

IN THE CIRCUIT COURT FOR BALTIMORE CITY

STATE OF MARYLAND

*

vs.

*

XXXXXX

*

CASE NO. XXXXXX

Defendant

*

*** **

DEFENDANT’S MOTION FOR SUBPOENA FOR TANGIBLE EVIDENCE FOR INTERNAL AFFAIRS FILES PURSUANT TO MARYLAND RULES 4-263 AND 4-264

The above-named defendant, XXXXXX, by and through undersigned counsel, XXXXXX, Assistant Public Defender, respectfully requests that this Honorable Court issue a Subpoena for Tangible Evidence for the production of the Baltimore City Police Department’s (BPD) complete Internal Affairs Division’s (IAD) files pertaining to Sergeant Kenneth Ivery (G495) and Officer Eduardo Pinto (E573). These files are likely to contain evidence that may be usable at trial, as well as impeachment evidence, which the State is required to disclose under the Fifth and Sixth Amendments to the United States Constitution, Article 21 of Maryland’s Declaration of Rights, Brady v. Maryland, 373 U.S. 83 (1963), Kyles v. Whitley, 514 U.S. 419 (1995), Fields v. State, 432 Md. 650 (Md. 2013), and Maryland Rules 4-263 and 4-264. Mr. XXXXXX further requests that these records be provided to defense counsel for an in-camera inspection.

STATEMENT OF FACTS & PROCEDURAL HISTORY¹

On _____, [insert the facts of your case demonstrating that Ivery & Pinto are likely to be called as witnesses at your client’s trial.] See Sworn Statement of Probable Cause at _____, Attached as Exhibit 1.

Because Sergeant Ivery and Officer Pinto were the . . . they are likely to be called as a

¹ The following statement of facts is based on the statement of probable cause provided in this case. Mr. XXXXXX cites these facts strictly for purposes of this motion and does not admit them for any other purpose.

witnesses at trial. Thus, the State has an obligation to provide all exculpatory and impeachment evidence, including that evidence that is contained within his IAD files.

BASIS FOR IAD INSPECTION

On June 22, 2017, a superseding indictment was filed charging Officers Daniel Hersl, Wayne Jenkins, and Marcus Taylor with various RICO violations. See Superseding Indictment, attached as Exhibit 2. One particular violation, as stated in the superseding indictment, occurred on January 24, 2014, which appears to involve Officers Ivery, Eduardo Pinto, Marcus Taylor, and Maurice Ward. Id.; see also Whiting Statement of Probable Cause, attached as Exhibit 3.

Specifically, the superseding indictment states that Officers Ivery, Ward, and Taylor arrested S.W.² and executed a search warrant on his residence. See Exhibit 2. Upon execution of the search warrant, Officers Ward, Taylor, Pinto, and Ivery recovered over \$10,000 from the residence (the Money), more than \$3,000 of which was stolen by the officers. Id. In an effort to conceal their illegal conduct, Officer Ward authored, and Officer Ivery approved, a false incident report. Id. The false incident report swore out that all property recovered was recovered by Officer Taylor and “another Detective”³ and was submitted to evidence control, when, in reality, the officers stole at least \$3,000 from S.W. Id. Based on the aforementioned conduct, it is highly likely that Sergeant Ivery and Officer Pinto have been investigated by Internal Affairs.

Additionally, a motion for subpoena for tangible evidence requesting the complete IAD records for Sergeant Ivery and Officer Pinto were previously litigated in front of the Honorable John S. Nugent in State of Maryland v. Michael Lionel Smith, Case Number 116341016. See Smith Order, attached as Exhibit 4. In response, the Honorable John S. Nugent ordered the production

² “S.W.” has been determined by defense counsel to be “Shawn Whiting.” See Exhibit 3

³ Upon review of the statement of probable cause submitted in Mr. Whiting’s case, the “Detective” mentioned above, who assisted Officer Taylor in submitting the Money to ECU at least \$3,000 short, was Officer Pinto. See Exhibit 3 at 5.

all IAD files pertaining to both Sergeant Ivery and Officer Pinto for an in camera inspection. Id. The IAD files for both officers are still under review.

