APPENDIX TABLE OF CONTENTS

APPENDIX A

REMITTITUR

Court of Appeals of Georgia
Atlanta, August 26, 2022

Case No. A22A0989.
ANTHONY JAMES SCOTT v. THE STATE.

Upon consideration of this case, which came before this Court on appeal from the Superior Court of Carroll County, this Court rendered the following decision:

Judgment affirmed.

McFadden, P.J., Gobeil and Land, JJ., concur

[DATE STAMP]
FILED
GA. CARROLL COUNTY
CLERK SUPERIOR COURT
2023 May -3 PM 2:02
/s/
CLERK SUPERIOR COURT
CARROLL COUNTY GEORGIA

[SEAL]
Court of Appeals of the State of Georgia
Clerk's Office, Atlanta, May 03, 2023.

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/, Clerk

FIFTH DIVISION
MCFADDEN, P. J.,
GOBEIL and LAND, JJ.

NOTICE: Motions for reconsideration must be *physically received* In our clerk's office within ten days of the date of decision to be deemed timely filed. https://www.gaappeals.us/rules

August 26, 2022

[DATE STAMP]
FILED
GA. CARROLL COUNTY
CLERK SUPERIOR COURT
2023 May -3 PM 2:02
/s/
CLERK SUPERIOR COURT
CARROLL COUNTY GEORGIA

In the Court of Appeals of Georgia
A22A0989. SCOTT v. THE STATE.

McFadden, Presiding Judge.

Anthony James Scott was tried before a jury on charges of serious injury by vehicle, homicide by vehicle, speeding, and reckless driving. Before the jury returned a verdict, the trial court granted Scott's motion for a mistrial on the ground that the state had failed to disclose material, exculpatory evidence in violation of *Brady* v. *Maryland,* 373 U.S. 83 (83 SCt 1194, 10 LE2d 215) (1963). Scott then filed a plea in

bar, arguing that a second trial would constitute double jeopardy. The trial court denied Scott's plea. He filed this direct appeal in reliance on the collateral order doctrine.[1] Scott argues that the state intentionally goaded him into moving for a mistrial, so retrial is barred. We disagree. So we affirm.

> When a mistrial is granted at the defendant' s request due to prosecutorial misconduct, the general rule is that the Double Jeopardy Clause does not bar the [s]tate from retrying the case. There is a narrow exception where the prosecutorial misconduct was intended to goad the defendant into moving for a mistrial. However, in order to prevail on such a claim the defendant must show that the [s]tate was purposefully attempting through its prosecutorial misconduct to secure an opportunity to retry the case, to avoid reversal of the conviction because of prosecutorial or judicial error, or to otherwise obtain a more favorable chance for a guilty verdict on retrial.

State v. *Traylor,* 281 Ga. 730, 731-732 (642 SE2d 700) (2007) (citations and punctuation omitted). The trial court acts as the factfinder in determining whether a prosecutor intended to goad the defendant into moving

[1] "[T]he appeal of a denied plea of double jeopardy is subject to the collateral order doctrine." *Carman v. State,* 304 Ga. 21, 25 (1) (815 SE2d 860) (2018).

for a mistrial, and the court's "resolution of factual issues will be upheld by the appellate court unless it is clearly erroneous." *Roscoe v. State,* 286 Ga. 325, 327 (687 SE2d 455) (2009) (citation and punctuation omitted). "[W]e will not reverse the factual findings of the court below if there is any evidence to support them, and this holds true even if the findings are based upon circumstantial evidence and the reasonable inferences which flow from them." *Yarbrough v. State,* 303 Ga. 594, 596-597 (2) (814 SE2d 286) (2018) (citation and punctuation omitted).

Viewed with these principles in mind, the record shows the following. On the night of September 26, 2015, Scott, then a Georgia State Trooper, was driving in his patrol car on Highway 27 headed north. Scott was speeding, although he was not responding to a call. Another driver was headed south on Highway 27, driving a Nissan Sentra with three passengers. As the other driver proceeded to turn left across the highway, Scott's patrol car collided with the Nissan. Two of the Nissan passengers were killed, and the other passenger and the driver suffered severe injuries.

Scott's trial began on May 13, 2019, and the jury began deliberations on May 20. That evening, defense counsel learned of something that led to his allegation of the *Brady* violation. Specifically, counsel learned that the two state troopers who had investigated the incident had developed a new theory based on an enhanced version of Scott's dash cam video. This theory was that one of the decedents in the Nissan may have been seated in or leaning forward into the

front passenger compartment of the Nissan, rather than in the backseat as previously thought. The troopers concluded that this new theory was relevant to the cause of the collision because of the possibility that the decedent had obstructed the driver's view as he turned left into the path of Scott's patrol car. The trial court concluded[2] that the state's failure to turn over the new theory to the defense was based on a misunderstanding of the law and amounted to a *Brady* violation, and it granted Scott's motion for mistrial over the state's objection.

Scott argues that the state goaded him into moving for a mistrial because the state did not believe it could secure an appeal-proof conviction. But the trial court found otherwise. Among other things, the court looked to the circumstances surrounding the jury deliberations – where the state repeatedly urged the court to allow the jury to continue deliberations, even after learning of the jury's difficulty in reaching a unanimous verdict – as evidence of the state's intent. As the trial court found, the jury received the case at 11:15 a.m. on Monday, May 20, 2019. The jury deliberated, and the court recessed for that day. Deliberations resumed the next morning, and at some point, the jury sent a note stating that, "We have decided on two counts and are undecided on four of the counts. No possibility of unanimous decision."

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[2] Whether the trial court correctly concluded that the state violated *Brady* by failing to turn over to the defense the investigating troopers' new theory is not before us.

