Alabama Prisoner Ordered Released Due To Prosecutor's Misconduct Concealing Evidence

IN THE CIRCUIT COURT OF MORGAN COUNTY, ALABAMA

State of Alabama vs. Daniel Wade Moore

Case No(s). CC02-646, CC00-1260

ORDER [Portions excerpted by *JD*]

I. Introduction and Statement of the Case

The above styled cause is before the Court on the Defendant's Post Trial Motion to Dismiss the Indictments. The Defendant, Daniel Wade Moore, was tried and convicted of Capital Murder in the Circuit Court of Morgan County, Alabama. ... of the murder of Karen Croft Tipton. ...

II. **Findings of Facts**

1. During the discovery phase of this trial, counsel for the Defendant made repeated requests for copies of statements and other documents in the possession of agents from the Federal Bureau of Investigation. The Court ordered the prosecutor and the investigators to provide the Defendant's attorney with copies of all documents in their possession of whatever kind relating to the murder of Karen Croft Tipton. Repeatedly, [Decatur Police Department Investigator Mike Petty and Prosecutors, Don Valeska and William Dill, denied the very existence of any reports or documents prepared or generated by agents from the Federal Bureau of Investigation. ...

2. After the Defendant was tried and convicted, Don Valeska produced to the Court a copy of a five page document that was faxed to him from the Federal Bureau of Investigation. The Court then learned that Mr. Valeska had actual knowledge of this document prior to his fervent denial that any such documents or reports existed. It was based on this fact that the Court granted the Defendant's Motion for New Trial.

3. The Court later learned that the Federal Bureau of Investigation had, in fact, collected 245 pages of documents in an internal document, which was released to the Defendant's attorneys after the trial and conviction of the Defendant.

4. During the trial of Daniel Wade Moore, the trial court sustained objections from the prosecution, which prevented counsel for the Defendant from asking Sarah Joyce Holden about conversations she had with the victim prior to her murder. ... In the days just prior to her murder, the victim told Ms. Holden that her burglar alarm system had been malfunctioning and that she, the victim, had disconnected said system so that she could sleep. ... Ms. Holden was interviewed by Investigator Mike Petty following the murder of the victim, at which time she conveyed this information about the alarm system. Ms. Holden prepared a written statement containing the aforementioned information.

5. At no time prior to the trial of the Defendant was the defense provided with the information given by Sarah Joyce Holden nor was the defense provided with a copy of her written statement containing the same information. Additionally, the prosecution consistently denied the existence of this written statement.

7. Pamela Brown Smith called the Decatur Police Department to report the fact that she had seen Karen Tipton alive in her driveway at her mailbox at 3:30 p.m. on the day of her death. Ms. Smith asked to speak to the person in charge of the Tipton investigation. She recalls that the person she spoke to was male. She gave them her name, her address, and the information she had. She was told that they would get back in contact with her, but they never did.

8. The defense was never provided with any information regarding Pamela Brown Smith or the statement she made to the person at Decatur Police Department regarding the time of the victim's death. ...

"There ain't no such thing as an FBI report."

Assistant A.G. Don Valeska lying to Judge Glenn Thompson about a 245-page FBI report he was concealing from Daniel Wade Moore's attorneys.

9. Pamela Brown Smith was never interviewed further by the Decatur Police Department and came forward after the trial of the Defendant when she learned that the investigators had estimated the time of death for Karen Tipton between 1:00 p.m. and 4:00 p.m.

11. …On or about October 11, 2002, … a four page synopsis of this case that had been compiled by the FBI plus a cover sheet was faxed from the FBI to Mr. Valeska nearly a month prior to the trial of the Defendant.

12. Investigator Mike Pettey told Don Valeska prior to the trial of the case that he had sent questionnaires to various people connected to the case, had them fill out the questionnaires, and sent the information back to the Federal Bureau of Investigation. None of these materials were ever provided to the Defendant. …

13. On October 30, 2002, the Court had hearings on motions filed by the defense requesting copies of information about an alleged Federal Bureau of Investigation report. On October 30, 2002, when questioned specifically by the Court regarding a Federal Bureau of Investigation report, Assistant Attorney General Don Valeska, said to the Court, "There ain't no such thing as an FBI report."

