STATE OF MARYLAND	*	IN THE
v.	*	CIRCUIT COURT
WILLIAM PORTER	*	FOR
Defendant	*	BALTIMORE CITY
	*	CASE NO. 115141037

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

SUPPLEMENT TO DEFENDANTS' JOINT MOTION TO COMPEL AND FOR SANCTIONS

Defendants, by their respective undersigned counsel, hereby supplement their Joint Motion to Compel and for Sanctions. In support thereof, Defendants state as follows:

INTRODUCTION

On July 30, 2015, the Defendants filed a Joint Motion to Compel and for Sanctions in the above-captioned case. In the Motion, Defendants provided a detailed list of the discoverable information they believed was being withheld by the State. Specifically, the Defendants believed that the State was withholding exculpatory information. The Defendants also attached to the Motion a certificate describing the good faith attempts to discuss the discovery dispute and certifying that the parties had been unable to resolve the issues.

Since the filing of the Defendants' Joint Motion to Compel and for Sanctions, the State has confirmed through its "supplemental disclosures" that it has not been complying with Maryland Rule 4-263 and, as a result, has violated the Defendants' constitutional rights by failing to produce relevant, material, and exculpatory information. The supplemental disclosures notwithstanding, it is the Defendants' belief that the State is still withholding relevant and exculpatory evidence. As explained in detail below, the materials and information which the State has withheld, and continues to withhold, from the Defendants largely relate to the following issues: (1) the

"reasonable officer" standard which serves as the legal predicate for this case, (2) the timing and cause of Mr. Gray's injuries, and (3) the lawfulness of Mr. Gray's initial stop and arrest.

In order to best understand the basis of the Defendant's concerns and the gravity of this pattern, it is necessary to first review the chronology of the State's disclosures since the filing of the Defendants' Joint Motion to Compel and for Sanctions.

FACTUAL BASIS FOR SUPPLEMENT

The basis of the Defendants' concerns begin with an analysis of what has happened to date. As articulated in the previously filed Motion, the entire Baltimore Police Department file relating to this matter was turned over to the State's Attorney Office on or about April 30, 2015. The State delivered to the Defendants its initial discovery disclosure on June 26, 2015, followed by two supplemental disclosures on July 16th and July 24th.

The chronology below picks up where the chronology in the first Motion to Compel ends. It demonstrates that the concerns of the Defendants at that time were justified given the unfortunate reality that the State has been withholding exculpatory evidence. The chronology further supports the Defendants' belief that the State is still withholding materials and information which the Defendants are owed under the Maryland Rules and United States Constitution.

I. State's supplemental discovery disclosure dated August 6, 2015

On August 6, 2015, the State delivered to the Defendants its third supplemental discovery disclosure. This disclosure includes an internal affairs resume for one of the Defendants, transcripts of testimony given by witnesses at the grand jury proceedings, closed-circuit television recordings from the date of this incident, and Baltimore Police Department investigative records. The Baltimore Police Department investigative records were created between April 12, 2015 and April 20, 2015, and contain a statement made by Donta Allen indicating that he heard Mr. Gray "banging"

his head against the metal divider in the police transport van at a point in time **after** the State contends he suffered his fatal injury.

This disclosure also contains a compact disc entitled "SAO Investigation." Included on the disc is an investigative note dated April 22, 2015, which contains the following witness statement:

> Spoke with [Blank] who . . . stated that [he/she] heard loud noises coming from Mount Street so [he/she] looked outside [his/her] bedroom window and saw a white police prisoner van parked on Mount Street next to Baker Street. [Blank] further stated that [he/she] saw officers placing someone inside the back of the police wagon. The individual inside the police van was kicking the inner door and aggressively shaking the wagon.

Also included on the "SAO Investigation" disc are four recorded witness statements, and one hundred twenty-three pictures, taken by investigators from the State's Attorney's Office.

