Rel: August 31, 2018

Notice: This opinion is subject to formal revision before publication in the advance sheets of **Southern Reporter**. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in **Southern Reporter**.

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2018

1170407

Ex parte State of Alabama

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(In re: State of Alabama

v.

George Martin)

(Mobile Circuit Court, CC-99-2696.80;
Court of Criminal Appeals, CR-15-0664)

MAIN, Justice.

In 2000, George Martin was convicted of murdering his wife, Hammoleketh Martin. The murder was made capital because it was "done for a pecuniary or other valuable consideration," see § 13A-5-40(a)(7), Ala. Code 1975. Specifically, the jury found that Martin killed his wife to collect the proceeds from life-insurance policies he had taken out on her life. The jury recommended by a vote of 8-4 that Martin be sentenced to life imprisonment without the possibility of parole, but the trial court overrode the jury's recommendation and sentenced Martin to death.

After his conviction and sentence were affirmed on direct appeal, Martin filed a Rule 32, Ala. R. Crim. P., petition for postconviction relief in which he alleged, among other things, that the State had suppressed material exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). After conducting an evidentiary hearing, the circuit court granted Martin's Rule 32 petition and held that he was entitled to a new trial. Specifically, the circuit court held that the State had improperly suppressed: (1) certain statements made by witness James Taylor during his discussions with police officers on April 22, 1997, and May 8, 1997, (2) an

identification made by Taylor from a photographic lineup on May 8, 1997, (3) statements made by the victim's sister concerning the presence of a gasoline can in the victim's vehicle, (4) statements made to police officers by witness Norma Broach, and (5) evidence concerning two anonymous telephone calls received by law-enforcement officers naming another man as a suspect.

On the State's appeal from that ruling, the Court of Criminal Appeals, in an unpublished memorandum, held that the "circuit court's finding that the State violated Brady through its suppression of Taylor's photographic identification and his comments from his May 8, 1997, police interview is sufficient to support the trial court's holding that Martin is entitled to a new trial." State v. Martin (No. CR-12-2099, December 12, 2014), 195 So. 3d 1077 (Ala. Crim. App. 2014) (table). The Court of Criminal Appeals declined to address the circuit court's remaining findings concerning other Brady violations. This Court denied the State's petition for a writ of certiorari, and the certificate of judgment was issued on April 17, 2015.

While preparing for a new trial, Martin moved the trial court, pursuant to Rule 16.5, Ala. R. Crim. P., to dismiss the capital-murder indictment against him with prejudice. According to Martin, the indictment was due to be dismissed both as a sanction for the State's willful misconduct and because the prejudice resulting from that misconduct could not be corrected by a new trial. In response, the State argued that its misconduct was not willful and that any prejudice could be corrected by a new trial. The trial court held an evidentiary hearing on Martin's motion. The trial court ultimately dismissed the indictment with prejudice on the grounds that the State's misconduct was willful and that the prejudice to Martin resulting from that misconduct could not be corrected by a new trial. The State appealed.

In a 3-2 decision, the Court of Criminal Appeals affirmed the trial court's decision. State v. Martin, [Ms. CR-15-0664, December 15, 2017] ___ So. 3d ___ (Ala. Crim. App. 2017). This Court granted certiorari review; we now reverse and remand.

Facts and Procedural History

The Court of Criminal Appeals' opinion throughly sets forth the lengthy facts and procedural history of this case.

See Martin, ___ So. 3d at ___. We summarize the pertinent facts here.

In 1995, the charred remains of Martin's wife, Hammoleketh, were found inside a burned vehicle that had collided with a tree. Although it appeared to be an accident, evidence indicated that the vehicle fire was intentionally set and that the victim was alive when the fire started. Further evidence indicated that Martin made inconsistent statements to law enforcement concerning the time he discovered his wife missing, whether his wife carried a gasoline can in her vehicle, and whether his wife had used a BIC brand lighter found at the scene as a flashlight because the dome light in her vehicle did not work. Also, evidence indicated that Martin acknowledged the existence of an insurance policy insuring his wife's life for $200,000 but stated that there were no other policies. However, another policy insuring the life of Martin's wife for $150,000 was introduced into evidence, and evidence indicated that this amount was collectible only if Martin's wife died in a "passenger vehicle." Martin was an Alabama State Trooper at the time of his wife's death. The State introduced evidence of a traffic-accident-investigation report prepared by Martin approximately

one year before his wife's death that involved an accident in which an automobile left the road, hit a tree, and burst into flames.

Further, State's witness James Taylor testified that, on the night Martin's wife was killed, he saw a black state trooper in a patrol car sitting at a stop sign near where the victim's body and vehicle were found. Martin is black and, as noted earlier, was an Alabama State Trooper at the time of his wife's death. At trial, Taylor was not asked to specifically identify Martin as the trooper he saw near the scene of the crime. However, during the guilt-phase closing argument, the State argued that Martin was the trooper that Taylor saw, and the State relied on Taylor's testimony to place Martin near where the victim's body and vehicle were found and to place Martin in that area immediately before the vehicle, with the victim inside, was set on fire.

