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Attorneys for Defendant

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

STATE OF ARIZONA,)
)
Plaintiff,)
)
v.)
)
RICHARD CHRISMAN,)
)
Defendant.)

NO. CR 2010-153913-001 DT

**RESPONSE TO OBJECTION TO MOTION
TO REMAND**

(Assigned to the Hon. Sherry Stephens)

ORAL ARGUMENT REQUESTED

RICHARD CHRISMAN, through counsel undersigned, responds to the state's
Objection to his Motion to Remand as follows:

1. Deputy Maricopa County Attorneys Ted Duffy and Juan Martinez conducted the grand jury presentation in this case. Prosecutors Duffy and Martinez presented the case almost entirely from the point of view of Officer Sergio Vergillo, omitting a myriad of material exculpatory facts and ignoring specific and implied Grand Juror questions.
2. The objections by the State include their apparent belief that the defense is asking additional time to develop facts and circumstances that have or will occur AFTER October 13, the day the State presented this case to the Grand Jury. This is incorrect. The

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defense is well aware that only material known to the State on October 13 or material of which they should have been aware on October 13, is relevant to a Motion to Remand.

3. An example of ¶2 is this: Grand Juror Bland asked the following questions and the State responded:

Grand Juror Bland: . . . Was there a statement given by officer Chrisman?

Mr. Martinez: The officer made a statement to another Officer by the name of Officer Kencannon. That was the only statement that was made by Officer Chrisman.

Grand Juror Bland: He's made no further comment about this?

Mr. Martinez: The only statement Officer Chrisman made immediately after this occurred to Officer Mark Kencannon. There are no other statements by Officer Chrisman. Grand Jury Transcript ("GJT"), pp. 41-42.

In fact on October 12th the State had in its possession a letter from Officer Chrisman's counsel, attached hereto as Exhibit "A," in which the defense specifically informed the State regarding statements made by Officer Chrisman:

Our client has been interviewed by Dr. William Lewinski, a nationally renowned expert in police officer use of force. . . . Dr. Lewinski has spent several hours with Richard and has a complete understanding of what happened the day of the shooting and why it was absolutely necessary that my client shoot Daniel. He would be pleased to relate his interview with Richard to the grand jury and additionally would be willing to offer his expert opinions as to why this was a justifiable use of force. Exhibit "A," ¶ 3

In addition to this being clear exculpatory evidence withheld from the Grand Juror in violation of *Trebus v. Davis*, 189 Ariz. 621, 944 P.2d 1235 (1997), it is also a violation of A.R.S. § 21-412.

4. Another example of ¶2 is: The first officer on the scene after the shooting was Phoenix police officer Eric Rude. He spoke with Officer Chrisman. Officer Chrisman told

Officer Rude that he had to shoot Mr. Rodriguez because the suspect had tried to take his gun. Neither the Phoenix police department nor the County Attorney's office interviewed Officer Rude until just last week on Wednesday, November 10, when Mr. Martinez and his assistant, Mr. Feminia, called Officer Rude into their office and interviewed him for approximately two hours.¹ All of Officer Rude's information obtained during this two hour interview [the State has not yet made the interview available to the defense] was known to the Phoenix Police Department on October 5 and should have been known to the State on October 13.

5. The grand jurors were told that Officer Chrisman briefly spoke with another officer at the scene. The prosecutors knew that Chrisman's attorney arrived almost immediately and advised him not to make any statements at that time which is of course his right. The prosecutor then asked the witness whether Officer Chrisman addressed "the handgun-to-the-temple event?"² The witness replied he had not, knowing that Chrisman had invoked. This was an improper, indirect and impermissible comment on Officer Chrisman's Fifth Amendment Right. This is a manipulation of the grand jury process.

6. Another example of what was known to the State and was not presented is: Grand Juror Bland asked:

It seems like there's a lot of irrational behavior. The mother calls saying that she feels threatened. She's now out of the trailer and hopefully in safe harbor in some fashion. The officers enter and in a very short period of time, everything is completely agitated.

What I am trying to best understand is that the other officers

¹ It is significant to note that none of Officer Rude's exculpatory evidence is contained in the lengthy Form 4 presented to the Judge who set bond for this case, the Honorable Douglas Rayes. This is the form, of course, that the County Attorney's office knows is the very first information imparted to the media.

² Virgillo is alleged to have stated Chrisman allegedly placed a gun to the decedent's temple which Chrisman, through his attorneys, has denied.

seemed to have all the chain of events in a very agitated state. I am just wondering on a couple of different levels is the behavior of the victim, like he was on PCP or something of that nature because he was not responding to anything and he was resisting arrest?" GJT pp. 39-40.

Mr. Duffy and Martinez avoid answering the grand jurors inquiry into the drug problem and get the juror to focus on the resisting arrest part of his question. But this grand juror is not so easily misled. He persists:

In terms of whether or not there were any substances, illicit or otherwise, inside the body of the victim, that toxicology report has not come back, correct? GJT p. 40.

It is obvious that the Grand Juror would like to know if the State has any evidence of the victim's drug use. The State, cleverly [and correctly] says that report has not come back. Yet the lead detective in the case, Ken Porter, who was testifying, surely knew and the State should have known that the victim's mother and the neighbors interviewed on October 5 had all reported that the victim was on drugs and had been violent in the past. Some examples: The victim's mother told the officer's **after** the shooting that "She knows Daniel's been doing drugs." When asked how long, she replied: "Since March, since his girlfriend and he broke up. She noticed the changes in him. She could tell. She has lived with him all his life and she can tell." Officer Jose Cisneros report, October 5; Neighbor Jonathan Lopez told Officer Eric Lumley on October 5 that the "victim" had hit his mother so hard that "she could not walk".

