STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF HENNEPIN	FOURTH JUDICIAL DISTRICT

State of Minnesota, Plaintiff, v. Kandace Montgomery, Defendant.	Chief Judge Peter A. Cahill Court File No. 27-CR-15-1304 **DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO COMPEL DISCLOSURE**

INTRODUCTION

In garden-variety misdemeanor cases, Minnesota law generally limits the State's duty to disclose to police investigatory reports and any material that tends to negate or reduce the guilt of the defendant. Minn. R. Crim. P. 9.04. It is a rare case where additional discovery should be necessary. *See* Minn. R. Crim. P. 9.04 cmt. This is that a rare case.

The State has charged dozens of defendants, including Montgomery with various misdemeanor-level offenses and claims costs in excess of $30,000. According the complaint, Montgomery participated in a demonstration by a group identifying itself as Black Lives Matter ("BLM") at the Mall of America ("MOA") on December 2014. (Complaint at 4.)

The demonstration upon which the State bases the charges in this case was covered in a *New York Times* described the demonstration "as part of a protest against police brutality" in a December 20, 2014 story.[1] The *Star Tribune* reported that the demonstration was "in response to recent police shootings of unarmed black men" in a December 20, 2014 story.[2] CNN reported

[1] At http://www.nytimes.com/2014/12/21/us/chanting-black-lives-matter-protesters-shut-down-part-of-mall-of-america.html?_r=0
[2] http://www.startribune.com/mall-of-america-braces-for-protest-this-afternoon/286442451/

that "Management shut down the stores on one side of the mall."[3] Bloomington's city attorney has fueled this media coverage.[4]

BLM, sometimes stylized as the "hashtag" #BlackLivesMatter, was created in 2012 and is "rooted in the experiences of Black people in this country who actively resist our de-humanization, #BlackLivesMatter is a call to action and a response to the virulent anti-Black racism that permeates our society. Black Lives Matter is a unique contribution that goes beyond extrajudicial killings of Black people by police and vigilantes." (http://blacklivesmatter.com/about/.) The stated goals of BLM include (1) developing a network of organizations and advocates to form a national policy specifically aimed at redressing the systemic pattern of anti-black law enforcement violence in the US; (2) ending the federal government's supply of military weaponry and equipment to local law enforcement; (3) having the U.S. Attorney General identify all officers involved in killing black people within the last five years, both while on patrol and in custody; (4) decreased law-enforcement spending at the local, state and federal levels and a reinvestment of that budgeted money into the black communities most devastated by poverty in order to create jobs, housing and schools. (http://blacklivesmatter.com/demands/.)

This a rare misdemeanor case in which discovery where additional discovery should be permitted. The public attention drawn to this case tips heavily in favor of full discovery to ensure that regardless of the outcome of these cases, the public is left with the truthful perception that

[3] http://www.cnn.com/2014/12/21/us/mall-of-america-black-lives-protest/

[4] *E.g.*, http://www.mprnews.org/story/2014/12/23/moa-protest-charges ("'It's important to make an example out of these organizers so that this never happens again,' Johnson said. 'It was a powder keg waiting for the match.'"); http://minnesota.cbslocal.com/2014/12/22/bloomington-city-atty-expected-to-file-charges-against-moa-protest-organizers/ ("'Who led that march through the Mall of America?' said Johnson. 'If we can identify those people who were inciting others to continue with this illegal activity, we can consider charges against them too.'").

the defendants received the kind of fair process that can only come from full disclosure of all relevant information.

STATEMENT OF FACTS

The charges against the Defendants arise from a peaceful protest on December 20, 2014 at the Mall of America and surrounding public grounds in Bloomington, Minnesota. An estimated 2,000 attended. In addition to being charged with the direct commission of a number of crimes, the Defendants are charged with aiding and abetting offenses. A critical part of the State's case for proving these charges is the identification of the Defendants as organizers and leaders of the protest. *See* Complaint at 4. In order to make these identifications, the State relies not just on first hand observation of the Defendants at the protest or earlier meetings, but social media posts on platforms like Twitter and Facebook, *infra*. The police were alerted to events existence on December 9, 2014 through a Black Lives Matter Facebook event page. *Id*. The timeline of the State's identification of the Defendants is unclear. However, representatives of the Mall of America and the City of Bloomington acted in a highly coordinated manner in their response and investigation of the protest.

