STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

RANDY ANDERSON Applicant	:	
Vs	:	PM 2009-0108
A.T. WALL, in his official capacity As the Director of The Rhode Island Department of Corrections Respondent	:	

MEMORANDUM IN SUPPORT OF
DEFENDANT'S CLAIM OF
POST CONVICTION RELIEF

The defendant claims that he is entitled to Post Conviction Relief as a result of the Prosecutorial Misconduct of the State in its failure to comply fully with the rules and mandates of discovery, as set forth in Rules 16 of the Superior Court Rules of Criminal Procedure. The defendant further claims he is entitled to Post Conviction Relief in that he was not provided relevant evidence in the possession of the State that was exculpatory in nature as it could affect the credibility of the complaining witness.

Prior to trail counsel for the defendant filed a timely Rule 16 Request for Discovery.

Rule 16: Discovery and Inspection (a)(5) states:

> (a) Discovery by defendant, upon written request by the defendant to inspect or listen to and copy or photograph any of the following items within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the State . . .
>
> (5) All results or reports in writing, or copies thereof, by physical or mental examinations, and scientific tests or experiments made in connection with the particular case and subject to an appropriate protective order under paragraph (f) any tangible objects still in existence that were the subject of such tests or experiment.

The defendant claims the State was in possession of and/or had knowledge of medical reports of a medical exam of the alleged victim which occurred at Women's and Infant's Hospital on June 15, 1995 in relation to the alleged sexual assault of which Mr. Anderson was later convicted of.

At the defendant's probation violation hearing which occurred in front of Justice Darigan on June 27 and June 30th of 1995 the State represented at side bar before the commencement of the hearing that

> "the same person(victim) has made it known to me that she has had a physical exam and that there is no evidence of scarring or damage to the areas that the State is alleging there was criminal offense. That is another matter where I do not have the records. It was only disclosed to me a short time ago." (violation transcript page 3)

At no time were these medical records turned over to the defendant by the State pursuant to the request for discovery. Furthermore, prior to the commencement of his trial before Judge Krause, the defendant also filed a Motion for Exculpatory Evidence and/or evidence favorable to the accused.

The State's response was that there was no such evidence. Mr. Smith, the defendant's counsel at trial on October 19, 1998 in response to Judge Krause's inquiries regarding the status of motions filed had the following colloquy with the Court:

> Mr. Smith: I filed a motion to be furnished with every statement, promises, rewards, inducements. I received a reply there was none. I'm assuming that is the status of this case at present.
>
> Mr. Regine: That is correct.
>
> Mr. Smith: In addition, I filed a motion to be furnished with evidence favorable to the accused. I received a reply from the State there there - - all of the information that was favorable to my client has been provided. I assume that is the status of the case at present?
>
> Mr. Regine: That is correct.
>
> Transcript of State of Rhode Island vs Randy Anderson K1/95-0661A, October 19th, 1998, page 3

Again, the medical reports of the physical examination of the victim that occurred on June 15th 1995 that the State had knowledge of on June 27th 1995 were not turned over to the defendant.

The defendant himself, received copies of the above-mentioned medical reports, as a result of a defense subpoena filed in relation to a previous post conviction claim. Those medical reports were received in September of 2006. (See enclosed medical records from Women's and Infant's Hospital)

The medical records indicate that as of June 15, 1995 subsequent to her allegations that she was digitally penetrated by Mr. Anderson which resulted in injuries to her vagina, as well as bleeding and pain, that there were no apparent injuries to her vaginal area, that her hymen was intact and that she was unable to tolerate the exam.

This evidence was relevant to her prior claims that she was assaulted by Mr. Anderson, assaulted by a prior boyfriend Joseph Theroux, that she had consensual sex with Mr. Theroux and/or that she was sexually active as she stated to the medical personnel at the hospital This information was exculpatory in nature as it could have been used to impeach her credibility or to be considered and weighed by the jury as to her overall credibility as a witness.

The State's deliberate failure to comply with rule 16 requires the Court to grant the relief sought in his Post Conviction Relief Petition.

