
STATE OF WISCONSIN,

Case No. 2012 CF 1602

Plaintiff,

vs.

ANDREW SPEAR,Defendant.

**NOTICE OF MOTION AND MOTION TO COMPEL PRODUCTION OF
COMPUTER HARD DRIVES**

To: Mr. Matthew Moeser
Assistant District Attorney
3000 Dane County Courthouse
215 South Hamilton Street
Madison, WI 53703

Now comes the defendant, Mr. Andrew Spear, appearing specially by his attorney, G. Brian Brophy of Sipsma, Hahn & Brophy, L.L.C., and reserving his right to challenge the court's jurisdiction, hereby seeks a subpoena compelling the State to provide the defense with a copy of the hard-drives of Mary Spear's and the defendant's computers.

This motion is brought pursuant to the 5th, 6th, and 14th Amendments to the United States Constitution; article 1, sections 1, 7, and 8 of the Wisconsin Constitution; sections §905.01; 971.31(1); and 971.23(1)(h) of the Wisconsin Statutes; *Brady v. Maryland*, 373 U.S. 83 (1963); *State v. Harris*, 2004 WI 64, 272 Wis. 2d 80, 680 N.W.2d 737.

AS GROUNDS, the defendant through counsel, based on a review of the discovery provided by the State, upon personal knowledge and upon information and belief asserts:

The dispute leading to the allegations in the Complaint has at its genesis the defendant's observations of secretive behavior by Mary Spear and the discovery of e-mails indicating Mary Spear was having an affair with her boss, Dennis Smith. (Complaint, pg. 4). Mary Spear alleged that the defendant lit her on fire while the two were in his woodshop. (Complaint). The defense contends Mary Spear threatened to light herself on fire and then did light a fire which came closer to her than she'd imagined it would in a pattern of increasingly dramatic behavior intended to keep the defendant from calling Dennis

Smith's wife and informing her of the affair. (State's Discovery pgs. 13-17). Mary Spear and Dennis Smith have denied any affair. (State's Discovery, pgs. 54, 143-144).

After the events in the woodshop, Mary Spear drove the defendant home to their condo, retrieved her computer, the defendant's computer and a pair of tennis shoes and headed out. (State's Discovery pg. 3). Mary Spear was stopped from leaving the condo by the defendant who wanted the keys to his truck. (State's Discovery pg. 8). Neighbors hearing the ruckus intervened and reported, "Mary's biggest concern was that Andrew didn't have access to her duffle bag, and it looked like a laptop computer was inside of it. Alyce said that Mary was "extremely protective" of the bag and insisted they hide the bag inside of Botham's apartment." *Id.* Later, Madison Police requested consent to access to the two laptop computers which Mary Spear declined to give. (State's Discovery, pg. 109). She informed police they'd need a warrant to get access to the computers. (State's Discovery, pg. 109).

Madison Police Detective Bernards interviewed Dennis Smith and reports:

"I told Dennis that I'd heard that there were e-mails between him and Mary that Andrew had found. Dennis then said that there are e-mails of a sensitive nature but that he and Mary are just friends. Dennis did not describe the contents of the e-mails any further." (State's Discovery pg. 55). However, Mary Spear stated to police, "It's my fault because I lied to him last night when he asked if he knew it all," and went on to report that the day's events were precipitated by the defendant finding e-mails between her and Smith on her hard drive. (State's Discovery, pg. 3).

The State has possession of the computers both of which have exculpatory information on them. The defendant needs the information on those computers to properly prepare and present his defense:

The Court of Appeals discussed the fundamental due process requirement that criminal defendant's be afforded pretrial discovery in *State v. Maday*, 179 Wis.2d 346, 353-55, 507 N.W.2d 365, 369-70 (Ct. App. 1993):

"Pretrial discovery is nothing more than the right of the defendant to obtain access to evidence necessary to prepare his or her case for trial. Because pretrial discovery concerns the ultimate ability of a defendant to present relevant evidence and witnesses in defense of criminal charges, pretrial discovery is a fundamental due process right. Providing a defendant with meaningful pretrial discovery underwrites the interest of the state in guaranteeing that the quest for the truth will happen during a fair trial.


An enduring requirement of the criminal justice system is that there must be a comprehensive presentation of facts. As the United States Supreme Court has stated:

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.” (internal citations omitted).

This is not a complicated matter. The State has evidence in its exclusive possession which is potentially exculpatory and which is necessary for a full presentation of the facts. There is no reasonable argument that the defendant is not only entitled to disclosure but is entitled to timely disclosure. *State v. Harris*, 2004 WI 64, 272 Wis. 2d 80, 114, 680 N.W.2d 737, 755.

Dated at Madison, Wisconsin this 19th day of February, 2013.

Respectfully submitted,



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