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April 3, 2015

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PINAL

STATE OF ARIZONA,

Plaintiff,

vs.

TYLER JAMES KOST,

Defendant.

Case No.: S1100 CR2014-00949; CR2014-01054; CR2014-01772

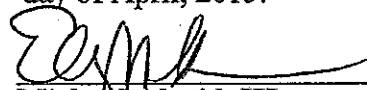
**REPLY TO STATE'S RESPONSE TO
MOTION TO COMPEL DISCLOSURE OF
SOCIAL MEDIA RECORDS**

(Oral Argument Requested)

(Status Conference set: April 6, 2015)

The Defendant, Tyler Kost, by and through undersigned counsel, hereby submits this Reply to the State's Response. This Reply is supported by the attached Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 3rd day of April, 2015.



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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **A. The Social Media Accounts Belonging to Alleged Victims and Witnesses are**
3 **Within the Possession and Control of the Pinal County Attorney's Office and**
4 **are Discoverable Pursuant to Rule 15.1 Ariz.R.Crim.P.**

5 In refusing to obtain and turn over any remaining social media records pertaining to this
6 case, the State claims, "the social media accounts belonging to victims and witnesses are not
7 within the State's possession or control." (See State's Response at 2.) The State's position is
8 completely without merit. In fact, the social media records are clearly in the prosecutor's
9 control and are discoverable under both Rule 15.1(f)(2) and (3) of the Arizona Rule of Criminal
10 Procedure. Specifically, Rule 15.1(f) provides:

11 **Disclosure by prosecutor.** The prosecutor's obligation under
12 this rule extends to material and information in the possession
13 or **control** of any of the following:

- 14 (1) The prosecutor, or members of the
15 prosecutor's staff, or
- 16 (2) **Any law enforcement agency which has**
17 **participated in the investigation of the case**
18 **and that is under the prosecutor's**
19 **direction or control, or**
- 20 (3) **Any other person who has participated in**
21 **the investigation or evaluation of the case**
22 **and who is under the prosecutor's**
23 **direction or control.**
24 *(emphasis added.)*

25 Here, the Pinal County Sheriff's Office has clearly participated in the investigation and
continues to participate, as evidenced by their multiple press conferences regarding this case,
the most recent occurring on April 2, 2015. Despite the fact that the Pinal County Sheriff's
Office has already easily obtained social media records belonging to seven (7) of the thirteen
(13) alleged victims by simply filling out an online form on Facebook's and Instagram's
website, the State is now claiming that those items are not in their control. This is incorrect.



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1 All Facebook or Instagram records are under the control of the prosecutor. (*See* Rule 15.1(f)(2)
2 Ariz.R.Crim.P.) The prosecutor, through its agent, the Pinal County Sheriff's Office, has
3 control over any Facebook or Instagram records they choose. Given the State's opposition to
4 this Motion, it appears that the State is now seeking to "pick and choose" what documents they
5 want. This type of selective evidence disclosure is improper and should not be allowed by this
6 Court.

7 Likewise, Facebook and Instagram have participated in the investigation by readily
8 handing over the requested records to the Pinal County Sheriff's Office. In doing so, Facebook
9 and Instagram are also under the prosecutor's direction or control. As such, any and all
10 Facebook records are under the control of the prosecutor. (*See* Rule 15.1(f)(3) Ariz.R.Crim.P.)

11 Furthermore, considering neither the defendant, nor this Court, has any subpoena power
12 over Facebook and therefore cannot obtain Facebook records, the State, through the Pinal
13 County Sheriff's office, has sole control over the records. Refusing to obtain and disclose any
14 remaining social media records and arguing that the social media records are not within the
15 State's possession is analogous to the State refusing to give over an item in a locked box, to
16 which only the State has the key, and then arguing that the item is not in the State's possession.
17 The State's argument is not only disingenuous, it is a derogation of the prosecution's special
18 duty to seek justice. Ethical Rule 3.8 of the Arizona Rules of Professional Conduct.

19 **B. The Requested Social Media Accounts are *Brady* Material and the Defendant is**
20 **Entitled to the Material as a Matter of Due Process.**

21 In a glaring omission, the State failed to even address its duty to disclose the requested
22 social media records as *Brady* material. *See Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10
23 L.Ed.2d 215 (1963). In *Brady*, the United States Supreme Court stated, "[w]e now hold that
24 the suppression by the prosecution of evidence favorable to an accused upon request violates
25

1 due process where the evidence is material either to guilt or to punishment, irrespective of the
2 good faith or bad faith of the prosecution.” *Id.* at 87. In addition to exculpatory evidence,
3 *Brady* requires the disclosure of evidence impeaching the testimony of a government witness
4 when the reliability of that witness may be determinative of a criminal defendant’s guilt or
5 innocence. *See Giglio v. United States*, U.S. 150, 153-55 (1972).

