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State of Franklin v. Hale

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State of Franklin v. Hale

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OFFICE OF THE DISTRICT ATTORNEY FOR THE STATE OF FRANKLIN
COUNTY OF JUNEAU

OFFICE MEMORANDUM

To: Examinee
From: Juliet Packard, District Attorney
Date: July 24, 2018
Re: Motion for new trial in *State v. Hale*, Case No. 17 CF 1204

In April, our office prosecuted Henry Hale for attempted murder. The jury convicted him. The evidence at trial demonstrated that Hale shot Bobby Trumbull during an argument in the courtyard of Trumbull's apartment complex. Our only substantive trial witnesses were the investigating detective and Trumbull. The defense did not call any witnesses.

Hale timely filed a motion for a new trial, and the judge recently held a brief evidentiary hearing. I need you to prepare the "Legal Argument" portion of our brief in response to Hale's motion for a new trial, following the office guidelines for drafting persuasive briefs.

Hale's motion raises three issues, two regarding our purported failure to comply with the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), and one arising under Franklin Rule of Evidence 804. With each of these issues, you need to discuss not only whether there was a violation of law, but also whether any violation entitles Hale to a new trial under Franklin Rule of Criminal Procedure 33. I have attached a copy of the relevant portions of Hale's brief, as well as pertinent pages from the trial transcript and the transcript of the hearing on the motion for a new trial.

OFFICE OF THE DISTRICT ATTORNEY FOR THE STATE OF FRANKLIN
COUNTY OF JUNEAU

OFFICE MEMORANDUM

To: Office staff
From: Juliet Packard, District Attorney
Date: September 5, 2016
Re: Guidelines for drafting persuasive briefs

…

III. Legal Argument

Your legal argument should be brief and to the point. Make your points clearly and succinctly, citing relevant authority when appropriate for each legal proposition.

Do not restate the facts as a whole at the beginning of your legal argument. Instead, integrate the facts into your legal argument in a way that makes the strongest case. The body of each argument should analyze applicable legal authority and persuasively argue how both the facts and the law support the state's position. Be sure to cite both the law and the evidence. Emphasize supporting authority but address contrary authority as well; explain or distinguish contrary authority in the argument.

Use headings to separate the sections of your argument. When drafting your headings, do not state abstract conclusions, but integrate factual detail into legal propositions to make them persuasive. An ineffective heading states only: "The motion to suppress should be denied." An effective heading states: "The motion to suppress should be denied because the officer read the defendant his rights under *Miranda v. Arizona* and the defendant signed a statement waiving those rights."

* * *

STATE OF FRANKLIN
DISTRICT COURT OF JUNEAU COUNTY

STATE OF FRANKLIN, **Plaintiff,** **v.** **HENRY HALE,** **Defendant.**	**Case No. 17 CF 1204**

DEFENDANT'S BRIEF IN SUPPORT OF MOTION FOR A NEW TRIAL

FACTS

On June 20, 2017, an anonymous male called 911 to report the shooting of Bobby Trumbull at the Starwood Apartments. Later that day, Denise Lee, the investigating detective, interviewed Sarah Reed, a resident of the apartment complex. During discovery, the prosecution provided the defense with a video recording of the detective's interview with Reed. In that interview, Reed said that she had been on her balcony watching a video when she looked up and saw defendant Hale arguing with another man in the courtyard. She resumed watching the video and then heard a gunshot. She looked up and saw Hale running from the courtyard. The other man had fallen to the ground.

After trial, defense counsel learned that Reed had made a subsequent statement to police, specifically Detective Mark Jones, that recanted her initial statement. The prosecution never provided information to the defense about the second statement.

In addition, *after trial*, defense counsel learned that the victim, Bobby Trumbull, told the emergency medical technician (EMT) immediately after the incident that he was not certain who had shot him. Trumbull also called Hale a "rat," said that Hale thought that Trumbull owed him money, and said that the shooting was "all [Hale's] fault." This evidence contradicted Trumbull's trial testimony that identified Hale as the shooter. The prosecution, however, failed to disclose this evidence to the defendant.

