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SUPERIOR COURT OF CALIFORNIA COUNTY OF SAN FRANCISCO

PEOPLE OF THE STATE OF CALIFORNIA, ) SCN: 2159246

)

Plaintiff, )

)

)

# ) MOTION FOR DISMISSAL )

**WITH PREJUDICE UNDER**

) **THE DUE PROCESS**

) **CLAUSE**

DAVID HILL, )

)

Defendant. )

 )

# STATEMENT OF FACTS

On October 19, 2006, Barry Parker testified that he had been shown a six-person photo- spread at SFGH in the early hours of April 11, 2004 by Inspectors Toomey and Pera (the case agents in this case) and had stated that Number Two (Reuben Sibley) “closely resembled” the shooter. This statement had never been disclosed to the defense despite repeated, frequent and specific requests for any statements of Barry Parker on April 10 or April 11, 2004 including repeated, frequent and specific requests for any statements of Barry Parker at SFGH during that very same time frame.

Defense requests for any such statement by Mr. Parker had been made formally and informally. The defense requests had been made orally and in writing. The requests had been translated into direct orders of the Court on occasions too numerous to recount here.

There is absolutely no conceivable legal justification for withholding this statement for two and one half years. There is even less justification for withholding the statement in the face of the repeated, frequent and specific requests by the defense.

This statement was clearly discoverable under PC 1054. More importantly, the statement is exculpatory both in substance and as impeachment. On a substantive level, it suggests that Mr. Sibley might have been the shooter and would have constituted the basis for a reasonable doubt defense at trial. On an impeachment level, it suggests strongly that Mr. Parker’s credibility, memory, or both are suspect and would have contributed significantly to a reasonable doubt defense at trial.

Had this statement been disclosed, undersigned counsel might have advised Mr. Hill not to concede liability and not to argue self defense in a case involving the death of an officer. Had this statement been disclosed at or near the time that it was made, undersigned counsel would have investigated Mr. Sibley and a reasonable-doubt theory based upon Mr. Sibley’s liability.

Mr. Sibley is now dead and the witness and information related to Mr. Sibley have been made stale by the passage of two and one half years of silence by the SFPD regarding this statement.

Mr. Parker’s statement also seems to be at odds with Mr. Parker’s unqualified placement of his signature and star number on Mr. Sibley’s picture. In this connection, four SFPD inspectors testified in sealed EC 402 hearings that they could not recall Mr. Parker having said anything at all when he was shown the photo-spread or when he signed the picture or placed his star number on the picture.1 Later, during trial, and in direct contradiction to her testimony

1Incredibly, Ms. Pera and Mr. Toomey testified during the closed hearings that they could not recall being in the trauma room when Mr. Toomey showed the photo-spread to Mr. Parker.

Even if Mr. Parker had clearly excluded Reuben Sibley as the shooter, it stretches the imagination that two homicide inspectors would not recall having shown a photo-spread to the

under oath, Ms. Pera “recalled” that Mr. Parker had stated “no” when shown the photo-spread. This alleged denial was, in the tradition of this case, revealed at trial and never disclosed to the defense despite repeated requests and specific questioning and testimony under oath.

surviving officer in a case involving the death of an officer. Only two photo-spreads have been shown to Mr. Parker in the history of this case.

The failure to disclose the Parker statement, the fantastic testimony that four inspectors could not recall Mr. Parker having placed his signature and star number on Mr. Sibley’s picture, and Ms. Pera’s epiphany at trial are but three examples of a well-established pattern of misconduct by the SFPD in this case – a pattern involving numerous witnesses known to the Court and the defense and quite possibly many others not yet known.2 Indeed, in light of the pattern and practice of the SFPD in this case, it is more than probable that there are numerous evidentiary issues in this case which have not yet been discovered by the defense.

# ARGUMENT

On October 19, 2006, immediately after Mr. Parker’s testimony, the defense requested a mistrial under the Due Process Clause, the Compulsory Process Clause, the Effective Assistance Clause, and the Confrontation Clause of the United States Constitution and under California Penal Code §1054 et seq. and *Brady/Giglio*. The motion was held in abeyance until several discovery issues were resolved.

In light of developments in this case, the defense now moves for dismissal of all charges with prejudice. The motion is based upon a failure to disclose exculpatory evidence as well as a failure to preserve exculpatory evidence (specifically, evidence related to the investigation of Reuben Sibley).

The prejudice to the defense is clear. Having been denied access to evidence which would have supported a reasonable doubt defense, the defense could not investigate a persuasive reasonable doubt defense and admitted liability at trial.

2For example, Inspectors Toomey and Pera sat through numerous hearings regarding federal discovery issues (and specifically regarding interviews of Marvin Jeffery and Berry Adams) without revealing that they had participated in many of these interviews. The Court has already ruled that some of these interviews included exculpatory information.

