STATE OF MAINE **YORK, ss.**	**SUPERIOR COURT** **CRIMINAL ACTION** **DOCKET NO. ALFSC-CR-12-2049**
STATE OF MAINE **v.** **MARK W. STRONG, SR.**	**DEFENDANT STRONG'S FIFTH MOTION TO DISMISS FOR DISCOVERY AND DUE PROCESS VIOLATIONS, OR, IN THE ALTERNATIVE, MOTION TO COMPEL THE DISCLOSURE AND PRODUCTION OF POLICE PERSONNEL FILES, WITH REQUESTED JURY INSTRUCTIONS**

NOW COMES Defendant Mark W. Strong, by and through his undersigned counsel, and respectfully moves this Honorable Court to dismiss, with prejudice, the remaining thirteen charges against him for the State of Maine's continuing violations of Defendant Strong's compulsory and due process Constitutional guarantees to discovery, as well as the Maine Rules of Criminal Procedure regarding discovery.[1] The time has come for this Court to impose the extreme sanction of dismissal, as this is the only remedy that is adequate after months of procedural gamesmanship and non-disclosure.

If this Court determines that it will not dismiss these counts to remedy the State's egregious and ongoing violations, Defendant Strong then respectfully requests that this Court compel the State to produce the police personnel records at issue concerning the Kennebunk Police Department, as such material is exculpatory as it impacts the credibility of these witnesses, and is therefore guaranteed to Defendant Strong by the mandates of *Brady*.

[1] This current Motion supplements the pending Motion to Dismiss before this Court, filed by Defendant Strong on February 20, 2013, and incorporated here by reference and as an attachment to this current Motion.

Defendant Strong further moves that this Court instruct the jury that the State has violated Defendant Strong's Constitutional rights, with the improper purpose to deprive him of access to favorable evidence, and that the State is and has been consciously aware of this weakness of their case, in order for the jury to understand that Defendant Strong is now laboring under an undue burden to attempt to "catch up" and make use of this evidence, if and when it is finally produced to him. Defendant Strong would also request that this Court instruct the jury that it may find reasonable doubt of Defendant Strong's guilt from the existence of these *Brady* violations.

I. PROCEDURAL HISTORY OF DEFENDANT STRONG'S MOTIONS TO DISMISS AS A REMEDY FOR THE STATE'S ONGOING DUE PROCESS AND DISCOVERY VIOLATIONS

1. On July 16, 2012, Defendant Strong requested discovery from the State concerning the single count of Promotion of Prostitution with which he was charged. (Exhibit A) The request included the production of "written or recorded statements of witnesses . . . all evidence of other crimes, *wrongs, or acts* . . . of any witness whom the state intends to call in any proceeding . . . [and] all favorable information known to the state after reasonable inquiry by the prosecutor and *all law enforcement agencies* that tends to create a reasonable doubt as to the guilty of the Defendant, including all *Brady* material, any evidence that is exculpatory, mitigating, *or that affects the credibility, reliability, or motive of any witness.*" (Exhibit A, emphasis added)

2. On August 23, 2012, Defendant Strong filed his first Motion to Dismiss for discovery violations, as the State had not provided any materials to him at that time, though he had been charged six weeks prior. (Exhibit B)

3. On September 14, 2012, the Superior Court (York County, J. Wheeler) denied Defendant Strong's Motion "for reasons stated on the record." (Exhibit C) Justice Wheeler ordered the State to provide a discovery report by September 24, 2012. (Exhibit C)

4. On October 5, 2012, Defendant Strong filed his second Motion to Dismiss for discovery violations, as the State had still not complied with the Court's directive to provide all requested discovery to Defendant Strong. (Exhibit D) In his motion, Defendant Strong wrote, "The Court indicated it would impose sanctions, but would not order dismissal as a sanction because the violation [of the discovery obligations] did not appear to be intentional at that point." (Exhibit D)

5. On October 9, 2012, Defendant Strong filed his discovery requests with the State for the fifty-nine count indictment he was then facing. (Exhibit E) This request mirrored the language of Defendant Strong's initial request. (Exhibit E)

