IN THE CIRCUIT COURT OF THE
17th JUDICIAL CIRCUIT, IN AND FOR
BROWARD COUNTY, FLORIDA

STATE OF FLORIDA
Plaintiff,
v.

COREY GORDON,
Defendant.
_____/

CASE NO.: 15001975CF10A
JUDGE: MURPHY

MOTION TO DISMISS PREDICATED UPON PROSECUTORIAL MISCONDUCT

COMES NOW, the Defendant, COREY GORDON, by and through the undersigned counsel, pursuant to U.S.C.A. Const. Amend. 5., and moves this Honorable Court to Dismiss the charges before the court, and as grounds therefore alleges as follows:

FACTS [1]

1. Corey Gordon is charged by Indictment with Murder in the 1st Degree.
2. Mr. Gordon has been brought to trial twice with each instance resulting in a mistrial.
3. The first mistrial was before the Honorable Lisa Porter and was predicated upon the Prosecutor causing comment on the Defendant's right to remain silent.
4. During testimony of the State's first witness, the State elicited testimony that commented on the same alleged silence.
5. Thereafter a mistrial was granted.
6. The case was then re-assigned to the Honorable Peter Holden for re-trial.
7. During a motion, Judge Holden agreed with Judge Porter's decision and refused admission of the offending testimony that caused the first mistrial, prohibiting the State from commenting on the Defendant's pre-arrest, pre-Miranda silence.
8. During the re-trial thereafter Judge Holden also provisionally excluded from testimony a

1 The facts in the instant motion are based upon trial notes and recollection. A transcript has been requested and ordered to ensure complete accuracy.

911 call.

9. The 911 caller was not identified, was not under the stress of any incident, there was no ongoing emergency, and the statement was hearsay or perhaps hearsay upon hearsay. The statement was also not properly authenticated. Additionally, the State could not prove the probative value of said call, since the child was already deceased and at the hospital and it had already been stated that the police had been notified per hospital protocol.

10. Judge Holden told the parties to go to lunch and come back at 1:30 p.m. as the trial would resume at 1:45 p.m. and to provide caselaw on the 911 call as a final ruling on admissibility remained pending.

11. At 12:19 p.m., ASA Katya Palmiotto sent a group text. Attached as Exhibit "A" (this exhibit has been redacted to delete the number of the ASA that replied to the text).

12. The text read, "Holden just sustained their objection and wouldn't let us put the 911 call in as hearsay."

13. Another person in the chat responded, "Is this a joke".

14. Palmiotto replied, "Sorry wrong chat", "Wrong group so sorry".

15. Presumably, the reason ASA Palmiotto wrote "Sorry wrong chat", "Wrong group so sorry" was the fact that Judge Holden, who was presiding over the trial, was included in the chat.

16. That during the lunch break, both the defense and state counsels remained in the courtroom.

17. However, ASA Palmiotto ran out of the courtroom a few minutes into the break, while on her phone stating that she needed to go somewhere so she could have privacy to talk.

18. She then stated, "don't you people ever leave?" to the defense team of Michael Gottlieb and Malinda Linkhorst who had remained in the courtroom, preparing for the cross examination of the next witness.

19. ASA Palmiotto was then overheard exclaiming "I f**ked up bad".

20. As the Defense was not privy to the *ex parte* text, it was presumed the odd and frantic behavior Palmiotto was exhibiting was due to the next witness or perhaps the State had perceived the Defense's next strategy move but had not properly prepared for it.

21. ASA Palmiotto's behavior was erratic and frantic, and it was obvious there was something going on; however, nothing was disclosed to the Defendant or his counsel, even though all parties remained within the courtroom or adjacent to the courtroom until resumed at 1:30 p.m..

22. At 1:30 p.m., knowing the Judge had been the recipient of the *ex parte* communication, ASA Katya Palmiotto and ASA Antonya Johnson allowed the parties to argue the admission of the 911 call. It is unknown what knowledge of the text ASA Johnson possessed.

23. Both ASA Palmiotto and ASA Johnson (if she knew of the text), should have known or expected that had the judge seen the text, it could influence his ruling on this important piece of evidence the State was fighting to introduce.

24. It is important to note that Judge Holden excluded the 911 call after hearing argument and not finding any caselaw presented by the State to be persuasive.

25. Thereafter at approximately 1:55 p.m., the cross examination of the mother of the deceased child began.

26. On or about 3:25 p.m., following a recess, the Judge returned to the courtroom and showed his phone to the parties, wherein the text exchange in Exhibit "A" was first disclosed.

27. The Judge was visibly upset and appeared angry.

28. Earlier during the trial, the Judge had jokingly chided the undersigned for using his phone while at counsel table.

29. The Judge indicated that he does not use his phone in court and in fact turns it off or leaves it in his office.

30. The Judge indicated that he had not seen or used his cell phone and stated that he took no part in seeing or responding to the *ex parte* communication.

31. His honor's attitude, demeanor, and candor about same clearly establish that he had no idea of the text nor any inclination to participate in this unwarranted and uninvited *ex parte* conversation.

32. As such, the Judge and the Defense remained unaware of the *ex parte* communication during the argument on the 911 call and during the cross examination of the mother of the child.

33. After reviewing the message on Judge Holden's phone, defense counsel asked for permission to take a photo of the screen depicting the offending text.

