IN THE DISTRICT COURT OF CREEK COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, Plaintiff, v. KENNETH RAY SMITH, Defendant.	CF-2020-0199

DEFENDANT'S MOTION FOR SANCTIONS AND REQUEST FOR HEARING

COMES NOW Defendant Kenneth Ray Smith, by and through his counsel of record Benjamin Fu, and submits the following brief in support of his Motion for Sanctions based on the Government's violation of its discovery obligations pursuant to *Brady v. Maryland*.

RELEVANT BACKGROUND

1. On Friday, June 4, 2021, at approximately 4:00 pm, Counsel for Defendant was notified by Defendant's Wife Manuella Golden that her neighbor Misty Butler had spoken with the Creek County District Attorney's Office earlier that morning.
2. At approximately 4:24 pm based on a summary of what Ms. Golden had been told by Ms. Butler, Defense Counsel filed his Application to Endorse Witness.
3. At approximately 4:26 pm, Defense Counsel was able to establish contact with Ms. Butler and her husband Ben Butler.
4. Ms. Butler informed Defense Counsel that, immediately following Defendant's arrest, she had reached out to the Creek County Sheriff to inform them that she had information and requested an interview. No one ever followed up with Ms. Butler, until approximately June 3, 2021, when Assistant District Attorney Steve Rouse left a voicemail on her phone asking her to contact them. On June 4, 2021, she and her

husband Ben Butler met with ADA Rouse and a female who was identified as a victim witness coordinator at their office in Sapulpa to give their statements.

5. During the meeting, Ms. Butler informed ADA Rouse that she and her husband had been outside trimming trees less than one hundred feet away from Kenneth Ray Smith when he shot Tyrese Boyd. Ms. Butler further informed the prosecution that although she could not see the events, she overheard a female, who she believed to be the State's sole lay witness and mother of the deceased Ms. Theresa Williams exclaim, "Get the gun! Get the gun!" before hearing a commotion and a car driving away.
6. Ms. Butler further informed ADA Rouse that the State's sole fact witness Theresa Williams had conducted a news interview the day following the shooting, which both Butlers viewed and recalled at the time having many clear inconsistencies with what they had heard while standing by the fence. ADA Rouse then asked Ms. Butler what specifically she recalled that was inconsistent, at which time Butler asked to review either her 911 call or the news story to refresh her memory. ADA Rouse never presented Butler the opportunity to refresh her memory with any of the requested materials. Butler then informed ADA Rouse that she was familiar with Defendant and his wife, that they were good people, and that he was defending himself that day.
7. Mr. Ben Butler then spoke separately with ADA Rouse. During this conversation, Mr. Butler informed ADA Rouse that he was standing near the fence with his wife when he overheard a series of shots, breaking glass, and a woman exclaiming, "Get the gun!" ADA Rouse then asked, "Would it be accurate to say it wasn't the lady who lives there?" Mr. Butler responded that he was comfortable saying the voice he heard was

neither of his neighbors' voices, and that he believed the voice he heard belonged to the same woman he saw give an interview on the news that evening.

8. When asked if they had ever spoken with the Defense, Ms. Butler responded that she had and Mr. Butler responded that he had not.
9. The Butlers do not appear in any of the discovery provided by the State of Oklahoma.
10. The Butlers have not been endorsed by the State of Oklahoma
11. Misty Butler's 911 call has not been provided to Defense.
12. Upon finishing phone conversations with the Butlers, Defense Counsel called OSBI Agent Marty Wilson who confirmed for Defense Counsel that no one at the OSBI had spoken with Misty Butler and she was not a witness in his investigation.
13. Defense Counsel then sent a text message to ADA Rouse inquiring, "You got any discovery you may want to have disclosed before our discovery cutoff?" ADA Rouse then placed a phone call to Defense Counsel, which Defense Counsel promptly returned.
14. During this phone conversation, Counsel for Defense asked ADA Rouse if discovery was complete in reference to a witness list provided to Defense on June 3, 2021, prior to meeting the Butlers. ADA Rouse responded that discovery was complete and that the list was indeed their final list. Defense Counsel then inquired if ADA Rouse had spoken with any other witnesses who were not on the State's witness list, and Rouse responded in the negative, never mentioning Butler. Defense Counsel and ADA Rouse then briefly discussed the lack of any plea negotiations and some stipulations that would facilitate smoother testimony at trial,

At the end of the conversation, after no mention of the Butlers, Defense Counsel wished ADA Rouse a good weekend and stated, "Let me know if anyone steps off the grassy knoll to tell you that my client is not guilty." To which ADA Rouse mentioned for the first time that he had met with "some neighbors" that morning. Defense Counsel then expressed considerable frustration that the Government had not provided any notice, written or oral, of this clearly exculpatory evidence obtained just prior to the discovery cutoff. When Defense Counsel expressed that this was a clear violation of the Government's obligation to disclose all exculpatory evidence pursuant to *Brady v. Maryland,* counsel for the State responded that he had been told by Ms. Butler that she had spoken with Defense counsel and he believed that relieved him of any duty to inform Defense that she had made any statements favorable to the defense and, further, he did not believe disclosure to be necessary as he did not see these statements as exculpatory, despite having argued previously in response to Defendant's Motion to Dismiss that Defendant was not entitled to dismissal precisely because "[n]o one could say the victim had a gun when the Defendant shot him," *Response to Defendant's Motion to Dismiss and Brief In Support,* 2, and despite the District Court's reliance on such an inference in denying Defendant's Motion to Dismiss. *See Order Denying Defendant's Motion to Dismiss*, 3 ("11. While a number of witnesses claimed that Boyd had a gun and had placed it in the trunk, no gun was ever recovered").