6. On November 9, 2012, the Superior Court (York County, J. Mills) denied Defendant Strong's second Motion to Dismiss, writing: "The State's failure to provide all discovery by the time of the filing of the defendant's second motion to dismiss does not require a dismissal of the complaint with prejudice. *State v. Reeves*, 499 A.2d 130, 133 (Me. 1985) ("The extreme sanction of dismissal should be reserved for extreme cases.")" (Exhibit F) The Court then indicated that the "deadline for the State's provision of the remaining discovery will be addressed in a separate order." (Exhibit F)

7. On November 9, 2012, this Court ordered that "[a]ll remaining discovery will be provided to the defendant by 11/26/12." (Exhibit G)

8. On December 6, 2012, Defendant Strong filed his third Motion to Dismiss for discovery violations, noting that the State had still not turned over all discoverable items as ordered by the November 26, 2012, deadline. (Exhibit H)

9. On December 31, 2012, this Court denied that third Motion. (Exhibit I) This Court did determine, however, that the State's providing of a police report authored by Kennebunk Police Department Lt. Anthony Bean Burpee, presumably only on December 4, 2012, days, more than a week after the discovery deadline, was a violation and ordered that "[a]ny information in the report of Lieutenant Burpee that was not provided to the defendant in other discovery will not be used by the State at trial." (Exhibit I) The issue of the missing hard drive was first raised by Defendant Strong in the hearing in support of this Motion to Dismiss. (Exhibit I)

10. On February 20, 2013, the last day of jury selection and the day in which opening statements were set to be delivered, Defendant Strong filed his fourth Motion to Dismiss for discovery violations. (Exhibit J) Defendant Strong emphasized that the State had still not provided all requested discovery, had withheld letters of plea negotiations with State witnesses, had withheld criminal information of prospective jurors until well into jury selection, had not provide notes and reports from interviews of several witnesses, had not provided discovery at all for some of their witnesses, including the patrons to be called as witnesses, and missing documents. (Exhibit J) Defendant Strong also highlighted that the State's exhibits, and the way in which the State delivered them to defense counsel, violated both the spirit and letter of the Court's order regarding their production. (Exhibit J) The Court has not yet taken up this Motion for decision.

11. On February 21, 2013, at 11 a.m., a mere two hours before Kennebunk Police Officer Audra Presby, the State's main witness, was set to testify, attorneys for the Town of Kennebunk

filed what was termed a "bench memorandum," referencing the confidentiality of municipal employee documents.[2] (Exhibit K) Though the State had been in communications with the law firm and the KPD regarding these allegedly "confidential" personnel records, for weeks if not months prior to the filing of this "bench memorandum," both defense counsel and the Court were, once again, left in the dark until the last minute. The State was thus ordered to put on other witnesses to replace Officer Presby while this matter was "sorted out."

12. During a preliminary hearing on February 22, 2013, Attorney Nathalie Burns represented to the Court that no personnel records existed on any police officer that fell within confidentiality exceptions to the statute. Upon examination by defense counsel, KPD Chief Robert McKenzie revealed that a final written decision regarding Officer Presby was available and was, in fact, public. That document was finally provided to defense counsel late that morning, while the jury, once again, waited for these State-created issues to be "sorted out." (Exhibit L)

13. Defense counsel argued to the Court that Constitutional considerations of a criminal defendant trump any sort of statutory confidentiality behind which the KPD was attempting to hide. The Court requested that counsel research that issue, as the Court would also research this issue over the weekend break. The Court expressed its dissatisfaction with the State's handling of this evidence; the State apologized, but defense counsel insisted that apologies at this stage in

[2] It should be noted that attorneys from Jensen Baird Gardner & Henry never entered their appearance on this issue, or a motion to intervene, nor did they file a formal motion on this issue, apparently holding on to this memorandum until the eleventh hour. The bench memorandum that was filed falls far short of anything that is useful for the parties or the Court, as it is a mere summarization of statutory language without analysis or without providing, as it should as a "bench memorandum," any opposing positions on the supposed confidentiality of these records. Additionally, this "bench memorandum" did not specify what records were at issue or what, if anything, the Town wanted the Court to do. The February 22, 2013, hearing on this matter did little to elucidate this issue.

the proceedings—when a jury was sworn and seated—rang hollow and that more severe sanctions would be appropriate.

