VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

COMMONWEALTH OF VIRGINIA

v. Case No. 11-102

GEORGE HUGUELY,

Defendant.

DEFENDANT'S SUPPLEMENTAL MEMORANDUM ON BRADY ISSUES

Defendant, George W. Huguely, V ("Mr. Huguely"), by counsel, as requested by the Court, for his Supplemental Memorandum on Brady Issues, respectfully submits the following further authority in support of his Supplemental Motion to Set Aside the Verdicts, based on the Commonwealth's failure to disclose to him information it had concerning an imminent lawsuit.

Summary of Argument

At the request of the Court, this Memorandum addresses three issues.

First, the Commonwealth argues that Mr. Huguely failed to inquire about the Loves' $30 million civil suit, and that the defense could have obtained information about this lawsuit through reasonable due diligence. Those arguments are wrong on the law and wrong on the facts. As a matter of law, the Commonwealth's obligation under Brady to produce potentially exculpatory evidence is wholly independent of whether the defendant asked for that evidence. Defendants are often unaware of the existence of exculpatory information until it is produced by the prosecution, so it would make no sense to blame the defense for failing to inquire about that specific evidence. On the

facts, the Commonwealth is flatly wrong to suggest that Mr. Huguely could have obtained information about the civil suit through reasonable diligence—i.e., by seeking this information directly from the Love family. Indeed, the Commonwealth itself took the position throughout the criminal proceedings that any contact between the defense and the Love family would have been inappropriate, and the defense respected that request.

Second, the withheld evidence was "material" under Brady. The fact that Sharon and Lexi Love had retained counsel to file a multi-million-dollar civil lawsuit against Mr. Huguely, the University of Virginia and others was relevant to multiple issues in the criminal case. At the very least, it was relevant to the issue of sentencing, given that Virginia law permits victims to testify to the impact of the crime, and given the broad discretion that juries in Virginia have to consider evidence for sentencing. The civil suit against Mr. Huguely was also relevant to the Loves' credibility because the theory underlying that case—namely, that Ms. Love's death was the result of negligence—was flatly inconsistent with the prosecution's theory of the criminal case (i.e., that Mr. Huguely acted with criminal intent). The prosecution itself clearly recognized that the civil suit was material: one of the Loves' attorneys has stated in a sworn affidavit that the prosecution asked him to "await the conclusion of the criminal trial" before filing the civil suit.

Finally, given the sharply disputed facts about the nature of the Commonwealth's interaction with the Loves' civil attorneys, Mr. Huguely has a right to an evidentiary hearing to further develop the evidence and his rights under Brady.

Argument

I. The Commonwealth's Argument Regarding "Due Diligence" Is Not Supported by Current Case Law Under the Circumstances.

Under Brady, Mr. Huguely was entitled to be informed of the imminent multimillion dollar lawsuit, and the fact that Loves' civil attorneys had been in contact with the prosecution. The Commonwealth argues that the fact of the imminent lawsuit is not subject to Brady because Mr. Huguely could have discovered that information through reasonable diligence. That is, the Commonwealth argues that despite its open file policy, Mr. Huguely was nevertheless required to search out additional impeachment evidence. The Commonwealth conceded in oral argument on July 31, 2012 both its open file policy and that information about the Loves' civil suit was not in the open file.

The Supreme Court has flatly rejected the Commonwealth's position. In Strickler v. Greene, the prosecution failed to disclose to the defendant additional interviews of the witness. 527 U.S. 263, 284 & n.26 (1999). The prosecution argued that even if such evidence should have been disclosed, the defendant could have discovered its existence by examining the witness' trial testimony along with a letter the witness published in a local newspaper. Id. The Court held that the prosecution had improperly withheld that impeachment information. The Court reasoned that the defendants rightfully relied on the prosecution's "open file" policy, and reasonably relied on the representation that such file contained all impeachment information. Id. at 285.

Moreover, the Court concluded that even if the defendants may have been able to learn of the existence of such interviews, the absence of such interviews in the

Commonwealth's file reasonably led them to assume that such interviews were not recorded or did not include information for impeachment. Id.