II. State's supplemental discovery disclosure dated August 19, 2015

On August 19, 2015, after the State represented that it had produced on June 26th "every piece of information" from its independent investigation the State delivered to the Defendants its fourth supplemental discovery disclosure. This supplemental disclosure contains nearly four hundred Baltimore Police Department records documenting the Department's investigation into the following: (1) the route and timing of Mr. Gray's transport, (2) a canvass of the area where Mr. Gray was arrested; (3) Mr. Gray's criminal background; (4) Donta Allen's previous contacts with police officers; (5) lab and evidence reports; (6) investigative emails; (7) organizational information; (8) progress reports; (9) special investigations unit reports; and (10) supplemental witness interviews. This disclosure further provides fifteen unexecuted search and seizure warrants.

III. State's supplemental discovery disclosure dated August 31, 2015

On August 31, 2015, the State delivered to the Defendants its fifth supplemental discovery disclosure. This disclosure includes evidentiary reports related to this incident, personnel records for one of the Defendants, copies of general orders and administrative policies, and a Western

District Areas of Concern/Operational Plan. With respect to the Western District Areas of Concern/Operation Plan, the document is dated July 17, 2011 and states that police officers are to "conduct proactive, targeted enforcement and provide a highly visible, uniformed presence in areas of the Western District that have experienced historical and current violence." This targeted enforcement is to include a number of activities, including "stop and frisks." Included within the list of areas requiring such attention are the locations where Mr. Gray initially fled from police and was ultimately arrested (Mount, Presbury, Baker, and Gilmour Streets).

IV. State's supplemental discovery disclosure dated September 9, 2015

On September 9, 2015, the State delivered to the Defendants its sixth supplemental discovery disclosure. This disclosure includes the Maryland Law Enforcement Officer Emergency Care Course Curriculum and Lesson Plan developed in 2009, and revised in 2013. The disclosure also includes the training materials used to instruct police officers in emergency medical care containing over three hundred PowerPoint slides. This disclosure further includes personnel files for one of the Defendants, as well as cell toll records for another Defendant.

V. State's supplemental discovery disclosure dated September 11, 2015

On September 11, 2015, the State delivered to the Defendants its seventh supplemental discovery disclosure. It is this disclosure that most definitively demonstrates the State's discovery violations. This disclosure was made one day after a hearing before this Honorable Court concerning the Defendants' requests for pre-trial subpoenas. During the hearing, Deputy State's Attorney Janice Bledsoe told this Court that the State had "provided everything that is in the Discovery Rules," including seven investigatory reports from the State's independent investigation, as well as the entire Baltimore Police Department file. At the conclusion of the hearing, this Court denied the Defendants' requests on the grounds that they were overly-broad. However, the Court

indicated that it would be inclined to grant such requests if they were properly amended and resubmitted. The Defendants revised and re-filed these requests.

In point of fact, the State had neither produced all seven investigative reports, nor the entire Baltimore Police Department file. Faced with the prospect of being served with these subpoenas, the State included the following materials in its sixth supplemental discovery disclosure: (1) seven notes authored by State investigators; (2) one email sent from a member of the Baltimore Police Department to an investigator from the State's Attorney's Office; (3) six pages of training records relating to one the Defendants in this case; (4) twenty-seven pages of Baltimore Police Department education and training materials; and (5) twelve audio and video recordings of interviews conducted by detectives from the Baltimore Police Department.[1]

With respect to the investigative notes, one note dated April 21, 2015 provides the following witness statement:

> While canvassing the area in the 1600 block of North Avenue, investigators located [BLANK] who stated that [he/she] was with Freddie Gray prior to and during a portion of a chase as they were fleeing from members of the BPD bike unit. [BLANK] showed us the direction they ran before separating from each other. [BLANK] also showed us the direction that was most likely taken by Mr. Gray prior to his apprehension.

The identity of this individual, and the information he or she provided, had previously been unknown to defense counsel.

