KERRY MAX COOK, Appellant

NO. 71,855 v. Appeal from SMITH County

THE STATE OF TEXAS, Appellee

CONCURRING AND DISSENTING OPINION

Appellant was indicted for the offense of a capital murder alleged to have been committed in Smith County in June of 1977. See, Tex. Penal Code Ann. § 19.03. In 1978, appellant was convicted of the alleged offense and sentenced to death. We affirmed. Cook v. State, 741 S.W.2d 928 (Tex.Cr.App. 1987). However, the United States Supreme Court vacated our judgment and remanded the case to this Court. Cook v. Texas, 488 U.S. 807, 109 S.Ct. 39 (1988). On remand, we reversed the judgment of the trial court. Cook v. State, 821 S.W.2d 600 (Tex.Cr.App. 1991). In 1992, appellant was re-tried but a mistrial was declared when the jury failed to reach a verdict after five days of sequestered deliberations.[1] In 1994, appellant was tried again.[2] The third trial resulted in a conviction and the jury affirmatively answered the two punishment issues submitted under Tex. Code Crim. Proc. Ann. art. 37.0711, § 3(b). Appellant was sentenced to death. Id., at § 3(g). The plurality sustains appellant's third and fourth points of error and remands the case to the trial court. For the following reasons, I concur in the decision to sustain those points, but I dissent to the decision to remand the case.

I. Introduction

In his third and fourth points of error appellant contends the due process clause of the United States Constitution and the due course of law provision of the Texas Constitution were offended by his retrial. Appellant argues that under the facts of his case, a fair trial is impossible after fourteen years of suppressed

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[1] The jury was deadlocked six to six on the charge of capital murder, and six to six on the lesser included offense of murder.

[2] The third trial occurred in Williamson County upon a sua sponte change of venue by the trial judge. The first and second trials were conducted in Smith County.

prosecutorial misconduct and that retrial would offend the most basic understanding of fundamental fairness. Appellant raised these arguments in a pre-trial habeas corpus petition prior to his second and third trials. The 26th District Court (third trial) did not conduct habeas corpus hearings but adopted the findings of fact and conclusions of law of the 241st District Court (second trial). Both courts denied the requested relief.[3]

This case presents a question of first impression, namely whether prosecutorial misconduct, magnified by the passage of fourteen years and the death of a key witness, can so degrade the normal workings of justice that a fair trial becomes impossible, and thus, retrial is forbidden under double jeopardy and due process principles.[4] Parts II and III and IV of this opinion will review the State's misconduct, assess its ill effects to both appellant's ability to present a defense and to the State's ability to prosecute a trial resulting in a verdict worthy of confidence. Part V will address the appropriate remedy.

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[3] Appellant appealed the 26th District Court's denial of relief. The Court of Appeals upheld the trial judge in an unpublished opinion. After appellant had been tried and sentenced to death, this Court dismissed appellant's petition for discretionary review without opinion on March 6, 1996.

[4] In Durrough v. State, 620 S.W.2d 134, 138 (Tex.Cr.App. 1981), Durrough contended that his third trial was barred by the doctrine of double jeopardy because of willful prosecutorial misconduct that occurred during the second trial of this case. Durrough claimed that at the second trial the prosecution failed to disclose favorable evidence regarding deals with accomplice witnesses made in exchange for their testimony and argued that the willful prosecutorial misconduct barred any future prosecution for this offense. We rejected the appellant's contention that the alleged misconduct was alone a bar to further prosecution. However, appellant's contentions are distinct from those raised in Durrough. Appellant does not argue that retrial is barred merely because of the State's misconduct. Appellant argues that under the particular circumstances of this case, the prosecution's misconduct has made a fair trial impossible and that because a fair trial is impossible due process principles require dismissal of the charges against him.

II. The Constitutional Role of the Prosecutor

At the beginning, it is important to review the State's constitutionally imposed duty to investigate and prosecute criminal charges with fairness.

Due process obliges the State to disclose exculpatory evidence to one accused of a crime. This obligation originates in early 20th century strictures against misrepresentation by members of the bar and is most prominently associated with the United States Supreme Court's decision in Brady v. Maryland, 373 U.S. 83, 86, 83 S.Ct. 1194, 1196 (1963) (relying on Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 342 (1935), and Pyle v. Kansas, 317 U.S. 213, 215-216, 63 S.Ct. 177, 178 (1942)). Brady 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 the prosecution." Id., 373 U.S. at 87, 83 S.Ct. at 1195-98; see also, Moore v. Illinois, 408 U.S. 786, 794-795, 92 S.Ct. 2562, 2567-68 (1972). The rationales underlying this legal obligation are basic to our notions of justice:

