ORIGINAL

State of Michigan
In The Supreme Court
Appeal from the Court of Appeals
Karen Fort Hood P.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee, Docket No. 146523

-vs-

SCHUYLER CHENAULT,

Defendant-Appellant.
_____/

Corrected Brief On Appeal – Appellant

ORAL ARGUMENT REQUESTED

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Defendant-Appellant says, "Yes."

II.

DID THE COURT OF APPEALS ERR WHEN IT REVERSED THE TRIAL COURT'S GRANT OF A NEW TRIAL WHICH WAS PREMISED ON THE PROSECUTION'S VIOLATION OF ITS OBLIGATION TO DISCLOSE EXCULPATORY AND IMPEACHING EVIDENCE UNDER BRADY v MARYLAND?

Defendant-Appellant says, "Yes."

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Defendant-Appellant says, "Yes."

BASIS OF JURISDICTION

The basis for jurisdiction is MCR 7.301(A)(2), review a case in which the Court of Appeals has issued an opinion. The issue involves a legal principle of major significance to the state's jurisprudence. MCR 7.302(B)(3).

On June 5, 2013, this Court granted leave to appeal.

STATEMENT OF FACTS

Schuyler Dion Chenault was convicted of felony-murder contrary to MCL 750.316(C) and possession of a firearm during the commission of a felony contrary to MCL 750.227(b). The offense arose out of a aborted drug deal which took place in the city of Pontiac. The deceased was Kevin Harris, a/k/a Kutta.

On December 8, 2009, the Court ordered that all discovery be exchanged. (Final Pretrial Order; 107a).

On March 8, 2010, trial began before the Honorable Daniel P. O'Brien, a judge of the Oakland County Circuit Court. The defense stipulated that the defendant was present at the scene of the offense.

In his opening argument, the defense contended that the defendant's intention was to buy drugs. He was the one who brought the money to the deal and thus had no motive to rob anyone. He did not shoot anyone.

Jared Chambers testified that he connected Kevin Harris, a/k/a Kutta, with people looking to buy cocaine. The defendant, whom he had recently met at a party, called him looking to buy some cocaine. Chambers contacted Kutta to see if there was any cocaine available. He then made arrangements with the defendant to meet him at a trailer later on in the day. It was Keith McBee-Blevins' trailer.

The defendant along with two other people arrived at the trailer in White Lake. Chambers and McBee-Blevins got into the car in which defendant had arrived and Chambers instructed them to drive to Pontiac.

In Pontiac, they rendezvoused with Kutta. Chambers and Defendant entered Kutta's car. After testing the drug, the defendant requested that it be turned into shake, a variety of powdered cocaine which has been microwaved. Kutta went back to his home where he microwaved the cocaine. He then met up again with Chambers and Defendant. At this point, Kutta was accompanied by his *inamorata,* Heather Holloway.

Ms. Holloway testified that she saw the Defendant and Chambers exit the car. Chambers sat

in the passenger seat behind her. The defendant walked in front of Kutta's car also to the passenger side. He then walked around the back and came up on the rear driver's side door. He stated to Kutta, "Give me the shit." and shot Kutta in the head. He then said "Run Bitch." She ran and the other car left the scene. (TT II 227-231; 123a-128a).

After a few minutes, Holloway returned to the car and called Santos DeValle to help her. He arrived and drove Kutta to the hospital. (TT II 232; 128a). Upon returning to the car, she did not see either the drugs, a gun or money. (TT II 227-233; 123a-129a). She identified the defendant as the shooter. (TT II-230; 126a).

Keith McBee-Blevins went along for the ride because he and Jared Chambers were going to meet up with some girls later on. McBee-Blevins only heard the gunshot, but did not see the shooting (TT II 187, 199, 207; 119a, 122a) so he couldn't say who shot Kutta.. (II 198-199; 1118a-119a). He did not see the Defendant with a gun or with any money. (TT II-205, 181-82; 120a, 108a-109a). He did not see anything. (II-196; 116a). After the shooting, the driver of the car pointed a gun at him and told him to get out. He then ran away. He never caught up with Holloway or Chambers. (TT II 188-189; 111a-112a). Although McBee-Blevins selected the defendant's photo from an array, he could not identify him at the preliminary examination. (TT II 191-192; 114a-115a).

The recorded statement of Keith McBee-Blevins has never been disclosed.

Trial counsel cross-examined the Officer-in-Charge of the case, Detective Wittebort, about whether Heather Holloway had mentioned Jared Chambers in her statements. The following colloquy was had:

> Q. Okay. In that statement, did she mention the name of Jared Chambers?
>
> A. Yes.
>
> Q. Do you have it listed in her statement, her handwritten statement?
>
> A. She did not put it in her statement?
>
> Q. Okay. She did not.

A. No.

Q. Okay.

A. All of our interviews are recorded, they are all videos and it is in the oral, it is in the recorded video of the interview that we conducted.

Q. Do you have that with you?

A. You guys should have it.

Q. Never seen it.

A. Should have.

(TT III 74; 137a).

While Detective Wittebort contended that he gave the recordings to Anthony Chambers, defendant's first attorney, Mr. Chambers never received them. (Anthony Chambers' Affidavit; 159a). Mr. Chambers gave his file to defendant's trial counsel who indicated in his motion for new trial that he never received them.

Schuyler Chenault testified that he was trying to buy some cocaine. He had given Jared Chambers his $1000 to make the buy. Upon the second meeting with Kutta, he testified that he heard a shot and thought Chambers had shot Kutta. Chambers took off running with his money.

On March 11, 2010, the jury convicted the defendant of open murder, felony murder, and open murder, premeditated murder, and of possession of a gun during a felony.

On March 29, 2010, the defendant was sentenced to life without parole on Count I and a consecutive two years on Count II.

POST-CONVICTION PROCEEDINGS

On April 13, 2010, the trial counsel filed a motion for new trial. He also requested a copy of the video recordings of the civilian witnesses' interrogations.

On June 9, 2010, the court heard argument. In regard to the production of the video recordings, the prosecutor argued that after conviction he did not have a duty to disclose evidence. He also argued that the subpoena served by trial counsel on Wittebort was invalid because it had no date of service on it. He told counsel to use FOIA procedures. (06/09/10 MT 6-9; 142a-145a). The

motion for new trial was continued so counsel could file an FOIA request for the video recordings and also because of a potential conflict of interest trial counsel had concerning his failure to obtain the recordings during trial. (06/09/10 MT 13; 149a).

Trial counsel filed FOIA requests. The City of Pontiac denied them noting that it had no such recordings. (Requests and Responses; 151a-156a).

In September of 2011, substitute counsel filed a supplement to the motion for new trial which raised the issues of ineffective assistance of counsel and of prosecutorial misconduct in failing to disclose the video recordings.

On November 2, 2011, the prosecutor filed with the Court the affidavit of trial counsel that he had never seen or heard of the video recordings. (Trial Prosecutor's Affidavit; 161a).

On November 30, 2011, the Court heard oral argument on the supplemental motion for new trial. The motion was denied in part. The matter was then adjourned so testimony could be taken on the *Brady* issue.

Appellate counsel issued another subpoena duces tecum for the secret video recordings and served it on the law office then representing the defunct Pontiac Police Department. In response, an attorney sent a letter detailing a search for the items and acknowledging that the recording were not in the its possession. This letter was admitted into evidence as Defendant's Exhibit A on February 1, 2012. (Mihelick Letter; 157a).