6 Under a *Brady* analysis, the material is under the prosecutor’s possession when the
7 holder of the material acts as an arm of the prosecution. *See Kyles v. Whitley*, 514 U.S. 419,
8 454 (1995) (declining State’s request to hold that prosecutor not responsible to disclose
9 information not known by prosecutor, although known by police.) *See also, Carpenter v.*
10 *Superior Court In and For County of Maricopa*, 176 Ariz. 486, 490 (Div. 1, 1993)(“We agree
11 that a law enforcement agency investigating a criminal action operates as an arm of the
12 prosecutor for purposes of obtaining information that falls within the required disclosure
13 provisions of Rule 15.1.”).

14 Here, the Pinal County Sheriff’s Office is clearly an arm of the prosecution. Likewise,
15 considering the fact that the social media content is not a matter of public record, and only
16 available to law enforcement, the records are under the exclusive control of the prosecution.

17 Furthermore, the prosecutor cannot avoid the requirements of *Brady* “by keeping
18 itself in ignorance, or compartmentalizing information about different aspects of a case.” *State*
19 *v. Lukezic*, 143 Ariz. 60, 67, 691 P.2d 1088, 1095 (1984) (quoting *Carey v. Duckworth*, 738
20 F.2d 875, 878 (7th Cir. 1984)). That is exactly what the prosecutor is trying to do in this matter.
21 Despite the obvious *Brady* material obtained in the social media records so far, the prosecution
22 is trying to remain ignorant of any additional *Brady* material by claiming they do not physically
23 possess it. Such willful ignorance is impermissible under *Brady* and flies in the face of the
24 prosecution’s duty to seek justice.
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C. The Social Media Accounts Already Disclosed Show a Conspiracy Among Multiple Alleged Victims and Witnesses to Make False Allegations Against the Defendant Thereby Making all Social Media Records of all Alleged Victims *Brady* Material.

The State claims that the defense must show a “substantial need” for the social media records requested pursuant to Rule 15.1(g). (See State’s Response at 3.) That analysis is incorrect. The correct analysis is whether or not the social media records are *Brady* material. *Brady* material is evidence which “would tend to exculpate or reduce the penalty” of a defendant. See *Brady v. Maryland, supra*. However, under either analysis, the defense prevails. The defense has plainly shown a substantial need and has also shown that the requested evidence would tend to exculpate or reduce the penalty of the defendant. The records disclosed so far show a blatant conspiracy by several of the alleged victims, and several civilian witnesses associated with other alleged victims.

In attempting to argue that the defense has not shown a substantial need for the requested social media records, the State argues that “the defense’s motion to compel is based entirely on speculation rather than materiality and facts.” (See Response at 3.) That argument is directly contrary to the evidence. The defense has provided multiple examples of clearly exculpatory evidence. This is not speculation but rather the actual incriminating statements made directly by co-conspirators as they plotted to attack Mr. Kost. The evidence set forth in the defense’s original Motion was found in discovery turned over by the State. More specifically, the State “document dumped” over 6,000 pages of Facebook and Instagram posts for the defense to sort through. In doing so, the defense found the proverbial needle in the haystack when discovering the Facebook conversation in which six (6) girls, three (3) of them alleged victims in this case, clearly conspired against Mr. Kost to seek revenge, and even scheduled a viewing of the John Tucker Must Die movie to assist in their conspiracy, only two



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1 weeks before they claim Mr. Kost assaulted them. (See Original Motion to Compel at 8-10.)
2 That is not speculation; that is clearly exculpatory *Brady* material.

3 Furthermore, the records obtained so far show that the conspiracy involved additional
4 parties outside of the six (6) girls involved in the Facebook group message cited above. As
5 pointed out in the original Motion to Compel, the six (6) girls mention a male friend of theirs
6 named AD who wanted to physically assault Mr. Kost. (See Original Motion to Compel at 8-
7 10.) Based on the records disclosed by the State, AD and another alleged victim, CB, appear to
8 be personally involved. Even though CB was not a party to the group Facebook chat plotting
9 against Mr. Kost, CB's Facebook records clearly show she had motive to lie about being
10 sexually assaulted.

11 Specifically, on 12/7/2013, two months *after* she was allegedly violently sexually
12 assaulted and impregnated by Mr. Kost, alleged victim CB corresponds with a completely
13 unknown witness, BM¹. In the exchange, CB states:

14 12/7/213; 16:39:42 UTC

15 CB: Hi [BM] my name is [CB]. I go to San Tan Foothills. I am 16 years old and my
16 boyfriend is 18 in 2 months. I've been really sick this past week so he bought
17 me pregnancy tests. I took one last night and one in the morning. They came out
18 positive. I'm not ready for a baby. I'm a cheerleader and I have state in a month.
19 My mom will completely disown me along with the rest of my family. . . What
20 do I do?!),: I came to you cuz you have [a daughter] and I follow you on
21 Instagram and you're such a good momma. I just need someone's help who is
22 my age),: please help me):

23 BM: Hi [CB] (: What you should do is go see a doctor or counselor and they will
24 discuss what is best for you. I hate saying this because I am totally against this
25 but, abortion might be the best. I know that you have a life right now and
everything is going great for you. Just think about it and let me know.. Because
if you don't want to do abortion but adoption, I have the perfect mom for it. Let

¹ It is unknown to the defense if BM is a juvenile or not, but in an abundance of caution the defense will refer to her by her initials.



