STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Michigan Supreme Court No. 146523
Court of Appeals No. 309384
Oakland County No. 2008-222726-FC

SCHUYLER DION CHENAULT,

Defendant-Appellant.

BRIEF OF *AMICUS CURIAE* MICHIGAN INNOCENCE CLINIC

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INTEREST OF *AMICUS CURIAE*

The Michigan Innocence Clinic is a part of the University of Michigan Law School's clinical legal education program. The Clinic investigates and litigates cases on behalf of inmates deemed to have viable claims of actual innocence of the crimes for which they were convicted. Unlike most other innocence clinics, the Clinic focuses on non-DNA cases.

In order to exonerate wrongfully imprisoned individuals without using DNA evidence, the Clinic must find and present evidence not introduced at trial. Not infrequently, this evidence comes in the form of materials or information that the prosecution or police failed to disclose before trial. Therefore, the proper application of the rule from *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), is essential to much of the work that the Clinic does.

In the case at bar, this Court has specifically asked the parties to discuss whether the Court of Appeals in *People v Lester*, 232 Mich App 262; 591 NW2d 267 (1998), correctly set forth the elements of a *Brady* claim. The Clinic files this brief in order to explain that *Lester* erred in adding a "due diligence" requirement to the *Brady* rule. In particular, this brief will explain how this requirement is inconsistent with both the plain language of the United States Supreme Court's *Brady* precedents and the purpose of the *Brady* rule.

INTRODUCTION

Amicus curiae Michigan Innocence Clinic ("the Clinic") submits this brief in response to this Court's June 5, 2013, Order granting Mr. Chenault's application for leave to appeal. The Clinic limits this brief to the question of whether *People v Lester*, 232 Mich App 262; 591 NW2d 267 (1998), correctly held that a defendant must show due diligence to claim a violation of the rule set forth in *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

Lester erred when it held that a defendant raising a *Brady* claim must demonstrate he could "not have obtained [the evidence] himself with any reasonable diligence." *Lester*, 232 Mich at 276. That holding was erroneous when it was issued, and the U.S. Supreme Court has since made it even clearer that diligence is not part of the *Brady* inquiry. Moreover, such a rule will inevitably lead to a greater incidence of wrongful convictions.

A due diligence requirement finds no support in U.S. Supreme Court precedent. Not only has the Court never made due diligence a requirement in *Brady* claims, it has repudiated such a requirement in no uncertain terms since *Lester*. *See Banks v Dretke*, 540 US 668, 696; 124 S Ct 1256; 157 L Ed 2d 1166 (2004) ("a rule thus declaring 'prosecutor must hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process"); *see also United States v Tavera*, 719 F3d 705, 711 (CA 6, 2013) (concluding that *Banks* rejected a *Brady* due diligence requirement "in no uncertain terms"). Moreover, the whole point of the *Brady* rule is to place an unqualified obligation on the prosecution to affirmatively disclose favorable evidence that is "material either to guilt or to punishment." But, a diligence requirement permits the prosecution to withhold exculpatory evidence, so long as it can concoct an argument as to how the defense could somehow have found the evidence on its own. A due diligence requirement ignores the simple truth that the prosecutor almost always possesses investigative resources far beyond the powers of the defense. To impose a diligence duty on a

defendant, requiring him to expend resources to obtain exculpatory materials already in possession of the State, destroys the very purpose of *Brady*: requiring prosecutors to disclose any exculpatory information they have so that the defendant receives a fair trial. Finally, experience has shown that any gloss on the *Brady* rule that reduces the obligation of police and prosecutors to disclose exculpatory evidence will lead directly to wrongful convictions.

Given that *Lester*'s due diligence requirement destroys the very purpose of *Brady*, and that the U.S. Supreme Court had never imposed such a requirement, *Lester* was wrong when it was decided. In light of *Banks*, that *Lester*'s error is even more clear. Therefore, the Clinic urges this Court to overrule *Lester* and recognize that the police and prosecution have a duty to disclose material and exculpatory evidence regardless of whether the defendant hypothetically could have done more to independently obtain the material.