Our Rhode Island Supreme Court in State vs Verlaque, 465 A.2d 207 (1983) stated that the language of Rule 16 is very clear. The prosecutor must provide a defendant with specific information when requested. The prosecutor does not have the authority to interpret the rule and decide what constitutes substantial compliance. The Court has also stated that when the defense is misled into proceeding to trial unprepared the basic precepts of due process are violated. State v. Concannon, 457 A.2d 1350 (1983). In Verlaque the court went so far as to hold that where there has been deliberate failure to comply with Rule 16 that

they will grant a new trial without inquiry into the degree of harm caused by the misconduct.

The language of rule 16 (a)(5) is quite clear. Under the rule, a defendant is entitled to the discovery of

> "all results or reports in writing, or copies thereof, of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case and, subject to an appropriate protective order under paragraph (f) any tangible objects still in existence that were the subject of such tests or experiments"

In this case it is clear from the representations of the prosecutor at the violation of probation hearing that the victim had undergone a medical exam and therefore a report of that exam was available. Surely, by October 1998 when the trial of Mr. Anderson took place the prosecutor was aware that such an exam had occurred at Women's and Infant's and the results were negative as to any injuries or of any evidence of sexual assault or sexual activity. The prosecutor was put on notice by defense counsel by the filing of a Rule 26.3 motion of the Rhode Island Superior Court Rules of Criminal Procedure (rape shield statute), that the defendant intended to explore the victim's prior sexual behavior and claims of false accusations of sexual assault. The existence of the June 15, 1995 medical report was at least within the knowledge if not also the possession and control of the prosecutor. This medical report was clearly required to be turned over to the defendant through the discovery process. The failure to disclose this known medical exam report is evidence of the State's deliberate failure to disclose.

This case is closely analogous to State v. Adams 481 A.2d 718 (1984). In Adams the State failed to turn over a report by Dr. Murray who wrote that he saw a bite mark on the arm of the victim and as a result, he made a report and took a cast impression of the bite mark.

Adams contended that the State violated Rule 16(a)(5) when it failed to turn over a copy of Dr. Murray's report. The State in response stated (1) that another doctor, Dr. Sturner wrote, as part of his report, the fact that Dr. Murray wrote a report and had taken a cast impression of the bite mark, therefore the defendant had notice and could have gotten a copy of Dr. Murray's report from the Office of Medical Examiner themselves.

The Supreme Court in Adams disagreed and held the State had a duty to turn over all records, as the language of Rule 16(a)(5) spells out regardless of the fact that Dr. Sturner wrote the information in his report or that the defense could have obtained a copy for themselves. The Court in Adams stated that rule 16(a)(5) does not make disclosure of such reports contingent upon whether the State intends to use such a report at trial. Adams at 724.

The Court in Adams found the non-disclosure of Dr. Murray's report to be deliberate. It is unnecessary to inquire into the degree of harm caused by the non-compliance. State v. Adams 481 A.2d at 724, 725

The defendant Anderson also made a request to be provided evidence favorable to the accused. The United States Supreme in Brady v. Maryland 373 U.S. 83 (1963) held that a criminal defendant due process right to a fair trial is violated whenever, subsequent to an accused's request, the prosecutor intentionally or unintentionally suppresses exculpatory evidence that has a material bearing on questions of guilt or punishment. The prosecutor must disclose the information only if it meets the Brady two-part test; that it (1) constitute either exculpatory or impeachment evidence and (2) be material to the outcome of the case or sentencing. State v. Wyche, 518 A.2d 907 (1986), Giglio v. United States, 405 U.S. 130 (1972).

It is routine in allegations of sexual assault for the alleged victim to be given a medical exam to determine whether injuries are apparent, to see if there is physical evidence to corroborate the victim and to collect evidence that may be considered incriminating against the accused. Most often rape victims undergo what is known as a rape kit exam. The Attorney General is very much aware of this procedure and this routine part of the investigation of rape cases and, the prosecution is often involved in the investigation at the outset.