The appellate prosecutor issued a subpoena duces tecum for the video recordings and served it on Detective Wittebort. On December 6, 2011, Wittebort handed the secret recordings to the appellate prosecutor. These were then disclosed to appellate counsel.

The prosecution obtained affidavit from the preliminary examination prosecutor which alleged that he had never possessed, seen or heard of any video recordings. (Preliminary Exam Prosecutor's Affidavit; 160a). Joint Exhibits 1-11 were also admitted into evidence on this date.. The exhibits were the secret video recordings along with transcripts.

On February 1, 2012, Audrey Rice, the defendant's maternal aunt, testified that after the Detective's testimony, she observed Detective Wittebort put a CD on a table near defense counsel

and then take it back saying that he would make copies for defense counsel.

On February 29, 2012, the defense offered Exhibits B-E into evidence. These were the FOIA requests served by trial counsel and responses by the City of Pontiac Law Department. (Requests and, Responses; 151a-156a). The affidavit of the trial prosecutor which alleged that he had never see nor heard of the tapes was offered. (Affidavit of Trial Prosecutor; 161a). Defendant stipulated to the entry of the affidavit into evidence but not to the averment that the prosecutor had never heard of the tapes. (02/29/12 Hearing transcript 90; 184a).

Detective Wittebort testified that he had been a police officer for 12 years, but had never heard of "*Brady*" material. He testified that he never turned over impeaching and exculpatory material to defense counsel, only to the prosecution. (02/29/12 Wittebort 4-5, 16, 24; 162a-163a, 163a, 172a). In this instance, he put the prosecution's copy of the recordings on a secretary's desk on the third floor after the preliminary examination. (02/29/12 Wittebort 15; 168a). He testified that his copies of the recordings are always kept in the file with the other discovery material. And that a warrant prosecutor might not have a copy because there is only one file and the recordings were with him, in his binder. (02/29/12 Wittebort 6-8; 163a-164a).

Wittebort denied making promises to witnesses but then his recollection was refreshed with a transcript of the interrogation of Jared Chambers in which he identified his partner, Detective Buchman, as making the promise. He did not tell the prosecutors that he promised Jared Chambers that he would not be charged. He refused to call his statement to Chambers a promise. (02/29/12 Wittebort 10-15; 165a-168a).

He testified that he provided recordings to the trial prosecutor, Pietrofesa. Then he said that these were the recordings he dropped off on the third floor. (02/29/12 Wittebort 14-15, 16; 167a-168a, 168a). He remembered doing it in this case because his partner reminded him to drop the recordings off. (02/29/12 Wittebort 20, but see pp 38-39; 170a, 179a-180a). The trial prosecutor had asked him if there were recordings and he said "Yes." (02/29/12 Wittebort 29; 175a).

Before interrogations, the recording system is turned on from another location. Melvin Wooten was interviewed in a conference room so his interview was not recorded. When MeBee-

Blevins was interviewed, the recorder wasn't working (02/29/12 Wittebort 24-25; 172a-173a).

Detective Wittebort claimed to have no knowledge of the FOIA for the recordings. But he admitted that he was informed that his boss had checked the file for the recordings

> ...and I laughed at him, I'm "So why didn't you give them to him?" He said, 'Well, I can't find them.' "They're right here in the binder." They were right there in the front. They've been there the entire time.

(02/29/12 Wittebort 36; 178a).

At this hearing, Wittebort claimed that Holloway's identification was very strong. He testified that upon making the identification, she said "That's the motherfucker right there." He did not think to put in his report what she actually said which was "I think this is him; out of all the guys that looks the most." Upon questioning by the judge, he admitted she never said "motherfucker." He also admitted that nothing in his report is verbatim. (02/29/12 Wittebort 30-34; 175a-177a).

After Wittebort testified, the court heard partial oral arguments and continued the matter. (02/29/12 Colloquy 94-106; 186a-189a). The prosecutor conceded that the video recordings were never disclosed to any of defendant's trial attorneys. (02/29/12 Prosecutor 89; 184a).

On March 8, 2012, after further oral argument, the trial court granted the motion for new trial based on the *Brady* violation. The trial court found that "the likelihood is great enough to undermine confidence in the outcome of the trial. The court adopts the Defense argument save its theory of the case." (03/08/12 Court 54; 23a)(LCT Order; 22a).

The prosecution filed an interlocutory appeal from that decision. Defendant Chenault filed a claim of appeal from the denial of his motion for new trial on the other grounds upon which it was denied and to appeal other grounds not covered in the motion for new trial. The Court of Appeals rejected the claim because the case was in an interlocutory posture. Defendant filed a Delayed Application for Leave to file an Interlocutory Appeal. The Defendant filed an interlocutory appeal from the decision denying his motion for new trial on the other grounds. On July 13, 2012, the Court of Appeals granted leave to appeal and consolidated the matter with the prosecution's appeal.

On November 28, 2012, the Court of Appeals reversed the trial court's grant of the motion for new trial and also upheld the trial court's rulings on the other issues. Thus Mr. Chenault's

convictions were affirmed. (COA Op; 3a-21a).

On June 5, 2013, this Court granted leave to appeal on the three issues argued in this brief.

Other facts will be referred to in the body of the brief and they are incorporated by reference into this Statement of Facts.

I.

THE MICHIGAN COURT OF APPEALS' DECISION IN *PEOPLE v LESTER* DOES NOT CORRECTLY ARTICULATE WHAT A DEFENDANT MUST SHOW TO ESTABLISH A *BRADY* VIOLATION.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *McDougall v Schanz*, 461 Mich 15, 24 (1999).

B. Discussion

A *Brady* claim is established upon a showing of the following:

1) that the evidence in question is favorable;

2) that the state suppressed the relevant evidence, either purposefully or inadvertently; and

3) the evidence is material.

Strickler v Greene, 527 US 263, 281-282 (1999). This formulation rests on the following paragraph from *Brady v Maryland*, 373 US 83, 86-87 (1963).

> We now hold 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.

The request requirement was abrogated in *United States v Agurs*, 427 US 97, 107 (1976).

The Appellee in this case offered a four-factor test which the Court of Appeals used to reverse the trial court's decision granting a new trial. Under that test, the defendant must show:

1) that the State possessed evidence favorable to the defendant;

2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence;

3) that the prosecution suppressed the favorable evidence; and

4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

(COA Op 2-4; 4a-5a). The Court cited to *People v Lester*, 232 Mich App 262, 281 (1998), where this

four pronged test was first articulated. In a footnote, the panel of the Court of Appeals in the case at bar, explained that because the *Lester* decision issued after November 1, 1990, it had precedential effect.

In *Lester*, the undisclosed evidence would have attacked the credibility of the witness and would also have shown that the witness perjured herself concerning the extent of the plea bargain. The *Lester* Court remanded the matter for a hearing on whether evidence was withheld and if so whether it was material. The Court did not discuss the diligence prong. The *Lester* Court cited to an Eleventh Circuit decision, *United States v Meros*, 866 F2d 1304, 1308 (11th Cir. 1989), as the source of its four-factor test.