Reed and Hale were married on August 25, 2017, after the shooting and well before the trial. At trial, Hale asserted the spousal testimonial privilege, preventing Reed from testifying against her husband. The prosecution then sought to admit Reed's initial out-of-court statement given to Detective Lee during her interview, under Franklin Rule of Evidence 804(b)(6), arguing that Hale had wrongfully caused Reed to become unavailable to testify. Hale objected. This court overruled the objection and admitted Reed's highly prejudicial out-of-court statement to Detective Lee, in which Reed identified Hale as the individual in the courtyard with Trumbull. The jury convicted Hale of attempted murder.

ARGUMENT

I. The Prosecution Violated *Brady v. Maryland* by Failing to Disclose the Sole Eyewitness's Recantation and the Victim's Exculpatory Statements.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court held that the government cannot suppress evidence that is favorable to the defendant and that is material to either guilt or sentencing. In analyzing whether *Brady* has been violated, this court must make three determinations: (1) whether the evidence in question was favorable to the defendant, (2) whether it was suppressed by the government, and (3) whether it was material. *Strickler v. Greene*, 527 U.S. 263 (1999). A prosecutor's good faith is irrelevant. *Brady*.

Reed's recantation of her prior identification of Hale as the shooter is favorable to the defense. In *Brady*, the Supreme Court defined evidence favorable to the defendant as evidence that would make a neutral fact-finder less likely to believe that the defendant committed the crime with which s/he was charged. Knowing that Reed, the only known eyewitness, had recanted her statement would make a fact-finder less likely to believe that Hale committed the crime. Similarly, Trumbull's statements to the EMT, in which he admitted that he was not certain who had shot him and expressed ill feelings toward Hale, were favorable to the defendant and directly contradicted Trumbull's trial testimony. A neutral fact-finder would be less likely to believe Trumbull's trial testimony if it heard that Trumbull had made these contradictory statements to the EMT.

Information about Reed's recantation was suppressed by the prosecution. The evidence was in the possession of the prosecution because it was held by Detective Jones. Evidence that is in the physical possession of an investigating officer is considered to be in the possession of the government, even if the investigating officer does not disclose the evidence to the prosecutor. *Kyles v. Whitley*, 514 U.S. 419 (1995). Likewise, the information about Trumbull's statements to the EMT was in the government's possession. The ambulance service is an agency of the government of Franklin City. Both pieces of evidence were suppressed because the government did not provide this evidence to the defendant.

The prosecutor's office provided discovery to the defendant through an "open file" policy. The prosecutor gave everything in her file to the defense. Neither of these pieces of evidence was in the prosecutor's file. In *State v. Haddon* (Fr. Sup. Ct. 2012), the court held that the "open file" policy could actually deter a defendant from investigating whether other information might be available. It would be reasonable for a defendant who was the beneficiary of an "open file" policy to assume that all relevant and exculpatory information was in the file and was thus disclosed.

Finally, the evidence at issue is material. Evidence is material 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*. Where the state has suppressed multiple pieces of evidence, the determination of materiality should be made on a cumulative basis. *Id*. Here, if the defendant had been given all of the suppressed evidence, there is more than a reasonable probability that the result of the trial would have been different.

A determination that suppressed evidence is material necessitates a finding that the defendant has been prejudiced. *Kyles*. Therefore, under Franklin Rule of Criminal Procedure 33, the defendant is entitled to a new trial.

II. Hale was Prejudiced by the Admission of Reed's Hearsay Statements; He Did Not Marry Her with the Intention of Causing Her Unavailability for Trial.

Hale's conduct in marrying Reed did not satisfy the requirements of Franklin Rule of Evidence 804(b)(6) for admission of Reed's hearsay statements. To satisfy that Rule, a significant motivation behind the defendant's conduct must have been to cause the unavailability of the declarant. Hale did not marry Reed with the intent of making her unavailable for trial. The facts of this case are much like *State v. Preston* (Fr. Ct. App. 2011), in which the defendant married the witness after the alleged crime. In *Preston*, the court held that the mere act of marriage did not constitute an intention to wrongfully cause the declarant's unavailability. And, as a policy matter, it is inconsistent for the court to uphold a particular marriage through the spousal privilege, thereby preventing a spouse from testifying, and then to undermine this same marriage by finding that the marriage itself served to wrongfully cause the spouse's unavailability in the court proceeding.