After the event, on December 22, 2014, Bloomington City Attorney Sandra Johnson sent an email to the Director of Mall Security Doug Reynolds and the Mall's Corporate Council Kathleen Allen instructing them to document all social media surrounding the event. *See* Declaration of Scott M. Flaherty, July 1, 2015, Ex. A, BLOOM-MOA9-10. Johnson stated that her office could not document these posts because "it would require us to be witnesses in our own prosecutions." *Id.* In an email ten minutes later, Johnson alerted Reynolds and Allen to the names of Defendants Mica Grimm, Michael McDowell and Kandace Montgomery and stated their Facebook pages had references to the protest and were unprotected by security settings. *See*

id., BLOOM-MOA8-9. Reynolds responded that he would have Mall employees do another look at social media sites. *Id.* In subsequent emails, Reynolds stated that his office was using social media as well as footage of the protest "to identify persons and their roles." *Id.*, BLOOM-MOA17. Information from these social media searches was turned over to Burlington Police Detective Heather Jensen. *See id.*, BLOOM-MOA4, 52, & 83.

The record of these emails remains incomplete. The initially disclosed emails, obtained through a Minnesota Government Data Practices Act (MGDPA) document request, indicate that the process of identifying the Defendants used evidence that is currently unavailable to them. Though these records were initially complied, subsequent attempts to retrieve them have been denied by the City of Bloomington and are the subject of a separate civil dispute over their disclosure.

ARGUMENT

In misdemeanor cases, the State's duty to disclose is generally limited to the police investigatory reports and any material that tends to negate or reduce the guilt of the defendant. Minn. R. Crim. P. 9.04. Additional discovery may be had if the parties consent or upon order of the court. *id.* The a court may look to the standards of Rule 9 to guide its discovery decisions, but Rule 9's guidelines are not mandatory. *See* Minn. R. Crim. P. 9, cmt. ("Rule 9 provides guidelines for deciding any [discovery] motions, but they are not mandatory and the decision is within the discretion of the district court judge. *State v. Davis*, 592 N.W.2d 457, 459 (Minn. 1999).") A district court judge has "wide discretion to issue discovery orders," and will not be reversed unless it makes findings unsupported by the evidence or if it by improperly applies the law. *State v. Underdahl*, 767 N.W.2d 677, 684 (Minn. 2009). Generally, generally, a criminal

defendant "should be allowed to discover information that could lead to admissible evidence." *State v. Olcutt*, No. A06-2340, 2008 WL 1747675 at *2-5 (Minn. Ct. App. April 15, 2008).

In all criminal cases, federal law guarantees a defendant the right to receive all exculpatory evidence in the actual or the constructive possession of the prosecution. Failure turn over this material to the defendant so is a violation of Due Process Clauses of the Fifth and Fourteenth Amendments. *Brady v. Maryland*, 373 U.S. 83 (1963); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Strickler v. Greene*, 527 U.S. 263 (1999). Due process requires that "criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." *Ritchie v. Pennsylvania*, 480 U.S. 39, 56, 107 S.Ct. 989, 1000, 94 L.Ed.2d 40 (1987). Under the Minnesota rules, a defendant may seek a discovery order from the court in its discretion, Minn. R. Crim. P. 9.04, or request a subpoena of witnesses and records, Minn. R. Crim.P. 22.01, 22.02. The rules are intended to give "complete discovery subject to constitutional limitations." Minn. R. Crim. P. 9, cmt. ¶ 1.

I. Due Process Requirements

Some courts define materiality in terms of the standard the defense must meet to get a conviction reversed when a *Brady* violation is discovered after trial, and the issue is raised on appeal or at post-conviction proceedings. *See generally Brady v. Maryland*, 373 U.S. 83, 87 (1963). In this context, materiality is usually defined as whether there was a reasonable probability that the result of the trial would have been different if the exculpatory material had been turned over before trial.

But other courts recognize, that this standard is not really appropriate as a guide for whether information must be turned over *before* trial. *See* I.B, *infra*. Today, Brady and its progeny impose on the prosecution a "duty to learn of," *Kyles v. Whitley*, 514 U.S. 419, 437

(1995), and disclose to the defense all "favorable," Brady, 373 U.S. at 87, "material," *id.*, information "known to the others acting on the government's behalf in the case, including the police." *Kyles*, 514 U.S. at 437. The prosecution must disclose this information "at such a time" and in such a manner "as to allow the defense to use the favorable material effectively," *Lindsey v. United States*, 911 A.2d 824, 838 (D.C. 2006), – which, as a practical matter, means well before trial if not at the outset of the case, because "the due process obligation under Brady to disclose exculpatory information is for the purpose of allowing defense counsel an opportunity to investigate the facts of the case and, with the help of the defendant, craft an appropriate defense." *Perez v. United States*, 968 A.2d 39, 66 (D.C. 2009).