Finally, while the State may argue that the officers' IAD files are not relevant because the State does not now intend to call them as witnesses, but this argument is mislaid as both officers **description of officers' impact in your case – Ex. observed the suspected criminal activity in Mr. XXXXX's case, participated in the arrest, and was responsible for discovering, transporting, and submitting the suspected narcotics].** Whether he carried out his duties to properly secure the scene and whether he actually observed what was alleged in the sworn statement of charges is certainly key evidence for use at trial. The State cannot escape its obligations under Brady, the Constitution, and the Maryland Rules by simply claiming that they are not calling Sergeant Ivery and Officer Pinto as witnesses. See Williams v. State, 392 Md. 194 (Md. 2006).

As a result, and based on the following additional argument, this Court ought to grant Defendant's Motion for Subpoena for Tangible Evidence for Internal Affairs Files for the complete IAD file pertaining to Sergeant Ivery and Officer Pinto.

ARGUMENT

I. MR. XXXXX IS ENTITLED TO ACCESS AND REVIEW SERGEANT IVERY AND OFFICER PINTO'S IAD FILES BECAUSE THEY ARE LIKELY TO REVEAL USABLE EVIDENCE; THEY CONTAIN BRADY MATERIAL; AND DEFENSE COUNSEL IS IN THE BEST POSITION TO DETERMINE RELEVANCY

As the Court of Appeals explained in Fields v. State, 432 Md. 650 (Md. 2013), the analysis regarding whether criminal defendants are entitled to access a law enforcement officer's IAD file is a multi-step process. First, the reviewing court must determine whether the IAD files are likely to reveal evidence that may be usable at trial. Id. at 668. During this phase of the analysis, the Fields court admonished that "a court . . . may deny a defendant any form of access to the material only if nothing in it, 'in anyone's imagination, [could] properly be used in defense or lead to the discovery of

usable evidence." Id. at 670 (quoting Zaal v. State, 326 Md. 54, 88 (1992)). After making that determination, the court must then rule on the manner of inspection, in other words, whether the court should review the records in camera, or whether the defendant should participate in that inspection. Id.

As will be explained further, Mr. XXXXXX should be afforded access to Sergeant Ivery and Officer Pinto's IAD files because they are key witnesses for the State in Mr. XXXXXX's trial and their IAD files are likely to reveal usable evidence. Moreover, as the defense counsel is in the best position to judge the importance of the impeachment material at issue, this Court should allow counsel for Mr. XXXXXX the opportunity to view the records.

A. Mr. XXXXXX is Entitled to Access Sergeant Ivery and Officer Pinto's IAD Files Because Those Files Are Likely to Lead to Usable Evidence at Trial

Mr. XXXXXX ought to be afforded access to Sergeant Ivery and Officer Pinto's complete IAD files because they are likely to lead to the discovery of usable evidence. In Fields, the Honorable Mary Ellen Barbera, writing for a unanimous Court of Appeals, held that the need to inspect IAD records should be interpreted broadly: "[O]nly when the records are not even arguably relevant and usable should the court deny the defendant total access to the records." Id. at 668. Put another way, Judge Barbera explained that the trial court should only exclude IAD material from the parties' review when it "could not, in anyone's imagination, properly be used in defense or lead to discovery of usable evidence." Id. at 668-69. The Fields case is remarkable in that the court reversed the defendants' Baltimore City Circuit Court murder convictions, after a multi-week jury trial, on the sole basis that the trial court had refused to order production of the two detectives' IAD records, who had testified at trial. Given that Sergeant Ivery and Officer Pinto's IAD files are likely to lead to the discovery of usable evidence, and they are likely to be called to testify in Mr. XXXXXX's case, this Court should order production of the IAD files to avoid any unnecessary miscarriage of justice.

The Fields holding, while expansive and impressive, is not new. In fact, the Fields Court merely expanded on Maryland law, settled decades ago in Zaal v. State, 326 Md. 54 (Md. 1992). In that case, the Court of Appeals explained that a defendant should be allowed access to confidential records when there is “a reasonable possibility that review of the records would result in discovery of usable evidence.” Id. at 81. The Zaal decision was based on the understanding that a criminal defendant’s right to confront his accusers and to prepare a defense trumps any purported confidentiality of personnel records. A “criminal defendant may be entitled to discovery of confidential personnel records where the defendant’s right to confront and cross-examine the witnesses against him outweighs the interests of the party holding the protection of the confidential records.” Id. at 81-87. Even if the officers’ IAD files are considered confidential records within the Maryland Public Information Act, a fact which the above-named defendant does not concede, a record deemed confidential does not “guarantee [its] insulation from . . . disclosure.” Id.; see also Fields, 432 Md. at 678, (McKenneth, J., concurring) (“If other law requires disclosure of a record, the record is disclosable under the [M]PIA even if it falls within one of the [M]PIA's many categories of exceptions to disclosure . . . the compulsory process of the subpoena itself might constitute ‘other law’ that overrides the [Maryland Public Information Act] exception”).