However, our own Circuit, the Sixth, only recognizes the three-factor *Brady* test. *Bell v Bell*, 512 F3d 223, 231 (6th Cir. 2008). Recently, this Circuit took the opportunity to specifically reject any due diligence requirement because the defense does not have even a burden to request *Brady* material. Requiring the defendant to discover *Brady* material on its own would release the prosecutor from the duty of disclosure placed upon it by the Supreme Court. *United States v Tavera*, ____ F.3d _____ (6th Cir. 2103)(2013 WL 3064599 (C.A. 6)). The *Tavera* Court also noted that in *Banks v Dretke*, 540 U.S. 668 (2004), the Supreme Court had "rebuked the (Fifth Circuit) Court of Appeals for relying on such a due diligence requirement to undermine the *Brady* rule."

In *Banks v Dretke, supra*, as in the case at bar, the suppressed evidence would have allowed the defendant to discredit two essential witnesses. One witness, unbeknownst to the defendant, was a paid police informant who at trial denied receiving money from the police. The other witness could have been impeached by a pretrial transcript which revealed that he had been coached by law enforcement officials. The State argued that the defendant could have discovered both of these pieces of evidence on its own. The Court rejected this argument because "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed. *Id.*, at 695. It noted that a judicial system which permits the prosecution to hide thus forcing the defense to seek "is not tenable in a system constitutionally bound to accord defendants due process." *Id.*, at 696.

In rejecting the notion of a possible defense duty to discover the evidence on it own, the Court summarized and characterized the State's argument as follows:

> The State here nevertheless urges, in effect, that 'the prosecution can lie and conceal and the prisoner still has the burden to ... discover the evidence ... so long as the potential existence of a prosecutorial misconduct claim might have been detected.' (internal citation omitted).

Id., at 696. "Might have" is too broad a burden, one inconsistent with a system where it is the prosecution that holds all the cards and where it has the burden to seek justice regardless of where the chips fall.

Before *Banks*, the Court in *Strickler, supra* at 281-282, had reiterated that the three components of a *Brady* claim are that evidence, either impeaching or exculpatory, was favorable to the accused; the evidence was suppressed by the State either wilfully or inadvertently; and prejudice must have ensued. In *Strickler*, the *Brady* material consisted of notes taken by a detective during his interviews with an eyewitness which impeached significant portions of her testimony and also letters written by that eyewitness to that same detective. The Court noted that these documents cast serious doubt on the witness' confident assertion of her "exceptionally good memory."

While *Strickler* discusses a defendant's duty to prove cause for failing to raise the issue, it was in the context of the cause and prejudice prongs under 28 USC 2254(d). That of course is not the issue here since the *Brady* violation was asserted in the motion for new trial, not in a collateral appeal.

But the *Strickler* Court did note that even if the defendant had cause to believe that there were numerous interviews of the eyewitness, it by no means followed that he would have known that records pertaining to interviews or letters written to the detective existed. In fact, he would have concluded just the opposite because of the open file discovery procedure. That would would have led him to believe that all that should have been disclosed was disclosed. *Strickler* at 284. The Court went on to say that "it is especially unlikely that counsel would have suspected that additional impeaching evidence was being withheld." *Id.*, at 285.

Thus, a defendant can rely on a State's assertion that it had complied with *Brady*. *Strickler*

supra, at 289. If a prosecutor represents that he or she has made full disclosure, a defendant may assume that "his prosecutors would not stoop to improper litigation conduct to advance prospects for gaining a conviction". *Banks v Dretke, supra,* at 694. See also *Bracy v Gramley,* 520 US 899, 909 (1997)(ordinarily we presume that public officials have properly discharged their official duties).

The rationale for imposing a broad disclosure obligation on the prosecution is rooted in the idea that the prosecution wins when justice is done, not just when it secures a conviction. *Kyles v Whitley,* 514 US 419, 439 (1995). The *Kyles* Court relied on the decision in *Berger v United States,* 295 US 78, 88 (1935) where the Court noted that the prosecutor is "the representative ...of a sovereignty...whose interest...in a criminal prosecution is not that it shall win a case, but that justice shall be done." See also *Strickler, supra* at 281)(Special status of the prosecution explains its broad duty of disclosure).

This obligation to disclose extends even to evidence known only to investigators and police officers. Thus in order to comply with *Brady,* a prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case. *Kyles, supra* at 437-438.

Suppression of evidence violates the due process clause irrespective of the good faith or bad faith of the prosecution. *Brady* 373 US at 87. Thus even if the suppression was completely unintentional, a violation is shown. While this result may seem harsh it is in keeping with the reason for the rule which is to secure a fair trial for the defendant. This distinguishes it from, for instance, the exclusionary rule where the exclusion of evidence for a constitutional violation is done to correct the conduct of law enforcement officers.

C. Conclusion

In light of the above principles, it is clear that *Brady* and its progeny place the duty of disclosure on the prosecution and not on the defense. The *Lester* Court adopted an incorrect version of the *Brady* test, one which placed a burden on the defendant when, in fact, it is the prosecution's obligation to come forward with evidence that it possesses. This Court should reject this narrowing of defendant's due process rights under *Brady.*

Both *Strickler, Banks* and *Tavera* were decided after *Lester.* This Court should take this

opportunity to bring Michigan's *Brady* jurisprudence back into the due process fold, aligning it with all of the decisions recognizing the prosecutor's due process obligation to see that justice is done.

II.

THE COURT OF APPEALS ERRED WHEN IT REVERSED THE TRIAL COURT'S GRANT OF A NEW TRIAL WHICH WAS PREMISED ON THE PROSECUTION'S VIOLATION OF ITS OBLIGATION TO DISCLOSE EXCULPATORY AND IMPEACHING EVIDENCE UNDER *BRADY v MARYLAND.*

The *Brady* material, in this case, consisted of five videotape recordings of four witnesses, two of whom were the most important witnesses testifying against the defendant: Heather Holloway and Jared Chambers. The other two, Glen Griffin and Santos DeValle, were not called to testify. Griffin's interview revealed material evidence that was both exculpatory and impeaching. The interview of Santos DeValle is not under discussion.

Transcripts of the two interviews of Heather Holloway, the interview of Jared Chambers and the interview of Glen Griffin are contained in the Appendix.

A. Standard of Review

Whether there has been a *Brady* violation is a mixed question of law and fact. A trial court's findings of fact are reviewed for clear error. Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made. *People v Johnson*, 466 Mich 491, 497-498 (2002). Legal decisions are reviewed de novo. *People v Katt*, 468 Mich 272, 278 (2003).

B. Application of the Law to the Facts

The prosecution conceded the second factor in the *Brady* test, that it failed to disclose evidence to the defendant that it had in its possession. (02/29/12 Prosecutor 89; 184a). Only the first and third factor of the *Brady* test are really in contention here. Was the suppressed evidence favorable and was it material?

1. The suppressed evidence was favorable to the defense.

Evidence is favorable if it is either exculpatory or impeaching. *United States v Bagley*, 473 US 667, 676 (1985). In this case, as will be discussed in the next section, the evidence was both exculpatory and impeaching.

The video recording revealed that Chambers had been promised complete immunity from

any narcotics charge and also complete immunity from a first degree murder charge if he would give a statement and write it down. (Chambers Video Interview 1-2, 11; 48a-49a, 58a). These promises were not disclosed in any document given to the defense. (Police Report; 103a-106a).

