

Summary of SC90197, *State ex rel. Reginald Clemons v. Steve Larkins, Superintendent*

Original proceeding in habeas corpus; case originated in St. Louis

Argued and submitted February 4, 2014; opinion issued November 24, 2015

Attorneys: Clemons was represented by Joshua A. Levine, Andrew M. Lacy, Gabriel Torres, Gabriel Rottman, Donald Conklin, Meredith C. Duffy, Noah Stern and Bashiri Wilson of Simpson Thacher & Bartlett LLP in New York, (212) 455-2000; and Mark G. Arnold of Husch Blackwell LLP in St. Louis, (314) 480-1500. The state was represented by Stephen D. Hawke 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 for the 1991 deaths of two sisters in St. Louis sought relief from the Supreme Court of Missouri, which appointed a special master to take evidence and issue a report regarding the man’s claims. In a 4-3 decision written by Chief Justice Patricia Breckenridge, the Court vacates the man’s convictions and sentences for first-degree murder and remands (sends back) the case. The state has 60 days from the date the mandate issues in this case to file an election in the circuit court to retry the man. If the state does not so elect, the case against the man shall be dismissed, and the man shall be discharged on this matter – although he will remain in state custody pursuant to a 15-year sentence in a different matter.

The master correctly concluded the man successfully proved his right to a new trial due to the state’s violation of the principles of due process and the standards of justice as outlined in the United States Supreme Court’s 1963 decision in *Brady v. Maryland*. Substantial evidence supports the master’s conclusions that the man proved that: undisclosed evidence from an objective, impartial witness – corroborating the man’s testimony that he was beaten and coerced into making a confession with incriminating evidence – was favorable to the defense; the state deliberately failed to provide the undisclosed evidence to the defense; the state’s failure to produce this favorable undisclosed evidence prejudiced the man, both in a hearing regarding the man’s motion to suppress his confession to police as well as in the guilt and penalty phases of the man’s trial. Considering the effect that undisclosed evidence may have had, along with the effect the man’s confession likely had on the jury, the man did not receive a fair trial with a verdict worthy of confidence. Because the man established the prejudice necessary to support his *Brady* claim, he also has shown the required prejudice to overcome the procedural bar for habeas relief.

Judge Paul C. Wilson dissents. He would deny the man’s petition on its merits. He would not review the undisclosed evidence from the witness because the man did not raise that claim in his petition seeking relief or any amended or supplementary pleading. Even if he were to review that claim, he would find there is not sufficient ground under *Brady* to vacate the man’s convictions and death sentences. The man has not shown he is “more likely than not” actually innocent, and he also fails to establish “cause” and “prejudice” entitling him to relief now. The evidence on which the man makes his claims is not exculpatory, impeaching or otherwise material to the

man's guilt or innocence. Even had the man's statement been suppressed, it likely would not have made much difference in the case, given the strength of the evidence against the man.

Judge Lisa White Hardwick – a judge of the Missouri Court of Appeals, Western District – participated in this case by special designation in place of Judge George W. Draper III.

Facts: Reginald Clemons and three codefendants were charged in the April 5, 1991, murders of sisters Julie Kerry and Robin Kerry, who were raped and then pushed to their deaths off the abandoned Chain of Rocks Bridge in St. Louis. Only the sisters' visiting cousin, Thomas Cummins, survived. Although police initially suspected Cummins, information ultimately led them to Clemons and the other three men. Police took Clemons to police headquarters on the evening of April 7, 1991, and interrogated him twice over the span of the next few hours. Police said that, during the second interrogation, Clemons voluntarily agreed to make a recorded statement, in which he admitted to robbing Cummins, raping one of the girls and being on the platform with one of the codefendants and all three victims. Clemons said the codefendant pushed the girls off the bridge. At the conclusion of this statement, in the early morning hours of April 8, police arrested Clemons and booked him for murder. Clemons filed a complaint with the police department's internal affairs division, alleging that detectives had beaten him during his interrogation and that he gave a statement only to avoid more physical abuse. The internal affairs report found the complaint was not substantiated because there was not sufficient evidence to prove or disprove the allegations. Although witnesses gave conflicting accounts as to whether they saw injuries to Clemons' face, the trial judge before whom Clemons made his initial appearance ordered a medical examination, and a doctor diagnosed Clemons with soft tissue swelling over the right cheek bone.

