

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PROVIDENCE, SC SUPERIOR COURT

STATE OF RHODE ISLAND

v.

IND. NO. P1/2007-4070A

RYAN GREENBERG

STATE'S RESPONSE TO
DEFENDANT'S SUPPLEMENTAL SENTENCING MEMORANDUM

Now comes the State of Rhode Island, by and through its attorneys, Attorney General Patrick Lynch, Deputy Attorney General Gerald J. Coyne and Special Assistant Attorney General Christian Capizzo, and submits this memorandum to assist the Superior Court with regard to the sentencing of the Defendant, Ryan Greenberg.

Travel of the Case

The Defendant is scheduled to be sentenced by this Court on July 22, 2009. Following extensive pretrial and status conferences, the Defendant entered a plea of *nolo contendere* to the charge of Operating a Vessel to Endanger, Death Resulting on May 18, 2009. Upon acceptance of the Defendant's plea to that charge, the remaining counts of the indictment were dismissed. The State and Defendant submitted presentencing memos to the Court on June 26, 2009. During a presentencing conference held with the Court on July 20, 2009, the Defendant submitted an additional 17 page memorandum, ostensibly responding to arguments made in the State's sentencing memo. This memorandum responds to the Defendant's Supplemental Memorandum.

Discussion

Ironically, the Defendant's Supplemental Memorandum opens not with a discussion of the case, but with a citation to Rule 3.8 of the Rules of Criminal Procedure, setting forth the "Special Responsibilities of a Prosecutor." To a prosecutor, these duties are well known. The goal of a prosecutor, as described by the United States Supreme

Court in the 1935 case of Berger v. United States, is not simply that “it shall win a case, but that justice shall be done.” This is distinct from the role of defense counsel, who has an ethical obligation to zealously represent their client, but without the same obligation to “seek justice” that is borne by prosecutors. It is the State’s position that the distinct differences between the roles of the prosecution and defense counsel are at the heart of the Defendant’s Supplemental Memorandum.

The State is obligated to provide exculpatory information to the defendant – including conflicting witness statements, and any other evidence that may show the defendant may not be not guilty of the offense charged. The defendant is generally not obligated to provide inculpatory information to the prosecutor – that is, evidence that supports his or her guilt – but must provide reciprocal discovery and comply with other court rules.

There is no better example of how this distinction is applied than the “reconstruction report” relied upon by the Defendant extensively in his memoranda.¹ Despite extensive investigation, the State has noted (most recently at page 11 of its Sentencing Memorandum) that there will always remain some uncertainty about the specific facts of Patrick Murphy’s death, for a variety of reasons. Defense counsel challenges that statement, relying upon the reconstruction report commissioned by the Defendant to establish what he proffers are the ‘facts’ of this case. The report relies extensively upon the GPS data retrieved from the Davis’s boat, which is then cited in the Defendant’s Sentencing Memorandum and Supplemental Memorandum (“the memoranda”). Contrary to the insinuation that the GPS data is virtually infallible, had this matter proceeded to trial, the State would have introduced evidence that the GPS unit on the Davis boat, when stationary in a storage hanger maintained by DEM, actually produced a report that the boat had moved several times. Thus, while the unit serves the purpose it was designed for – navigation – it is less reliable when attempting to create a historical record of movement.

In addition, the Defendant’s memoranda have focused extensively upon the specific track which counsel believes represents the course track during which Patrick

¹ Despite numerous requests, the Defendant has never filed a final copy of the “Reconstruction Report” in accordance with Rule 16 of the Superior Court Rules of Criminal Procedure, nor has he provided the State with a signed and complete final copy of the report.