The parties agreed that it was premature to give an *Allen* charge, see *Allen v. United States,* 164 U.S. 492 (17 SCt 154, 41 LE 528) (1896), so the trial court instructed the jury to continue deliberating. Before recessing for lunch, the court asked for a numerical vote count for each count of the indictment, without an indication of whether the votes were guilty or not guilty. The vote was: count one, five to seven; count two, seven to five; count four, ten to two; count five, ten to two; count six, twelve to zero; and count seven, twelve to zero. (Count three had been nolle prossed.)

The jurors continued deliberating after lunch, and around 2:17 p.m. sent a note that they were deadlocked and that "[t]here is no chance or possibility of this changing." With the assent of the parties, the court asked the foreman whether there had been any movement in the vote counts, and he answered that there had been. The new vote count was: count one, eight to four; and count two, eight to four. The remainder of the counts had the same vote count as before. The court instructed the jurors to continue deliberating and they did so until the court recessed for the evening.

The next morning, the defense made its motion for a mistrial. The state opposed the motion, arguing that the *Brady* criteria had not been met. The court heard testimony from the two troopers who had changed their theory. The state cross-examined them, and then, as the trial court found in the order denying the plea in bar, "strenuously argued that Scott had failed to meet his burden to prove a *Brady* violation,

that the court should deny the mistrial motion, and that the court should bring the jury back and allow them to continue to deliberate to a verdict."

The court recessed the deliberations for two days. When proceedings resumed, the court granted the motion for mistrial and dismissed the jury. The state noted its objection on the record and filed a written objection.

When assessing Scott's plea in bar, the trial court found that the prosecutors consistently requested that the jurors continue deliberations to reach a verdict, even after having learned that the jury was split, and argued against mistrial. The court concluded that the record was "wholly inconsistent with the allegation of intentional goading." Scott has not shown that the trial court clearly erred in finding that the state did not intend to goad him into moving for a mistrial. See *Yarbrough,* 303 Ga. at 597 (2).

Scott argues that the trial court should have granted his plea in bar to punish the state for its abuses of Scott's rights. But as the trial court held, Scott has cited no authority for the proposition that a court may grant a plea in bar to punish the state, rather than to vindicate a defendant's right against double jeopardy where the state has attempted to subvert it.

"[W]e cannot say the trial court clearly erred in finding that the prosecution did not intend to goad the defense into moving for a mistrial, and we therefore

affirm the denial of [Scott's] plea in bar." *Yarbrough,* 303 Ga. at 597 (2).

Judgment affirmed. Gobeil and Land, JJ., concur.

APPENDIX B

IN THE SUPERIOR COURT OF
CARROLL COUNTY
STATE OF GEORGIA

[DATE STAMP]
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CLERK OF SUPERIOR COURT
CARROLL COUNTY, GEORGIA
SUCR2017000775
Bill Hamrick
FEB 04, 2022 05:33 PM
/s/
Alan Lee, Clerk
Carroll County, Georgia

STATE OF GEORGIA,

v .

ANTHONY "AJ" SCOTT,
Defendant.

Case No. 17CR775
Judge Bill Hamrick

ORDER DENYING DEFENDANT'S
PLEA IN BAR

1. Procedural History

On August 31, 2017, Defendant Scott was indicted for serious injury by vehicle (counts 1 and 2), violation of oath by public officer (count 3), homicide by vehicle in the second degree (counts 4 and 5), speeding (count 6), and reckless driving (count 7). (See Indictment, pp. 1-6). Count 3 was nolle pressed prior to trial. (See "Motion to Enter Nolle Prosequi" and "Order" filed March 18, 2019).

After a jury trial on May 13-17 and 20-22, 2019, but before the jury reached a verdict, the trial court granted the Defendant's motion for a mistrial based on the Court's finding that the prosecution had committed a *Brady* violation. The Court entered its order granting the mistrial on May 24, 2019 (See "Order on Defendant's Second Motion for Mistrial"). In the order, the Court made findings of fact and conclusions of law including but not limited to, that the Carroll County trial prosecutors had intentionally withheld material, exculpatory evidence in the form of *a* new theory developed by the investigators on the case. *Id.* The theory, developed by State Troopers Brandon Stone and Chad Barrow based on an enhanced version of the dash cam video of the collision, was that one of the decedents in the Nissan may have been seated in or leaning forward into the front passenger compartment of the vehicle at the time of the collision, rather than in the backseat as previously thought. (See "Order on Defendant's Second Motion for Mistrial," pp, 2-5). The Troopers determined that this was a relevant factor in the cause of the collision due to the possibility that the decedent had obstructed the driver's view as he turned left into the path of Defendant's patrol car. *Id.* The

mistrial was granted over the State's objections, on the basis of the *Brady* violation as found by the Court, and the jury was dismissed from service. (T. 866-68).[1]

Subsequently, the original trial judge (the Honorable John Simpson) recused from the case, as did the Coweta Judicial Circuit District Attorney's Office. (See Orders, filed 9/23/19).

On September 24, 2019, the DeKalb County District Attorney's Office was appointed by the Attorney General to prosecute this case.

On May 12, 2021, Defendant filed a "Plea in Bar for Violation of *Brady v. Maryland"* (hereinafter referred to simply as the "plea in bar" or "the motion"), seeking to bar his retrial based on the State's misconduct in the first trial proceeding.

The State filed its response in opposition to the plea in bar on June 24, 2021. The Court set the motion for virtual hearing on January 13, 2022. On that date, both parties appeared by Zoom video conference, and the Court heard the parties' arguments. The Defendant was also present on the video conference. Neither party presented any additional evidence, but both relied on the existing record. At the conclusion of the hearing, the Court denied the plea in bar. This order sets out the findings of fact and conclusions of law upon which the Court's ruling is based.

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[1] All citations to the trial transcript are "T." followed by consecutive page numbers.