In Heather Holloway's first video statement and also in her second video statement, the police promised that she would not be charged with any narcotic offense. (Holloway Video Interview I 23 ; 81a)(Holloway Video Interview II 8; 97a). The police report makes no mention of any promises. Police Report; 103a-106a).

In Holloway's first video interview, when she lied to the police about what occurred, she said she did not did get a good look at the shooter. She mentioned that he wore a dark hat and dark clothing. (Holloway Video Interview I 7 and 22; 65a and 80a).

In Holloway's second video recording, the officer used a suggestive procedure to tell her whom to select from the photo array. The video revealed that she did not get a good look at the shooter and that her identification was tentative. Holloway said that the photos he selected looks the most like the shooter. She even asked if that was the person that Chambers had picked out and Officer Wittebort assured that it was. (Holloway Video Interview II 7-8 ; 96a-97a). But in her testimony at trial she stated that she got a good look at the shooter and then identified the defendant in the courtroom and there was no cross examination on the identification. (TT II 230; 126a). And Wittebort testified that she immediately selected the Appellant. (TT III-68; 136a). So this evidence was exculpatory on the issue of identification and impeaching on the issue of the credibility of both of the witnesses.

In the disclosed written statements, no mention was made of an inability to see the shooter's face or of a tentative identification. In fact, Detective Wittebort wrote in his July 3rd report that "Holloway pointed out number one stating 'that's the motherfucker right there!' Holloway circled the photo, dated, and initialed for positive identification." (07/03/08 Wittebort Police Report; 106a).

The prosecutor's duty to disclose includes any information which would materially affect the credibility of the witnesses. This includes evidence of any deals, promises or inducements made to witnesses in exchange for testimony. *United States v Bagley,* 473 US 667 (1985). The duty to

disclose this class of evidence is related to its importance to the jury's verdict.

> 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.

Napue v Illinois, 360 US 264, 269 (1959).

The *Bagley* court noted the failure to disclose impeaching evidence may be even more egregious than the failure to disclose exculpatory evidence because it threatens the defendant's right to confront adverse witnesses. 473 US at 676. It is so important that, irrespective of the good faith or bad faith of the prosecutor, suppression of this category of evidence requires reversal.

> When the reliability of a given witness may well be determinative of guilt or innocence, the prosecution's nondisclosure of evidence affecting credibility justifies a new trial under the due process clause irrespective of the prosecution's good faith or bad faith.

Giglio v United States, 405 US 150, 31 L Ed2d 104, 195 (1972)(failure to disclose that the witness was promised immunity in return for his testimony required reversal).

Proof of the promise does not even have to be in writing. A tacit promise or just an expectation of leniency is *Brady* material. *Bell v Bell*, 512 F3d 223, 231 (6th Cir. 2008); *Wisehart v Davis*, 408 F3d 321, 323-324 (7th Cir. 2005)(expectations of leniency constitutes *Brady* material).

In this case, all the undisclosed materials was either impeaching or exculpatory and thus it was favorable to the defense. The first prong of *Brady* is met.

2. The suppressed evidence was material.

Evidence is material when there is a reasonable probability that, had it been disclosed, the result of the proceeding would have been different. *Cone v Bell*, 556 US 449, 469-470 (2009). A reasonable probability is shown when the likelihood of a different result is great enough to undermine confidence in the outcome of the trial. *Kyles, supra* at 434; *Smith v Cain*, 132 S. Ct. 627, 630 (2012). So the defendant does not have to prove innocence or prove that he would have been acquitted. *Bagley, supra*; *United States v Agurs, supra* at 111.

A showing of materiality does not even require proof by a preponderance of the evidence that the disclosure of the suppressed evidence would have resulted in an acquittal.

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial.

Kyles, supra, at 434.

Further, materiality is not a sufficiency of the evidence test. Nor is a harmless error analysis applicable.

> A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. ... One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Kyles, supra at 434-435. If consideration of the additional evidence shakes the court's confidence in the verdict, a new trial should be ordered even if there remains sufficient evidence to sustain a conviction. *Strickler, supra* at 290. The effect of the withheld evidence is considered collectively. *Castleberry v Brigano*, 349 F3d 286 (6th Cir. 2004).

The Court of Appeals found the evidence not material. (COA Op 7; 9a). However, its decision is based partially on a misstatement of fact. It concluded that Holloway, Chambers, **and** McBee-Blevins all testified that the defendant shot Harris in the head. (COA Op 7; 9a). This statement is inaccurate because McBee-Blevins testified that he did not see anyone shoot Harris. (S of F 2). This then leaves just Chambers and Holloway as the only eye witnesses and their testimony, as will be shown, is suspect.

It was the defense theory that Jared Chambers, who was with the defendant at the time of the shooting, not only shot Kutta but also made off with the Appellants' $1000 and the drugs that Kutta had brought to the scene. But, Chambers became a star witness against the defendant claiming that he was only an innocent bystander facilitating a drug deal.

Neither in any written statement by Chambers, nor in any police report disclosed to the defense, was there an indication that he had been offered immunity from prosecution in return for

his statement and testimony against Defendant. But his undisclosed secret videotaped statement reveals that this is exactly what occurred. At the very outset, the police let Chambers know that he was a suspect. They told him that the offense carried a penalty of life in prison. Then they told him that he would not be prosecuted for any narcotic offense. (Chambers Video Interview 1; 48a). They told him only the shooter would be charged with the murder, thus ruling out any aider and abettor charge if that was his true role. (Chambers Video Interview 1-2; 48a-49a). After a discussion with the police, they asked him to put his statement in writing. He refused and said he wanted to talk to a lawyer first before he wrote anything. In order to encourage him to write a statement and so Chambers would know that the police promises were real they informed him that the interview was being videotaped and "you aren't being charged with shit." (Chambers Video Interview 11; 58a). This is a promise of complete immunity to a charge of first degree murder. This promise was not contained in any written document or in any police report. Indeed the officer did not understand the import of what he said to the witness. (02/29/12 EHT Wittebort 10-14; 165a-167a).

In Heather Holloway's two written statement, no mention is made of a promise that she would not be charged with a drug offense if she cooperated with police. (Holloway Written Statements; 90a, 101a-102a). But during the first interview they told her "We're not the narcotics police we don't care, we don't give a fuck about drugs." (Holloway Video Interview I 23; 81a). In the second interview, the police again promised not to charge her with a drug offense[1]. (Holloway Video Interview II 8; 97a).

In neither of her written statements is there an indication that she did not get a good look at the shooter. But in the first recorded interview, she describes the shooter as tall with a skinny face and light-complected. She admits that she did not get a good look at the shooter. She could see his

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[1] This would not have been viewed by Holloway as an idle threat. She had real concerns about her role in drug deals as is evidenced by her subsequent indictment. She and Santos Del Valle were indicted in federal court in November of 2010 for drug trafficking. *USA v Del Valle et al.*, 2010-cr-20694. The case is still pending. The indictment is unrelated to the facts in this case.

complexion but not a perfect look. She saw high cheekbones but did not see the eyes. (Holloway Video Interview I 7, 21-22, 29; 65a, 79a-80a, 87a). This recorded statement could have been used to impeach Holloway's identification at trial. As exculpatory evidence, this description fits the characteristics of Jared Chambers.

