CR15-0162194	:	SUPERIOR COURT
STATE OF CONNECTICUT	:	JUDICIAL DISTRICT OF
v.	:	NEW HAVEN
SAIFULLAH KHAN	:	February 6, 2018

DEFENDANT'S MOTION FOR HEARING PURSUANT TO *STATE V. MORALES*, 202 CONN. 737 (1995)

The defendant in the above-captioned matter moves the Court, pursuant to the due process provisions of the state and federal constitutions for a hearing pursuant to *State v. Morales*, 232 Conn. 707 (1995) and *Brady v. Maryland*, 373 U.S. 83 (1963). He further sets forth the law and circumstances supporting this unique request in this unique case, herein.

The fundamental question in this case is whether the Yale Police Department operates in accordance with constitutional duties incumbent on *all* law enforcement or whether it is a *de facto* arm of the campus bureaucracy and, vicariously, politics? A growing body of evidence suggests the latter. Surely the Court is aware: most prosecutions rely upon the investigative efforts of municipal or state police departments. The investigative engine of this case, however, was the Yale Police Department. Recent revelations indicate that Yale Administrators operated as a secondary engine of *law enforcement* investigation. Moreover, late disclosed discovery has revealed a police force unbound by hard wrought constitutional rules and instead beholden to political fashions and the oscillating views of the federal Office of Civil Rights.

The unique history and circumstances of this case warrant a full hearing in which the Court catalogues the evidence generated in this case, its whereabouts, the cause for its late disclosure, and an accounting of any evidence further evidence that the

defense suspects may be outstanding. The circumstances in this matter warrant precisely such a hearing: evidence has already once been set to commence in this case and a jury selected. Moments prior to the commencement of evidence, the state notified defense counsel that the Yale Police Department had just discovered what amounted to 40 to 50 pages of notes which were disclosed to the defense shortly thereafter. On the basis of the documents' contents, implications for trial, and jury schedule, a mistrial was declared later that day. Having fully reviewed the notes and the circumstances of their disclosure, they raise further questions about evidence that existed and may have been withheld, lost, or destroyed by the Yale Police Department, faculty, or administrators. Additionally, a *Morales* hearing is warranted as a precautionary measure in order to prevent another curtain call disclosure. The factual and legal basis of this motion are further set forth herein.

I. FACTUAL BASIS.

This case has been pending for more than two years. The defendant first addresses the history of the case and then addresses the day of trial and subsequent discoveries.

A. History Of The Case.

The defendant was charged, by way of a warrant, with various counts of sexual assault based upon a single alleged event on November 10, 2015. He self-surrendered two days later and was arraigned on or about November 12, 2015.

An additional fact, that the defense previously viewed as collateral, is relevant to this analysis as well. The defendant is a native and citizen of Afghanistan. He is in this country on an F-1 visa for the purpose of attending Yale. The defendant was summarily

suspended from Yale on November 9, 2015—the day before the warrant issued and probable cause was found. The defendant was evicted from his dormitory housing on approximately two hours' notice and left for homeless. While the Office of International Students and Scholars (OISS) had twenty-one days to notify the Department of Homeland Security of Mr. Khan's change in status, it notified them in approximately thirteen to fourteen days. This has placed Mr. Khan's immigration status in jeopardy.

The defendant filed a twenty-five page *Brady* motion on November 24, 2015 at his first Part A screening. He subsequently filed a second motion specifically requesting personal notes that the complaining witness referred to in her recorded statement because. He did so on the grounds that she referred to her notes in her statement to the Yale Police and explained: "After I decided to call SHARE…I scheduled a meeting for the next day…to allow myself to kind of recollect all the events so I made a timeline for myself of things that I definitely remember and then I talked to everyone that I was with to kind of fill in the gaps…" These notes were disclosed on this basis.