The defense respectfully submits that dismissal is dictated by a pattern and practice by the SFPD which includes withholding or failing to preserve (1) the information reflected in the Statement of Facts section above, and (2) the exculpatory items of evidence listed below.

1. Any report or memorandum related to the identification of Reuben Sibley on April 10 or April 11, 2004.
2. Any report or memorandum related to the questioning of Barry Parker at SFGH on April 10 or April 11, 2004.
3. Inspector McMillan’s “tip” that Reuben Sibley was the shooter that was the catalyst for the photo-spread at SFGH.
4. The failure to disclose two exculpatory FBI 302 interviews of Berry Adams (in November and December, 2004, and involving SFPD Inspectors McMillan and Philpott). This failure was found by this Court to be a discovery violation requiring a one-week continuance and a jury instruction.3
5. The “missing” interviews of Berry Adams not yet provided to the defense.4
6. The failure to disclose Mr. Adam’s federal immunity agreement (witnessed and signed by Inspector McMillan).
7. The statements of Marvin Jeffery related to both Berry Adams and Marvin Jeffrey disclosed mid trial -- all which were made in the presence of SFPD inspectors including Toomey and Pera.

3 The Court will have to refashion this Jury Instruction in light of the exclusion of Berry Adams as a witness.

4As argued in a separate letter brief, the defense has in its possession notes of FBI interviews involving SFPD inspectors, but does not have the corresponding FBI 302 interviews. This indicates that the “comprehensive” review of all interviews of Berry Adams was not, in fact, comprehensive. This conclusion is supported by Mr. Adams’ recollection, relayed by his counsel and confirmed by FBI agent Van Nimitsilpa, that Mr. Adams was interviewed on many many occasions.

1. The failure to disclose the tape cassette of an exculpatory interview of Marvin Jeffery made in June, 2004, while in Las Vegas.
2. The failure to disclose a police report of Inspector Toomey and Inspector Pera meeting with postal inspectors on behalf of Marvin Jeffery in Las Vegas in August, 2004.
3. Ex parte documents filed by the defense, and withdrawn in light of Court’s rulings, containing *Brady* material for both Berry Adams and Marvin Jeffery related to their criminal conduct.
4. The “Lowder Letter” to Harry Dorfman (already submitted to the Court) regarding Marvin Jefferey’s lack of credibility and the lack of credibility of Inspector Whitfield, one of Mr. Jefferey’s handlers. The letter was provided to the defense by independent counsel mid trial.
5. A chronological report of investigation in this case which would have reflected the numerous investigative efforts related to Reuben Sibley including the Contra Costa dog search.
6. Reports, notes or memoranda of the searches of residences occupied or inhabited by Reuben Sibley as discussed in the taped statement of Reuben Sibley.
7. The failure to preserve unknown and unrecorded police contacts related to this case. In this connection, the defense learned on Monday, November 20, 2006, that Chief Fong ordered that SFPD officers not directly involved in the investigation of Officer Espinoza’s death not record or preserve information related to this case.5

The defense submits that in light of the history of this case and the numerous items listed above, this Court cannot assume that this list exhausts the SFPD’s failure to disclose and preserve.

5The defense has represented this order as it was described by Inspector Chaplin during a break in the proceedings. The defense has requested but not yet received the text of this directive.

The defense further submits that dismissal with prejudice is warranted not only in light of the pattern and practice of withhholding exculpatory information, but in light of a pattern and practice of attempting to ambush the defense at trial by not disclosing inculpatory information or testimony. This information and testimony includes:

1. Ronan Shouldice’s measurements of the “dimple” and his expert trajectory opinions.
2. Inspector Toney Chaplin’s opinion that Third Street and Palou Avenue would be a safer place to purchase marijuana as opposed to Newhall Street and Newcomb Avenue.
3. The statements of David Hill which Officer Shaughn Ryan reported less than a week before trial.
4. The prosecution’s attempt to reverse major strategic decisions on the eve of trial.

# CONCLUSION

The SFPD has from the outset of this case failed to preserve and disclose exculpatory information. These failures are too numerous and fundamental to be attributed to negligence. The contradictions and omissions with respect to the SFGH photo-spread, in particular, rise to the highest level as they involve the principal witness in this case and the two case agents.

This Court cannot condone this pattern and practice. The only remedy which can fully redress the injury done to Mr. Hill is dismissal with prejudice.

DATED: December 9, 2004 November 27, 2006

Respectfully submitted,

MARTIN ANTONIO SABELLI

Attorney for DAVID HILL

*From the outset of this case, the San Francisco Police Department engaged in a vindictive prosecution against David Hill by establishing a pattern and practice of withholding evidence favorable to David Hill in violation of law and David Hill’s constitutional rights.*