STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: July 19, 2017)

STATE OF RHODE ISLAND	**:**	
VS.	**:**	**P2/15-1538 AG**
WILLIE WASHINGTON	**:**	**(Supreme Court No. 16-151-C.A.)**

DECISION

KRAUSE, J. On December 8, 2015 a jury convicted Willie Washington of shooting a food delivery driver in a fit of road rage in the middle of the Providence College campus on November 15, 2014 at about 1:00 a.m. The evidence at trial included an anonymous 911 caller who offered the license plate of the shooter's vehicle. Two visiting nursing students from Connecticut identified the defendant as the shooter at separate show-ups after the police had arrested him during a foot chase not far from the campus and within about ninety minutes of the shooting. This Court denied the defendant's motion for a new trial on December 18, 2015, and he appealed his conviction to the Supreme Court.

In March of this year, the defendant's private investigators learned that the 911 caller was Stephen Rasch, then a nineteen-year-old Providence College freshman from Dallas, Texas. After Washington's appellate attorneys from the Public Defender's Office spoke with Rasch on April 18 and May 1, 2017, the defendant interrupted his appeal, complaining to the Supreme Court that the state's trial attorneys had actually known about Rasch prior to trial. He has also alleged that the prosecutors were aware that Rasch was accompanied by another person who was a percipient witness to the incident. Invoking Brady v. Maryland, 373 U.S. 83 (1963) and state decisional

law, the defendant accused the state of intentionally concealing this information and contended that those nondisclosures have earned him a new trial.

In his pleadings before the Supreme Court, accompanied by affidavits of the appellate attorneys who had spoken with Rasch, the defendant avowed that the state "*deliberately suppressed and misstated the facts*" (his emphasis) and "intentionally withheld and misrepresented" facts to support the admissibility of Rasch's 911 call. (Def.'s May 2, 2017 Supreme Ct. Suppl. Mem. at 1-2; Def.'s May 4, 2017 Supreme Ct. Reply at 1.)[1] The defendant specified that "the state withheld the following critical information from the defense concerning that 911 call":

1. "The identity of the 'anonymous' 911 caller - now known to the defense as Chase Rasch, a student at Providence College - who reported the purported license plate of the shooter's vehicle;
2. "That Chase Rasch spoke to police at the scene immediately after the shooting and provided police with his name and contact information;
3. "That one of the trial prosecutors spoke with Chase Rasch before trial, in the summer of 2015, by calling him on the same cell phone number that placed the 911 call; and
4. "That after speaking with Chase Rasch, the state decided not to call Mr. Rasch as a witness, list him in discovery, or disclose his identity to the defense." (Def.'s Apr. 28,

[1] This Court will take judicial notice of all the remand pleadings filed in the Supreme Court. Although the affidavits of the defendant's appellate attorneys were not submitted as exhibits at the remand hearing, they are part of the package presented by the defendant to the Supreme Court in support of his remand motion. The Remand Order includes that portion of the record, and both parties have referenced the affidavits in their briefs. (Def.'s Mem. 2-3, n.2; State's Mem. at 10-11.) See Quillen v. Macera, ___ A.3d ___, 2017 WL 2347111, at *4 (R.I. May 30, 2017), In re Michael A., 552 A.2d 368, 370 (R.I. 1989).

2017 Supreme Ct. Mem. in Supp. of Mot. to Remand at 2; Def.'s May 2, 2017 Supplement at 1).

On May 15, 2017, over the state's objection, the defendant secured from the Supreme Court an order remanding the case and directing the Superior Court to conduct a hearing within ninety days to "decide the defendant's Brady-related motion for new trial" (hereafter referred to as the "Remand Order" and the "Remand Hearing"). On Monday, June 19, 2017, this Court commenced and concluded the hearing. Witnesses included the three lawyers who conducted the trial: Special Assistant Attorneys General Joseph McBurney and his co-counsel Peter Roklan; the defendant's trial counsel, Assistant Public Defender Sarah Potter; and Stephen Rasch, the 911 caller whom the defendant learned of in March of this year.

Exhibits which were submitted to the Court by agreement included all of the 2015 Superior Court pretrial and trial transcripts, as well as transcripts of Rasch's 911 call, the March 24, 2017 interview of Rasch by the defendant's private investigator Edward Pelletier, the May 1 and May 2, 2017 interviews of Rasch by Providence Police Det. Angelo A'Vant (accompanied by Det. Jonathan Primiano on May 1), copies of November 24, 2014 text messages between Rasch and his "Uber driver" friend, Alberto Bautista, and an ATT telephone record of the Attorney General. Audio c.d.'s of the 911 call and of the interviews were also submitted. After the hearing, the Court took the matter under advisement, pending a written ruling.[2]

I. Motion to Recuse

At the outset, this Court is obliged to address the defendant's recusal motion, which he filed four days after the Remand Hearing had already been completed. The defendant proposes

