

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BERKELEY)
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 STATE OF SOUTH CAROLINA,)
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 Plaintiff,)
)
 -versus-)
)
 MICHAEL COLUCCI,)
)
 Defendant.)
 _____)

IN THE COURT OF GENERAL SESSIONS
 FOR THE NINTH JUDICIAL CIRCUIT
 INDICTMENT NUMBER: 2016-GS-08-02603
 WARRANT NUMBER: 2016A0810400692

**MOTION FOR DISCLOSURE OF
 STATE WITNESSES, EXPERT
 SUMMARIES AND TEST RESULTS**

2018 SEP 27 PM 4:03
 FILED
 CLERK OF COURT
 COUNTY OF BERKELEY
 CALIFORNIA

INTRODUCTION

Michael Colucci seeks this Court to order the State to disclose its list of potential witnesses to both the Court and the Defense for purposes of jury selection. Furthermore, Mr. Colucci moves to require the State to provide him with the names, curriculum vitae and summary of the *general* nature of the experts' field of expertise as it relates to their anticipated testimony. Finally, Mr. Colucci requests that this Court order the State to provide the results of any tests or experiments performed in accordance with Rule 5(a)(1)(D), SCRCrimP.

ANALYSIS

I. Providing Witness Information Will Minimize the Risk of Juror Issues Due to Jurors Knowing Potential Witnesses

In the case at bar, jury selection is going to be an intense task due to the fact that the case garnered significant publicity. In order to ensure that the Defense, the State and the Court are aware of any relationships jurors may have to potential witnesses in this case and to ensure that the Court has enough fair and impartial jurors to create a jury pool, it is important that the State disclose its potential witness list. It is also imperative that the Court inquire of the jury through voir dire as to

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whether or not they have any connection to the witnesses.

“It is the duty of the trial judge to see that a jury of unbiased, fair, and impartial persons is impaneled.” *State v. Powers*, 331 S.C. 37, 43 , 501 S.E.2d 116 (1998) cert denied, 525 U.S. 1043, 119 S. Ct. 597 (U.S.S.C. 1998); *see also State v. Matthews*, 353 S.E.2d 444, 291 S.C. 339 (S.C. 1986). It has become the established practice of trial courts in South Carolina to list the names of potential State and Defense witnesses *prior to* voir dire to determine if any potential juror may have a relationship with a witness that may impact the juror’s ability to be fair and impartial. *Powers* at 44. *See State ex rel Hill v. Reed*, 199 W.Va. 89, 483 S.E.2d 89 (1996). Inclusion of the aforementioned will insure that each juror has a meaningful opportunity to recognize and identify proposed witnesses so that the Court may qualify a jury with some degree of accuracy and pursuant to the law.

II. Providing the General Nature of Expert’s Testimony Will Minimize the Need for Delay During Trial

The State has provided very limited information regarding its intention to rely on experts. The limited information provided by the State thus far indicates that experts may present information that is beyond the expertise of defense counsel and that the retention of experts by Mr. Colucci will be necessary. To delay the disclosure of the experts’ information until trial begins will necessitate a continuance in the midst of trial so that Mr. Colucci may secure the aid of his own experts.

Discovery rights are provided by statute or court rule. *State v. Flood*, 257 S.C. 141, 184 S.E.2d 549 (1971). The rules authorizing discovery are, in fact, a matter of legislative grace. *See Id.*; *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984). The legislature adopted the South Caroline Rules of Criminal Procedure providing defendants with

certain discovery rights. See *Miller*, 289 S.C. 316, 184 S.E.2d 489; Rule 5, SCRCrimP. Specifically, Rule 5(d)(1), SCRCrimP, provides substantial authority to the court to regulate discovery. “Upon a sufficient showing that court may at any time order that discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate.” *Id.* If a court has inherent authority to order discovery outside of the rule, it necessarily has the authority to regulate the discovery process, particularly in this case, when the power to regulate discovery is explicitly provided in the South Carolina Rules of Criminal Procedure.

In construing the South Carolina Rules of Criminal Procedure, state courts look to its federal analogue, the Federal Rules of Criminal Procedure, upon which the South Carolina Rules of Criminal Procedure are based.¹ See *State v. Miller*, 289 S.C. 316 (1986). For matters that involve criminal discovery, Fed. R. Crim. P. 16 applies. The inherent authority of courts to regulate the criminal discovery process is set forth in Fed. R. Crim. P. 16. *United States v. Beckford*, 962 F.Supp. 748, 755 (E.D. Virginia 1997) (citing *United States v. Fletcher*, 74 F.2d 49, 54 (4th Cir. 1996)).

With respect to summaries of anticipated expert witness testimony that require disclosure are governed by Fed. R. Crim. P. 16(a)(1)(G). The government must provide testimony summary to include “the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.” Consequently, this Court has the authority to order the State to provide information concerning its experts’ education and experience as well as the general nature of their testimony pursuant to Rule 5(d)(1), SCRCrimP.