Murphy was killed. The GPS instrument on the Davis's boat measures direction, time and distance, and then determines an average speed for each course track, based upon that data. Thus, the memoranda cite that the boat was traveling at an "approximate speed of 9 miles per hour" at the time Patrick Murphy was struck. Because the GPS identified an average speed of 9 miles per hour on the track in question, and because the track included the start from a virtual standstill and a deceleration after Murphy was struck, it is reasonable to conclude that the top speed on the track was higher than the average speed of the entire track cited by counsel. Had this matter proceeded to trial, the State would have argued that the GPS data largely corroborated the testimony of numerous witnesses, but should not be relied upon any more than other evidence, due to the limitations of the system and the analysis of it.

Although the State does not share defense counsel's view of the importance of the GPS data, there is a more fundamental issue with the Defendant's Reconstruction Report. The Defendant's reconstructionists had access to all of the State's investigative materials before embarking on their investigation, but with one key difference. Unlike the State's investigators, they also had access to the Defendant.

It is possible, though unlikely, that the experts retained by the Defendant chose not to speak with him to hear, from him, how Patrick Murphy was killed. Notwithstanding the fact that such an interview would have occurred nearly 18 months after the incident and after the Defendant had the opportunity to review all of the discovery filed by the State, there is no mention of such an interview in the over sixty pages of their report. It is the State's belief that it is far more likely that the Defendant was interviewed by the experts, but their report was specifically drafted to conceal that conversation. (The Defendant actually accompanied his experts to the testing of the Davis boat on the Barrington River.) With the Defendant's plea, the opportunity to cross-examine the Defendant's experts on this point and others was eliminated. Thus, while counsel has relied extensively upon the 'facts' determined by their experts, it is the State's position that their work was anything but objective. Recognizing the distinct role of defense counsel, the State urges that the weight given to the Defendant's reconstruction experts' findings be limited by their clear bias.

The Supplemental memorandum also accuses the State at several points of taking witnesses' testimony out of context in its Sentencing Memorandum. The purpose of the State's Sentencing Memorandum was *not* to present the facts of this case to the Court. The State recognizes that there may be factual disputes about collateral issues, though the fundamental basis of the Defendant's criminal liability is clear. The factual basis for the Defendant's sentencing was established at the time of his plea on May 18th, when the Defendant admitted that he operated a vessel recklessly, causing the death of Patrick Murphy. The Defendant's Supplemental Memorandum concedes that the Defendant, at the time, of his plea, admitted accelerating the boat in Patrick Murphy's direction. The Supplemental Memo takes great issue, however, at page 10, with the use of the word "gunned" to describe the Defendant's operation of the boat prior to Murphy's death, and clearly implies some ethical breach by State for using that word. That word was used as a quotation three times in the State's Memorandum – once on page ten when quoting a witness's testimony regarding the Defendant's operation of the boat which caused another passenger to cut his foot, and twice on page 24, when the word was used by a friend of the defendant who was relaying Loflin's description of the incident. It was *not* used by the State to characterize the Defendant's actions in accelerating towards Patrick Murphy.

It is true that with few notable exceptions, such as Phoebe Horne, Laura Barton and Kyle Gladney, many of the key witnesses to this case provided statements that evolved over time. The Defendant is aware of these discrepancies because those varying stories were detailed by investigators, and provided as the law requires to the Defendant. Although defense counsel sinisterly accuses the State of selectively citing only portions of testimony, it is clear that in an effort to advocate for his client, he does the exact same thing. Defense counsel, for example, asks that Loflin's estimate of Murphy being approximately 20 feet from his boat be accepted as fact, yet because a witness on shore did not hear Patrick Murphy's last words – and because Greenberg apparently claims he did not hear them either - Loflin's testimony regarding that fact should be disregarded.

It is unfortunate that more witnesses did not simply tell the whole truth when initially questioned. Unfortunately, that phenomenon is not unique to this case. It is the State's position that the impeachment of witnesses based upon prior inconsistent

statements is a matter for trial, and the fact finder in that circumstance would be called upon to weigh the credibility of each individual. Given the Defendant's plea, the opportunity to conduct such an examination is but one of several rights that the Defendant specifically chose to waive.