[2] Those transcripts are abbreviated herein as "RH" for the June 19, 2017 Remand Hearing; "Pelletier" for private investigator Edward Pelletier's interview of Rasch on March 24, 2017; "A'Vant May 1 (or May 2)" for his two interviews of Rasch on those dates in 2017. Defendant's appellate attorneys did not record their two conversations with Rasch.

disqualification because Mr. McBurney was once teamed with Allison Krause (this Court's daughter who, like Mr. McBurney, is also a Special Assistant Attorney General) to assist in the prosecution of an unrelated case in another courtroom. In essence, the defendant suggests that a rational observer would conclude that this Court would accord extra weight to Mr. McBurney's credibility *versus* that of Ms. Potter purely because Mr. McBurney and Allison Krause were simply doing their assigned jobs: jointly pursuing an entirely unrelated matter, with completely different facts and allegations, before a different judge, regarding an unconnected case which was informed long before the Supreme Court ever saw Willie Washington's remand motion. Conspicuously, that joint prosecution which the defendant tenders as key support for his recusal motion was, in the end, never even contested. It was resolved by a *nolo contendere* plea in another courtroom before Washington ever launched his argument at the recusal hearing. Indeed, Mr. McBurney was not even present in that courtroom for that disposition.[3]

The defendant, through present counsel, Michelle Alves, a senior Assistant Public Defender, has admitted that the motion is not one which would support a claim of actual prejudice or favoritism. At the June 26, 2017 hearing on the motion, Ms. Alves, and perforce her client, admitted that the recusal claim is "not one of actual bias or actual failure to be impartial." (Recusal Hearing Tr. 5.)[4] Instead, the defendant asserts that circumstances exist which would

[3] State v. Barrous, P2/15-1522A.

[4] Concessions and admissions of attorneys are binding upon their clients. Lima v. Holder, 758 F.3d 72, 79 (1st Cir. 2014) ("Generally speaking, '[a] party's assertion of fact in a pleading is a judicial admission by which it normally is bound throughout the course of the proceeding.' . . . And 'an admission of counsel during trial is binding on the client' if, in context, it is 'clear and unambiguous."') (Citations omitted.); McLyman v. Miller, 52 R.I. 374, 161 A. 111, 112 (1932) ("Admissions of attorneys bind their clients in all matters relating to the progress and control of the case.") (Citation omitted.); accord, Washington Trust Co. v. Bishop, 78 R.I. 157, 158, 80 A.2d 185, 186 (1951).

cause "reasonable [] members of the public or a litigant or counsel to question the trial justice's impartiality." State v. Clark, 423 A.2d 1151, 1158 (R.I. 1980). He is mistaken.

Most importantly, and entirely dispositive of his motion, is the defendant's considerable misjudgment as to whose credibility is really in the balance. It is not at all a credibility contest between Mr. McBurney and Ms. Potter. Rather, it is a question of whether Stephen Rasch's testimony can withstand scrutiny. The success or failure of the defendant's new trial motion is essentially riding on Rasch, not McBurney or Potter. Rasch is the central witness of the Remand Hearing, and it is his credibility which is at stake. After all, if the Court finds that Rasch never offered any Brady information to Roklan, the defendant's motion is valueless *ab initio.*

As discussed, *infra*, it is entirely unnecessary for this Court to weigh what the three attorneys said to each other. To the extent that there need be a paired credibility appraisal at all, it is between Roklan and Rasch. From its front row observation post, this Court easily finds that Rasch fares very badly on his own scale and is acutely deficient on a scale with Roklan.

It is axiomatic that trial judges should recuse themselves if they are unable to render a fair or impartial decision, Mattatall v. State, 947 A.2d 896, 902 (R.I. 2008). It is "an equally well-recognized principle that a trial justice has as great an obligation not to disqualify himself or herself when there is no sound reason to do so." Kelly v. RIPTA, 740 A.2d 1243, 1246 (R.I. 1999) (citing State v. Clark, 423 A.2d at 1158). The proponent of a recusal motion shoulders a "substantial burden" to prove the existence of judicial bias. In re Jermaine H., 9 A.3d 1227, 1230 (R.I. 2010). The defendant has failed to carry his burden by the widest of margins.

* * *

So that the record is not incomplete, other fatal shortcomings of the defendant's partiality motion invite exposure.

He also fails to recognize that the test for recusal extends far beyond Clark's three-part evaluation. The Rhode Island Supreme Court has erected an additional barrier to a partiality motion. "The party seeking recusal bears the burden of establishing that the judicial officer possesses a personal bias or prejudice by reason of a preconceived or settled opinion of a character calculated to impair his or her impartiality seriously and to sway his or her judgment." State v. Howard, 23 A.3d 1133, 1136 (R.I. 2011) (internal quotations and brackets omitted). Indeed, the United States Supreme Court has decreed that the moving party must demonstrate that the court's purported impartiality is "so extreme as to display clear inability to render fair judgment." Liteky v. United States, 510 U.S. 540, 551 (1994); see United States v. Howard, 218 F.3d 556, 566 (6th Cir. 2000). The defendant has not only completely failed to make any such showing, he has openly admitted that his recusal motion does not even include such reproaches.

