RECEIVED FOR RECORD
CIRCUIT COURT FOR
BALTIMORE CITY

2016 JUN -7 P 3:49

STATE OF MARYLAND	*	IN THE
	*	CIRCUIT COURT FOR
v.	*	BALTIMORE CITY
	*	CASE No. 115141032
CAESAR GOODSON	*	(Filed under seal)

* * * * * * * * * * * * *

STATE'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS BASED ON THE STATE'S VIOLATION OF DEFENDANT'S CONSTITUTIONAL AND DISCOVERY RIGHTS

Now comes the State of Maryland, by and through Marilyn J. Mosby, the State's Attorney for Baltimore City; Michael Schatzow, Chief Deputy State's Attorney for Baltimore City; Janice L. Bledsoe, Deputy State's Attorney for Baltimore City; and Matthew Pillion, Assistant State's Attorney for Baltimore City; responds herein to the Defendant's Motion to Dismiss Based on the State's Violation of Defendant's Constitutional and Discovery Rights; and moves this Court to deny the Defendant's Motion.

I. Factual background

On June 26, 2015, as part of the State's Initial Disclosures, Notices, and Motions, the State provided the Defendant with a recorded statement that Mr. Donta Allen gave to Baltimore Police investigators on April 12, 2015, regarding the incident underlying this case. St.'s Initial Discl. at 11; *see also* Def. Ex. A (a transcript of that recorded statement). On August 6, 2015, the State disclosed a supplemental police report received two days prior on August 4 memorializing that Mr. Allen had, indeed, given a statement on April 12. On May 6, 2016, the State supplementally disclosed additional information that had been obtained from Mr. Allen during a meeting prosecutors held with him and his attorney on May 4, 2016. *See* Def. Ex. B. Thereafter, on May 16, 2016, defense counsel wrote to the State requesting to know whether the May 4, 2016, interview had been audio or video recorded and asking the State to list and detail

all prior contacts with Mr. Allen. Def. Ex. C. The State responded to this request by a letter dated May 24, 2016, informing counsel that the interview had not been recorded and declining to detail any prior meetings the State may have had with Mr. Allen on grounds that the State's discovery obligations do not require disclosure of such information.

On June 3, 2016, the State received a letter from Mr. Jack Rubin, who was Mr. Allen's attorney in May of 2015. In the letter, which was copied to defense counsel and the Court, Mr. Rubin writes that he has "been made aware" of the State's May 6, 2016, disclosure to the Defendant of the discovery material regarding Mr. Allen. Def. Ex. E. Mr. Rubin then makes reference to what he describes as "an extended proffer session" held on May 7, 2015, between prosecutors, Mr. Allen, and Mr. Rubin, writing, "I feel it is my duty to advise the attorneys involved in this case and the Court of the existence of that meeting, as I feel the content of that meeting may be exculpatory in nature." *Id.* As to what specific content he means and how that content may be exculpatory, Mr. Rubin does not explain. Mr. Rubin concludes his letter with the offer, "[s]ubject to the bounds of attorney-client privilege, I will make myself available for further questioning regarding the contents of that meeting." *Id.*

Before the State could contact Mr. Rubin regarding his cryptic letter, on June 5, 2016, defense counsel called undersigned Deputy State's Attorney Janice Bledsoe and asked about the May 7, 2015, meeting. Ms. Bledsoe informed counsel that the meeting had not been recorded and that no one from the State's Attorney's Office took notes about the meeting. As to what Mr. Allen stated during that meeting, Ms. Bledsoe characterized him as being "completely consistent concerning the two inconsistent statements that he gave." In context, that description referred to the fact that Mr. Allen—subsequent to his April 12, 2015, statement, but prior to the May 7, 2015, meeting—had given a series of news interviews in late April, 2015, in which he made

statements inconsistent with his statement to police on April 12, 2015. The Defendant previously described these inconsistent statements in his motion for recusal. *See* Joint Mot. for Recusal of Balt. City St.'s Atty.'s Office at 14-15; *see also* Peter Hermann, *Prisoner in van heard "banging against walls,"* Washington Post, April 29, 2015 (available at https://www.washingtonpost.com/local/crime/prisoner-in-van-said-freddie-gray-was-banging-against-the-walls-during-ride/2015/04/29/56d7da10-eec6-11e4-8666-a1d756d0218e_story.html). Ms. Bledsoe's description of Mr. Allen as being consistent with his inconsistence meant only that at the May 7 meeting, Allen merely repeated and maintained the accuracy of *both* his April 12 statement to police and his later statements to the press and did not acknowledge that the statements were inconsistent or offer further explanation. Indeed, to prosecutors' recollection, what had been intended by counsel for the parties as a standard proffer session quickly became a farcical, unproductive meeting from which emerged no new information about the case and that was, instead, largely "extended" because the intended purpose of the meeting could not take place until a full airing of Mr. Allen's absurd concerns about whether Mr. Rubin was truly acting in Mr. Allen's best interest, followed by a private session between Mr. Allen and his other lawyer, from which session the prosecutors and Mr. Rubin were excluded.

