

9189-9739



ALAN WILSON
ATTORNEY GENERAL

August 26, 2014

Joe S. Dusenbury, Jr.
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South Carolina Department of Revenue
300A Outlet Pointe Blvd.
Columbia, SC 29210

Dear Mr. Dusenbury:

We are in receipt of your letter requesting an opinion as to whether “a properly filed Rule 5 discovery motion, and applicable case law pertaining to discovery in criminal cases, would permit the disclosure of tax returns and other tax related information in criminal cases without violating Section 12-54-240 [of the South Carolina Code].” Our response follows.

I. Law/Analysis

According to its legislative title, Section 12-54-240 of the Code generally prohibits, among other things, the “[d]isclosure of records . . . reports and returns filed with the Department of Revenue.” Specifically, Section 12-54-240(A) explains that, “[e]xcept in accordance with proper judicial order or *as otherwise provided by law*, it is unlawful for a person to divulge or make known in any manner any particulars set forth or disclosed in any report or return required under Chapters 6, 8, 11, 13, 16, 20, or 36 or Article 17, Chapter 21 of this title.” S.C. Code Ann. § 12-54-240(A) (2014) (emphasis added). As we understand it, your question focuses on whether, in a criminal prosecution, Section 12-54-240(A)’s “as otherwise provided by law” exception applies to criminal discovery provisions such as those mandated by Brady v. Maryland, 373 U.S. 83 (1963) and Rule 5 of the South Carolina Rules of Criminal Procedure. We believe that it does.

While we have previously construed Section 12-54-240(A)’s “as otherwise provided by law” language to mean “permitting disclosure where the Legislature has otherwise directed” Op. S.C. Att’y Gen., 1994 WL 50387 (January 21, 1994), we have never said state statutory law is the exclusive source of “law” for purposes of construing this phrase. To the contrary, we believe Section 12-54-240(A)’s “otherwise provided by law” language would necessarily include those legal sources mentioned in your letter—federal constitutional law and state rules of criminal procedure—as it is abundantly clear that both would apply in a state criminal prosecution in South Carolina. Moreover, because both sources of legal authority clearly require disclosure in certain circumstances, it seems clear that the phrase “otherwise provided by law” would include both federal constitutional and state procedural law.

A. Constitutional Law Requires Disclosure in Certain Circumstances

Under Brady and its' progeny, "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87; see also Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 268 (1993) ("Brady requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment."). The requirements of Brady also apply to impeachment evidence. See U.S. v. Bagley, 473 U.S. 667, 682 (1985) (explaining there is no difference between exculpatory and impeachment evidence for Brady purposes). For purposes of determining evidence that may be subject to disclosure, Brady places the burden of determining the relevant facts of a case on the prosecutor. Kyles v. Whitley, 514 U.S. 419, 436-40 (1995); Gibson v. State, 344 S.C. 515, 524 n.3, 514 S.E.2d 320, 324 n.3 (1999). Notably, the Supreme Court of the United States and our Supreme Court have both advised, "in close cases, 'the prudent prosecutor will resolve doubtful questions in favor of disclosure.'" Gibson, 344 S.C. at 526, 514 S.E.2d at 325 (quoting in part Kyles, 514 U.S. at 438-40). Thus, because the Fourteenth Amendment of the United States Constitution clearly requires a criminal prosecutor to disclose evidence which is material either to guilt, punishment or impeachment under Brady, we believe Section 12-54-240(A)'s "as otherwise provided by law" language must be read as permitting the State to provide materials that would otherwise be subject to the non-disclosure protections of Section 12-54-240 of the Code.

B. South Carolina Procedural Law Requires Disclosure in Certain Circumstances

Similar to Brady, Rule Five of the South Carolina Rules of Criminal Procedure ("Rule 5") require a prosecutor in a criminal trial to provide certain types of material evidence to the defense. Rule 5(a)(1)(A-D), SCRCrim.P. (2014). In particular, the prosecution, under Rule 5(a)(1)(A), must provide "any relevant written or recorded statements made by the defendant . . . within the possession, custody or control of the prosecution, the existence of which is known, or by the existence of due diligence may become known, to the attorney for the prosecution." Rule 5(a)(1)(A), SCRCrim.P (2014). Additionally, Rule 5(a)(1)(B) of the Rules of Criminal Procedure requires a prosecutor to disclose a defendant's prior record. See Rule 5(a)(1)(B), SCRCrim.P. ("Upon request of the defendant, the prosecution shall furnish to the defendant such copy of his prior criminal record, if any, as is 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."). Further, Rules 5(a)(1)(C) and 5(a)(1)(D) of the Rules of Criminal Procedure mandate the disclosure of certain "[d]ocuments and [t]angible [o]bjects" as well as "[r]eports of [e]xaminations and [t]ests." See Rule 5(a)(1)(C), SCRCrim.P. ("Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or

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portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.”); Rule 5(a)(1)(D), SCRCrim.P. (“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 existence 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.”). Thus, it is clear that Rule 5, like Brady, requires disclosure of certain types of material evidence in a criminal trial and therefore, Section 12-54-240(A)’s “as otherwise provided by law” language must be read as permitting the State to disclose material evidence that would otherwise be subject to Section 12-54-240’s non-disclosure provisions.

II. Conclusion

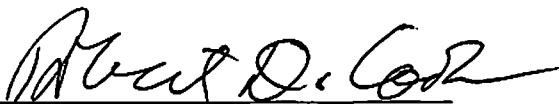
In conclusion, because the Fourteenth Amendment of the United States Constitution as well as Rule 5 of the South Carolina Rules of Criminal Procedure both require the prosecution to disclose certain types of material evidence in a criminal prosecution, we believe Section 12-54-240(A)’s “as otherwise provided by law” exception applies in this situation. Thus, while Section 12-54-240 of the Code generally prohibits the disclosure of certain records and returns that are filed with the Department of Revenue, where such evidence is requested pursuant to a properly filed Rule 5 or Brady motion in the context of a criminal prosecution, it is the opinion of this Office that the statute, by virtue of its’ “otherwise provided by law” language, does not prohibit disclosure of such evidence.

Sincerely,



Brendan McDonald
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General