Additionally, ill-timed recusal motions, such as this one, "result in increased instances of wasted judicial time . . . and a heightened risk that litigants would use recusal motions for strategic purposes . . ." Preston v. United States, 923 F.2d 731, 733 (9th Cir. 1991) (citation omitted); In re Medrano Diaz, 182 B.R. 654, 658 (D.P.R. 1995) ("Such delay in taking action surely results in a waste of judicial resources and can only be seen as [an] attempt to take a second bite of the proverbial apple, that is, to manipulate the judiciary in order to avoid the consequences of an adverse judgment.").

The defendant's stated excuse for filing this post-hearing recusal motion includes his professed surprise by Mr. McBurney's testimony. (Recusal Hearing Tr. 2-3.) That Mr. McBurney (or, for that matter, Mr. Roklan) would flatly deny withholding any Brady information could scarcely have been a revelation to the defendant. He knew full well, from the state's denial of his accusations and from its objection to his remand request in the Supreme

Court, that the prosecutors would most assuredly challenge and contradict his claims of nondisclosure.

* * *

The Remand Hearing has been concluded, but the defendant is demanding a full reprise of all the witnesses and is shopping for a different judge, not because of any actual bias or predisposition on the part of this Court (which he and his attorney have acknowledged do not support the partiality motion), but because of purely mistaken conjecture. Like Mr. Justice Breyer's unicorn, the defendant's recusal motion finds its home in the imagination, not in the courtroom. Henderson v. United States, 133 S. Ct. 1121, 1129 (2013).

The defendant's recusal motion is denied.

II. Motion for a New Trial

Brady, et al.

Quite apart from its discovery obligations pursuant to Rule 16 of the Rhode Island Superior Court Rules of Criminal Procedure, the state's pretrial disclosure responsibilities also have constitutional dimensions which have been addressed in Brady and countless other decisions by the United States and Rhode Island Supreme Courts. Cases such as Tempest v. State, 141 A.3d 677 (R.I. 2016), State v. Wyche, 518 A.2d 907 (R.I. 1986), Turner v. United States, ___ U.S. ___ (No. 15-1503, June 22, 2017), and myriad others address a prosecutor's obligation to disclose exculpatory information, and they prescribe tests to determine whether or not a failure to do so was intentional and the consequences to be assessed for deliberate nondisclosure. The rules themselves are not particularly complex; it is the Brady examination itself which is "fact intensive." Turner, slip op. at 2. What is gleaned from Brady and its progeny, in nutshell fashion, are the following principles:

- The Brady decision holds that if the prosecution has suppressed evidence that would be favorable to the accused, and that evidence is material to guilt or punishment, the defendant is entitled to a new trial. Tempest, 141 A.3d at 682.
- Rhode Island law extends Brady: When the failure to disclose is "deliberate," the degree of harm to the defendant is not considered, and a new trial will automatically be granted. Tempest, 141 A.3d at 682.
- The prosecution acts "deliberately" (1) when it makes a considered decision to suppress for the purpose of obstructing, or (2) where it fails to disclose evidence whose high value to the defense could not have escaped its attention. Tempest, 141 A.3d at 683.
- Impeachment evidence (even if it appears facially inculpatory), as well as exculpatory evidence, falls within the disclosure rules. United States v. Bagley, 473 U.S. 667, 676 (1985).
- If the nondisclosure is not deliberate, the defendant is not entitled to a new trial unless he demonstrates that the undisclosed evidence is "material." Bagley, 473 U.S. at 682; see DeCiantis v. State, 24 A.3d 557, 571 (R.I. 2011).
- Material evidence, either in the nature of exculpatory or impeachment evidence (unless the latter is merely cumulative), must be sufficiently central to the criminal case. State v. Briggs, 886 A.2d 735, 755 n.8 (R.I. 2005).
- Evidence is "material" if there is "a reasonable probability" that, had it been disclosed, "the result of the proceeding would have been different." Lerner v. Moran, 542 A.2d 1089, 1091 (R.I. 1988); Bagley, 473 U.S. at 682; State v. Nickerson, 94 A.3d 1116, 1125 (R.I. 2014).

- A '"reasonable probability"' is a probability sufficient to '"undermine confidence in the outcome."' Lerner, 542 A.2d at 1091 (quoting Bagley, 473 U.S. at 682).
- The materiality of undisclosed evidence must be assessed in light of all of the evidence adduced at trial. DeCiantis, 24 A.3d at 573; United States v. Paladin, 748 F.3d 438, 444 (1st Cir. 2014).

The Remand Order

The defendant persuaded the Supreme Court to remand this case by alleging four *deliberate* Brady violations. In support of his new trial motion before this Court, however, he has included another theory of relief ("inadvertent nondisclosure") which he never presented to the Supreme Court. The state rightly contends that this Court is not permitted to stray beyond the boundaries limned by the Remand Order and urges this Court to restrict its analysis to the intentional nondisclosure allegations which the defendant espoused in the Supreme Court.