> Such disclosure will serve to justify trust in the prosecutor as "the representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations. See Rose v. Clark, 478 U.S. 570, 577-78, 106 S.Ct. 3101, 3105-3106, 92 L.Ed.2d 460 (1986); Estes v. Texas, 381 U.S. 532, 540, 85 S.Ct. 1628, 1631, 14 L.Ed.2d 543 (1965); United States v. Leon, 468 U.S. 897, 900-901, 104 S.Ct. 3405, 3409, 82 L.Ed.2d 677 (1984) (recognizing general goal of establishing "procedures under which criminal defendants are 'acquitted or convicted on the basis of all the evidence which exposes the truth'") (quoting Alderman v. United States, 394 U.S. 165, 175, 89 S.Ct. 961, 967, 22 L.Ed.2d 176 (1969)). The prudence of the careful prosecutor should not therefore be discouraged.

Kyles v. Whitley, 514 U.S. ___, ___, 115 S.Ct. 1555, 1568-69 (1995).

In short, under the rule of law, it is preferable that the State err on the side of caution than win its case through abuse of

its power. This principle is derived from the notion that the prosecutor represents a government whose power to govern is defined by its constitutional obligation to govern with fairness. This is one of the few protections which citizens have against prosecutorial abuse of the State's resources.

To this end, in United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392 (1976), it became clear that even a defendant's failure to request favorable evidence did not leave the State free of all obligation to disclose exculpatory evidence. In United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375 (1985), the Supreme Court disavowed any distinction between exculpatory and impeachment evidence for Brady purposes, and held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., 473 U.S. at 682, 105 S.Ct. at 3383 (opinion of Blackmun, J.) and 473 U.S. at 685, 105 S.Ct. at 3385 (White, J., concurring in part and concurring in judgment). See also, Thomas v. State, 841 S.W.2d 399, 402 (Tex.Cr.App. 1992). And recently, in Kyles, 514 U.S. ___, 115 S.Ct. 1555, the Supreme Court reaffirmed the law's demand for fairness to a criminal defendant, extending the prosecutor's responsibility to material information within the police's knowledge.[5]

Of course, the principle of due process is general and requires fundamental fairness by the State in all of its dealings with those accused of crimes. The State, for example, has a duty to seek the truth in its investigation of crimes, and where its investigative procedures are so improper that they undermine confidence in the verdict, the accused's right to due process has

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[5] The police misconduct in Kyles is strikingly similar to that of the State in the case at bar. Id., 514 U.S. at 498-505, 115 S.Ct. 1560-65. The misconduct in the case at bar is more egregious insofar as it was perpetrated by members of the bar, at times in contradiction of the behests of the police, and in blatant disregard of the law, and the misconduct was concealed for more than fourteen years.

been violated. Foster v. California, 394 U.S. 440, 89 S.Ct. 1127 (1969) (eyewitness was effectively told that defendant committed the crime); Dispensa v. Lynaugh, 847 F.2d 211, 218 (5th Cir. 1988) (defendant identified in a manner that suggested whom the witness should identify); Ex parte Brandley, 781 S.W.2d 886 (Tex.Cr.App. 1989) cert. denied, 498 U.S. 817, 111 S.Ct. 61 (1990) (egregious misconduct by the police in the investigation of a capital murder). Due process is likewise violated where the State contrives a conviction "through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty ...." Mooney, 294 U.S. at 112,. 55 S.Ct. at 342 (State's use of perjured testimony). And, due process is offended where the State fails to correct unsolicited perjury. Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177 (1959). Furthermore, where the State's conviction is based in part upon the introduction of a coerced confession, a defendant's right to due process is clearly violated, Rogers v. Richmond, 365 U.S. 534, 81 S.Ct. 735 (1961), and where the State conceals a material witness whose testimony is shown to create a reasonable doubt of guilt that did not otherwise exist, there is also a deprivation of due process. Hernandez v. Estelle, 674 F.2d 313 (5th Cir. 1981).

Moreover, it should be noted that entire amendments to the federal and state constitutions were provided to ensure that the prosecuting agent of the government behaves with fairness toward all those accused of crimes, i.e., the right to counsel, the right to confront accusers, the right to public trials, the right to a speedy trial and the right against double jeopardy. The principles embodied in these amendments provide further guidance for what fundamental fairness requires and where these principles are violated with some deleterious effect to the accused, due process has not been maintained. This is the rationale underlying the application of several federal constitutional principles to the acts of the various state governments through the Due Process

Clause of the Fourteenth Amendment to the United States Constitution.

With these principles in mind, I will review the State's misconduct on appellant's rights and society's rights under the rule of constitutional order and on the State's ability to obtain a verdict worthy of confidence.