II. THE CONSTITUTION, DISCOVERY, AND STATUTORILY-DEFINED "CONFIDENTIALITY"

14. The United States Constitution provides that due process of law, as well as the right "to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor," are inviolate rights afforded to *all* criminal defendants. U.S. Const. amends. V, VI, and XIV.

15. These rights collectively have been referred to as "the right to present a defense." The "right to present a defense" includes the right to discovery of relevant information, and the right to obtain and present defense evidence, notwithstanding the rules of evidence, privileges, and statutory limitation. *See, e.g.*, *Washington v. Texas*, 388 U.S. 14 (1967). To vindicate these Constitutional guarantees, courts have a manifest duty to ensure that all relevant or admissible evidence be produced to the defense.

16. In *Brady v. Maryland* the U.S. Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[3] 373 U.S. 83 (1963).

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[3] This Court commented at the February 22, 2013, hearing that it did not believe that the prosecutors acted in bad faith in not providing this information much sooner. However, the Constitution does not require bad faith: the mere failure to provide such information in a timely and responsive way is all that is needed to demonstrate a *Brady* violation. From *Brady*, "A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though . . . his action is not 'the result of guile.'"

17. The Supreme Court has extended *Brady* to require the State "to share exculpatory information with the defendant *to include information concerning the credibility of government witnesses*." *Giglio v. United States*, 405 U.S. 150 (1972) (emphasis added).

18. In *United States v. Agurs*, the Supreme Court expanded this rule further, recognizing the State's duty to disclose exculpatory information even in the absence of a specific defense request for it. 427 U.S. 97 (1976).

19. The Supreme Court has since clarified that impeachment evidence must be disclosed to the defense and defined the materiality of such information as anything that would cast doubt on the motives or credibility of any government witness. *United States v. Bagley*, 473 U.S. 667 (1985).

20. The prosecution also, the Supreme Court declared, has an affirmative duty to learn of any favorable evidence known to the officers acting on the government's behalf and the corresponding duty to disclose such information to the defense. *Kyle v. Whitley*, 514 U.S. 419 (1995).

21. The U.S. Supreme Court expounded on these principles:

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed by the prosecution or defense.

United States v. Nixon, 418 U.S. 683 (1974). This "compulsory process" is colloquially known as "discovery" and is thus Constitutionally mandated.

22. "On cross examination, counsel may ask the witness questions designed to test his memory, accuracy, veracity, bias, or to attack his estimate of character, or to contradict him." *Davis v. Alaska*, 415 U.S. 308 (1975). It needs little further comment that in order to attack a witness's credibility thoroughly, the defense must have access to impeaching evidence for that witness if in the State's possession. Impeachment evidence, if disclosed and used effectively, may make the difference between conviction and acquittal. *Naper v. Illinois*, 360 U.S. 264, 269 (1959) ("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.").

23. "When the right of the accused to examine the witness is compared to the State's desire that [the testifying law enforcement witness] fulfill his public duty to testify free from embarrassment and with his reputation unblemished . . . the right of confrontation is paramount to the State's policy which 'must fall before the right of the [defendant] to seek out the truth in the process of defending himself.'" *Id.* at 320-21. *See also, Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (guaranteeing compulsory process rights of accused to favorable information in *confidential* child sex abuse reports for use at his criminal trial); *People v. Gissendanner*, 48 N.Y.2d 543, 423 N.Y.S.2d 893 (1979) (holding that the constitutional roots of the guarantees of compulsory process and confrontation are entitled to "categorical primacy" over the State's interest in safeguarding the *"confidentiality" of police personnel records*).

24. The Supreme Court has unequivocally determined that Constitutional considerations trump legislatively created "privacy" or "confidentiality" concerns in the context of an accused's right to mount a defense:

> We conclude that when the ground for asserting the privilege as to subpoenaed materials sought for use in a criminal trial is based only on the

> generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. ***The generalized assertion of a privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.***

Nixon, 418 U.S. at 713 (emphasis added).

25. These Supreme Court decisions create a clear rule that requires prosecutors to learn of and to disclose to the defense information that *could be used* to discredit law enforcement witnesses in a case, including information contained in their personnel files.

26. Other states have considered the issue before the Court today and have determined that confidentiality surrounding police personnel records cannot be paramount to a defendant's need for that material.