At trial, Clemons moved to suppress his statement to the police, arguing it was involuntary because the police obtained it by beating him, in violation of his constitutional rights. Following a February 1993 hearing, the trial court overruled Clemons' motion, finding there was no credible evidence to show if or how Clemons sustained his injuries other than his own testimony. At the conclusion of the guilt phase of trial in February 1993, the jury found Clemons guilty of two counts of first-degree murder. Following the penalty phase, the jury found 12 aggravating circumstances and recommended two death sentences. The trial court sentenced Clemons accordingly, and Clemons sought but was denied post-conviction relief. In a consolidated appeal, this Court affirmed the convictions and sentences as well as the denial of post-conviction relief. The United States Supreme Court declined review, and Clemons' petitions for relief in the federal courts ultimately were unsuccessful.

In June 2009, Clemons filed a petition for a writ of habeas corpus in this Court, asserting that newly discovered evidence establishes his "actual innocence" and that he has a right to have the proportionality of his death sentence reviewed, despite this Court's previous finding that his sentence was proportional. The Court appointed a special master to take evidence and issue a report regarding Clemons' claims. Discovery took several years due to difficulties in obtaining DNA results and the parties' requests for additional discovery. Before the formal hearing, Clemons expanded his claim for relief to assert what commonly is called a "cause and prejudice" claim. After hearing three days of live and videotaped testimony from 23 witnesses, conducting an in-depth review of the evidence and reviewing thousands of pages of trial record, the master

issued his initial report in August 2013 and his amended report the next month. The master found the state violated the United States Supreme Court's 1963 ruling in *Brady v. Maryland* by failing to produce evidence favorable to Clemons that a witness observed an injury on Clemons' face shortly after a police interrogation and that the witness documented his observations in a written report that the state later altered. The master determined the state's failure to disclose this evidence was prejudicial to Clemons because it could have led to the suppression of Clemons' confession, which could have put the case in a different light, undermining confidence in the verdict. This Court now reviews the master's report and the parties' arguments.

VACATED AND REMANDED.

Court en banc holds: Because substantial evidence supports the master's findings that the state deliberately violated *Brady* and that, in the absence of the undisclosed material evidence, the jury's verdicts are not worthy of confidence, Clemons' convictions and sentences for first-degree murder are vacated. Within 60 days from the date the mandate issues in this case, the state may file an election in the circuit court to retry Clemons. If the state does not so elect, the first-degree murder case against Clemons shall be dismissed, and he shall be discharged on this matter – although he will remain in state custody pursuant to a 15-year sentence in a different matter.

(1) The master correctly concluded that Clemons successfully proved his right to a new trial due to the state's violation of the principles of due process and the standards of justice as outlined in *Brady*. To prevail on his *Brady* claim, Clemons must show that: the evidence at issue is favorable to him, either because it is exculpatory or impeaching; the state suppressed the evidence, either willfully or inadvertently; and he suffered prejudice as a result of the state's suppression of the evidence. Under the United States Supreme Court's 1995 holding in *Kyles v. Whitley*, a defendant is prejudiced by the suppressed evidence if the favorable evidence is material and there is a reasonable probability that, had the evidence been disclosed to the defense, the proceeding's result would have been different. The question is not whether the defendant more likely than not would have received a different verdict but whether, in the absence of the evidence, he received a fair trial – one resulting in a verdict worthy of confidence. The evidence at issue is that of Warren Weeks, a former bail investigator for the Missouri Board of Probation and Parole who saw Clemons shortly after his arrest, who observed an injury to Clemons' face and who recorded the injury on a pretrial release form that later was altered to omit the reference to the injury. Although the state endorsed Weeks as a witness in a memorandum sent to Clemons' counsel in September 1992, the state failed to include any information regarding Weeks' observation of the injury or his record of the injury on the pretrial release form.