III. The State's Misconduct

On December 6, 1993, prior to his third trial, appellant filed a pre-trial habeas corpus petition arguing that due process and double jeopardy principles in both the federal and state constitutions barred his retrial because prosecutorial misconduct had denied him the ability to effectively defend himself. Adopting the findings of fact and conclusions of law of the 241st District Court (Smith County), which had entertained similar arguments in a pre-trial habeas corpus petition prior to appellant's second trial in 1992, the 26th District Court (Williamson County) denied relief. While habeas findings are not binding, where supported by the record, they should be accepted by this Court. Ex parte Castellano, 853 S.W.2d 476, 485-486 (Tex.Cr.App. 1993), and Ex parte Brandley, 781 S.W.2d 886, 887 (Tex.Cr.App. 1989), except where there has been an abuse of discretion. Ex parte Adams, 768 S.W.2d 281, 288 (Tex.Cr.App. 1989).[6]

The trial courts' findings establish numerous undisputed acts of misconduct by the Smith County District Attorney's Office.[7] According to the district courts, the State suppressed evidence relating to Louella Mayfield, the sixteen-year-old daughter of Jim Mayfield. Jim Mayfield was Dean of the Library at a local

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[6] The State does not specifically challenge appellant's factual allegations of misconduct. Indeed, the State's brief asserts: "The appellant has accurately stated the facts of the case. Any error or omission will be clarified within the context of the State's Brief."

[7] From the onset we note the egregious acts of misconduct were committed almost twenty years ago, long before the Honorable Jack Skeen, Jr., the current Criminal District Attorney of Smith County, was elected to office.

university. He and the victim were involved in an adulterous relationship which had been exposed in a public scandal days before the victim's murder. The affair had cost Jim Mayfield his career.

Shortly before the victim's murder, Louella Mayfield had made death threats directly and indirectly to the victim, and, shortly before the victim's murder, Louella had gone to the victim's apartment complex, impersonating a police officer purporting to investigate a murder involving Jim Mayfield and the victim, and asking questions regarding the victim. The district courts also found that the State knew and suppressed evidence that Louella was believed by at least one police officer, who knew her personally, to be mentally and emotionally unstable and a pathological liar.[4] The district courts found that the State, though in possession of this information and despite discovery dating to 1977, did not disclose this exculpatory evidence to appellant until 1991, fourteen years after the alleged offense. Indeed, the district courts found that while in possession of this information, the State informed the initial trial judge and appellant that there was no exculpatory evidence. The district courts concluded that the State's conduct constituted prosecutorial misconduct.

According to the district courts, Doug Collard, a fingerprint investigator with the Tyler Police Department, had lifted latent fingerprints, later matched to appellant, from the outside of the victim's patio door. The district courts found that on each occasion that Collard testified before the grand jury and at appellant's first trial, he had expressed the misleading opinion that the fingerprints had been placed on the patio door six to twelve hours immediately preceding their discovery. According to the courts' findings, Collard had repeatedly informed the State, prior to testifying, that he did not want to testify as to the age

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[4] Louella Mayfield was enrolled in a Tyler Police Department scouting program, the Law Enforcement Explorer Scouts. Those in the program wore distinctive uniforms and participated in programs designed to teach them public safety and familiarize them with police procedures. It was through this program that officers came to know that Louella was troubled and a pathological liar. It was in her scout uniform that Louella conducted her investigation.

of the prints because there was no scientific basis for such a conclusion. Collard met sustained resistance from the district attorney and yielded to the district attorney's insistence that Collard testify about the age of the fingerprints when the State assured him that it would give him the opportunity to qualify his opinion before the jury. But, according to the district courts' findings, the State did not allow Collard to clarify his testimony. The district courts concluded that the district attorney intended to, and probably did, mislead the grand jury, the trial court and the jury with its presentation of Collard's testimony and that the misrepresentation was critical because it placed appellant at the apartment at the time of the victim's death. The district courts concluded that the State's insistence that Collard provide misleading testimony and the State's failure to bring out the truth during discovery or in court, as Collard requested, constituted prosecutorial misconduct.

The district courts also found prosecutorial misconduct in the failure of the State to disclose to the defense, the court, and the jury that an "understanding" of leniency existed between the State and Edward "Shyster" Jackson in exchange for his testimony regarding appellant's alleged jail house confession. While acknowledging the possibility that there could have been a breakdown in communications within the district attorney's office, the district courts concluded that such a misunderstanding did not justify the State's denial of such an agreement and the State's forceful argument to the jury, dramatically and emphatically asserting that no such "deal" existed. The district courts concluded that the State's failure to disclose the fact that Jackson's testimony was in exchange for leniency constituted prosecutorial misconduct.