The Rhode Island Supreme Court has on a number of occasions reminded lower courts and administrative tribunals that they are not free to expand the record and reach beyond that which is prescribed in remand orders, especially with respect to engrafting legal theories which have not been included in its directives. In Sansone v. Morton Mach. Works, Inc., 957 A.2d 386 (R.I. 2008), the Court said:

> "We hold that the Superior Court transgressed the extent of our remand by entertaining more than the remand's limited purpose as expressed in our order. We consistently have held that, on remand, the lower courts may not 'exceed the scope of the remand or open up the proceeding to legal issues beyond the remand." *** Known as the 'mandate rule,' this doctrine 'provides that a lower court on remand must implement both the *letter and spirit* of the [appellate court's] mandate, and may not disregard the explicit directives of that court.' *** Indeed, 'the opinions of this Court speak forthrightly and not by suggestion or innuendo' and it is therefore 'not the role of the trial justice to attempt to read 'between the lines' of our decisions.'" Id. at 398 (emphasis in original text; citations omitted).

The defendant is entitled to a hearing and a decision based upon Brady and Wyche's disdain for deliberate nondisclosure. That is the theory upon which he procured the Remand Order, which expressly adverts to the defendant's request to file "a motion for new trial based on the *state's alleged violations*." (Emphasis added.) Those alleged violations target the state's purportedly deliberate concealment and intentional misstatements of evidence regarding the 911 call. The new trial motion which he has filed now professes that evidence may have been "*inadvertently suppressed."* (Def.'s Mot. for New Trial at ¶ 2, and his Mem. at 21, *et seq*.) Unlike deliberately withheld evidence, which automatically results in a new trial, evidence which was inadvertently omitted requires the defendant to satisfy a "materiality" test before a new trial will be awarded. In other words, if the disclosure is inadvertent or, say, negligent, as the defendant now additionally posits, he is not entitled to a new trial if the materiality meter does not register "a reasonable probability" that, had the matter been disclosed, "the result of the proceeding would have been different." Briggs, 886 A.2d at 755; Bagley, 473 U.S. at 682.

This Court will assess the merits of the defendant's new trial motion principally in the context of the four allegations of deliberate nondisclosure which prompted the Supreme Court to remand the case. To the extent that a new accusation of deliberate nondisclosure has been alleged, it will also be addressed so that the record is complete at this end.

First Allegation of Nondisclosure

> *"The identity of the 'anonymous' 911 caller - now known to the defense as Chase Rasch, a student at Providence College - who reported the purported license plate of the shooter's vehicle."*

At the Remand Hearing, Rasch initially testified during direct examination that he had divulged his name to Roklan. (RH at 69, 92, 93.) During cross-examination, however, Rasch quickly retreated to and reaffirmed his earlier admissions to Det. A'Vant that not only had he not

offered anything of value to Roklan, he had *never* disclosed his identity to him. (A'Vant May 2, 2017 at 5-6.) As Rasch said at the Remand Hearing, "I was not cooperative." (RH at 104.) Even on redirect examination, Rasch refused to confirm his direct testimony that he had given his name to Roklan. Id.[5]

During his May 1, 2017 interview with Det. A'Vant, Rasch explicitly said that Roklan "had no idea who I was." (A'Vant May 1, 2017 at 25.) The following day, when Det. A'Vant asked him if had wanted "to provide any information" to Roklan, Rasch said, "No, I did not." (A'Vant May 2, 2017 at 4.) At the Remand Hearing, Rasch was confronted with and conceded the accuracy of his dialogue with A'Vant on May 2, 2017:

> "Q: He [Roklan] had no idea who you were at that point.
>
> "A: Correct.
>
> "Q: And he had no idea at the time of the conversation and *after that conversation, he still had no idea who you were, is that correct?*
>
> "A: *To the best of my knowledge, yes*.**"** (RH at 104, referencing A'Vant May 2, 2017 at 5-6; emphasis added.)

It is inconceivable that Rasch, who so desperately wanted to conceal his identity in order to avoid becoming a witness in the case, would have revealed his name and contact information. From the outset, when he made the 911 call, Rasch had assumed his identity was hidden and that he would remain anonymous. E.g., "I thought when you called 911 that you were relatively anonymous and I certainly didn't think that [the 911 call] was gonna be utilized within a trial." (A'Vant May 2, 2017 at 6). Not only was Rasch "utterly shocked" that he had even been

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[5] Incredulously, Rasch blithely testified that his name was not of "super personal" significance. (RH at 114.) For an individual who acknowledged that he had been "traumatized" by the shooting (RH at 103), was loathe to involve himself in any possible way as a witness, and "knew that the more information that I provided [to Roklan], the more likely I would have to probably testify" (RH at 104), this Court finds Rasch's disclaimer that his name was not of personal significance entirely implausible and quite unbelievable.

discovered (RH at 102; A'Vant May 2, 2017 at 9), he also expressed displeasure that his 911 call was even aired at trial: "I didn't want to testify against him . . . they used my 911 call in court, correct? . . . **[**I]s that allowed? I mean, I didn't sign off on that. I mean, is that okay? Are they allowed to do that? It's a public record or what?" (Pelletier at 10.)[6]

Throughout the interviews with Detective A'Vant as well as with the defendant's private investigator Pelletier, and during his testimony at the Remand Hearing, Rasch made it "abundantly clear" (RH at 83, 103) that he never had any intention whatsoever of getting involved in the case. "I really didn't want any part of it and I think I made it clear to Mr. Roklan." (A'Vant May 2, 2017 at 3). As Roklan himself, a bit roughly but entirely credibly, put it: "The guy was basically telling me to go screw." (RH at 29.)