Armed with Mr. Rubin's letter and Ms. Bledsoe's description, on the morning of June 6, 2016, the Defendant filed the present Motion to Dismiss, positing that the State withheld purportedly exculpatory information obtained during the May 7, 2015, meeting. Nowhere in his Motion does the Defendant identify the information he deems exculpatory; nor does the Defendant aver that Mr. Rubin has offered any new insights into the basis for his letter. Instead, the Motion asks "that the Court, as the finder of fact, draw the inference that the information obtained by the State in the May 7, 2015, meeting with Mr. Allen was detrimental to the

prosecution and exculpatory to the defendant, and that it was for that reason that the State chose not to disclose that evidence to Officer Goodson." Def. Mot. at 10.

Given the Defendant's failure to identify the specific factual basis for his Motion beyond Mr. Rubin's letter and this apparent inference of an exculpatory something from the disclosure of nothing, the State, on the afternoon of June 6, 2016, attempted to take Mr. Rubin up on his offer to be "available for further questioning." Undersigned Deputy State's Attorney Janice Bledsoe called Mr. Rubin and asked him about the meaning of his letter. Mr. Rubin responded, "I can't talk to you about the letter because of attorney-client privilege." When pressed for some explanation of what information he viewed as exculpatory, Mr. Rubin stated, "I'm not saying it is exculpatory; I'm not saying it isn't exculpatory," Rather, "[i]nformation is in the eye of the beholder," he said. Asked if he had spoken to defense counsel and answered their questions about the letter, Mr. Rubin replied that he had told the defense no more than he told the State, again citing attorney-client privilege.

Finally, the State notes that Mr. Allen is not a State's witness in this case, and the State does not intend to call Mr. Allen to testify at trial, barring some unexpected development. Because, however, Mr. Allen is incarcerated in the custody of the Maryland Department of Public Safety and Correctional Services, the State has ensured that a writ was issued for Mr. Allen to be transported to Baltimore to be available for trial. Assuming corrections officials comply with that writ, Mr. Allen will be available to testify if the Defendant chooses to call him.

II. No legal basis exists to support the Defendant's Motion

Turning the legal merits of the Defendant's Motion, the Defendant focuses almost entirely on the remedy he asks this Court to impose, namely dismissal of the indictment.

Remarkably, he concedes that he is "unable to find a case" to support this request, citing instead a Fordham Law Review article as authority. Def. Mot. at 7. Regarding the reason for invoking a remedy in the first place, the Defendant claims the State has committed a discovery violation by failing to disclose allegedly exculpatory or impeachment information. In support of this claim, however, the Defendant cites only Mr. Rubin's vague letter and the circular inference that *whatever* it was that the State did not tell him about the May 7, 2015, meeting with Mr. Allen, it *must* have been either exculpatory or impeachment information *because* the State did not tell him about it. Assuming that the Defendant is making this claim in good faith and not merely for the purpose of sensationalism and wasting the State's time and resources on the eve of trial, the State can only respond that the claim offers no basis for relief.

Without dispute, the State must under Rule 4-263 disclose information that "tends to exculpate the defendant" or that "tends to impeach a State's witness." Rule 4-263(d)(5)-(6). Regarding the latter of these requirements, the fact that Mr. Allen is not a State's witness precludes finding a violation of this aspect of the State's discovery obligations. Moreover, to the extent the *Defendant* intends to call Mr. Allen as a defense witness, as his December 7, 2015, disclosures assert, Rule 4-263 does not require the State to disclose impeachment information about defense witnesses other than about the Defendant himself. Furthermore, the May 7, 2015, meeting did not result in any tangible evidence that would fall under the State's disclosure requirement listed in Rule 4-263(d)(9) concerning evidence intended for use at trial.