26. In New Hampshire, the Supreme Court held there that the State has an obligation to disclose to the defendant information in a police officer's personnel file that could be used by the defense to impeach the officers' credibility or character when the officer is a potential prosecution witness in a criminal case. *State v. Laurie*, 139 N.H. 325 (1995). Further that Court determined that when the prosecution fails to disclose this information and it would have been material to the preparation or presentation of a defendant's case, the conviction of the defendant would be overturned unless the prosecutor could prove *beyond a reasonable doubt* that the information would not have affected the verdict. *Id.* The New Hampshire Supreme Court has also held that procedural requirements for "in camera" inspection of these files is unnecessary when the evidence is impeaching, as that evidence is thus exculpatory and guaranteed for disclosure to the defendant under the Federal and State Constitutions. *State v. Thoclosopoulos*, 153 N.H. 318 (2006).

27. In Massachusetts, the Supreme Judicial Court determined that even presumptively privileged documents are not entitled to absolute privilege when requested by a criminal

defendant. *Martin v. Commonwealth*, 451 Mass. 113 (2006). This evidence, the Court determined, should be relevant and unavailable by any other source other than law enforcement department records. *Id.* If the absence of this evidence's pretrial production would delay the trial and when the defendant is not engaged in a mere "fishing expedition" for such material, the material must be disclosed. *Id.*

28. New York has held that "[d]espite privacy and privilege claims, the defendant is entitled to records from police department personnel, disciplinary, or civilian complaint files relevant to the credibility of police officers on the material facts of the case." *People v. Gissendanner*, 48 N.Y.2d 543, 423 N.Y.S.2d 893 (1979).

28. California's high court determined nearly forty years ago that "a criminal defendants' fundamental right to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information entitles [him] . . . to discovery of police personnel records." *Pitchess v. Superior Court*, 11 Cal.3d 531 (1974).[4]

29. The mandates of the U.S. Supreme Court and the State courts' holdings are clear: When a criminal defendant requests police personnel files that are material to his defense, for impeachment purposes or otherwise, confidentiality considerations for these files must be shuttled to the side.[5] The compulsory due process protections afforded to all criminal defendants

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[4] In California, "[a] trial court's decision concerning the discoverability of material in police personnel files is reviewable under an abuse of discretion standard." *People v. Mooc*, 26 Cal.4th 1216, 1228 (2001).

[5] Recent high-publicity defeats for the Department of Justice has led to the DOJ, through Attorney General Eric Holder's, promulgating standards for federal prosecutors discovery disclosures to defense counsel. In the bungled corruption case against former U.S. Senator Ted Stevens, following a guilty verdict in which the prosecutors ultimately dismissed the indictment against the senator for their repeated failure to disclose to the defense potentially helpful evidence, in 2009 U.S. District Court Judge Sullivan remarked, "In nearly 25 years on the beach, I've never seen anything approaching the mishandling and misconduct that I've seen in this case."

trump such concerns, a fact presumably known to the attorneys for Jensen Baird when they filed their "bench memorandum" on this very issue.

III. DEFENDANT STRONG'S REQUESTS FOR RELIEF

30. A review of the tortured and incomplete discovery production in this case should lead this Court to the same conclusion reached by Defendant Strong: the only appropriate and effective remedy at this point, in the middle of this sprawling and meandering trial against him, is dismissal, with prejudice, of all counts against him for the cumulative effect of these ongoing discovery violations. This extreme case calls out for the extreme sanction of dismissal; the State has not fulfilled its obligations and has thus trampled upon the due process rights of Defendant Strong since July 2012; we are now in the midst of trial; the sanction must be extreme. *See, e.g.*, *State v. Sergeant*, 656 A.2d 1196, 1199 (Me. 1995). Seven months is beyond an adequate length of time for the State of Maine to pull together the relevant, material, requested, and Constitutionally-required discovery owed to Defendant Strong; the time has come for the State to face the consequences of its inaction and dereliction of its duties. Dismissal of these final thirteen charges is the appropriate and necessary consequence here.

