

CAUSE NO. 1546111

THE STATE OF TEXAS

§
§
§
§
§

IN THE DISTRICT COURT

V.

OF HARRIS COUNTY TEXAS

ANTONIO ARMSTONG, JR.

178TH JUDICIAL DISTRICT

**SUPPLEMENTAL MOTION TO DISMISS FOR
BRADY V. MARYLAND VIOLATIONS, VIOLATION OF THE SIXTH AMENDMENT
OF THE UNITED STATES CONSTITUTION, VIOLATION OF THE FOURTEENTH
AMENDMENT OF THE UNITED STATES CONSTITUTION, VIOLATIONS OF
ARTICLE V, SECTION 12 OF THE TEXAS CONSTITUTION AND ARTICLE I,
SECTIONS 19, 115, 13 AND 10 OF THE TEXAS CONSTITUTION, VIOLATIONS OF
THE MICHAEL MORTON ACT, ARTICLE 39.14 OF THE TEXAS CODE OF
CRIMINAL PROCEDURE**

To the Honorable Judge:

COMES NOW, Defendant, Antonio Armstrong, Jr., by and through his attorneys, Rick DeToto and Chris Collings, and respectfully requests, pursuant to the due process clause of the Fourteenth Amendment, the Sixth Amendment to the United States Constitution, as well as the provisions of Article V, Section 12 of the Texas Constitution, and Article I, Sections 19, 115, 13, and 10 of the Texas Constitution, that this Court dismiss this case due to a violation of *Brady v. Maryland*, 373 U.S. 83, S. Ct, 1194, 10 L.Ed2d 215 (1963) and Article 39.14 of the Texas Code of Criminal Procedure (*The Michael Morton Act*), the Sixth Amendment to the United States Constitution and the Fourteenth Amendment to the United States Constitution.

ADDITIONAL FACTS

For purposes of this section, Counsel will list additional facts learned subsequent to the filing of the original motion. Counsel will rely on legal arguments contained in the original Motion to Dismiss as well as legal arguments added to this Supplemental Motion to Dismiss.

1. The Houston Police Department was in possession of the Maxine Adams audio recording (*Adams recording*) that contained exculpatory Brady and Michael Morton Act material on December 22, 2016. This audio is approximately 13 minutes long. The allegations contained in this short, 13-minute audio includes statements by Maxine Adams that Antonio Armstrong, Sr. was involved in a prostitution ring, that he had received death threats and that he was considering changing his life insurance policy.
2. The Houston Police Department Homicide Division was in possession of the *Adams recording* between December 22, 2016 and December 29, 2016.
3. The Harris County District Attorney's Office was in possession and aware of the *Adams recording* on December 29, 2016. Homicide Detective Daignault sent the Harris County District Attorney's office an email on December 29, 2016 with the *Adams recording* attached.
4. On January 20, 2017, Houston Police Department Officer Hett emailed a Harris County Assistant District Attorney stating, "I've talked to the female a couple of times about the prostitution ring and am meeting with her in about 30 mins. **I think there may be something to it but there still needs to be a lot of digging to do. Go ahead and pursue your deal, I will open my case with a different case number BUT if the two cases cross paths, so be it...I don't see how Morton will affect it...thx.**" - **Why is a Houston Police Department Officer discussing with a Harris County Assistant District Attorney about creating a separate case number, if they case numbers will cross paths and the affect the Michael Morton act has on their actions?**
5. On January 26, 2017, the State provided the Defendant with a Brady notice stating, "on or about December 22, 2016, Maxine Adams reported to the Houston Police Department that Antonio Armstrong Sr. may have been involved in a prostitution ring."