Daniel Wade Moore the day of his release. The Alabama Ct. of Appeals ordered him back in custody four days later.
The Decatur Daily

14. … All of the material in question here passed through the hands of the investigators for the Decatur Police Department or the Assistant Attorney General Don Valeska and should have been provided to the defense as ordered by this Court.

15. The Decatur Police Department denies that the FBI did any investigation in the present case. However, the Court has before it 245 pages of information that was collected by investigators from the Decatur Police Department and provided to the Federal Bureau of Investigation, … The prosecution, in fact, denied to the Court the existence of the documents which they collected and sent to the Federal Bureau of Investigation. Said documents and information were … only provided it to the Court after the Defendant was tried and convicted.

16. ... This information was subject to the Court's order requiring ALL information collected or gathered in this case be provided to the defendant. …

21. … The Court finds the Investigator Mike Pettey wrongfully refused to acknowledge the existence of these documents and did not provide copies of the questionnaires they collected to the defense as ordered by this Court.

22. … FBI agents, Stapp Regalia and Jennifer Akin came to Decatur to meet with Decatur Police Investigator Mike Pettey at his request. The FBI summary says that during this meeting, Investigator Pettey presented the facts and circumstances surrounding this matter to include a complete victimology of Karen Tipton, crime scene information, including a walk-thru of the residence and surrounding area, autopsy and laboratory information, and "neighborhood investigation and interviews conducted with family members, close friends, and associates." Yet, when questioned during the hearing on January 20, 2004, Investigator Pettey denied having conducted any interviews with family members or close friends. He further denied having any information regarding victimology and denied conducting a neighborhood investigation.

23. The medical examiner's report indicates that they reported the cause of death of Karen Tipton, not only to Investigator Pettey, but also to Special Agent Regalia of the FBI.

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Moore cont. from page 18

24. Decatur Police Department Investigators traveled to the Days Inn located at Highway 69 at the Good Hope Exit on Interstate 65 to interview Mary Tomlinson regarding two members of the paving crew working for Bonner Paving, which paved the Tipton's driveway the day before the murder of the victim. Said crew was working next door to the victim's house on the day of her murder. The defense was never provided with any information regarding that interview or the fact that one of these crew members was known to keep large sums of money in the safe at the Days Inn and that three (3) days after the murder of Karen Tipton, he removed his money from the motel safe and left the State of Alabama. This information was provided to the FBI by the Decatur Police Department but not to the Defendant's attorneys.

26. The Court finds that Investigator Mike Pettey of the Decatur Police Department did not conduct a fair and impartial investigation and that said actions were intentional and violated the Defendant's Constitutional rights.

27. The Court finds that Assistant Attorney General Don Valeska intentionally withheld information from the Defendant in violation of the Defendant's Constitutional rights and in defiance of this Court's Order of Discovery. Further, Assistant Attorney General Don Valeska failed to be honest and forthright with this Court regarding the information about which he learned and that was at his disposal.

III. Statement of Applicable Law

The Fifth Amendment to the United States Constitution states that, "[no person shall] be subject for the same offence to be twice put in jeopardy of life or limb." About the Double Jeopardy Clause, the courts have said: "the Double Jeopardy Clause bars retrials where bad faith conduct by a judge or prosecutor threatens the harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict the defendant." *United States v. Dinitz*, 424 U.S. 600 (1976). …

…

The United States Supreme Court makes it clear that under ordinary circumstances a defendant's request for a new trial (or mistrial) generally removes any Constitutional barrier to a retrial. Ordinarily, a retrial would be necessary to protect the public's interest in fair trials designed to end in just judgments. However, the Supreme Court also recognizes that there may be exceptions to this general rule; rare cases involving circumstances which are attributable to prosecutorial misconduct and overreaching. Where prosecutorial overreaching exists, a defendant's new trial request does not remove the Constitutional barrier afforded by the Double Jeopardy Clause, preventing the retrial of the defendant. *United States v. Jorn*, 400 U.S. 470 (1971), *United States v. Kessler*, 530 F.2d 1246 (5th Cir. 1976).