An evidentiary rule violation, unlike a *Brady* violation, requires a separate determination of prejudice under Franklin Rule 33 to warrant a new trial. Here Hale was prejudiced by the erroneous introduction of Reed's out-of-court statements. Reed was the only known eyewitness to the events, and the prosecution was allowed to present hearsay that was never subject to cross-examination. But for this error, there is a strong probability that the result of the trial would have been different. *Preston*. This error was made even more prejudicial by the state's *Brady* violation, which hid from the defense those inconsistent statements that could have been used to impeach Reed and Trumbull. The state was in possession of believable statements by Reed and Trumbull that contradicted their statements admitted at trial.

* * *

Excerpts from *State v. Hale* Trial Transcript, April 26, 2018

TESTIMONY OF SARAH REED

Prosecutor: Please state your name for the record.

Defense Att'y: Your Honor, could you please excuse the jury for a few moments? [Whereupon the jury was excused.]

Defense Att'y: The defendant asserts spousal privilege under § 9-707 of the Franklin Statutes.

Court: Ms. Reed, when did you marry the defendant?

Reed: August 25, 2017.

Court: When did he propose?

Reed: July 25, 2017.

Court: When did you start dating?

Reed: We dated four years ago for about seven months, but then we broke up. We got back together in March 2017.

Court: Ms. Reed, did Mr. Hale ever indicate to you that he married you so that you couldn't testify at his trial?

Reed: Henry married me because he loves me. He did say that he wanted to marry me quickly, before the trial started.

Court: Did he ever threaten you or tell you that bad things would happen if you did testify against him?

Reed: He did say that it would be hard for us to stay together if I testified against him. I'm not sure if he'd really leave me because of this, but I hope I don't have to find out. I do know that we love each other.

Court: Thank you. The witness will be excused based upon the defendant's exercise of spousal privilege. Bailiff, please ask the jury to come back now.

DIRECT TESTIMONY OF DETECTIVE DENISE LEE

Prosecutor: Please state your name for the record.

Lee: I am Detective Denise Lee of the Franklin City Police Department.

Prosecutor: Did you have occasion to investigate the shooting of Bobby Trumbull at the Starwood Apartments on June 20, 2017?

Lee: Yes. We received an anonymous call stating that a man had been shot in the courtyard of the Starwood Apartments. I arrived after the victim, Mr. Trumbull, had been taken

to the hospital. We could locate only one witness to the shooting, and that was Sarah Reed.

Prosecutor: And what did Ms. Reed tell you?

Defense Att'y: Objection. Hearsay.

Court: I am going to excuse the jury and hear your argument for why this is or is not admissible evidence. [Whereupon the jury was excused from the courtroom.]

Defense Att'y: Your Honor, this is blatant hearsay. The state is attempting to introduce Ms. Reed's out-of-court statements for the truth of the matter asserted.

Prosecutor: Your Honor, Mr. Hale married Ms. Reed after the shooting but before this trial. A significant motivation for the marriage was to prevent Ms. Reed from testifying in this case. We have also heard that he threatened to leave her if she testified. Consequently, the hearsay is admissible because the defendant wrongfully caused the witness's unavailability under Franklin Rule of Evidence 804(b)(6).

Defense Att'y: Your Honor, Ms. Reed and Mr. Hale were married on August 25, 2017. There is no evidence in the record that the marriage was intended to wrongfully cause the unavailability of Ms. Reed. And Ms. Reed herself said that she wasn't sure what the defendant meant when he said that it would be difficult for them to stay together if she testified. She also made clear that she and Mr. Hale loved each other.