II. The Grounds of the Plea in Bar

In his plea in bar, Defendant generally argues that the State's intentional misconduct in the first proceeding should bar his retrial. Defendant's arguments fall into three main categories:

1) The *Brady* violation, as found by the trial court previously;

2) Intentional goading by the State;

3) Punishing the State for its prior misconduct.

The Court will consider each basis in turn.

1) The Brady Violation Committed by the State

Defendant first argues that because the State's intentional misconduct with regard to the *Brady* violation caused the mistrial, his re-trial should be barred by Double Jeopardy. (Plea in Bar, pp. l-7).

As noted above, the Court previously concluded that the State had committed a *Brady* violation and granted a mistrial on that basis. See "Order on Defendant's Second Motion for Mistrial," pp. 2-11. In that order, the Court found that the State intentionally withheld the evidence of the investigating troopers' new theory regarding where victim Lindsey was sitting in the vehicle at the time of

the collision, The Court found that while the suppression of the evidence was intentional, it was based on the prosecutors' misunderstanding of the law on the victims' potential negligence in relation to the proximate causation of the collision. In other words, the Court found that the State incorrectly believed that the victims' negligence was not legally relevant or material to the question of Defendant's criminal culpability in the collision. And because they believed it was not relevant, they elected not to disclose the theory to the defense. See "Order on Defendant's Second Motion for Mistrial," pp. 7, 8, 11, and 12.[2]

Both parties agreed that the *Brady* violation could not be relitigated at the plea in bar stage of the proceedings. The State conceded that the *Brady* violation was *res judicata* and binding on the parties. *See, e.g.*, *Davis v. State,* 305 Ga. 851, 852-53 (2019).[3]

However, the finding of the *Brady* violation is

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[2] p. 7: "This understanding of the criminal law"; "The State appears to be unfamiliar with the law"); p. 8, "The State believes the conduct of the victim is entirely irrelevant... contradicts the 1aw"; "based on the district attorneys' understanding of the law in vehicular homicide cases"; "based on their misunderstanding of the law"; p. 11 ("the Court presumes the State's determination was guided by its erroneous understanding of the law"; p. 12 "An accurate understanding..."

[3] "Three prerequisites must be satisfied before res judicata applies – (1) identity of the cause of action, (2) identity of the parties or their privies, and (3) previous adjudication on the merits by a court of competent jurisdiction." *Id.* These elements appear to be satisfied here.

not dispositive of Defendant's contentions in the plea in bar. The Georgia Supreme Court has explained that even intentional, malicious, or deliberate prosecutorial misconduct is not a basis to bar retrial:

> Actions constituting even intentional misconduct "do not raise the bar of double jeopardy, notwithstanding the fact that the defendant was thereby deprived of due process of law, unless the actions were intended to subvert the protections afforded by the Double Jeopardy Clause." *Dinning v. State,* 267 Ga. 879, 881 (1997) (rejecting argument that where the conduct is malicious and deliberate, that – in and of itself – should be sufficient to invoke the bar of double jeopardy; reiterating that what is critical is the objective of the improper conduct). *See State v. Brown,* 278 Ga. App. 827, 829 (2006) ("The test is not whether the ... intentional conduct is so egregious and prejudicial that it denies the defendant a fair trial. Rather, what is critical is the objective of the improper conduct. Unless the state is trying to abort the trial, its misconduct will not prohibit a retrial.")

Woody v. State, 357 Ga. App. 752, 756 (2020) (citations and punctuation omitted).

For this reason, the Court finds that the *Brady* violation in and of itself provides no basis to grant

Defendant's plea in bar. The plea in bar is denied on that basis.

2) Intentional Goading

The second basis raised by Defendant is intentional goading by the State based on the *Brady* violation. (Plea in Bar, pp. 7-9). For this proposition, Defendant relied on the existing record of the first trial proceeding. Defendant alleges that the State goaded the defense into requesting a mistrial because "the State did not legitimately believe it could secure an appeal-proof conviction... with the evidence that was presented to the jury." (Plea in Bar, p. 7).

The Georgia Supreme Court has explained:

> A defendant does not waive a double jeopardy claim by moving for a mistrial when the defendant is goaded into that action by the State's behavior. In order to prevail on such a claim, the defendant must show that the State was purposefully attempting, through its prosecutorial misconduct, to secure an opportunity to retry the case, to avoid reversal of the conviction because of prosecutorial or judicial error, or to otherwise obtain a more favorable chance for a guilty verdict on retrial.

Davis v. State, 278 Ga. 305, 306 (2004).

The relevant intent was further explained in *State v. Traylor,* 281 Ga. 730 (2007):

> Unless the prosecutor is intentionally trying to abort the trial, his misconduct will not bar a retrial. It doesn't even matter that he knows he is acting improperly, provided that his aim is to get a conviction. The only relevant intent is the intent to terminate the trial, not the intent to prevail at trial by impermissible means.

Traylor, 281 Ga. at 732 (quoting *Williams v. State,* 268 Ga. 488, 490 (1997)) (punctuation omitted).

In other words, whether the State's actions *caused* the mistrial is not the relevant inquiry, but rather whether the State had the subjective *intention to cause a mistrial.* Thus, the issue squarely before the Court is whether the State through its misconduct had the intent to abort the first trial proceeding against Defendant. On this question, the Court must "make a finding of fact by inferring the existence or nonexistence of intent from objective facts and circumstances." *Yarbrough v. State,* 303 Ga. 594, 596 (2018) (citing *Davis, supra).*

Here, the Court must infer the State's intent based on the record of the trial proceedings before it, as neither party presented additional evidence. In particular, the Court finds it relevant to assess the actions and statements of the prosecution upon first

learning that the jury was having difficulty reaching a unanimous verdict on all counts. In other words, the point at which the State first became aware that a unanimous conviction was imperiled.