Nearly two years passed. The state's attorney represented to defense counsel that he inquired of the Yale Police on *numerous* occasions whether the department had any further disclosable evidence. He was told, each time, that the department had none and had disclosed everything. On October 16, 2017, shortly before the complaining witness was supposed to testify and moments before double jeopardy attached, counsel for state summoned defense counsels. He informed them that the Yale Police Department had just found a collection of notes related to this case. Testimony was delayed while the notes were delivered for review. In the meantime, counsel for the state reviewed with defense counsel the efforts he had made to comply with his *Brady*

obligations. He told defense counsel that he had inquired numerous times of the Yale Police Department and they told him that they either had no notes or *had destroyed or discarded* the notes they had.[1]

Counsels for both parties received the notes and reviewed them throughout the day on October 16, 2017.

The notes included a number of developments or suggestions previously unknown to counsel. These developments include:

1. The complaining witness engaged in extensive "pre-interview" with the Yale Police Department that may have extended for several hours over two days.
2. That "AC Woz" walking speaking to Susan Sawyer, in Yale's General Counsel's office prior to or contemporaneous to the interviewing of witnesses. Independent investigation indicates that the Yale Police Department includes or included and "Assistant Chief Steven Woznyck."
3. That Yale administrators or counsel may have disclosed the defendant's FERPA or other protected information to the Yale Police Department for a law enforcement function without the defendant's consent or knowledge.
4. Two references to the defendant being, or possibly being, a Muslim. One stated "from Afghan. (Muslim) violence accepted" and later noted that his parents were in Afghanistan.

[1] Undersigned counsel do not doubt the word of the state's attorney in this case.

5. A witness was identified that, the notes suggest, stated the complaining witness "was not that drunk."

6. That the Yale Police Department had a further, follow-up interaction with the complaining witness on November 10, 2015 at 10 a.m. in which she revealed the fact and content of Title IX proceedings to the Yale Police Department.

7. That the complaining witness had, what one can only presume to be, an *ex parte* meeting with Professor David Post—a Yale Professor of Ecology and Evolutionary Biology who also happens to be the chairman of the Yale University Wide Committee on Sexual Misconduct (UWC). *See http://eeb.yale.edu/people/faculty/david-post*. One does not presume the same courtesy was extended to the accused.

8. Finally, the notes suggest that the complaining witness would send UWC emails ("She will send emails to Paul" connected by an arrow to the meeting event with Mr. Post) to "Paul." Detective Paul Sires was the detective that interviewed the complaining witness, attempted to interrogate the defendant, and ultimately signed the arrest warrant.

9. Additional investigation has revealed that the Yale Police Department has a "Sensitive Crimes & Support Coordinator" who reports to the lieutenant assigned as the "Officer In Charge of The Investigative Unit." The position is presently occupied by a sergeant who's job description states:

> "As a liaison between victims of these crimes and the Yale Police Department, the Coordinator interfaces with the Sexual

> Harassment and Assault Response & Education (SHARE) Center, Title IX coordinators, and the University-wide Committee on Sexual Harassment (UWC). This officer also works closely with the Women's Center, the Yale College Dean's Office, and the New Haven County Prosecutor's Office."

The occupant of this office is Sargent Marnie Robbins-Hoffman who is listed in the warrant as a participant, with Detective Sires, in the interview of the complaining witness.

10. The Chief of the Yale Police Department, Ronnell Higgins, recently told the Yale Daily News the department's officers "are trained to ask the right questions and provide the right information during these highly sensitive investigations *placing emphasis on a victim advocacy approach*." B. O'Daly, "*Justice Delayed: Litigating Sexual Assault on Campus*," December 8, 2017, Yale Daily News.