With respect to the recorded interviews provided by the State, these interviews were conducted by Baltimore Police Department detectives between April 24, 2015 and April 27, 2015. The subjects of the interviews are Baltimore Police Department officers. Several of these officers were working in the Western District on April 12, 2015, while others were on wagon patrol in

[1] These twelve recordings involve a total of six interviews.

other areas of the City. During these interviews, one of the officers provides the following statement with respect to Mr. Gray's actions in the police van:

> [A]fterward I had noticed the wagon was shaking inside. Violently shaking inside. There was yelling and screaming, and a whole bunch of [making banging noises]. And the wagon was literally shaking like this, back and forth like this . . . Nobody [was] in there. And Freddie was losing his mind.

It must be stated that this was one of the first eye witness accounts definitively demonstrating that Mr. Gray was "violently shaking" the van **after the doors closed at Mount and Baker.** This evidence could be profoundly exculpatory to any officer charged with gross negligence for acts and/or omissions which occurred **before the doors closed at Mount and Baker** as it could break the link of proximate cause regarding what caused Mr. Gray's injuries.

In this "new discovery" (which, again, had been in the possession of the State's Attorney's Office for over 5 months), one of the officers also recounts his previous encounter with Mr. Gray, in which Mr. Gray ran from police officers and discarded narcotics:

> Um, I'm watching [Freddie Gray] sell heroin on North Avenue and Mount Street, and uh, we had to watch him on videotape, and we were gonna go up and, uh, ID him, and I was the runner that day. . . [I] jumped out of the car, said "Hey", [Freddie Gray] he turned around, took off. So, that was from North and Carey. I chased him down from North and Carey eastbound into the Metro station, down the Metro station, and then up the escalator to the northeast side of Penn North . . . he gave up when he got to - when he started going up the escalator at the northeast of Penn North . . . we ended up letting him go, because he discarded the heroin.

For reasons which, if not patently obvious, will be discussed at the Hearing on this Motion, this evidence is exculpatory and had been withheld from the Defense until the Court indicated an inclination to grant a subpoena for the State's Investigatory File.

VI. State's supplemental discovery disclosure dated September 22, 2015

On September 22, 2015, the State delivered to the Defendants its eighth supplemental discovery disclosure. This disclosure includes Baltimore City Fire Department dispatch recordings

from April 12, 2015. This disclosure also includes cell phone certification records, as well as DNA validation records. The State also provided the Defendants with the names of forty-six witnesses the State plans to call during its case in chief.

SUPPLEMENTAL ARGUMENT

As this Court is aware, the State bears the burden of proving that the Defendants were acting outside of the "reasonable officer standard." Moreover, the State bears the burden of proving that the Defendants acts or omissions were the proximate cause of Mr. Gray's injuries and/or death. In order to prove this causal link, the State must show that there were no intervening or superseding causes between the alleged negligence of the Defendants and Mr. Gray's death. From this perspective, the matter before this Court is not a typical criminal case. Consequently, the term "exculpatory" must be afforded a broad definition and include any information relating to the reasonableness of the Defendant's actions and omissions, the cause and timing of Mr. Gray's injuries, and the opinions of any witnesses relating to these issues.

I. State's discovery obligations under the Maryland Rules and United States Constitution

On June 26, 2015, the State was required to provide to the Defendants the materials and information listed under Maryland Rule 4-263(d). This included "[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." 4-263(d)(5). The State was also required to deliver to the Defendants the name, address, and written statements of any witnesses the State plans to call during its case in chief. 4-263(d)(3). Additionally, the State was required to disclose the identification of any experts the State consulted with in connection with the action, the substance of the expert's findings and opinions, a summary of the grounds for each opinion, any oral report or conclusion reached by the expert, and the opportunity to inspect and copy all

written reports issued by the expert. 4-263(d)(8). In making this disclosure, the State was required to "exercise due diligence to identify all of the material and information that must be disclosed" under the Maryland Rules. 4-263(c)(1). Moreover, the scope of this responsibility included not only those materials and information in the possession of the State's Attorney's Office, but also information possessed by any individual who had reported to the Office with respect to this matter. 4-263(c)(2).