The Supreme Court of Virginia has also emphasized that defendants may reasonably rely on the prosecution's open file policy. In Workman v. Commonwealth, the defendant argued that the Commonwealth improperly withheld evidence of another interview by a witness. 272 Va. 633, 649 (2006). The prosecution argued that the defense attorney should have independently discovered that the witness had given another interview to police, and that "if [the defendant] had exercised reasonable diligence, [he] could have discovered [the prior interview] on his own." 272 Va. 633, 649 (2006). There was no question that the defense could have discovered this evidence by simply speaking to the officer who had interviewed the witness; indeed, defense counsel had already interviewed that officer. Id.

The Supreme Court of Virginia nonetheless held that the prosecution had violated the defendant's rights under Brady. The Court emphasized that even if the defendant could reasonably locate that information through the interviewing of witnesses, the Commonwealth cannot conceal that information from its open file. The Court cited with approval the Supreme Court's reasoning in Strickler, noting that "if a prosecutor asserts that he complies with Brady through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under Brady." Id. (quoting Strickler, 527 U.S. at 283). In sum, "under Strickler, [the defendant] cannot be faulted for relying on the Commonwealth's open file policy and cannot, on these facts, be found to have failed to exercise reasonable diligence." Id.

The Commonwealth's position in this case cannot be squared with the reasoning of Workman and Strickler. Here, the Commonwealth maintained an open file policy, and it is undisputed that the file contained no information whatsoever about either the prosecution's knowledge of the imminent $30 million civil suit or the prosecution's contacts with the Loves' civil attorneys. Accordingly, defense counsel reasonably believed that the Commonwealth had no such exculpatory information in its possession. Under Workman, even if counsel for Mr. Huguely could have contacted Sharon and Lexi Love, they were under no obligation to do so to secure Mr. Huguely's access to potentially exculpatory evidence.

The Commonwealth nevertheless argues that Mr. Huguely's counsel could have contacted Sharon and Lexi Love to inquire about whether they intended to file a civil suit. But this assertion is disingenuous. While victims of crime in Virginia are not technically clients of the Commonwealth's Attorney's Office, Virginia law affords victims the protection and representation by that office. See, e.g., Va. Code § 19.2-11.01. Throughout the trial, the Commonwealth consistently presented itself as advocates on behalf of Sharon and Lexi Love. The notion that defense counsel could have simply spoken to the Loves about potential impeachment evidence is farfetched and indeed, the Commonwealth itself would have objected to any such contact. It is also disingenuous for the Commonwealth to suggest that because the defense gave the required statutory notice to Ms. Love that they had subpoenaed her daughter's medical records, a line of communication existed that would have enabled Mr. Huguely's lawyers to contact the Loves to inquire about future civil litigation. The defense sent a notice mandated by

statute. There is nothing about that "contact" suggesting anything more than mechanical compliance with the statute governing a request for medical records.

The Commonwealth further argues that the prosecutors and counsel for Mr. Huguely were in regular contact regarding logistical issues, and that, if Mr. Huguely sought information about the imminent lawsuit, his attorneys could have simply asked the Commonwealth. That argument gets the Brady analysis exactly backwards. The entire purpose of Brady is to ensure that the defense has access to all potentially exculpatory evidence so that they can mount a full and fair defense. The Brady doctrine would be rendered an empty formality if the defendant were required to ask for specific evidence in order to receive it from the prosecution. Indeed, in many cases the defense will not even be aware of the existence of such evidence. The defense cannot be faulted for failing to "ask" for evidence when they are unaware that such evidence even exists. Finally, the Commonwealth's argument on this point begs the question of why the January 30, 2012 letter did not simply disclose to the defense what the Commonwealth obviously knew about the status of the Loves' civil claim. The letter could have revealed the truth. Instead the prosecution chose to represent in the letter something other than the true status of any anticipated civil litigation.