Further, the Court should order production of the records because [the nature of the nature of the charges; the issues before the Court; The relationship between the charges and the information sought; and the likelihood that relevant information will be obtained as a result of reviewing the records]

Where a defendant demonstrates a “need to inspect,” or, in other words, “a reasonable possibility that review of the records would result in discovery of usable evidence,” the court then must, at a minimum, review the records in-camera. The court can choose to view the records alone, in the presence of counsel, or it could allow counsel for both parties to review the records

themselves as officers of the court. Id. at 667. Given the Court of Appeals' expansive directive in Fields, this is certainly a case in which there is a need to inspect the records because they are likely to reveal usable evidence.

More specifically, the records will shed light on Sergeant Ivery and Officer Pinto's prior bad acts that the State should be required, without request, to provide. As the Fields court stated, the "Maryland Rules authorize trial courts to allow cross-examination of a witness about a prior bad act, not resulting in conviction, that relates to the witness's credibility, so long as the cross-examiner can establish 'a reasonable factual basis' for the inquiry." Fields v. State, 432 Md. 650, 671 (Md. 2013); see also Sessoms v. State, 357 Md. 274 (2000); Md. R. Evid. 5-608(b).

B. Defense Counsel, as the Advocate, Should be Able to Examine the Contested Files

After establishing a need to inspect, as the defendant has done in this case, the court must then determine the manner of inspection. When deciding how to proceed with the in-camera inspection, "the court should take into account, among other factors, 'the degree of sensitivity' of the material to be inspected; the strength of the showing of the 'need to inspect'; whether the information sought is readily identifiable; considerations of judicial economy, etc.'" Fields, 435 Md. at 668 (quoting Zaal, 326 Md. at 87). "A strong need to inspect weighs in favor of allowing counsel to participate in the review as officers of the court." Id.

In this case, the defendant has carried his burden of showing a need to access the IAD files. Thus, the only question that remains is how this court will choose to conduct the inspection. Because there is a strong need to inspect in the present cases, defendant's attorney requests to either participate with the court's in-camera inspection, or to be able to view the materials independently as an officer of the court.

First, the information is not particularly sensitive because it relates to Sergeant Ivery and Officer Pinto's conduct as police officers, not in their private life. Other than reporting conduct,

which may be unbecoming of a law enforcement officer, there is nothing remarkably sensitive about the facts at issue.

Second, there is a strong need to inspect because the information contained in the documents goes directly to the veracity and performance of key witnesses. While the police department has an interest in protecting confidential records, “that confidentiality interest must yield . . . to the defendant's interest in having an opportunity to mount a defense and confront the witnesses against him.” Id. at 672 (“[W]hen due process concerns have been involved, the confidentiality of [internal investigation] records” yields to those concerns); see also Davis v. Alaska, 415 U.S. 308, 320 (1974); Robinson v. State, 298 Md. 193, 308 (1983). Sergeant Ivery and Officer Pinto are likely to provide key testimony at Mr. XXXXX’s trial, and the information contained in his IAD files go directly to his credibility. See Fields, 432 Md. at 670-71. In addition to the due process and confrontation rights that require inspection, the prosecution is obligated to make the records available to the defendant under Brady v. Maryland, 373 U.S. 83 (1963), and Maryland Rule 4-263(d)(b).

Third, the files the defendant seeks are concise and readily available. There is no implication that allowing counsel to participate in an in camera review would impose a strain on judicial economy or an undue burden on the prosecution to produce the files.

Finally, the most compelling reason defense counsel should to be permitted to participate in the records review is that there is no other advocate for the defendant like his own counsel. As the Fields Court noted, a judge, while scrupulous, is not an advocate for the defendant, and may overlook or fail to conclude that certain aspects of the file would be instrumental to the defense:

the court must approach its task cognizant of the fact that it is not an advocate and, in most instances, will not, and, indeed, cannot be expected, to discern all the nuances or subtleties which may render an innocuous bit of information relevant to the defense. Whether there is impeaching information in a file is not easily determined. Indeed, whether information is impeachment evidence, or may otherwise be

characterized, often depends upon the circumstances, including context, and, to a large extent, the perception of the person interpreting it. Consequently, well-prepared defense counsel--one who has spoken extensively with his client, developed a strategy for the trial and is familiar, thoroughly, with the State's case--would then be able to bring the advocate's eye to the review of the records, thus, protecting the interest of the defendant in ensuring that relevant, usable exculpatory or impeachment evidence is discovered. . . . Moreover, by having the benefit of counsel's input on the critical questions of relevance and admissibility, the court is enabled to rule more responsibly.