C. A Pattern And Practice Of Undermining Due Process.

Following the October 16 declaration of a mistrial and prompted by the Yale Police Department's disclosures, further defense investigation revealed collateral due process violations relating to another Yale student accused of sexual misconduct. Contemporaneous to Yale Police Department's investigation of Mr. Khan, the University Wide Committee on Sexual Misconduct was investigating a, then sophomore, for sexual misconduct. That student was ultimately expelled. He has now filed a federal civil rights lawsuit against Yale alleging, amongst other things:

> "[His] case arose during a tumultuous period at Yale in which the University faced mounting criticism concerning its handling of allegations of sexual assault made by female students. Specifically, Yale had been accused by students and alumni alike of not taking these allegations of sexual misconduct seriously enough and of shirking its duty to harshly perpetrators sexual assault. Moreover, results from a survey of 27 colleges and universities around the country painted a damning

> picture of the campus climate: sexual assaults at Yale, according to the survey, were the third-highest of all the schools surveyed. As a consequence, the University had to show it was willing to take a hard line against male students accused of sexual assault in order to dispel the notion that Yale's campus was an unfriendly and unsafe environment for women.

Montague v. Yale University, et al, 3:16-cv-885(AVC), Document 1, *Complaint*, ¶15, 6/9/2016. Yale has acknowledged the existence of these forces but denied their effect. [2] *Id.* Document 29, ¶15. Importantly, the events in the Montague complaint occurred in November 2015—near contemporaneous with the investigation in this matter. Additionally, Yale has moved to discover the plaintiff's legal fees that reportedly were contributed by Yale alumni. *Id.* Document 123, *Motion To Compel Re: Public Relations Firm, Fundraising For Legal Fees, and Medical Records; and Memorandum in Support*, 5. It is difficult to imagine a reason to uncover such information other than to publicly shame donors and thereby the further undermine the due process interests of accused students.

D. These Are The Officers and Offices And That Controlled The Chain Of Custody Of Evidence In This Trial.

This constellation of facts points to two unmistakable conclusions. First, Yale had an actual or perceived problem with sexual assault. Rather than convene an open and public debate on protecting both young woman and due process simultaneously, it embarked upon a secretive Jacobin-style crusade in which complainants were pressured to come forward, procedural due process was ignored, and exculpatory

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[2] Tellingly a former editor of The Yale Daily News wrote of the, presumptively innocent, defendant and similarly accused men that, "they have no right calling themselves men. Their actions have degraded them to the level of beasts, and deserve[] as much of our derision as we can muster." F. Schick, "*Towards positive masculinity*," Yale Daily News, November 17, 2017. It does not appear that is an isolated sentiment. In a courtroom, both accused and convicted persons remain human beings and are entitled to the every recognized constitutional protection.

evidence was casually and conveniently misplaced. Second, the Yale Police Department worked hand-in-glove with Yale's UWC and Title IX offices bringing each within the ambit of state action. The defendant addresses the significance of each of these facts in the following section of this brief.

II. LAW AND ARGUMENT.

"There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it." *United States v. Olson*, 737 F.3d 625, 626 (9th Circ. 2013) *Kozinski, C.J.*, dissenting.[3] Far from being a case of an unscrupulous prosecutor, this is a case about a special police department for whom one of two descriptions applies. In the best case scenario, the police force of one the nation's most prestigious universities called the court the day its evidence was to be tested and said "the dog ate its homework." In the, increasingly more likely scenario, Yale has an office devoted to obfuscating the lines between campus discipline and the police function: it feeds federally protected student data to local law enforcement so it can selectively disclose inculpatory facts to the state's attorney and the defense, while it hides its exculpatory facts behind Title IX. The Southern District of New York has noted "the reasons to reject selective, manipulative and strategic use of evidentiary privileges are numerous." *Gruss v. Zwirn*, 2013 U.S. Dist. LEXIS 100012, 36 (S.D.N.Y., 2013). Yet, this appears to be the operating manual at the Yale Police Department and the administration it serves. That is not what the constitution requires.

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[3] Far from being a quixotic dissent, Chief Judge Kozinski was joined by four of his colleagues from the Ninth Circuit.

