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Robert Wasserman

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## NOTE

# "A Verdict Worthy of Confidence": The Weakening of *Brady*'s "Materiality" Requirement in Missouri

*State ex rel. Clemons v. Larkins*, 475 S.W.3d 60 (Mo. 2015) (en banc)

*Robert Wasserman*\*

### I. INTRODUCTION

In 1993, Reginald Clemons was convicted and sentenced to death for his alleged participation in the brutal rapes and murders of two sisters at the Chain of Rocks Bridge in St. Louis, Missouri. Over twenty years later, and after several unsuccessful appeals by Clemons, the Supreme Court of Missouri vacated his convictions. The court found that the prosecution had failed to disclose evidence to Clemons's trial counsel that suggested that he may have given his confession involuntarily. The court concluded that this evidence was sufficiently important that the prosecution's failure to disclose it undermined confidence in the trial court's verdict.

The court therefore held that the prosecution violated Clemons's due process rights under the Supreme Court's decision in *Brady v. Maryland*. However, *Brady* and its progeny held that the prosecution's failure to disclose evidence violates the defendant's due process rights only where the undisclosed evidence is material. For evidence to be material under *Brady*, there must be a reasonable probability that its disclosure would have changed the outcome of the defendant's trial. This Note will argue that the court in *Clemons* erroneously applied the *Brady* doctrine because the undisclosed evidence was immaterial. The result of Clemons's trial would have been the same even if the trial court had suppressed his confession because the State's evidence was overwhelming, and it simply did not need Clemons's confession to convict him. Because the allegedly undisclosed evidence was not material under *Brady*, Clemons's due process rights were not violated, and the court erred in vacating his convictions.

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\* Associate, Bretz & Young LLC. B.A. Liberal Arts, Thomas More College of Liberal Arts, 2013; J.D., University of Missouri School of Law, 2016. Thanks to Professor Ben Trachtenberg for his assistance throughout the writing process and to the editors of the *Missouri Law Review* for their helpful comments and feedback during the editing process.

## II. FACTS AND HOLDING

On the night of April 4, 1991, sisters Julie and Robin Kerry took their cousin, Thomas Cummins, to the Chain of Rocks Bridge in St. Louis to see a poem they had painted on the bridge several years before.<sup>1</sup> As they walked east on the bridge, the cousins saw a group of four men approaching them.<sup>2</sup> The four men were at first friendly, and the groups parted without incident.<sup>3</sup> As the cousins continued to walk east toward the Illinois side of the bridge, they heard the footsteps of the four men behind them.<sup>4</sup> At that point, one of the men grabbed Cummins by the arm, walked him away from the group, and told him to lie facedown on the ground or be killed.<sup>5</sup> The four men then took turns brutally raping the Kerry sisters.<sup>6</sup> Cummins stated that the men threatened to throw the Kerry sisters off the bridge if they resisted.<sup>7</sup>

While the assault was still going on, one of the men, who Cummins would later identify as Reginald Clemons, approached Cummins, told him that he had just raped his girlfriend, and asked him “how that felt.”<sup>8</sup> Cummins replied that she was his cousin, not his girlfriend.<sup>9</sup> The man identified as Clemons then walked Cummins toward an open manhole and instructed him to climb onto the platform below, on which the Kerry sisters were already lying down.<sup>10</sup> The three cousins were then told to step down onto a concrete pier about three feet below the platform.<sup>11</sup> At this point, Cummins “saw an arm push Julie and then Robin off the bridge.”<sup>12</sup> One of the men, who Cummins later identified as Antonio Richardson, told Cummins to jump from the pier, and he complied.<sup>13</sup> Cummins swam to the surface of the Mississippi river and “briefly had contact with Julie” but was unable to see her; he never saw Robin.<sup>14</sup>

Cummins somehow swam to the river bank and climbed up to a road at around 2:00 a.m.<sup>15</sup> He then flagged down a driver and told him “that his cousins had been raped, and that he had been thrown off the bridge.”<sup>16</sup> Police later arrived and questioned Cummins.<sup>17</sup> When it became light outside, the police

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1. State *ex rel.* Clemons v. Larkins, 475 S.W.3d 60, 64 (Mo. 2015) (en banc).

2. *Id.*

3. *See id.*

4. *Id.*

5. *Id.*

6. *See id.*

7. *Id.*

8. *Id.* at 65.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 66.

discovered several items that the perpetrators had left on the bridge, including "an unused condom, a used condom, a pen, some change, and a cigarette butt."<sup>18</sup> They also found a flashlight engraved with "Horn I."<sup>19</sup> Julie's body was found in the river three weeks later near Caruthersville.<sup>20</sup> Robin's body was never recovered.<sup>21</sup>

Officers took a statement from Cummins at 9:00 a.m., roughly seven hours after he had been forced to jump into the river.<sup>22</sup> The police became skeptical about Cummins's version of the events, and the investigation began to focus on him as the prime suspect.<sup>23</sup> The police then took a second statement from Cummins, which was largely consistent with his first.<sup>24</sup> Nevertheless, an "incident report that purportedly summarized Mr. Cummins' statements in the second recorded interrogation[] materially mischaracterized his statements to indicate" that he and Julie had been in a romantic relationship, and that he had actually never jumped from the bridge but had only gotten wet when he entered the river from the bank to search for the sisters.<sup>25</sup>

Cummins then agreed to submit to a polygraph test.<sup>26</sup> When he was finished, the polygraph examiner informed Cummins that the test results indicated he had been deceptive in his answers.<sup>27</sup> Police officers then told Cummins's father that his son's story did not make sense.<sup>28</sup> Cummins's father responded by urging his son to be truthful with the officers.<sup>29</sup> The police then interrogated Cummins again.<sup>30</sup> A police report purporting to summarize Cummins's statements during that interrogation was prepared.<sup>31</sup> The report indicated that Cummins had caused the deaths of the sisters after Julie rejected his sexual advances.<sup>32</sup> Cummins would later testify that after his father had left the interrogation room, the interrogating officers screamed at him, threatened him, and

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18. *Id.*

19. *Id.*

20. *Id.* at 65.

21. *Id.*

22. *Id.* at 66.

23. *See id.*

24. *Id.*

25. *Id.* As set forth more fully below, the police department's manipulation of Cummins's statements was one of the many incidents of alleged police misconduct in the investigation of the Chain of Rocks Murders. *Id.* at 66–69.

26. *Id.* at 66.