The jury received the case at 11:15 a.m. on Monday, May 20, 2019. (T. 760). At 11:30 a.m. the Court called the jury in and announced it would take a lunch recess until 12:33 p.m., during which time the jurors were not to discuss the case. (T. 763). A couple of times that afternoon, the jury asked to view certain exhibits and they were brought into the courtroom to do so. (T. 765-67). Later, they asked to take a break. (T. 768). After further deliberation, the Court recessed for the day. (T. 768). Deliberations resumed the next morning, May 21st, at 9:00 a.m. (T. 768). At some point, the jury sent a note stating the following:

> We have decided on two counts and are undecided on four of the counts. No possibility of unanimous decision.

(T. 769). The prosecutor suggested that an *Allen* charge would be premature and that they should be instructed to continue deliberating for "a little while." (T. 769). Defendant agreed it was too soon for an *Allen* charge and left it in the discretion of the Court. (T. 769). The Court instructed the jury to continue deliberating. (T. 771).

Later, the Court requested a numerical vote count for each count of the indictment, without a description of which votes were guilty or not guilty,

and then dismissed the jury for a long lunch break. (T. 772). The vote count was count one, 5 to 7, Count two, 7 to 5, Count four, 10 to 2, Count five, 10 to 2, Count six, 12 to 0, Count seven, 12 to 0. (T. 772).

After lunch, the jury continued deliberating and around 2:17 p.m. sent a note stating: "We, the jury, are at a deadlock. There is no chance or possibility of this changing." (T. 773). The State requested that the Court find out if the vote counts had changed since lunch. (T. 773). The Defendant agreed they should find out if there was any movement. (T. 773). The Court asked the foreman if there was any movement and he indicated there had been. (T. 774). The Court then requested the vote count, and it came back as: Count one, 8 to 4, Count two, 8 to 4, Count four, 10 to 2, Count five, 10 to 2, Count six, 12 to 0, Count seven, 12 to 0. (T. 775). The Court instructed them to continue deliberating. (T. 775). The jury continued deliberating without further communications, and the Court recessed for the night. (T. 775).

The next morning, Wednesday, May 22, the Court held the jury in recess and the defense made its motion for a mistrial based on the *Brady* violation it had discovered. (T. 776). Defense counsel stated:

> Your Honor, late Monday night around 8:30 or so, it was brought to my attention that there may have been some evidence in this case that the District Attorney's Office knew about that was not made available to me, and we spent the better

> part of Tuesday following up on this lead, if you will.

(T. 777). Defendant then laid out the basis for his mistrial motion, including the *Brady* factors. (T. 777-81). The State opposed the motion, arguing that the *Brady* criteria were not met and that the Court should deny the motion for mistrial. (T. 781-82). Then, the Court heard witness testimony from Troopers Stone and Barrow. (T. 784-820). The testimony is recounted in the Court's "Order on Defendant's Second Motion for Mistrial" and will not be recounted here.

The prosecution cross-examined Troopers Stone and Barrow, questioning them on the speculative nature of their theory, technological problems they had in viewing the enhanced video at the District Attorney's Office, as well as the prosecutors' disagreement with what the enhanced video showed. (T. 792-95, 797-98; 806-10). After the testimony, the prosecution strenuously argued that the Defendant had failed to meet his burden to prove a *Brady* violation and that the Court should deny the mistrial. (T. 820-28). In closing, the prosecutor argued specifically, "So we ask that you deny the motion, you find that there is no *Brady* violation, and we bring the jury back and **we allow them to continue to deliberate to a verdict in this case."** (T. 828).

At 1:30 p.m., the Court called the jury into the courtroom and announced it was going to recess deliberations until 1:00 p.m. on Friday, May 24th. (T. 846-48). When proceedings resumed on that date, the

Court asked the jury to be seated in the courtroom, and then the Court read aloud its "Order on Defendant's Second Motion for Mistrial." (T. 848-66). After the Court read the order, the jury was excused from the courtroom and the prosecution stated it was noting its objection to the mistrial for the record. (T. 867). The prosecutor also noted they would be filing a formal, written objection, which they filed in open court. (See "Objection to Mistrial," filed May 24, 2019). The Court then dismissed the jury from their service, and the trial proceeding concluded. (T. 868).

Thus, the record shows that, from the very beginning of deliberations, the prosecutors consistently requested the jurors continue deliberating to reach a verdict. After the mistrial motion was made, the prosecutors consistently and vigorously argued against the finding of the *Brady* violation and opposed the grant of the mistrial. (T. 781-82, 820-28). The prosecution specifically asked that the mistrial motion be denied and that the jury continue to deliberate to a verdict. (T. 828). Even after the mistrial was declared, the prosecution objected for the record and filed a six-page written objection to the Court's findings on the *Brady* violation. This record is wholly inconsistent with the allegation of intentional goading now argued by Defendant. Furthermore, there is no evidence that the prosecution had any role in making defense counsel aware of the withheld evidence when it became so aware. Rather, the record is ambiguous as to how defense counsel became aware of the new theory during the overnight recess after the first day of deliberations. (T. 777). Therefore, there is no

evidence of goading in that regard.[4]

Based on the record before it, including the statements, arguments, and actions of the prosecution and reasonable inferences therefrom, the Court finds as fact that the prosecution lacked any intent to abort the first trial proceeding or to a cause a mistrial. Rather, the Court finds that the prosecution had the subjective intent to try the case to verdict.

Accordingly, the Court finds that there was no intentional goading by the State in causing the mistrial and this claim provides no basis for the granting of Defendant's plea in bar.