Fields, 435 Md. at 668 (citations and internal quotation marks omitted, alteration in original).

Because the information is not particularly sensitive, there is a strong need to inspect, the files are readily available, and the defense attorney is in the best position to determine the importance of the information as they are the only individual(s) aware of the intricacies and nuances of the defendant's case, this Court ought to order the aforementioned officers' entire IAD files to be produced for undersigned counsel to review.

C. Mr. XXXXX is Also Entitled to Sergeant Ivery and Officer Pinto's IAD Records Under The Due Process Clause, Brady V. Maryland, and Maryland Rule 4-263

In Brady v. Maryland, 373 U.S. 83 (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87. The Supreme Court has made clear that the duty under Brady exists irrespective of whether the accused has made a request, see United States v. Agurs, 427 U.S. 97, 103-04 (1976); it extends to impeachment evidence, as there is no distinction between impeachment and exculpatory evidence; see Kyles v. Whitley, 514 U.S. 419, 433 (1995); Williams v. State, 416 Md. 670, 695 (2010); and it extends even to evidence known *only* to police investigators. Whitley 514 U.S. 419, 437-38 (1995) ("the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including

the police.”); accord Youngblood v. West Virginia, 547 U.S. 867, 869–870 (2006); Williams v. State, 416 Md. 670, 695 (2010); Robinson v. State, 354 Md. 287, 309 (1999) (holding that IAD records are in the prosecutions constructive possession).

The obligations under Brady are not to be taken lightly; rather they are the columns atop which a fair and just criminal process is built. Taking heed, Maryland codified the State’s Brady obligations in Rule 4-263 of the Maryland Rules, requiring disclosure to the defendant, without request, of “[a]ll material or information in any form, whether or not admissible, that tends to impeach a State's witness . . .” Md. Rule 4-263(d)(6). This obligation extends to information that is not in the possession of, or even known to, the State’s Attorney: “The obligations of the State's Attorney . . . extend to material or information that must be disclosed under this Rule and that are in the possession or control of the attorney, members of the attorney's staff, or any other person who either reports regularly to the attorney's office or has reported to the attorney's office in regard to the particular case.” Md. Rule 4-263(c)(2); see also Robinson, 354 Md. at 309. As the Supreme Court clearly explained, “the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.” see Kyles v. Whitley, 514 U.S. 419, 437 (1995). Thus, the prosecution simply cannot contend that they are unaware of the Brady material related to Sergeant Ivery and Officer Pinto, nor can they shirk their responsibility by claiming they are not calling them as witnesses. The observations of Sergeant Ivery and Officer Pinto form the basis for the prosecution, and their truthfulness is now at issue.

Moreover, our Court of Appeals has determined that IAD records are deemed in the possession of the prosecution, regardless of whether the prosecutor even knows those records exist:

In [Maryland], each major police department has an IAD division. Consequently, because that division is a part of the police, its records are in the possession of the police. And if the police is an arm of the prosecution, it follows that the records are also constructively in the possession of the prosecution; records in the possession of the police are not rendered not in possession simply

because they are made confidential and are not, on that account, shared with, or readily available to, the prosecution.

Robinson, 354 Md. at 309.

In the instant case, the defendant is affirmatively seeking evidence that would tend to impeach the State's key witnesses. The records at issue likely deal with Sergeant Ivery and Officer Pinto's prior bad acts. Without question, the defense is entitled to access those records, and it is not sufficient for the State to hide behind confidentiality of police personnel records. Additionally, the State is ill-equipped to make the determination as to the relevance of these records on behalf of the defendant. As the Court of Appeals explained in Fields, the defense attorney is best situated to determine the relevance or importance of information in the IAD files, as the defense attorney is the "one who has spoken extensively with h[is] client, developed a strategy for the trial and is familiar, thoroughly, with the State's case—[who] would then be able to bring the advocate's eye to the review of the records." Fields v. State, 432 Md. 650, 668 (2013) (internal quotation marks omitted). Defense counsel should be able to review the file and determine what evidence would be usable at trial, or, at a minimum, this court should review the records and make that decision.