ARGUMENT

I. The U.S. Supreme Court Has Rejected a Due Diligence Rule As Contrary to the Purpose of the *Brady* Rule.

The central purpose of the *Brady* rule is to ensure that the defendant has access to material and exculpatory or impeaching information so that he or she may receive a fair trial. *United States v Bagley*, 473 US 667, 675; 105 S Ct 3375; 87 L Ed 2d 481 (1985). *Brady* seeks to push the focus of criminal trials toward the truth, as opposed to gamesmanship. *See* Kate Weisburd, *Prosecutors Hide, Defendants Seek*, 60 UCLA L Rev 138, 145 (2012). *See also Neder v United States*, 527 US 1, 18; 119 S Ct 1827, 1838; 144 L Ed 2d 35 (1999) (noting "the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence."). The U.S. Supreme Court has therefore consistently articulated the *Brady* rule as entirely focused on the prosecution's duty to disclose material and exculpatory or impeaching

evidence to the defense, and on the prejudice to the defendant flowing from non-disclosure. *See e.g. Strickler v Greene*, 527 US 263, 281-82; 119 S Ct 1936, 1948; 144 L Ed 2d 286 (1999) ("[t]here are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.").

Since deciding *Brady* in 1963, the Court has elaborated upon the doctrine many times, but it has never once announced, and in *Banks* affirmatively rejected, a due diligence requirement.

A. The U.S. Supreme Court has elaborated on *Brady* often, but never instituted a diligence rule.

The Court has never included a defendant due diligence requirement in the *Brady* rule because the rule is designed to encourage prosecutors to err on the side of disclosure, not to come up with legal defenses to justify non-disclosure. *See e.g. United States v Agurs*, 427 US 97, 108; 96 S Ct 2392, 2398; 49 L Ed 2d 342 (1976) ("the prudent prosecutor will resolve doubtful questions in favor of disclosure."). Consistent with this theme, in *Kyles v Whitley*, 514 US 419; 115 S Ct 1555; 131 L Ed 2d 490 (1995), the Court expanded the duty to disclose even to situations where the prosecution is unaware of the exculpatory evidence. A prosecutor was thus assigned the duty to actively "learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id.* at 437. *Kyles* furthered *Brady*'s central goal of leveling the playing field by requiring the prosecution to affirmatively examine the evidence at its disposal to ensure it turns over any material and exculpatory evidence in the possession of the State.

In *Bagley*, the Court further broadened the *Brady* rule by confirming that exculpatory

impeachment evidence must be disclosed, a holding reiterated in *Kyles*, *Strickler* and *Banks*, among other cases. *Bagley, supra* at 676; *Kyles*, *supra* at 420; *Strickler*, *supra* at 281-82; *Banks*, 540 US at 691. In *Wood v Bartholomew*, 516 US 1; 116 S Ct 7; 133 L Ed 2d 1 (1995), the Court expanded the *Brady* rule again by recognizing that even *inadmissible* evidence must be disclosed under *Brady* if disclosure would lead to admissible exculpatory evidence. *Id.* at 6 (ultimately denying relief because defendant did not satisfy the requirement).

B. The diligence rule arises from misinterpretations of, and out of context statements from Supreme Court precedent.

Despite the Court's clear emphasis that the *Brady* rule is about the duty of the prosecution (and police) to disclose and the absence of any suggestion in any of the Court's precedents that the prosecution can be relieved of its *Brady* obligations by arguing that the defendant should have found the exculpatory evidence on his own, some lower courts have engrafted a due diligence requirement onto the *Brady* rule. *See generally* Weisburd, 60 UCLA L Rev 138. *Lester* itself relied on this line of erroneous lower court precedents. In particular, *Lester* cited to *United States v Meros*, 866 F 2d 1304 (CA 11, 1989). *See Lester*, *supra* at 281. *Meros*, in turn, cited to another Eleventh Circuit case, *United States v Valera*, 845 F2d 923, 927 (CA 11, 1988). And *Valera* created a due diligence requirement by relying on the words "unknown to him" ("him" being the defendant), which it pulled from certain Fifth Circuit cases. *Id.* at 927-28.