It is common practice for reports, medical diagnoses and scientific test results of such exams to be made available to the prosecutor or to be secured by prosecutors to assist in the prosecution of their cases. In this case the Attorney General's Department was made aware that such an examination was conducted on the victim as far back as June 26, 1995 the first day of the defendant's violation hearing. In fact it was the prosecutor who alerted the Court of the exam and disclosed for the purposes of the violation hearing the exculpatory nature of the results of the exam. It is common practice under our rules of discovery that such evidence is routinely provided to the defendant in the discovery process.

Another analogous case is State v. Wyche 518 A.2d 907 (1986). Wyche filed for discovery prior to trial and on the eve of trial, which was also a rape case, the State was informed by the examining doctor that a blood alcohol test was conducted on the day the victim was in for a rape test kit and examination. As a result, her blood alcohol level was .208. The State did not have any report of the test results. It was not until after trial that the State revealed the results of the blood alcohol test. Wyche moved to vacate his conviction citing a violation of the defendant's discovery right.

The State in its response in Wyche stated that no test result report was ever turned over to the State and that the results of the blood alcohol test was given orally to him, thus he did not violate the duty to turn over the evidence. Further, the witness herself testified to her "drunken state" therefore the information, if given would have simply corroborated her trial testimony. The State exhorted the Court to adhere to the literal reading of the rule and require the prosecution to deliver only reports and results that are (1) known by the State to be in existence, (2) within the State's custody and control and (3) in writing. Because the prosecutor had no written report or results about the victim's blood alcohol test within his possession, the State in Wyche argued he had no Rule 16 duty to disclose the .208 reading. State v. Wyche, 518 A.2d 910

The Rhode Island Supreme Court in Wyche declined to limit Rule 16 (a)(5) in this fashion. The Court stated

> "There is no disputing that a blood alcohol test was performed June 19, 1984 on Garcia and that it indicated a .208 concentration. In all likelihood some type of written report or record of the test was made in the normal course of hospital procedure. What became of that report is not of concern here. The key factor for this court is the State's knowledge that the .208 reading existed and that the State possessed this information prior to the doctor taking the witness stand. Knowledge plus possession of the results in oral form was sufficient in our belief to trigger disclosure under Rule 16 (a)(5). To require the prosecution to produce written but not oral test results in its possession invites abuse." State v. Wyche at 910, 911.

In addition to the Court's proscription regarding discovery duties, the State was put on notice by the filing of a motion to disclose exculpatory evidence under Brady. In Kyles v. Whitley, 514 U.S. 419 (1995), the Court stated the 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. But whether the prosecutor succeeds or fails in meeting this obligation, the prosecution's responsibility for failing to disclose known favorable evidence rising to a material level of importance is inescapable.

However, our Rhode Island Supreme Court has established its own criteria for evaluating prosecutorial non-disclosure of exculpatory evidence. The Court in In re Ouimette, 115 R.I. 169, 342 A.2d 250 (1975) has taken as their guidepost the Second Circuit Court of Appeal's discussion in United States v. Keogh, 391 F.2d 138 (2nd Circuit 1968) and adopted a variable standard of materiality based on the degree of prosecutional culpability. 115 R.I. at 177, 342 A.2d at 254.

> "When the failure to disclose is deliberate, this court will not concern itself with the degree of harm caused to the defendant by the prosecution's misconduct; we shall simply grant defendant a new trial. The prosecution acts deliberately when it makes a considered decision to suppress . . . for the purpose of obstructing or where it fails to disclose evidence whose high value to the defense could not have escaped . . . its attention. Keogh, 391 F.2d at 146-47, State v. Wyche, 518 A.2d at 910.

The Court in Wyche concluded that when non-disclosure is deliberate, the defendant is entitled to a new trial and this Court will not inquire into the presence of the other factors. The Court went on to hold that it wanted to make clear that questions including deliberate discovery violations under either Ouimette or Rule 16 shall be governed by the same standards. Wyche at 911.

As in Wyche, the State was made aware of the June 15, 1995 examination of the prosecutrix, by his predecessor, from the violation hearing. For the foregoing reasons, defendant moves to have his conviction vacated and a new trial to be ordered.

RANDY ANDERSON

CERTIFICATION

I hereby certify that on July 1, 2009 I delivered a copy of the within Memorandum to the Department of Attorney General, Providence, Rhode Island.