Also, while incarcerated before his original trial, Martin allegedly told Clifford Davis, a fellow inmate, that he had killed his wife. At trial, the State presented Davis's testimony that Martin had confessed to the murder.

Through discovery during the Rule 32 proceedings, Martin obtained information regarding an identification made by

Taylor from a photographic lineup. Martin also obtained a handwritten note and a typed narrative concerning Taylor's interaction with police regarding this case. The lineup contained photographs of 13 black Alabama State Troopers, including Martin. However, when presented with that lineup on May 8, 1997, Taylor identified Trooper Grayling Williams, not Martin, as the trooper he had seen in the area where the vehicle was found. Further, the handwritten note and typed narrative indicated that Taylor stated that the trooper he had seen was a "big man that filled up the car." Testimony and observation from the Rule 32 hearing revealed that Martin is not a "big" man. Based solely on the State's suppression of both Taylor's photographic identification and his comments to the police, the Court of Criminal Appeals affirmed the circuit court's holding that the State had violated Brady and that Martin was entitled to a new trial.

Further, as the Court of Criminal Appeals noted, in addition to the Brady violations concerning Taylor, the Rule 32 circuit court found three other Brady violations concerning statements made by the victim's sister, statements made by Norma Broach, and two anonymous telephone calls received by law-enforcement officers. Specifically,

> "Hammoleketh's sister, [Terri Jean] Jackson, had also stated to [the police] that she had seen a gas can in Hammoleketh's car approximately one month before the murder, which was contrary to the State's argument at Martin's trial that only Martin's relatives had seen a gas can in Hammoleketh's vehicle. Norma Broach, who was at a Texaco gasoline station located near the crime scene on the night of the murder, made statements to police that pointed to a different possible suspect; Broach had seen a white male fill up two large gas cans at the Texaco and watched him move a heavy object from a small black car into the passenger seat of the cab of a camper truck. Finally, the State suppressed evidence of anonymous telephone calls to police indicating that Trooper Williams was involved in Hammoleketh's murder."

Martin, ___ So. 3d at ___.

The following is the trial court's entire discussion of the applicable law and facts in its order dismissing the indictment:

> "APPLICABLE LAW
>
> "In the case of State of Alabama v. Moore, 969 So. 2d 169 (Ala. Ct. Crim. App. 2006), a case prosecuted by Assistant Attorney General Don Valeska and William Dill, the Court reviewed the allegations which led to the granting of the Rule 32 new trial, and then to a dismissal of the Indictment by Judge Glenn E. Thompson of Morgan County. In reversing the dismissal, the Court of Criminal Appeals stated:
>
>> "'Our decision should not be meant as condoning the conduct of the prosecutor. Like the circuit court, we are concerned at the prosecutor's actions. "We are not unmindful of the court's frustration with the prosecutor's defiance in the face of

> the court's order." (cite omitted). However, any prejudice that was suffered in the first trial may be corrected by a new trial. Accordingly, based on the cases cited above, we hold that the circuit court erred in imposing the extreme sanctions of dismissal of the capital-murder indictment returned against Moore.' 969 So. at 185.

"In the later case of State of Alabama v. Hall, 991 So. 2d 775 (Ct. Crim. App. Ala. 2007), in reversing the granting of the dismissal of the indictment with prejudice, the Court noted:

> "'As was the case in Moore, [969 So. 2d at 185], our decision in the instant case should not be seen as condoning the conduct of the Government.
>
> "'....
>
> "'Like the trial court, we believe the Government's actions are cause for concern. However, rather than dismissing the indictments against the Halls, the trial court can ensure that any prejudice that the Halls have suffered as a result of the videotape's destruction may be brought to light during their trials.' 991 So. 2d at 782.

"If the Martin case is not one which is appropriate for dismissal, there may never be one.

"RULE 16.5 ALABAMA RULES OF CRIMINAL PROCEDURE

"The basis for Martin's Motion to Dismiss procedurally is brought under Rule 16.5[, Ala. R. Crim. P.]. The Court of Criminal Appeals recognized that Rule 16.5 of the Alabama Rules of Criminal Procedure can provide for a dismissal. In commenting on that, the Court noted:

> "'Although dismissing the charges is not specifically cited as a sanction in Rule 16.5, this Rule gives a circuit court wide discretion in considering the manner and nature of relief it affords a defendant who has been denied discovery. While we are aware of no reported Alabama case that affirms the dismissal of an indictment based on a prosecutor's Brady violation, it appears from the wording of Rule 16.5, Ala. R. of Crim. P., that this sanction may be available based on the circuit court's supervisory powers.' 960 So. 2d at 181-182.