Those courts have usually adhered to the language of *Brady*, *Kyles*, and *United States v. Bagley*, 473 U.S. 667, 675 (1985), all of which speak of the obligation to turn over anything that is relevant to guilt or punishment and is exculpatory or favorable to the defense.

A. Favorability.

Favorable information encompasses "exculpatory," "impeaching," and mitigating information. *E.g.*, *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *see also Bagley*, 473 U.S. at 676 ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.") (internal quotation and citation omitted).

Examples of favorable information include:

1. Any information that tends to cast doubt on the defendant's guilt with respect to any essential element in any charged count. *Brady*, 373 U.S. at 87.
2. Any physical evidence, testing, or reports tending to make guilt less likely. *See, e.g.*, *Benn v. Lambert*, 283 F.3d 1040, 1060 (9th Cir. 2002) (failure to disclose investigative report that fire was not caused by an arson); *Sawyer v. Hofbauer*, 299 F.3d 605 (6th Cir. 2002) (testing withheld by prosecution demonstrated that semen stain in forced fellatio case belonged to a

person different than the defendant); *Mitchell v. Gibson*, 262 F.3d 1036, 1063-64 (10th Cir. 2001) (State actively withheld and misled about DNA testing by different lab that completely contradicted forensic testimony of police examiner at trial); *United States ex rel. Smith v. Fairman*, 769 F.2d 386, 391 (7th Cir. 1985) (withheld ballistics results showing that alleged firearm was inoperable); *State v. Larimore*, 17 S.W.3d 87 (Ark. 2000) (withheld original medical examiner opinion on time of death).

3. Any information that tends to support an affirmative defense. *Mahler v. Kaylo*, 537 F.3d 494, 500-01 (5th Cir. 2008) (*Brady* violated where prosecution failed to disclose witness statements that decedent and defendant were actively fighting when gun went off); *United States v. Spagnoulo*, 960 F.2d 990 (11th Cir. 1992) (government withheld psychiatric report demonstrating that defendant may have a disorder, which could have made an insanity defense viable and otherwise changed defense strategy); *Finley v. Johnson*, 243 F.3d 215 (5th Cir. 2001) (prosecution withheld fact that there had been a restraining order placed against victim to protect his wife and child, which would have supported defendant's affirmative defense that he kidnapped victim in order to protect the victim's wife and child).

4. Any information that tends to cast doubt on the admissibility of the government's evidence. *Gaither v. United States*, 759 A.2d 655, 663 (D.C. 2003) (remanding because motions court "ignored the *Brady* consequences" of allegations of use of suggestive identification procedures by the police); *mandate recalled and amended by* 816 A.2d 791 (D.C. 2003) (again directing remand); *Smith*, 666 A.2d at 1224-25 (information that could have undermined admission of statement as excited utterance "require[d] disclosure under Brady"); *James v. United States*, 580 A.2d 636 (D.C. 1990) (same).

5. Any information that tends to support the defendant's pretrial constitutional motions or tends to show that defendant's constitutional rights were violated. *United States v. Gamez-Orduno*, 235 F.3d 453, 461 (9th Cir. 2000) (*Brady* violated where prosecution suppressed report that would have demonstrated that defendants had Fourth Amendment standing to challenge search); *Nuckols v. Gibson*, 233 F.3d 1261 (10th Cir. 2000) (*Brady* violation when government failed to disclose allegations of theft and sleeping on the job of police officer whose testimony was crucial to the issue of whether a Miranda violation had occurred—and thus, crucial to the admissibility of the confession).

6. Any information that tends to diminish culpability and/or support lesser punishment. *Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993); *State v. Rein*, 477 N.W.2d 716, 719-20 (Minn. Ct. App. 1991) ("[C]riminal defendants have a due process right to explain their conduct to the jury, whether or not their motives constitute a valid defense"); *Cone v. Bell*, 129 S. Ct. 1769, 1783-86 (2009) (evidence that defendant "was impaired by his use of drugs around the time his crimes were committed" constituted *Brady* information; remand to assess its materiality as mitigation evidence in sentencing); *United States v. Quinn*, 537 F. Supp. 2d 99 (D.D.C. 2008) (prosecution's plea deal with another target was Brady information where it showed sentencing disparity).