Moreover, as noted, both the Defendant's Sentencing Memorandum and Supplemental Memo have contained references to what "Ryan" recalls. (ie., "Phoebe Home did not hear that and neither did Ryan Greenberg." Supplemental Memo, Page 8). Considering the defense counsel's concerns about limiting the discussion of the factual basis of this case, his repeated references to conversations with his client are perplexing. Nevertheless, since the purpose of his memoranda is advocacy we simply ask the Court to recognize that the Defendant has never provided a comprehensive account of this incident to investigators or to the State. (We also clearly recognize that he is under no obligation to produce such an account.) But if sentencing memos are to confine themselves to established facts, the sporadic references to the Defendant's recollections clearly have no place.

Finally, much of the Defendant's memoranda have focused upon the issue of whether the Defendant's actions on July 17, 2007, leading to the death of Patrick Murphy, were "intentional." The State has never alleged that this Defendant intended to kill Patrick Murphy. (See, for example, page 28 of the State's Sentencing Memorandum) Even when indicted for murder, the basis of that charge was recklessness. As the Court is well aware, recklessness forms the basis in certain circumstances for criminal conduct, as opposed to conduct that was simply careless, accidental or negligent, and therefore is not criminal.

Though the consequence of his conduct was not intended, it is the State's position that it was foreseeable. That is, by accelerating a vessel in the direction of a swimmer, the Defendant demonstrated a total disregard for the consequences of his actions, giving rise to criminal liability.

The Defendant's Supplemental Memo states:

"The instant case is not one where a defendant had no choice but to accept a plea. On the contrary, counsel felt (and still believes) that the facts in this case presented a very triable case. Ryan Greenberg and his family were aware of this. Quite simply, Ryan Greenberg pleaded nolo to spare everyone - especially the Murphys - from reliving

a nightmarish day over the course of several weeks. Any suggestion that the defendant had any other motivation in deciding to plea is patently false and unsupported by the record."

The State takes factual issue with defense counsel's numerous references to any agreed upon sentencing recommendations prior to the defendant's plea. There were none. The State is obviously not privy to the motivations of the Defendant in changing his plea. Any decision of the magnitude of changing a plea in a contested criminal case clearly involves numerous factors. The State assumes that among the factors contributing to that decision was a very fundamental one: that he changed his plea because he is guilty, and like many similarly situated defendants, he sought to limit the scope of the sentence that the Court would impose. Regardless of the reason why, the decision to enter a plea agreement ultimately rests with the Defendant, not with the State.

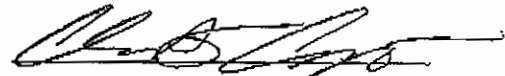
Within the range of sentence contemplated by the plea agreement, the State recognizes the Court's prerogative to exercise significant discretion. The purpose of the State's Sentencing Memorandum was to bring to the Court's attention issues that were not apparent by the factual basis for the plea itself – most specifically, the background of Patrick Murphy, the Defendant's actions following the death of Patrick Murphy, and his own background. As the Berger Court stated, the prosecutor's duty is to see that justice be done, and we are confident that we have done so.

Respectfully Submitted,

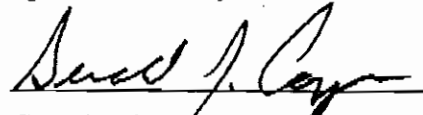
STATE OF RHODE ISLAND

PATRICK C. LYNCH
ATTORNEY GENERAL

By:



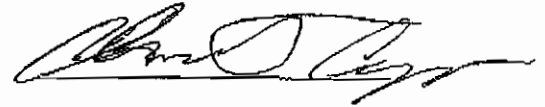
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Certification

The undersigned hereby certifies that true copy of this memorandum was forwarded by first class mail to Attorney William Devereaux, Counsel for the Defendant, on this 21st day of July, 2009.

A handwritten signature in black ink, appearing to be "Albert D. [unclear]", written in a cursive style.