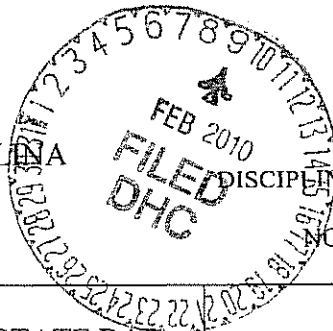


STATE OF NORTH CAROLINA

WAKE COUNTY



BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
09 DHC 8

THE NORTH CAROLINA STATE BAR,

Plaintiff

v.

GREGORY C. BUTLER, Attorney,

Defendant

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter was heard on December 17th and 18th, 2009, before a hearing panel of the Disciplinary Hearing Commission composed of F. Lane Williamson, Chair, M. H. Hood Ellis, and Joe Castro. Carmen Hoyme Bannon and Leonor Bailey Hodge represented Plaintiff, the North Carolina State Bar. James B. Maxwell represented Defendant, Gregory C. Butler. Based upon the pleadings and the evidence presented at the hearing, the hearing panel hereby finds by clear, cogent, and convincing evidence the following

FINDINGS OF FACT

1. Plaintiff, the North Carolina State Bar, is a body duly organized under the laws of North Carolina and is the proper party to bring this proceeding under the authority granted it in Chapter 84 of the General Statutes of North Carolina, and the Rules and Regulations of the North Carolina State Bar, Chapter 1 of Title 27 of the North Carolina Administrative Code ("NCAC").

2. Defendant, Gregory C. Butler, was admitted to the North Carolina State Bar in 1985, and was at all times referred to herein an attorney at law licensed to practice in North Carolina, subject to the laws of the State of North Carolina, the Rules and Regulations of the North Carolina State Bar and the Revised Rules of Professional Conduct.

3. During the relevant periods referred to herein, Butler was engaged in the practice of law in the State of North Carolina and was employed as an Assistant District Attorney in the Eleventh Prosecutorial District, covering Harnett, Lee, and Johnston Counties, North Carolina.

4. Butler was properly served with process and received due notice of the hearing in this matter.

5. In September 2007, Butler assumed primary responsibility for the prosecution of *State of North Carolina v. Tiffany Ann Bassett*, ("the Bassett Case") a first-degree murder case pending in Johnston County. The murder had occurred on 18 July 2006, and charges were filed against Ms. Bassett on 20 July 2006.

6. Assistant District Attorney Lauren Tally was assigned to assist Butler with the Bassett Case.

7. Butler was the third prosecutor in the District Attorney's Office to have primary responsibility for the Bassett Case.

8. Initially, the investigation into the Bassett Case involved the Johnston County Sheriff's Office ("JCSO"). A number of its officers conducted some initial field investigation and interviews of potential witnesses to the crime. The State Bureau of Investigation was asked to take over primary responsibility for the investigation after it came to light that the victim was a former Johnston County law enforcement officer. The lead agent from that point forward became Blaine Hicks, Special Agent of the SBI, who served in that capacity up to and through the trial of Ms. Bassett.

9. The District Attorney's Office provided court-ordered and voluntary discovery to the defense both before and after Butler assumed primary responsibility for the case. While the certificates of service for court ordered production of documents would typically list the category of materials that were being provided to the defense, there was no system then in place in the Johnston County District Attorney's Office by which material received by that office from various law enforcement agencies was logged in or numbered or specifically identified through a bates stamp or similar docketing procedure. In addition, there was no method in place for tracking documents once they were received in that office. It was therefore not possible to determine from looking at the certificates of service what specific documents had actually been provided to the defense.

10. There was a notation in a log maintained in the District Attorney's Office in September 2006 that a "file" had been delivered to it from the Johnston County Sheriff's Office and had been received by the District Attorney's Office, but there was no specific indication in the log as to what documents were in that file or how large the file was. This material was either misplaced or lost, and in any event apparently did not become a part of the District Attorney's working file in the Bassett Case. While an inference can be drawn that this file was the JCSO investigation file for the Bassett Case, as a result of the deficient procedures for tracking file material, it is impossible to make such a determination.

11. When Butler assumed responsibility for the Bassett Case he received a "working file" from Susan Doyle, the prosecutor who previously had primary responsibility for the Bassett Case. Ms. Doyle was the second prosecutor who had primary responsibility for the Bassett Case.