7. Benefits received by a witness. *Banks v. Dretke*, 540 U.S. 668, 702-03 (2004); *Giglio v. United States*, 405 U.S. 150 (1972).

8. Other known conditions that could affect the witness's bias such as: animosity toward defendant, animosity toward a group of which the defendant is a member or with which defendant is affiliated, relationship with the victim, known but uncharged criminal conduct. *See* DAG Guidance Memo, Step 1.B.7.[5]

9. Information that calls into question efforts to present the witness as neutral and disinterested. *Schledwitz v. United States*, 169 F.3d 1003, 1015-16 (6th Cir. 1999) (*Brady* violation when government presented witness as disinterested expert but witness had been actively involved in the criminal investigation).

10. The prosecution has a duty to review documents that are otherwise privileged or protected from disclosure by statute or court rule. *United States v. Kohring*, 637 F.3d 895, 908 (9th Cir. 2010) ("prosecution ha[d] a duty to disclose the non-cumulative underlying exculpatory facts in the [prosecutor's] email") (internal quotations and citation omitted); *United States v. Lloyd*, 71 F.3d 408 (D.C. Cir. 1995) (*Brady* violation when government failed to disclose IRS filing information for people, even though protected by statute, because those people's prior false returns could have helped defendant show that the new falsities were not his doing, but rather, a continuation of their prior improper conduct); *Hammon v. United States*, 695 A.2d 97, 105 (D.C. 1997) (acknowledging that "under certain circumstances, records in confidential juvenile case files are subject to Brady disclosure" & citing cases); *Cf. Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (relying on *Brady* cases, Court holds defendant's due process entitlement to favorable material documents potentially extended to documents in statutorily-protected Children and Youth Services file and affirming remand for in camera review); *United States v. Williams Companies, Inc.*, 562 F.3d 387, 397 (D.C. Cir. 2009) (Acknowledging that Brady "contemplates a role" for the trial court vis-à-vis disclosures of privileged information, and directing that "[u]pon remand the district court can flesh out the details as to which documents must be disclosed . . . and determine whether a protective order should be issued with respect to any of those documents").

B. Materiality

Information is material if "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. The prosecution's "duty of disclosure" pretrial under *Brady* is "broad," *Strickler*, 527 U.S. at 281, and "exists even when the items disclosed later prove not to be material" on appeal. *Boyd*, 908 A.2d at 60; *see also Cone*, 129 S. Ct. at 1783 at n.15 (prosecutors must "resolv[e] doubtful questions in favor of disclosure"); *Kyles*, 514 U.S. at 439-40 (same).

[5] 2010 memo "Guidance for Prosecutors Regarding Criminal Discovery" issued by then Deputy Attorney General David Ogden in the wake of the Ted Steven's scandal, now codified at Section 165 of the United States Attorney's Criminal Resource Manual and available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00165.htm.

II. THE MATERIALS SOUGHT HERE ARE FAVORABLE AND MATERIAL.

The motion seeks six classes of information:

1. All email correspondence, with all metadata intact, that meets the following criteria: (A) between employees or agents of the City of Bloomington and employees or agents of the Mall of America, (B) dated between December 2014 and January 2015 inclusive, (C) and related to the December 20, 2014 demonstration at the Mall of America.

2. A log that shows all deletions of or alterations to the email correspondence in item 1, *supra*.

3. A privilege log for an emails in item 1, *supra*, that the State withholds on the basis of attorney-client privilege or work-product doctrine (including the application of either via a joint-defense privilege).

4. All documentation related the Bloomington Port Authority's repayment of tax incremental financing bonds used for Mall of America development.

5. All documentation related to joint work, presentations, or equipment earmarked or used exclusively for the benefit of the Mall of America including all collaborations with law enforcement.

6. All documentation on the Mall of America expansion construction's impact on surrounding public grounds including traffic and pedestrian flow planning documentation.