Rasch eventually admitted that it was not until about a year and a half *after* Roklan's call that he ever identified himself as the 911 caller. On St. Patrick's Day, March 17, 2017, Gil Wilson, a Texas private investigator who had been engaged by the defendant, called Rasch and confronted him with his belief that Rasch had made the 911 call. At the Remand Hearing, Rasch acknowledged that he had confirmed Wilson's suspicions, and he also acknowledged on cross-examination that his disclosure to Wilson was the first time he had disclosed to anyone that he had made that 911 call. (Remand Hearing at 109.)[7] Additionally, he said, it was the first time he had ever revealed the identity of his friend, the "Uber driver," Alberto Bautista.

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[6] All 911 calls, whether or not anonymous, reflect the number of the telephone being used to make the call.

[7] When pressed by defense counsel on that disclaimer, Rasch refused to indulge in or accommodate her speculation:

> Q. And during that conversation, do you recall whether or not there was any discussion of you making the 911 call?
> A. I don't recall, no.
> Q. You don't recall. That doesn't mean that there wasn't a conversation, correct?
> A. It means I don't recall. I mean, we can speculate, but I don't recall. (RH at 73.)

The Court also finds significant that during the time that Rasch was speaking with the defendant's appellate attorneys, Rasch's father had called Roklan from Dallas and told him that his son was the 911 caller. This the first time Roklan learned that Stephen Rasch had made that call. Mr. Rasch's call on behalf of his son in the spring of 2017 further corroborates Roklan's testimony that, after the November 24, 2015 phone conversation, he still had no idea who the 911 caller was. Had Roklan known of Rasch's identity before trial, there would have been no reason at all for him to have alerted Ms. Potter in 2017 of the father's call (RH at 159, 162), nor, indeed, would Rasch's father even have had any reason at all to call the Attorney General's office in 2017 (and thereafter warn his son that he probably had made a mistake regarding the date he had provided to the defendant's appellate attorneys of Roklan's call. See *infra*.)

This Court finds, beyond peradventure, that Rasch never identified himself to Roklan during the November 24, 2015 telephone call and that Rasch's contrary assertions during his direct testimony, which do not at all square with his later testimony or with his statements to Det. A'Vant, are entirely without credibility. The Court fully credits Roklan's testimony that he never learned Rasch's identity during the call and never knew whether the person with whom he was speaking was even the 911 caller. (RH at 3-63, Roklan *passim.*)

The Court also finds that Rasch never revealed to Roklan during that telephone conversation that there had been another person (Bautista) with him. After initially testifying that he had told Roklan about a second person (RH at 70, 74), Rasch nevertheless concluded his direct examination by conceding to defense counsel that he actually could not recall if he had told Roklan that someone else had been with him that night. Id. at 95.

Defendant's claim that Rasch told Roklan about the presence of a second person is also totally antithetical to Rasch's statements to private investigator Pelletier and to Det. A'Vant that

he offered no information whatsoever to Roklan.[8] Roklan testified that he "didn't get anything of substance" from the call and that he never learned anything about the presence of another person. (RH at 5, 27.) "If we had talked about a third party, I would have been interested in that because then that would've been another potential witness for the state," and "If I had known about this third person, we would have gone after him . . . . [I]t would have been something that we would've looked to get, to gain." (RH at 28, 29.)

That testimony is entirely credible, and when coupled with Rasch's numerous credibility failings throughout his testimony, the Court readily rejects any asseveration that Rasch told Roklan about the presence of another person, much less implying anything about someone else relaying a license plate number to him.[9]

Second Allegation of Nondisclosure

"That Chase Rasch spoke to police at the scene immediately after the shooting and provided police with his name and contact information."

As conspicuous and important as this allegation was to the defendant in his entreaties to the Supreme Court to remand the case,[10] it has now been consigned to a footnote in his memorandum (p.20, n.15). In all likelihood this objurgation has been marginalized because

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8 Defendant's heavy reliance on the text messages exchanged with Bautista after Roklan's call is misplaced. The messages reflect Rasch's (as well as Bautista's) utter disinterest in the shooting incident as well as their clear intentions not to cooperate with law enforcement authorities. Manifestly, neither one of them took the incident seriously, even prejudging the outcome of the case. Rasch says that "it should be an easy prosecution without our testimony . . . . should be an easy win." Bautista echoes his conclusions, and both of them display an unnatural and abnormal humor over the shooting, as they punctuated their comments to each other with "lol," the ubiquitous text message abbreviation for "laugh out loud."