27. *Id.* The majority opinion noted that "Cummins' condition and the circumstances under which the polygraph was performed were such that its results should not have been given any credence." *Id.*

28. *See id.*

29. *Id.*

30. *Id.*

31. *See id.*

32. *See id.* at 66–67. The report stated that Cummins had tried to get Julie to have sex with him. *Id.* at 66. When she refused, he became angry and shoved her; she then

punched the back of his head several times.<sup>33</sup> He claimed that despite this coercion, he never made the inculpatory statements that were attributed to him in the police report.<sup>34</sup> After he was cleared of any wrongdoing in connection with the murders, Cummins would receive a \$150,000 settlement from the City of St. Louis for the abuse he suffered at the hands of the police.<sup>35</sup>

About the same time that the authorities charged Cummins with the murders, they “received a call from a woman who had seen a television news story about the search for the owner of a black flashlight.”<sup>36</sup> The woman told the officers that the flashlight belonged to her family and “had been stolen a few days earlier.”<sup>37</sup> The information she provided eventually led police to one of the men, Antonio Richardson, who, in turn, implicated Clemons and Marlin Gray in the murders.<sup>38</sup> The police then located Clemons who “voluntarily agreed to give a recorded statement.”<sup>39</sup> Clemons’s statement was consistent with what Cummins had told the police.<sup>40</sup>

The police then located Gray, took him into custody, and interrogated him.<sup>41</sup> His statement also largely corroborated what Cummins had initially told police, but he denied that he was in the manhole when the cousins were pushed off the bridge.<sup>42</sup> While Clemons was in custody, his attorney and family members noticed swelling and an abrasion on the right side of his face.<sup>43</sup> The judge presiding over Clemons’s case ordered that Clemons be medically examined; the doctor who performed the examination determined that Clemons had soft tissue swelling over the right side of his face.<sup>44</sup> Both Clemons and Gray then filed complaints with the St. Louis Metropolitan Police Department Division of Internal Affairs.<sup>45</sup> They alleged that the officers had beaten them in the interrogation room and that they provided their recorded statements only out of fear of further abuse.<sup>46</sup>

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lost her balance and fell off the bridge. *Id.* at 66–67. At that point, “he became hysterical and blacked out.” *Id.* at 67. Cummins believed Robin either then jumped into the river to rescue her sister or was pushed off the bridge by Cummins. *Id.* The police then announced that the murders had been solved and that they had definitively identified Cummins as the perpetrator. *Id.*

33. *Id.* at 67.

34. *Id.*

35. *See id.* at 93 (Wilson, J., dissenting).

36. *Id.* at 67 (majority opinion).

37. *Id.*

38. *Id.*

39. *Id.*

40. *See id.* at 67–68.

41. *Id.* at 68.

42. *See id.*

43. *Id.*

44. *Id.* at 68–69.

45. *Id.* at 69.

46. *Id.*

Prior to trial, Clemons moved to suppress the statements he had provided to the police on the ground that such statements were the product of police coercion and brutality.<sup>47</sup> He called several witnesses who testified that they had observed swelling on the right side of Clemons's face following his interrogation.<sup>48</sup> The trial court, however, overruled his motion to suppress the confession, claiming that there was no credible evidence demonstrating how Clemons had received his injuries, if he did in fact receive them.<sup>49</sup>

At Clemons's trial, the State's principal evidence consisted of Clemons's confession, the testimony of Cummins, and the testimony of Daniel Winfrey, who had been identified as the fourth perpetrator at the bridge.<sup>50</sup> Both Cummins and Winfrey testified that Clemons had raped the Kerry sisters, robbed Cummins, and had at least acquiesced in the group's decision to throw the cousins from the bridge.<sup>51</sup> Clemons "did not testify on his own behalf, but he did present witnesses who testified they observed Mr. Clemons' bruised face."<sup>52</sup> Clemons's attorney was not allowed to argue in his closing statements that police had coerced his confession by beating him because the court found that there was insufficient evidence to support such a claim.<sup>53</sup> The jury found him guilty on two counts of first degree murder.<sup>54</sup> At the penalty phase of the trial, the jury found twelve aggravating circumstances and recommended two death sentences.<sup>55</sup>

After his trial and sentencing, Clemons filed his first of many motions for post-conviction relief.<sup>56</sup> These motions principally revolved around his claim that his confession should not have been admitted at trial because it was procured by means of physical force in violation of his due process rights.<sup>57</sup> He filed a writ of habeas corpus in a U.S. district court; that court denied relief on his Fifth Amendment claim but vacated his death sentence on other grounds.<sup>58</sup>

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47. *Id.* See *Brown v. Mississippi*, 297 U.S. 278, 286 (1936) (holding that "the use of the confessions thus obtained [through force is] . . . a clear denial of due process").

48. *Clemons*, 475 S.W.3d at 70.

49. *Id.* In Missouri, "the State has the burden of proving the 'voluntariness' of a confession." *State v. Bradford*, 262 S.W.2d 584, 586 (Mo. 1953). Further, "when there is substantial conflicting evidence and the evidence is close, it is better to refer the issue to the jury than to exclude the confession upon the preliminary hearing." *Id.*

50. *Clemons*, 475 S.W.3d at 67, 70.

51. *Id.* at 70.

52. *Id.*

53. *Id.* at 71.

54. *Id.*

55. *Id.*

56. *Id.* at 72.

57. *Id.* This included a direct appeal and a writ of habeas corpus to the Supreme Court of Missouri, as well as a writ of habeas corpus to a U.S. district court. *Id.*

58. See *Clemons v. Luebbers*, 212 F. Supp. 2d 1105, 1135 (E.D. Mo. 2002), *aff'd in part, rev'd in part and remanded*, 381 F.3d 744 (8th Cir. 2004). The district court ruled that the trial court had unconstitutionally excluded six people from serving as jurors because they expressed discomfort with imposing the death penalty. *Id.* at 1107.

The Eighth Circuit subsequently reversed the district court's decision and reinstated Clemons's death sentence.<sup>59</sup> Clemons then filed a writ of habeas corpus with the Supreme Court of Missouri on the basis of his "actual innocence."<sup>60</sup> The court then appointed a special master to examine the claims made in Clemons's petition in light of the evidence.<sup>61</sup>

When Warren Weeks learned of the special master proceeding, he contacted Clemons's counsel.<sup>62</sup> In a videotaped deposition, he testified that he had been working as a bail investigator for the Missouri Board of Probation and Parole.<sup>63</sup> While serving in that role, he was responsible for interviewing prisoners and filling out pre-trial release forms, which included, among other things, information about the prisoner's "physical problems."<sup>64</sup> Weeks further testified that during his interview of Clemons, he observed a bruise on Clemons's right cheek "between the size of a golf ball and a baseball."<sup>65</sup> He testified that he had made a note of this in his pre-trial release form, but that he later saw that his notation "had been scratched out and could not be read."<sup>66</sup> Weeks further testified that he was questioned by police and the prosecutor handling Clemons's case regarding the injuries that Weeks claimed he had observed, and that "he felt pressured not to say anything" about those injuries.<sup>67</sup>

In light of Weeks's testimony, the special master determined that the State had willfully suppressed evidence tending to exculpate Clemons in violation of *Brady*.<sup>68</sup> The special master further concluded that had Weeks's testimony been revealed, it may have resulted in the suppression of Clemons's confession on the ground that it had not been freely and voluntarily given.<sup>69</sup> If the trial court had suppressed Clemons's confession, it may have "put the case in a different light so as to undermine confidence in the verdict."<sup>70</sup> The Supreme Court of Missouri affirmed the special master's findings and recommendation, concluding that the State's *Brady* violation had substantially prejudiced Clemons's defense and thus undermined the credibility of the verdict.<sup>71</sup>

59. *Luebbbers*, 381 F.3d at 757.

60. *Clemons*, 475 S.W.3d at 72. In Missouri, "[a]ny person restrained of liberty within this state may petition for a writ of habeas corpus to inquire into the cause of such restraint." MO. SUP. CT. R. 91.01(b).

61. *Clemons*, 475 S.W.3d at 73.

62. *Id.*

63. *See id.* See also Petitioner's Brief at 8, *State ex rel. Clemons v. Larkins*, 475 S.W.3d 60 (Mo. 2015) (en banc) (No. SC90197), 2013 WL 6975162, at \*8.

64. *Clemons*, 475 S.W.3d at 73.