Court: The court finds itself bound to respect the marriage as being valid under Franklin law. Thus this court allowed Mr. Hale to assert the spousal testimonial privilege and ruled that Ms. Reed could not be compelled to testify. But the question before this court is a much more nuanced one: whether by virtue of that valid marriage, along with his statements to Ms. Reed, Mr. Hale intended to wrongfully cause, and in fact did wrongfully cause, Ms. Reed to be unavailable as a witness. Based upon the evidence before this court, I am going to overrule the defense's objection and admit the statement. Bailiff, please bring the jury back in. [Whereupon the jury was reseated.]

Prosecutor: Detective Lee, could you tell us what Ms. Reed told you later in the afternoon on June 20, 2017, immediately after the incident?

Lee: She told me that she had been sitting on her balcony above the courtyard in the apartment complex watching a video on her computer. She saw two men yelling at each other in the courtyard. She recognized one of them as her boyfriend, Henry Hale. She couldn't make out what they were saying, but she knew that the two men were

arguing. She went back to watching the video and then heard a shot. She looked up and saw Mr. Hale running out of the courtyard and saw Mr. Trumbull collapsed on the ground.

CROSS-EXAMINATION

Defense Att'y: Did you ever find any forensic evidence linking Mr. Hale to the crime?

Lee: No.

* * *

DIRECT TESTIMONY OF BOBBY TRUMBULL

Prosecutor: Please state your name for the record.

Trumbull: Bobby Trumbull.

Prosecutor: What happened on June 20, 2017, in the courtyard of the Starwood Apartments?

Trumbull: Well, I was arguing with Mr. Hale [witness points to the defendant], and he pulled out a gun and shot me in the shoulder.

Prosecutor: What were you arguing about?

Trumbull: I guess I owed him some money and he wanted it back.

Prosecutor: Did you owe him the money?

Trumbull: Yes.

Prosecutor: Did you in any way provoke him before he shot you?

Trumbull: No.

CROSS-EXAMINATION

Defense Att'y: You did owe Mr. Hale money, didn't you?

Trumbull: Yes.

Defense Att'y: And have you ever paid him back?

Trumbull: No.

Defense Att'y: And, in 2014, you were convicted in Franklin of the felony of fraudulently obtaining money, weren't you?

Trumbull: Yes.

* * *

Excerpts from Hearing on Defendant's Motion for a New Trial, July 17, 2018

DIRECT TESTIMONY OF DETECTIVE MARK JONES

Defense Att'y: Detective, does your file contain notes about Ms. Reed's recantation in this case?

Jones: I'm not sure I would characterize it as a recantation. But as my notes indicate, she did come to the police station on August 26, 2017, about two months after the incident. I met with her, and she told me that Mr. Hale was not the shooter at the Starwood Apartments on June 20, 2017. I asked her who was in the courtyard with the victim and she said she didn't know. I asked her why she lied to Detective Lee on the day of the crime and she just shrugged. I asked for more details and she shrugged and said, "He just told me to tell you that he didn't do it." I asked her who the "he" was who told her to recant her statement and she just shrugged. She never made eye contact with me, and she appeared to be nervous. I asked her if she was afraid of her husband and she shrugged.

CROSS-EXAMINATION

Prosecutor: Detective Jones, were you involved in the investigation of the shooting of Bobby Trumbull?

Jones: Yes, I was part of the team that worked on this case.

Prosecutor: Do you happen to know whether Ms. Reed was married to the defendant at the time she came to your precinct?

Jones: Yes, she told me that they had just been married the day before. She also told me that her husband had told her that she would not have to testify in court because they were now married and that he was going to tell the court to keep out her testimony.

Prosecutor: Did you place notes about Ms. Reed's August 26, 2017, statement in the case file?

Jones: Yes, I did.

Prosecutor: Did you provide information about this second statement to the prosecutor's office?

Jones: I was out on medical leave when the prosecutor's office requested information from our file. I don't know who processed the request. I assumed that all information was given to the prosecutor.

DIRECT TESTIMONY OF ASSISTANT DISTRICT ATTORNEY LUCY BEALE

Defense Att'y: Ms. Beale, you were the chief prosecutor in this case, correct?