"The Alabama Rules of Evidence give similar discretionary authority to the trial court under discovery authority to the trial court under discovery matters involved directly in the trial. The Alabama Rules of Evidence Rule 612(b) provide, concerning production of a writing used to refresh memory in a trial, that if it is not produced appropriately by the State, the following is authorized:

> "'If a writing is not delivered pursuant to order under this rule, the court shall make any order justice requires, except that in a criminal case if the prosecution does not comply, the order shall be one striking the testimony of the witness whose memory was refreshed or, if the court in its discretion determines that the interests of justice so require, the order shall be one dismissing the indictment or other charging instrument or declaring a mistrial.'

"In Moore, the Court cited from numerous jurisdictions which indicated that '... the Court must look to both the need to undo prejudice resulting from a violation and the appropriate deterrent value of the sanction in each case.' 969

So. 2d at 182 (citing from Government of the Virgin Islands v. Fahie, 419 F.3d 249 (3d Cir. 2005).

"The Moore Court also relied upon State v. Carpenter, 899 So. 2d 1176 (Fla. Dist. Ct. App. 2005), which had stated:

> "'Dismissal of an information is, however, an extreme sanction that should be used with caution, and only when a lesser sanction would not achieve the desired result. (cites omitted).
>
> "'The Court noted: "[T]he Rule authorizing the imposition of sanctions for discovery violation was 'never intended to furnish a defendant with a procedural device to escape justice.'"'

"The Moore Court then went on to adopt the Florida rationale and held:

> "'We agree with the rationale of the Florida appellate court. [State v. Carpenter, 899 So. 2d 1176 (Fla. Dist. Ct. App. 2005).] See also [Government of the Virgin Islands v.]Fahie[, 419 F. 3d 249 (3d Cir. 2005)](cite omitted). "[T]o merit the ultimate sanction of dismissal, a discovery violation in the criminal context must meet the two requirements of prejudice and willful conduct, the same standard applicable to dismissal for a Brady violation."' (969 So. 2d at 184)

"Finally, the Moore Court held as follows:

> "'Under any analysis, to warrant dismissal of the charges the defendant must show intentional or willful conduct and prejudice. Even if Moore established intentional and willful conduct, which we question, the circuit court made no finding

> that the evidence that was suppressed could not, and has not been, furnished or made available to Moore. The trial court did not consider ... the factors relevant to a sanction for prosecutorial misconduct, and in particular, the two prerequisites to dismissal with prejudice. (cite omitted)
>
> "'Moreover, it appears from the record that Moore has received the materials that were discussed at the hearing on the motion to dismiss and has access to the witnesses whose statements were not disclosed to him. Certainly, Moore was prejudiced at his first trial; however, we see no indication that the prejudice suffered by Moore could not be corrected by a new trial.' (emphasis supplied) 969 at 183-184.

"Unlike Moore, Martin does not have 'full access' to the deceased witnesses and those with impaired memories.

"This trial court finds that, under the facts presented, Defendant Martin has shown intentional or willful conduct and prejudice on the part of the State. Furthermore, this court finds that, even though certain materials were ultimately furnished to the defendant over almost ten years, after extensive discovery motions, appeals, mandamus, and other remedies sought by the State, that time has become the enemy of memory and life. The Court hereby finds that the prejudice suffered by Martin cannot be corrected by a new trial. Further, the violations of Brady by the prosecutors were willful, and the appropriate sanction to be applied is a dismissal with prejudice.

"This trial court is not unmindful of the injustice that has been brought about against Martin, and is also aware of and sympathetic to the injustice brought about against Hammoleketh Martin's

family. Had this case been tried fairly, all would have had resolution of this matter long ago.

"PREJUDICE

"Even if all of the witnesses who testified at trial had lived and retained perfect memories, there is no question that we are now sixteen years beyond the original trial of this case and twenty years beyond the event of the death of Hammoleketh Martin. This is not a cold case, but a case that is riddled with impropriety and missteps brought about during the prosecution of the case, resulting in a death sentence and fifteen years on death row.

"Evidence of the lack of 'full access' is shown in that the State has moved to allow the reading of certain testimony at the original trial in the year 2000, because several witnesses are now deceased. The State has also asked [for] the reading of the testimony of the 'snitch' Clifford Davis, who now tells the State that he has no memory, after several strokes, of the events that led to the so-called admissions and confession by George Martin to him while he was a misdemeanor prisoner assigned to the wedge which housed Martin and other capital-murder defendants.

"Also, the testimony at the Rule 32 hearing of the witness James Taylor, which placed a black State Trooper near the scene of the event, who no longer recalls he made a direct statement to Major Calhoun, who wrote in his non-delivered notes that Taylor specifically told him about the size of the defendant in that he 'filled up the car,' will be difficult to replicate.