Unsurprisingly, courts have roundly rejected the Commonwealth's narrow interpretation of the Brady doctrine. As explained above, it is well-established that if the Commonwealth has an open file policy, the defendant is not required to ask the Commonwealth for further information. Workman, 272 Va. at 644; see also Strickler, 527 U.S. at 280–81; United States v. Agurs, 427 U.S. 97, 107 (1976).

In Tuma v. Commonwealth, the Court of Appeals similarly rejected an argument by the prosecution that counsel for the defense could have had access to evidence if only they had asked. 60 Va. App. 273, 303, 726 S.E.2d 365, 380 (2012). The Court reasoned, "despite the prosecutor's representation to the trial court that counsel for [the defendant] "can listen to it if he wants to," with the benefit of the hindsight provided by the record in this case, the futility of any request Tuma might have made at trial for a recess to listen to the audio tape is obvious." Id.

More generally, the law expects more from the Commonwealth than to withhold information and to require the defendant to seek it out. The Supreme Court has rejected a reading of Brady that would encourage less than full candor on the part of prosecutors, reasoning that "[a] rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." Banks v. Dretke, 540 U.S. 668, 696, 124 S. Ct. 1256, 1275 (2004). To the contrary, the Supreme Court has repeatedly "underscored the special role played by the American prosecutor in the search for truth in criminal trials," and "[o]rdinarily, we presume that public officials have properly discharged their official duties." Id. (citations omitted).

It is true as a general matter that under Brady, the Commonwealth is not required "to produce information available to the defendant from other sources, including diligent investigation by the defense." Porter v. Warden of Sussex I State Prison, 283 Va. 326, 331–32 (2012). For example, the Commonwealth need not inform the defendant of publicly available information, such as a witness's potentially exculpatory statements made on television. Muhammad v. Warden of Sussex I State Prison, 274 Va. 3, 11

(2007). Some decisions have also suggested that evidence need not be disclosed under Brady if it could have been obtained by the defense by interviewing or subpoenaing the relevant witnesses. See Garnett v. Commonwealth, 275 Va. 397, 417 (2008); Hoke v. Netherland, 92 F.3d 1350, 1355 (4th Cir. 1996).

But those cases have no application here. As explained above, when a jurisdiction adopts an "open file" policy, the defense may reasonably assume that the file contains all exculpatory material known to the prosecution. See Workman, 272 Va. at 644-50; Strickler, 527 U.S. at 280–83. In any event, it is disingenuous for the Commonwealth to suggest that Mr. Huguely should have merely interviewed or subpoenaed Sharon and Lexi Love. During the lead up to the trial, the Commonwealth consistently took the position that it would be inappropriate for Mr. Huguely and his counsel to have contact with Sharon and Lexi Love, and the defense honored that request. It is equally disingenuous to suggest that the defense should have somehow identified and interviewed the civil attorneys. Absent specific information that the Loves had engaged counsel, the defense would have no reasonable means for identifying the Loves' civil attorneys. The civil attorneys would be under no obligation to discuss the status of their clients' claims and would likely have refused to do so.

Moreover, Mr. Chapman's statement to Mr. Huguely, seven days before trial, that Sharon and Lexi Love had available a "potential cause of action" suggested to the defense, under Workman, that the prosecution possessed no other information about a potential civil suit. That statement was not just incomplete, but an affirmative misrepresentation. Based on the Commonwealth's limited disclosure, Mr. Huguely

certainly had no reason to believe that the Loves' attorneys were actively preparing a multimillion dollar civil suit, and that those attorneys had been in contact with the prosecution.

Accordingly, counsel for Mr. Huguely reasonably relied on the Commonwealth's open file policy and its duties under Brady to disclose evidence in its control, and counsel for Mr. Huguely exercised sufficient diligence to secure Mr. Huguely's rights under Brady.

II. The Withheld Evidence is "Material" Under Brady.

The evidence of the imminent multi-million-dollar lawsuit is "material" under Brady, and therefore the prosecution was required to disclose its knowledge of that fact. Even if the Court concludes that this evidence was only relevant to sentencing, the withholding of the evidence still violated Mr. Huguely's rights under Brady. But the relevance of this evidence actually extends beyond sentencing, as the Loves' theory of the case in the civil suit is directly at odds with the prosecution's arguments in the criminal case.