3) Punitiveness

Lastly, Defendant alleges that the Court should grant the motion in order to "punish" the State "permanently" for its "undeniable trail of abuses" of the Defendant's rights. (Plea in Bar, pp. 9-10). The Court is unaware of any case law which provides that a plea in bar may be granted purely to punish the State, rather than to vindicate a Defendant's right against Double Jeopardy where the State has attempted to subvert it. And Defendant cites no

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[4] Notably, the basis of the *Brady* violation, i.e. the withholding of the evidence itself occurred weeks prior to trial. Such intentional misconduct is either born of ignorance of the law or, at worst, "an intent to prevail at trial by impermissible means." *Traylor,* supra. In either case, the requisite intent to abort the trial proceedings is not present.

authority for such a proposition. The relevant legal standards are cited and applied above with respect to the other two claims. Accordingly, the Court finds this final claim provides no basis to grant the plea in bar.

III. Conclusion

For all of the foregoing reasons, the Defendant's Plea in Bar is hereby DENIED on each and every claim raised.

So ordered, this 4 day of February 2022.

/s/
Hon. Bill Hamrick, Judge
Coweta Judicial Circuit
Carroll County Superior Court

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APPENDIX C

IN THE SUPERIOR COURT OF
CARROLL COUNTY
STATE OF GEORGIA

[DATE STAMP]
FILED IN OPEN COURT THIS 24
DAY OF MAY, 2019.
/s/
CARROLL COUNTY DEPUTY CLERK
SUPERIOR/STATE COURT

STATE OF GEORGIA,

vs. Case No: 17-CR-775

ANTHONY JAMES "A.J." SCOTT,
Defendant.

ORDER ON DEFENDANT'S SECOND MOTION FOR MISTRIAL

FINDINGS OF FACT

The trial of State of Georgia v. Anthony James "A.J." Scott began on May 13, 2019. From May 15 to May 20 the State and Defense presented evidence and conducted closing arguments. The jury deliberated the case on May 20 and May 21. Defense counsel was notified of the evidence, which is the subject of this order, on the evening of May 20. Defense investigated

the credibility of the evidence on May 21 before bringing same to the Court's attention on the morning of May 22. Defense made its second Motion for Mistrial on May 22 at 9:00 A.M. at which time the Court suspended deliberations to consider this issue. On the night of September 26, 2015, Defendant was driving in his trooper patrol car on Highway 27 headed north. Dillon Wall was headed south on Highway 27, driving a Nissan Sentra, with passengers Ben Finken suffered severe injuries. As a result of the accident, State charged Defendant with, two counts of Serious Injury by Vehicle, two counts of Homicide by Vehicle in the Second Degree, Reckless Driving, and Speeding. Major themes arose throughout the course of this trial including: the speed of the patrol car, the alleged impairment of Wall by alcohol, and whether Wall yielded to the right of way.

In preparation for a motions hearing on March 18, 2019, Trooper Stone began taking a second look at the evidence collected. Upon examining the physical evidence and considering the physics of the accident, Stone began to believe his first impressions about the case were incorrect. He started to believe that Ms. Lindsey was in the front compartment of the vehicle immediately preceding, and at the time of, impact.

> *"Prior to I believe it was March – I believe the trial was supposed to go March 18th, or that's when the motions were. I was preparing for trial and had a colleague go over the case with me to make sure I had everything taken care of, and he*

> *questioned the ejection of Ms. Lindsey. When I started looking at that, it came to me that there was something different about why she was ejected. She was the only one ejected from the vehicle. Looking at the video, we were able to take the video to Southern Crescent Technical College and have the audio visual department enhance it by lightening it so you could see better to see if we could see right before impact who was sitting where. And right before impact, you do see what appears to be a blonde head which Ms. Lindsey was the only blonde in the car. Everyone else had dark hair. That blonde object or light-colored object is in the forward sitting position, meaning somewhere in front, the driver's area. Now, you can't tell exactly what we're looking at here, but it is a bright object that is lighter colored"*[1]

After reviewing Trooper Stone's findings, Trooper Barrow similarly started to question his first impressions about the case:

> *"[B]ack when we were discussing pre-trial – the trial got continued of course to this date, but when we were preparing pre-*

[1] Testimony and statements from the May 22, 2019 oral argument on the present motion are set off by quotation marks and italicized font.

> *trial when Trooper Stone contacted me, he came across some evidence that the right front passenger window was indicative of someone getting ejected out that window which we did not have in our evidence at that time, but he got me to start pulling up pictures and as I did I was like, you're right. At that point is when we decided to take another look at the video...* ***Once Trooper Stone discovered this and contacted me, and we started looking at the evidence, then it started coming together that if she's sitting where we saying she's sitting then this could be a factor in the case."***

On March 15, 2019, Trooper Stone sent the State a disc containing enhanced videos and pictures of the accident and notified the State of new evidence. On March 28, 2019, Trooper Stone, Trooper Barrow, Assistant District Attorney Lara Myers, Assistant District Attorney Matthew Swope, and District Attorney Herb Cranford met to discuss the enhanced video and Stone's new findings. This meeting was not memorialized in any way. On May 2, 2019, the disc that was the subject of the March 28 meeting was sent to Defense. With the disc was a short a paragraph summarizing the contents of the disc. The summary reads as follows:

> *During the course of trial preparation Trooper Brandon Stone met with*

> *members of the Georgia School of Cinema Department at the Southern Crescent Technical College in the City of Griffin. Trooper Stone provided a copy of the GSP dash cam video, which was recovered from the Defendant's patrol vehicle, to the department. A program was used to lighten the resolution of the video. A program was also used to attempt to lighten the resolution of a snap chat video which was created prior to the collision. A copy of the lightened dash cam video and the frame by frame snap chat video are contained on the attached disc.*

On May 3, 2019, defense counsel called the State to ask about the significance of the video. Defense counsel Gribben recounted her conversation with the State:

> *"[W]hen I got to speak with the State I asked them, what is the significance of this video, and they said, there is none. They said, we don't know why they did this; they didn't do it our direction; we don't plan to use it; it's not relevant; don't worry about it."*