"The Supreme Court of Alabama has expressed concern over the Confrontation Clause of the U.S. Constitution and the use of prior statements. In Ex parte Scroggins, 727 So. 2d 131 (Ala. 1998), concerning an issue of use of prior statements and the confrontation clause, the Court noted:

> "'While the question of the sufficiency of the proof offered to establish the predicate of a witness's unavailability is addressed to the sound discretion of the trial judge, the issue is of constitutional significance in a criminal case and especially so in a capital one.' 727 [So. 2d] at 134 (emphasis supplied).

"Because the death of at least two significant witnesses, the alleged loss of memory of the 'snitch,' Clifford Davis, and the loss of memory of James Taylor, this court believes that a substantial prejudice has been demonstrated and is such that the simple use of prior transcribed testimony would not accommodate the confrontation required by the Constitution of the United States of America.

"WILLFULNESS

"This Court took judicial notice and incorporated all of the testimonial hearings, including the original trial, as part of the record for its review. Defense puts forward the following areas as evidence of the willfulness practiced by the prosecution, and they are as follows:

> "1. Norma Broach: failure to disclose (See this court's Rule 32 order dated August 30, 2013.)
>
> "2. The anonymous calls: failure to disclose (See defendant Martin's response to State's proposed order on defendant's motion to dismiss filed February 12, 2016.)
>
> "3. The bike tracks: (State's contention in closing argument that Martin allegedly rode a bike home from the scene of the fire, but withheld evidence that would establish that no bike tracks were ever found at the scene, even though they

were searched for.)(See defendant Martin's response to the State's proposed order on defendant's motion to dismiss filed February 12, 2016.)

"4. Clifford Davis: snitch. (See defendant Martin's response to the State's proposed order on defendant's motion to dismiss filed February 12, 2016.)

"5. James Taylor: (See [unpublished] memorandum ... on Brady issued by the Court of Criminal Appeals affirming the granting of the new trial in the Rule 32 proceeding dated December [12], 2014.)

"6. The gas can: (See trial court's Rule 32 order dated August 30, 2013, concerning the failure to disclose statement of Terry Jean Jackson that she had witnessed a gas can in Mrs. Martin's car less than a month before her death.) (See also opening statement of Gerri Grant (Volume 3, pages R. 308-09). Grant stated in opening statement as to the carrying of gasoline in the car, a lighter in the car, that she hit something that 'but you will see that the evidence in this case will not support that, not one iota.') (See also defendant George Martin's response to the State's proposed order on defendant's motion to dismiss the indictment with prejudice.)

"Of importance to this court was the testimony of Major Calhoun, City of Mobile policeman, who was the case officer and primary investigator putting together the file that was used to prosecute Martin. Calhoun was present throughout the trial of Martin in 2000. He heard the opening statements of Assistant Attorney General Grant, who stated that there would not be an iota of evidence concerning a gas can. Calhoun had taken the statement from

Hammoleketh's sister, Terry Jean Jackson, that she had observed the gas can in the hatchback car that was ultimately burned, and this observation was made just a few weeks before that event. He also heard Assistant Attorney General Valeska make strong argument in closing that there was no gas can and that it was simply a creation of certain Martin family members. Calhoun certainly knew, based on his own investigation, that this was not true. Also, Calhoun heard Assistant Attorney General Grant argue that an inference could be drawn from the testimony of James Taylor that Martin was a black State Trooper close to the scene before the event in question. Calhoun knew that a photo spread had been presented to Taylor and that Taylor identified a physically different State Trooper as being like the one he saw. Martin's picture was in the photo spread and not identified by Taylor. The description 'he filled up the car,' and the fact that Taylor identified Trooper Gray[ling] Williams as that trooper, destroyed any such inference. Yet Calhoun testified at the motion-to-dismiss hearing [that] he felt no obligation to intervene, correct, or suggest to the attorneys that their arguments were not only incorrect, but untrue. There is no question that:

> "'The knowledge of government agents working on the case, including a Deputy Sheriff, as to the existence of exculpatory evidence will be imputed to the prosecutor.' Sexton v. Slate, 629 So. 2d 1041, 1045 (Ala. Crim. App. 1988), Savage v. State, 600 So. 2d 405, 407 (Ala. Crim. App. 1992). Moreover, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf, including the police.' Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct 1555, 131 L. Ed. 2d 490 (1995). 'The Rules of the Criminal discovery are not "mere etiquette," nor is compliance a matter of

> discretion.' State v. Scott, 943 S.W.2d 730, 735 (Mo. Ct. App. 1997), Moore, 969 So. 2d at 175.

"Experienced trial lawyers, including these prosecutors, know that they must be prepared to address weaknesses of their case. The greatest weakness in the prosecution's case in the Martin trial was the identification by James Taylor of a different trooper as being the one who looked like who he saw on the night of the event. Another weakness was the admission by the sister of the deceased that Hammoleketh carried a gas can in her car. This court has held that those matters were not produced to the defense and that has been affirmed by the Court of Criminal Appeals. The affirmative use by the prosecutors of partial truths and untruths with knowledge satisfy the element of the prosecution's willful misconduct in this case. Thus, prejudice and willful misconduct co-exist in the prosecution of George Martin.

