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IN THE FIFTH DISTRICT COURT, BEAVER COUNTY,
STATE OF UTAH

<p>STATE OF UTAH, Plaintiff, v. WAYNE HSIUNG, Defendant.</p>	<p>DEFENSE POSITION FOR ORAL ARGUMENT Case No. 181500061 JUDGE: ANN MARIE MCKIFF ALLEN</p>
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Wayne Hsiung, by counsel, with the stipulation of the State as to filing, hereby submits his position with respect to the issues to be addressed at oral argument. Since the prosecution has amended the charges so radically it is worthwhile to clarify the fundamental defense position as well, prior to full discussion at oral argument.

BACKGROUND

Hsiung and his co-defendant, Paul Darwin Picklesimer, (the “Defendants”) stand charged with two counts of Third Degree felony burglary and one count of Class B misdemeanor theft. The allegations are that they entered into buildings at a Circle Four

Farms facility owned by Smithfield Foods, and took two piglets. On these same facts, the State originally also charged violations of the pattern of unlawful activity statute and the riot statute, and had enhanced most charges under the animal enterprise statute. The State has now dismissed these charges, and the animal enterprise enhancements, in an apparent effort to eliminate the need for disclosure of evidence of animal cruelty in this case, pursuant to its May 28, 2020 Motion in Limine to Preclude Defense from Raising Inhumane Animal Conditions at Trial and Protective Order (the “Exclusion Motion”).

The State’s effort must fail, as Defendants have clear constitutional and statutory rights that require production of the evidence at issue. Evidence of animal cruelty at Circle Four Farms is relevant to the elements of the remaining charges; the impeachment and credibility of the State’s witnesses; and Defendants’ ability to formulate an effective defense. Accordingly, the Exclusion Motion must be denied.

ARGUMENT

A. DEFENDANTS HAVE CONSTITUTIONAL AND STATUTORY RIGHTS THAT REQUIRE PRODUCTION OF THE EVIDENCE.

Defendants have the constitutional rights to present a full defense, e.g. Crane v. Kentucky, 476 U.S. 683, 685 (1985), as discovery becomes complete and as the evidence develops at trial See, e.g. State v. Low, 2008 UT 58, ¶25, 192 P.3d 867 (if there is any reasonable basis in the evidence presented by the other side during the trial, courts are obliged to give affirmative instructions).

Pursuant to the right to present a full defense, the federal constitution creates an “affirmative duty to disclose evidence favorable to a defendant” under the Due Process Clause of the US Constitution. Kyles v. Whitley, 514 U.S. 419, 432 (1995). Moreover, “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.” Brady v. Maryland, 373 U.S. 83, 87 (1963). This duty extends not only to exculpatory or inculpatory evidence but also evidence that may be used to impeach witnesses at trial, United States v. Bagley, 473 U.S. 667, 676 (1985) (“Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule”), or evidence relating to the reliability of a witness. Giglio v. United States, 405 U.S. 150, 154 (1972) (“nondisclosure of evidence affecting credibility falls within [the Brady] rule”).

Utah state law goes even further than the federal constitution, providing an obligation by the prosecution, upon request of a defendant, to disclose any evidence that “tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment” or “any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare a defense.” Utah R. Crim. P. 16.

While Rule 403 of the Utah Rules of Evidence provides that, “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of ... unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or

needlessly presenting cumulative evidence,” the court’s power to exclude evidence is limited. Most notably, “Rule 403 ... is an “inclusionary” rule,” and “ ‘if the evidence is prejudicial but is at least equally probative[,] ... it is properly admissible.’ ” State v. Ramirez, 924 P.2d 366, 369–70 (Utah Ct.App.1996) (internal citations omitted).

Under these authorities, the State’s Exclusion Motion has no basis and must be denied.

B. EVIDENCE OF INHUMANE ANIMAL CONDITIONS IS MATERIAL TO GUILT OR PUNISHMENT UNDER THE OFFENSES CHARGED

As noted in Defendants’ Response in Opposition to State’s Motion in Limine and for Protective Order filed on June 25, 2020 (the “Prior Response”), the State bears the burden of proving each element of an offense that has been charged, including the necessary actions and mental states. Prior Response at 4-5. Defendants, in turn, are entitled under both federal and state law to any evidence material either to guilt or punishment under the offenses charged. The charges in this case requires evidence of the apparent inhumane animal conditions for three reasons.

First, a charge of theft requires the State prove the specific intent to permanently deprive a victim of the property in question. As noted in the Prior Response, evidence of inhumane conditions is probative of the mental state of the Defendants. In particular, inhumane animal conditions would lend weight to the notion that Defendants lacked the specific intent necessary to prove the offense charged. An individual who takes a pig to the vet, due to concern about mistreatment, is distinct from an individual who takes a pig with

the intent to take permanent possession.