Beale: Yes.

Defense Att'y: Did you give the defense information about Ms. Reed's August 26th statement to Detective Jones?

Beale: No, I didn't. But I didn't know about it until after the trial.

Defense Att'y: Were you provided with information about the August 26th statement?

Beale: No. I asked the police department for their file. I received what I thought was a complete record, but there was no information about a statement on August 26, 2017, or any information suggesting that Ms. Reed had made a second statement.

Defense Att'y: Before trial, did you give the defendant access to everything in your office's file?

Beale: Yes, our office follows an "open file" policy.

DIRECT TESTIMONY OF GIL WOMACK

Defense Att'y: You are an emergency medical technician for the Franklin City ambulance service?

Womack: Yes.

Defense Att'y: Is the ambulance service part of the City government?

Womack: Yes.

Defense Att'y: Did you help transport Mr. Trumbull to Franklin City Hospital on June 20, 2017?

Womack: Yes.

Defense Att'y: Did Mr. Trumbull say anything to you?

Womack: He blurted out, "I don't know exactly what happened or who shot me, but that rat Henry Hale thinks I owe him money. This is all his fault."

Defense Att'y: And what happened?

Womack: After that he went to sleep—we were giving him heavy narcotics intravenously….

CROSS-EXAMINATION

Prosecutor: Mr. Womack, other than transporting Mr. Trumbull, were you in any way involved in the prosecution or investigation of the attempted murder of Mr. Trumbull?

Womack: No, I wasn't even called as a witness.

Prosecutor: If Mr. Hale's attorney had asked to speak to you before trial, would you have voluntarily spoken to him?

Womack: Yes.

Prosecutor: And would you have told him everything you just testified to today?

Womack: Yes, I would have told him exactly what I just testified to.

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Relevant Franklin Statutes and Rules

Franklin Rule of Evidence 804. Hearsay Exceptions; Declarant Unavailable

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

> (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies; . . .

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness: . . .

> (6) **Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.** A statement offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result.

Franklin Criminal Statute § 9-707. Spouse's Privilege Not to Testify Against Spouse

One spouse cannot be compelled to give testimony against his or her spouse who is a defendant in a criminal trial. Only the accused may claim the privilege. The spouses must be married at the time that the privilege is asserted; so an ex-spouse can be compelled to give testimony about a defendant to whom he or she was previously, but is no longer, married.

Franklin Rule of Criminal Procedure 33

Upon the defendant's motion, the court may vacate any judgment and grant a new trial if an error during or prior to trial violated a state or federal constitutional provision, statute, or rule, and if the defendant was prejudiced by that error. In appropriate circumstances, the court may take additional testimony on the issues raised in the motion. No issue may be raised on appeal unless it has first been raised in a motion for new trial.

Haddon v. State
Franklin Supreme Court (2012)

Defendant Miriam Haddon appeals her conviction of robbery on the ground that the prosecution failed to satisfy its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). The Franklin Court of Appeal affirmed the conviction. We reverse and remand.

Haddon was working as a prostitute, and she was accused of taking money from one of her customers while threatening to harm him. At trial, the customer, Tim Morgan, testified that Haddon took $1,000 from his wallet and threatened to "cut him in little pieces" if he tried to stop her. The robbery occurred while they were in a motel room; there were no other witnesses to the incident. The motel owner testified that he had seen Morgan and Haddon when they checked in and that Morgan's wallet "was full of money—all sorts of bills." In addition, a clerk from a nearby convenience store testified that Haddon entered the store shortly after the time of the alleged robbery and had "a purse full of money."

Haddon argues that the prosecution suppressed two pieces of evidence: (1) inconsistent statements Morgan made to police on various occasions and (2) forensic tests that found none of Haddon's fingerprints on Morgan's wallet. Defense counsel learned of this evidence after trial from the investigating detective. The evidence was not given to the defense before trial.