12. Within a month after Butler assumed responsibility for the Bassett Case, the Court filed eleven orders it had entered at an August 2007 hearing on Bassett's motions seeking pretrial discovery, including the following orders:

- a. Order on Motion for Exculpatory Information (Including Impeaching Information);
- b. Order on Motion to Compel Investigating Officers to Turn Over All Information Related to the Investigation of this Case to the Prosecutors; and
- c. Order on Motion to Compel Discovery Disclosure of Statements of State's Witnesses)

13. The Court's order requiring disclosure of statements by State's witnesses found that "[t]he State has in its possession numerous interviews which the Defendant is entitled to inspect and review pursuant to NCGS 15A-903," and ordered the State to "disclose to the Defendant . . . all statements of State's witnesses as required and allowed pursuant to 15A-903."

14. The Court's order compelling investigating officers to turn over information to prosecutors provided that "all law enforcement officers in any way connected with the investigation of this case shall turn over to the prosecution all notes, evidence, and materials relating to this investigation and this case."

15. The Court's order regarding exculpatory information concluded that "[t]he Defendant is entitled to exculpatory information, including impeaching information, which may become known or within the possession of the State whether through its District Attorney or some other agent of the State, pursuant to [*Brady v. Maryland*, *United States v. Agurs*, *United States v. Bagley*, and *Kyles v. Whitley*]," and ordered the State and its agents "to produce any exculpatory information, including impeaching information, which may become known or within the possession of the State, whether through its District Attorney or some other agent of the State, as allowed by law." The Order was "continuing in nature," and the State was ordered to provide Bassett "any exculpatory or impeaching information immediately when such information becomes known to the State."

16. Although the Bassett Case was investigated by two law enforcement agencies—the Johnston County Sheriff's Office ("JCSO") and the State Bureau of Investigation ("SBI")—the "working file" Butler received from Doyle contained only some of the documentation generated by the JCSO though it contained all of the documentation generated by the SBI. Butler incorrectly assumed that the working file contained all of the documentation generated by the JCSO.

17. Between September 2007 and a 29 October 2007 hearing in the Bassett Case, Butler and Tally did not ask any of the JCSO officers to review their files for documentation that was responsive to the discovery ordered by the Court in August 2007.

18. Butler asked SBI Agent Hicks to confirm with JCSO personnel that the contents of the JCSO file had already been provided to the prosecutor's office. Butler relied upon Hicks and did not follow up with him to determine what efforts Hicks made in response to this directive. Hicks advised Butler that he had been assured that all of the JCSO file material had been turned over to the District Attorney's Office.

19. The JCSO had a separate lead officer who was responsible for coordinating the JCSO's investigation of the Bassett Case. Butler did not inquire directly of the lead JCSO officer to confirm that the prosecutor's file contained a copy of all documentation generated by the JCSO during its investigation of the Bassett Case. Rather, Butler relied upon SBI Agent Hicks in this regard.

20. At the 29 October 2007 hearing in the Bassett Case, Butler stated to the Court "We felt that we made every effort to comply with all the discovery requests and discovery orders as required by law up to this point."

21. On 2 November 2007, Bassett's defense counsel filed: (1) a Motion to Compel seeking production of phone records obtained by the State during the investigation, and (2) a Motion to Compel Items as Ordered, seeking production of all items the State was previously ordered to provide in discovery.

22. Also on 2 November 2007, Bassett's counsel filed a Motion to Compel production of an 18 July 2006 interview of Charles L. Byrd, Jr. by a detective with the JCSO ("the Charlie Byrd Statement"). The motion alleged that although the State had provided a report of a 1 August 2006 interview of Byrd by the SBI, it had not provided any report of the 18 July 2006 JCSO interview.

23. Butler asked SBI Agent Hicks to obtain a copy of the Charlie Byrd Statement.

24. In response to Butler's request for the Charlie Byrd Statement, Agent Hicks obtained a copy of the statement from the lead JCSO officer and provided it to Butler.

25. When Butler received the Charlie Byrd Statement in November 2007, he had notice that the entire contents of the JCSO file had not been made part of the prosecutor's "working file."

26. After he received a copy of the Charlie Byrd Statement, Butler stated to the Court at a 16 November 2007 hearing: "[W]e're going to make sure every officer in the sheriff's department is contacted, you know, verbally and instructed to provide—to look through their files and provide anything that they have in their paperwork or anything in their files that have to do with this case. . . . And if we find anything as a result of that search, we obviously will provide that to [Bassett]." In response, the Court stated, "The statements are to be furnished within 14 days."

27. At the 16 November 2007 hearing Butler also told the Court that the defense had all the telephone records that were searched by the SBI and all the records that were received.

28. Although Butler asked SBI Agent Hicks to confirm that all documentation generated by JCSO had been previously provided to the District Attorney's Office, Butler did not personally ask anyone to review the contents of the JCSO file to confirm that the District Attorney's Office had a complete copy of the contents of the JCSO investigative file.

29. After the 16 November 2007 hearing Butler did not personally review the contents of the JCSO file to confirm that the prosecutor's office had a copy of the complete contents of the JCSO file.