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1 me know(: and it's totally fine if you come to me, I'm here anytime! I love to
2 help out in any way that I can (:
3 CB: Thank you so much. I just don't want to lose the relationship I have with my
4 mom),; I'm so scared on what she's going to do to me),;

5 (sic.) (See CB's Facebook records p. 1585 attached as Exhibit A to the Appendix filed
6 separately under seal.) During this conversation, CB talks about Mr. Kost as her current
7 boyfriend buying her pregnancy tests, expresses she is terrified that her mother would disown
8 her if she finds out that she is pregnant, and never mentions anything about being sexually
9 assaulted. These facts show a powerful motive for CB to fabricate a rape allegation. This is
10 clearly exculpatory evidence. This evidence has now uncovered another witness that would not
11 have been known without this disclosure and shows that the conspiracy may very well reach
12 further than what is shown in the current records disclosed by the State. It is crucial for the
13 defense to have the remaining social media records requested.

14 Finally, despite the State's argument that there is no "material or factual justification for
15 [a] substantial need for the Facebook, Instagram, or other social media account information for
16 victims HJ, LP, CM, SB, RH, or JB," there are actually several connections amongst the
17 current conspirators and some of the remaining alleged victims.

18 Specifically, according to the Facebook records disclosed so far, Austin Schack was the
19 19 year old friend of TS and MH, two members of the group Facebook plot against Mr. Kost.
20 Mr. Schack made it his mission to "fucking destroy" Mr. Kost, and he contacted numerous
21 other alleged victims prior to their statements to police. In fact, Austin Schack's Facebook
22 records indicate he contacted alleged victim CM numerous times before, during, and after her
23 interview with police. (See Austin Schack's Facebook records p. 1054-1089 attached as
24 Exhibit B to the Appendix filed separately under seal.) Tellingly, Austin deleted numerous
25

1 messages between them, as evidenced by the records. (*See Id.*) Therefore, the defense needs
2 CM's Facebook records to determine exactly what was deleted.

3 Likewise, Austin Schack's Facebook records indicate alleged victim SB's mother
4 contacted Austin Schack. In the exchange SB's mother says:

5 SB's Mother: Hi Austin, I'm [SB]'s mom and I just wanted to say thank you for
6 what you've done to help not only [SB] but all these other girls
7 Tyler assaulted. I am truly grateful to you for getting the ball
8 rolling and getting this a-hole off the street. You have probably
9 saved lives in doing so. He would've only escalated with his
10 behavior and who knows what he would've done. I'm so happy
11 you did the right thing and reported him. Most people wouldn't
12 have, so thanks again.

13 (*See Austin Schack's Facebook records p. 93-94 attached as Exhibit C to the Appendix filed*
14 *separately under seal.*) Based on that message it is clear that Austin Schack and SB
15 communicated, yet there are no messages between Austin Schack and SB in his Facebook
16 records. The defense has reason to believe Austin Schack and SB were good friends and knew
17 each other very well. Therefore, SB's social media records are necessary to determine if
18 Austin Schack interfered with her statement, or if she was a part of the conspiracy.

19 There are known connections between nine (9) of the thirteen (13) alleged victims, and
20 a conspiracy between at least three (3) of the alleged victims along with three (3) civilian
21 witnesses; the remaining social media records are necessary *Brady* material.

22 **II. CONCLUSION**

23 Based on the foregoing, the defense requests the Court compel the State to obtain and
24 disclose any and all social media records pertaining to the remaining alleged victims, HJ, LP,
25 CM, SB, RH, and JB, as well as the three (3) girls who were members of the Facebook group
chat to plot against Mr. Kost: MR, MH, and CB. The defense further requests leave to compel



1 additional social media records of witnesses should they become necessary based upon
2 continued review of the social media records and ongoing discovery.

3
4 **RESPECTFULLY SUBMITTED** this 3rd day of April, 2015.

5 

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8 One E. Washington Street, Suite 1800
9 Phoenix, Arizona 85004

10 **ORIGINAL OF THE FOREGOING**

Hand-delivered this 3rd day of April, 2015, to:

11 Clerk of the Court
12 Pinal Superior Court
13 971 N. Jason Circle, Building A
14 P.O. Box 2730
15 Florence, Arizona 85232

16 **COPY OF THE FOREGOING**

Hand-delivered this 3rd day of April, 2015, to:

17 Honorable Kevin D. White
18 971 N. Jason Circle, Building A
19 P.O. Box 2730
20 Florence, Arizona 85232

21 Deputy County Attorney Assigned
22 Pinal County Attorney's Office
23 P.O. Box 887
24 Florence, Arizona 85232

25 By: 



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