Brady established the requirement, under the due process clause of the Fifth and Fourteenth Amendments, that the prosecution not suppress any exculpatory evidence. Later opinions established that the government's burden is to provide the defendant with all material exculpatory evidence, regardless of whether the defendant requests it. There are three components of a *Brady* violation: (1) The evidence must be favorable to the defendant; (2) the government must have suppressed the evidence, either willfully or unintentionally; and (3) the evidence must be material. *Strickler v. Greene*, 527 U.S. 263 (1999).

Thus, first, we must determine whether the evidence was favorable to the defendant. Evidence which will serve to impeach a prosecution witness is "favorable" evidence. *Giglio v. United States*, 405 U.S. 150 (1972). Here, the evidence consisted of police interviews with Morgan in which he gave conflicting accounts of the alleged robbery. In one account, he claimed that nothing happened. In another, he claimed that he voluntarily gave Haddon the money. This evidence would serve to impeach Morgan and is therefore favorable to Haddon. It would have benefitted her case had the defense been able to cross-examine Morgan about the conflicting

statements that he made to police officers. Likewise, the forensic evidence is favorable. A neutral fact-finder who learned that Haddon's fingerprints were not found on Morgan's wallet would be less likely to believe that Haddon had committed the crime.

Next, we must determine whether the government suppressed the evidence. The government claims that it did not intentionally suppress evidence. Indeed, this prosecutor's office has an "open file" policy—it provides everything in its file to defense counsel, even if providing such information is not required by the Rules of Criminal Procedure. But under *Brady*, it does not matter whether the suppression was intentional. The investigating officers possessed exculpatory information that the government failed to provide to the defense before trial. *Brady* violations occur whether the suppression was intentional or inadvertent. When the prosecution has adopted an open-file policy, "it is especially unlikely that counsel would have suspected that additional impeaching evidence was being withheld." *Strickler*. Because the prosecution here had an open-file policy, the defense would have had no reason to believe that there were conflicting statements to police that were not in the prosecution's file.

Finally, we must determine whether the evidence was material—that is, whether, had the jury been provided with the evidence, there is a reasonable probability that the result would have been different. When the state suppresses evidence favorable to the defendant, the only fair determination of materiality is a collective one. The state's obligation is not a piece-by-piece obligation. Rather, it is a cumulative obligation to divulge all favorable evidence. Any other result would tempt the state to withhold evidence, in the hope that, individually, each piece of evidence would not make a difference.

We have concluded that the evidence in question was favorable to Haddon and was suppressed by the state. We further conclude that, had the state timely disclosed the evidence to the defendant, there is a reasonable probability that the result of the trial would have been different. There is a paucity of evidence of Haddon's guilt. Morgan's testimony is critical to establishing that Haddon committed robbery. Morgan's prior inconsistent statements to the police were believable. Had the jury heard those statements, it would likely have been more hesitant to convict Haddon. Disclosure of the evidence would probably have affected the outcome of the case. Having found that the evidence was material, we necessarily find that Haddon was prejudiced by its suppression.

Reversed and remanded to the trial court for further proceedings consistent with this ruling.

State v. Capp
Franklin Court of Appeal (2014)

In this interlocutory appeal, defendant Vincent Capp challenges the trial court's decision denying his motion to dismiss a pending murder charge. We affirm.

Capp is charged with murdering his wife. The state's theory is that Capp injected her with a lethal dose of narcotics. The defense claims that the cause of death was suicide. The couple had a history of domestic violence: Capp was charged four times for assaulting his wife.

Capp claims that the state failed to comply with its responsibilities under *Brady v. Maryland*, 373 U.S. 83 (1963). The basis of this claim is that the state suppressed his deceased wife's medical records, made many months prior to her death, that show that she was at risk of harming herself. The records are in the possession of a county hospital.

We first determine whether the government "suppressed" the evidence. The first question raised by "suppression" is whether the evidence at issue was in the "possession" of the government. Evidence can be in the "possession" of the government even if the evidence is unknown to the prosecutor. If the evidence is in the possession of the investigating police department or another government entity involved in the investigation or prosecution, the evidence will be deemed to be in the possession of the government. *Kyles v. Whitley*, 514 U.S. 419 (1995). However, it would stretch the law too far to charge the government with possession of all records of all government agencies regardless of whether those agencies had any part in the prosecution of the case. If a government agency was not involved in the investigation or prosecution of the defendant, its records are not subject to disclosure under *Brady*. The role of a hospital is to treat patients, not to investigate crime. Thus we hold that, here, the government did not "possess" the records housed at the county hospital and therefore did not suppress them.

Although not essential to the determination of this case, we further hold that a prosecutor is not required to furnish a defendant with *Brady* material if that material is fully available to the defense through the exercise of due diligence. Capp's defense and the prosecution had equal access to the wife's medical records. Defense counsel could have subpoenaed the records as easily as the government might have. The records were not solely within the control of the prosecution and thus were not subject to *Brady* disclosure.

Affirmed.

State v. Preston
Franklin Court of Appeal (2011)

Defendant Reginald Preston appeals his conviction for theft over $1,000. He alleges that the trial court erroneously allowed the government to introduce the out-of-court statements of his wife. We reverse and remand.

Preston was convicted of having stolen artwork from the local library. There was no forensic or other physical evidence linking him to the crime. The only witness who could connect Preston to the theft was his wife, Felicity Carr. At the time of the theft, Preston and Carr were not married. Carr was questioned by police and stated that she saw Preston steal the artwork.

Preston and Carr were engaged, with a wedding date arranged, at the time of the theft and the time she made her statement to the police. They were married before the date of the trial. At the trial, Preston successfully asserted spousal privilege to prevent Carr from testifying.

When Carr did not testify due to the spousal privilege, the government sought to introduce her pretrial statement to the police in lieu of her in-court testimony. Preston objected that Carr's out-of-court statement was inadmissible hearsay. The government successfully countered that, by making Carr unavailable as a witness through marriage, Preston had forfeited the right to challenge admission of her hearsay statements.

Rule 804 of the Franklin Rules of Evidence provides that certain hearsay evidence may be admissible if the witness is unavailable. A witness who claims spousal privilege is considered to be unavailable. FRANKLIN RULE OF EVIDENCE 804(a)(1). The issue, then, is whether the hearsay statements meet any of the exceptions defined in Rule 804(b). Franklin Rule of Evidence 804(b)(6) allows for the admission of a hearsay statement which is "offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result." Importantly, the Rule requires that the conduct causing the unavailability be wrongful; it does not require that the conduct be criminal.

Under Rule 804, then, the question is whether Preston engaged in conduct designed to prevent the witness from testifying. The trial judge found that the defendant married the witness with the intent to enable him to claim spousal privilege and thereby prevent his wife from testifying against him. *See* FRANKLIN CRIMINAL STATUTE § 9-707. We conclude that this finding was erroneous. The defendant and his wife were engaged to be married when the theft occurred and had set a date for the wedding. Their marriage appears to have occurred in the normal course of

events. A court's finding of wrongful causation must be rooted in facts establishing that a significant motivation for the defendant's entering into the marriage was to prevent his or her spouse from testifying. In this case, there is no evidence that the defendant's purpose in marrying was to prevent his wife from testifying. All of the proof establishes that the couple had intended to marry even before the crime occurred.

The trial court erred in admitting Carr's out-of-court statement. We also find that Preston was prejudiced by the introduction of the hearsay testimony. But for the error, there is a strong probability that the result of the trial would have been different. Felicity Carr was the only witness who connected Preston to the theft. By erroneously admitting Carr's statement, the trial court allowed the prosecution to convict the defendant with blatant hearsay that was never subject to cross-examination. Preston was clearly prejudiced by that error. *See* FRANKLIN RULE OF CRIMINAL PROCEDURE 33.

The defendant's conviction is hereby reversed, and the case is remanded to the trial court for a new trial.

NOTES

NOTES

MULTISTATE PERFORMANCE TEST DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

Do not include your actual name anywhere in the work product required by the task memorandum.

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.