Separate and distinct from the State's obligations under the Maryland Rules are its obligations under the Due Process Clause of the United States Constitution. *See Yearby v. State*, 414 Md. 708 (2010). Under *Brady v. Maryland*, the State violates a defendants rights under the Due Process Clause of the Fourteenth Amendment when it fails to disclose to the defendant prior to trial "evidence favorable to an accused . . . [which] is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). The State's disclosure obligation includes not only evidence which is favorable to the accused because it is exculpatory or mitigating, but also evidence which provides a basis for impeaching a State's witness. *Giglio v. United States*, 405 U.S. 150 (1972). Like its obligation under the Maryland Rules, the State's obligation under the Due Process Clause is both automatic and mandatory. *United States v. Agurs*, 427 U.S. 97 (1976).

II. The State has violated the Maryland Rules of discovery and its obligation under the United States Constitution by purposefully withholding information which is relevant, material, and exculpatory

As indicated earlier, the materials and information being withheld by the State largely relate to the following issues: (1) the "reasonable officer" standard which serves as the legal predicate for this case, (2) the timing and cause of Mr. Gray's injuries, and (3) the lawfulness of Mr. Gray's initial stop and arrest.

A. The State has failed to disclose discoverable information pertaining to the "reasonable officer" standard which serves as the legal predicate for this case

In its initial discovery disclosure, the State identified all "police officers . . . disclosed as witnesses in this case to testify as experts in their respective fields. Any police officers called as witnesses **will** testify as experts in police training, police procedure, police policy, police orders, police safety procedures, police email, police investigations, police misconduct, and police transportation of prisoners . . . ." *State's Initial Discovery Disclosure, June 26, 2015*. Any opinion from any named witness from the Baltimore Police Department about the reasonableness of the Defendants' actions must therefore be disclosed pursuant to Maryland Rules 4-263(d)(5) and 4-263(d)(8). This necessarily includes any opinions relating to the following:

- The officer's opinion as it relates to the reasonableness of the Defendants' actions and/or omissions;
- The officer's opinion as it relates to the use of seatbelts to secure arrestees;
- The officer's opinion as it relates to the legality of Mr. Gray's initial stop and subsequent arrest;
- The officer's opinion as it relates to the legality of the knife at issue;
- The officer's opinion as it relates to the criminality of this matter;
- The officer's opinion as it relates to general orders and police policies, and whether such items are intended to form the basis of criminal prosecutions;
- The officer's opinion as it relates to the timing of Mr. Gray's injuries, and/or whether he or she believes that Mr. Gray was injured or not injured at the point in time where Defendant Porter or Defendant White made contact with him;

Based on the Defendants' investigation, many of the State's named experts have formed opinions, or have knowledge, of the above-mentioned issues. However, none of these opinions or conversations have been provided to the Defendants.

B. The State has failed to disclose discoverable information pertaining to the timing and cause of Mr. Gray's injuries

The civilian witness statement dated April 22, 2015 indicates that Mr. Gray was aggressively kicking and shaking the police transport van after being placed in leg shackles at Mount Street and Baker Street. This information is probative of the Defendants' innocence as it

not only demonstrates that any alleged failure of the police officers to seatbelt Mr. Gray was reasonable under the circumstances, but it also indicates that Mr. Gray's own actions may have caused his own injuries. This is further corroborated by the police officer's statement dated April 24, 2015, in which he describes Mr. Gray's aggressive demeanor at the second stop and states that "Freddie was losing his mind."

The latter of these statements was not disclosed by the State until two weeks ago despite the fact that the State has been in possession of the statement for over five months. Moreover, based upon the information which has gradually been provided up until this point in time, it is the Defendants' belief that the State is still in possession of such exculpatory information.

C. The State has failed to disclose discoverable information pertaining to the lawfulness of Mr. Gray's initial stop and arrest

Since April 21, 2015, the State has known the identification of the individual who was with Mr. Gray when he fled from police officers at the corner of North Avenue and Mount Street. However, the State failed to disclose this individual's identity until September 11, 2015. Defendants are at a loss as to why the State felt this information should not be disclosed. This individual was present when this entire event started, and will be a key witness when the matter proceeds to trial. This individual can help explain what Mr. Gray was doing on the corner that day, why he fled from the police, and whether he had taken similar actions in the past. Such information is absolutely essential to those Defendants charged with arresting Mr. Gray absent probable cause.