The second Holloway recorded interview shows the suggestive nature of the identification procedure used by the officers.[2] As the officer showed her the array, he had his finger on the photo of the defendant.[3] After Holloway circled the defendant's photo, the officer told her that she circled the right one and that he is light complected. (Holloway Video Interview II 8; 97a). The officer, pursuant to her inquiry, also told her that Jared Chambers identified the same person and told her "that was him for sure." (Holloway Video Interview II 9-10; 98a-99a). Her identification is further revealed as weak because after she selected Mr. Chenault's face she said "I think this is him, out of all these guys that looks the most." (Holloway Video Interview II 7; 96a). This kind of comparison identification is suspect and this whole procedure as now revealed would support a motion to suppress her in-court and out-of-court identification.

So this evidence is not merely impeaching of her identification testimony but it is also exculpatory in that if she had to be told who the suspect was, the shooter could equally be Jared Chambers. It also brings into question, the credibility of the investigating officer, Wittebort, who attributed to Holloway, in his police report, a comment leading one to conclude that there was no question but that she could identify the shooter. This officer successfully misled the defense into not attacking the Holloway identification at trial. There was no cross examination of Holloway on her identification of the defendant as the shooter.

Moreover, the beginning of the first videotape reveals that Melvin Wooten, a friend of Kutta, was talking with her in the interview room before the police came into the room. (Holloway Video

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[2] This DVD along with the others have been filed with this Court.

[3] The defendant's photo in the disclosed xeroxed copy of the array is in the location of the officer's hand in the video.

Interview I 7; 65a. Holloway Video II 3; 92a). After reviewing the previously undisclosed interview of Glenn Griffin, it is apparent that Chambers called Melvin Wooten the night of the shooting and blamed Chenault for the killing. Wooten then spread the word based on Chambers' self-serving statements. (Griffin Video Interview 3; 27a-28a). At trial, Holloway denied ever talking to Wooten alone in a room at the police station (II 249-250; 132a-133a). But the first few minutes of the video of her first interview show she and Wooten talking in a room by themselves.

Griffin was interviewed by the police before Chambers and before Holloway. His interview was on June 30, 2008 at 16:39 hours. Griffin then told the police not what he knew but what he heard from Wooten. (Griffin Video Interview 3; 27a). That Wooten was the person functioning as an unofficial investigator for the police is again apparent in the Holloway second interview where the police even asked her about what Melvin told her. (Holloway Video Interview II 3; 92a).

Wooten was never called as a witness and there is no recording of any of his conversations with the police. Officer Wittebort claimed that something happened to the automatic recording system when they interviewed both Keith McBee-Blevins and Melvin Wooten. (02/29/12 HT 25-27; 173a-174a).

The Glenn Griffin tape also showed that the police talked to the witnesses before they brought them into the interview room where the recorder was activated. The conversation that is recorded is *in media res*. (Griffin Video Interview 1; 25a).

The above evidence is either exculpatory such as the description of the shooter fitting Jared Chambers and the difficulty Holloway had in selecting a perpetrator or it is impeaching. Chambers' testimony is obviously suspect under the defense theory. Holloway's identification is very weak as she did not get a good look at the shooter and her identification is based on an impermissibly suggestive procedure. The suppressed evidence could have been used to attack both her ability to see and her subsequent identification.

In view of the lack of physical evidence connecting the defendant to the crime, the hidden evidence which could have been used to attack the identification and the witnesses' motives in testifying shows that there was a reasonable probability that with the suppressed evidence the

defendant would have been acquitted. *Kyles, supra* at 434. This also includes the evidence of the misleading testimony given by Wittebort in regard to Holloway's out-of-court identification A reasonable probability is a standard requiring even less proof than the civil standard of a preponderance of the evidence.

In the Court of Appeals, the prosecution argued that the recordings were incremental impeachment and so would not be material. It relied upon *Pyles v Johnson*, 136 F.3d 986, 999-1000 (5th Cir. 1998) in support. In that case, a witness testified to receiving a deal and explained its terms. In actuality she received a better deal than she admitted to. The reviewing court thought this evidence would have had only a marginal negative impact because of the extensive amount of negative impeachment material offered against Phibbs at trial.

In the case at bar, the impeachment of Holloway and Chambers was desultory at best. In fact there was no cross examination on Holloway's identification of the defendant at all. But with the suppressed evidence, both witnesses credibility would have suffered fatal attacks because each had a motive for testifying falsely which is shown by the recordings and because Heather Holloway's identification of the defendant could be impeached. So the disclosed recordings would have had a significant impact. This evidence was hardly incremental.

The prosecution contended in this case that lying to a suspect does not violate due process. This argument is a red herring. The question is what motivated a witness to give a statement or to testify because a witness' motivation, bias or prejudice in testifying helps the jury to decide whom to believe. The issue is not one of police conduct in taking a statement. The question is whether the witness agreed to cooperate because he or she thought they were promised something. The focus is on the effect it had on the witness, not on whether an officer did or did not lie in obtaining a statement.

Moreover, there can be no question that Holloway's undisclosed description of the shooter and her inability to see his face is *Brady* material. In *Strickler, supra*, an interview showed that the witness did not have the good memory she claimed to have when she testified at trial. She also testified at trial to observing this terrifying incident where in her statement to police she said she

thought it was just some college kids fooling around. *Strickler, supra* at 282. The Court found a *Brady* violation. In *Kyles, supra*, disclosure of statements containing a description of the suspect which deviated greatly from the witness' trial testimony was also held to be *Brady* material. 514 US at 441. Here, the violation is aggravated because there was no challenge to the identification procedure as being suggestive nor was there any cross examination on it but the disclosed evidence shows that such an argument should have been made and an attack on the identification would have borne fruit.

Here the prosecution did not turn over the secret recordings. That an aunt suspects the prosecution of having recordings does not relieve the prosecution of its burden. Further if the Appellee still contends that the recordings were not secret because the allegedly Aunt knew of then, it must explain how she could know of the secretly recorded interviews if the two prosecutors responsible for the case did not know of them. (Affidavit of the Preliminary Examination Prosecutor; 160a, Affidavit of the Trial Prosecutor; 161a). The aunt was just being suspicious based on a newspaper article concerning another case. (Article; 139a).

Under *Brady,* impeachment evidence is just as important as exculpatory evidence because it helps secure the guarantee of the Sixth Amendment that a defendant will be able to confront and cross examine his accusers. But the evidence is also exculpatory. The circumstances of the Holloway identification procedure and her admission on the recording that she did not get a good look at the shooter make it exculpatory. And the fact that her description matches the features of Jared Chambers is also exculpatory.

On this issue, this case is also controlled by the decision in *Smith v Cain*, 132 S. Ct. 627 (2012), the court found statements containing impeaching information made by the eyewitness the night of the murder and also five days after material where that witnesses's was the only evidence linking the defendant to the crime. That is the situation here where the two eyewitnesses who identify Mr. Chenault as the shooter gave statements. They contained impeaching material and they were not disclosed.

In this case, the suppressed evidence was both exculpatory and impeaching. It was also

material and there is reasonable probability that a different outcome would occur if the evidence had not been suppressed.