6. On March 8, 2017, the certification hearing in this case took place in the 314th District Court of Harris County, Texas.
7. At no time did any employee of the Harris County District Attorney's Office or Houston Police Department provide the Defendant a copy of the Adams Recording on or before March 8, 2017.
8. Because the Defendant was not provided a copy of the Adams Recording, the Defendant was denied the right to investigate the accusations made by Maxine Adam and call and/or cross examine witnesses regarding the exculpatory Brady information contained on the *Adams recording* during the juvenile certification hearing that took place on March 8, 2017.
9. From December 22, 2016 to June, 2018 members of the Houston Police Department had multiple conversations with Maxine Adams regarding her statements.
10. Officer Hett, while having multiple telephone conversations as well as in person meetings with Maxine Adams over an 18-month period, never documented his investigation. There was a complete failure by Officer Hett as well as the Houston Police Department in the questioning of a key witness without reports, notes or any form of recording as to what actually transpired. The only official record of this investigation was an offense report that Officer Hett created on August 1, 2018 from his "memory". This report was only created after he was instructed to do so by the Harris County District Attorney's Office.
11. March 18, 2017, Houston Police Department Officer Hett texts a Harris County District Attorney stating, "Hey this is Hett/Vice. I got a text from Adams (The female that came forward to homicide talking about sex trafficking). She said she had a PI contact her saying he was hired by the lawyers of the murdered family and wanted to know why she thought there was trafficking

involved and who she spoke with. She said she didn't tell him anything ...just FYI...she's pretty nervous about being contacted."

12. March 18, 2017, Houston Police Department Officer Hett texts a Harris County District Attorney regarding his contact with Maxine Adams, "OK...She told me that she didn't say anything (and didn't know what to do)...**I told her that if she didn't want to talk, she didn't have to unless she gets a GJS...**she's going to let me know if she's contacted again. She has a little "conspiracy theory" going on." **Why would a Houston Police Department Officer tell a witness who has provided exculpatory information on a capital murder that she did not have to speak with a defense investigator?**

13. On March 20, 2017, Houston Police Department Homicide Investigator Daignault texts a Harris County Assistant District Attorney in reference to the *Adams recording* stating, "**I never added it to the case file. I had got with (an Assistant District Attorney) and he said to leave it separate unless Hett got somewhere which he never did.**"

14. On March 21, 2018, there is an email from an Assistant Harris County District Attorney to another Assistant Harris County District Attorney titled "Maxine Adams recorded audio interview". This is now the third prosecutor that is aware of the *Adams recording*.

15. On March 21, 2018, there is a text from the Harris County Assistant District Attorney referenced in #14 above to the prosecutor who received the *Adams recording* via email stating, "we need to meet with Maxine Adams Asap. I can have Hett set up a meeting for all of us just let me know when. Thank you."

16. On March 21, 2018, there is a text from an Assistant Harris County District Attorney to Houston Police Department Officer Hett that states, "Just sent it. Please listen to it and let me

know if she told you everything she told these officers. **I'm concerned about what she says in the end.**"

17. On April 11, 2018, two Assistant Harris County District Attorney's had a meeting where they discussed "how to handle" the Maxine Adams recording.

18. On May 1, 2018, another Assistant Harris County District Attorney is made aware of the Adams Recording. This brings the number to four (4) prosecutors who were aware of the recording starting on December 29, 2016.

19. On May 1, 2018, an Assistant Harris County District Attorney tells another Assistant Harris County District Attorney that the "**audio is burning a hole in my pocket.**"

20. On May 18, 2018, an Assistant Harris County District Attorney texts, "**This entire thing is so feking annoying! She should have just stayed in her lane to begin with...its a complete waste of everyone's time** (referring to Maxine Adams).

21. June 27, 2018, the Harris County District Attorney's Office finally provides a copy of the Maxine Adams audio recording to the defense.

ARGUMENT

In addition to the arguments made in the original motion to dismiss we make the following arguments.

The Defendant has shown, through emails and text conversations, that he has suffered a Brady v. Maryland violation, a violation of Article 39.14 of the Texas Code of Criminal Procedure (*the Michael Morton Act*), a due process violation of the 14th Amendment of the United States Constitution and a violation of the Sixth Amendment to the United States Constitution.

Here, no less than four Harris County District Attorney's were aware of the Maxine Adams audio recording that contained exculpatory information for eighteen (18) months before it was

finally disclosed to the defense. Further, a minimum of five Houston Police Department officers were aware of the audio as well before disclosure to the Defendant. The Harris County District Attorney's Office along with the Houston Police Department were actively talking to and meeting with Maxine Adams during these eighteen (18) months prior to disclosure of the evidence to the Defendant in late June of 2018.