A. It is well-established that "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," and that "a 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985); see also Bly v. Commonwealth, 280 Va. 656 (2010). It is certainly true, as the Commonwealth argues, that Brady applies to information available to impeach living victims, and to witnesses who might testify

during the guilt or innocence stage.

But it is equally true that Brady applies to collateral facts or to facts relevant only to sentencing. See, e.g., Cone v. Bell, 556 U.S. 449, 472 (2009); see also Tuma, 60 Va. App. at 299–300. In Cone, the defendant was tried for murder, and he raised an insanity defense based on an alleged drug addiction. 556 U.S. at 455–57. After conviction, he argued that the prosecutor had improperly failed to disclose statements of witnesses that would have corroborated his claim that he was addicted to drugs and that he did not appreciate his actions at the time of the murder. Id. at 457. The Supreme Court held that this evidence "falls short of being sufficient to sustain [the defendant's] insanity defense," and thus was not material to the guilt phase of the trial. Id. at 474.

But the Court concluded that the withholding of evidence that would have been relevant to sentencing did implicate Brady. The Court held, "the evidence suppressed at [the defendant's] trial may well have been material to the jury's assessment of the proper punishment in [the] case." Id. at 475, 129 S. Ct. at 1786. The Court reasoned that this evidence was admissible during the sentencing phase and "may have persuaded the jury that [the defendant] had a far more serious drug problem than the prosecution was prepared to acknowledge, and that [the defendant's] drug use played a mitigating, though not exculpating, role in the crimes he committed." Id.

In this case, the testimony of Sharon and Lexi Love was the sole evidence heard by the jury regarding sentencing. Evidence of the imminent $30 million civil lawsuit was surely relevant both to the Loves' credibility and to the jury's determination of the appropriate sentence.

In Virginia, victims play a central role in the determination of the appropriate sentence. By statute, the prosecution is entitled to present evidence of the impact of the offense on the victims. Va. Code § 19.2-295.1. Victims include the parents and siblings of the victim of a homicide. Va. Code § 19.2-11.01 (B). Victims are permitted to testify to "the nature and extent of any physical or psychological injury suffered by the victim as a result of the offense," and "any change in the victim's personal welfare, lifestyle or familial relationships as a result of the offense." Va. Code § 19.2-295.3 (incorporating clauses (i) to (iv) of Va. Code § 19.2-299.1 (A)).

The sentencing instructions given to the jury do not limit the effect that this testimony might have on the sentence. To the contrary, the model sentencing instruction, given in this case, instructs the jury only, "You should impose such punishment as you feel is just under the evidence and within the instructions of the Court." VMJI 2.700.

Had Mr. Huguely been made aware of the imminent, multi-million dollar lawsuit on the part of Sharon and Lexi Love, counsel for Mr. Huguely could have explored with them the ultimate injury and impact of the offense. Mr. Huguely has already explored with the Court the various means by which his counsel would have employed this evidence to cross-examine Sharon Love and Lexi Love, during both the guilt and sentencing phases of the trial. Indeed, at the sentencing phase, counsel for Mr. Huguely could have explored means other than lengthy incarceration of Mr. Huguely that would help the Loves deal with this tragedy. This includes the establishment of the One Love Foundation, a planned multi-million dollar lawsuit against the University, and their apparent plans to use part of the proceeds to fund the Foundation.

The imminent civil suit was also highly material to the criminal case because it relied on an inconsistent theory of the cause of Ms. Love's death. The prosecution argued in the criminal case that Mr. Huguely should be convicted of first- or second-degree murder because he acted with criminal intent. The civil suit, however, alleges that Ms. Love's death was the result of negligence. Had the defense been aware of the contradictory theory underlying the civil suit, it surely would have cross-examined the Loves about this during the criminal trial.

