these five documents was sufficiently prejudicial to undermine confidence in the jury's verdict. Further, the court found that, although Strickler had procedurally defaulted the *Brady* claim because he had not raised it earlier, he demonstrated cause to excuse the default.[22] The court issued a writ of habeas corpus and dismissed Strickler's claim concerning proportionality review of his death sentence.[23]

On appeal, the Fourth Circuit held that Strickler's *Brady* and proportionality claims were procedurally defaulted because the factual bases for them were available at the time Strickler filed his state habeas petition.[24] Further, the court held that Strickler failed to show cause to excuse the default.[25] Finally, the court stated that the claim would fail on the merits even if it were not defaulted because Strickler had not shown prejudice.[26]

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17. *Id.* at 1944.

18. *Id.* at 1947.

19. *Id.* at 1944-45.

20. *Id.* Stoltzfus learned of Whitlock's boyfriend through a newspaper story. She claims that she went to visit him because she had "to see pictures of Leanne. The picture in the newspaper did not look like the black girl that I saw." After viewing the photos, she claims to have been certain of her identification of Whitlock. Green, *supra* note 6, at A1.

21. *Strickler*, 119 S. Ct. at 1947.

22. *Id.* Defense counsel had no independent access to these materials and the Commonwealth withheld the evidence during state habeas proceedings. *Id.*

23. *Id.*

24. *Strickler*, 1998 WL 340420, at *8.

25. *Id.*, at *9.

26. *Id. See* Douglas R. Banghart, Case Note, 11 CAP. DEF. J. 145 (1998) (analyzing Strickler v. Pruett, Nos. 97-29, 97-30, 1998 WL 340420 (4th Cir. June 17, 1998)).

The Supreme Court granted certiorari to determine (1) whether the state violated *Brady* and its progeny, (2) whether defense established the requisite cause for the failure to raise the claim in state court, and (3) if there were acceptable cause, whether Strickler suffered prejudice sufficient to excuse the procedural default.[27]

II. Holding

The United States Supreme Court held that (1) the "Stoltzfus materials" were favorable to Strickler for purposes of *Brady*, (2) Strickler established cause for the procedural default in raising the *Brady* claim because he reasonably relied on the open file policy of the prosecutor, but (3) Strickler could show neither materiality under *Brady* nor prejudice that would excuse his procedural default.[28] The Supreme Court affirmed the Fourth Circuit's denial of relief.[29]

III. Analysis / Application in Virginia

A. The Brady *Rule*

The Supreme Court began its analysis of Strickler's claim by noting "there is never a real *Brady* violation unless the non-disclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different result."[30] The Court framed the *Brady* inquiry to include the following three elements: (1) the evidence must be favorable to the defendant; (2) the State must have suppressed it; and (3) prejudice[31] must have resulted.[32] The Court found that the first two elements were "unquestionably established."[33]

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27. *Strickler*, 119 S. Ct. at 1941.

28. *Id.* at 1937.

29. *Id.*

30. *Id.* at 1948 (citing standard for materiality set forth in *United States v. Bagley*, 473 U.S. 667 (1985)).

31. Prior to this decision, the third prong of a *Brady* violation required petitioner to show "materiality," not "prejudice." *See infra* Part III.B.3.

32. *Strickler*, 119 S. Ct. at 1948. *Brady* held that "suppression of evidence favorable to an accused upon request violates due process where that evidence is material to guilt or to punishment." 373 U.S. at 87. *See also* United States v. Bagley, 473 U.S. 667 (1985) (holding that this duty to disclose extends to impeachment evidence). Moreover, in *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), the Court determined that the prosecution has an affirmative duty to learn of any favorable information known by anyone acting on the government's behalf.

33. *Strickler*, 119 S. Ct. at 1948.

B. The Brady *Analysis*

1. Evidence Favorable to Strickler (Brady Prong #1)

The Court found the evidence was favorable to Strickler because of the impeaching character of the suppressed materials.[34] The vivid testimony that Stoltzfus offered at trial, when contrasted with her initial impressions (or lack thereof) of the abduction, readily established this component of the claim.[35]

2. Evidence Suppressed by the State and Cause to Excuse the Procedural Default of the Brady *Claim* (Brady Prong #2, Procedural Default Prong #1)

The second prong of the *Brady* claim was also easily met. Strickler established the requisite cause because there was no dispute about the fact that the "Stoltzfus materials" were known to the Commonwealth, but not disclosed to his counsel.[36] In finding that Strickler established the requisite cause, the Court relied on a combination of the following three factors: (1) exculpatory evidence was withheld; (2) Strickler reasonably relied on the prosecution's "open file" policy as fulfilling the *Brady* obligation to disclose such material; and (3) the Commonwealth confirmed Strickler's reliance on the file during state habeas proceedings.[37]

The Court found fault with the reasoning employed by the Fourth Circuit in its determination that Strickler did not establish cause to excuse the procedural default.[38] The Fourth Circuit held that the factual basis for the *Brady* claim was available during state habeas proceedings because defense counsel knew that Stoltzfus had been interviewed by Harrisonburg police.[39] The Fourth Circuit reasoned that Strickler should have sought discovery of those files.[40] The Supreme Court found this reasoning illogical.