30. Butler's "working file" contained copies of applications for telephone records that were prepared by the JCSO and copies of court orders directing that the requested records be provided to the JCSO.

31. The "working file" did not, however, contain a copy of all of the telephone records applied for by the JCSO.

32. Although their "working file" did not contain a copy of all of the telephone records applied for by the JCSO, Butler and Tally did not contact anyone at the JCSO to determine if the requested records had been received.

33. Instead, Butler relied on SBI Agent Hicks' statement that all law enforcement agencies, including the JCSO, had previously provided the prosecutor's office with all documentation generated by law enforcement in the Bassett Case.

34. At a 30 November 2007 hearing in the Bassett Case, defense counsel renewed his request for the phone records sought in Bassett's 2 November 2007 motion to compel by noting "I do think that [the SBI agent] has the phone records somewhere, somebody has them. . . . I want to certainly give him the opportunity to check into that."

35. At a 3 January 2008 hearing in the Bassett Case, Butler stated to the Court: "I will say again on the record that [defense counsel] has all phone records that have been produced by—through any investigation of the State and that we have provided him everything."

36. Between 30 November 2007 and 3 January 2008, the only inquiry Butler made to determine whether the State had obtained telephone records that had not yet been turned over to Bassett was to ask SBI Agent Hicks if everything generated by law enforcement had previously been provided to the prosecutor's office.

37. Between 30 November 2007 and 3 January 2008, Butler and Tally did not review the contents of the JCSO file to confirm that the prosecutor's office had a copy of all documentation contained in the JCSO investigative file.

38. At a 12 February 2008 hearing in the Bassett Case, Butler informed the Court that Bassett had been provided everything requested in discovery by December 2007.

39. When Butler represented to the Court in February 2008 that all discovery had been provided to Bassett by December 2007, Butler had not reviewed the contents of the JCSO investigative file to confirm that he had a copy of all documentation contained in that file, nor had he asked anyone to make such a review on his behalf.

40. In early March 2008, as Butler prepared for trial, a JCSO officer showed Butler a document obtained by the JCSO in its investigation of the Bassett Case that Butler had not previously seen. As a result, Butler asked for the first time to review the JCSO investigative file. When Butler realized that this document was not in his "working file" and had not been provided to Bassett, he immediately directed that a complete copy of the JCSO investigation file be copied and sent to Bassett's defense counsel. Butler also personally notified Bassett's defense counsel of the discovery of the additional file material.

41. On or about 12 March 2008, Butler provided Bassett with "the complete prosecution file" of the JCSO, consisting of some 437 pages, which contained the Crime Scene Investigator's ("CSI") handwritten notes from the crime scene, several handwritten reports of JCSO witness interviews, and phone records obtained by JCSO. These items had not previously been provided to Bassett's defense counsel. Other material in the JCSO file was duplicated in the working file, and had been previously turned over to defense counsel.

42. The handwritten crime scene notes of the CSI contained information that was impeaching information. These notes were used by defense counsel in the Bassett Case to impeach the testimony of the CSI.

43. The handwritten notes of JCSO witness interviews that were provided to Bassett in March 2008 correlated with typed reports of those interviews that had been in the prosecutor's "working file" since before Butler was assigned to the Bassett Case. None of the prosecutors who had worked on the Bassett Case had noticed that their file contained numerous typewritten reports which were not accompanied by underlying handwritten officers' notes.

44. Throughout the Bassett Case, each time the prosecutor's office provided discovery to Bassett's defense attorney, it executed and filed a disclosure certificate certifying which items were being provided. The discovery disclosure certificates filed prior to 12 March 2008 do not reflect that the CSI's handwritten crime scene notes, handwritten notes of JCSO witness interviews, or several sets of phone records obtained by the JCSO were provided to Bassett before 12 March 2008.

45. The Court had previously ordered the State to produce the documentation provided to Bassett on 12 March 2008.

46. N.C. Gen. Stat. § 15A-903(a)(1) required Butler to produce the documentation that was provided to defense counsel on 12 March 2008.

47. None of the prosecutors who had been assigned to prosecute the Bassett Case before Butler reviewed the contents of the JCSO investigative file to confirm that the prosecutor's office had a copy of all documentation contained in the JCSO file.

48. Before Butler's discovery of an unfamiliar document the week before trial was scheduled to begin, Butler and Tally had not reviewed the contents of the JCSO investigative file to confirm that the prosecutor's office had a copy of all documentation contained in the JCSO file.

49. On 18 March 2008, the day jury selection was scheduled to begin in the Bassett Case, defense counsel informed the Court that he had received new discovery materials from Butler on 12 March 2008. Butler acknowledged this and the imposition to defense counsel.