More importantly, it appears that the Houston Police Department along with the Harris County District Attorney's Office was working together to avoid disclosing the evidence. Here, the evidence shows:

1. There was discussion about creating a separate case number for the Maxine Adams investigation thus not linking it to the murder investigation.
2. There was discussion about the Michael Morton Act and how it would affect disclosure of this evidence.
3. There is an email from a Houston Police Department Homicide Detective stating that he was told to keep this investigation separate from the murder case file.
4. Houston Police Department Officer Hett made no records of his investigation until he was instructed to by the State.
5. Houston Police Department Officer Hett told Maxine Adams that she did not have to speak with the Defendant's investigator unless subpoenaed to a grand jury.
6. Lastly, the prostitution ring investigation was never added to or linked to the homicide investigation in this case. Up until August 1, 2018 there was nothing linking the murder investigation to the prostitution ring investigation.

A. HARM

1. The Certification Hearing

On March 8, 2017 a juvenile certification hearing was held in the 313th Criminal District Court under cause number 2016-04464J. This was a full blown, adversarial hearing where the State called multiple witnesses including Houston Police Department Homicide Detective Daignault. Clearly, the Defendant's Sixth Amendment right to counsel attached at this hearing.

Because we were not provided a copy of the *Adams recording* by the state, the Defendant was denied his Sixth Amendment rights under the Texas and United States Constitutions. The Defendant has suffered, at a minimum, a Sixth Amendment violation in that he was unable to investigate or call and cross examine witnesses for the the juvenile detention hearing in this case regarding the exculpatory evidence provided by Maxine Adams. Specifically, names, phone numbers, Facebook accounts, allegations of death threats and allegations of Antonio Armstrong, Sr. discussing changing his life insurance policy. (Please listen to the Maxine Adams recording, which is in evidence, for a detailed listing of everything she mentioned regarding the prostitution ring).

Antonio Armstrong, Jr. has suffered demonstrable prejudice or a substantial threat thereof and the Court will be unable to neutralize this taint by any other means. *State v. Mungia*, 119 S.W.3d 814 (Tex. Crim. App. 2003) There is no way for the Court to neutralize this Sixth Amendment violation because the certification hearing took place over a year ago.

2. Maxine Adams

As of August 21, 2018, Maxine Adams is not available. A private investigator working for the Defendant attempted to contact her around March, 2018 and she said she did not want to speak with him. This conversation is recorded. Further, attempts to contact Maxine Adams, up until a few days from the filing of this motion, have failed.

More importantly, there is evidence that the Houston Police Department advised Maxine Adams that she did not have to talk to the Defendants investigator unless she received a grand jury subpoena. This is tantamount to obstruction of justice. Why would a Houston Police Department Officer tell a witness in a capital murder case that has exculpatory evidence not to speak to the defense?

We do not know what Maxine Adams was told by Officer Hett or the Houston Police Department in their multiple conversations. Every day that Maxine Adams is not available is a continuous harm to the Defendant and a violation of his Sixth and Fourteenth Amendment rights under the Texas and United States Constitutions.

Lastly, the circumstances surrounding the handling of the Maxine Adams statements suggests tampering with a witness and obstruction of justice by law enforcement in an attempt to keep the Defendant from fully discovering and investigating her claims.

3. The Exculpatory Evidence is Stale

The *Adams recording* contains numerous facts such as phone numbers, names and addresses that the defense received 18 months after law enforcement was made aware of them.

We know that Officer Hett did no actual investigation of these names, phones numbers and locations. While he was given the name of five different people who were involved in this prostitution ring, he interviewed none of them. He failed to look at bank accounts, phone numbers, text messages and actual locations.

At this time the defense is 18 months behind and scrambling to attempt to piece this information together. The simple disclosure of this information does not cure the problem. This information has become stale and it will likely be extremely difficult to fully investigate these claims and provide effective assistance of counsel.

Again, the Sixth Amendment and Fourteenth Amendment violations are on-going.