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34. *Id.* The Court rejected the Commonwealth's argument that the materials did not come under the reach of *Brady* because they were inculpatory. The Court noted that *Brady* disclosure extends to materials that may be used to impeach a witness. *Id.* n.21 (citing *Bagley*, 473 U.S. at 676).

35. *Id.* at 1948-49.

36. *Id. See Kyles*, 514 U.S. at 437 (noting that the *Brady* rule extends to evidence known only to the police and not to the prosecution).

37. *Strickler*, 119 S. Ct. at 1952. In the state habeas proceedings, the Commonwealth maintained that Strickler was given full disclosure of everything known to the government. *Id.* at 1949 & n.14. The Court further noted that "if a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*." *Id.* at 1952 & n.23.

38. *Id.* at n.18. "For reasons we do not entirely understand, the Court of Appeals thus concluded that, while it was reasonable for trial counsel to rely on the open file policy, it was unreasonable for postconviction counsel to do so." *Id.*

39. *Strickler*, 1998 WL 340420, at *8.

40. *Id.*

The Court noted that although counsel knew that Stoltzfus had been interviewed, it did not follow that counsel knew interview notes existed and had been suppressed.[41] The Court also found that there was no evidence to suggest that Strickler's failure to raise the claim in state court was a tactical decision by defense counsel.[42]

Defense counsel should note that the broad discovery order granted by the district court in this case is not guaranteed to a petitioner under state law.[43] Not only would Strickler have been unable to procure this discovery in state habeas proceedings, but under Rule 3A:11 of the Virginia Supreme Court Rules Strickler was not entitled to these materials (except as modified by *Brady*) at trial.[44] The Court noted that it is not even clear that Strickler had a right to this discovery in federal habeas proceedings.[45] This situation creates a serious problem for defense counsel who have only a suspicion that exculpatory materials exist. Counsel should note the need to federalize any objection to lack of discovery.

3. *Materiality/Prejudice under* Brady *and Prejudice to Excuse Procedural Default* (Brady Prong #3, Procedural Default Prong #2)

A. Background

Historically, after the Court found cause to excuse procedural default of a *Brady* claim, the next question would have been whether prejudice ensued.[46] In this case, however, the Court merged the prejudice analysis

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41. *Strickler*, 119 S. Ct. at 1950.

42. *Id.* at 1952. "There is no suggestion that tactical considerations played any role in petitioner's failure to raise his *Brady* claim in state court." *Id. See* Amadeo v. Zant, 486 U.S. 214, 222 (1988) (stating that "if concealment rather than tactical considerations, was the reason for the failure . . . then petitioner has established ample cause to excuse procedural default").

43. *Strickler*, 119 S. Ct. at 1950. Under Virginia law, Strickler would not have been entitled to this broad discovery in state habeas proceedings absent a showing of good cause. *Id.* The Court noted that mere speculation is not likely to satisfy this requirement. *Id.* at 1950-51.

44. VA. SUP. CT. R. 3A:11. This rule excludes from defendants much of the Commonwealth's investigation material, including statements made by Commonwealth witnesses to agents of the Commonwealth. Section (b)(2) of the rule states in part that it "does not authorize the discovery or inspection of statements made by Commonwealth witnesses or prospective Commonwealth witnesses to agents of the Commonwealth." Furthermore, Virginia law limits discovery available during state habeas proceedings. *See* VA. SUP. CT. R. 4:1 (b)(5)(3)(b).

45. *Strickler*, 119 S. Ct. at 1951 nn.28 & 29. Under Rule 4:1 (b)(5)(3)(b) the state court may deny or limit discovery in any proceeding for a writ of habeas corpus. VA. SUP. CT. R. 4:1 (b)(5)(3)(b).

46. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 750 (1991) ("[W]e now make it explicit: In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the

with the materiality determination under *Brady*. The Court considered both claims at the same time, using the same evidence and apparently the same standards. The framework of the analysis in this case is a departure from the traditional analysis of a *Brady* claim.

Before *Strickler*, the tests for materiality and prejudice were different in theory if not practice. In *Bagley*, the Court held that evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[47] In *Kyles v. Whitley*, the Court noted that under *Bagley* the question is, "not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial."[48] The *Kyles* Court stated that a fair trial is one that results in "a verdict worthy of confidence."[49]

Conversely, the Court's formulation of the prejudice test used to establish cause to excuse procedural default has not been as clearly defined. In *Wainwright v. Sykes*,[50] the Court expressly declined to define the prejudice standard, noting only that it is more narrow than a standard "which would make federal habeas review generally available to state convicts absent a knowing and deliberate waiver of the federal constitutional contention."[51]

B. Application

The Court noted that in order to obtain relief Strickler was required to demonstrate that there was a "reasonable probability" that his conviction or sentence would have been different if the "Stoltzfus materials" had been disclosed.[52] This standard proved impossible to meet. The high standard set by the Court again emphasizes the necessity of obtaining exculpatory materials prior to trial.