65. *Id.*

66. *Id.* at 73–74.

67. *Id.* at 74.

68. *Id.* at 75.

69. *Id.*

70. *Id.*

71. *Id.* at 88.

### III. LEGAL BACKGROUND

For a confession to be admissible at trial, it must be given voluntarily.<sup>72</sup> The Weeks evidence lent support to Clemons's claim that he had given his confession involuntarily. The Weeks evidence also served as the basis of Clemons's *Brady* claim. To understand the court's decision in *Clemons*, it is necessary that one understand both the voluntariness requirement, as well as the requirements set out under *Brady*. This section will therefore examine the voluntariness requirement and the evolution of the *Brady* doctrine.

#### A. The Voluntariness Requirement

In *Brown v. Mississippi*, the Supreme Court of the United States addressed the question of "whether convictions, which rest solely upon confessions shown to have been extorted by officers of the state by brutality and violence, are consistent with the due process of law required by the Fourteenth Amendment of the Constitution of the United States."<sup>73</sup> In that case, the defendants confessed to murdering a man only after they were "severely whipped" and beaten "with a leather strap with buckles on it."<sup>74</sup> The Court noted that in its description of the defendants' confessions, "the transcript reads more like pages torn from some medieval account than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government."<sup>75</sup>

The Court held that a State may not substitute "[t]he rack and torture chamber . . . for the witness stand."<sup>76</sup> The State may not "contrive[] a conviction resting solely upon confessions obtained by violence."<sup>77</sup> It concluded that the State had elicited the defendants' confessions through methods "revolting to the sense of justice," and that its use of those confessions at trial was therefore "a clear denial of due process."<sup>78</sup>

Since the Supreme Court's decision in *Brown v. Mississippi*, the prohibition against the prosecution's use of a defendant's involuntary confession has been a bedrock principle of criminal procedure in America. In later years, the Court would hold that a defendant need not suffer actual violence – "a credible threat of physical violence" will suffice to render his confession involuntary.<sup>79</sup>

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72. *Brown v. Mississippi*, 297 U.S. 278, 283 (1936) ("There was thus enough before the court when these confessions were first offered to make known to the court that they were not, beyond all reasonable doubt, free and voluntary; and the failure of the court then to exclude the confessions is sufficient to reverse the judgment.").

73. *Id.* at 279.

74. *Id.* at 281–82.

75. *Id.* at 282.

76. *Id.* at 285–86.

77. *See id.* at 286.

78. *Id.*

79. *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991).



The Court has also expanded the doctrine by holding that a confession may be involuntary if it is procured by means of psychological coercion.<sup>80</sup> In short, if a trial court finds that the defendant did not give his confession free of physical or psychological coercion, actual or threatened, it will not allow the prosecution to use that evidence at trial, no matter how probative.<sup>81</sup> Evidence bearing on the voluntariness of a defendant's confession can theoretically make the difference between a guilty or innocent verdict, and its suppression by the prosecution may violate his due process rights under the Supreme Court's *Brady* jurisprudence.

### B. *Brady and Progeny*

*Brady v. Maryland* was the first Supreme Court case holding that the prosecution's failure to disclose material evidence violates a criminal defendant's due process rights.<sup>82</sup> In *Brady*, the petitioner and his companion, Boblit, were each found guilty of first degree murder and sentenced to death.<sup>83</sup> Brady admitted his role in the murder but claimed that it was Boblit who had actually killed the victim.<sup>84</sup> His counsel admitted that "Brady was guilty of murder in the first degree" but requested that the jury not impose the death sentence, as he had not actually killed the victim.<sup>85</sup> Brady's counsel requested that he be allowed to examine the extrajudicial statements made by his client's accomplice.<sup>86</sup> The State turned over several such statements but withheld Boblit's statement in which he admitted that it was he, not Brady, who had committed the homicide.<sup>87</sup>

When Brady's attorneys discovered that Boblit's exculpatory statements had been withheld by the prosecution, they moved for a new trial.<sup>88</sup> The trial court denied the motion, but the court of appeals ruled that the prosecution's suppression of those statements denied Brady due process of law, and it remanded the case solely on the issue of his punishment.<sup>89</sup> The Supreme Court of the United States agreed with the appellate court, holding that "suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment."<sup>90</sup> The Court held that "the suppression by the prosecution of

80. *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960).

81. *See Brown*, 297 U.S. at 284 (holding that an involuntary confession admitted into trial is sufficient grounds for reversal).

82. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). *See also* Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685, 686 (2006) (discussing the "landmark decision").

83. *Brady*, 373 U.S. at 84.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 86. The Fourteenth Amendment states:

evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."<sup>91</sup> The Court then held that whether the withheld evidence is "material either to guilt or to punishment" depends on whether the "evidence[,] . . . if made available, would tend to exculpate [the defendant] or reduce the penalty."<sup>92</sup>

In a later case, the Supreme Court clarified the *Brady* materiality standard and also addressed the question of whether potentially exculpatory material needed to be turned over to the defense absent a request.<sup>93</sup> In that case, the defendant, Agurs, was tried for a murder she allegedly committed while staying at a hotel with the victim, Sewell.<sup>94</sup> Witnesses stated that they had heard Agurs screaming, that they went to her hotel room, and that they discovered Agurs struggling underneath Sewell, who was then bleeding from fatal stab wounds inflicted by Agurs.<sup>95</sup> Agurs argued at trial that Sewell had attacked her, and that she had stabbed him in self-defense.<sup>96</sup> She was convicted.<sup>97</sup> Three months later, her attorneys discovered that Sewell had a criminal record indicating a violent character, and that the State had possessed this record during trial but failed to disclose it to the defense.<sup>98</sup> Agurs then moved for a new trial.<sup>99</sup>

The Court held that "there are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request."<sup>100</sup> The Court then held that the standard of materiality with respect to *Brady* disclosures must reflect the degree to which the failure to disclose casts doubt on the validity of the conviction.<sup>101</sup> It stated that "if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed."<sup>102</sup>

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No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1 (emphasis added).

91. *Brady*, 373 U.S. at 87.

92. *Id.* at 87–88; *see also* JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES, AND PERSPECTIVES 884 (4th ed. 2009).

93. *United States v. Agurs*, 427 U.S. 97, 98–99, 107 (1976).

94. *Id.* at 99.

95. *Id.*

96. *Id.* at 100.

97. *See id.*

98. *Id.*

99. *Id.*

100. *Id.* at 110.

101. *See id.* at 112.

102. *Id.*

In *United States v. Bagley*, the Supreme Court addressed the issue of whether impeachment evidence, as distinguished from exculpatory evidence, must be disclosed under *Brady*.<sup>103</sup> The defendant, Bagley, was indicted in federal court on weapons and drug charges.<sup>104</sup> Before his trial, Bagley had requested that the prosecutors handling his case turn over the names and addresses of the witnesses they intended to call, as well as any deals or inducements that had been promised to the witnesses in exchange for their testimony.<sup>105</sup> The government responded by providing the names of its two principal witnesses who had been assisting in an undercover investigation of Bagley on behalf of the Bureau of Alcohol, Tobacco, Firearms, and Explosives.<sup>106</sup> The information produced, however, did not include any deals that the government had struck with the two witnesses.<sup>107</sup> The government disclosed no such deals.<sup>108</sup>

Bagley was subsequently found guilty of the narcotics charges and not guilty of the weapons charges.<sup>109</sup> After his trial, Bagley submitted a request for documents pursuant to the Freedom of Information Act regarding the agreements that the government had entered into with its principal witnesses in Bagley's case.<sup>110</sup> Those documents revealed that the witnesses had been compensated for their testimony.<sup>111</sup> Bagley then moved to vacate his convictions, arguing that the government's failure to disclose its witnesses' compensation prevented him from impeaching their testimony and thereby denied him a fair trial.<sup>112</sup>

The Supreme Court first noted that there is no distinction between impeachment evidence and exculpatory evidence in the context of alleged *Brady* violations.<sup>113</sup> It then clarified the materiality standard for non-disclosed evi-

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103. *See United States v. Bagley*, 473 U.S. 667, 669 (1985).