Second, the definition of property under the state's theft statute, and many criminal law treatises, requires that the pigs in question have some positive value. Utah Code Ann. § 76-6-401 (indicating that "property" under the theft statute must have value); § 372. Property of value, 3 Wharton's Criminal Law § 372 (15th ed.) ("Property may be the subject of larceny only if it has some value."); 50 Am. Jur. 2d Larceny § 112 ("[O]ne cannot be convicted of the crime of theft for taking or assuming control over something that has no value"). Evidence of inhumane animal conditions directly relates to the value, or lack thereof, of the pigs in question. If many pigs were suffering from severe neglect and abuse, then the piglets who were removed may have lacked the value necessary to prove an essential element of the charge of theft.

Third, the severity of the punishment allowed under the theft statute depends on the value of the property at issue. Utah Code Ann. § 76-6-401. Evidence of widespread mistreatment of animals would therefore be material to not just the question of guilt but to the punishment allowed by law.

For these reasons, the evidence at issue must be produced and admitted at trial, regardless of what defenses the Defendants may raise, as it relates to the guilt or punishment of the accused. Improper exclusion of the evidence, in turn, is reversible error that would require a new trial. *State v. Otkovic*, 2014 UT App 58, ¶ 15, 322 P.3d 746, 750 (improper exclusion of evidence of victim's criminal conduct in felony robbery trial requires reversal and new trial).

C. EVIDENCE OF INHUMANE ANIMAL CONDITIONS MAY BE USED TO IMPEACH OR ASSESS THE CREDIBILITY OF WITNESSES

Independent of the inculpatory or exculpatory nature of the animal cruelty evidence, the evidence must be produced and admitted if it is relevant to either the impeachment or credibility of witnesses that may be called at trial. The Prosecution Summary produced by the State, and written by FBI Special Agent Chris Anderson and Beaver County Detective Glen Woolsey, states that Defendants actions were part of a “larger scheme to defame Costco” and that “this defamation campaign has caused reputation and public image damage to Costco and Smithfield.” (Prosecution Summary at Bates No. AG 2018-119 Chapter 2 0017, attached as Exhibit A.) The Prosecution Summary also describes Defendants’ communications to the public and media as “propaganda” (Prosecution Summary at Bates No. AG 2018-119 Chapter 2 0019) and defends Smithfield’s internal audits as “largely positive regarding the health and welfare of the hogs and Smithfield’s history of being transparent and in compliance.” (Prosecution Summary at Bates No. AG 2018-119 Chapter 2 0017.)

Evidence of inhumane animal conditions may directly contradict the filed reports of the witnesses, and therefore impeach the statements made by the witnesses, or otherwise influence a jury’s assessment of the witnesses’ credibility. This evidence is therefore not just admissible, but required for the prosecution to produce, under the controlling Supreme Court case law in Bagley and Giglio.

D. EVIDENCE OF INHUMANE ANIMAL CONDITIONS IS NECESSARY FOR THE FORMULATION OF AN EFFECTIVE DEFENSE

The State argues that there is no animal rescue defense under Utah law. However, Defendants have not yet asserted any defenses and cannot assert any defenses without production of relevant exculpatory evidence. Defenses ranging from selective prosecution to justification may be appropriate in this case and will depend on production of evidence relating to the conditions at Circle Four Farms. For example, evidence of ongoing unlawful conduct at Circle Four Farms may suggest prosecutorial bias or selective prosecution. Evidence of diseases at the facility so severe that they threaten the local population, e.g. antibiotic resistant staph infections, may constitute a legal defense of justification. However, Defendants' counsel cannot make any assessment of appropriate defenses without the production of the relevant evidence. Under the general rule requiring disclosure of exculpatory evidence for defendants in criminal discovery, it is therefore error to bar the production of such evidence.

CONCLUSION

In summary, the State seeks to unlawfully and unconstitutionally prevent the disclosure of evidence necessary for Defendants to mount a defense to serious criminal charges. A parallel can be drawn to the recent decision by Judge Shelby in federal court regarding the State's so-called "ag gag" law. There, the State sought to prevent the

dissemination of photographs of animal cruelty from animal agricultural facilities. Judge Shelby ruled that this prohibition unconstitutionally infringed on the First Amendment rights of the citizens of Utah.¹

For an even stronger reason, the State's attempts to prevent the disclosure of evidence of animal cruelty in this case must also be rejected. The Due Process Clause, like the First Amendment, is a foundational right of the US Constitution. The State's interest in protecting a particular industry or company cannot outweigh this most essential of civil liberties. If the Exclusion Motion is granted, Defendants will be denied crucial evidence relating to the offenses charged; prevented from effectively impeaching or assessing the credibility of key witnesses; and blocked in their efforts to formulate and present a defense. This is precisely why controlling state and federal case law rejects the course of action that the State demands.

For these reasons, the Exclusion Motion must be denied.

Respectfully submitted on this 22nd day of June, 2021.

/s/ Elizabeth Hunt
ELIZABETH HUNT
Attorney for Defendant

¹ <https://www.npr.org/sections/thetwo-way/2017/07/08/536186914/judge-overturns-utahs-ag-gag-ban-on-undercover-filming-at-farms>

CERTIFICATE OF EFILING

I hereby certify that I e-filed this document on June 22, 2021, and emailed it to Mary Corporon, counsel for Mr. Picklesimer, thereby served all parties.

/s/ Elizabeth Hunt
ELIZABETH HUNT