(a) Substantial evidence supports the master's conclusion that Clemons proved that the Weeks evidence – undisclosed evidence from an objective, impartial witness corroborating Clemons' testimony that he was beaten and coerced into making a confession with incriminating evidence – was favorable to the defense. In reaching this conclusion, the master found especially significant this Court's findings in its affirmance of Clemons' convictions and sentences as well as the denial of post-conviction relief in 1997. In rejecting Clemons' assertion then that the police used physical force to coerce his confession, this Court found that the majority of witnesses testifying that they had observed injuries to Clemons' face saw Clemons 48 hours or more after his interrogation.

It found that the only testimony in Clemons' favor came from the observation of his attorney, Michael Kelly, who saw Clemons about 14 hours after the interrogation. But the Court found Kelly's testimony was impeached by the testimony of St. Louis police Officer Warren Williams, who saw Clemons shortly before Kelly and testified he did not observe any injuries. The Court further noted that, although Clemons' family members corroborated the injuries, the trial court had the opportunity to judge the credibility of the witnesses and found the state's witnesses were more credible than those of Clemons. Based on this Court's reliance on witness testimony and its emphasis on the timing and credibility of those witnesses' observations of Clemons, the master determined that Weeks' testimony that he saw Clemons less than three hours after he was booked and more than eight hours before Williams could contradict Williams and impeach his testimony, especially given that Weeks had no ties to either Clemons or the city police department. As such, Weeks' testimony offered independent corroboration of Clemons' allegation that the police beat him – and the credibility of this allegation turned exclusively on the weight of the evidence presented. Additionally, this evidence may have led the trial court to sustain Clemons' motion to suppress his confession, which included the only direct evidence that Clemons was on the platform when the sisters were pushed into the water and that the rapes were planned and other evidence that likely influenced the jury's decision in sentencing Clemons to death. Even if the trial court were to continue to deny Clemons' motion to suppress, the Weeks evidence would be favorable to the defense at trial because it may have led the trial court to overrule the state's motion to prohibit closing argument by defense counsel that the police beat Clemons to coerce his confession. The Weeks evidence – which supports a reasonable inference that Clemons was beaten by police during his interrogation – would have been significant to the court in its ruling. It also would have been significant given that the jury was instructed to disregard and give no weight in its deliberation to Clemons' statement to the police if the jury did not believe it was made freely and voluntarily. This Court adopts the master's findings as to the first prong of *Brady*.

(b) Substantial evidence supports the master's determination that Clemons proved that the state suppressed the Weeks evidence from the defense. Although it does not matter whether the state acted willfully or inadvertently, the master found the state deliberately failed to produce the favorable Weeks evidence to Clemons. This Court defers to the master's unique ability to judge the credibility of witnesses. The master concluded the pretrial release form Weeks completed had been altered and, although it was uncertain who had crossed out the description of Clemons' injury, it had to be someone who had done it on behalf of the state. The master also concluded the state attempted to convince Weeks to change his report. The master further found there was no indication the state ever informed the defense of Weeks' recorded observations or of his oral statements of those observations. This Court adopts the master's findings and conclusions that Clemons satisfied the second prong of *Brady*.

(c) Substantial evidence supports the master's determination that Clemons proved he was prejudiced by the state's failure to produce the favorable Weeks evidence. The fact that the trial court denied Clemons' claim that his confession was physically coerced and allowed the confession into evidence without having the benefit of Weeks' testimony