"There is no question that the Court of Criminal Appeals in its [unpublished] memorandum ... affirming the Rule 32 granting of a new trial noted that:

> "'... Taylor's photographic identification coupled with his comments to police concerning the size of the state trooper he saw at the scene of the crime were inconsistent with the State's use of Taylor's testimony, which was to show that Martin was the trooper who was seen near the scene of the crime shortly before the victim's body and vehicle were burned.
>
> "'....
>
> "'Taylor never identified Martin, and, based on his comments to police, it appears that he could not have done so.' (emphasis

supplied)(Id. memorandum opinion CR-12-2099, Dec. [12], 2014.)

"The requirements of the Moore case have been met. In May of 2000, the State undertook the prosecution of George Martin through Assistant Attorney Generals [Donald] Valeska, [William] Dill, and [Gerri] Grant. In November 2000, Daniel Wade Moore was indicted and later re-indicted in May of 2002 on five counts of capital murder. It was the Moore situation which brought forth the standard for determining whether or not a dismissal with prejudice should be entered because of prosecutorial misconduct. The Moore case was prosecuted by Assistant Attorney Generals Valeska and Dill. This court has carefully weighed the competing factors. This is not a windfall to defendant Martin, who has served fifteen years in solitary confinement on death row, and is certainly not a procedural device to allow Martin to escape justice. This court has looked at both the need to undo prejudice resulting from multiple violations and the appropriate deterrent value of the sanction in this case. While this is a rare sanction, it is the proper sanction in this case. ..."

Discussion

The State argues, among other things, that "Martin did not establish both that the State willfully suppressed evidence and that suppression of the same evidence irreparabl[y] prejudice[d] his case; thus, dismissal of Martin's capital murder indictment was error." State's brief, at 23. We agree. Specifically, the trial court did not make a sufficient finding of prejudice to warrant the extreme sanction of dismissing the indictment.

The trial court dismissed Martin's indictment under Rule 16.5, Ala. R. Crim. P., which provides:

> "If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection; may grant a continuance if requested by the aggrieved party; may prohibit the party from introducing evidence not disclosed; or may enter such other order as the court deems just under the circumstances. The court may specify the time, place, and manner of making the discovery and inspection and may prescribe such terms and conditions as are just."

Concerning that rule, as the trial court recognized, the Court of Criminal Appeals has correctly stated:

> "There is no constitutional right to discovery in a criminal case in Alabama. However, Rule 16, Ala. R. Crim. P., as adopted by the Alabama Supreme Court, specifically provides for discovery in criminal cases. Rule 16.5, Ala. R. Crim. P., addresses the sanctions that a court may impose for noncompliance with a discovery order. ...
>
> "'....'
>
> "... Although dismissing the charges is not specifically cited as a sanction in Rule 16.5, this Rule gives a circuit court wide discretion in considering the manner and nature of relief it affords a defendant who has been denied discovery. While we are aware of no reported Alabama case that affirms the dismissal of an indictment based on a prosecutor's Brady violation, it appears from the wording of Rule 16.5, Ala. R. Crim. P., that this sanction may be available based on the circuit court's supervisory powers.

"In Government of the Virgin Islands v. Fahie, 419 F.3d 249 (3d Cir. 2005), the federal district court reversed a lower court's dismissal of the charges against Fahie based on a Brady violation. The court stated: 'Our research discloses no case where a federal appellate court upheld dismissal with prejudice as a remedy for a Brady violation.' 419 F.3d at 254 n.6. The court then discussed the various federal circuits and their individual responses to prosecutorial misconduct that necessitates a retrial. The court stated:

> "'Given the "societal interest in prosecuting criminal defendants to conclusion," it is especially important in the criminal context that a court applying sanctions for violation of Rule 16 carefully assess whether dismissal with prejudice is necessary to exact compliance with discovery obligations. [United States v.] Coleman, 862 F.2d 455 [(3d Cir. 1988)]. In particular, as discussed above, a court must look to both the need to undo prejudice resulting from a violation and the appropriate deterrent value of the sanction in each case.
>
> "'Other courts have considered the question of when a court may dismiss an indictment under its supervisory powers. The Ninth Circuit has held that "[d]ismissal under the court's supervisory powers for prosecutorial misconduct requires (1) flagrant misbehavior and (2) substantial prejudice." United States v. Kearns, 5 F.3d 1251, 1253 (9th Cir. 1993). It has suggested that prosecutorial conduct might satisfy those requirements even where it would fail to justify dismissal under Brady directly. See [United States v.] Ross, 372 F.3d [1097] at 1110 [(9th Cir. 2004)]; United States v. Barrera-Moreno, 951 F.2d 1089, 1091 (9th Cir. 1991). The