Though the Court recognized that Stoltzfus's testimony was prejudicial, it found that the record strongly supported the conclusion that the outcome of Strickler's case would have been the same even if her testimony

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claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.").

47. United States v. Bagley, 473 U.S. 667, 682 (1985).

48. Kyles v. Whitley, 514 U.S. 419, 434 (1995).

49. *Id.*

50. 432 U.S. 72 (1977).

51. Wainwright v. Sykes, 432 U.S. 72, 87 (1977). *See also* United States v. Frady, 456 U.S. 152, 167 (1982) (stating that proper standard of review for a procedurally defaulted motion is "cause and actual prejudice"); United States v. Maybeck, 23 F.3d. 888 (4th Cir. 1994) (citing "actual prejudice" standard employed in *Frady*).

52. *Strickler*, 119 S. Ct. at 1955.

had been impeached.[53] In so doing, it relied upon the testimony of other witnesses at trial and reasoned that their testimony was sufficient to establish that Strickler participated in the murder.[54] Furthermore, the Court recognized that the capital murder charge was not dependent upon Strickler's being the dominant partner.[55]

What the majority did not consider was the effect that Stoltzfus's testimony had upon the jurors when they made their sentencing recommendation.[56] In his dissent, Justice Souter pointed out that no other testimony so clearly established Strickler as the dominant member of the trio which abducted Whitlock.[57] Justice Souter concluded that Stoltzfus's characterization of Strickler as the leader might have influenced jurors in their assessment of his future dangerousness.[58]

The majority was not persuaded by this argument. The Court concluded that Stoltzfus's testimony was not sufficiently related to Strickler's eligibility for the death penalty since her testimony addressed neither the "future dangerousness" nor the "vileness" predicate.[59] Moreover, the prosecution did not rely upon Stoltzfus's testimony during its closing argument at the penalty phase of the trial.[60] Accordingly, the Court dismissed Strickler's claim that he suffered prejudice from the failure to disclose the evidence.[61]

C. *Effect of Merger*

Materiality and prejudice determinations are both forms of harmless error analysis. After this decision, in a *Brady* case the materiality determination is merged with the prejudice finding of procedural default. This merger raises the question of whether either standard has been altered by this shift. The effect of the shift may be to elevate the showing of prejudice in a procedural default claim as the Court seems to be moving toward a unified standard for all harmless error analyses.

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53. *Id.* at 1954.

54. *Id.* at 1953-54.

55. *Id.* The judge instructed the jury that they could find Strickler guilty of capital murder if the evidence established that he was a joint participant in the fatal beating. *Id.* The Supreme Court of Virginia affirmed this instruction on direct appeal. *Id.* at n.39. The joint participation theory is a recognized exception to Virginia's "triggerman rule." *See* Coppola v. Commonwealth, 257 S.E.2d 797, 806 (Va. 1979); *see also* VA CODE ANN. § 18.2-18 (Michie 1999).

56. *See Strickler*, 119 S. Ct. at 1958 (Souter, J., dissenting) (rejecting the Court's assessment of the significance that jurors likely attached to Stoltzfus's testimony).

57. *Id.*

58. *Id.* at 1960.

59. *Id.* at 1955 & n.48.

60. *Id.*

61. *Id.*

IV. Conclusion

Although the United States Supreme Court ultimately denied relief in this case, there are a number of important points to recognize. One is the relative ease with which the Court found that the first two prongs of *Brady* were satisfied. Another is that both *Bagley* and *Kyles* were reaffirmed with vigor on all points except the materiality determination. Conversely, the failure to find that Stoltzfus's testimony was material under *Brady* is troubling. This holding reaffirms that it is essential to obtain exculpatory or impeaching evidence prior to trial, as the materiality determination at the appellate level is rarely favorable to defendant. Furthermore, such a determination would not accurately reflect whether the evidence would have in fact been material at both phases of the trial.

The problem of investigators withholding evidence, whether by accident or design, is serious and has been before the Court on at least two occasions prior to this case.[62] One way defense counsel may be able to obtain exculpatory materials pre-trial is through a motion to examine law enforcement officials under oath in order to determine whether exculpatory evidence exists that has not been disclosed to the Commonwealth.[63] This motion is available from the Virginia Capital Case Clearinghouse.

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62. *See* United States v. Bagley, 473 U.S. 667 (1985); *see also* Kyles v. Whitley, 514 U.S. 419 (1995).

63. *See Strickler*, 1998 WL 340420, at *8 (stating "reasonably competent counsel would have sought discovery in state court in order to examine the Harrisonburg Police Department files").

CASE NOTES:

United States Court of Appeals, Fourth Circuit

Decisions on the Merits