Turning to the allegation that the State has failed to disclose exculpatory information, the Defendant supports his claim primarily with Mr. Rubin's letter and the "objective view" of Mr. Rubin that the May 7 meeting "contained exculpatory information," *id.* at 6, n. 3, notwithstanding the fact that Mr. Rubin (a) never identifies in his letter the specific information

he has in mind, (b) does not actually assert that the information is exculpatory (only that it "may" be so), (c) is not an attorney of record in this case, (d) has no idea about the extent of the information that has already been disclosed in this case,[1] and (e) told Ms. Bledsoe that he will not tell the State—and has not told the defense—what information he has because of attorney-client privilege. This latter point is significant because Mr. Rubin would be at liberty to tell the State anything Mr. Allen said to the State at the May 7 meeting given that the attorney-client privilege would not apply to such statements. *See Peterson v. State*, 444 Md. 105, 160 (2015) (statements made by a client to a prosecutor during a proffer session are not protected by attorney-client privilege). The fact that Mr. Rubin explicitly invoked attorney-client privilege implicitly means that the information—whatever it may be—was something Mr. Allen said in confidence to Mr. Rubin outside the presence of the State. That being the case, the State cannot disclose what it does not possess.

Even if the State does possess whatever information Mr. Rubin believes "may" be exculpatory, Mr. Rubin's belief does not make it so; nor does the Defendant's inference from the mere fact of nondisclosure. "[E]xculpatory evidence is that which is 'capable of clearing or tending to clear the accused of guilt.'" *Jackson v. State*, 207 Md. App. 336, 357 (2012) (quoting *Colkley v. State*, 204 Md. App. 593, 606 (2012)); *accord State v. Giles*, 239 Md. 458, 469 (1965). As Judge Moylan aptly noted, however,

> all that is non-inculpatory is not thereby exculpatory, just as all that is non-exculpatory is not thereby inculpatory. The absence of a quality is not the same thing as the opposite of that quality. There is a wide 'No Man's Land' of neutral connotation between the opposing verbal trench lines.

[1] The State will save for another day the question of how, given the Court's gag order, Mr. Rubin was "made aware" of the contents of discovery disclosures in this case, an awareness that prompted him to write an unsealed letter to the Court effectively accusing the State of hiding exculpatory information, a letter sent the Friday before this highly publicized trial was set to begin.

Colkley, 204 Md. at 608.

The State's obligation to disclose genuine exculpatory information derives from a prosecutor's constitutional responsibilities outlined in *Brady v. Maryland*, 373 U.S. 83 (1963). To establish a violation of the *Brady* case, however, a defendant must do more than invoke its name; rather the defendant "must establish three necessary components: (1) that the prosecutor suppressed or withheld evidence that is (2) favorable to the defense—either because it is exculpatory, provides a basis for mitigation of sentence, or because it provides grounds for impeaching a witness—and (3) that the suppressed evidence is material." *Diallo v. State*, 413 Md. 678, 704 (2010). "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *U.S. v. Bagley*, 473 U.S. 667, 682 (1985). "Suppressed evidence, for *Brady* purposes, is 'information which had been known to the prosecution but unknown to the defense.'" *Diallo*, 413 Md. at 704. Consequently, "*Brady* offers a defendant no relief when the defendant knew or should have known facts permitting him or her to take advantage of the evidence in question or when a reasonable defendant would have found the evidence." *Id.* at 705. Indeed, "[t]he *Brady* rule does not relieve the defendant from the obligation to investigate the case and prepare for trial," and "[t]he prosecution cannot be said to have suppressed evidence for *Brady* purposes when the information allegedly suppressed was available to the defendant through reasonable and diligent investigation." *Ware v. State*, 348 Md. 19, 39 (1997). Moreover, no *Brady* violation occurs when the non-disclosed evidence "would have impeached cumulative or non-material witnesses' testimony," *Ellsworth v. Balt. Police Dep't*, 438 Md. 69, 85 (2014), or was "information merely repetitious, cumulative, or embellishing of facts otherwise known to the defense . . . ." *U.S. v. Agurs*, 427 U.S. 97, 110 n. 16 (1976).

