

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)
STATE OF SOUTH CAROLINA,)
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

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

INTRODUCTION

Michael Colucci ("Colucci") petitions this Court to order the State to disclose its list of potential witnesses to the Defense prior to jury selection. Colucci also seeks 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, Colucci requests that this Court ensure that the State has provided to Colucci 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

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 limited information regarding its intention to rely on the testimony of experts. Disclosures by the State thus far indicate that experts may present information that is beyond the expertise of defense counsel and that the retention of experts by Colucci will be necessary. To delay the disclosure of the experts’ opinion until trial will necessitate undue delay. Colucci may consult with and perhaps present testimony of his own experts depending on the State’s expert testimony.

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 Carolina 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) and the Due Process Clauses of both the State and Federal Constitutions. 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

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 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.

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 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, Colucci respectfully requests that the Court order the State to disclose its witness list. Colucci also requests that the Court order the State to provide their experts name, curriculum vitae, field of expertise, opinion, and basis thereof. Colucci herein specifically requests:

Colucci herein specifically requests:

1. The State provide to defense counsel the identity of and qualifications for all expert witnesses expected to provide testimony of scientific, technical or other specialized knowledge to aid the trier of fact in understanding evidence or to determine a fact in issue pursuant to Rule 702, SCRE.
2. The State identify the subject matter and specific areas of expertise of which each and every expert witness is expected to testify pursuant to Rule 702, SCRE.
3. That for each and every expert, the State identify the ultimate issue the expert witness is expected to testify to and provide the corresponding opinion of each pursuant to Rule 704, SCRE.
4. That for each and every expert, the State set forth the basis for each opinion or inference in this case pursuant to Rule 703, SCRE.
5. That for each and every expert, the State set forth the specific facts and data upon which the expert relied when forming an opinion or inference in this case pursuant to Rule 703, SCRE.

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6. That the State set forth the specific compensation provided to each expert for their testimony.
 7. That if the State proposes to introduce 702 (expert) testimony and the alleged expert has failed to produce a written report made available to Colucci, that the witness be instructed to meet with Colucci's attorneys in advance of their testimony for a reasonable period of time and respond to Colucci's questions regarding their opinions and basis for same. The timing of the expert's disclosures should be such as to allow Colucci sufficient time to consult with his own expert to either validate or discredit the opinion of the State's expert.

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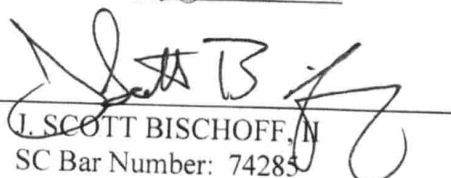
Finally, Colucci requests that the results of any tests or experiments made in connection with this case and which the State intends to introduce at trial or are which are material to the preparation of his defense be disclosed within thirty (30) days pursuant to Section (a)(3) of Rule 5, SCRCrimP. This production is specifically sought so that the information discoverable pursuant to Rule 5, SCRCrimP or any of the above-cited cases will be meaningful for the proper preparation of the defense of Michael Colucci.

Respectfully submitted,

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