Seventh Circuit has adopted a more restrictive approach, holding that a sanction under supervisory powers is only appropriate where the conviction could not have been obtained but for the failure to disclose exculpatory evidence. See United States v. Johnson, 26 F.3d 669, 683 (7th Cir. 1994). At least two other circuits instruct courts to balance a number of factors in their choice of a sanction, including "the reasons for the Government's delay in affording the required discovery, the extent of prejudice, if any, the defendant has suffered because of the delay, and the feasibility of curing such prejudice by granting a continuance or, if the jury has been sworn and the trial has begun, a recess." United States v. Euceda-Hernandez, 768 F.2d 1307, 1312 (11th Cir. 1985); see also United States v. Wicker, 848 F.2d 1059, 1061 (10th Cir. 1988). While we appreciate the importance of all these factors, we believe that, to merit the ultimate sanction of dismissal, a discovery violation in the criminal context must meet the two requirements of prejudice and willful misconduct, the same standard applicable to dismissal for a Brady violation. Accordingly, we do not expect that trial courts will dismiss cases under their supervisory powers that they could not dismiss under Brady itself.

"'....'

"419 F.3d at 258.

"In United States v. Euceda-Hernandez, 768 F.2d 1307 (11th Cir. 1985), the court stated:

"'In exercising its discretion, the district court must weigh several factors, and, if it decides a sanction is in order,

should fashion "the least severe sanction that will accomplish the desired result -- prompt and full compliance with the court's discovery orders." United States v. Sarcinelli, 667 F.2d 5, 7 (5th Cir. Unit B 1982). See also [United States v.] Burkhalter, 735 F.2d [1327] at 1329 [(11th Cir. 1984)]; United States v. Gee, 695 F.2d 1165, 1169 (9th Cir. 1983) (citing Sarcinelli, supra). Among the factors the court must weigh are the reasons for the Government's delay in affording the required discovery, the extent of prejudice, if any, the defendant has suffered because of the delay, and the feasibility of curing such prejudice by granting a continuance or, if the jury has been sworn and the trial has begun, a recess. Burkhalter, 735 F.2d at 1329; United States v. Hartley, 678 F.2d 961, 977 (11th Cir. 1982), cert. denied, 459 U.S. 1170, 103 S. Ct. 815, 74 L. Ed. 2d 1014 and 459 U.S. 1183, 103 S. Ct. 834, 74 L. Ed. 2d 1027 (1983); Sarcinelli, 667 F.2d at 6-7.

"'....

"'The presence of a clear violation of a discovery order does not excuse a trial judge from weighing the factors cited above and imposing the least severe, but effective, sanction. The purpose of requiring the Government to disclose evidence is to promote "the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to plea; by minimizing the undesirable effect of surprise at trial; and by otherwise contributing to an accurate determination of the issue of guilt or innocence." Fed. R. Crim. P. 16 advisory committee note.'

"768 F.2d at 1312 (footnote omitted).

"Our neighboring State of Florida in State v. Carpenter, 899 So. 2d 1176 (Fla. Dist. Ct. App. 2005), cautioned against dismissing the charges as a sanction for a Brady violation and aptly stated:

> "'Dismissal of an information is, however, an extreme sanction that should be used with caution, and only when a lesser sanction would not achieve the desired result. State v. Thomas, 622 So. 2d 174, 175 (Fla. 5th DCA 1993). See also [State v.] Del Gaudio, 445 So. 2d [605] at 608 [(Fla. Dist. Ct. App. 1993)] ("Dismissal of an information or indictment is 'an action of such magnitude that resort to such a sanction should only be had when no viable alternative exists'") (quoting State v. Lowe, 398 So. 2d 962, 963 (Fla. 4th DCA 1981)). Before a court can dismiss an information for a prosecutor's violation of a discovery rule or order, the trial court must find that the prosecutor's violation resulted in prejudice to the defendant. Thomas, 622 So. 2d at 175; Richardson v. State, 246 So. 2d 771 (Fla. 1971).
>
> > "'"The obvious rationale for limiting the sanction of dismissal of criminal charges to only those cases where no other sanction can remedy the prejudice to the defendant is to insure that the public's interest in having persons accused of crimes brought to trial is not sacrificed in the name of punishing a prosecutor's misconduct. And, of course, where the prosecutor's failure to make discovery has not irreparably prejudiced the defendant, the

> > sanction of dismissal punishes the public, not the prosecutor, and results in a windfall to the defendant.... [T]he rule authorizing the imposition of sanctions for discovery violation was 'never intended to furnish a defendant with a procedural device to escape justice[.]'"
>
> "'Del Gaudio, 445 So. 2d at 608 (quoting Richardson, 246 So. 2d at 774).
>
> "'The order of dismissal in this case contains no finding of prejudice to the defendant nor does our review of the record support such a finding.'