Since the initiation of this matter, the State has also possessed information demonstrating that the area in which Mr. Gray fled from police was a high crime, high narcotics area. The Western District Areas of Concern/Operational Plan specifically states that police officers in the Western District were to focus on the area where Mr. Gray was arrested, and to conduct "stop and frisks" in order to curb violence. Given that it is undisputed that Mr. Gray initially fled from the police

officers, such information further proves that the arresting officers possessed reasonable, articulable suspicion to stop and conduct an investigative search of Mr. Gray. *See Illinois v. Wardlow*, 528 U.S. 119 (2000). Moreover, given that the area was classified as being exceptionally violent, such information demonstrates that the use of handcuffs by the officers to detain Mr. Gray was reasonable and did not elevate the investigative stop to an arrest. *See In re David S.*, 367 Md. 523, 539–40 (2002) (holding that handcuffing a suspect does not convert an investigatory stop into an arrest when the officer reasonably believes that the suspect poses a threat to the officer's safety).

The State has also been in possession of information indicating that the knife found on Mr. Gray the day of his arrest was illegal. In the Baltimore Police Department video dated July 13, 2015, the detective examines the knife and states that it is "spring-assisted." As a result, the knife is illegal under the plain language of the Baltimore City Code. *See* BALT. CITY CODE art. 19, § 59-22 ("It shall be unlawful for any person to sell, carry, or possess any knife with an automatic spring or other device for opening and/or closing the blade, commonly known as a switch-blade knife."). The fact that the knife is illegal further proves that the arrest of Mr. Gray was lawful. *See* MD. CODE ANN., CRIM. PROC. § 2-202(b) (West 2015) ("A police officer who has probable cause to believe that a felony or misdemeanor is being committed in the presence or within the view of the police officer may arrest without a warrant any person whom the police officer reasonably believes to have committed the crime."). Based upon information and belief, many other law enforcement officers share this opinion.

II. The State's "supplemental disclosures" are not supplementary, but instead include information which the State was required to disclose on June 26, 2015

It appears to be the State's position that it has committed no discovery violation(s) because it provided the information discussed above through "supplemental disclosures." Maryland Rule 4-263(j) governs supplemental disclosures and a party's continuing obligation to deliver

discoverable material. Specifically, the Rule provides that "[e]ach party is under a continuing obligation to produce discoverable material and information to the other side. A party who has responded to a request or order for discovery and *who obtains further material information* shall supplement the response promptly." Md. Rule 4-263(i) (emphasis added).

Supplemental disclosures are not meant to be used by a party to avoid delivering discovery by the applicable deadline. Instead, as the plain language of the Rule indicates, it is meant to only cover that information which is obtained *after* the initial discovery disclosure is made. A majority of the information in the State's "supplemental disclosures" is information which it has possessed, or which has been in the possession of investigating law enforcement officers, since charges were filed in this matter. Accordingly, this information is not supplementary and should have been delivered to the Defendants by June 26, 2015. *See* Md. Rule 4-263(c)(2) (explaining that the State's obligation to provide discoverable information extends to any information in the possession or control of the State's Attorney's Office, or anyone who has reported to the Office in regard to that case). By failing to deliver this information to the Defendants by June 26, 2015, the State has violated its discovery obligations.

III. Sanctions requested by the Defendants

Maryland Rule 4-623 provides the following sanctions which may be imposed on a party who has failed to meet his or her discovery obligations:

> If at any time during the proceedings the court finds that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances.

Md. Rule 4-263(n). The purpose of the Defendants' Motion is to acquire all discoverable materials from the State in order to prepare their defense, determine which pre-trial motions need to be filed,

and avoid any unfair surprise at trial. Given that the State has not only failed to satisfy its discovery obligations, but has also misrepresented the nature and extent of its disclosure to this Court, the Defendants are in no position to trust the State's assertion that it has disclosed everything to which the Defendants are entitled.