C. Even applying *Lester* 's second prong, the Court of Appeals decision is still clearly erroneous.

This second prong is the one that the Michigan Court of Appeals grafted on to the *Brady* test. It places a burden on the defendant to show that he did not know about the evidence nor could he have known about it. But in this case, the Appellee cannot show that the defense knew or should have known about the video recordings.

First, the prosecution had been ordered by the trial court to turn over all discovery materials. (Final Pre-trial Order; 107a). Second, under MCR 6.201(A)(2), a prosecutor is required even without request to disclose any written or recorded statements including electronically recorded statements pertaining to the case made by a lay witness whom the party may call at trial. Third, the trial prosecutor assured the defense counsel that he had all the discovery materials. (06/09/10 MT Defense Counsel 11; 147a).

Here defense counsel obtained the discovery materials through normal procedures. The recordings were not included. Defendant had a right to rely on the representation of the prosecution that it turned over all the evidence that existed.. *Banks, supra* at 671-672. See also Strickler, supra at 289.

The defendant did not have access to the secretly made recordings that the police hid from him. In fact, so secret were these recordings that the two prosecutors involved in this case were unaware that recordings of the witnesses existed. So secret were these recordings that the witnesses were unaware that they were being taped. The only time the police ever revealed the fact that they were recording the interrogations was when they were trying to gain Jared Chambers' confidence. In order to get the reluctant Mr. Chambers to start writing down his statement, the officers told him that their promise to him was being recorded, so they couldn't go back on it. (Chambers Video Recording 11; 58a). Apparently, Mr. Chambers did not believe the officer when he said the promise was being recorded because he never wrote out a statement.

Although the prosecution cites to the testimony of the defendant's aunt that they had been looking for the tapes, the court must take her testimony with a grain of salt. While this case was pending, it was reported in the newspaper that another judge on the Oakland County Circuit Court bench granted a mistrial where the police failed to timely turn over a recording of a defendant's statement. The trial prosecutor alluded to that case in argument on the motion for new trial at an earlier stage of the proceedings. (06/09/10 Trial Prosecutor 6; 142a)(Newspaper Article; 139a).

And how could defendant's family know about a secret recording when the seasoned trial and pretrial prosecutors claimed to have no knowledge of any recordings? There was no reason for the defendant to know of the existence of the secretly recorded witnesses' statements.

D. The Prosecution's Continuing Duty to Disclose

The prosecutor is required to disclose *Brady* material that it acquires during the trial itself, or even afterward. *Imbler v Pachtman*, 424 US 409, 427 n. 25 (1976). This Court through its court rules also imposes the same requirement. Pursuant to MCR 6.201(H), the prosecution has a continuing duty to produce discoverable material. That rule reads as follows:

(H) Continuing Duty to Disclose

> If at any time a party discovers additional information or material subject to disclosure under this rule, the party, without further request, must promptly notify the other party.

In this case, the duty was violated by the trial prosecutor who after Wittebort admitted the existence of the secret video recordings never disclosed them to the defense. He also blocked a post-trial attempt by trial counsel to obtain them. (S of F 4). He refused to turn them over despite a post-trial request. Trial counsel had also served Wittebort with a subpoena but the prosecutor decided not to honor the subpoena because there was no date showing service on Wittebort. (06/09/10 MT Colloquy 4-7; 140a-143a). Instead the prosecutor claimed that there was no post sentence discovery because there was no case pending before the court and told defense counsel he would have to file an FOIA request. (06/09/10 MT Colloquy 6-9, 25; 142a-145a, 150a).

The City of Pontiac also denied two FOIA requests with a notation that it did not have the

requested materials. A third subpoena duces tecum served on the attorney for the Pontiac Police Department by appellate counsel also went unfulfilled although that police attorney tried several times to find the evidence. In fact, we now know that the police department knew of the request and laughed at it or laughed at the fact that Sgt. Troy could not find the recordings despite the fact that they were "right here in the binder." (02/29/12 Wittebort 36; 178a). So even post trial, when Wittebort acknowledges that he knew that the defense was looking for the recordings, he still made no effort to turn them over either to defense counsel or to the prosecutor.

In that courtroom, only Detective Wittebort knew that recordings had been made. But one wonders why the trial prosecutor and Wittebort didn't discuss recordings just as part of normal trial preparation? After all, if taping is automatic, a trial prosecutor ought to expect recordings in cases originating in Pontiac. From the trial prosecutor's comments at the motion for new trial, he offers us some insight into his thinking.

> ...and I never had these audio tapes in my possession; I guess if I knew they existed I probably wouldn't have asked for them anyway because the police reports are based on the audio tapes that we later learn exist.

(06/09/10 MT 10; 146a). This comment shows that this prosecutor did not understand his obligation under *Brady* and under *Kyles* to disclose *Brady* evidence that is in the possession of others working on the case.

The trial prosecutor failed to disclose the recordings in violation of MCR 6.201(H), even when their existence came to his attention during trial. He avoided his constitutionally imposed obligation when he did not require Wittebort to immediately hand over the secret video recordings. Under the Court of Appeal's opinion in this case, prosecutors are relieved of this continuing duty to produce discoverable evidence as it comes to their attention.

The Constitution places the obligation of disclosure on the prosecution, not on the defense to seek it out. It requires the prosecutor to do the seeking even to finding out if there is favorable evidence known to others acting on its behalf. *Kyles, supra* at 437-438. The prosecutor's 5th Amendment duty to disclose is paramount.

E. The Trial Court Did Not Abuse Its Discretion in Granting A New Trial

The Court of Appeals clearly erred in reversing the trial court's decision.

The lower court heard testimony on this issue and reviewed all of the video recordings. The post-conviction hearing was only premised on two issues: whether the material was *Brady* material and whether there was a reasonable likelihood of a different result. The prosecutor conceded that the recordings had been suppressed. (02/29/12 HT 89; 184a). The court noted that the good faith or the bad faith of the officer was not an issue. (02/29/12 HT 91; 185a).

The lower court judge spent part of two days cross examining both counsel about the issues and the facts. At the end of the argument, the Court stated:

> Court has heard the arguments, considered the evidence, the law. Court finds the likelihood is great enough to undermine confidence in the outcome of the trial. The Court adopts the defendant's argument save its theory of the case. That'll be the ruling of the Court.

(03/08/12 MT Court 54; 23a).

This was not the decision of an unbridled judge. This was a decision made after a careful examination of the facts and after a complete audit of the electronic recordings. The judge actively questioned Detective Wittebort. And the questions asked by the judge of both counsel during the two days of colloquy indicated that he had a command of both the facts and the law. He even referred to a grid he had made of what was turned over to the defense, when it was turned over, and whether it was material. (03/08/12 MT Court 9; 193a).

Based on all of the above, this Court should conclude that Judge O'Brien's findings of fact were not clearly erroneous. The correct *Brady* test when applied to these facts make out a violation. Judge O'Brien decision was within the range of principled outcomes. He did not abuse his discretion in granting the motion for new trial.

CONCLUSION

The prosecutor's *Brady* obligation assures the defendant that the government will not hide favorable evidence and it assures the public that participants in the judicial system act with integrity. The Court of Appeals opinion turns *Brady* upside down and inside out. It ignores the prosecution's

constitutionally mandated duty to disclose favorable evidence. It ignores the *Kyles* requirement that the prosecutor discover *Brady* material in its possession or in the possession of others working on the case. And it ignores the court rule.