From the discovery provided so far, these are just a few areas that the defense knows of in the grand jury transcript where Officer Chrisman was denied his procedural due process rights in the presentation of the evidence. As discovery is being provided to the defense, more information demonstrating the improprieties in the grand jury proceedings is coming to light.

This is not a fishing expedition as the state implies. Defense counsel has said on more than one occasion that he is filing a Motion to Remand as soon as he has all the evidence the state possessed when it decided to indict Officer Chrisman.


To give the Court an idea of the volume and the pace of dissemination of the discovery in this matter, the state sent a letter to the defense on October 20 saying that 169 pages of discovery, 3 CD-Rs and one DVD-R were ready for pick up. On October 25th a letter stating another 17 pages of discovery were ready. A CD-R video was disclosed on October 26th, 76 pages were disclosed on October 28th, nine more on November 2nd, three DVD-Rs including one containing 10 interviews on November 4th, another 36 pages of discovery on November 5th and two more on the 9th. And discovery is not complete.

Maule v. Superior Court specifically contemplated scenarios where a defendant would need more time than the 25 day limit provided by the Rules of Criminal Procedure and allowed that Motions for Extension may be filed or Motions to Remand may be filed and later supplemented. 142 Ariz. 512, 515, 690 P.2d 813, 816 (App. 1984). The defendant has not sat by idly but rather has identified areas with problems and is analyzing the discovery as it comes in. The request for extension was in good faith and the state's objection does not set forth any harm that the state would suffer by the Court's grant of an extension.

This case involves a police officer responding to a domestic violence call. The state rushed to the grand jury, rushed to condemn Officer Chrisman in the media and now is trying to rush his case through the Court system. His attorneys should be allowed the time needed to thoroughly defend him.

RESPECTFULLY SUBMITTED this 15th day of November, 2010.

MEHRENS AND WILEMON, P.A.

By: 
Craig Mehrens
Amy Wilemon
Attorneys for Officer Chrisman

COPIES of the foregoing delivered
this 15th day of November, 2010, to:

Hon. Douglas Reyes
Maricopa County Superior Court
101 W. Jefferson, Suite 411
Phoenix, AZ 85003

Hon. Sherry Stephens
Maricopa County Superior Court
101 W. Jefferson, Suite 412
Phoenix, AZ 85003

COPY of the foregoing mailed
this 15th day of November, 2010, to:

Ted Duffy, Esq.
Juan Martinez, Esq.
Maricopa County Attorney's Office
301 W. Jefferson, 4th Floor
Phoenix, AZ 85003



EXHIBIT A

MEHRENS & WILEMON

Attorneys at Law

A Professional Corporation

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October 12, 2010

Juan M. Martinez, Esq.
Deputy Maricopa County Attorney
301 West Jefferson, 4th Floor
Phoenix, AZ 85003

Re: Richard Chrisman
CR 2010-153913

Dear Juan:

This office represents Officer Richard Chrisman. I understand that you are assigned to his case. It is my hope that we could work together to reach a determination that there is not sufficient evidence to support your presenting this matter to a Grand Jury for their determination. Of course, if I cannot, I would ask that the following information be presented to the Grand Jury as it is clearly exculpatory evidence under *Trebus v. Davis*, 189 Ariz. 621, 944 P.2d 1235 (1997).

In addition to the prosecution's duty to present clearly exculpatory evidence to the grand jury, A.R.S. §21-412 empowers the grand jury, if there is other evidence which is available and which "will explain away the contemplated charge," to order the production of that evidence for its review. That statute appears broader than the "clearly exculpatory" case law and allows the grand jury to require the prosecutor to produce "any evidence" which might explain away the charge. Obviously, they may not exercise their rights under A.R.S. §21-412 if they are unaware of what "other evidence" is available.

Our client has been interviewed by Dr. William Lewinski, a nationally renowned expert in police officer use of force. His *curriculum vitae* is attached. Dr. Lewinski has spent several hours with Richard and has a complete understanding of what happened the day of the shooting and why it was absolutely necessary that my client shoot Daniel. He would be pleased to relate his interview with Richard to the grand jury and additionally would be willing to offer his expert opinions as to why this was a justifiable use of force.

Juan M. Martinez, Esq.

October 12, 2010

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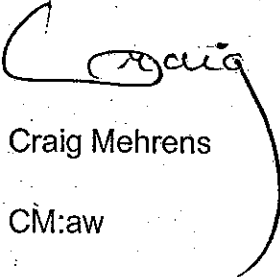
Dr. Lewinski hasn't had time to make a report of the time he spent with Richard due to his other commitments, but he and I are available to discuss this with you.

Juan, I think it is very important that the investigators who are looking into this case have the benefit of Dr. Lewinski's knowledge, not only of the facts but also his expertise. I also have spent several hours with my client. I too believe this was a justifiable use of force. One of the problems, of course, is Officer Virgillo's version, which I assume is what is stated in the Form 4. I do not know why his version is so contrary to my client's version, nor do I know why he is skewing the facts. I believe that a thorough investigation should be made of Officer Virgillo as well as my client, because it seems to me that one of them is seriously mistaken.

Please let me know what you would like to do with the above information.

Very truly yours,

MEHRENS AND WILEMON, P.A.

A handwritten signature in cursive script that reads "Craig". The signature is written in black ink and is positioned above the printed name "Craig Mehrens".

Craig Mehrens

CM:aw

cc: client