The Yale Police Department is an arm of the state, not campus outrage, and due process applies. It is bound by rules of preservation and disclosure just as much as the State's Attorney's office or any other department. There is no doubt that:

> Police are treated as an arm of the prosecution for *Brady* purposes, 'and the taint on the trial is no less if they, rather than the state's attorney, were guilty of the nondisclosure.'" *Walker* v. *Lockhart*, supra, 958; see also *Barbee* v. *Warden*, 331 F.2d 842, 846 (4th Cir. 1964). "The State's duty of disclosure is imposed not only upon its prosecutor, but also on the State as a whole, including its investigative agencies. Therefore, if the [exculpatory materials] were held by the .... police department we would be compelled to conclude that, constructively, the State's attorney had both access to and control over the documents.

Demers v. State, 209 Conn. 143, 153-54 (1988). This rule guides each inquiry in this case: the fundamental problem is that Yale has shrouded its police department in campus discipline, federal Dear Colleague letters, and—most insidiously—campus politics. The bottom line is that its police department must ensure a fair trial rather than the political satisfaction of its student body and donors.

A. The Yale Police Department Was Not Permitted To Destroy Of Lose ANY Of Its Notes.

There are two type of evidence within *Brady's* ambit: evidence that clearly exculpates a defendant and evidence that *could*—subject to testing or examination—exculpate the defendant. *See e.g. Arizona v. Youngblood*, 488 U.S. 51 (1988). The notes the Yale police may have destroyed fall in the later category.

The state and federal constitutions have two distinct rules governing when lost evidence constitutes a *Brady* violation. Under the federal constitution, the defendant must show that the police lost or destroyed the subject evidence in bad faith. *Youngblood*, supra, 488 U.S. 51. One point that courts ought never forgot is that the law of *Youngblood* is *based upon an anecdote of factual innocence*. Defendant

Youngblood was convicted of taking a young boy to a secluded location and raping him; the boy identified Youngblood; the police seized some of the boy's clothes but failed to preserve them in such a way that DNA and blood type material on the clothes would not deteriorate for testing; Youngblood was convicted and appealed; the Supreme Court ultimately held that Youngblood did not make out a *Brady* violation because the police did not act in bad faith when they failed to adequately refrigerate his clothing. However, as defendant Youngblood bounced between prison and parole, DNA testing technology advanced. In the late 1990s, his post-conviction attorneys were able to get the specimens retested and they conclusively proved his innocence. M. Bookman, "*Does An Innocent Man Have The Right To Be Exonerated?*," The Atlantic, December 16, 2014 available at https://www.theatlantic.com/national/archive/2014/12/does-an-innocent-man-have-the-right-to-be-exonerated/383343/. Youngblood's case was dismissed in 2000. In 2002, the actual perpetrator, Walter Calvin Cruise was sentenced for the crime. As a result of the Supreme Court's decision in *Youngblood*, an innocent man spent nearly a decade in prison and a dangerous pedophile went free for twenty-seven years. But *Youngblood* remains federal law.

Connecticut's constitution provides for a different rule and the Court should be especially cognizant of its wisdom in this case. Under Connecticut's due process clause, Article First, §8, the good or bad faith of the police in losing or destroying evidence is not dispositive. *State v. Morales*, 232 Conn. 707 (1995). Instead, Connecticut courts look to the materiality of the evidence; its susceptibility of misinterpretation by a jury; the reason the evidence was lost; and the ultimate prejudice to the defendant. *Id.*

The actions of the Yale Police Department may have violated both theories. The defendant addresses each, *seriatim*.

1. **The facts support an inference that the Yale Police Department acted in bad faith with respect to the preservation and disclosure of evidence.**

There is no excuse for the Yale Police Department to have disclosed these notes so late in the trial process. This fact, in addition to the contents of the notes and the Yale Police Department's "interface" with a federal civil rights office means the only explanation for what is happening is bad faith. The state's attorney informed counsel that he had inquired whether the YPD had anything further from this investigation and was *repeatedly* told there were none or that any notes had been discarded or destroyed. First, the YPD was not at liberty to discard or destroy *anything* and that fact that they may have done so and it was never disclosed to the defense is perplexing. Second, the only explanation for their false statements to the state's attorneys is that they were lying. This was not evidence that they simply failed to collect or overlooked: this was evidence that the *investigating officers generated themselves*. They were absolutely on notice of its existence and failed to disclose it.