This Court should reverse the decision which undermines an accused's right to a fair trial.

III.

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER *STRICKLAND V WASHINGTON* WHEN COUNSEL, AFTER LEARNING OF THE EXISTENCE OF THE VIDEO RECORDINGS, FAILED TO EXERCISE DUE DILIGENCE TO OBTAIN THEM.

A. Standard of Review

Review of any findings of fact by the trial court is done on a clearly erroneous basis. MCR 2.613(C). The application of the law to the facts is reviewed on a *de novo* basis. *People v Pickens,* 446 Mich 298 (1994). The decision to grant the motion for new trial is reviewed for an abuse of discretion. *People v Crear*, 242 Mich App 158, 167 (2000).

B. Test

To find that a defendant's right to the effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show 1) that counsel's performance fell below an objective standard of reasonableness, and 2) that the representation prejudiced the defendant. As to the second prong, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v Washington,* 466 US 668, 694 (1984).

C. Trial Strategy and Counsel's Duty to Investigate

Counsel has an overarching duty to advocate the defendant's cause. He or she must bring such skill and knowledge as will render the trial a reliable adversarial testing process. *Id.* at 688. Counsel, as part of the obligation owed to the defendant, must make a reasonable investigations or make a reasonable decision that makes a particular investigation unnecessary. *Id.* at 690- 691 *Mason v Mitchell*, 257 F3d 554 (6th Cir, 2001); *People v Grant*, 470 Mich 477 (2004). The Court also held that while there is a presumption that counsel rendered effective assistance, trial counsel's strategic decisions would be deferred to only to the extent that those decisions were based on investigation. *Strickland, supra* at 690-691.

The duty to investigate has been continually strengthened over the last 30 years with the Court squarely placing the duty on the defense counsel. *Wiggins v Smith,* 539 US 510 (2003);

Rompilla v Beard, 545 US 374 (2005)(Counsel cannot rely on statements of family and cease to investigate).

The *Rompilla* Court cited with approval the ABA's Standards for Criminal justice which read as follows:

> Standard 4-4.1 Duty to Investigate
>
> > It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. **The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's desire to plead guilty. (Emphasis added)**

Only through an investigation can an attorney arrive at a sound trial strategy, one that is developed based on an investigation that is adequately supported by reasonable professional judgment. Counsel is required to make an independent examination of the facts, circumstances, pleadings and law involved. *Von Moltke v Gillies*, 332 US 708, 721 (1948) quoted in *Grant* at 486. Counsel must pursue all leads relevant to the merits of the case. *Blackburn v Foltz*, 828 F2d 1177, 1183 (6th Cir, 1987).

A strategic decision is a conscious, reasonably informed decision made by an attorney and one which benefits the client. *Cox v Donnelly*, 387 F3d 193, 198 (6th Cir. 2004). While this Court must defer to counsel's strategic decisions, this deference is limited by two concepts.

First, deference is only required to the extent that the strategic decision is based on investigation. So if there was no investigation, this Court would not have to defer to counsel's decision at all. If there was some investigation, then only some deference is owed on decisions relative to that investigation. *White v McAninch*, 235 F3d 988 (6th Cir, 2000); *Couch v Booker*, 632 F3d 241 (6th Cir. 2011)(a lawyer cannot make a protected strategic decision without investigating the potential basis for it).

Second, if the choices made by counsel in adopting a strategy were unreasonable, the Court

does not have to defer to them. The key question is whether the strategy was reasonable. Thus, the label "strategic" does not insulate counsel's choices from appellate review. *White v McAninch, supra* at 995.

D. First Prong - Deficient Performance

In the middle of trial, Detective Wittebort testified that there were video recordings of all the interviews of all the civilian witnesses. Counsel was obviously stunned by the revelation, but did nothing to obtain them. (TT III 74-75; 125a-126a). This constituted a deficient performance. He should have asked the Court to order their production and should have asked for a continuance in order to review them for exculpatory and impeaching material. The recordings, as argued above, contained impeaching material and also exculpatory material concerning the suggestive identification procedure and Holloway's tentative identification of the appellant as the shooter. The failure to obtain the recordings was prejudicial.

Defense counsel has a duty to investigate the case and to make a reasonable decision that an avenue of investigation is not needed. *Strickland, supra* at 690-692. Here counsel passed up the opportunity to see what the two eyewitnesses said unmediated by police editorializing. There was no down side to obtaining the recordings. These witnesses were already pointing the finger at Appellant. At the least, impeaching information would be obtained. That there was also exculpatory evidence in the suppressed recordings shows just how important it is to discover the very first statements made to law enforcement. An attorney of ordinary skill and training would have asked for disclosure of the secret recordings.

E. Second Prong - Prejudice

The second prong of the *Strickland* test is prejudice. A deficient performance only constitutes ineffective assistance of counsel if that performance prejudiced the defendant.

In order to show prejudice, appellant does not have to prove beyond a reasonable doubt that the outcome of the trial would have been different but only that there is a **reasonable probability** that it would have been different but for counsel's errors. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *People v Pickens, supra.* p. 314.

Neither in any written statement by Jared Chambers, nor in any police report disclosed to the defense, was there an indication that he had been offered immunity from prosecution in return for his statement and testimony against Defendant. But his undisclosed videotaped statement reveals that this is exactly what occurred. At the very outset, the police let Chambers know that he was a suspect. They told him that the offense carried a penalty of life in prison. Then they told him that he would not be prosecuted for any narcotic offense, (Chambers Video Interview 1; 48a). They told him only the shooter would be charged with the murder. (Chambers Video Interview 1-2 ; 48a-49a). This ruled out any aider and abettor charge if that was his true role. After a discussion with the police, they asked him to put his statement in writing. He refused and said he wanted to talk to a lawyer first before he wrote anything. In order to encourage him to write a statement, and so Chambers would know that the police promises were real, they informed him that the interview was being videotaped and "you aren't being charged with shit." (Chambers Video Interview 11; 58a). Further, his refusal to write out a statement opened up a fertile area of cross examination.

In Heather Holloway's two written statement, no mention is made of a promise that she would not be charged with a drug offense if she cooperated with police. But during the first interview they told her "We're not the narcotics police we don't care, we don't give a fuck about drugs." (Holloway Video Interview I 23; 81a). In the second interview, the police again promise not to charge her with a drug offense. (Holloway Video Interview II 8; 97a).

In her first recorded interview, Holloway describes the shooter as tall with a skinny face and light-complected. (Holloway Video Interview I 21-22; 79a-80a). She also admits that she did not get a good look at the shooter. She could see his complexion but not a perfect look. She saw high cheekbones but did not see the eyes. (Holloway Video Interview I 29; 87a). This recorded statement could have been used to impeach Holloway's identification at trial. This is also exculpatory evidence, because this description fits the characteristics of Jared Chambers.

The second Holloway recorded interview shows the suggestive nature of the identification procedure used by the officers. As the officer showed her the array, he had his finger on the photo

of the defendant.[4] After Holloway circled the defendant's photo, the officer told her she circled the right one. "You're alright baby. Hey, you did a good job." He also told her that he is light complected. (Holloway Video Interview II 7; 96a). The officer also told her that Jared Chambers identified the same person and "that was him for sure." (Holloway Video Interview II 9-10; 98a-99a). But even her identification is weak because after she selected Mr. Chenault's face she said "I think this is him, out of all these guys that looks the most." (Holloway Video Interview II 7; 96a). Further comparison identifications are suspect and this whole procedure as now revealed would support a motion to suppress her in-court and out-of-court identification.