"899 So. 2d at 1182-83. We agree with the rationale of the Florida appellate court. See also Fahie, 419 F.3d at 259 ('[T]o merit the ultimate sanction of dismissal, a discovery violation in the criminal context must meet the two requirements of prejudice and willful misconduct, the same standard applicable to dismissal for a Brady violation.').

"Under any analysis, to warrant dismissal of the charges the defendant must show intentional or willful misconduct and prejudice. Even if Moore established intentional and willful misconduct, which we question, the circuit court made no finding that the evidence that was suppressed could not, and has not been, furnished or made available to Moore. The trial court did not consider 'the factors relevant to a sanction for prosecutorial misconduct, and in particular, the two prerequisites to dismissal with prejudice.' Government of the Virgin Islands v. Fahie, 419 F.3d at 259.

"Moreover, it appears from the record that Moore has received the materials that were discussed at the hearing on the motion to dismiss and has full access to the witnesses whose statements were not

> disclosed to him. Certainly, Moore was prejudiced at his first trial; however, we see no indication that the prejudice suffered by Moore could not be corrected by a new trial. Moore got all the relief to which he was entitled -- a new trial. ..."

State v. Moore, 969 So. 2d 169, 181-84 (Ala. Crim. App. 2006) (footnotes omitted). See also State v. Hall, 991 So. 2d 775 (Ala. Crim. App. 2007) (holding that the dismissal of the indictments as a sanction for a Brady violation, which occurred when the prosecutors failed to provide the defendants with a copy of a videotape, was not warranted because, even if the defendants established intentional and willful misconduct by the prosecutors, the defendants were aware of the existence of the evidence before their trials and, thus, had the opportunity to make use of the State's destruction of the evidence during their trials).

Under Rule 16.5, Ala. R. Crim. P., a trial court can dismiss an indictment if the State fails to comply with discovery rules. However, the dismissal of an indictment is an extreme sanction that should be used only when a lesser sanction would not achieve the desired result. To warrant dismissal of the indictment the defendant must establish intentional or willful misconduct by the State and irreparable prejudice.

In the present case, the following is the trial court's entire finding concerning prejudice:

> "PREJUDICE
>
> "Even if all of the witnesses who testified at trial had lived and retained perfect memories, there is no question that we are now sixteen years beyond the original trial of this case and twenty years beyond the event of the death of Hammoleketh Martin. This is not a cold case, but a case that is riddled with impropriety and missteps brought about during the prosecution of the case, resulting in a death sentence and fifteen years on death row.
>
> "Evidence of the lack of 'full access' is shown in that the State has moved to allow the reading of certain testimony at the original trial in the year 2000, because several witnesses are now deceased. The State has also asked [for] the reading of the testimony of the 'snitch' Clifford Davis, who now tells the State that he has no memory, after several strokes, of the events that led to the so-called admissions and confession by George Martin to him while he was a misdemeanor prisoner assigned to the wedge which housed Martin and other capital-murder defendants.
>
> "Also, the testimony at the Rule 32 hearing of the witness James Taylor, which placed a black State Trooper near the scene of the event, who no longer recalls he made a direct statement to Major Calhoun, who wrote in his non-delivered notes that Taylor specifically told him about the size of the defendant in that he 'filled up the car,' will be difficult to replicate.
>
> "The Supreme Court of Alabama has expressed concern over the Confrontation Clause of the U.S. Constitution and the use of prior statements. In Ex parte Scroggins, 727 So. 2d 131 (Ala. 1998),

> concerning an issue of use of prior statements and the confrontation clause, the Court noted:
>
> > "'While the question of the sufficiency of the proof offered to establish the predicate of a witness's unavailability is addressed to the sound discretion of the trial judge, <u>the issue is of constitutional significance in a criminal case and especially so in a capital one</u>.' 727 [So. 2d] at 134 (emphasis supplied).
>
> "Because the death of at least two significant witnesses, the alleged loss of memory of the 'snitch,' Clifford Davis, and the loss of memory of James Taylor, this court believes that a substantial prejudice has been demonstrated and is such that the simple use of prior transcribed testimony would not accommodate the confrontation required by the Constitution of the United States of America."

Thus, the trial court based its finding of prejudice solely on (1) "the death of at least two significant witnesses," (2) "the alleged loss of memory of the 'snitch' Clifford Davis," and (3) "the loss of memory of James Taylor."