104. *Id.*

105. *Id.* at 669–70.

106. *Id.* at 670.

107. *Id.*

108. *See id.*

109. *Id.* at 671.

110. *Id.* The pertinent rule states:

An inmate may make a request for access to documents in his or her Inmate Central File or Medical File (including documents which have been withheld from disclosure during the inmate's review of his or her Inmate Central File pursuant to § 513.40) and/or other documents concerning the inmate which are not contained in the Inmate Central File or Medical File. Staff shall process such a request pursuant to the applicable provisions of the Freedom of Information Act, 5 U.S.C. 552.

28 C.F.R. § 513.61 (2017).

111. *Bagley*, 473 U.S. at 671.

112. *Id.* at 671–72.

113. *Id.* at 676.

dence as follows: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."<sup>114</sup> Accordingly, the Court remanded the case for a determination of whether the suppressed evidence would have, with reasonable probability, affected the trial court's verdict.<sup>115</sup>

In what Professor Joshua Dressler called the "most recent pronouncement on the discovery issue,"<sup>116</sup> the defendant in *Smith v. Cain* was charged with murdering five people during an armed robbery.<sup>117</sup> At his trial, a single witness identified Smith as the perpetrator.<sup>118</sup> Smith was subsequently convicted on five counts of first degree murder.<sup>119</sup> Smith then moved to vacate his convictions on the ground that the State had failed to disclose that its sole eyewitness had made statements indicating strong uncertainty about whether he could remember the perpetrator or identify him if he saw him again.<sup>120</sup>

The Court began its analysis by reiterating the materiality standard set forth in *Bagley*.<sup>121</sup> That is, non-disclosed evidence is material if there is a reasonable probability that its use by the defendant at trial may have altered the trial's outcome.<sup>122</sup> A reasonable probability does not mean that the defendant "'would more likely than not have received a different verdict with the evidence,' [it means] only that the likelihood of a different result is great enough to 'undermine[ ] confidence in the outcome of the trial.'"<sup>123</sup> The Court further held that "evidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict."<sup>124</sup> It did find, however, that the suppressed evidence in this case was sufficiently strong to undermine confidence in the verdict.<sup>125</sup>

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114. *Id.* at 682.

115. *Id.* at 684. On remand, the U.S. Court of Appeals for the Ninth Circuit determined that the State's failure to disclose the impeachment evidence "unconstitutionally interfered with Bagley's right to a fair trial." *Bagley v. Lumpkin*, 798 F.2d 1297, 1302 (9th Cir. 1986).

116. DRESSLER & THOMAS, *supra* note 92, at 901. Professor Dressler is the Frank R. Strong Chair in Law at The Ohio State University Moritz College of Law and "is one of the country's most respected authorities on the subjects of criminal law and criminal procedure." *Professors: Joshua Dressler*, OHIO ST. UNIV. MORITZ C. OF L., <http://moritzlaw.osu.edu/faculty/professor/joshua-dressler/> (last visited Mar. 5, 2017).

117. *Smith v. Cain*, 132 S. Ct. 627, 629 (2012).

118. *Id.*

119. *Id.*

120. *Id.* at 629–30.

121. *See id.* at 630.

122. *Id.*

123. *Id.* (second alteration in original) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

124. *Id.*

125. *Id.* at 631.

## IV. INSTANT DECISION

In a 4-3 decision, the Supreme Court of Missouri vacated Clemons's convictions.<sup>126</sup> The court held that his claim for habeas relief could proceed under the "cause and prejudice" exception and thus his due process rights had been violated.<sup>127</sup> The court emphasized that this was the conclusion reached by the special master, and that it was "supported by substantial evidence and [did] not erroneously declare or apply the law."<sup>128</sup> The dissent strongly disagreed, arguing that Clemons's habeas claim was procedurally barred and that the special master's recommendation and the majority's ruling were based on a fundamental misunderstanding of the *Brady* doctrine.<sup>129</sup>

A. *Majority Opinion*

The Supreme Court of Missouri began its analysis of Clemons's claim for habeas relief by noting that such relief is usually not available for a claim that could have been raised "on direct appeal or in a post-conviction proceeding."<sup>130</sup> Therefore, the court had to determine whether an exception to the procedural bar existed in this case before it could proceed to its substantive *Brady* analysis.<sup>131</sup> Whether such an exception existed in this case depended on whether "the procedural defect was caused by something external to the defense – that is, a cause for which the defense is not responsible – and [] prejudice resulted from the underlying error that worked to the petitioner's actual and substantial disadvantage."<sup>132</sup> The "cause and prejudice" exception would require Clemons to demonstrate that an external cause prevented him from presenting this evidence at trial and that he was prejudiced thereby.<sup>133</sup> Under this standard, the basis for the claim "must not have been reasonably available to [the defense]"; "[e]vidence that has been deliberately concealed by the state is not reasonably available . . . ."<sup>134</sup> The court ruled that, as Weeks's report had been altered and withheld from the defense, that evidence was not reasonably available, and thus Clemons had carried his burden with respect to the "cause" prong of the exception.<sup>135</sup> Next, the court considered whether withholding the evidence had

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126. *State ex rel. Clemons v. Larkins*, 475 S.W.3d 60, 88–89 (Mo. 2015) (en banc).

127. *Id.* at 88.

128. *Id.*

129. *See id.* at 89 (Wilson, J., dissenting).

130. *Id.* at 76 (majority opinion).

131. *Id.*

132. *Id.* (quoting *State ex rel. Zinna v. Steele*, 301 S.W.3d 510, 516–17 (Mo. 2010) (en banc)).

133. *Id.*

134. *Id.*

135. *Id.* at 76–77.

prejudiced Clemons's defense under the second prong.<sup>136</sup> The court determined that if Clemons could demonstrate that the State's withholding Weeks's report had prejudiced him under *Brady*, he would have met both prongs of the "cause and prejudice" exception to the procedural bar to habeas relief.<sup>137</sup>

The court reiterated that a successful *Brady* claim actually consists of three elements: (1) the evidence is favorable to the defendant's case because it either is exculpatory or impeaches a prosecution witness, (2) the evidence was withheld by the police or prosecution, and (3) the defendant was prejudiced by the suppression in either the guilt or punishment phase of trial.<sup>138</sup> The court then cautioned that the defendant need not show that disclosure of the evidence would have ultimately resulted in acquittal in order to demonstrate that he was prejudiced by its suppression.<sup>139</sup>

The court first considered whether the evidence was favorable to Clemons's defense under the first *Brady* prong.<sup>140</sup> It noted that the special master had found that Weeks's report or testimony would have been favorable to Clemons's defense, and that the special master's conclusions were entitled to significant deference.<sup>141</sup> The court noted that while several witnesses had testified that they observed swelling on Clemons's face, the majority of those witnesses had observed Clemons at least forty-eight hours after the interrogation.<sup>142</sup> Thus, while they could attest to the existence of his injuries, their testimony left great uncertainty regarding who inflicted those injuries.<sup>143</sup> On the other hand, Weeks had met with Clemons only a few hours after he was booked, making his testimony regarding Clemons's injuries substantially better support for Clemons's claims that the interrogating officers had beaten him.<sup>144</sup> Moreover, if Weeks had been allowed to testify, he would have been the only witness without a familial or personal connection to Clemons to describe the injuries.<sup>145</sup>

Furthermore, the court held that if Clemons had been able to rely on Weeks's observations at the suppression hearing, the trial court may have been

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136. *Id.* at 78.