Regarding specific discovery procedural rules, "*Brady* and its progeny deal not . . . with discovery sufficiently timely to enable the defense team to calibrate more finely its trial tactics but with the very different issue of withholding from the knowledge of the jury, right through the close of the trial, exculpatory evidence which, had the jury known of it, might well have produced a different verdict." *De Luca v. State*, 78 Md. App. 395, 424 (1989). Under *Brady*, "[d]efense counsel has no constitutional right to conduct his own search of the State's files to argue relevance." *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987). Furthermore, "there is no general constitutional right to discovery in a criminal case, and *Brady* did not create one." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

Maryland has implemented *Brady's* holding with Rule 4-263(d)(5)'s requirement that the State disclose "[a]ll material or information in any form, whether or not admissible, that tends to exculpate the defendant or negate or mitigate the defendant's guilt or punishment as to the offense charged." In 2008, Rule 4-263 was amended to more specifically address impeachment information about "a State's witness" and to require disclosure by the State of impeachment

> evidence of a relationship or agreement between the witness and prosecution; prior criminal convictions; materially inconsistent witness statements not otherwise memorialized; medical, psychiatric, or addiction conditions of the witness that would impair his ability to testify truthfully; the witness's failure of a polygraph examination; the witness's failure to identify the defendant; and "evidence of prior conduct to show the character of the witness for untruthfulness pursuant to Rule 5-608 (b).

Ellsworth, 438 Md. at 87.

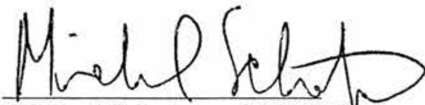
In fulfilling these obligations, the State disclosed on June 26, 2015, the statement that Mr. Allen gave to Baltimore police on April 12, 2015, concerning the incident in this case. Regarding Mr. Allen's inconsistent statements to the media, the Defendant's own pleadings demonstrate he already knew about the statements, which were not, in any event, in the State's

possession. Moreover, the fact that the State met with Mr. Allen on May 7, 2015, is not a fact that is in and of itself discoverable. Similarly, the fact that Mr. Allen on May 7 repeated and maintained the accuracy of both his statement to the police and his statements to the media is also not a fact that is itself discoverable—Mr. Allen is not a State's witness subject to impeachment, the meeting was not recorded, and he merely repeated information that was public or that the State had already disclosed. In short, the State has fulfilled its obligation to provide information obtained from Mr. Allen to the Defendant, and nothing in Mr. Rubin's letter or in the Defendant's Motion shows otherwise. Instead, the Defendant's Motion asks for admittedly unauthorized relief based on allegations devoid of demonstrated factual support.

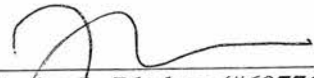
Wherefore, the State asks this Court to deny the Defendant's Motion to Dismiss Based on the State's Violation of Defendant's Constitutional and Discovery Rights.

Respectfully submitted,

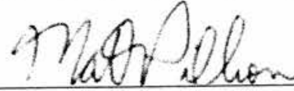
Marilyn J. Mosby



Michael Schatzow (#717876)
Chief Deputy State's Attorney
120 East Baltimore Street
The SunTrust Bank Building
Baltimore, Maryland 21202
(443) 984-6011 (telephone)
(443) 984-6256 (facsimile)
mschatzow@stattorney.org



Janice L. Bledsoe (#68776)
Deputy State's Attorney
120 East Baltimore Street
The SunTrust Bank Building
Baltimore, Maryland 21202
(443) 984-6012 (telephone)
(443) 984-6256 (facsimile)
jbledsoe@stattorney.org



Matthew Pillion (#653491)
Assistant State's Attorney
120 East Baltimore Street
The SunTrust Bank Building
Baltimore, Maryland 21202
(443) 984-6045 (telephone)
(443) 984-6252 (facsimile)
mpillion@stattorney.org

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June, 2016, a copy of the State's Response to the Defendant's Motion to Dismiss Based on the State's Violation of Defendant's Constitutional and Discovery Rights, was mailed and e-mailed to:

Matthew B. Fraling, III
Sean Malone
Harris Jones & Malone, LLC
2423 Maryland Avenue, Suite 100
Baltimore, MD 21218
(410) 366-1500
matthew.fraling@mdlobbyist.com
Attorneys for Officer Caesar Goodson

Andrew Jay Graham
Amy E. Askew
Kramon & Graham, P.A.
1 South Street, Suite 2600
Baltimore, MD 21202
410-752-6030
AGraham@kg-law.com
Attorney for Officer Caesar Goodson

Respectfully submitted,

Marilyn J. Mosby

Janice L. Bledsoe (#68776)
Deputy State's Attorney
120 East Baltimore Street
The SunTrust Bank Building
Baltimore, Maryland 21202
(443) 984-6012 (telephone)
(443) 984-6256 (facsimile)
jbledsoe@stattorney.org