The district courts found misconduct in the State's violation of appellant's right to counsel in May of 1992. When appellant was returned to the Smith County Jail to await his second trial, the assistant district attorney prosecuting the case asked to be

informed of appellant's arrival. When appellant arrived, the prosecutor, knowing appellant was represented by counsel, immediately went to visit appellant without the knowledge or consent of appellant's counsel. The district courts found the prosecutor went with the intent to speak with appellant and did approach and attempt to speak with appellant at the jail. (The nature of their conversation is not completely clear from the record.) The district courts found that the State's conduct was improper and misguided but "without bad motive or evil purpose" and asserting that "if [defense counsel] can forgive [the prosecutor], so should the court." The district courts concluded that the State's conduct did not rise to the level of prosecutorial misconduct or in the alternative, that if the conduct rose to the level of prosecutorial misconduct, "it had no effect on the 1978 trial." The legal standard employed "to forgive" the State's clear misconduct is unknown; the employment of this standard is an abuse of the trial courts' discretion. Therefore, the trial courts' alternative, more legal, conclusion that the State's conduct constituted misconduct should be adopted. I will defer to the trial courts' conclusion that the misconduct was harmless, though such a conclusion is suspect in view of the fact that the full extent of the conversation is unclear and that the trial judge indicates it might have been assessing only the harm to appellant's initial trial in 1978; such an assessment is irrelevant to the issue raised.

Appellant also alleged in his habeas writ that the State suppressed exculpatory statements made by Randy Dykes and Rodney Dykes. The Tyler Police Department possessed Randy Dykes' sworn statement, dated August 3, 1977, in which Randy stated that appellant had told him (Randy) that he (appellant) had met a woman fitting the victim's description at the pool and had gone, upon her invitation, to her apartment where they had sexual intercourse and she had left "passion marks" on his neck. On October 3, 1977,

Randy Dykes testified to these same facts before the Smith County Grand Jury.

Appellant further alleged that the State also suppressed Rodney Dykes' October 3, 1977, grand jury testimony in which he asserted that appellant told him (Rodney) a few days before the murder that he (appellant) had been to a woman's apartment and that she had kissed him passionately and left "passion marks" on his neck. Rodney testified that appellant did in fact have marks on his neck.

Appellant also alleged that the State had also suppressed exculpatory grand jury testimony and exculpatory statements given to the State by Robert Hoehn. Hoehn testified before the grand jury that appellant had told him (Hoehn) about having gone to a woman's apartment a few days before the murder and that she left "passion marks" on appellant's neck. Appellant further alleges that the State suppressed statements from Hoehn which contradicted his trial testimony and which would have served to impeach Hoehn at trial.

These important allegations regarding the Dykes brothers and Hoehn were treated in a cursory manner by the district courts:

> The second portion of Applicant's Sixth Complaint has merit but does not amount to prosecutorial misconduct. The Statements were exculpatory and should have been delivered to Cook's attorney for cross examination purposes in the 1978 trial. (The Court is assuming the statements of the witnesses were given prior to said trial). However, the evidence fails to show whether the statements were willfully suppressed by the prosecutors or in violation of any court order relating to discovery. Accordingly, the court cannot, and declines to, find that the failure of the prosecutors to deliver such statements to defense counsel earlier constitutes prosecutorial misconduct.[1]

After concluding that the statements were exculpatory and should have been delivered to appellant, the district courts abused their discretion in failing to find prosecutorial misconduct. The

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[1] All emphasis is supplied unless otherwise indicated.

The parenthetical is curious since the trial courts should have known that most of the statements were from grand jury testimony and, therefore, were known to the State, and were subject to appellant's pre-trial discovery motions.

district courts had already established that discovery orders were in place. Therefore, as the courts correctly concluded, the exculpatory grand jury testimony and impeachment evidence should have been delivered to appellant. The failure to do so constituted prosecutorial misconduct. The language of Brady is unequivocal: "suppression by the prosecution of evidence favorable to an accused ... irrespective of the good faith or bad faith of the prosecution" violated due process. Brady, 373 U.S. at 87, 183 S.Ct. at 1196-97 (emphasis added). Therefore, suppression of the exculpatory statements and testimony of Robert Hoehn and the Dykes brothers constituted prosecutorial misconduct which remained uncorrected until its revelation during the 1992 trial.

In conclusion, the State's misconduct in this case does not consist of an isolated incident or the doing of a police officer, but consists of the deliberate misconduct by members of the bar, representing the State, over a fourteen year period -- from the initial discovery proceedings in 1977, through the first trial in 1978 and continuing with the concealment of the misconduct until 1992.