Furthermore, the notes themselves reveal bias against the defendant. An officer wrote that the defendant was "from Afghan. (Muslim) violence accepted." Either a witness, that will presumably testify against the defendant told the police this, or someone in the Yale Police Department has substituted cheap cultural stereotypes for actual police work. That qualifies as bias and bad faith. In any event, the defendant is entitled to know.

Finally, the fact that YPD was "interfacing" with the SHARE office, the Title IX office, and the UWC indicates two things. First, they likely have further statements of the complaining witnesses that must be disclosed. Second, is that they are using the confidentiality provisions of federal civil rights regimes in bad faith: if the complaining witness waives her Title IX protections with respect to law enforcement, she creates discoverable *Brady* material that must be disclosed. The fact that YPD has a sergeant devoted to this "interfacing" is patently disingenuous, blatantly contrary to the letter of the law, and suggests nothing but bad faith attempts to hide the truth from the Court and the defendant. Anything that the YPD or Yale administration still, likely, has is being held in bad faith and constitutes a federal constitutional violation.

2. Regardless of their mens rea, the Yale Police Department is violating the Article First, §8 of the Connecticut Constitution.

Connecticut courts have the wisdom to recognize that whether police errors are attributable to malice or ignorance, they undermine the fairness and reliability of the trial. The acts and omissions of the Yale Police Department have vastly undermined the reliability and fairness of this trial. Simply being a college police department does not make it a sinecure for second-career lawmen; when the YPD involves itself in major felony investigations, it must be up to the task of being fair to all involved. Apparently it is not and the defendant can only receive a fair trial if he knows the full scope of their failings.

3. Yale Administrators Fall Within The Ambit Of State Action.

It is well known that Yale is a private university and, therefore, a private actor. It is also well-established that only state action can amount to a constitutional violation. "When the defendant is a private actor, the state action requirement may be satisfied if

the defendant's alleged conduct is 'fairly attributable to the state.'" *Turner v. Procopio*, 2016 U.S.Dist.LEXIS 171391, 10 (2016) quoting *Fabrikant v. French*, 691 F.3d 193, 207 (2d. Cir. 2012). "The issue of whether the conduct of a private actor constitutes state action is a question of law." *UFCW, Local 919 v. Crystal Mall Associates, L.P.*, 270 Conn. 261, 272 (2004).

The Second Circuit has identified three tests for state action in the 42 U.S.C.S §1983 context. *Fabrikant*, supra, 691 F.3d at 207. It has said:

> [T]he actions of a nominally private entity are attributable to the state . . . (1) [when] the entity acts pursuant to the coercive power of the state or is controlled by the state ("the compulsion test"); (2) when the state provides significant encouragement to the entity, the entity is a willful participant in joint activity with the state, or the entity's functions are entwined with state policies ("the joint action test" or "close nexus test"); or (3) when the entity has been delegated a public function by the state ("the public function test").

Id. quoting *Sybalski v. Indep. Grp. Home Living Program, Inc.*, 546 F.3d 255, 257 (2d. Cir. 2008). In this case, Yale qualifies under each test.

a. Yale is acting under the color of state action pursuant to the compulsion test.

Yale's Office of the Provost includes a Title IX office. Lest there be any ambiguity, this refers to Title IX of the Education Amendments of 1971. These were codified at 20 U.S.C. § 1681 *et seq.* The Yale Title IX website lists its Sexual Harassment and Assault Response & Education Center (SHARE) as closely related or a subsidiary of the Title IX Office. *See* Yale, "Title IX," www.provost.yale.edu/title-ix. The official complaint, in this matter, originated in the SHARE office. Similarly, the Title IX Office website suggests that the *UWC* is also part and parcel of the university's Title IX regime. Additionally, the website discusses Title IX compliance at Yale. There is, at least, a prima facie case that Yale is acting under compulsion of federal law.

b. Yale is acting under color of state action pursuant to the close nexus test.