50. The trial in the Bassett Case had to be continued because of the prosecution's late disclosure of discovery on 12 March 2008.

51. The Court found that the defendant in the Bassett Case was prejudiced by the late and untimely discovery disclosure.

52. The events of this case as outlined above stemmed from a systemic failure of the District Attorney's Office for the Eleventh Prosecutorial District, where procedures and mechanisms for ensuring compliance with North Carolina's Open File Discovery Law were demonstrably inadequate (NCGS § 15A-901 et seq).

53. There are procedures and mechanisms available to District Attorney's Offices which can help ensure that all documentation is received, properly accounted for and disclosed to the defendant as required by law. Following the events described herein, the District Attorney's Office for the Eleventh Prosecutorial District has implemented procedures designed to insure proper accounting and disclosure for discoverable information.

54. During the relevant periods herein, however, the District Attorney's Office for the Eleventh Prosecutorial District did not have sufficient procedures and control mechanisms to ensure that all documentation from law enforcement investigative agencies was: (i) properly received and accounted for by the prosecutor's office and (ii) produced to the defense as required by the North Carolina Open File Discovery Law.

Based on the record and the foregoing Findings of Fact, the hearing panel makes the following:

CONCLUSIONS OF LAW

1. Rule 3.8(d) imposes a duty on prosecutors to make reasonably diligent inquiry before making timely disclosure to the defense of all evidence or information required to be disclosed by applicable law, rules of procedure, or court opinions, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

2. All the parties are properly before the hearing panel and the panel has jurisdiction over Defendant, Gregory C. Butler, and the subject matter.

3. Protection of the public requires that District Attorney's Offices conscientiously carry out their duty to comply with constitutional and statutory discovery requirements.

4. The State Bar has proven by clear, cogent and convincing evidence that the District Attorney's Office for the Eleventh Prosecutorial District during the relevant period herein:

(a) Failed to timely provide to defense counsel in the Bassett Case: (i) the CSI's handwritten crime scene notes, (ii) JCSO officers' handwritten reports of witness interviews and (iii) phone records obtained by law enforcement in the course of the investigation, and thereby failed to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party and failed to disclose evidence or information that the prosecutors knew, or reasonably should have known, was subject to disclosure under applicable law, rules of procedure or evidence, or court opinions in violation of Rule 3.4(d);

(b) Failed to ascertain the contents of the JCSO file and failed to timely provide the complete JCSO file to Bassett and thereby failed to make a reasonably diligent inquiry and failed to make timely disclosure to the defense of all evidence or information required to be disclosed by the applicable law, rules of procedure, or court opinions in violation of Rule 3.8(d); and

(c) Caused delay in the trial of the Bassett Case and wasted judicial resources and thereby engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d).

5. Defendant Butler contributed to the systemic failure of the District Attorney's Office, but should not be held individually responsible for this failure. Butler assuredly could have done more to ensure compliance by the District Attorney's Office with the applicable constitutional and statutory discovery obligations, as well as the specific court orders entered in the Bassett Case. With the benefit of hindsight, it appears that a reasonably prudent prosecutor may have realized at an earlier point in time that the prosecution's "working file" did not contain all of the documentation from the JCSO investigation file. Nevertheless, as the third attorney in that office to be assigned primary

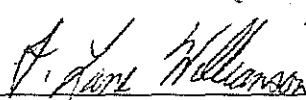
responsibility for the Bassett Case, and in the absence of reliable records of what specific documentation had previously been produced to defense counsel, Butler was justified to some extent in his belief that full disclosure of discovery material as required by applicable law and prior discovery orders had been made prior to his involvement in the case. In addition, Butler's reliance on SBI Agent Hicks to assist him in determining if all law enforcement agents had turned in everything to the District Attorney's Office was not unreasonable, although the better practice would have been for Butler to personally verify the thoroughness of Hicks' inquiry into the matter. Finally, the fact that Butler immediately provided Bassett's defense counsel with documentation that he realized had not been previously disclosed when it came to Butler's attention was proper and negates any inference of bad faith by Butler.

6. The Disciplinary Hearing Commission does not have jurisdiction to impose discipline against a law firm, law department or District Attorney's Office. If this tribunal had jurisdiction and authority to impose discipline against a District Attorney's Office, the panel would impose a reprimand on the District Attorney's Office for the Eleventh Prosecutorial District in this case.

Based upon the foregoing findings of fact and conclusions of law it is hereby ORDERED:

1. That the complaint in this action is DISMISSED.
2. Each party shall bear its own costs.

Signed by the Chair with the consent of the other hearing panel members, this the 9th day of February, 2010.


F. Lane Williamson, Chair
Disciplinary Hearing Panel