Email correspondence between the Mall and the State show a disturbingly close relationship, and one joined against Defendants. (Flaherty Decl. Ex. A, BLOOM-MOA26, 29) The Bloomington City Attorney gave her cell phone number to MOA's in-house counsel and other employees. (Flaherty Decl. Ex. A, BLOOM-MOA1.) Bloomington and MOA discussed coordination of their criminal and legal strategies. (*Id.* BLOOM-MOA7.) The State claimed privilege on behalf of MOA. (*Id.*, Ex. H pp. 2-4.) Bloomington directed MOA's investigation and evidence-preservation efforts. (*Id.*, Ex. A BLOOM-MOA9-10.) Bloomington advised MOA regarding sentencing to better inform MOA's discipline of its retail tenant and urged that the tenant be punished by MOA. (*Id.* BLOOM-MOA8, 12.) The volume of this correspondence itself casts doubt on the State's argument that MOA is no different than any other alleged victim, and

supports the defense that the close relationship between Bloomington and the MOA strongly undercuts the credibility of the State's witnesses. These emails also show that the demonstration was in fact peaceful and was political advocacy. (*Id.*, BLOOM-MOA37 (referring to "zero injuries" & BLOOM-MOA38-39 (discussing advocates trying to prove a point and describing "chants").)

The emails also have very high impeachment value. For example, at the last hearing, the Bloomington City Attorney told the Court "we have not determined whether we are going to ask for restitution." (Flaherty Decl. Ex. G, 26:13-14.) But the Bloomington City Attorney told several MOA employees that "I would like to include a restitution claim in the body of the complaint." (Flaherty Decl. Ex. A, BLOOM-MOA19.)

The emails also support Defendants' argument that MOA's and law enforcement's overreaction is the true cause of any alleged disturbance, rather than Defendants themselves. A jury could find that but for the overreaction by security forces, no disturbance or disorder would have occurred. (*E.g.* Flaherty Decl. Ex. A, BLOOM-MOA16, 19, 61.) The emails are also material and favorable to show that Defendants' conduct was motivated by a genuine, good-faith desire to raise public awareness of racial injustice and police misconduct. (*Id.*, BLOOM-MOA30.) Defendants are not social miscreants bent on wanton destruction; they are advocates for the same ideals embodied in the Fourteenth Amendment and § 1983. This correspondence is thus highly mitigating.

Information regarding alterations or deletions—and claims of privilege—also are material and favorable. The civil, open-records lawsuit against the City, contains credible allegations that Bloomington altered or destroyed information related to this case. (*See* Flaherty Decl. Ex. C pp. 14-15, 52-55.) If Bloomington has not altered or destroyed information related to

this case, its log can simply state so. But if, as it appears, that Bloomington, or some other member of the prosecution team, has altered or destroyed information related to this case, Defendants deserve a log containing that information.

The information sought in categories 3 – 6 likewise show the closeness of the relationship between MOA and the government, the changed circumstances since *Wickland*, and facts particular to the road-blocking charges. (*E.g.*, Flaherty Decl. Ex. F).

To the extent that the Court may not be able to determine based on descriptions of the evidence that said evidence is discoverable, Defendants request an in camera review by the Court to determine whether to require disclosure pursuant to *State v. Hokanson*, 821 N.W.2d 340 (Minn. 2012). To the extent that the prosecution fails or refuse to disclose any and all of the above-described evidence, Defendants move for dismissal of the charges against them or such other relief that is just and appropriate in the Court's wisdom and experience.

To the extent that the State asserts that the information requested is—or needs to be—confidential or otherwise secret, Defendant has no objection to having the Court issue a protective order designating any or all documents as "Confidential" or "Attorneys Eyes Only." Any issues regarding these designations can be resolved post-disclosure before trial, through the good-faith efforts of counsel.

CONCLUSION

The emails requested by the Defendants' are material and essential to present a complete defense. The information requested regarding the government's dealings with the Mall of America are public and must be disclosed. For these reasons, Defendants respectfully request their Motion to Compel Disclosure be granted.

Dated: July 1, 2015

BRIGGS AND MORGAN, P.A.

s/ Scott M. Flaherty
Scott M. Flaherty (#388354)
Michael M. Sawers (#392437)
Cyrus M. Malek (#395223)
Jordan L. Weber (#396769)
Briggs and Morgan, P.A.
80 South Eighth Street, #2200
Minneapolis, Minnesota 55402-2157
(612) 977-8400

ACLU OF MINNESOTA

By: s/ Teresa J. Nelson
Teresa J. Nelson (#269736)
2300 Myrtle Ave., Suite 180
Saint Paul, Minnesota 55114
Telephone: (651) 645-4097

ATTORNEYS FOR
KANDACE MONTGOMERY