31. If this Court does not decide that dismissal is warranted after these seven months of discovery games and negligence by the State, Defendant Strong would request that this Court compel—as it may—the immediate production of the personnel records of the Kennebunk Police Department officers involved in the prosecution of Defendant Strong and who are going to be

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Similarly, in a 2009 two-and-a-half month trial against W.R. Grace & Company, who was acquitted of a variety of serious environmental-related charges, the prosecution failed to disclose to the defense evidence that undermined the credibility of its main witness. The judge in that case explicitly instructed the jury that the government had "violated its solemn obligation and duty" by withholding such evidence. Adam Hoffington and Robert Solerno, "Department of Justice Issues Memoranda Addressing Discovery Obligations of Prosecutors in Criminal Cases," January 5, 2010, at http://www.mofo.com/department-of-justice-issues-memoranda-addressing-discovery-obligations-of-prosecutors-in-criminal-cases-01-05-2010/

called as State's witnesses. As detailed in the case law above, Defendant Strong's Constitutional considerations and right to present a defense trump the confidentiality statutes belated cited by the Town of Kennebunk, through counsel. Any further delay of this trial would have deleterious effects on Defendant Strong's ability to secure a fair trial before a fair and impartial panel of jurors, who have been *more* than patient throughout the procedural wranglings and posturings of this case. Not a single hour or day should be wasted on this latest prosecution misstep.

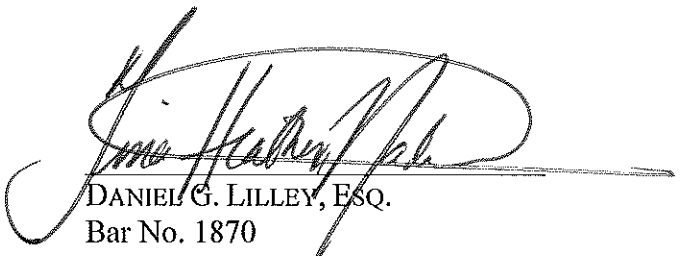
32. Defendant Strong further requests that should dismissal not be granted, and whether or not the Court compel the production of the requested documents, that the Court instruct the jury as to the State's failure to provide such discovery in a timely and efficient manner, which has thus prejudiced Defendant Strong's ability to mount a defense.

33. This latest Motion to Dismiss is not concerned with procedural niceties, nor has any other Motion to Dismiss filed by Defendant Strong to this Court. Defendant Strong's Constitutional rights have been repeatedly ignored or violated due to the State's sloppiness and inattentiveness; malfeasance need not be proven in order to grant Defendant Strong the relief requested. Defendant Strong is calling upon this Court to provide him the remedy that the State either cannot or will not provide to him: a complete dismissal, with prejudice, of the thirteen remaining charges against him.

WHEREFORE Defendant Strong respectfully requests that this Honorable Court DISMISS WITH PREJUDICE the remaining counts against him for the aforementioned reasons, or, in the alternative, that this Honorable Court compel the State to produce forthwith the police personnel records that implicate the credibility of the testifying officers of the Kennebunk Police Department and deliver the jury instruction as requested above.

Dated at Portland, Maine, this 24th day of February, 2013.

Respectfully submitted,



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STATE OF MAINE **YORK, ss.**		**SUPERIOR COURT** **CRIMINAL ACTION** **DOCKET NO. ALFSC-CR-12-2049**
STATE OF MAINE **v.** **MARK W. STRONG, SR.**	))))))))))	**ORDER ON** **DEFENDANT STRONG'S FIFTH** **MOTION TO DISMISS FOR** **DISCOVERY AND DUE PROCESS** **VIOLATIONS, OR, IN THE** **ALTERNATIVE, MOTION TO** **COMPEL THE DISCLOSURE AND** **PRODUCTION OF POLICE** **PERSONNEL FILES, WITH** **REQUESTED JURY INSTRUCTIONS**

Defendant Strong's Motion to Dismiss with prejudice all remaining counts with prejudice based on continuing and cumulative discovery violations by the State is hereby:

GRANTED / DENIED

Defendant Strong's Motion, in the alternative, to Compel Production of Police Personnel Records is hereby:

GRANTED / DENIED

Defendant Strong's Request for Specific Jury Instructions regarding this evidence is hereby:

GRANTED / DENIED

The Clerk is ordered to incorporate this Order into the docket record by reference, pursuant to M.R. Crim. P. 39(c).

Date:_____

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Justice, Maine Superior Court