Yale easily satisfies the close nexus test. Detective Robins-Hoffman's job description is clear evidence of this. She inserts law enforcements presence and function *directly* into the Title IX office, the UWC, and SHARE—her job descriptions even associates her directly with the New Haven County State's Attorney's Office. Additionally, the notes that were the basis of the mistrial indicate that the Yale PD was acting in concert with the Title IX organization and had contact with Susan Sawyer in the Yale General Counsel's office and David Post of the UWC. Yale's student disciplinary and law enforcement function are so close as to be one in the same.

c. Yale is acting under color of state action pursuant to the close nexus text.

The Yale Title IX office and administration qualify as state action under the public function test. Clearly, each constituent office is taking on a police function. This case is analogous to *United States v. Ackerman*, 831 F.3d 1292 (10th Cir., 2016). In *Ackerman*, the Tenth Circuit found the National Center For Missing And Exploited Children (NCMEC) to be a state actor for purposes of the Fourth Amendment's warrant requirement. *Id.* The NCMEC conducted a search of the defendant's computer: that yielded child pornography which was the basis for the defendant's prosecution. *Id.* The Tenth Circuit held that, given the NCMEC congressional mandate, it qualified as a state actor who was satisfying a law enforcement function *in a criminal case. Id.*

d. Additionally, Yale stands in *parens patriae* over this non-citizen student and his immigration status; therefore owes him substantial due process as a state actor.

This defendant has more than a simple contractual relationship with Yale. Yale exercises control over his access to the United States. That is a quintessential state function. Accordingly, Yale behaves as a state actor in that regard as well. That matter is inextricably related to this matter. The United States Supreme Court has recognized that deportation is more than a collateral consequence of conviction for Sixth Amendment purposes. *See Padilla v. Kentucky*, 555 U.S. 1169, (2009). It should be no different with respect to *Brady* obligations of those who control the immigration function and take on a law enforcement role.

It is clear that Yale administrators were intimately involved in the investigation and prosecution of this case. They, under numerous theories constitute state action in this regard. Accordingly, they are subject to the commands of *Brady* and *Morales*: a hearing should be held to determine the extent of the law enforcement function at Yale and any and all evidence those administrators possession must be disclosed to the state attorney for disclosure to the defense.

B. Any Title IX Information The Complaining Witness Disclosed To The Yale Police Department Is Discoverable.

Any emails or other communications between the complaining witness and David Post in which the Yale Police Department was included are discoverable. It is well settled that the conveyance of information in the presence of a third party constitutes a waiver of the privilege. In fact the complaining witness asserted this *very proposition* herself in a prior brief to this Court, in this case. *See Brief In Opposition To Defendant's Motion To Exclude Victim's Rights Center of Ct From Pretrial Conferences*, 4/5/2016, at 5 ("[W]hen one party discloses information or documents to another, then the attorney-client privilege is generally considered waived for that content....The presence or

absence of another person during voluntary disclosure does not change the fact that the attorney-client privilege has been waived"). Any Title IX proceedings and the communications contained were opened, at a minimum, when the YPD was included in those proceedings. Those communications must be disclosed to the defense.

III. CONCLUSION.

The playwright Paul Green once said that the University of North Carolina was, with respect to civil rights, "like a lighthouse that throws a beam out to the far horizons of the South, yet dark at its own base." *See e.g.* J. Ehle, "*The Free Men*," 284 (New York: Harper & Row, 1965). Yale has no shortage of candlepower beaconing its virtue. It needs a foil that permits it to examine the navy-blue darkness cloaking its New Haven base—one that permits its police force to record inflammatory remarks about its most vulnerable student, cast him out on the street, and deny him his most basic due process rights. This court should be that foil. A hearing is warranted so that the full scope of the evidence that is or was in the custody of the Yale police may be fully documented and appropriate remedies may be crafted.

Respectfully submitted,

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CERTIFICATION

This is to certify that a copy of the foregoing has been served on counsel at:

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In the Superior Court at 235 Church Street, this 6th day of February 2018.

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