

of alcohol versus contaminations by interferants was at a tolerable rate for such technology.

This case also shows that potential experts may have a vested interest in the technology in question and still testify as expert witnesses in SCRAM-related cases. The finding by the South Dakota Supreme Court that Jeffrey Hawthorne qualified as an expert witness, despite his financial interest in the technology in question, could be an ethics-related concern. Mr. Hawthorne holds the patent for the SCRAM and also is employed by AMS, Inc., the manufacturer. At the time of this writing, the SCRAM has only one competitor on the market. Also, AMS has since introduced SCRAMx, a device that combines the SCRAM technology with house-arrest monitoring. Financial interests may be taken into account by the court in determining expert status, but are not grounds for automatic disqualification if the subject meets the required criteria. The court cited *Maroney v. Aman*, 565 N.W.2d 70 (S.D. 1997), stating that an expert can be qualified only by comparing “the area in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness’s testimony” (*Maroney*, p 79).

With the increasingly overstretched correctional system searching for viable options to incarceration, technology such as the SCRAM will continue to be an attractive option, since such programs save the cost of incarceration, and many of these programs require the offender to pay any related fees for the program. These factors make it likely that more jurisdictions will adopt this technology, and therefore the precedent set in the ruling of the Supreme Court of South Dakota will affect future challenges nationwide.

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Holding Prosecutors to a Higher Standard Than Constitutionally Required?

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The United States Supreme Court, in a Footnote, Cited the American Bar Association (ABA) Model Rule of Professional Conduct 3.8(d) (2008), Which Compels a Prosecutor to Disclose Exculpatory and Mitigating Evidence to the Defense Beyond What Is Constitutionally Mandated

In *Cone v. Bell*, 129 S. Ct. 1769 (2009), in a seven-to-two decision, the Supreme Court vacated the decision of the U.S. Court of Appeals for the Sixth Circuit and remanded the case to the U.S. District Court for the Western District of Tennessee, Western Division, with instructions to give full consideration to the merits of the defendant’s *Brady* claim—specifically, to consider whether the prosecutor’s failure to disclose exculpatory evidence could have mitigated the defendant’s capital sentence. The Court held that Mr. Cone’s *Brady* claim was not procedurally defaulted and state court decisions did not provide independent and adequate grounds for denying a federal *habeas corpus* review.

The Due Process Clause of the Fourteenth Amendment mandates the disclosure of material exculpatory evidence by the prosecution to the defense (*Brady v. Maryland*, 373 U.S. 83 (1963)). Material exculpatory evidence is defined as evidence favorable to the defense, where there is reasonable probability that, if disclosed, the result of the proceeding would have been different. To establish a *Brady* violation, a petitioner must show that the prosecution withheld evidence that is both favorable to the defendant and material to either guilt or punishment.

Aside from the procedural and constitutional aspects of this case, the Court cites the American Bar Association (ABA) Model Rule of Professional Conduct 3.8(d) (2008), which addresses a prosecutor’s ethics-based responsibility to disclose evidence to defense counsel that tends to negate the guilt of the accused or mitigates the punishment. The ABA model rule sets a higher standard of ethics than the constitutionally required standard. In the Discussion section, we address the relevance and potential impact of the Court’s citation of this ABA model rule.

Facts of the Case

On August 10, 1980, Gary Cone robbed a jewelry store in Memphis, Tennessee. After a high-speed car chase, Mr. Cone shot and killed a police officer and a bystander. He escaped, and the following day, he gained entry into the home of an elderly couple and beat them to death. While in their home, he bathed

and shaved his beard and then fled to Florida, where he was arrested several days later after attempting to rob a drugstore.

Mr. Cone's sole defense was that he was not guilty by reason of insanity. He claimed that he was suffering from chronic amphetamine psychosis resulting from substance abuse that began during his military service in Vietnam. Two defense experts testified that Mr. Cone exhibited symptoms of chronic amphetamine psychosis at the time of the alleged crimes. However, the prosecution discredited the experts' opinions on cross-examination, because these opinions "were based solely on Cone's own representations to them rather than on any independently corroborated sources, such as medical records or interviews with family or friends" (*Cone*, p 1774).

Mr. Cone was found guilty on all the charges, including two counts of first-degree murder and two counts of murder in the perpetration of a burglary. At sentencing, "the jury could impose a capital sentence only if it unanimously determined that one or more statutory aggravating circumstances had been proved by the state beyond a reasonable doubt, and that the mitigating circumstances of the case did not outweigh any statutory aggravating factors" (*Cone*, p 1775). The jury voted unanimously for the death penalty.

The threshold issue in this case is whether Mr. Cone's *Brady* claim was ever heard on the merits by the state courts. Mr. Cone raised a *Brady* claim on state appeal that was lacking in specificity because, at the time, he did not have the prosecutor's files. In the middle of Mr. Cone's state appeal, another case was decided that interpreted state law in such a way that allowed Mr. Cone access to the prosecutor's files. In the files, Mr. Cone discovered documents that had been withheld from him at trial and that tended to corroborate the testimony by his psychiatric experts. These statements were from witnesses who described Mr. Cone's appearance during and around the time of the crimes as "wild eyed" and his behavior as "real weird." One witness stated that Mr. Cone appeared "to be drunk or high" (*Cone*, p 1777). The file also contained a police report in which a police officer described Mr. Cone as looking around "in a frenzied manner" and "walking in an agitated manner" before his arrest as well as police bulletins describing Mr. Cone as a "heavy drug user" (*Cone*, p 1777).