First, concerning Clifford Davis, there is no finding of any actual failure to comply with discovery, which is required for any sanction under Rule 16.5, Ala. R. Crim. P. Martin specifically moved the trial court to dismiss the indictment under Rule 16.5, and, on its face, that rule applies only to failure to comply with Rule 16 or with orders issued pursuant to Rule 16, i.e., it applies only to failure to comply with

discovery. It appears that no trial court -- not the Rule 32 circuit court or the trial court in the present proceedings -- has actually found a Brady violation or any other specific failure to comply with discovery concerning Davis, and the Court of Criminal Appeals does not point out any such finding. "To prove a Brady violation, a defendant must show that '"(1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the issues at trial."'" Freeman v. State, 722 So. 2d 806, 810 (Ala. Crim. App. 1998) (quoting Johnson v. State, 612 So. 2d 1288, 1293 (Ala. Crim. App. 1992), quoting in turn Stano v. Dugger, 901 F.2d 898, 899 (11th Cir. 1990)). There is no specific finding before this Court that the State suppressed anything concerning Davis. Neither the Rule 32 circuit court nor the trial court in the present proceedings made any specific finding of suppression by the State or of any other failure by the State to comply with discovery concerning Davis. Further, the Court of Criminal Appeals does not set forth a Brady violation or any other failure to comply with discovery concerning Davis. In fact, the Court of Criminal Appeals lists the trial court's findings concerning the

State's misconduct upon which the court relied in dismissing the case under Rule 16.5 as follows:

> "(1) the State suppressed evidence that Jackson saw a gas can in Hammoleketh's vehicle and then argued to the jury that there was no evidence of a gas can being in the vehicle; (2) the State suppressed evidence that Taylor had identified Trooper Williams from a photographic lineup -- which also included Martin's photograph -- as being the size of the trooper he saw in the patrol car on the night of murder and in the vicinity of the crime scene and argued to the jury that it could infer from Taylor's statements that Martin was the trooper Taylor saw, although it was clear that Martin and Trooper Williams were not of similar build; (3) the State used Davis to testify that Martin confessed to the murder, although Davis's credibility and the circumstances under which he obtained the confession were suspect; (4) the State suppressed an anonymous telephone call that indicated Trooper Williams's possible involvement in the murder; (5) the State suppressed Broach's statements that pointed to a different man as a possible suspect in the murder; and (6) the State suppressed the lack of evidence that a bicycle was used to flee the scene yet argued to the jury that Martin used a bicycle to flee the scene."

Martin, ___ So. 3d at ___ (emphasis added).

Thus, the Court of Criminal Appeals lists five pieces of evidence the trial court found the State suppressed, but concerning Davis, the Court of Criminal Appeals states that the trial court found that Davis's credibility and the circumstances under which he obtained the confession "were suspect." There is no specific discovery violation under Rule

16 in that finding; thus, it cannot form the basis for a dismissal under Rule 16.5.

Finally, neither the death of two unnamed witnesses nor James Taylor's loss of memory establishes the irreparable prejudice required to warrant dismissal under Rule 16.5. Concerning Taylor, he is available to testify at a new trial, and Martin now has Taylor's previously suppressed statements. If necessary, Taylor can be impeached with his prior statements. There is no reason the prejudice suffered by Martin at his first trial cannot be corrected by a new trial.

It is not clear which two deceased witnesses the trial court is referring to, and there is no specific finding concerning how their deaths actually prejudice the defense; thus, the death of the two unnamed witnesses does not establish the irreparable prejudice required for dismissal of the indictment. Martin states in his brief that the two deceased witnesses are Lt. Frank Woodward and Corp. Matthew Thompson, who were officers in the Mobile Police Department at the time of Martin's wife's death. According to Martin, Lt. Woodward was responsible for investigating the crime scene and Corp. Thompson received the statements made by Norma Broach and investigated the two anonymous telephone calls. Lt.

Woodward was not linked to any of the evidence the State suppressed; he was cross-examined at Martin's original trial; and he was not the only officer who investigated the crime scene. His death does not establish irreparable prejudice to Martin's defense in a new trial. Likewise, concerning Corp. Thompson, it is not clear what, if any, additional admissible evidence he could provide in a new trial concerning the statements made by Norma Broach or the two anonymous telephone calls, and the trial court did not cite any specific evidence in its order. Thus, assuming that Martin has correctly identified the two unnamed deceased witnesses, their deaths do not establish irreparable prejudice.

Further, it appears that the trial court's entire finding of prejudice is tied to its finding that "the simple use of prior transcribed testimony would not accommodate the confrontation required by the Constitution of the United States of America." However, if, in a new trial, certain evidence is offered that violates the Confrontation Clause, a lesser sanction is available, i.e., the trial court can simply exclude that particular evidence. Dismissing the indictment is unnecessary.

Conclusion

Based on the foregoing, we hold that the Court of Criminal Appeals erred in affirming the trial court's order imposing the extreme sanction of dismissing the indictment. Accordingly, we reverse the Court of Criminal Appeals' judgment and remand the case to the Court of Criminal Appeals for that court to remand it for a new trial.

REVERSED AND REMANDED.

Stuart, C.J., and Bolin, Parker, Shaw, Bryan, Sellers, and Mendheim, JJ., concur.

Wise, J., recuses herself.