substantially supports the master's finding that Clemons was not given a fair trial. When a defendant challenges the admissibility of a confession due to allegations of physical coercion, the state has a burden to show by a preponderance of the evidence that the confession was voluntary. The trial court's credibility findings as to Officer Williams' testimony were made without the benefit of the evidence from Weeks, the only neutral party supporting Clemons' claim that his confession was coerced. The totality of the evidence the trial court will consider on remand will include the Weeks evidence and, therefore, it is likely the trial court's credibility findings will not be the same. Clemons, one of Clemons' codefendants and Cummins all reported they were instructed to sit on their hands before being struck by a police officer, a unique restraint tactic by police. While it is possible Clemons and his codefendant might have colluded to create stories with the same unique manner of restraint, there is no likelihood they colluded with Cummins, and it strains credulity to suggest it is a coincidence that Cummins testified about the same unique manner of restraint during his interrogation. This evidence, along with the Weeks evidence, is credible evidence that Clemons' will was overborne at the time of his confession and that his confession should have been suppressed. The master expressly stated that he believed Clemons satisfied the *Brady* materiality standard such that the favorable evidence reasonably could be taken to put the whole case – including both the guilt and penalty phases – in such a different light as to undermine confidence in the verdict. Accordingly, Clemons was denied a fair trial not only because the state's suppression of the Weeks evidence prejudiced Clemons at the hearing on the motion to suppress his confession but also because the jury was not able to hear Weeks' testimony in determining whether the confession was made freely and voluntarily, as required by a jury instruction. Under *Kyles*, once a *Brady* violation has been found, there is no need for harmless-error review. Such an error cannot be treated as harmless because there is a reasonable probability that, had the evidence been disclosed to the defense, the proceeding's result would have been different. In his analysis of the issues, the master correctly applied the United States Supreme Court's 1984 ruling in *Strickland v. Washington*. In observing that it is enough if there is a "reasonable probability" of a different result before finding Clemons met that standard, it is clear the master understood the "reasonable probability" standard as articulated by *Strickland* to find that Clemons satisfied the prejudice standard of *Brady*. This Court accepts the master's conclusion that Clemons has demonstrated that the state's suppression of the favorable evidence of Weeks' observations and recordings was prejudicial. Considering the effect that evidence may have at the suppression hearing and the trial, along with the effect Clemons' confession likely had during the guilt and penalty phases of the trial, there is a reasonable probability of a different result in Clemons' conviction or sentence – Clemons was prejudiced and did not receive a fair trial with a verdict worthy of confidence. Because Clemons has established the prejudice necessary to support his *Brady* claim, he also has shown the required prejudice to overcome the procedural bar for habeas relief.

(2) Because this Court reverses Clemons' convictions and sentences for the state's violation of his due process rights as recognized in *Brady*, this Court will not address Clemons' proportionality claim.

Dissenting opinion by Judge Wilson: The author would deny Clemons' petition on its merits.

(1) The author would not review Clemons' claim about the Weeks evidence because he did not raise it in his 2009 petition seeking habeas relief or any amended or supplementary pleading, it was not one of the issues this Court appointed the master to hear, and it arose so late in the master's proceedings it would not have been included in the master's report but for the master leaving the record open to allow for Clemons' last-minute deposition of Weeks. Clemons' petition raised only a freestanding claim of actual innocence based on Cummins' 1993 suit against the city alleging the police assaulted Cummins in an effort to make him confess that he was responsible for his cousins' deaths and a 1995 payment of \$150,000 by the city to resolve Cummins' suit. None of this evidence, however, was new, and the master properly concluded Clemons could not rely on this information as "new evidence" of actual innocence. To the extent Clemons suggests he possesses new evidence that shows he is innocent, the master concluded Clemons had a right to litigate the claim that his own testimony would exonerate him in his trial.

(2) Even if the author reviews Clemons' *Brady* claims about the Weeks evidence, he would find there is not sufficient ground under *Brady* to vacate Clemons' convictions and death sentences.

(a) Even though Clemons did not allege any new constitutional claims in his 2009 habeas petition, he argued "gateway" claims permitting him to raise a previously waived constitutional claim, and the master analyzed each. As to the first gateway, the master found Clemons could not show he is "more likely than not" actually innocent. The second gateway – called "cause and prejudice" – concerned Clemons' *Brady* claims. Although the elements for cause and prejudice seem to be identical to the *Brady* elements of nondisclosure and materiality, they are not – as the master pointed out, proof of "nondisclosure" of exculpatory or impeachment evidence does not necessarily constitute proof of sufficient "cause" to excuse an inmate's failure to assert the claim earlier.