The next step is to determine whether the State's misconduct has made it impossible to guarantee appellant a fair trial by either depriving appellant of the ability to defend himself or by creating a situation where the State cannot achieve a verdict worthy of confidence.

IV. Assessing the Impact of The State's Misconduct

In Kyles v. Whitley, ___ U.S. ___, 115 S.Ct. 1555, the United States Supreme Court emphasized four aspects of the analysis for evaluating the impact of Brady violations. That analysis is useful to our evaluation of the harm arising from the State's misconduct. First, citing Bagley, the Supreme Court emphasized that the touchstone of materiality of Brady violations

> 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,

> understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial."

Kyles, 115 S.Ct. at 1556, citing Bagley, 473 U.S. at 678, 105 S.Ct. at 3381. The Supreme Court emphasized that materiality in the Brady context is not a sufficiency of evidence test:

> ... A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Kyles, 514 U.S. at ___, 115 S.Ct. at 1566 (emphasis in original).

Thirdly, the Court emphasized that once a reviewing court has found constitutional error there is no need for further harmless error review; "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different, necessarily entails the conclusion that the suppression must have had 'substantial and injurious effect or influence in determining the jury's verdict.'" Kyles, 514 U.S. at ___, 115 S.Ct. at 1566 (internal quotations omitted), citing Bagley, 473 U.S. at 682 (opinion of Blackmun, J.), and at 685 (White, J., concurring in part and concurring in judgment), and Brecht v. Abrahamson, 507 U.S. ____, 123 L.Ed.2d 353 (1993), quoting Kotteakos v. United States, 328 U.S. 750 (1946).

Finally, the Supreme Court stressed that by definition, the impact of the Brady violations must be assessed in terms of the State's misconduct considered collectively. Kyles, 514 U.S. at ___, 115 S.Ct. at 1567.

With these principles in mind, the impact of the State's violations upon the integrity of the proceedings against appellant must be assessed. I pause to note that my concern is not with the effects of the State's misconduct on the first trial; that is not appellant's complaint. Appellant argues that because the State's

misconduct was not discovered until after the passage of fourteen years, the ill effects of the State's misconduct is incurable. Specifically, appellant contends his ability to defend himself has been irreparably harmed by the State's long-silent misconduct. I must, therefore, assess the ill effects of the State's misconduct on appellant's ability to defend himself against the charges raised at his third trial and I must simultaneously assess whether, under the totality of the circumstances, the State's misconduct has impacted its own ability to ensure that the proceedings are fundamentally fair.

The State's misconduct was in some instances harmless to appellant's ability to defend himself even after the passage of fourteen years. For example, the violation of appellant's Sixth Amendment right to counsel was only harmful insofar as it shows that as late as 1992, the State was still willing to violate the law in the prosecution of this case. This incident was not shown to have affected appellant's ability to defend himself. Standing alone, this incident does not destroy confidence in the verdict of the trial, but it is part of the collective acts of misconduct which chip away at that confidence. It evinces at least a careless disregard on the part of the State to act within the rule of law

Similarly, the State's misconduct in failing to reveal its "understanding" with Edward Jackson in exchange for his testimony against appellant was of no consequence to appellant's ability to defend himself because Jackson was not called to testify at appellant's third trial, the trial which is the subject of this review. Similarly, the State's misconduct regarding Doug Collard's testimony was not of an incurable nature. Likewise, the Dykes brothers' availability and testimony at the third trial allowed appellant the opportunity to correct the State's suppression of their exculpatory statements.

However, the passage of fourteen years has had corrosive effects on both the State's misconduct regarding Robert Hoehn's grand jury testimony and exculpatory statements, and the

suppression of the information incriminating Louella Mayfield. The State's theory has been, and the State continues to present evidence that the murder was of the type committed by a stranger and not by someone who knew the victim. It was the State's contention that, frustrated by his sexual ambivalence and impotence, appellant saw the victim naked in her bedroom, broke into her apartment through the patio door, sexually assaulted and killed her, and, imitating a scene from a television movie he had just seen, sexually mutilated the victim's body, cutting and taking part of her lip and vagina as souvenirs. With this theory, the State removed from suspicion the victim's lover, Jim Mayfield and his daughter, Louella Mayfield, both of whom were well acquainted with the victim, and placed appellant, presumably a stranger, whose fingerprints were on the outside of the victim's patio door, under suspicion. But Robert Hoehn testified before the grand jury that appellant had told him prior to the murder that he had met a girl fitting the victim's description at the apartment swimming pool and that she had invited appellant to her apartment where they had engaged in passionate sexual intercourse. Hoehn testified that appellant had "passion marks" on his neck which he claimed he received from the girl fitting the victim's description.

Hoehn's statements would have explained appellant's fingerprints on the victim's patio door and were potentially very damaging to the State's theory that this crime was committed by a stranger. As the district courts determined in their findings and conclusions, these statements were exculpatory and should have been delivered to appellant. Hoehn's testimony before the grand jury provided other exculpatory statements. For example, he testified that appellant had not paid attention to the television movie which the State claimed had inflamed appellant and inspired the victim's mutilation. Moreover, various aspects of Hoehn's testimony before the grand jury and his statements to the State contradicted incriminating statements which he made during appellant's first trial.

Hoehn died before the revelation of the State's suppression of his exculpatory and contradictory assertions. But even posthumously, he was a key witness for the State because Hoehn's testimony from the first trial was introduced at appellant's third trial. Appellant strongly objected to the introduction of Hoehn's testimony, contending the State's misconduct had robbed appellant of the opportunity to effectively cross-examine Hoehn during the first trial and that the admission of Hoehn's testimony would allow the State to benefit from its suppression until after Hoehn's death.[10] By recreating appellant's activities on the night of the murder, Hoehn is the sole witness able to place appellant directly at the victim's apartment complex at the time of the murder. The importance of this testimony to the State's case is evidenced by the fact that during its nine days of jury deliberation, the jury repeatedly asked for the record of Hoehn's testimony.

Accordingly, appellant correctly argues that Hoehn's testimony was gained through the fraudulent suppression of Hoehn's statements which were unsupportive of the State's theory of the case. As previously noted, Hoehn's testimony was critical for the State's case because it placed appellant at the scene of the murder, at the time of the murder and watching the television movie which the State alleges inflamed appellant.

The State's misconduct deprived appellant of the opportunity to investigate Hoehn's contradictions and of the right to confront Hoehn with his own contradictions. The admission of prior testimony given at a trial during which the State suppressed exculpatory and contradictory grand jury testimony and statements made by the witness is offensive to notions of fundamental fairness. It undermines our system of justice with its guarantees that one accused of a crime may confront the State's witnesses with

[10] In fact, the trial judge denied appellant's request to introduce Hoehn's grand jury testimony regarding the "passion marks" on appellant's neck.

their own contradictory or exculpatory assertions and thereby clarify their statements and perhaps build his own defense.[11]

For example, in this case, Paula Rudolph, another key witness for the State, has over the course of fourteen years come to clarify her initial statements that she saw Jim Mayfield in the victim's bedroom on the night of the murder. Rudolph had by the third trial refined her statement to assert that she assumed, on the night of the murder, that the man she saw in the victim's bedroom was Jim Mayfield since he was the victim's lover. And, the State has investigated and developed its "halo" theory to explain why Rudolph saw a white-haired man, like Jim Mayfield and unlike appellant, in the victim's room.[12]

It is not necessary to believe appellant would have built a successful defense based on evidence which the State suppressed. The point is that the State's suppression of the evidence until after Hoehn's death has denied appellant the opportunity to investigate, clarify and perhaps impeach Hoehn's testimony in the same manner as the State has developed evidence like Rudolph's testimony, through repeated clarification and investigation. Hoehn's death prior to the discovery of the State's misconduct has made it impossible to assess the full impact of the misconduct on appellant's ability to defend himself. This weighs against the State because it makes it impossible to determine whether the taint from the State's misconduct can be fully neutralized and appellant can be afforded a fair trial. Because of the State's theory of the case, the suppressed evidence could reasonably be taken to put the State's case in such a different light as to undermine confidence

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[11] Indeed, according to Hoehn's own testimony and statements, suppressed and otherwise, he fit the State's profile of the offender better than appellant.

[12] Rudolph testified that she saw a white haired man in the victim's bedroom the night of the murder. It was established that Jim Mayfield had white hair and that appellant's hair was black at the time of the murder. The State introduced expert testimony, developed over the years, that because of the intense lighting in the victim's bedroom, which doubled as a sewing room, conditions were such that black hair could have appeared white to someone standing where Rudolph was standing.

in the verdict. Therefore, I agree with the plurality that having deprived appellant of any opportunity to pursue Hoehn's contradictory and exculpatory statements, the State cannot now use this testimony against him.