As a result of the delay in disclosing this evidence for eighteen (18) months the Defendant has suffered a demonstrable prejudice, or substantial threat thereof and the trial Court will not be able to identify and neutralize the taint by other means. *State v. Mungia*, 119 S.W.3d 814 (Tex. Crim. App. 2003). Quite simply put, the evidence is stale and the Defense will not be able to recover from the delay.

B. MOTIVATION

Curiously, the state seems to think that it is irrelevant as to whether this evidence was not disclosed intentionally. “[I]t appears that the Defendant intends to conduct an evidentiary inquiry into why the State delayed disclosure of the witness statement. Such inquiry is **irrelevant** to the issue at hand.” *Page 1-2, States Motion to Abate* filed on August 20, 2018.

Under that reasoning it would not matter if the state intended to withhold evidence to gain an advantage in a case and to deny a Defendant his rights under the United States and Texas constitutions. Based on their argument, the Defense would simply get a continuance, even if the conduct was intentional.

Is it really the position of the Harris County District Attorney’s Office that it does not matter or it is irrelevant for a court to inquire into the nature of a violation such as this? Is it their position that if a prosecutor intentionally withheld evidence that it is not relevant and of no concern for the Court or the Defendant’s constitutional rights?

C. THE HEARING

“In certain instances, dismissal may be the only means of adequately protecting an individual’s right against infringement from the state.” *State v. Mungia*, 119 S.W.3d 814 (Tex.

Crim. App. 2003). “Additionally, a charging instrument may be dismissed to remedy a violation of the Sixth Amendment right to counsel.” *State v. Fry*, 897 S.W.2d 324 (Tex. Crim. App. 1995) “In the context of a Sixth Amendment violation, a trial court may properly dismiss a charging instrument if ‘a defendant suffers demonstrable prejudice, or a substantial threat thereof, and where the court is unable to identify and neutralize the taint by other means’.” *State v. Mungia*, 119 S.W.3d 814 (Tex. Crim. App. 2003) quoting *State v. Frye*, 897 S.W.2d 324 (Tex. Crim. App. 1995).

The Defendant has suffered demonstrable prejudice or a substantial threat thereof which is ongoing and a violation of his Sixth Amendment rights. Therefore, the Court should hold a hearing to hear evidence and determine if the case should be dismissed for constitutional violations.

Understandably, the State does not want a hearing in this case. Their argument furthers a continuing violation of the Defendant’s 6th and 14th Amendment rights under the United States and Texas constitutions. They are attempting to again deny the Defendant the opportunity to due process and his rights under the Sixth Amendment.

However, the Defendant simply requests the ability to cross examine all witnesses related to this issue under oath to determine the duration and extent of the constitutional violations in this case. Mr. Armstrong is facing the most serious criminal accusation in the face of, potentially, law enforcement misconduct or gross negligence. The Court must determine if the violations are constitutional in nature and egregious enough to warrant dismissal of the indictment.

In closing, remarkably, the Harris County District Attorney’s Office as well as the Houston Police Department were in possession of this exculpatory Maxine Adams audio recording prior to a trial setting in this case on May 25, 2018. Right up to May 18, 2018 there is an Assistant Harris

County District Attorney complaining that the Maxine Adams issue, “is so fcking annoying.” Even with a potential trial date looming, the state failed to disclose this evidence to the defense.

Here, the Court should take into consideration the timing of these comments, the May trial setting in this case and when the audio was actually disclosed in June, 2018 in determining the seriousness of the violations in this case.

Respectfully submitted,

/s/ Rick DeToto

RICK DETOTO

TBA No. 24005020

300 Main Street, 2nd Floor

Houston, Texas 77002

(713) 223-0051 (Tel.)

(713) 223-0877 (Fax)

rickdetoto@aol.com

/s/ Chris Collings

CHRIS COLLINGS

TBA No. 24036382

300 Main Street, 2nd Floor

Houston, Texas 77002

(713) 337-1180 (Tel.)

(713) 337-1179 (Fax)

chris@myhoustonlawfirm.com

Attorneys for Defendant,
ANTONIO ARMSTRONG, JR.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing motion was forwarded via hand delivery to the Assistant District Attorney handling this case for 178th Judicial District Court of Harris County, Texas on this the 21th day of August 2018.

/s/ Rick DeToto

RICK DETOTO