To find prosecutorial overreaching the government must have, through gross negligence or intentional misconduct, caused aggravated circumstances to develop which seriously prejudiced the defendant causing him to reasonably conclude that a continuation of the tainted proceedings would result in a conviction. See *United States v. Dintz*, supra. A stringent analysis of the prosecutor's conduct, considering the totality of the circumstances, is required to determine if this prosecutorial overreaching has occurred. See *Kessler*, 530 F.2d 1246. Additionally, the Court's inquiry must center upon the prosecutor's conduct prior to the granting of a new trial. Although mere negligence by the prosecutor is not the type of overreaching contemplated by *Dinitz*, if prosecutorial error is motivated by bad faith or undertaken to harass or prejudice the defendant, then prosecutorial overreaching will be found. *United States v. Martin*, 561 F.2d 135 (8th Cir. 1977). Where this overreaching is found, a second trial will be barred by the Double Jeopardy Clause. (See *Jorn*, supra; *Kessler*, supra; *Dinitz*, supra.)

"It appears to have been and to be the attitude of Assistant Attorney General Don Valeska that it is his job to procure a conviction at all costs, without consideration for the Constitutional rights of the Defendant "

Morgan County Circuit Court Judge Glenn Thompson

The Court's power to dismiss an indictment on the grounds of prosecutorial misconduct is frequently discussed but rarely invoked. Generally, the Court will not interfere with prosecutorial discretion unless it is abused to such an extent as to be arbitrary and capricious to the point that it violates the Due Process rights of the defendant. The goal of the Court in the dismissal of an indictment is to protect the integrity of the judicial power from unfair and improper prosecutorial conduct.

IV. The Application of Law

"Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."[1]

One of the greatest elements of our system of criminal jurisprudence is that all legally available, admissible evidence, whether showing guilt or innocence, is presented to the jury. It is therefore of utmost importance that the State not suppress evidence that might exonerate the defendant. Only the self-serving interest of a prosecutor is advanced, and not the interest of justice, when such evidence is withheld from the finder of fact. It is the duty of the prosecutor to fully air all relevant evidence in his possession. Assistant Attorney General Don Valeska chose to disregard his duty.[2]

The Defendant, Daniel Wade Moore, made an incriminating statement to his uncle while being returned to jail by his uncle and grandfather. At this time, the Defendant was addicted to crack cocaine. ... it is not at all uncommon for a person addicted to crack cocaine ... to make any statement, true or false, and even against his own interests, to avoid being put in jail.

At the trial of the Defendant, DNA evidence was presented by the prosecution. This evidence was not nuclear DNA which would have been able to identify the perpetrator with a very high degree of scientific certainty. The DNA evidence offered against the Defendant in this case was mitochondrial DNA. This evidence only failed to exclude the Defendant as the donor; however, it also did not exclude others as the possible donor of the sample tested. In fact, the trial of the Defendant was based almost entirely on circumstantial evidence. There is no direct evidence linking the Defendant to the scene of the crime. Additionally, the prosecution pointed to the circumstance that the Defendant had previously been employed by the burglar alarm company that installed the system belonging to the victim, stating that he knew how to disable it. However, the statements of Sarah Joyce Holden made to the Decatur Police, makes this evidence almost irrelevant.[3] The prosecution never informed the defense of Ms. Holden's statements.

The thrust of the Defendant's case was that someone else had committed this terrible crime. Because of this, the conduct of Don Valeska and Mike Pettey was more egregious. The information wrongfully withheld from the defense included the names of others who had the means, motive, and opportunity to commit the crime of which the Defendant was accused. The information suppressed is exculpatory in nature and supportive of the Defendant's contentions and defense. By ex-

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to help keep a defendant from being convicted. That proved true in his first case, when in January 2006 he won an acquittal for a Michigan State Trooper charged with second degree murder and manslaughter for shooting an unarmed drunken man shuffling toward him with his pants down around his knees. The trooper's defense was that he acted in self-defense because he was in fear of his life. He was acquitted even though the shooting was videotaped by a Detroit police car's dashboard camera. [22]

Koubriti claims double jeopardy bars retrial

On May 1, 2006, Judge Rosen held a hearing concerning a motion by Koubriti's lawyers to dismiss the conspiracy to commit fraud charge that is pending against him. Koubriti's lawyers argued that Convertino's egregious misconduct during Koubriti's 2003 trial bars a retrial because it would violate his Fifth Amendment right against double jeopardy. The U.S. Attorney's Office argued against dismissal of the charge, and as of early July 2006 Rosen has not made a ruling on the motion. The 27-year-old Koubriti has been released on bail pending the outcome of his criminal case. He is working two jobs, and according to his lawyer, is "trying to get on with his life." [23]

Endnotes:

1 *United States v Koubriti, Hannan, El Mardoudi*, CR NO. 01-80778 (USDC ED MI, S DIV), Previous *Justice:Denied* articles about the Koubriti case are: Terrorism Conviction Of 2 Men Tossed - Prosecutor Criminally Investigated For Frame-up, *Justice:Denied*, Issue 27, Winter 2005; and, Federal Prosecutor Resigns Under Heat of Criminal Investigation For Possible Frame-up Of 35 People, *Justice:Denied*, Issue 28, Spring 2005.
2 Hmimssa is scheduled for release from Bureau of Prison custody on July 24, 2008.
3 *United States v Koubriti, supra.*, Government's consolidated response concurring in the defendants' motions for a new trial, August 31, 2004, at 32, 56.
4 U.S. to Seek Dismissal of Terrorism Convictions, Allan Lengel and Susan Schmidt, *The Washington Post*, September 1, 2004, p. A02.
5 These included the Birmingham Six, Guildford Four and the McGuire Seven.
6 *United States v Koubriti, supra.*, Government's consolidated response concurring in the defendants' motions for a new trial, August 31, 2004, at 60.
7 "Terror case prosecutor is probed on conduct," by David Ashenfelter, Detroit *Free Press*, January 17, 2004
8 *Convertino v United States Dept of Justice, et al*, USDC Dist of Col.), Complaint, February 13, 2004, ¶42.
9 *Id.* at ¶58.
10 *Id.* at ¶49.
11 *Id.* at ¶52.
12 News publisher subpoenaed by former federal prosecutor, *Reporters Committee for Freedom of the Press*, July 14, 2006.
13 *United States v Convertino et al*, Case: 2:06-cr-20173 (USDC ED MI, S DIV), Indictment, March 29, 2006.
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.*
18 Witness for the prosecution, by Ann Mullen, Detroit *Metro Times*, May 7, 2003.
19 *Id.*
20 Report: FBI raises questions in bungled Detroit terror case, by John Solomon, Detroit *Free Press*, April 21, 2006.
21 U.S. Prosecutor Resigns, David Ashenfelter, Detroit *Free Press*, May 17, 2005.
22 Trooper acquitted in fatal shooting of man, by Ben Schmitt, Detroit *Free Press,* January 6, 2006
23 Lawyer-drop terror case charge, by Paul Egan, *Detroit News*, May 1, 2006.

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cluding this evidence, Mr. Valeska greatly enhanced his chances for a conviction.

It appears to have been and to be the attitude of Assistant Attorney General Don Valeska that it is his job to procure a conviction at all costs, without consideration for the Constitutional rights of the Defendant or for the orderly administration of justice. When Assistant Attorney General Don Valeska and Investigator Mike Pettey willfully defied this Court's orders they chose to defy justice. When Assistant Attorney General Don Valeska and Investigator Mike Pettey intentionally suppressed relevant, exculpatory evidence they chose to suppress justice. Such disregard for our process of administering fair justice goes beyond mere negligence and rises to the level of intentional misconduct.