137. *Id.* at 77.

138. *Id.* at 78 (citing *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 338 (Mo. 2013) (en banc)).

139. *Id.*

140. *Id.*

141. *Id.* at 78, 80. The Supreme Court of Missouri has explained that a special "master's findings, conclusions and recommendations . . . [are] accord[ed] the weight and deference given to trial courts in court-tried cases, in light of the master's opportunity to view and judge the credibility of witnesses." *State ex rel. Busch by Whitson v. Busch*, 776 S.W.2d 374, 377 (Mo. 1989) (en banc).

142. *Clemons*, 475 S.W.3d at 79.

143. *See id.*

144. *Id.*

145. *Id.*

more likely to exclude the confession as involuntary.<sup>146</sup> While Clemons's confession was certainly not the only evidence that the State presented at his trial, "[a] confession is like no other evidence' because it 'is probably the most probative and damaging evidence that can be admitted against [a defendant].'"<sup>147</sup> At the very least, the court held, Weeks's report or testimony could have made the difference between a life sentence and a death sentence.<sup>148</sup> The court concluded, therefore, that Clemons had met his burden under the first *Brady* prong.<sup>149</sup>

The court then proceeded to the second *Brady* prong and affirmed the special master's conclusion that the State had failed to produce the favorable Weeks evidence.<sup>150</sup> Specifically, the court noted the special master's findings that Weeks's notation had been crossed out and his belief that it had been done by "someone . . . on behalf of the state."<sup>151</sup> It referred further to the special master's finding that the State had attempted to persuade Weeks to remain silent about his observation of Clemons's injuries.<sup>152</sup> In light of all of this evidence, and considering that the special master's factual findings are entitled to significant deference, the court concluded that the second *Brady* prong had been satisfied as well.<sup>153</sup>

Finally, the court considered whether the State's suppression of the Weeks evidence had prejudiced Clemons.<sup>154</sup> It began its inquiry by observing that the special master found this prong to be satisfied.<sup>155</sup> Weeks interviewed Clemons fewer than three hours after the interrogation in which Clemons alleged he was beaten.<sup>156</sup> Because of Weeks's "close proximity" to the alleged beating, and because he was a completely impartial witness, the court concluded that either his report or his testimony would have cast doubt on the voluntariness of Weeks's confession.<sup>157</sup> The court then called attention to the unique and highly probative value of a confession in a criminal proceeding.<sup>158</sup> Since Weeks's report or testimony quite possibly could have resulted in

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146. *See id.* at 80. *See Blackburn v. Alabama*, 361 U.S. 199, 205 (1960) (noting "that the Fourteenth Amendment is grievously breached when an involuntary confession is obtained by state officers and introduced into evidence in a criminal prosecution which culminates in a conviction").

147. *Clemons*, 475 S.W.3d at 80–81 (alterations in original) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991)).

148. *Id.* at 81.

149. *Id.* at 82.

150. *Id.*

151. *Id.*

152. *See id.*

153. *Id.*

154. *Id.*

155. *Id.* at 83.

156. *See id.*

157. *See id.*

158. *Id.* at 84.

Clemons's confession being suppressed, the court held that Clemons had suffered substantial prejudice by its non-disclosure.<sup>159</sup> Therefore, confidence in the verdict had been undermined.<sup>160</sup>

In its conclusion, the court once again referred to the special master's report.<sup>161</sup> The special master found that the State had suppressed critical evidence and that this suppression sufficiently prejudiced Clemons's defense to undermine confidence in his guilty verdicts.<sup>162</sup> The court held that these findings were "supported by substantial evidence and [did] not erroneously declare or apply the law."<sup>163</sup> Consequently, the court "adopt[ed] the master's recommendation, and vacat[ed] Mr. Clemons' convictions."<sup>164</sup>

### B. Judge Wilson's Dissent

Judge Paul Wilson took issue with the special master's conclusion that disclosure of the Weeks evidence "may have resulted" in a different verdict. He argued that vacating a defendant's convictions is only appropriate under *Brady* if there is a reasonable probability that disclosure "would have" resulted in a different verdict.<sup>165</sup> Furthermore, the dissent pointed to language in the report indicating the special master's skepticism that disclosure of the Weeks evidence would have affected the outcome of the case considering the strength of the State's other inculpatory evidence.<sup>166</sup> He stated that *Brady* does not require reversal of the defendant's convictions "when the case against the defendant remains overwhelming, even when viewed in light of the undisclosed evidence."<sup>167</sup> The dissent argued that the special master had misapplied *Brady* and its progeny.<sup>168</sup> The special master found it reasonably probable that disclosure of the Weeks evidence would have resulted in suppression of Clemons's confession and argued that this alone warranted reversal of his convictions.<sup>169</sup> The special master did not, the dissent contended, base his decision on a reasonable probability that disclosure of the Weeks evidence would have affected the outcome of Clemons's case.<sup>170</sup> Because Judge Wilson believed that the special master had misapplied the law, he argued that the appropriate

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159. *Id.* at 84–85.

160. *Id.* at 85.

161. *Id.* at 88.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 90 (Wilson, J., dissenting) (citing *Strickler v. Greene*, 527 U.S. 263, 289 (1999)).

166. *Id.*

167. *See id.*

168. *Id.*

169. *See id.* ("It is enough if there is a *reasonable probability* of a different result. . . I believe Clemons has satisfied that standard.")

170. *Id.*



remedy was to remand the case to the special master to address that question, rather than to vacate Clemons's convictions.<sup>171</sup>

The dissent then argued that the suppression of the Weeks evidence did not satisfy the "cause and prejudice" test necessary to overcome the procedural bar to Clemons's claim for habeas relief.<sup>172</sup> As stated above, in order to show cause under this exception, the defendant must demonstrate that the allegedly suppressed evidence was not reasonably available to the defense.<sup>173</sup> The dissent argued that Clemons could not carry his burden under this prong because Weeks had mentioned the swelling on Clemons's face during their interview.<sup>174</sup> Thus, Clemons knew that Weeks could testify concerning his injuries and thereby corroborate his claim that the police extracted his confession by means of physical abuse.<sup>175</sup> As the "prejudice" element for habeas relief (within the context of an ineffective assistance of counsel claim) is identical to the materiality determination under *Brady*, the dissent found that even if Clemons could show that the Weeks evidence was unavailable to him, he still would not be able to demonstrate that prejudice.<sup>176</sup>

The dissent expressed strong skepticism that the Weeks evidence would have resulted in suppression of Clemons's confession.<sup>177</sup> But even if it would have, the dissent argued, that failure alone would not have sufficiently prejudiced Clemons's case to allow him to overcome the procedural bar to his habeas claim.<sup>178</sup> This is because the State's other evidence was so overwhelming that it simply did not need Clemons's confession to procure his conviction.<sup>179</sup> Judge Wilson concluded that even if the admission of Clemons's confession at trial was error, such error was immaterial because even without the confession, the State's other evidence was strong enough to support Clemons's convictions

171. *Id.* at 91.