Without access to the secret recordings, defense counsel had no idea that Holloway's identification of the defendant was tentative. His only information came from Detective Wittebort police report in which he claimed that Holloway immediately identified the defendant and did so with street emphasis. The recordings were not merely impeaching of her identification testimony but they were also exculpatory in that if she had to be told who the suspect was, the shooter could equally be Jared Chambers.

Moreover, the beginning of the first videotape reveals that Melvin Wooten, the deceased's friend, was talking with her in the interview room before the police came into the room. (Holloway Video Interview I; View start of video). After reviewing the previously undisclosed interview of Glenn Griffin, it is apparent that Chambers called Melvin Wooten the night of the shooting and blamed Chenault for the killing. Wooten then spread the word. Griffin then told the police not what he knew but what he heard from Wooten. (Griffin Video Interview 3; 27a). That Wooten was the person functioning as an unofficial investigator for the police is again apparent in the Holloway second interview where the police even asked her about what Melvin told her. (Holloway Video Interview II 3; 92a).

Wooten was never called as a witness and there is no recording of any of his conversations

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[4] The defendant's photo in the disclosed xeroxed copy of the array is in the location of the officer's hand in the video. (Photo Array; 100a).

with the police. Officer Wittebort claimed that something happened to the recording system when they interviewed both Keith McBee-Blevins and Melvin Wooten. (02/29/12 HT 25-27; 173a-174a).

The Glenn Griffin tape also showed that the police talked to the witnesses before they brought them into the interview room where the recorder was activated. The conversation that is recorded is *in media res*. (Griffin Video Interview 1; 25a).

The above evidence is either exculpatory such as the description of the shooter fitting Jared Chambers and the difficulty Holloway had in selecting a perpetrator or it is impeaching.

Even without the undisclosed video recordings, counsel should have requested an evidentiary hearing on the out-of-court identification proceedings. But the recordings reveal that Holloway's identification of the defendant was the product of an impermissibly suggestive procedure. Heather Holloway denied ever meeting Appellant before. The crime took place at night, in the dark. She was only able to see part of his face and her vague description also fit Jared Chambers who she also denied ever seeing before. And now with the video recordings, it is clear that Holloway only got a brief look at the shooter. Her identification was based on an impermissibly suggestive procedure in which the officer held his thumb or fingers on defendant's photo in the array. After she said his photo looked the most like him, the detective reassured her that she got the right person and that Jared had also identified him. By the time of trial, this tentative identification had turned into a positive one. Defense counsel also had no clue that Wittebort had lied about the alacrity of Holloway's identification.

Defense counsel's inaction denied defendant his best attack on the identification testimony and on the prosecution's theory of the case.

Confidence in the verdict is undermined when this suppressed evidence is considered along with the evidence produced at trial. The evidence against Defendant was weak. Appellant made no admissions. There is no scientific evidence that points to him as the triggerman. Instead this verdict rests only on the testimony of civilians each of whom had a motive to curry favor with the prosecution as was shown by the secret video recordings. Also Heather Holloway's identification of

the defendant, it is now clear, was a very weak one. Based on the newly released recordings, we know she did not get a good look at the shooter. Her identification was suggested to her by the procedure used by the officer. And her description of the shooter, newly disclosed in the video recording, fits the defendant as well as Jared Chambers.

F. No Deference Is Owed to Counsel's Choices

The Court of Appeals found that the defense should have asked for a continuance to get the recordings once Wittebort let the cat out of the bag. (COA Op 4; 6a). The Court relied on *United States v Kimoto*, 588 F3d 464, 488 (7th Cir. 2009). Appellant agrees with the Court of Appeals.

But the Court of Appeals clearly erred in deferring to what it labeled as "counsel's decision" not to utilize the recordings. The Court may only defer to reasonable strategic choices. The hallmark of a reasonable choice is that it is made after an investigation. *Strickland, supra* at 688-689. Since counsel never obtained the recordings how could he make any determination as to their value.

As the *Cox* Court held, a strategic decision is a conscious, reasonably informed decision made by an attorney and one which benefits the client. *Cox v Donnelly*, *supra* at 198. While this Court must defer to counsel's strategic decisions. Here the decision, if it was one, not to obtain the recordings, does not have to be deferred to because it was not based on an investigation of those recordings.

Any strategy which failed to point out to the jury that Jared Chambers could have been charged as an aider and abettor to murder and to drug trafficking and had a motive to testify falsely was an unreasonable one. Any strategy which failed to point out to the jurors that Santos De Valle was called rather than 911 because he came to retrieve the gun and the drugs from the car before the police arrived was unreasonable. Any strategy that failed to point out that Heather Holloway was also vulnerable to a drug trafficking charge and therefore curried favor with the prosecution by adopting its story line was an unreasonable strategy. Finally any strategy that failed to attack her identification of the defendant as the shooter was also unreasonable especially where her first description of the defendant fit the characteristics of Jared Chambers and where the procedure used was suggestive.

Here, trial counsel's failure to obtain the recordings means there was no investigation into their contents. Thus this Court does not have to defer to counsel's decision not to ask the trial court to order their production. It is not a protected strategic choice.

The Court of Appeals also stated that counsel was harboring appellate error. (COA Op 4; 6a). If that was his choice, then it is unreasonable in this day and age where the standards of review, and prejudice and error analyses make it almost impossible for a prisoner to get his conviction overturned even when a constitutional violation has been egregious. Perhaps when the automatic reversal doctrine was in its heyday, it might have been a reasonable strategy.

This Court should find the strategy employed unreasonable, that counsel performed below an attorney of ordinary skill and training, and that Mr. Chenault was prejudiced by his counsel's deficient performance.

SUMMARY

In this case, the Court of Appeals rejected the holding in *Brady* and placed a burden of proof on the defense that conflicts with **Brady** jurisprudence. This decision by the appellate court allows the prosecution to hide evidence thus forcing the defendant to seek. It ignored the clear dictates of MCR 6.201(A)(2) which mandates the disclosure of electronic recording of witnesses as part of pretrial discovery. Under the court rule and under *Kyles, supra,* the prosecution had an affirmative duty to discover what evidence the police had and make sure it was disclosed. It did not do so and thus it denied appellant a fair trial. The prosecution also had a continuing duty to disclose which it ignored. Further, this Court should not graft on to *Brady* a concept found in the test for newly discovered evidence, that of diligence.

Defense counsel's failure to ask the Court to order Wittebort and the prosecutor mid trial to disclose the secret video recordings and for time to review them the denied appellant the effective assistance of counsel.

The failure of both the prosecutor and the defense counsel to act in accordance with their constitutionally mandated duties denied Schuyler Chenault his 5th and 6th Amendment rights to a fair trial, to present a defense, and to confront the witnesses against him. Under these circumstances, this verdict cannot stand.

RELIEF SOUGHT

In light of the forgoing arguments, Schuyler Chenault asks this Court to reverse his convictions and remand the matter for a new trial.

Respectfully submitted,

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DATED: July 16, 2013