Finally, the State cannot escape disclosure by hiding behind the Maryland Public Information Act, especially when no MPIA request is at issue. The defendant seeks these records through his attorney's subpoena power through the process of discovery, not through a general request as a member of the public. As the United States District Court explained in Mezu v. Morgan State University, 269 F.R.D. 565 (D. Md. 2010), the MPIA must give way to applicable discovery rules in litigation. More specifically, the Mezu Court held that the MPIA applies to the general public seeking records, it is not a tool that litigants can use to supplant the applicable laws of discovery. See id. at 576.

In reaching its conclusion, the Mezu court explained that "[t]he MPIA is modeled on the Federal Freedom of Information Act (FOIA), 5 U.S.C. § 552, and therefore decisions interpreting the

federal statute are persuasive in interpreting counterpart provisions of the MPIA.” Id. (citations and internal quotation marks omitted). The Mezu Court then turned to a Maryland Court of Appeals decision, which likewise explained that “the purpose of the Maryland PIA is ‘virtually identical’ to that of the Federal FOIA and . . . except where there may be some relevant differences in two statutes, we may, and should, look to persuasive interpretations of the Federal Act.” Id. (internal quotation marks omitted) (citing Stromberg Metal Works, Inc. v. Univ. of Md., 395 Md. 120, 909 A.2d 663, 668 n. 2 (2006)). The Mezu Court then pointedly explained that the FOIA “does not displace discovery in domestic civil litigation under the Federal Rules of Civil Procedure.” Id. (citing In re Application of Mohamed Al Fayed, 36 F.Supp.2d 694, 695 (D.Md.1999); Baldrige v. Shapiro, 455 U.S. 345, 360 n. 14 (1982) (NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n. 10 (1975))). Instead, the Court explained, “FOIA exceptions only . . . permit the withholding . . . of information from the public generally.” Id. But, in litigation, the court explained, “the need of a litigant for the material must be taken into account, and may require disclosure where the FOIA itself would not.” Id. Applying the same logic the records at issue in Mezu, the court held that the records were discoverable pursuant to the rules of discovery. See id. The same is certainly true here.

In summary, the prosecution possesses Brady material as to Sergeant Ivery and Officer Pinto, and the State is required to provide those documents. As a result, Mr. **XXXXXX** respectfully moves this Court to issue a subpoena for tangible evidence for the complete IAD records pertaining to Sergeant Ivery and Officer Pinto, as it is clear that those documents are likely to yield evidence that is usable at trial.

CONCLUSION

Having met his burden of demonstrating a need to inspect the IAD files, Mr. XXXXX respectfully requests that this Honorable Court permit defense counsel to inspect the IAD files of Sergeant Ivery and Officer Pinto.

A hearing is hereby requested on Defendant's Motion for Subpoena for Tangible Evidence for Internal Affairs Files Pursuant to Maryland Rules 4-263 and 4-264.

Respectfully submitted,

XXXX, Esq.
Assistant Public Defender
1400 E North Avenue
Baltimore, MD 21213
Phone (410) 878-8726
XXXX@opd.state.md.us

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of _____, 2018, a copy of the foregoing A hearing is hereby requested on Defendant's Motion for Subpoena for Tangible Evidence for Internal Affairs Files Pursuant to Maryland Rules 4-263 and 4-264, was hand delivered to Cassandra Zaleski, Assistant State's Attorney for the Office of the State's Attorney for Baltimore City, 120 E. Baltimore Street, 9th Floor, Baltimore, Maryland 21202, and e-mailed to Alexa Curley, Esquire, at Alexa.Curley@BaltimoreCity.gov.

XXXX, Esq.
Attorney for Defendant

IN THE CIRCUIT COURT FOR BALTIMORE CITY

STATE OF MARYLAND

*

vs.

*

XXXXXX

*

CASE NO. XXXXXX

Defendant

*

*** **

ORDER

Upon review of the foregoing Defendant's Motion for Subpoena for Tangible Evidence for Internal Affairs Files Pursuant to Maryland Rules 4-263 and 4-264., it is this _____ day of _____, 20____,

HEREBY ORDERED that a hearing is scheduled for the _____ day of _____ 20____;

OR in lieu of a hearing;

_____ The State is ORDERED to provide defense counsel with the complete IAD files for Officer Sergeant Ivery and Officer Pinto; or

_____ A subpoena for tangible evidence for Sergeant Ivery and Officer Pinto's entire IAD files will be hereby issued by this Honorable Court, for production to and inspection by counsel for Mr.

XXXXXX.

JUDGE