The State's attorney, Lara Myers recalls the same exchange:

> *"[M]y recollection of the conversation was she asked why it was done, and I advised*

> *her truthfully, I don't know why the troopers did it because we had not asked them to do it... It was just the frame by frames that had been lightened. I advised that the State was not going to use the lightened enhanced dash cam video because in my opinion it showed nothing."*

ADA Myers related that she saw nothing on the video. When questioned about the clarity of the video, Trooper Stone testified that without adequate explanation the video is essentially useless. Standing alone, the video does not constitute the entire expert opinion. Trooper Stone's analysis of the physical evidence lends support to the findings he made based on the video. Specifically, regarding the physical evidence Trooper Stone found:

> 1) The right front passenger window was indicative of someone being ejected out the window while the rear left window was left intact;
>
> 2) Only one passenger was wearing a seatbelt, however, Ms. Lindsey was the only passenger ejected from the vehicle;
>
> 3) There was no indication that the front seats of the Nissan Sentra had been struck or loaded by a body;
>
> 4) The passenger door had loading that indicated that something was loaded

against it;

5) Considering the momentum of the Nissan and the momentum of the Dodge, everyone in the vehicle was going to move toward the right front side of the Nissan and there was no evidence consistent with the theory that Ms. Lindsey's body was in the back seat.

Trooper Stone testified to the direction of the impact as follows:

"The impact itself due to the momentum of the car and the momentum of the Nissan and the momentum of the Dodge, when they're struck they're going to go like I said toward that right front side of the Nissan, so everybody's going to move that way. There's no indication that the front seats of this car had been struck or loaded by a body."

"There's no indication that an object, being a person, loaded forward and struck [the two front] seats. Normally in my training and experience, I see that they're hit and actually bend forward. It's a lot of momentum. There's nothing to indicate that."

"[T]he passenger door has some outward loading or inward loading going out

> *which would indicate that something loaded against that. I realize there is a person sitting in the right front seat, but the loading is to the top window which makes me believe that of something goes out that window it's slightly higher than the seated position of the seat meaning that someone is either leaning over sitting on the console area, somewhere in that front area higher than the seated position."*

Trooper Barrow explained the probative value of the new finding:

> *"Trooper Stone's the one that brought it alive, and then we as the SCRT team started discussing the theory, and then all of a sudden it was pretty obvious that she was not sitting in the back left."*
>
> *"My opinions pretty much have been maintained and stayed the same throughout this whole case from the beginning to end, and that [is Ms. Lindsay's position in the front compartment] just another factor that we would have added to the case and the reason why we did so."*
>
> *"If she's sitting or leaning through the middle console or sitting in the front passenger seat, yes, she would have*

obstructed the driver's view and possibly distracted his view from making this turn."

"There's nothing to say, like you said earlier, how she was sitting, where she was sitting, where she was leaning except the evidence of the fact that she is somewhere forward of the two front driver's seat or at least more of her body than none."

"No, sir. I still had the same theory that I just mentioned to him, and this just added to the fact that there would be another factor in the case. And that's why we had the meeting with [the District Attorney's Office]."

Trooper Stone's testimony additionally provided critical conclusions concerning the new finding:

"There is a probability that Ms. Lindsey is in the forward sitting position in the vehicle."

"The question is whether the driver of the Nissan, what they could see. And of course if someone is there to their right as they're making a left turn, it's going to hinder them to see."

Q. Okay. And as an accident

reconstructionist who's testified before in trials; you testified earlier that you had, would that be a factor that you would consider important?

A. *It could be, yes, sir.*

Q. *It would be speculation to guess when she entered that front area, right? In the video when she did, I can tell you in the video that it appears that she's in it just seconds before the crash.*

"Well, if you have somebody up front that's in a higher seating position or higher area, higher than the seat is itself as if moves forward, they go out the window."

Despite these expert opinions, the State decided that this new finding was neither relevant nor material to the Defense's case and therefore did not turn this evidence over. As a result of the State's inaction, the Defense motioned for a mistrial based on the principles of *Brady v. Maryland*, 373 U.S. 83 (1963), Georgia Rule of Professional Conduct 3.8(d), and O.C.G.A. § 17-16-4.

CONCLUSIONS OF LAW

1. Analysis Under *Brady v. Maryland*

In a *Brady* claim, defendant may prevail by

successfully showing "that the prosecution willfully or inadvertently suppressed evidence favorable to the accused, either because it is exculpatory or impeaching." *Young v. State*, 290 Ga. 441, 443 (2012). Defendant can make this showing by proving the following four factors: "(1) the state possessed evidence favorable to the defense; (2) the accused did not possess the evidence and could not have obtained it through reasonable diligence; (3) the state suppressed favorable evidence, and (4) a reasonable probability exists that disclosure of the evidence would have altered the outcome of the proceedings." *Harridge v. State*, 243 Ga. App. 658, 660 (2000), There is no dispute that the State possessed the new findings and never turned over those findings to defense, so the Court must evaluate whether a *Brady* violation in fact occurred. A *Brady* violation occurs when the suppressed evidence is *material. Young*, 290 Ga. at 443. The United States Supreme Court has held that 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 the confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

Defendant contends that the suppressed evidence is material because it is exculpatory to the extent that Kylie Lindsey's position in the front compartment of the car significantly obstructed the driver's view of oncoming traffic, resulting in the driver's failure to yield to the Defendant, and the ultimate collision. Defendant argues the State's

suppression of this exculpatory evidence not only inhibited the Defendant's theory of the case but also prevented Defendant from sufficiently cross-examining multiple key witnesses, including, Dillon Wall, Ben Finken, Trooper Chad Barrow, and Trooper Brandon Stone. In the absence of this evidence, defense believes the outcome of the proceedings would have been different.