9 "I said absolutely nothing" to Roklan about the license plate, Rasch told Det. A'Vant (A'Vant May 1 at 23); "Actually, no, I can say it didn't happen," Rasch repeated at the Remand Hearing (RH at 77). In any event, the correct license plate number was admitted into evidence at trial without objection by the defendant. The plate number which Rasch provided to the 911 operator was not accurate, as it was a digit off.

10 See Def.'s April 28, 2017 Supreme Court Mem. in Support of Motion to Remand at p. 5, and April 28, 2017 Affidavit of Camille McKenna, ¶ 6.

Rasch conceded at the Remand Hearing that he had no recollection of providing the police with his contact information. (RH at 67.)

Indeed, had Rasch disclosed his identity and contact information and offered any statement about the incident, it would have been included in the police reports. The reports and information collected by lead Detective Alicia Hersperger are bereft of Rasch's name. (RH at 143-44, 147, 149.) Although Rasch testified that he spoke to a female police officer at the scene (RH at 66), he was fixated on anonymity from the moment he made the 911 call and intent on ensuring that he would never become a witness. Det. Hersperger's unrebutted trial testimony reflects that after canvassing the scene, she could locate only three sober, cooperative witnesses. Rasch, who was admittedly intoxicated, was not among them. (Trial Tr. 553, Vol. 4, Dec. 4, 2015.)[11]

This Court rejects any notion that Rasch divulged to any police officer any information about the incident, much less his name or contact information. [12]

Third Allegation of Nondisclosure

> *"That one of the trial prosecutors spoke with Chase Rasch before trial, in the summer of 2015, by calling him on the same cell phone number that placed the 911 call."*

That Roklan was speaking to Rasch is true, of course, but as this Court has found, *supra,* at the time of the call Roklan had no idea with whom he was conversing.[13] In any event, this

[11] Rasch was not at all sober that night after having been drinking illegally at a Providence night club. (RH at 110; A'Vant May 1 at 32.) Explaining his stammering in the 911 call, Rasch said to Det. A'Vant, "Given the condition I was in I probably just didn't recite it [the license plate] correctly." (A'Vant May 2, 2017 at 36.) When asked by A'Vant whether he was more inebriated on the night of the shooting or when he was talking to the defendant's private investigator Gil Wilson on St. Patrick's Day in March of 2017, Rasch could only offer, "That's a tough question." (A'Vant May 1, 2017 at 38.)

[12] Rasch also spoke with a college official for "[j]ust counseling." (RH at 98.) "There was no discussion on the details. I think it was specifically to make sure that I was okay and, honestly, to distract me from what had happened." (RH at 99.)

allegation is not accurate as to the date, nor are Rasch's statements to defendant's appellate counsel and to investigator Pelletier that he "was at work" (Pelletier at 7) and "he had known he had been home in Dallas when he got the call." (May 1, 2017 Affidavit of Angela M. Yingling, ¶¶ 6 and 10, Exhibit A to Defendant's May 2, 2017 Supreme Court Supplement.)

Rasch wasn't anywhere near Dallas when he answered Roklan's call. He was in Providence, rushing to catch a plane to return home to Dallas for Thanksgiving. (A'Vant May 2, 2017 at 9-10; RH at 115). Roklan's call was received by Rasch on November 24, 2015, two days before Thanksgiving – not in the summertime, not in Dallas, and not while he was at work.[14]

The defendant also attempts to make much from the fact that the telephone record reflects that the call lasted seven minutes, forty-two seconds. A lot, he asserts, must have been said during the call. He is mistaken.

Both Roklan and Rasch characterized the call as brief (RH at 5, 73; A'Vant May 2, 2017 at 4, 12), and although Roklan was uncertain (RH at 20, 57), Rasch agreed that the length of the connection might well have been extended simply because he put Roklan on hold. Id. at 75. Rasch obviously was unimpressed at the length of the call ("I would still say that's brief.") Id. at 74. He agreed that a lot of meaningless talk could have filled the airtime regardless of how long the contact lasted: "I think that there probably was a conversation that took place, but like I've said, things can be discussed within seven minutes without giving him concrete information." Id.

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[13] As pointed out by the state, with case law support (State's Mem. at 16-17 and n. 9), and as one knows from practical experience, it is simply wrong to assume that cell phones are utilized only by their owners/subscribers.

[14] Rasch eventually recanted his erroneous statement, not because he suddenly recalled the events accurately, but because his father, after speaking with the prosecutor's office in the spring of 2017, admonished him that the summer date he had given to the Public Defender's appellate attorneys on April 28, 2017 was likely incorrect. Rasch never explicitly corrected his misstated location (allegedly at work) where he said he received Roklan's call until he spoke with Det. A'Vant. (Yingling Affidavit ¶¶ 5, 6; A'Vant, May 2, 2017 at 8-9.)

at 75-76. That acknowledgement is entirely consistent with Roklan's credible testimony that he got nothing of substance from Rasch.