(b) As to Clemons' argument that the state failed to disclose a draft of a police incident report that Clemons says shows it was Cummins – and not Clemons and his codefendants – who killed the Kerry sisters, the master properly concluded Clemons failed to establish either "nondisclosure" or "cause" because his counsel had sufficient information to know the document existed and could have obtained the report before trial. As to Clemons' argument that the state should have disclosed a rape kit taken from Julie Kerry's body that showed no seminal fluid at the time of the autopsy, the master properly concluded there was no reasonable probability that disclosure of the kit would have caused the trial's result to be different, given that condoms were found at the scene and the girl's body was not recovered from the river until three weeks after her murder.

(c) The Weeks evidence also does not give Clemons grounds for relief now. First, there was no failure to disclose. Long before trial, the state produced to the defense Weeks' name, his job and the document on which he supposedly noted his observation. But even if the state had not disclosed all of this before trial, the disclosure would not require relief under *Brady* because Weeks' evidence is neither exculpatory evidence concerning guilt or punishment nor impeachment evidence concerning the credibility of a witness who might be determinative of guilt or punishment. Weeks' subjective impression of Clemons' appearance formed hours after Clemons was interrogated has no bearing on

whether Clemons' audiotaped statement was voluntary. And even if the Weeks evidence was exculpatory or impeaching, Clemons is not entitled to relief because the evidence is not material. Based on his misunderstanding of *Kyles*, the master determined he was not permitted to address the second step of the materiality analysis. As such, the master never determined whether there is a reasonable probability that, if the jury had not heard Clemons' statement, it would not have convicted him and recommended that he be sentenced to death. But the master did note nonetheless that he was dubious that the suppression of Clemons' statement would have made much difference in the case, due to the strength of the evidence against Clemons.

(d) The Weeks evidence would not have affected the suppression hearing. All the witnesses – including Weeks – admit they have no personal knowledge of what caused Clemons' injuries, if any, and they all admit they did not observe any officer strike Clemons at any time or for any reason. Further, neither the medical records nor any of the photographs (neither those taken 4.5 hours after Clemons' interrogation nor those taken 36 hours later) show signs of any injuries. In any event, it is not this Court's job to determine whether Clemons was beaten. Only the trial court was responsible for weighing the conflicting direct evidence to determine whether Clemons' statement was voluntary. The state proved it was more likely than not that Clemons' statement was voluntary. The author disagrees with the master that Weeks' story may have changed the outcome of the suppression hearing. Because the trial court believed the officers and not Clemons, there is no likelihood it would have been swayed by another contradictory witness who had no direct knowledge about how any such injuries were caused.

(e) Even had Weeks' testimony swayed the trial court to suppress Clemons' statement, there is no reasonable probability that the jury would not have convicted him or sentenced him to death. The master was obligated to assess what impact suppressing Clemons' statement would have had in light of the state's other evidence. That statement aside, the evidence supporting Clemons' convictions and sentences is overwhelming. Regardless of where Clemons was standing when the sisters were pushed to their deaths, the master found there was compelling evidence putting Clemons on the platform with the victims shortly before their deaths. The jury had in the deliberation room the statement made by one of Clemons' codefendants as well as the lengthy transcripts of Cummins' two taped statements to police on the morning his cousins were killed. Both described in detail what happened on the bridge, and the codefendant's statement corroborates Cummins' story almost perfectly. Further, Clemons argued at the time of trial that he should not have been convicted or sentenced to death because it was another man who pushed the sisters off the bridge. The jury instructions, however, made clear that it did not matter who pushed whom or who saw what, as long as the jury concluded that either Clemons or his codefendant intentionally and with cool deliberation killed the sisters and that Clemons coolly deliberated on that act.