Mr. Cone amended his state appellate petition after obtaining this new information to strengthen his *Brady* claim. He argued that his claim was never addressed on the merits by the Tennessee state courts. The Tennessee courts, however, held that Mr. Cone's *Brady* claims were restatements of previous grounds that had already been denied or that the claims were waived when not raised in the initial appeal. After exhausting his state appeals, Mr. Cone filed a federal *habeas corpus* case raising his *Brady* claim. The U.S. district court denied relief on the procedural grounds that Mr. Cone had waived the claim by not presenting it in state court. The Sixth Circuit affirmed, and Mr. Cone sought review by the Supreme Court.

Ruling and Reasoning

The Supreme Court vacated the decision of the Sixth Circuit and remanded the case to the U.S. district court. Preliminarily, it held that federal *habeas corpus* review is not barred every time a state court invokes a procedural rule to limit a defendant's claims. Deciding that the case could be heard in federal court, the Court then reviewed Mr. Cone's claims on the merits.

The Court concluded that the likelihood that the suppressed evidence would have affected the jury's verdict on the issue of insanity in the guilt phase of the trial was "remote." On the other hand, the Court concluded that the suppressed evidence "lends support to Mr. Cone's position at trial that he habitually used excessive amounts of drugs, that his addiction affected his behavior during his crime spree, and that the state's arguments to the contrary were false and misleading" (*Cone*, p 1784). Because the lower courts had not fully considered whether this exculpatory mitigating evidence might have persuaded one or more jurors to choose a life sentence, the Court remanded the case to the U.S. district court to give full consideration to the merits of Mr. Cone's *Brady* claim regarding mitigation of his sentence.

Dissent

Justices Thomas and Scalia would have affirmed the lower court's decision. They dissented partly on grounds that the suppressed evidence, viewed in context, could easily be consistent with someone who was in an excited state while committing crimes and evading police and might be unrelated to any alleged drug use. In their view, looking

“wild eyed” or looking around “in a frenzied manner” did not rise to the level of material evidence that would have changed the mind of any juror to mitigate a capital sentence.

Discussion

In a footnote, the Court cited the ABA Model Rule of Professional Conduct 3.8(d) (2008), which compels a broader obligation from an ethics standpoint for a prosecutor to disclose evidence favorable to the defense. “As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure” (*Cone*, p 1783).

Justice Roberts in his concurrence specifically noted, “The lower courts should analyze the issue under the constitutional standards . . . not under whatever standards the American Bar Association may have established” (*Cone*, p 1787). “The majority’s passing citation of [the ABA model rule] should not be taken to suggest otherwise” (*Cone*, p 1787). The majority opinion of the Court did not further clarify this issue and left unresolved the extent to which courts can grant relief for a prosecutor’s failure to abide by this higher ethics-based but not constitutionally mandated standard.

This ruling is relevant to forensic practice. More disclosure by the prosecution may result in more evidence favorable to the defendant’s case that the forensic evaluator will have access to for an NGRI evaluation. In the present case, both defense expert opinions were based solely on the defendant’s account of his amphetamine use and symptoms of chronic amphetamine psychosis to establish an NGRI defense. This limited source of evidence allowed the prosecution to discredit the reliability of the basis for the opinions.

This case highlights the perils for a forensic expert in basing an evaluation and testimony solely on a party’s statements without collateral information and on the importance of pressing to seek any such information from opposing counsel. It is not safe to assume that no such evidence exists or that all such evidence has been properly produced. Prudence dictates, therefore, that the forensic expert should specifically request of counsel any such information and inquire whether there might be collateral information of this type.

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Competent With a Caveat

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Courts Have the Duty to Ensure That a Defendant Is Competent When on Notice of a Troubled History

In *United States v. Ruston*, 565 F.3d 892 (5th Cir. 2009), the United States Court of Appeals for the Fifth Circuit considered whether the United States District Court for the Northern District of Texas erred in not ordering *sua sponte* a competency evaluation, thus allowing a questionably competent defendant to proceed *pro se* at his postacquittal commitment hearing.

Facts of the Case

In May of 2004, Lester Jon Ruston left a threat-ridden voicemail for the Honorable Irma Ramirez, a federal magistrate judge whom he believed to be involved in a plot to murder him. Upon arrest, he was charged with threatening to assault and murder a federal official in violation of 18 U.S.C. § 115 (2000). Although a federal defender was appointed his counsel in August, Mr. Ruston began filing irrational *pro se* motions, alleging that the district court was attempting to cover up a conspiracy against him. After a competency to stand trial (CST) evaluation was ordered and completed, Mr. Ruston was found not competent and was remanded to the custody of the attorney general on May 4, 2005, for competency restoration. Throughout his 16-month stay at the U.S. Medical Center for Federal Prisoners (MCFP), Mr. Ruston refused treatment, denied he had a mental illness, and continued filing erratic *pro se* motions (telephone communication with James Wolfson, MD, October 26, 2010).

In August 2006, a *Sell* hearing was scheduled to determine whether Mr. Ruston could be involuntarily medicated. Before the hearing, Mr. Ruston’s attorney had Mr. Ruston’s CST assessed by an independent evaluator, Dr. George Trapp. Dr. Trapp