¹ In *State v. Trotter*, the South Carolina Supreme Court notes the parallel between the two rules stating, “[t]he federal court in each of these cases is interpreting Rule 16, Fed. R. Crim. P., the equivalent of Rule 5, SCRCrimP.” 322 S.C. 537, 473 S.E.2d 452 (1996).

III. Providing the Results of Tests or Experiments Made in Connection with the Case and Intended for Use as Evidence in Chief is Required by Rule 5

The Defense is requesting that the State provide experiment or test results which they intend to introduce as evidence in chief. The State's obligation to disclose this type of information is currently contemplated in Rule 5(a)(1)(D), SCRCrimP, which states:

(a) Disclosure of Evidence by the Prosecution.

(1)(D) Reports of Examinations and Tests. Upon request of a defendant the prosecution shall permit the defendant to inspect and copy any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution, and which are material to the preparation of the defense or are intended for use by the prosecution as evidence in chief at the trial.

As to the timing of this disclosure, the Rules afford the Court wide latitude in order to avoid "trial by ambush" and last minute disclosures. "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." Rule 5(d)(2), SCRCrimP; *See also* Rule 5(a)(3), SCRCrimP ("within such other time as may be ordered by the court.").

In addition to the requirements set forth in Rule 5, SCRCrimP, the South Carolina Supreme Court looks to the interpretation of Fed. R. Crim. P. 16 by federal courts when construing state rules of criminal procedure. *State v. Miller*, 289 S.C. 316, 317, 345 S.E.2d 489 (1986);² *see also State v. Hoffman*, 285 S.C. 130, 328 S.E.2d 631 (1985). With respect to test and exam disclosure, Fed. R. Crim. P. 16(a)(1)(F) requires the government to provide the defense with test and examination reports or results if "(i) the item is within the government's possession, custody, or control; (ii) the

² Rule 5, SCRCrimP, the successor to former Circuit Court Rule 103, is based on Fed. R. Crim. P. 16. *State v. Miller*, 289 S.C. 316, 317 (1986).

attorney for the government knows—or through due diligence could know—that the item exists; and (iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.”

Given that both state and federal rules of criminal procedure require disclosure by the State of any and all tests and examinations, this Court has the authority to order the production of the same by the State.

IV. Failure to Order the State to Disclose Requested Information Violates Due Process Rights, Right to Fair Trial and the Right to Confront Witnesses

Mr. Colucci believes the failure of the State to disclose the information sought herein deprives him of the ability to present a full and complete defense—a denial of a full and complete opportunity to confront the charges against him. Such a limitation on the defense irreparably prejudices Mr. Colucci and amounts to a violation of his Due Process rights under the 5th and 14th Amendments to the Constitution of the United States and Article I, §3 and §14 of the Constitution of South Carolina.

Mr. Colucci has the right to present a defense, as enumerated in the 6th Amendment to the Constitution of the United States and recognized by the Supreme Court of the United States through *Washington v. Texas*, 388 U.S. 14 (1967). “The Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” *Holmes v. South Carolina*, 547 U.S. 319 (2006). The South Carolina Supreme Court has recognized that the “right to present a defense” is “a fundamental element of due process of law.” *State v. Inman*, 395 S.C. 539 (2011), quoting *Washington* at 19. If the identities of the witnesses against him, the basis of the expert testimony intended for use by the State and the results of any tests or examinations conducted are withheld,

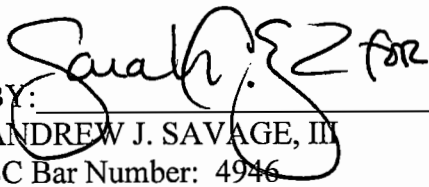
then Mr. Colucci will not be afforded “a meaningful opportunity to present a complete defense” as required by the Constitution and law.

CONCLUSION

For the reasons stated above, Mr. Colucci respectfully requests that the Court order the State to disclose its witness list. Mr. Colucci also requests that the Court order the State to provide the names, curriculum vitae and summary of the general nature of its experts’ field of expertise as it relates to their anticipated testimony. Finally, Mr. Colucci requests that the results of any tests or experiments made in connection with this case and which the State intends to introduce at trial or are which are material to the preparation of his defense be disclosed. Mr. Colucci requests the Court order that the State produce the information requested no later than Monday, October 1, 2018.

Respectfully submitted,

SAVAGE LAW FIRM
15 Prioleau Street
Charleston, SC 29401
Telephone: (843) 720-7470
E-mail: andy@savlaw.com


BY: _____
ANDREW J. SAVAGE, III
SC Bar Number: 4946

ATTORNEY FOR MICHAEL COLUCCI

Charleston, South Carolina

October 9/27, 2018.