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Recent Developments: Ware v. State: State May Not Deny the Existence of Brady Material Simply Because It Is Available in Public Records

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Ware v. State:

In an opinion that addressed many areas of criminal law, the Court of Appeals of Maryland outlined in *Ware v. State*, 348 Md. 19, 702 A.2d 699 (1997), why the State had committed a *Brady* violation for failing to disclose that its key witness had a pending motion for reconsideration of his own sentence. As a result, the court reversed the defendant's conviction because the State failed to notify him that *Brady* material existed, and was available in public court files.

Darris Ware was sentenced to death after being convicted of two counts of first degree murder for killing Bettina Krista Gentry and her friend Cynthia Allen. Prior to trial, Ware filed a Request for Discovery and a Motion to Produce Documents. When he received no response, he filed a Supplemental Discovery Motion to Compel Disclosure of Existence and Substance of Promise of Immunity, Leniency, or Preferential Treatment Offered to Any State's Witness, requesting the disclosure of any preferential treatment offered to a State's witness. In early December of 1994, a hearing was held in Anne Arundel County Circuit Court to address Ware's Motion to Compel Discovery. At the hearing, defense counsel expressed concern about the State's key witness, Edward Anderson, who

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By Doug May

was serving a life sentence for first degree murder. After the State testified that it knew of no preferential treatment offered to Anderson in exchange for his willingness to testify at Ware's trial, Judge Lawrence Rushworth denied Ware's Motion to Compel Disclosure.

Prior to Ware's trial, Anderson filed a Motion for Reconsideration of Sentence in Baltimore County. Before his hearing, the State's Attorney prosecuting Ware's case wrote a letter about Anderson's willingness to testify at Ware's trial to the State's Attorney handling Anderson's Motion for Reconsideration of Sentence. When Anderson's hearing was held in April of 1995, Judge Joseph F. Murphy held his decision on the motion *sub curia* in order to await the outcome of the Ware trial. In addition, the court decided that the State's Attorney's letter about Anderson's willingness to testify at Ware's trial should not be made part of the court file for

Anderson's own safety.

At trial, the question of whether there were any deals between the State and Anderson came up again, but the matter was not resolved until Ware's Motion For A New Trial. Before Anderson was cross-examined at Ware's trial, the court asked the State whether Anderson had been offered leniency in exchange for his testimony. The State replied that they had informed Anderson that if his testifying put him in any danger in jail that the State would do what they could to protect him. Ware's counsel finally learned about Anderson's Motion for Reconsideration of Sentence in November 1995, after Ware had been convicted. At that point, he supplemented his Motion for a New Trial with the additional allegation that the State had committed a *Brady* violation by not informing Ware of the State's involvement in Anderson's Motion for Reconsideration of Sentence.

After Ware's trial, the State wrote a letter to Judge Murphy, informing him that Anderson had appeared as a witness for the State in the Ware trial and had been truthful and cooperative. Despite these communications between the State's Attorneys in Ware's case and Anderson's case, the court denied Ware's Motion for a New Trial, finding that the information that Ware

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was seeking was available in the court files and could have been found through diligent investigation.

Initially, Ware was indicted by a Grand Jury in Anne Arundel County on two counts of first degree murder, two counts of the use of a handgun in the commission of a felony, and two counts of the use of a handgun in the commission of a crime of violence. After the State filed a notice to seek the death penalty, the case was removed to the Circuit Court for Howard County for trial. On September 11, 1995, a jury found Ware guilty on all counts, and sentenced him to death. After the denial of Ware's Motion for a New Trial, he appealed the decision to the Court of Appeals of Maryland.

The court reversed the judgments against Ware and remanded the case for a new trial. The court found merit in Ware's challenge that the State had failed to disclose requested material under *Brady v. Maryland*, 373 U. S. 83 (1963). *Ware v. State*, 348 Md. 19, 37, 702 A.2d 699, 708. *Brady* held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process." *Id.* at 37, 702 A.2d at 708 (quoting *Brady* at 87). In its decision, the court explained that the defendant can establish a *Brady* violation by demonstrating that the State had withheld material evidence that was favorable to the accused, that could either be

used for the mitigation of a sentence, or for the impeachment of a witness. *Id.* at 38, 702 A.2d at 708 (citing *United States v. Bagley*, 473 U. S. 667, 674-78 (1985); *Giglio v. United States*, 405 U. S. 150, 153-54 (1972); *Brady*, 373 U. S. at 87). The court explained that if the State had "evidence highly probative" of the innocence of the accused in his file, "he should be presumed to recognize its significance." *Id.* at 38, 702 A.2d at 708 (quoting *United States v. Agurs*, 427 U. S. 97, 110 (1976)).

The court discussed the three elements of a *Brady* violation: suppression of evidence by the state; favorable to the accused; and materiality. *Id.* at 38, 702 A.2d at 708. The court began by explaining that the defendant's assertion that evidence was suppressed by the State did not relieve Ware from making an attempt to find the evidence through diligent investigation. *Id.* at 39, 702 A.2d 708 (citing *Hoke v. Netherland*, 92 F.3d 1350, 1355 (4th Cir.), *cert. denied*, -U. S. -, 117 S.Ct. 630, 136 L.Ed.2d 548 (1996); *United States v. Payne*, 63 F.3d 1200, 1208 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 1056, 134 L.Ed.2d 201 (1996)).