V. Conclusion

When viewing the totality of the circumstances, this Court finds that the intentional misconduct on the part of the prosecution resulted in "prosecutorial overreaching" due to the serious nature of the governmental misconduct. Further, said misconduct insured a much more favorable opportunity for the State to convict the Defendant, and these circumstances caused serious prejudice to the Defendant. Proceeding in this matter would result in tainted jurisprudence and would undermine the sanctity of the criminal justice process. The Double Jeopardy Clause protects a criminal defendant's interest in a single, fair adjudication of his guilt or innocence.[4] When the lack of fairness is intentionally caused by the government's overreaching and misconduct, the Defendant is entitled to the protections of the Constitutions of the United States and the State of Alabama .

This Court can only conclude that Daniel Wade Moore's Constitutional right not to be twice put in jeopardy will be violated if the State is allowed to proceed with a second trial in this matter. The prosecution had its opportunity to place Daniel Wade Moore on trial, and they squandered that right.

Therefore, for the above stated reasons, it is hereby ORDERED, ADJUDGED, and DECREED that the Defendant's Motion to Dismiss with Prejudice is due to be and is hereby GRANTED. ... The Defendant is hereby DISCHARGED.

... the 4th day of February 2005.

Glenn E. Thompson, Circuit Judge

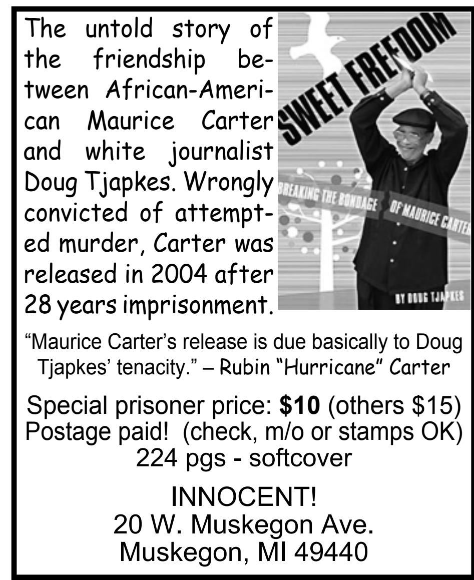
Endnotes:

1 Excerpt from Justice Brandeis' famous dissent in *Olmstead v. Unites States*, 48 S.Ct. 564 (1928).
2 See the Court's Finding of Fact above.
3 See Finding of Fact # 4 above.
4 See *United States v. Jenkins*, 420 U.S. 358 (1975); *United States v. Wilson*, 420 U.S. 332 (1975); *Downum v. United States*, 372 U.S.

Daniel Wade Moore's Case Chronology

Date	Event
March 12, 1999	Karen Tipton murdered in her Decatur, Alabama home.
November 2002	Moore convicted of the first-degree murder of Tipton.
January 23, 2003	Jury recommends life without parole, but Judge Glenn Thompson sentences Moore to death.
March 2003	Thompson set aside Moore's convictions and vacated his sentence after granting his Motion for a New Trial based on the prosecution's failure to disclose exculpatory evidence.
January 20-1, 2004	Thompson holds hearing concerning Moore's Motion to Dismiss the Indictments based on additional exculpatory evidence concealed by the prosecution.
February 4, 2005	Judge Thompson dismisses Moore's indictment with prejudice and orders his immediate release due to prosecutorial misconduct in concealing exculpatory evidence. Moore released that night.
Feburary 5, 2005	After learning of Thompson's ruling, one juror declared, "I'm happy with it. I felt like Daniel didn't do it."
February 8, 2005	AL Court of Appeals (COA)grants State's Motion to Stay Thompson's Order and Orders Moore Back into custody. COA indicates it will give Moore's case preference over other cases.
February 10, 2005	AL COA denies bail to Moore and orders Thompson to not make any rulings in Moore's case pending the State's appeal.
March 2005	AL COA denies Moore's motion to dismiss the State's appeal because it had failed to comply with a time limit on paying for a trial transcript. The COA suspends enforcement of the rule.
June 2006	After 16 months of inaction by the COA, Moore files AL Supreme Court petition requesting dismissal of the State's appeal.

As this issue of *Justice:Denied* was going to press, Alabama's Court of Appeals ruled on July 21, 2006, that the egregious prosecutorial misconduct in Daniel Wade Moore's case entitles him to a new trial, but not a dismissal of the charges. *Justice:Denied* will report on future developments in Moore's case.



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