

## **Summary of SC89831, *Mark Gill v. State of Missouri***

Appeal from the New Madrid County circuit court, Judge J. Max Price  
Opinion issued Dec. 1, 2009

**Attorneys:** Gill was represented by William J. Swift of the public defender's office in Columbia, (573) 882-9855, and the state was represented by James B. Farnsworth of the attorney general's office in Jefferson City, (573) 751-3321.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** A man convicted of first-degree murder and sentenced to death appeals the circuit court's judgment that the state did not engage in prosecutorial misconduct and that he did not receive ineffective assistance of counsel. In a unanimous decision written by Judge Mary R. Russell, the Supreme Court of Missouri affirms that judgment in part, reverses it in part and remands (sends back) the case for a new penalty-phase trial. The prosecutor did not mislead the defense counsel into believing he would waive the death penalty. The state disclosed the contents of the victim's computer to the defense, but defense counsel failed to read the computer report carefully and failed to investigate the computer's contents. Had they conducted further investigation – as reasonably competent counsel would have – they would have discovered sexually explicit material on the victim's computer and would have used it either to dissuade the state from introducing positive character evidence about the victim or to rebut such character evidence during the penalty phase of the trial. Had they done so, there is a reasonable probability the jury would not have recommended the death penalty.

**Facts:** Mark Gill was tried for and found guilty of first-degree murder, armed criminal action, kidnapping, first-degree robbery and first-degree tampering. During the penalty phase of his trial, the state introduced evidence of the victim's good character through the testimony of the victim's family members. The jury recommended the death penalty, and the trial court sentenced Gill to death. This Court affirmed the conviction and sentence on direct appeal in *State v. Gill*, 167 S.W.3d 184 (Mo. banc 2005). After Gill's trial, his co-defendant, Justin Brown, was tried. In preparation for that trial, Brown's counsel received – pursuant to a judge's order and over the prosecutor's objection – a copy of the contents of the victim's computer. A computer analyst found, among the computer's contents, sexually explicit instant-messaging files, child pornography images and bestiality videos. The prosecutor filed a motion in Brown's case to exclude the computer's sexually explicit content, and the trial court ruled that such content would be excluded as irrelevant unless penalty-phase witnesses portrayed the victim as a "saint" or "someone who walks on water." During the penalty phase of Brown's case, although the same family members testified, the state did not elicit good character evidence about the victim, thereby not opening the door to the computer evidence. The jury found Brown

guilty of first-degree murder and kidnapping, and, although the state pursued the death penalty, the jury recommended life in prison without the possibility of parole. Gill subsequently sought postconviction relief, claiming prosecutorial misconduct and ineffective assistance of counsel. The circuit court denied his claims. Gill appeals.

**AFFIRMED IN PART; REVERSED IN PART; REMANDED.**

**Court en banc holds:** (1) The circuit court did not clearly err in finding the state did not violate *Brady v. Maryland*, 373 U.S. 83, 87 (1963), by failing to disclose the contents of the victim's computer to Gill's counsel before trial. A month before the trial, the state disclosed the computer's contents to defense counsel by sending a copy of the report, which listed all the computer's file folders and directories. Although counsel may not have examined the report thoroughly, they had it. As such, there was no *Brady* violation.

(2) The circuit court clearly erred in failing to find that the performance of Gill's counsel was deficient and that, as a result, he suffered prejudice. To prove ineffective assistance of counsel sufficient to reverse a death sentence, the movant must establish first that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense. *Strickland v. Washington* 466 U.S. 668, 687 (1984). While generally neither the state nor the defense may introduce evidence of the victim's character in a murder case, the state is allowed to present evidence showing the victim's uniqueness. If the state introduces evidence of the good character of a victim during the penalty phase, defense counsel either may object to the introduction of character evidence, which the trial court should sustain, or, as an alternate strategic maneuver, defense counsel may choose to allow the state to present the good character evidence, opening the door for defense counsel to present rebuttal character evidence.

(a) Here, the state introduced good character evidence about the victim through the testimony of the victim's family members. Gill's counsel should have presented rebuttal character evidence. They did not, however, because they failed to discover it. They saw the names of the sexually explicit files on the report about the computer's contents but failed to investigate further. They had the opportunity to discover the child pornography, bestiality videos and sexually explicit instant-message conversations on the victim's computer but failed to do so. As such, their performance was deficient, falling outside the wide range of professional, competent assistance. A reasonably competent attorney would have reviewed the report carefully and would have recognized the file names as evidence of sexually explicit material on the computer, would have conducted further investigation – including interviewing or deposing the police investigator who prepared the report about the computer's contents and who knew the victim's computer contained sexually explicit material – would have discovered the sexually explicit material and would have used it during the penalty phase of the trial.

(b) Had Gill's counsel discovered the material, they could have persuaded the prosecutor to limit the family members' testimony to victim-impact evidence rather than to elicit positive character evidence about the victim. Alternatively, had the state still chosen to elicit positive character evidence about the victim, they could have used the sexually explicit material in rebuttal, giving the jury an alternative description of the victim when it deliberated whether to recommend the death penalty. Given that the jury in the later trial of Brown – in which the defense persuaded the state not to present the positive character evidence about the victim – recommended life in prison, not death, there is a reasonable probability that the jury in Gill's trial would not have sentenced him to death either. As such, the deficient performance of Gill's counsel prejudiced him, and he is entitled to a new penalty-phase trial.

(3) The circuit court did not clearly err in finding the state did not engage in prosecutorial misconduct by misleading the defense. The state may not give misleading information to the defendant. Here, however, the evidence established that, although the prosecutor believed Gill had no information to implicate another defendant in the victim's murder, the prosecutor would have considered waiving the death penalty had Gill provided information to charge a potential defendant with a serious crime. As such, the prosecutor did not mislead defense counsel into believing he would waive the death penalty.

(4) Gill failed to preserve, for appellate review, his claim that the circuit court should not have signed the state's proposed findings of facts and conclusions of law. Further, because this Court is remanding Gill's case for a new penalty phase, it need not discuss other errors Gill raises in regard to the penalty phase of his trial.