172. *See id.* at 104. The Supreme Court of Missouri has held that habeas relief is "the last judicial inquiry into the validity of a criminal conviction." *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 337 (Mo. 2013) (en banc) (quoting *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 125 (Mo. 2010) (en banc)), *modified* (Jan. 29, 2013). It is not, however, "a substitute for post-conviction relief claims cognizable on direct appeal or in Rule 29.15 motions." *Id.* Thus, to proceed with a habeas claim that should have been raised on direct appeal, the defendant must demonstrate the presence of an extraordinary circumstance, such as his "actual innocence" or (as in this case) that he has satisfied the requirements for the "cause and prejudice" exception. *Id.*

173. *Clemons*, 475 S.W.3d at 104 (Wilson, J., dissenting).

174. *Id.*

175. *Id.* at 104–06. Judge Wilson essentially argued that since Clemons knew who Weeks was, and he knew that Weeks had noticed his injuries, Clemons's counsel could have presumably located Weeks and his report through reasonable diligence. *Id.* at 105–06. Thus, the Weeks evidence was practically available to Clemons and his counsel before and during his trial, and the evidence was therefore not "undisclosed" under *Brady*. *See id.* at 104.

176. *Id.* at 107–08.

177. *See id.* at 108–13.

178. *See id.* at 113, 122.

179. *Id.* at 119–20.

and sentences.<sup>180</sup> Specifically, the dissent argued that the most damning evidence against Clemons consisted of the testimony provided by Cummins (Clemons's alleged victim) and Winfrey (Clemons's alleged accomplice).<sup>181</sup> Judge Wilson opined that the testimony of those witnesses, and not Clemons's confession, constituted the "lynchpin" of the State's case against Clemons.<sup>182</sup> In light of what it deemed to be overwhelming evidence against Clemons, the dissent therefore declared that "Clemons should not be given relief because there is no reasonable probability that – without Clemons' statement – the jury would not have convicted him or sentenced him to death."<sup>183</sup>

## V. COMMENT

The majority's decision in *Clemons* is flawed in a number of respects. The court held that the State had failed to disclose the Weeks evidence,<sup>184</sup> but it was undisputed that Weeks's report and testimony were readily available to Clemons and his attorneys because Weeks asked Clemons personally about the swelling on his face while he was preparing his report.<sup>185</sup> The court held that the State's failure to disclose Weeks's report had prejudiced Clemons under *Brady*,<sup>186</sup> but this holding is unsupportable. While it is certainly true that Clemons may have been able to convince the trial judge to exclude his confession had he presented the Weeks evidence at his suppression hearing, that possibility is not sufficient to warrant vacating his sentences. Rather, *vacatur* is only warranted under *Brady* where "nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict" or a different sentence.<sup>187</sup> No such reasonable probability existed in Clemons's case because, as the special master himself suggested, the strength of the State's other evidence remained overwhelming, even absent Clemons's confession. Furthermore, the *Clemons* majority erred in adopting the special master's recommendation after concluding that it did not "erroneously declare or apply the law."<sup>188</sup> To the contrary, as the dissent persuasively argued, the special master's recommendation was premised on a fundamental misapplication of the *Brady* doctrine.

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180. *Id.* Judge Wilson is essentially making a harmless error argument – the undisclosed evidence was not "material" under *Brady*, and therefore the State's failure to disclose it is "harmless" because Clemons suffered no prejudice through its suppression. *See id.* at 122–23. According to Judge Wilson, *vacatur* of Clemons's convictions or sentences was therefore not warranted under the harmless error doctrine. *See id.*

181. *Id.* at 117–19.

182. *Id.* at 119.

183. *Id.* at 123.

184. *Id.* at 82 (majority opinion).

185. *Id.* at 105–06 (Wilson, J., dissenting).

186. *Id.* at 88 (majority opinion).

187. *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

188. *Clemons*, 475 S.W.3d at 86.

### A. *Brady and Prosecutorial or Police Misconduct*

As mentioned above, the investigation of the Chain of Rocks murders produced multiple allegations of police misconduct. Clemons and Gray both alleged that police had extorted their inculpatory statements through intimidation and physical abuse.<sup>189</sup> Cummins, who was cleared of any wrongdoing, similarly complained that police had beaten him in the interrogation room.<sup>190</sup> The police further “mischaracterized” Cummins’s statements in an obvious effort to inculcate him.<sup>191</sup> Finally, Weeks alleged that the police had altered the notation he had made in his pretrial release form regarding Clemons’s injury, and that even the prosecutor had pressured him to keep quiet about his observations.<sup>192</sup> In short, Weeks put it very mildly when he commented that “there[ was] something weird going on” in the investigation of the Chain of Rocks murders.<sup>193</sup>

It is important to note at the outset that, despite these instances of flagrant police and prosecutorial misconduct, Clemons must still demonstrate that he suffered *Brady* prejudice to justify vacating his sentences. The *Brady* Court made clear that the doctrine is not a tool for punishing and deterring police and prosecutorial misconduct.<sup>194</sup> Rather, the *Brady* analysis is the same, “irrespective of the good faith or bad faith of the prosecution.”<sup>195</sup> Its primary purpose is the “avoidance of an unfair trial to the accused.”<sup>196</sup> Under *Brady*, the defendant has only endured an unfair trial in violation of his due process rights where the undisclosed evidence is “material either to guilt or to punishment.”<sup>197</sup>

### B. *Brady’s Applicability in Suppression Hearings*

The dissent assumed for the sake of argument that *Brady* applies to suppression hearings.<sup>198</sup> But the Supreme Court has not addressed this issue squarely. While the Supreme Court has not yet weighed in on this issue, the lower courts have generally found that the *Brady* analysis should apply where the undisclosed evidence could potentially have altered the result of a defendant’s motion to suppress.<sup>199</sup> But as the dissent argued, even if *Brady* does apply

189. *Id.* at 69.

190. *Id.* at 67. *See also id.* at 93 (Wilson, J., dissenting) (detailing the settlement paid to Cummins by the City of St. Louis for allegations of assault by police officers with the intent of obtaining a false confession).

191. *Id.* at 66 (majority opinion).

192. *Id.* at 74–75.

193. *Id.* at 75.

194. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963).

195. *Id.*

196. *Id.*

197. *Id.*

198. *Clemons*, 475 S.W.3d at 107 (Wilson, J., dissenting).