The State's suppression of the evidence incriminating Louella Mayfield also deprived appellant of the opportunity to investigate and develop a potential defense. See, Ex parte Mitchell, 853 S.W.2d 1, 5 (Tex.Cr.App. 1993) (Suppression of favorable evidence hampered defense counsel's ability to prepare a defense which could have created a reasonable doubt.). For fourteen years the State suppressed the fact that Louella Mayfield, apparently an emotionally and mentally unstable, angry, young woman with a motive for murder, had been to the victim's apartment complex asking questions about her. After fourteen years, appellant cannot now pursue an independent investigation to develop this potentially exculpatory evidence: it is virtually impossible, fourteen years after the fact, to retrace Louella's steps on the night of the murder, or to find witnesses who might have seen Louella at or near the scene of the crime around the time of the crime or someplace other than where she said she was. Appellant cannot now investigate Jim or Elfrieda Mayfield's whereabouts to test Louella's alibi. Moreover, potentially exculpatory evidence is lost forever; for example, the suspicious pants in the trunk of Louella's car cannot now be tested. See, n. 14, infra.

I note again that it is not that I necessarily believe appellant would have built a successful defense based on the suppressed evidence. The point is that the State's willful misconduct has denied appellant the opportunity to investigate and develop his case in the same manner as the State has developed its evidence against appellant. The State's misconduct in this instance can reasonably be taken to put its case in such a different light as to undermine confidence in the verdict, especially in view of the State's failure to present any direct evidence of appellant's guilt.

In my view the most pernicious effect of the State's egregious misconduct is that by inhibiting the natural development of appellant's defense, the State permitted its own investigation to be less than thorough. In allowing itself to gain a conviction based on fraud, the State ignored its own duty to seek the truth and thereby weakened its own ability to obtain a verdict worthy of confidence. There are various examples of the State's complacency toward its duty to search out the truth: Elfrieda Mayfield, Jim's wife and Louella's mother, was not questioned by the State about her own, her daughter's or her husband's whereabouts on the night of the murder until 1992. This failure was extraordinary since Jim and Louella Mayfield claimed that they were at home with Elfrieda on the night of the murder; not to mention that as the scorned wife, Elfrieda had her own motives to murder the victim. The State's insistence that Doug Collard provide misleading information is another example of the complacency and illicit manipulation of the evidence on the part of the State which permeated the entire investigation of the murder. Another irregularity is found in the fact that the medical examiner failed to note in the autopsy protocol whether parts of the victim's lip and vagina had been removed. Without explanation for its absence in his original notations, the pathologist now insists that the body parts were, in fact, missing. Unfortunately, the autopsy and crime scene photographs are of such a quality that subsequent pathologists disagree as to whether it can be determined from them whether body parts are in fact missing. We note that appellant's second trial fell victim to the State's complacency during jury deliberations when the jury found the victim's sock in the leg of the victim's pants after the State had argued that appellant had carried off the souvenir body parts in the missing sock. The jury dead-locked and appellant's second trial ended in a mistrial. See n. 1, supra.

These are only a few examples which illustrate the State's less than thorough, indeed, intentionally misleading investigation which was facilitated by its misconduct. Having suppressed

evidence unfavorable to its theory of the case, the State was free to neglect the weaknesses in its own case and to manipulate the evidence to support its theory of the offense. Thus, the State suppressed its own incentive to conduct a thorough examination of the evidence, especially the evidence contrary to its theory of the case. After fourteen years, some of the weaknesses in the State's case are now impossible to correct. And, as appellant correctly argues, the State's presentation of a weak case based on less than thorough investigation increases the risk that the State's misconduct has affected the verdict; a verdict only weakly supported by the evidence is more likely to have been influenced by the State's wrongful manipulation of the evidence than a verdict based on strong direct evidence of guilt. Mitchell, 853 S.W.2d at 5; Brandley, 781 S.W.2d at 894.

In suppressing evidence unfavorable to its theory of the case, the State undermined appellant's ability to defend himself and undermined its own ability to gain a verdict worthy of confidence. Against the background of an incriminating theory of events which is weakened at every turn by the State's complacency toward its truth-finding duty -- a complacency facilitated in large part by the State's suppression of evidence contrary to its theory of the case -- and the deprivation to appellant arising from the State's fourteen years of concealed misconduct, that misconduct can reasonably be taken to put the State's case in such a different light as to undermine confidence in the verdict.

V. The Remedy

Remedies in criminal cases should be narrowly tailored to the injury suffered and should not unnecessarily infringe on society's interest in prosecuting criminal activity. United States v. Morrison, 449 U.S. 361, 365, 101 S.Ct. 665, 668 (1981). To this end it is necessary to identify and then neutralize the taint of the State's misconduct by tailoring the relief to assure, if possible, a fair trial. Id., 449 U.S. at 366, 101 S.Ct. at 669.

The usual remedy for due process violations discovered after trial is reversal of the fraudulently gained conviction and upon retrial deny the State the fruits of its transgression. Id.

