STATE OF MARYLAND

v.

BRIAN RICE

IN THE
CIRCUIT COURT FOR
BALTIMORE CITY
CASE No. 115141035
(filed under seal)

STATE'S RESPONSE TO DEFENDANT'S JUNE 29, 2016, MOTION FOR APPROPRIATE RELIEF REGARDING CONTINUED DISCOVERY VIOLATIONS

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; and Janice L. Bledsoe, Deputy State's Attorney for Baltimore City; and responds herein to the Defendant's June 29, 2016, Motion for Appropriate Relief Regarding Continued Discovery Violations.

The main argument the Defendant's Motion sets forth suggests that the State disclosed allegedly exculpatory evidence on June 27, 2016, to the effect that the Defendant's desktop work computer was in the repair shop from March 20, 2015, to April 10, 2015, such that the State should be precluded from arguing the applicability of Policy 1114 at trial. The specious logic behind this argument is that Policy 1114 was disseminated via email on April 9, 2016, so the Defendant asserts that the fact that his desktop computer was on that date being repaired somehow means he did not have access to his email and so could not have known about Policy 1114; and that the State was in the "sole possession" of this information until June 27, 2016. This argument is factually incorrect, as the Defendant well knows.

Before even addressing the Defendant's misuse of the word "exculpatory" as that term is legally defined, the State must correct the facts. On June 26, 2015—**over one year ago**—during initial discovery, as reflected on page 10 of the State's Initial Disclosures, Notices, and Motions,

the State disclosed to defense counsel the following relevant emails, among others, from the Defendant's BPD account:

1. On April 9, 2015, at 4:01 p.m., the Defendant received an email (State's Exhibit 1) from the Mayor's Office of Information Technology Service Desk entitled "Satisfaction Survey," reading:

> Dear Brian Rice:
>
> It's our goal at the MOIT Service Desk to ensure your technology functions smoothly. To help us improve our service and the quality of support for you, please take a moment to fill out the attached Satisfaction Survey regarding your recently resolved issue 67713, TT-0116985 - COB | <DEPARTMENT> | Desktop connection.
>
> Regards,
>
> MOIT Service Desk

2. On April 9, 2015, at 5:01 p.m., the Defendant sent an email (State's Exhibit 2) entitled "My Computer" to Ebony Lee, reading:

> Can you have P/O Bond check on the status of my computer???
>
> Thanks

3. On April 9, 2015, at 5:04 p.m., the Defendant sent an email (State's Exhibit 3) entitled "B Shift Stats" to Donald Bauer and Erik Pecha that had no text in the body of the email but that contained two Excel spreadsheet attachments that the Defendant sent, "4.9.xlsx" and "Rice.xlsx," which contained the shift statistics for that day's Baker shift.

4. On April 9, 2015, at 6:00 p.m., the Defendant received an email (State's Exhibit 4) from BPD Broadcast entitled "FW: New Policies," reading:

> Subject: New Policies
>
> The Police Commissioner has authorized the distribution of the new policies listed below. Commanders are responsible for communication of these policies to their subordinates and to ensure compliance.

Policy 212, Field Training and Evaluation Program

Policy 1014, Video Surveillance Procedures

Policy 1105, Custodial Interrogations

Policy 1114, Persons in Police Custody

Policy 1206, Investigations Involving Children Who Have Witnessed a D/V Homicide

Policy 1731, Critical Incident Stress Management

These policies are effective on the date listed herein.

Lieutenant Robert Quick Jr.

Written Directives Unit

Email: Robert.Quick@Baltimorepolice.org

Cell: (443) 865-9589

The email also contained six attachments, which were .pdfs of the six policies described in the email, including Policy 1114.

5. On April 10, 2015, at 4:06 p.m., the Defendant sent an email (State's Exhibit 5) entitled "Re: Standardized Field Sobriety Testing" to Patty Silvers, which was a reply to an email Silvers sent to BPD Broadcast on April 10, 2015, at 11:38 a.m. The Defendant's email, with the original Silvers's email included in the content, read:

If Frank still does the PBT cert class on the last day (May 8), I would like to send Ann Bucksbaum from the WD. She is finishing up DRE school and has a PBT, but isn't certified to use it. Can you check with Frank and see if she could drop in just for that portion? It used to be just a couple hours long.

Thanks

-----Original Message-----

From: Silvers, Patty

Sent: Friday, April 10, 2015 11:38 AM Eastern Standard Time

To: Police Officers; Broadcast, BPD

Subject: Standardized Field Sobriety Testing

Good afternoon,

I currently have one opening in the May 4-8, 2015 0800 x1600 and two openings in the October 26-30, 2015 0800 x1600 classes for Standardized Field Sobriety Testing that will be held in Baltimore County. Any officer or supervisor that is interested in attending please forward me an approved 95 from your command. These classes will be filled on first come first serve basis. This training can and will only be scheduled by me, please do not contact Baltimore County.