Fourth Allegation of Nondisclosure

> *"That after speaking with Chase Rasch, the state decided not to call Mr. Rasch as a witness, list him in discovery, or disclose his identity to the defense."*

This allegation has no legs. It is merely a conclusory charge, wholly unsupported by the credible record. This Court has already found unequivocally, *supra*, that Rasch never identified himself to Roklan and that Roklan never knew who the 911 caller was prior to trial.

* * *

New Allegation of Nondisclosure

> *That the state did not disclose Roklan's telephone call to an unknown individual who refused to cooperate.*

Apparently concerned that his four original allegations of deliberate nondisclosure have no traction, the defendant posits an alternative charge of intentional nondisclosure. He now rebukes the prosecutors for deliberately not telling Ms. Potter that Roklan's conversation was with an unidentified, uncooperative individual. This new reproach awkwardly contradicts all of the defendant's prior accusations which assert that Roklan actually knew about Rasch and was aware that there had been another person with him.

Even so, Mr. Roklan thinks that he did tell Ms. Potter (RH at 33-34), but he could not specifically recall. Id. at 40, 43. Mr. McBurney is certain that she was told ("I have a recollection of telling Ms. Potter that we got an individual who was uncooperative, wouldn't give a name, and she indicated her investigator was having the same problems. I have a recollection of that. I don't know where that conversation occurred, but I do remember that.") Id. at 131. Ms. Potter says that neither of them told her. Id. at 153.

It is unnecessary, however, for this Court to offer an assessment as to which of the three attorneys has the best memory on this point, because, at bottom, that useless telephone call in no way changed the landscape between the two parties. In the end, the state still knew nothing more than did the defense about the 911 caller. He remained unidentified, and Roklan had learned absolutely nothing about the incident from that call, nor that the person with whom he spoke was even the 911 caller.

Lest there be any lingering doubt, however, the Court offers this coda: Even if, and purely for the sake of discussion, Ms. Potter had not, as she professes, been notified of Roklan's wholly unproductive and fruitless call, this Court rejects, as nonsensical, any claim that its purported nondisclosure was "deliberate" in either requisite sense, i.e., not deliberately withheld for the purpose of obstruction, nor, in any rational sense, evidence which the state could possibly have recognized as "high value" to the defense. Not knowing to whom Roklan was speaking, and learning nothing at all from that unidentified person, is scarcely something which could have ever undermined confidence in the outcome of this case. This Court finds, without question, that the November 24, 2015 telephone "conversation" (a charitable characterization at best) is factually barren, entirely uninformative in every way, and not at all "sufficiently central to the criminal case" to constitute "material" information. Briggs, 886 A.2d at 755.

It is the resolute view here that there is no way by which this empty phone call would have supported *any possibility* – much less "a reasonable probability" - that the results of this case would have been different (including this Court's pretrial decision to admit the 911 recording) or that confidence in the outcome of this case would have been undermined. The other evidence produced at Washington's trial was simply too powerful to overcome. As this Court

said in its December 18, 2015 bench decision denying the defendant's new trial motion and referencing the two nursing students' identifications:

> "Here it would be easy and not wrong to simply say that the defendant's guilt is readily apparent from the testimony of Laura Ferretti, an eyewitness to the shooting, who identified the defendant without hesitation and without any doubt at all, as the shooter. Couple her solid identification of the defendant with the testimony of Brianna Sheetz, whose identification of the defendant was almost as certain as Ms. Ferretti's, and the guilt of the defendant was foreordained. In my capacity as a front-row observer of these two eyewitnesses, I'm frank to say that I found them both to be reliable and credible." (Trial Tr. 11-12, Dec. 18, 2015.)

Notably, the defendant has not contested in his direct appeal that there was insufficient evidence to convict him. See Smith v. Cain, 565 U.S. 73, 76 (2012) ("[E]vidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict."). The materiality of undisclosed evidence must be assessed in light of all of the evidence adduced at trial. DeCiantis, 24 A.3d at 573; Paladin, 748 F.3d at 444.

Forgoing a Continuance

Because the defendant continues to stress the urgency and importance of Ms. Potter's pretrial request for a continuance, the Court adds a postscript to this Decision.

Contacting the 911 caller, he says, "was crucial to the motion for a continuance; Ms. Potter argued that she needed additional time to identify and reach out to the individual 'to see whether or not that person was a percipient witness to this incident.'" (Def.'s Mem. at 13-14, June 30, 2017.) [15] The defendant, however, rejected the Court's offer to continue the case for precisely that purpose.

[15] A week before trial was "far too late to be conducting an investigation" to find out who made the 911 call. (Def.'s Mem. at 8 n.7.)

The state obtained the 911 recording on November 24, 2015 and immediately forwarded it to the defense. Pretrial motions were expected to be heard on November 30. Because of its late receipt, the defendant requested a continuance to try to locate the 911 caller:

> "So in the event the Court determines that it [the 911 recording] meets the foundational requirements of an excited utterance, I would ask that pursuant to Rule 16 it not be admitted, and, if so, I be given a continuance, a reasonable amount of time to investigate the identity of the caller. I would ask that a subpoena issue to the AT&T mobile provider of the number so that I can ascertain the identity and investigate to see whether or not that person was a percipient witness to this incident." (Trial Tr. 172, Vol. 2, Dec. 1, 2015.)