The State acknowledges that the troopers' new findings were in its possession and never turned over to Defendant. The State justifies this decision by arguing that Defendant was not entitled to the evidence because it was neither material nor favorable to Defendant. The State contends that the evidence was not material because Defendant is accused of a strict liability crime that was solely caused by Defendant's reckless driving and excessive rate of speed, thus making any negligence of the victim entirely irrelevant. This understanding of the criminal law, which they are prosecuting Defendant for violating, informed the State's determination that the new findings were immaterial and irrelevant.

Contrary to the State's approach in prosecuting this Defendant, the district attorneys do not decide what is legally relevant. An analogous situation arose in *Harridge v. State*, where a jury found Harridge guilty of underage possession of alcohol, failure to maintain lane, and vehicular homicide in the second degree. 243 Ga. App. 658 (2000). Harridge moved for *a* new trial on various grounds, one ground being an alleged *Brady* violation. *Id.* at 659. Harridge argued

that the state suppressed evidence of cocaine and marijuana in the victim's urine. The state argued that the evidence was not favorable to defendant because the collision was solely caused by Harridge's failure to maintain lane. *Id.* at 661. The Court of Appeals rejected the State's argument and stated that the cause of the collision "is a matter for the jury to decide after hearing all of the material evidence, including conduct and condition of the [victim] at the time of the accident." *Id.*

The State appears to be unfamiliar with the law stated in *Harridge* and various other cases in Georgia.[2] The State believes the conduct of the victim is entirely irrelevant in a case of vehicular homicide. The State's position directly contradicts the law in Georgia, which states: the victim's conduct, *"negligent or not*, is material to the extent that it bears upon the question of whether under all circumstances the defendant was negligent, or, if negligent, whether the decedent's negligence was the sole proximate cause of the injury, or whether the injury or death resulted from an unavoidable accident." *Harridge v. State*, 243 Ga. App. 658, 661 (2000) (emphasis added) (quoting *Miller v. State*, 236 Ga. App. 825, 829(2) (1999)).

Defendant's entire case rests upon his defense that his actions did not cause this accident and argues that the victims' conduct caused the accident.

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[2] *Harridge v. State*, 243 Ga. App. 658 (2000). *See also Crowe v. State*, 277 Ga. 513 (2004), *Miller v. Stagg*, 236 Ga. App. 825 (1999), *Cain v. State*, 55 Ga. App. 376 (1937).

Defendant contends that he could have used Kylie Lindsey's location in the vehicle in the moments leading up to the crash in further support of his defense that Dillon Wall's unsafe driving caused this accident. The State, however, decided that this evidence was not material based on the district attorneys' understanding of the law in vehicular homicide cases. The State concluded that the accident was caused solely by Defendant's excessive speed and reckless driving, so any evidence related to the conduct of the victims must be irrelevant. While one could logically conclude that the accident was caused solely by Defendant, that is a conclusion to be reached by the jury, and the district attorneys do not get to control the conclusion to be reached by the jury by controlling the evidence the jury may use to reach its conclusion. The district attorneys gambled with the Defendant's constitutional rights based on their misunderstanding of the law and elected to conceal Trooper Stone's new findings that Kylie Lindsey was very likely in the front compartment. Unfortunately, that was a losing bet for the State. This Court finds that the troopers' new findings are favorable to Defendant.

Neither side disputes that the State did not disclose the troopers' new findings, but the State contends that it was under no obligation to disclose the troopers' new findings because defense could have discovered the new findings by exercising reasonable diligence. In support of this position, the State argues that defense was free to interview Trooper Stone and Trooper Barrow and independently discover the new findings, so defense's failure to do so bars any *Brady*

claim. The State also argues that it complied with *Brady* by producing a disc containing the enhanced video along with a one paragraph summary of the disc's contents, so it became the defense's duty to inquire with Trooper Stone as to the significance of the enhanced dashcam video .

The Court is not persuaded by the State's position. Upon receipt of the disc, defense counsel Katherine Gribben called District Attorney Lara Myers to ask about the significance of the enhanced video. Gribben informed Myers that they were unable to view the video or any additional contents of the disc. Myers advised defense counsel that the disc contained an enhanced version of the dashcam video and stated: she did not know why the troopers had the video enhanced, and the State did not plan to use it because it showed nothing. It is clear that the State failed to provide defense with any details regarding the troopers' use for the enhanced video. At this point the defense reasonably relied on the State's determination of the significance of the video. Without any additional context and in reliance on the district attorney's statements, the defense reasonably concluded that the video was of no value beyond an enhanced version of the original dashcam video.[3] The district attorney's

[3] See Walker v. Johnson, 282 Ga. 168, 171 (2007) ("Rather than informing the defense of the substantive nature of [the] statement, there is a significant likelihood that the State's incomplete and inaccurate response to discovery and *Brady* motions induced defense counsel to believe either than the taped statements were not in existence or that they contained no information beneficial to the defense.").

incomplete and misleading statements about the video's significance led defense counsel to believe that the suppressed evidence did not exist, and no amount of "reasonable diligence" would have led defense counsel to Trooper Stone's new findings.[4]

Finally, in concluding that the suppressed evidence is favorable to Defendant, a reasonable probability must exist that the outcome would have been different had the evidence been turned over to defense. *Bagley*, 473 U.S. at 682. The jury was in the midst of deliberations when defense counsel became aware of the potential *Brady* violation, so the Court has no outcome to necessarily reference. However, the Court of Appeals in *Harridge* unequivocally held that "there is a reasonable probability that the disclosure [of victim's toxicology test results] may have altered the outcome of the trial on the charges of vehicular homicide in the second degree and failing to maintain lane." 243 Ga. App. at 661. This Court is confronting similar suppressed evidence–evidence that relates to the victim's conduct at the time of the collision. The Court of Appeals determined that evidence tending to show the victim was intoxicated was material because

[4] It is worth noting that the video was turned over to defense on May 2, 2019, over 45 days after receiving the video from Trooper Stone. Furthermore, in March 2019, defense had an opportunity to question Trooper Stone about his anticipated testimony in a motions hearing. Nothing in Trooper Stone's testimony related to theories beyond the speed of the Defendant's vehicle at the time of the crash, so defense had no reason to believe that the video would add any additional material to the substance of Trooper Stone's expert opinion.

had the evidence been disclosed, there is a reasonable probability that the outcome may have been different. Similarly, this Court can conclude that evidence suggesting three of the victims were located in the from compartment of the compact vehicle at the time of collision is material because had the evidence been disclosed, there is a reasonable probability that the outcome may have been different.