Detective Patty Bauer

Traffic Training Coordinator/Crash Team

410-396-2606

6. On April 10, 2015, at 5:13 p.m., the Defendant sent an email (State's Exhibit 6) entitled "B Shift Stats" to Donald Bauer and Erik Pecha, reading:

> Of Interest: P/O Aaron Jackson (7B11) located and apprehended Jermaine McCory, who was wanted for questioning for the shooting 3/22/15 in the Unit blk N Monroe. He ran...and was located hiding in a vacant house.
>
> Stats / after actions are attached.....

The email also contained two attachments that the Defendant sent with the email, "4.10.xlsx" and "Rice.xlsx," containing the shift statistics for that day's Baker shift.

7. On April 10, 2015, at 5:19 p.m., the Defendant sent an email (State's Exhibit 7) entitled "Ag Assault / 1300 N Carey" to Donald Bauer and Erik Pecha, reading:

> At this time (shift change) we are investigating an on-view ag assault which appears to have happened in the 1300 blk of N Carey St.
>
> The complainant was struck in the head and knocked out. No suspects or witnesses were located. He is at Shock Trauma with a serious head injury. Crime lab was called to the scene. DDU is investigating. The victim is not talking much.
>
> We don't have anything further at this time. SIC Smith-Gee (7C09) will continue to follow-up and advise.
>
> Brian

Even ignoring the fact that the matter in question is the Defendant's *own* computer and email use—not, for example, the computer and email use of a *State's witness* whose receipt of an email

has legal significance—the inescapable facts are that the State disclosed over a year ago the Defendant's desktop computer connection problem and his inquiry about the status of his computer. On June 27, 2016, the prosecution merely sent defense counsel some additional information about this computer issue, information that added nothing substantive to the underlying issue of the computer being repaired. There is no discovery violation here because the State timely provided information that there was a computer issue, the Defendant was aware of the issue, and the State supplemented the information it initially provided.

Indeed, defense counsel's most urgently asserted argument in this regard is that the computer being in the repair shop is "exculpatory" because it somehow, in his view, shows that the Defendant did not have access to the email and attachments disseminating Policy 1114 on April 9, 2015. On the contrary, the above-listed emails, which again were disclosed over a year ago, show that the Defendant was not only actively using his email both before and after the Policy 1114 dissemination email, but he was also both before and after sending emails that contained *attachments*. Furthermore, though the Defendant has previously argued that Policy 1114's having been sent via a BPD Broadcast blast somehow had significance regarding the Defendant's knowledge of the email (presumably on the same theory that other defendants have argued, *i.e.*, that such blast emails are too frequent to be read), the same emails listed above also show the Defendant responding to a blast email sent out just a few hours before the Defendant's response. In other words, notwithstanding the Defendant's personal desktop computer being repaired, he clearly had access to his email during the relevant time period via *some* method—a method that permitted him to handle attachments and read blast emails. Accordingly, defense counsel's assertions of "exculpatory" value in the State's June 27, 2016, disclosure can only reflect a misuse of the word.

"[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.

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).

These legal principles merely reinforce the conclusion that commonsense compels under the facts of this case—the Defendant cannot cry "exculpatory!" about facts he already knew, facts available to him through basic investigation, or facts that immaterially embellish facts already known to him. In this case, the supposedly exculpatory information concerned the *Defendant's own computer* being repaired. It is impossible to fathom how the Defendant did not know about the repair of his own computer, particularly when he sent an email inquiring about the status of his computer just hours after receiving a satisfaction survey about the repair job submitted for the work. In addition to the Defendant's own knowledge, defense counsel received in discovery on June 26, 2015, the very same set of emails that prompted the State to inquire further into the computer repair issue. Though counsel now asserts that Mr. Jaffee, the information technology employee for BPD, was not cooperative with the defense, absolutely nothing prevented defense counsel from seeking a subpoena under Rule 4-264 at any point over the last year to obtain follow-up records about the computer repair issue. *Diallo* and *Ware* do not permit the Defendant to claim an exculpatory discovery violation under such circumstances. Finally, on the point *Agurs* stresses, facts which immaterially embellish known facts—such as

the repair ticket number and exact repair dates of a desktop computer repair known to be ongoing as of the date Policy 1114 was disseminated—are not grounds for claiming a *Brady* violation. Instead, it is abundantly clear that the Defendant is merely misusing the word "exculpatory" in the hope of raising an alarm that will bring about the result he desires, namely the suppression of damaging evidence. In this instance, however, the Defendant's cries are a false alarm and should form no basis for the relief his Motion seeks.

Wherefore, the State requests that this Court deny the Defendant's June 29, 2016, Motion for Appropriate Relief Regarding Continued Discovery Violations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 2016, a copy of the State's Response to the Defendant's June 29, 2016, Motion for Appropriate Relief Regarding Continued Discovery Violations was mailed and e-mailed to:

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