Indeed, it is likely because of this inconsistency that the prosecution asked the civil attorneys to "await the conclusion of the criminal trial" before filing their suit. See Funk Affidavit, 1. There is no reason the prosecution would have asked the civil attorneys to do this unless they feared that the civil suit would have negatively impacted the criminal proceedings. But this only reinforces that—under the facts set forth in Mr. Funk's sworn affidavit—the existence of the imminent civil suit was material and should have been disclosed to the defense.

B. Mr. Chapman's notice of the fact of a "potential civil cause of action," seven days before trial, was plainly insufficient to satisfy the Commonwealth's obligations under Brady. Indeed, a vague reference to a "potential" civil suit was an affirmative misrepresentation, given that the prosecution had specific knowledge of an imminent $30 million civil complaint.

The courts that allowed impeachment based on a civil suit have noted the significance of the both the amount in controversy and the imminent nature of the suit. For example, in People v. Wallert, the defendant was served with a subpoena for an

$18,000,000 civil suit "[t]wo days after a jury had convicted him of first degree rape and related crimes." 98 A.D.2d 47, 469 N.Y.S.2d 722 (1983). The New York appellate court noted that although the prosecutor "knew prior to the trial that the complainant had consulted an attorney who was but awaiting the outcome of the criminal action, the prosecutor felt no duty to disclose this information to defendant's counsel." Id. The Court concluded that this failure to disclose this information "was a clear Brady violation." Id. at 50, 469 A.D.2d at 50.

Mr. Chapman was obligated to inform counsel for Mr. Huguely of the fact of the imminent civil lawsuit, the fact that the prosecution had been in contact with the Loves' civil attorneys, and the fact that the attorneys were awaiting only the conclusion of the criminal trial to file the pleadings. This information was material, and its nondisclosure violated Mr. Huguely's rights under Brady.

III. Mr. Huguely Is Entitled to an Evidentiary Hearing.

Finally, Mr. Huguely is entitled to an evidentiary hearing to resolve conflicts in the testimony regarding the prosecution's knowledge of the impending civil suit, and of the availability of that information through reasonable diligence on the part of counsel for Mr. Huguely. The Court must hold an evidentiary hearing to examine evidence relevant to a Brady claim, in order to conduct the "searching inquiry" that is required by the Constitution.

The Sixth Circuit recently held that a district court abused its discretion in declining to hold an evidentiary hearing on a Brady claim. United States v. White, 492 F.3d 380, 413 (6th Cir. 2007). The Court concluded, "The point, of course, is that absent

more detailed examination, we cannot know whether the government violated Defendants' Fifth Amendment Due Process rights in withholding the materials. Absent a more searching inquiry of claims as serious as those lodged by Defendants here, we effectively permit the government to ride roughshod over the accused, stripping the accused of both sword and shield." Id.; see also Defendant's Reply to the Commonwealth's Response to Supplemental Motion to Set Aside the Verdicts, § 4 (citing cases). By denying an evidentiary hearing, this Court will not only deprive Mr. Huguely of his ability to establish his Brady claim, but will also deprive any appellate court of its ability to give the issue meaningful review.

The substantial evidence developed by the Commonwealth in the July 31, 2012 hearing, along with defendant's proffer, suggest that there is additional evidence which will support Mr. Huguely's entitlement to a new trial.

Moreover, the current evidence before the Court establishes a disputed issue of material fact that will require an evidentiary hearing to resolve. In Mr. Chapman's May 25, 2012 letter, Mr. Chapman claimed that "the Commonwealth has never asked either Sharon Love or civil legal counsel on her behalf to 'hold off' or refrain from bringing a civil suit in relation to the death of Y. Love." This assertion is refuted in the presentation of Mahlon G. "Bud" Funk ("Mr. Funk") to the Court on April 19, 2012 and continues to be refuted in Mr. Funk's Affidavit dated July 22, 2012. In that affidavit, Mr. Funk stated, "I informed Mr. Chapman that we were planning to file a civil suit on behalf of the Love family against Huguely," and "Mr. Chapman indicated ... that his preference would be that we await the conclusion of the criminal trial." Funk Affidavit, 1.