199. *See Biles v. United States*, 101 A.3d 1012, 1020 (D.C. Cir. 2014) (holding “that the suppression of material information can violate due process under *Brady* if it

where the undisclosed evidence allegedly would have been favorable to an accused on his motion to suppress, the defendant must satisfy a two-prong test to procure a reversal of his convictions – “the inmate must show *both*: (1) a reasonable probability that the undisclosed evidence would have altered the outcome of the suppression hearing; *and* (2) a reasonable probability that the suppression of the evidence would have altered the outcome of the trial on the question of guilt or punishment.”<sup>200</sup>

The dissent argued that neither prong had been satisfied.<sup>201</sup> Judge Wilson reasoned that “there is no reasonable probability that the disclosure of Weeks’ evidence would have changed this ruling because the trial court made its decision on the basis of the officers’ and Clemons’ credibility, not on the strength (or weakness) of the corroborating witnesses . . . . Weeks’ evidence sheds no light on this . . . .”<sup>202</sup> This argument does not seem particularly compelling. The trial judge at Clemons’s suppression hearing denied his pretrial motion because Clemons presented “no ‘credible evidence to show how he got [his] injuries if, in fact, he got them.’”<sup>203</sup> As the majority opinion notes, Weeks’s report and testimony would have made Clemons’s claim of police brutality substantially more credible.<sup>204</sup> The special master found that Weeks had interviewed Clemons “less than three hours” after Clemons alleged that he was beaten by the officers.<sup>205</sup> Furthermore, had Weeks testified at the suppression hearing, he would have been the only witness to corroborate Clemons’s claim who had no connection to Clemons and therefore no motive “to fabricate his observations.”<sup>206</sup>

It is, of course, possible that the judge still would have denied Clemons’s motion to suppress his own confession. However, Weeks, an entirely disinterested witness, could have testified that he observed a large bump on Clemons’s face very shortly after Clemons alleged he was beaten. Weeks’s report or testimony thus would have provided exactly the sort of credible evidence that the judge found was lacking when he denied Clemons’s motion to suppress. The dissent’s argument that there was no reasonable probability that the Weeks evidence would have affected the outcome of the suppression hearing is therefore unpersuasive.

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affects the success of a defendant’s pretrial suppression motion”); *United States v. Gamez-Orduño*, 235 F.3d 453, 461 (9th Cir. 2000) (“The suppression of material evidence helpful to the accused, whether at trial or on a motion to suppress, violates due process if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.”).

200. *Clemons*, 475 S.W.3d at 107 (Wilson, J., dissenting) (citing *McNary v. Lemke*, 708 F.3d 905, 916–17 (7th Cir. 2013)).

201. *Id.* at 108.

202. *Id.* at 109.

203. *Id.* (alteration in original).

204. *Id.* at 82 (majority opinion).

205. *Id.* at 79.

206. *Id.*

*C. The Weeks Evidence Would Not Have Altered the Outcome of Clemons's Trial*

As mentioned, three requirements must be met to justify overturning a defendant's convictions on *Brady* grounds: "The evidence at issue must be favorable to the accused . . . ; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."<sup>207</sup> While there is some question about whether disclosure of the Weeks evidence would have altered the result of the suppression hearing, it seems even less likely that it would or should have affected the outcome of his trial. This appears to be the dissent's primary argument.<sup>208</sup> Indeed, despite recommending that Clemons's convictions be overturned, the special master himself expressed serious doubts about whether suppression of his inculpatory statements would have affected the jury's verdict.<sup>209</sup>

A *Brady* violation only warrants *vacatur* of the defendant's convictions or sentences where the violation "undermines confidence in the outcome of the [defendant's] trial."<sup>210</sup> Thus, even a serious *Brady* violation will not require *vacatur* if the State's other evidence is sufficiently strong to sustain the defendant's convictions and sentences.<sup>211</sup> As the majority asserted, "[A] confession is like no other evidence" because it "is probably the most probative and damaging evidence that can be admitted against [a defendant]."<sup>212</sup> Furthermore:

In our criminal justice system as it has developed, suppression hearings often are as important as the trial which may follow. The government's case may turn upon the confession or other evidence that the defendant seeks to suppress, and the trial court's ruling on such evidence may determine the outcome of the case.<sup>213</sup>

But the State's evidence against Clemons was not limited to his confession. The other inculpatory evidence was sufficiently strong that it seems highly doubtful that Clemons was prejudiced within the meaning of *Brady*, even if the Weeks evidence would have caused the trial court to suppress his confession. Specifically, as the dissent argued, the true lynchpin of the case

207. *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999).

208. *See Clemons*, 475 S.W.3d at 120–23 (Wilson, J., dissenting).

209. *Id.* at 122 ("I am dubious that the suppression of Clemons' statement would have made much difference in this case, due to the strength of the evidence against him.")

210. *Id.* at 83 (majority opinion) (quoting *United States v. Bagley*, 473 U.S. 667, 678 (1985)).

211. *See id.* at 91 (Wilson, J., dissenting).

212. *Id.* at 80–81 (majority opinion) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991)).

213. *Gannett Co. v. DePasquale*, 443 U.S. 368, 397 n.1 (1979) (emphasis added).

against Clemons was the testimony provided by the two eyewitnesses – Cummins and Winfrey.<sup>214</sup>

Both witnesses testified, saying that Clemons had raped the Kerry sisters, that he had encouraged others in the group to rape the Kerry sisters, that he had, at the very least, been complicit in shoving the cousins off the bridge, and that he had later bragged about the crime.<sup>215</sup> Clemons's audiotaped confession merely reiterated the testimonies of Cummins and Gray.<sup>216</sup> The majority stressed that "Clemons' confession [was] the only direct evidence placing [him] on the platform" where the Kerry sisters were shoved into the river.<sup>217</sup> But as the dissent made clear, the State did not need that evidentiary fact in order to convict Clemons of first degree murder under the law of accomplice liability.<sup>218</sup> In fact, Marlin Gray, one of the four alleged perpetrators, was convicted of murder and sentenced to death, *even though* he was not on the bridge when the cousins were shoved into the river.<sup>219</sup>

As the Supreme Court has held, a defendant can demonstrate a *Brady* violation sufficient to overturn his conviction or sentence "by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."<sup>220</sup> Thus, although the State failed to disclose evidence favorable to the accused, this is not a sufficient reason to vacate his conviction or sentence. As the dissent argued, even without his own audiotaped confession, the evidence against Clemons remained overwhelming.<sup>221</sup> The special master himself expressed serious doubt that suppression of Clemons's confession would have affected the jury's verdicts at all.<sup>222</sup> Thus, there was no reasonable probability that Clemons's trial would have resulted in a different result if his confession had been suppressed. Even if Clemons's confession were involuntary and thus improperly admitted at trial, the State's other evidence was sufficiently strong that its erroneous admission could not reasonably "undermine confidence in the outcome" of his trial.<sup>223</sup>

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214. *Clemons*, 475 S.W.3d at 119 (Wilson, J., dissenting).

215. *Id.* at 120–23.

216. *Compare id.* at 67–68 (majority opinion) (summarizing Clemons's audiotaped confession), *with id.* at 118–19 (Wilson, J., dissenting) (summarizing the testimony of Cummins and Winfrey).

217. *Id.* at 85 (majority opinion).

218. *See id.* at 121 (Wilson, J., dissenting).

219. *Id.*

220. *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

221. *Clemons*, 475 S.W.3d at 123 (Wilson, J., dissenting).

222. *Id.*

223. *See United States v. Bagley*, 473 U.S. 667, 682 (1985).