However, other remedies might be necessary to neutralize the taint of the State's misconduct. In some instances, dismissal of the prosecution with prejudice may be warranted where a defendant suffers demonstrable prejudice, or the substantial threat thereof, and where the taint cannot be identified and neutralized by other means. In other words, dismissal with prejudice is appropriate in rare cases where it is the only means of adequately protecting an individual's rights and society's interest in checking abuse of the State's power. Id., Frye v. State, 897 S.W.2d 324, 330 (Tex.Cr.App. 1995), citing Phillips v. State, 650 S.W.2d 396, 399-403 (Tex.Cr.App. 1983).[1] For example, in Frye, the District Attorney contacted and interviewed Frye in violation of his Sixth Amendment right to counsel. Frye, 897 S.W.2d at 330, citing Morrison. The interview revealed the defense's theory of the case. Because Frye demonstrated a substantial threat of prejudice arising from the State's misconduct, i.e., a threat of prejudice which eluded precise identification and which could not be neutralized by other means, we held dismissal with prejudice was the appropriate remedy. Id. Similarly, in Morrison, the Supreme Court noted the appropriateness of dismissal as a remedy in cases where State misconduct of a constitutional dimension leads to permanent, rather than transitory prejudice, which cannot be purged to assure that a defendant can effectively defend himself and that he will not be unfairly convicted. 449 U.S. at 668.

In the instant case, the parties argue for two entirely different remedies. The State argues that no remedy is required because its transgressions were remedied when appellant's initial

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[1] The Morrison Court anticipated that such egregious violations of the law might be committed by "investigative officers." The instant conduct is even more egregious because it was committed by members of the bar who were acting as officers of the court. Although the most egregious conduct occurred earlier, as late as 1992, the State showed its continued willingness to violate the law in the prosecution of this case.

conviction was reversed and appellant was retried with the knowledge of the State's prior misconduct. Although the trial courts accepted this argument, I believe they missed the point; the relevant question is not whether appellant has knowledge of the suppressed evidence and the other instances of misconduct, but whether after fourteen years of concealment the State's misconduct can be corrected such that there is no prejudice or substantial risk of prejudice to appellant arising from the misconduct.

The State's argument is undermined by the retrial record which reveals that when given the opportunity to show that a fair retrial -- free of taint from its misconduct -- was possible, the State instead demonstrated its dependance on some of the tainted evidence, e.g., Hoehn's testimony. Thus, instead of supporting the State's argument, the record along with the history of this case support a conclusion that the State's own misconduct has rendered the prosecution incapable of obtaining a verdict worthy of confidence.

With that in mind, I turn to appellant's requested remedy which is dismissal of the prosecution with prejudice. The record and history of this case support appellant's contention that the State's misconduct has destroyed its ability to ensure a fair trial worthy of confidence in its result. In 1978, appellant was tried and convicted, but as we now know, this conviction was obtained through fraud and in violation of the law. Appellant's second trial resulted in a mistrial due to a hung jury. The conviction in this case came after nine days of jury deliberation and was gained in large part through Hoehn's testimony which was clearly a due process violation since that testimony occurred while the State was yet suppressing Hoehn's exculpatory and contradictory statements in violation of Brady.

Appellant has produced a record showing actual prejudice, in the form of Hoehn's prior testimony, and a continuing threat of substantial prejudice arising from the State's misconduct in that it robbed appellant of the opportunity to investigate and confront

> to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

In the instant case, the State's misconduct has ripened with the passage of years into a situation where the State cannot demonstrate that a fair trial, free of the taint of its misconduct, will ever be possible. Under these circumstances appellant's retrial serves no purpose but to subject him to continuing mental, emotional and financial hardships. Retrial under these circumstances would violate the most fundamental and compelling notions of fundamental fairness essential to the rule of law embodied in both the Texas Constitution and the United States Constitution. Having irreparably crippled appellant's ability to defend himself, and its own ability to uncover the truth, I do not believe the State should be permitted to abuse its power by again forcing appellant to defend himself against these accusations. Such abuse of State power is precisely what our federal and state constitutional rule of law, in general, and due process and due course of law, in particular, were intended to prohibit.

VI. CONCLUSION

In light of the facts of this case, the usual remedy of reversal and retrial is inadequate to fully remove the taint of the State's misconduct. Under my understanding of due process principles and appropriately fashioned remedies, I would hold the due process and due course of law clauses prohibit retrial when prosecutorial misconduct so taints the truth-finding process that it renders a subsequent fair trial on the same charges impossible. See, Morrison, 449 U.S. at 365, 101 S.Ct. at 668; Erye, 897 S.W.2d at 330. Accordingly, I would reverse the judgment of the trial

court and remand the case to that court to enter an order discharging appellant and precluding any future prosecution for the same offense.

BAIRD, Judge

Overstreet. J., joins this opinion.

(Delivered November 6, 1996)

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