Mr. Chapman's letter goes on to recount that, "aided by an email ... received from attorney Irv Cantor on August 17, 2012," he recalls that he received "an unsolicited telephone call from Mr. Funk in the time period shortly before Mr. Cantor's email," and that Mr. Chapman cannot recall whether the caller identified himself as retained counsel, as an attorney with whom Ms. Love had consulted, or as an attorney with whom Ms. Love was consulting. Despite a significance which could not have been lost on the Commonwealth, the Commonwealth apparently asked no follow-up questions. While the Commonwealth's memory was vague, the letter asserts positively that "the Commonwealth has never asked either Sharon Love or civil legal counsel on her behalf to hold off...."

The Commonwealth's excuses for this lack of disclosure are irrelevant. Under Brady, "[i]t matters little whether the government suppresses the evidence out of oversight or guile. White, 492 F.3d at 409 (citing cases); see also United States v. Agurs, 427 U.S. 97, 110, 96 S. Ct. 2392 (1976) ("Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor.").

Furthermore, the Commonwealth has put in controversy the apparent access that counsel for Mr. Huguely had to Sharon and Lexi Love. This, too, warrants an evidentiary hearing. The Commonwealth has asserted that counsel for Mr. Huguely had reasonable access to the Office of the Commonwealth's Attorney and, apparently, to Sharon and Lexi Love, such that counsel could have discovered the fact of the imminent civil lawsuit through reasonable diligence. Mr. Huguely's counsel has repeatedly asserted that the Commonwealth interposed itself between counsel for the defendant and the Loves, and

that such a communication would have been impossible, not fruitful, or counterproductive.

Accordingly, to the extent that the Court is not satisfied with the diligence of Mr. Huguely, the Court should hold an evidentiary hearing into the circumstances of the possible contact between counsel for Mr. Huguely and Sharon and Lexi Love.

Conclusion

The Commonwealth's failure to disclose its knowledge of an imminent civil suit on the part of Sharon and Lexi Love violated Mr. Huguely's rights under Brady. Under the circumstances, Mr. Huguely reasonably relied on the open file policy of the Commonwealth, and he was not required to specifically ask the Commonwealth for this evidence or further investigate the possibility of a civil claim on the part of the family members. The Commonwealth had consistently interposed itself between counsel for Mr. Huguely and Sharon and Lexi Love, and therefore it was plainly unreasonable to expect Mr. Huguely to interview Sharon and Lexi Love regarding possible impeachment material that was already in the hands of the Commonwealth.

The fact of an imminent lawsuit was material. At the very least, the fact was material to sentencing, given the nature of the testimony of Sharon and Lexi Love during the punishment phase, and given the broad discretion of juries in Virginia to consider evidence relevant to impact on the victims. The different theory of Ms. Love's death that is advanced in the civil suit would have also cast doubt on both the Loves' credibility and the prosecution's theory of the case.

If the Court does not immediately grant Mr. Huguely a new trial, then the Court should hold an evidentiary hearing to resolve conflicts in the evidence regarding the extent of the Commonwealth's knowledge of the imminent civil case, and the possibility of discovery between counsel for Mr. Huguely and Sharon and Lexi Love.

WHEREFORE, the defendant, George W. Huguely, V, respectfully requests that the Court grant his motion for a new trial, or in the alternative, schedule an evidentiary hearing where Mr. Huguely can further develop evidence to which he is entitled under Brady, and to grant him all other relief the Court deems proper and appropriate.

GEORGE HUGUELY
By Counsel

ST. JOHN, BOWLING, LAWRENCE & QUAGLIANA, LLP

By: _____

Francis McQ. Lawrence
VSB# 14754
Rhonda Quagliana
VSB# 39522
416 Park Street
Charlottesville, Virginia 22902
434-296-7138 telephone
434-296-1301 facsimile
rq@stlawva.com
Counsel for George W. Huguely, V

CERTIFICATE

I hereby certify that a true and exact copy of the foregoing was sent by hand delivery this 7th day of August 2012 to:

Warner D. Chapman
Charlottesville Commonwealth
Attorney's Office
P. O. Box 911
Charlottesville, Virginia 22902

Rhonda Quagliana