The trial had already been continued once from November 9 (RH at 157, 171), and there was still a week before it would be reached; so, the Court denied this initial continuance request. (Trial Tr. 178, Vol. 2, Dec. 1, 2015.) Ms. Potter, however, continued to press her point and offered:

> "If I may simply, just for the record, Judge, state that a one-week time period, with a Thanksgiving holiday, was simply not enough time to obtain a subpoena for the phone records company to obtain the identity of the witness. So I would make the offer of proof as well in regards to Rule 16." Id.

The Court did not reexamine its ruling at that time. Other pretrial matters were completed, and jury selection commenced the following day. A jury was selected but not sworn. Instead, the Court revisited the defendant's request for a continuance, and, in view of the recent delivery of the 911 recording, offered the defendant the option of going forward with the trial or deferring it to a later time so that the investigation contemplated by defense counsel could be accomplished. Since the jurors had not been sworn, there was no double jeopardy impediment to releasing them and assembling a new panel later on. In extending the offer to continue the case, the Court said:

> "Yesterday, Mr. Washington, your lawyer demanded that this case be continued. I don't know whether she received your consent to make such a motion or not, but, in any event, she demanded that the case be continued because of the late disclosure of the 911 tape that she received just before Thanksgiving.

> "I want to know whether you continue to pursue that request, because if you do, I'm going to grant it. This case will not be tried today. It will be continued. You won't have it behind you. It will be a couple of months before it gets tried, because your lawyer said that she wanted to do some investigation to see if there was some way that she could identify who the caller was. I don't know if there is or there isn't, but she wanted that time to do that.
>
> "Now that you've seen your jury and expressed satisfaction with it, I'll give you a few minutes to talk with Ms. Potter to decide whether or not you wish to go forward with the case or whether you wish to pursue the request that she made yesterday to continue the case." (Trial Tr. 191-92, Vol. 2, Dec. 2, 2015.)

The Court took a recess so that the defendant and counsel could confer. After considering the two options, the defendant withdrew his request for a continuance and opted to proceed to trial. Tactical reasons and other trial strategy were doubtless in play at that point. The defendant had, after all, fully expressed his satisfaction with the jury which had been selected. He also had just had a pretrial preview of the state's two eyewitnesses at a suppression hearing, and their testimony was fresh in mind. The defendant was not suffering the privations of imprisonment; he had posted bail in the case and was subjected only to a federal home confinement limitation. Doubtless other reasons were part of the defense strategy which led the defendant, voicing his unequivocal concurrence with counsel, to withdraw the request for a continuance which he had so emphatically demanded the previous day. The following colloquy ensued:

> "THE COURT: All right. Mr. Washington, Ms. Potter, you've had time to consider the option. What's your desire?
>
> "MS. POTTER: Yes, Your Honor, I have spoken with Mr. Washington. At this time I will withdraw my request for a continuance, proceed with this jury, but I would like to expressly reserve my objection based upon the hearsay ground that was laid out yesterday to the admission of the 911 call. But relative to the continuance and the Rule 16 violation, I will withdraw that request.
>
> "THE COURT: Very well. Mr. Washington, do you agree?
>
> "THE DEFENDANT: Yes, Your Honor." (Trial Tr. 192, Vol. 2, Dec. 2, 2015.)

What the defendant has recently learned through his investigation in the spring of 2017 was likewise readily ascertainable two years ago through similar investigative means.

* * *

In sum, this Court finds, unreservedly and without hesitation, as a front row observer, that Stephen Rasch displayed an extraordinarily tenuous relationship with truth and reality and was a markedly unreliable witness. The Court further finds, beyond any doubt, that Rasch offered absolutely nothing of value to Roklan in the November 24, 2015 telephone call. This Court fully credits Roklan's testimony that he never knew prior to trial that Rasch was the 911 caller or that he had been accompanied by another person on the night of the shooting, much less someone who had relayed an incorrect license plate number to him. There is simply no credible evidence which supports any of the defendant's imprecations – either before the Supreme Court or before this Court – that the state violated its Brady responsibilities.

What is clear, and what this Court emphasizes and underscores in the strongest terms, is that whatever new information of significance that the defendant's recent investigation may have unearthed, it was entirely unknown to the state before trial, and the state's attorneys never concealed anything of material importance from the defendant, either deliberately or, for that matter, inadvertently.

The defendant's motion for a new trial is denied. In accordance with the Remand Order, this case shall forthwith be returned to the Supreme Court.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**State of Rhode Island v. Willie Washington**
CASE NO:	**P2/15-1538AG**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**July 19, 2017**
JUSTICE/MAGISTRATE:	**Krause, J.**

ATTORNEYS:

For Plaintiff:	**J. Patrick Youngs, III, Esq.** **John M. Moreira, Esq.** **Lauren S. Zurier, Esq.**
For Defendant:	**Michelle M. Alves, Esq.**