Based on the foregoing findings, the Court determines that the State suppressed the troopers' new findings in violation of *Brady*. Without the evidence of the new findings, defense was deprived of the opportunity to fully cross-examine witnesses. Defense was deprived of significant evidence that could lead a jury to logically conclude that the conditions in the victims' vehicle and the victims' conduct caused the accident. The State has a constitutional obligation to "disclose evidence which creates a reasonable doubt," and the Court believes Trooper Stone's new findings could create a reasonable doubt as to whether Defendant's actions caused this accident. *West v. State*, 213 Ga. App. 362, 364 (1994).

II. Analysis Under Georgia Rule of Professional Conduct 3.8(d)

Georgia Rule of Professional Conduct 3.8(d) mandates prosecutors in a criminal case to "make *timely* disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or that mitigates the offense." Defense alleges that the State's failure to turn over the troopers'

new findings is a direct violation of the State's duty stated in Rule 3.8(d). Based on the Court's findings under *Brady*, the Court agrees that the State's failure to turn over the troopers' new findings may be characterized as a violation of Rule 3.8(d).

The State was in possession of information that the investigating troopers determined to be significant enough to bring to the attention of the district attorney's office. Both investigating troopers characterized the new findings as a "factor" in the case.[5] Despite the troopers' emphasis on the new findings, the State determined that the new findings need not be disclosed to the defense. The Court presumes that the State's determination was guided by its erroneous understanding of the law in vehicular homicide cases. The State has vigorously argued that the victims' conduct in this case is irrelevant because Defendant's speed was the sole cause of the collision. This position is contrary to the law in Georgia, which unequivocally holds that the conduct and condition in both cars is relevant for purposes of ascertaining the true, legal cause of a collision. An accurate understanding of the law in Georgia would have aided the State in understanding its obligations under Rule 3.8 Special Responsibilities of a Prosecutor because a prosecutor with an accurate understanding of the law in Georgia would have known that the new evidence at the very least "tends to negate the guilt of the

[5] The troopers also identified (1) Defendant's speed and (2) Wall's failure to yield to the right of way by failing to stop or slow down as "factors" in the case.

accused." Unfortunately, the State was not aware that evidence, which suggests three victims were located in the front compartment of the compact vehicle, is a relevant consideration in determining the cause of the collision and the ultimate guilt of the Defendant.

III. Analysis Under O.C.G.A. § 17-16-4(a)(4)

O.C.G.A. § 17-16-4(a)(4) requires prosecuting attorneys, "no later than ten days prior to trial," to give criminal defendants an opportunity "to inspect and copy or photograph a report of any physical or mental examinations and of scientific tests or experiments, including a summary of the basis for the expert opinion" if the State intends to use such information in its case-in-chief. Under the circumstances of the case, this code section does not apply.

CONCLUSION

The assertion by the State's attorney Ms. Myers to defense attorney Ms. Gribben that there was nothing in the disc of value and that the State did not intend to use it is troubling. And this misimpression should have been corrected. The disc alone is hard for a lay person to discern anything. But the disc coupled with the technical college enhancement, and the new findings of the expert troopers is material, and the state is required to make this information available to the defense .

We are proud of our work in the Coweta Judicial Circuit. In our work on improving child support,

domestic violence court, mental health court, drug court, veterans court. We seek to be state and national leaders. So why are we shooting for the bottom in the protection of our constitutional rights? Instead, let's lead the state in protection of constitutional rights by turning every page and always erring on the side of transparency and turning information over to the defense.

The cases of *Harridge* and *Crowe* are the latest in a chain of cases going back almost 100 years. These cases show a liberal view of what is relevant and thus require the State to turn over all relevant evidence to the defense in cases such as this. This is more than an adversary process; this is about defendants' fundamental constitutional rights. This behavior is inconsistent with our American legal heritage. We invented judicial review, the independent judiciary, and the modern jury trial. I believe that no person's constitutional rights should be violated anywhere in the United States, anytime, under any circumstances.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Defendant's Second Motion for Mistrial is GRANTED.

SO ORDERED, this 24 day of May, 2019.

/s/
The Honorable John Simpson
Judge of Superior Court
Coweta Judicial Circuit

APPENDIX D

SUPREME COURT OF GEORGIA
Case No. S23C0126

April 18, 2023

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

ANTHONY JAMES SCOTT v. THE STATE.

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Court of Appeals Case No. A22A0989

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/, Clerk

REMITTITUR

SUPREME COURT OF GEORGIA
April 18, 2023

Case No. S23C0126

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

ANTHONY JAMES SCOTT v. THE STATE.

Upon consideration of the petition for a writ of certiorari filed to review the judgment of the Court of Appeals in this case, the following judgment has been rendered:

Judgment denied. All the Justices concur.

The remitittur shall be transmitted to that court with the attached decision.

Associated Cases
A22A0989
Costs paid: $80

[SEAL]

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, May 03, 2023

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said Court hereto affixed the day and year last above written.

/s/, Chief Deputy Clerk