*D. The Weeks Evidence Was Known to Clemons*

As both the majority and dissent discussed, Clemons was required to show “cause and prejudice” to justify bringing his belated *Brady* claim.<sup>224</sup> As set forth above, the cause element “requires ‘a showing that the factual or legal basis for a claim was not reasonably available to counsel or that some interference by officials made compliance impracticable.’”<sup>225</sup> But as the dissent illustrates, the Weeks evidence was reasonably available to Clemons. Weeks’s name was disclosed to Clemons’s defense counsel.<sup>226</sup> But most importantly, Clemons himself knew of Weeks’s existence and knew that Weeks could have provided him with favorable testimony.<sup>227</sup> This is because Weeks interviewed Clemons personally, noticed the swelling on Clemons’s face, and “mentioned the apparent swelling to Clemons when the two were sitting face-to-face that morning of April 8, 1991.”<sup>228</sup> The Weeks evidence was thus more than “reasonably available to” Clemons’s counsel; it was known by Clemons himself.<sup>229</sup> Because Clemons could not show cause as to why he did not bring his *Brady* claim sooner, he should not have been allowed to circumvent the procedural bar to his claim for habeas relief.

Furthermore, even if Clemons’s habeas claim were not procedurally barred, the Weeks evidence was still available to him and his counsel, which is fatal to his *Brady* claim. Federal courts have held that “[t]he rule of *Brady* is limited to the discovery, after trial, of information which had been known to the prosecution *but unknown to the defense*.”<sup>230</sup> It therefore does not apply where, as here, the defendant was fully aware of the favorable evidence. Clemons’s *Brady* claim should have failed for the same reason that his “cause and prejudice” claim should have failed – he knew that Weeks had observed a bruise on his face shortly after his interrogation because Weeks specifically asked him about the bruise during their interview. For that reason, Clemons should not have been able to “profit [] from information that he knew about long before trial and that his lawyers could have pursued (but did not pursue) more than 20 years ago.”<sup>231</sup>

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224. See *Clemons*, 475 S.W.3d at 76; *id.* at 93 (Wilson, J., dissenting).

225. *Id.* at 104 (Wilson, J., dissenting) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)).

226. *Id.* at 105.

227. See *id.*

228. *Id.*

229. See *id.* at 94, 105–06.

230. See, e.g., *Nassar v. Sissel*, 792 F.2d 119, 121 (8th Cir. 1986) (emphasis added) (citing *United States v. Agurs*, 427 U.S. 97, 103 (1976)).

231. *Clemons*, 475 S.W.3d at 105 (Wilson, J., dissenting).

*E. The Special Master Misapplied the Brady Doctrine*

Perhaps most importantly, the dissent argued that the special master's recommendation was erroneous because he had apparently misunderstood the law set forth by *Brady* and its progeny.<sup>232</sup> First, the special master concluded that, had Clemons made use of the evidence at the pretrial hearing, Weeks's report or testimony "may have resulted" in the trial court suppressing his confession.<sup>233</sup> As the dissent contends, "This is insufficient."<sup>234</sup> As set forth above, if the *Brady* analysis applies to suppression hearings, the defendant must show *both* a reasonable probability that the result of the suppression hearing would have been different and a reasonable probability that the result of the trial would have been different.<sup>235</sup> That the result of the suppression hearing "may have been different" does not warrant reversal of the defendant's convictions.<sup>236</sup> In *Agurs*, the Court rejected the idea that prejudice is shown by "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial."<sup>237</sup>

Additionally, as the dissent pointed out, the special master did not find it reasonably probable that the result of the trial would have been different had the trial judge suppressed Clemons's confession.<sup>238</sup> In fact, the special master declined to address this question altogether.<sup>239</sup> The special master stated in his report:

The state has suggested that harmless error would protect the jury verdict, even if Clemons' confession had been suppressed. It seems to me that the State's argument is contrary to *Kyles v. Whitley*[,] . . . where the Supreme Court held that once a violation of *Brady* and its progeny is shown, "there is no need for further harmless-error review."<sup>240</sup>

The dissent argued persuasively that the special master's application of *Kyles* reflected a crucial misunderstanding of that case.<sup>241</sup> The special master's conclusion suggests that where evidence favorable to the accused has been suppressed, the reviewing court's inquiry is complete.<sup>242</sup> It must reverse the defendant's convictions without examining whether the undisclosed evidence would have affected the outcome of the proceeding.<sup>243</sup> But as the dissent made

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232. *Id.* at 91, 113.

233. *Id.* at 90.

234. *Id.* (citing *Strickler v. Green*, 527 U.S. 263, 289 (1999)).

235. *See id.* at 89.

236. *See id.* at 90.

237. *United States v. Agurs*, 427 U.S. 97, 109–10 (1976).

238. *See Clemons*, 475 S.W.3d at 90 (Wilson, J., dissenting).

239. *Id.* at 90, 113.

240. *Id.* (citation omitted) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

241. *Id.* at 91, 113.

242. *Id.* at 90.

243. *See id.*



clear, “*Kyles* is not the roadblock to common sense that the Master thought (or was told) it is.”<sup>244</sup> *Kyles* does not prohibit the reviewing court from determining what effect, if any, the undisclosed evidence would have had on the jury’s verdicts – “[t]hat is the *opposite* of what *Kyles* holds.”<sup>245</sup> *Kyles* affirmed the Court’s prior *Brady* jurisprudence by holding that a *Brady* violation only occurs where the absence of the withheld evidence had a “substantial and injurious effect or influence in determining the jury’s verdict.”<sup>246</sup> This requirement necessarily contemplates that reviewing courts will have to determine what impact admission of the undisclosed evidence would have had on the jury’s decision in light of the State’s other evidence.

The special master’s misunderstanding of *Kyles* prevented him from basing his recommendation on the probable impact that omission of the Weeks evidence had on the outcome of Clemons’s trial. But had he thought himself free to answer this question, he strongly suggested that his conclusion would have been the same as the dissent’s. That is, the prosecution’s alleged non-disclosure of the Weeks evidence was “harmless” due to the overwhelming strength of the State’s other evidence. Because the special master’s recommendation was based on a clear misconstruction of the Supreme Court’s holding in *Kyles*, the court should not have ordered that Clemons receive a new trial. Rather, it should have sent the case back to the special master with instructions that he determine whether Clemons actually suffered *Brady* prejudice through non-disclosure of the Weeks evidence.

## VI. CONCLUSION

As Judge Wilson stated in the conclusion of his dissent, we “do not know whether Clemons was beaten to compel him to give” his confession.<sup>247</sup> Weeks’s report and statements, coupled with Cummins’s and Gray’s substantially similar allegations, seem to provide strong support for Clemons’s claim. But *Brady* and its progeny make clear that gross misconduct by agents of the State does not justify *vacatur* of a criminal defendant’s convictions. That drastic remedy is only available where the undisclosed evidence was so significant that the State’s suppression resulted in a verdict unworthy of confidence. Here, the State’s “suppression” of the Weeks evidence did not produce that result. Even without his confession, the State’s evidence was more than sufficient to sustain his convictions and sentences. The court’s decision in *Clemons* reflects a crucial misunderstanding of the *Brady* doctrine. It presents a dangerously

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244. *Id.* at 113.

245. *See id.* at 114.

246. *Kyles v. Whitley*, 514 U.S. 419, 435 (1995) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *see also Strickler v. Greene*, 527 U.S. 263, 281 (1999) (stating “there is never a real ‘*Brady* violation’ unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict”).

247. *Clemons*, 475 S.W.3d at 123 (Wilson, J., dissenting).

watered down version of *Brady*'s "materiality" requirement. It allows criminal defendants whose convictions are supported by overwhelming evidence to succeed in having those convictions overturned. *Clemons* sets a dangerous precedent in Missouri – one that the Supreme Court of the United States has condemned over and over again through its *Brady* jurisprudence.