Next, the court noted that evidence that could be used to impeach one of the State's witnesses should be disclosed, since it could be favorable to the accused. *Id.* at 41, 702 A.2d at 709 (citing *Marshall v. State*, 346 Md. 186, 198, 695 A.2d

184, 190 (1997)). The court said that "an agreement or understanding between the witness and the State need not be formal or detailed to come within the prosecutor's duty to disclose" *Id.* at 41, 702 A.2d at 709 (citing *Reutter v. Solem*, 888 F.2d 578, 582 (8th Cir.1989); *United States v. Shaffer*, 789 F.2d 682, 690 (9th Cir.1986)).

Finally, the court addressed the materiality requirement. The court noted that it had discussed the materiality of *Brady* material in *State v. Thomas*, 525 Md. 160, 190, 599 A.2d 1171, 1185 (1992). *Ware*, 348 Md. at 45, 702 A.2d 711. In *Ware*, the court explained that the Supreme Court had recently applied the reasonable probability test from *Strickland v. Washington*, 466 U. S. 668, 694 (1984), to determine whether the suppression of evidence by the State was so prejudicial that a new trial was required. *Ware*, at 44-45, 702 A.2d 711 (citing *Bagley*, 473 U. S. at 682). The standard for whether evidence was material was if its "suppression undermines confidence in the outcome of the trial." *Id.* at 47, 702 A.2d at 712 (citing *Bagley*, 473 U.S. at 434).

The court then applied these principles to Ware's case. First, the court concluded that Ware had made specific requests for evidence, and that the State had not responded adequately. *Id.* at 48, 702 A.2d at 713. The court did not accept the State's

argument that the information was available in the court files, and found that the State had mislead Ware by telling him that they had nothing to disclose. *Id.* at 49, 702 A.2d at 713. The court stated that "evidence of agreements or deals with witnesses often provides powerful impeachment evidence against a witness and enables a defendant to attack the motive or bias of a witness who might otherwise appear to have no motive to falsify or color his testimony." *Id.* at 50, 702 A.2d at 714 (citing *Giglio v. United States*, 405 U. S. 150, 154-55 (1972)).

The court also held that because Anderson was such a central witness in the case, his testimony was very material in the case. *Id.* at 51-52, 702 A.2d at 715. The court noted that Anderson was the only one who heard the gunshots. *Id.* at 52, 702 A.2d at 715. His testimony could have been impeached at Ware's trial because he stated that he heard three shots. At his sentence modification hearing, prior to Ware's trial, he stated that he heard two shots. *Id.* at 52-53, 702 A.2d at 715. The court concluded that,

considering the impact that Anderson's possible testimony on cross-examination could have had on the jury, the *Brady* violation was sufficient to undermine the confidence in the outcome of the trial. *Id.* at 54, 702 A.2d 716..

Even though the court found that a new trial was warranted based solely on the State's *Brady* violation, the court addressed Ware's other issues in order to assist the trial court on remand. The court found that the trial court had given the proper jury instruction for the death sentence, pursuant to Maryland Rule 4-343(e). *Id.* at 58, 702 A.2d at 718. The court also held that the Division of Parole and Probation did not violate Maryland Code Article 41, Section 4-609(d) (1957, 1997 Repl.Vol.), by accepting victim impact statements from the State for use in Ware's pre-sentence investigation. *Id.* at 63, 702 A.2d at 720 (citing *Williams v. State*, 342 Md. 724, 679 A.2d 1106 (1996)). Next, the court held that the trial court had correctly decided that Ware had failed to lay the foundation for demonstrative evidence before introducing it. *Id.* at 66,

702 A.2d at 722 (citing *Grandison v. State*, 305 Md. 685, 732, 506 A.2d 580, 603 (1986)). Finally, the court held that the trial court did not err by allowing the State to cross-examine a witness to show his bias and interest. *Id.* at 68 702 A.2d at 723.

Ware v. State gives notice to State's Attorneys that they should disclose any communications with a witness that could be used to impeach that witness, as *Brady* material. The State cannot use the excuse that the material is part of public record, but must tell the defendant about it, if it could be favorable to the accused. The court also gave instructions to the lower court in the areas of the death penalty, victim impact statements, demonstrative evidence, and impeachment evidence. *Ware* is primarily a reminder to the State to disclose any *Brady* material that might be favorable to the accused. However the court gave the State a small victory by permitting it to provide victim impact statements to the Division of Parole and Probation for use in the pre-sentence report.

NOTES

ADM v. Martin:

Baker v. General Motors Corp.:

Briggs v. State:

Buchanan v. Angelone:

Ferro v. Lewis:

Harford Cnty v. City of Bel Air:

Hudson v. United States:

Hyle v. Motor Vehicle Admin.:

Kostelec v. State:

Post v. Bregman:

Rice v. Paladin Enters. Inc.:

Tuer v. McDonald:

Ware v. State: