STATE OF MARYLAND	*	IN THE CIRCUIT COURT FOR BALTIMORE CITY
v.	*	CASE No. 115141035
BRIAN RICE	*	(filed under seal)

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STATE'S RESPONSE TO DEFENDANT'S JUNE 30, 2016, MOTION FOR APPROPRIATE RELIEF FOR 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 30, 2016, Motion for Appropriate Relief for Continued Discovery Violations.

The Defendant's Motion claims that the State's June 29, 2016, disclosure of supplemental training records for the Defendant contained "many" documents that he deems "exculpatory." Def. Mot. at 1. Notably, the Defendant does not claim that the documents were untimely under Rule 4-263, nor does he even cite Rule 4-263. Equally significant, the Defendant does nothing more than baldly assert that the training records are "exculpatory" merely because they bear on *relevant* training subject matter, as if the words "relevant" and "exculpatory" are synonyms. Instead, the Defendant—without reference to any controlling legal authority—moves to have the case dismissed or, in the alternative, to have it continued for two days and to impose a sanction (a) that the defense may use any of the training records it pleases, (b) that the court impose a "stipulation" that the Defendant was actually trained in accordance with those records (regardless of whether there is any competent evidence he actually was so trained), and (c) that the State, by contrast, not be permitted to utilize any of the training records (notwithstanding the natural two-party meaning of the word "stipulation"). Def Mot. at 3-4. While the State has no objection to granting a two-day continuance from the current July 5, 2016, trial start date (which the

Defendant implicitly suggests is sufficient time to review the records), the State objects to any of the Defendant's other suggested relief for the simple reason that the information disclosed on June 29, 2016, is about the Defendant's *own* training, *i.e.*, the State merely disclosed facts that were already known to the Defendant and facts that were contained within records that have been readily available to defense counsel through judicial process but that counsel did not, so far as the State knows, avail himself to use.

While the State has no doubts about its obligation to disclose genuinely "exculpatory" information, the Defendant's Motion merely uses the label "exculpatory" irrespective of its meaning. "[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).

Applying these principles to the facts in this case, the Defendant has not identified how the information in the State's June 29, 2016, disclosure "is capable of clearing or tending to clear" him of guilt. Instead, the Defendant has merely pointed out that the records may be *relevant* to the question of the reasonableness of the Defendant's conduct, listing in his Motion certain disclosed documents that bear on relevant subjects about which the Defendant may have been trained but without identifying how those documents bear on training the Defendant received that may clear him of any guilt in this case. Def. Mot. at 2-3. Indeed, the training materials provided to defense were in-service supervisory courses that the defendant has taken.

The subject matters of the courses include, among other things, such varied topics as: blood borne pathogens, child abuse, elderly care, liquor establishments, missing and exploited children, BPD's medical policy, 4th Amendment law from 2006, ICD (incident command systems for disasters), Comstat for lieutenants, effective communication, federal firearms investigations, uniform crime reports, firearm case folder preparation, judicial talking points, supervising for safety in the workplace, hazard identification techniques, FMLA, gang updates, and a few management courses. Even to the extent the Defendant can eventually seize upon something among the documents that is plausibly exculpatory, the Defendant can claim no possible prejudice given that these are records of the training he personally is listed as having received according to his personnel file.

Indeed, the State disclosed to defense counsel the Defendant's BPD Employee Profile on September 11, 2015. This Profile listed all of the classes that the Defendant's training record shows he took. The curricula for those classes are the materials contained within the State's June 29, 2016, supplemental disclosure. As such, defense counsel could easily have obtained the very same documents using a Rule 4-264 subpoena. Indeed, defense counsel even acknowledges that "[o]ne of the focal issues to be determined at this trial is whether Lt. Rice's actions were reasonable, in the context of his training, education, and experience." Def. Mot. at 2.

Given the information the Defendant himself already possessed before this case was indicted, coupled with the information defense counsel received on September 11, 2015, there is no reason defense counsel could not have subpoenaed the records months ago he claims now to be prejudiced by having received. On the question of timing, it must also be noted that prosecutors did not receive the Defendant's training records from BPD Legal until June 28, 2016, at 9:54 p.m. Prosecutors then provided those documents promptly to the defense on June

29, 2016, at 12:44 p.m. To the extent the Court considers it appropriate to fashion some sort of remedy for the disclosure of an admittedly voluminous amount of information received close to the start of the trial, this timeline of prosecutorial diligence must be given weight, particularly in light of the non-exculpatory nature of the materials and the Defendant's ability to have obtained the documents at any time since this case's inception. The State does not minimize the possible inconvenience to the defense of such a disclosure, but the State notes defense counsel's expressly stated ability to review the materials with a two-day continuance, something the Court was already planning to grant for reasons wholly independent of the June 29th disclosure.

Wherefore, the State requests that this Court deny the Defendant's June 30, 2016, Motion for Appropriate Relief for 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 30, 2016, Motion for Appropriate Relief for Continued Discovery Violations was mailed and e-mailed to:

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Respectfully submitted,

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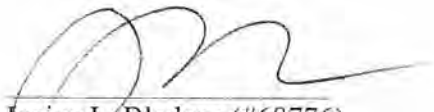

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