

STATE OF MARYLAND

vs.

ADNAN MASUD SYED
Defendant

IN THE CIRCUIT COURT

FOR

BALTIMORE CITY

Indictment Nos. 199103042-46

* * * * *

MEMORANDUM OPINION AND ORDER

On February 9, 1999, the body of Ms. Hae Min Lee was found in Leakin Park. On February 28, Defendant Adnan Masud Syed was arrested and charged with the first degree murder of Ms. Lee.

On June 30, 1999, the Defendant filed his Motion to Compel Discovery and Motion to Compel Production of Tangible Evidence.¹ On July 7, 1999, the State filed a Motion in Limine to bar disclosure of certain statements of an accessory-after-the-fact and a Motion for Protective Order. The Motion sought permission "to withhold discovery consisting of all statements made by [the] accessory after the fact . . . and any affidavits or warrants making reference to such statements[.]" Citing alleged conflicts of interest of defense counsel, the State contended that

divulgence of these statements and affidavits would place the witness and evidence in jeopardy. Defense counsel's actions at best create the impression that witnesses could have been compromised, and to allow access to the testimony of another key witness could create the impression that the public interest in a fair adjudicatory process has been compromised.

State's Motion for Protective Order, ¶ 6 at 2d unnumbered page.

The Defendant's Response to the Motion for Protective Order states his belief that the undisclosed witness is Mr. Jay Wilds and seeks an "Order . . . compelling the State to disclose all

¹Neither motion was supported by the certificate required by Rule 4-263 (f). Of course, "[t]he court need not consider any motion to compel discovery unless the moving party has filed a certificate describing good faith attempts to discuss with the opposing party the resolution of the dispute and certifying that they are unable to reach agreement on the disputed issues. The certificate shall include the date, time, and circumstances of each discussion or attempted discussion." *Id.* Apparently, the motions have been largely mooted by the State's disclosures.

information about Jay Wilds and any other like witness, including, . . . all statements by Jay Wilds and any others pursuant to the State's discovery obligations under the Md. Rules . . . pursuant to *Brady v. Maryland*² and the Due Process clause.

DISCUSSION

The State's Discovery Obligations Under Maryland Rule 4-263

Maryland Rule 4-263 specifies the State's discovery obligations in circuit court criminal cases. Rule 4-263 (a) requires the State's Attorney to disclose, without request, "[a]ny material or information tending to negate or mitigate the guilt or punishment of the defendant as to the offense charged." Similarly, the State must also provide, without a discovery request,

Any relevant material or information regarding: (A) specific searches and seizures, wire taps or eavesdropping, (B) the acquisition of statements made by the defendant to a State agent that the State intends to use at a hearing or trial, and © pretrial identification of the defendant by a witness for the State.

Rule 4-263 (a)(2).

Upon request, the State must disclose: (1) the name and address of each witness the State intends to call to prove its case in chief or to rebut alibi testimony; (2) statements of the defendant; (3) statements of codefendants; (4) reports or statements of experts; (5) evidence that the State intends to use at a hearing or trial; and (6) property obtained from or belonging to the defendant. Rule 4-263 (b).

Accordingly, (1) the name and address of the unidentified accessory after the fact, and (2) the search warrant affidavits and the warrants themselves are discoverable under Rule 4-263 (a) (2) and (b)(1). Any statement made by the Defendant and in the State's possession is discoverable under Rule 4-263 (b)(2)

Other Statements of the Unidentified Accessory After the Fact

Under the principles adopted by the Court of Appeals in *Carr v. State*, 284 Md. 455 (1979) and *Jencks v. United States*, 353 U.S. 657 (1957), a defendant is entitled to production of a witness's prior statement if, *inter alia*, the prosecution or the prosecutorial arm of the government is in possession of the statement. Subsequent to the decision in *Jencks*, Congress enacted the "Jencks Act," which clarified and limited the *Jencks* holding. See 18 U.S.C. § 3500. (1994).

Although the Maryland Legislature has not enacted a counterpart to the "Jencks Act,"—

²373 U.S. 83 (1963).

and neither *Carr* nor subsequent cases have wholly adopted the Jencks Act and its discovery rules--Maryland courts have looked to the Act, as well as subsequent analysis and interpretation of the statute, for guidance in interpreting *Carr*. See, e.g., *Kanaras v. State*, 54 Md. App. 568, 577 (1983) (Maryland courts have "implicitly accepted the underlying foundations" of the Jencks Act "without adopting wholesale the rules contained therein.").

To receive a witness's prior statement under the Jencks Act, the defendant must establish that: (1) the witness has testified on direct examination; (2) defense counsel has requested the statement; (3) the statement is discoverable under the Jencks Act; (4) the statement must relate to the subject matter of the witness's testimony; and (5) the statement must be in the possession of the prosecution. See *Robinson v. State*, 1999 Md LEXIS 258 (J. Raker dissenting).

Accordingly, under *Carr* and its progeny, after the unidentified accessory-after-the-fact has testified at trial, the Defendant will be entitled to any statement of that witness which has not previously been produced pursuant to Rule 4-263 (a) (2) and (b)(1) and (2).

The State's Discovery Obligations Under Brady v. Maryland

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held "that 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 punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. See also *Bloodsworth v. State*, 307 Md. 164, 175 (1986).

A defendant's right to discover exculpatory evidence does not include the right to an unsupervised rummage through the State's files. No Maryland court has held that a defendant alone may make the determination as to the materiality of the information contained within the State's files. Settled practice is to the contrary. In the typical case when a defendant makes only a general request for exculpatory material under *Brady*, the State decides which information must be disclosed. Unless defense counsel becomes aware that exculpatory evidence has been withheld and brings it to the Court's attention, the prosecutor's decision with respect to *Brady* disclosure is final.

The State's Motion for a Protective Order

Although the statements of the accessory-after-the-fact are discoverable under the guidelines discussed above, the State seeks a protective order to avoid disclosure. As discussed above, the protective order is sought on the basis of alleged conflicts of interest of defense counsel and the State's assertion that "would place the witness and evidence in jeopardy."

The privilege of the State to withhold certain matters from defendants in criminal cases has long been recognized in Maryland. *Coleman v. State*, 321 Md. 586, 602 (1991). Ordinarily, the privilege of non-disclosure must yield when disclosure is essential to a fair trial. *Id.* Trial judges are required to balance the public interest in protecting the flow of information--an interest


protected by ensuring the safety of witnesses by limiting the disclosure of their identities--against the individual's right to prepare a defense. *Id.* The key element is the materiality of the witness's testimony to the determination of the accused's guilt or innocence balanced against the State's interest in protecting the identity of the witness. *Id.* at 603.

In this case, the only³ basis for the protective order is the assertion that disclosure would place the witness and evidence in jeopardy. In *Coleman*, the State produced sworn testimony--which was subject to cross-examination by defense counsel--which detailed the danger which disclosure would create for the State's witnesses. In the absence of a comparable showing in this case, the State has shown no entitlement to a protective order.

CONCLUSION

The Court will enter an Order in accordance with this Memorandum Opinion.

Date 9/10/99



William D. Quarles
Judge

³Judge Mitchell rejected the State's contention that defense counsel has a disqualifying conflict of interest in this case.