34. The undersigned reviewed the text with the Defendant and then the undersigned handed the phone back to the clerk.

35. The tense situation unfolding caused the Defendant grave concern and he began showing outward signs of stress, crying, and indicated that he was confused as to why the State would text the presiding judge in the middle of a trial.

36. The Defense discussed the matter and decided they had no choice but to ask for a mistrial.

37. The Defendant believed the State purposely and intentionally withheld the knowledge of the *ex parte* communication, hoping that had the court seen it, the apparent dissatisfaction expressed by ASA Palmiotto and the undisclosed texter, would have the desired effect of peer pressuring the judge into making future favorable rulings for the State.

38. Feeling that the remainder of the proceedings would be clouded in suspicion and that the Defendant would now have an uphill battle of fighting the judge and his colleagues'

opinions of him, as his every ruling was scrutinized via text.

39. The Defendant, despite counsel's advice to the contrary, stated he had no choice but to ask for a mistrial.

40. It is important to note that counsel had explained to the Defendant two strategy positions that were in play that were unrelated to this *ex parte* text and that both would be lost should the Defendant persist in his request for a mistrial. [2]

41. Likewise, it is important to note that the State was forced to call witnesses out of order because the grandmother of the deceased child passed. She was a listed State witness and was expected by the Defense to testify at trial.

42. Likewise, the mother of the child had allegedly contracted COVID and as such the State had to call witnesses out of turn. During the first trial, the mother was the first witness, the State indicated due to COVID she would now be called out of order.

43. Additionally, following the direct examination of Dr. Osbourne, the medical examiner, the court had to hold a Richardson, hearing.

44. Dr. Osbourne testified differently to his deposition testimony as it related to the time for the injury to cause the death of the child. Dr. Osbourne's change in testimony had not been disclosed by the State to the defense prior to his taking the stand, despite their admitted knowledge of the change.

45. In ruling on and denying the Richardson hearing, the court stated the doctor's testimony remained *unclear* about when the injury occurred or when the death occurred.

46. This element of timing of injury/death was crucial to the State's case, so much so that they called a second witness to attempt to clarify same, that being Dr. Jason Schulman.

47. The Defense believes that Dr. Schulman did little to bolster the State's case and in fact

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2 The undersigned will be asking the court to hear in camera the two strategy positions that were in play and had not been disclosed to the State, so that the court can determine the full extent to which the Defendant suffered by being forced and goaded into requesting this mistrial.

added to the confusion.

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO DISMISS PREDICATED UPON PROSECUTORIAL MISCONDUCT

48. Generally, when a motion for mistrial is declared on the defendant's motion, jeopardy does not attach, and the defendant may be retried. Rutherford v. State, 545 So.2d 853, 855 (Fla.1989). "An exception occurs when the prosecution goads the defense into moving for mistrial and gains an advantage from the retrial." Id. (citing Oregon v. Kennedy, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982)) as cited in Richards v. State, 140 So. 3d 1158, 1160 (Fla. 1st DCA 2014).

49. "[P]rosecutors may be walking a dangerous line that could result in a defendant's release from custody should the prosecutorial misconduct be deemed intentional, resulting in the application of the double jeopardy clause." Hill v. State, 515 So.2d 176 (Fla.1987), cert. denied, 485 U.S. 993, 108 S.Ct. 1302, 99 L.Ed.2d 512 (1988) as cited in Duncan v. State, 525 So. 2d 938, 942 (Fla. 3d DCA 1988).

50. In the instant case it is believed the motivation behind the failure to disclose the *ex parte* communication, by both lead counsel ASA Johnson, (*assuming she knew of the ex parte communication*) and ASA Palmiotto, was that the communication would have a desired effect of persuading the judge to rule in their favor. While that did not happen, their failure to disclose compounded and exacerbated the situation.

51. It is the classic situation where the cover up is worse than the offense.

52. It exhibits a conscious intent to gain an evidentiary advantage.

53. While the original text, in the light most favorable to ASA Palmiotto, was an error, the cover up and failure to disclose was clearly intentional misconduct.

54. The original text was sent at 12:19 p.m. and it was not until approximately 3:25 p.m. when the presiding judge brought this issue to light that the Defense first learned of it.

55. Had the State brought the issue to the parties' attention it might have defused the situation and the resulting tension that arose from the intentional non-disclosure would not have been present.

56. The court in State v. Kennedy, 295 Or. 260, 274, 666 P.2d 1316, 1325 (1983), held "that a court may infer from the character and the circumstances of the prejudicial conduct that it was so intended [to provoke the defendant to demand a mistrial] without having to obtain an admission to that effect. When a court draws that inference, a retrial is barred." As cited in Duncan v. State, at 942.

57. The Defendant has been irreparably harmed and has had to forego two significant defense strategies, one of which cannot be replicated in a trial in the future.

58. As such, the court should grant this Motion to Dismiss.

WHEREFORE, the Defendant respectfully requests that this Honorable Court grant this Motion to Dismiss the above styled cause.

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the Office of the State Attorney, via Florida Court's E-Filing Portal, on this 17th day of August 2022.

/s Michael A. Gottlieb
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EXHIBIT A


AT&T LTE
3:25 PM
79%
HTU
iMessage
Today 12:19 PM
Katya Palmiatto
Holden just sustained their objection and wouldn't let us put the 911 call in as hearsay
+1 (954)
Is this a joke
Katya Palmiatto
Sorry wrong chat
Wrong group so sorry
iMessage