ARGUMENT

In *Brady,* the Supreme Court stated, "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 v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196 (1963).

> The government's duty to disclose material evidence favorable to the accused is rooted in the premise that the sovereign's ultimate interest in criminal prosecution is not to maximize convictions for their own sake, but to ensure that justice shall be done. This goal entails a commitment to the principle that every defendant shall receive a fair trial. When exculpatory or impeachment evidence might make the difference between conviction and acquittal, the failure to disclose that evidence to the defense deprives the defendant of a fair trial.
>
> It would eviscerate the purpose of the *Brady* rule and encourage gamesmanship were we to allow the government to postpone disclosures to the last minutes, during trial. As the Second Circuit noted in *Leka v. Portuondo*, the belated disclosure of *Brady* material tends to throw existing strategies and trial preparation into disarray. It becomes difficult to assimilate new information, however favorable, when a trial already has been prepared on the basis of the best opportunities and choices then available. If a defendant could never make out a *Brady* violation on the basis of the effect of delay on his trial preparation and strategy, this would create dangerous incentives for prosecutors to withhold impeachment or exculpatory information until after the defense has committed itself to a particular strategy during opening statements or until it is too late for the defense to effectively use the disclosed information. It is not hard to imagine the many circumstances in which the belated revelation of *Brady* material might meaningfully alter a defendant's choices before and during trial: how to apportion time and resources to various theories when investigating the case, whether the defendant should testify, whether to focus the jury's attention on this or that defense, and so on. To force the defendant to bear these costs without recourse would offend the notion of fair trial that underlies the *Brady* principle.
>
> … Where the district court concludes that the government was dilatory in its compliance with ***Brady***, to the prejudice of the defendant, the district court has discretion to determine an appropriate remedy, whether it be exclusion of the witness, limitations on the scope of permitted testimony, instructions to the jury, or even mistrial. The choice of remedy is in the sound discretion of the district court.
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> *United States v. Burke*, 571 F.3d 1048, 1053-54 (10th Cir. 2009)(internal citations omitted).

The State of Oklahoma's lack of candor and diligence in their sacred duty to disclose clearly material and exculpatory evidence to the Defense is alarming. As is abundant in the record, Ms. Williams is far from credible. She has denied her son's extensive history of mental health to OSBI

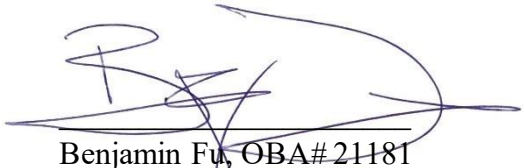
agents, despite texting extensively with Jasalynn Snell that he was dangerous and mentally unstable the morning of his death. She denied destroying several jars of marijuana at the crime scene, despite clear evidence that several broken glass jars of marijuana are plainly visible next to her vehicle and several witnesses testifying that she had indeed broken them following Boyd's death. Further, and most significantly, Williams is the only witness who denies seeing Boyd with a gun, despite the fact that: (1) multiple witnesses had seen him with a firearm that day; (2) Jasalynn Snell testified that Boyd had a .40 cal Springfield XDM handgun; (3) numerous witnesses testified to seeing Boyd place a bag of guns into the trunk of a white BMW; (4) numerous witnesses testified that Boyd was reaching for the trunk immediately after exclaiming that he would shoot Defendant and others; (5) multiple witnesses testified that Kalib Springer removed some items from Boyd's person; (6) Boyd's pocket was observed to be turned out as though an item had been removed; (7) upon arrival at the scene, agents with the OSBI observed a 250 count box of live Magtech brand .40 caliber cartridges inside the trunk of the BMW; and (8) OSBI agents also observed a duffel bag between the BMW and a nearby car containing a Bowie knife, a machete, and one empty Pro Mag brand twenty six round .40 cal magazine for a Springfield XDM handgun.

Consequently, when the Butlers informed ADA Rouse that they had overheard Ms. Williams exclaim to others to "get the gun," the exculpatory nature of such evidence was readily apparent. To deny its clear exculpatory value would be obtuse bordering on the unethically absurd. Pursuant to *Brady*, the Government is obligated to provide a full summary of any exculpatory statements or evidence within their possession or knowledge. Their failure to do so in this instance is shocking and merits this Court's very serious scrutiny.

CONCLUSION

The State of Oklahoma's withholding of exculpatory evidence is in direct violation of *Brady v. Maryland*. This Court should not abide such willful violations of the rule of law, and should consider dismissal of above-entitled cause for such gross misconduct or, failing that, a rehearing on the issue of Defendant's Lawful Use of Defensive Force in light of this evidence. Further, this Court should admonish the State of Oklahoma to provide any and all exculpatory evidence in the possession of either their agents or themselves and, should this matter proceed to trial, instruct the jury of the State's misconduct and inform them that they may consider such evidence in determining whether or not the Defendant's Use of Force in Self Defense was Lawful.

Respectfully Submitted,



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CERTIFICATE OF HAND DELIVERY

I hear by certify that a copy of the foregoing instrument was delivered via email on June 7, 2021, to the office of the following:

Creek County District Attorney's Office
222 East Dewey
Sapulpa, OK 74067