WHEREFORE, Defendants respectfully ask this Court to grant the Defendants' Motion to Compel and order the following sanctions and/or remedies:

1. Order that the Defendants have the opportunity to depose each law enforcement officer designated by the State in its discovery disclosures;

2. Order that the State proffer the opinion of each law enforcement officer designated by the State in its discovery disclosures concerning his or her opinions on the following:

    a. The officer's opinion as it relates to the reasonableness of the Defendants' actions and/or omissions;
    b. The officer's opinion as it relates to the use of seatbelts to secure arrestees;
    c. The officer's opinion as it relates to the legality of Mr. Gray's initial stop and subsequent arrest;
    d. The officer's opinion as it relates to the legality of the knife at issue;
    e. The officer's opinion as it relates to the criminality of this matter;
    f. The officer's opinion as it relates to general orders and police policies, and whether such items are intended to form the basis of criminal prosecutions;
    g. The officer's opinion as it relates to the timing of Mr. Gray's injuries, and/or whether he or she believes that Mr. Gray was injured or not injured at the point in time where Defendant Porter or Defendant White made contact with him;

3. Order that the State deliver to the Defendants any materials and information relating to the reasonableness of the Defendants alleged actions and omissions, the timing and cause of Mr. Gray's injuries and death, the location where Mr. Gray suffered his injuries, and the legality of the initial stop and arrest of Mr. Gray;

4. Order that the State deliver to the Defendants any file(s) pertaining to the investigation and prosecution of the Defendants in this matter;

5. Order that the State deliver to this Honorable Court any file(s) pertaining to the investigation and prosecution of the Defendants in this matter for an *in camera* review;

6. Order that any of the State's withheld evidence or testimony which is inculpatory be excluded at trial;

7. Order that the State compensate defense counsel's attorney's fees in relation to this matter;

8. Order any other relief this Honorable Court deems appropriate.

Respectfully submitted,

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

ORDER

Upon consideration of the Defendants' Joint Motion to Compel and for Sanctions, it is this _____ day of _____, 2015, hereby **ORDERED** that the Defendants' Motion is **GRANTED**; and it is further

☐ **ORDERED** that the Defendants have the opportunity to depose each law enforcement officer designated by the State in its discovery disclosures;

☐ **ORDERED** that the State proffer the opinion of each law enforcement officer designated by the State in its discovery disclosures concerning his or her opinions on the following:

- The officer's opinion as it relates to the reasonableness of the Defendants' actions and/or omissions;
- The officer's opinion as it relates to the use of seatbelts to secure arrestees;
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- The officer's opinion as it relates to the timing of Mr. Gray's injuries, and/or whether he or she believes that Mr. Gray was injured or not injured at the point in time where Defendant Porter or Defendant White made contact with him;

☐ **ORDERED** that the State deliver to the Defendants any materials and information relating to the reasonableness of the Defendants alleged actions and omissions, the timing and cause of Mr. Gray's injuries and death, the location where Mr. Gray suffered his injuries, and the legality of the initial stop and arrest of Mr. Gray;

☐ **ORDERED** that the State deliver to the Defendants any file(s) pertaining to the investigation and prosecution of the Defendants in this matter;

☐ **ORDERED** that the State deliver to this Honorable Court any file(s) pertaining to the investigation and prosecution of the Defendants in this matter for an *in camera* review;

☐ **ORDERED** that any of the State's withheld evidence or testimony which is inculpatory be excluded at trial;

☐ **ORDERED** that the State compensate defense counsel's attorney's fees in relation to this matter;

☐ **ORDERED** any other relief this Honorable Court deems appropriate.

_____

Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing Motion and Proposed Order were this 29 day of September, 2015, emailed and hand-delivered to the Office of the State's Attorney for Baltimore City, 120 E. Baltimore Street, Baltimore, Maryland 21202.

Joseph Murtha

Joseph Murtha, Esquire