While the Fifth Circuit did correctly observe that those words were found in the Supreme Court's opinions in *Agurs* and *Kyles*, they were never intended to create a defendant due diligence requirement. *See e.g.,* Weisburd, *supra* at 142-43. Rather, the U.S. Supreme Court only used the phrase "unknown to the defense" to refer to the notion that a *Brady* violation can be established when the prosecution withholds material and exculpatory or impeaching **evidence that the defense does not, in fact, possess**. *See Agurs*, *supra* at 103; *Kyles*, *supra* at 43. In other

words, the "unknown to the defense" language simply recognizes the obvious point that a defendant cannot establish a *Brady* violation if he or she actually has or knows about the evidence that the prosecution failed to turn over because that defendant has not been prejudiced by the prosecution's non-disclosure. *See* Weisburd, *supra* at 148-151. But some lower courts, including the Court of Appeals in *Lester*, have misapplied U.S. Supreme Court precedent by construing "unknown to the defense" to somehow mean "unknowable to the defense," thereby implicating a diligence inquiry. *See id.* at 150.

C. The diligence rule is illogical in the *Brady* context and has been explicitly repudiated by *Banks*.

With the diligence rule that *Lester* imposes, the prosecution's burden to disclose **all** exculpatory and material evidence in the possession of the State is eliminated, so long as the prosecutor can make an argument that the defendant could have somehow found the evidence independently. No matter that a typical criminal defendant lacks the investigative resources of the prosecution and may be represented by a defense attorney who lacks adequate funding or resources to conduct an extensive investigation; if the prosecution can claim that a diligent defense attorney **could** have found the exculpatory evidence, the prosecutor is off the hook. *Brady*'s field-leveler is thus turned on its head, and a potentially innocent defendant is denied relief because he failed to obtain the favorable information that he never knew existed, while the prosecution escapes any responsibility for failing to disclose evidence of innocence readily available in its file.

Even before *Lester*, the U.S. Supreme Court had emphasized over and over again that *Brady* is about the prosecution's duty to disclose, not the defendant's duty to find. Given the vast

disparity in resources available to the prosecution and to the defense,[1] a rule that would allow the prosecution to withhold exculpatory evidence is a rule that inevitably would cause wrongful convictions. This is a result *Lester* allows, but *Brady* cannot condone.

While *Lester* was wrong when it was decided, the Supreme Court's subsequent decision in *Banks* eliminated any doubt as to *Lester*'s continuing validity. In *Banks*, the Court considered whether the Fifth Circuit correctly concluded that the prosecution could withhold exculpatory evidence from the defense without violating *Brady* if a diligent defendant could have discovered the withheld evidence. *Banks*, 540 US at 670. Specifically, the Court examined whether the defense could raise a *Brady* claim for withheld witness testimony when the testimony could have been discovered if the defense had interviewed the witness. *Id.* at 688.

The Court firmly rejected the prosecution's argument that a *Brady* claim would be barred in such contexts. *See id.* at 695. The Court reiterated that none of its decisions "lend support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material shall be disclosed." *Id.* The Court continued, "a rule thus declaring 'prosecutor must hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process." *Id.* at 696. Thus, it is even clearer after *Banks* that the *Brady* rule does not contain a defendant due diligence component.

In light of the Court's affirmative declaration that there is no defendant due diligence component to *Brady*, the contrary holding from *Lester* cannot survive. The due diligence

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[1] The investigative advantages prosecutors possess over the defense are obvious. Prosecutors usually have unfettered access to the crime scene and can ask the police to locate witnesses and records. Prosecutors also have legal tools at their disposal, such as promises of immunity, to encourage witnesses to talk. Weisburd, *supra* at 176-77; *See also* Bennett L. Gershman, *Litigating* Brady v. Maryland: *Games Prosecutors Play*, 57 Case W. Res. L. Rev. 531, 532 n.18 (2007). The defense does not have access to any of those resources. *See id.* Additionally, prosecutors are not burdened with being required to ask the court for funding for an investigation, as indigent defendants are required to do. *Id.*

requirement allows a prosecutor to intentionally hide material exculpatory evidence and hope the defense does not find it, secure in the knowledge that if the evidence does surface after trial, a reviewing court will deny relief so long as the prosecutor can plausibly argue that the defense could have found it. Such a rule is exactly what the Court rejected in *Banks*.

The Sixth Circuit recently came to precisely this conclusion in *United States v Tavera*, 719 F3d 705 (CA 6 2013). *Tavera* considered whether the defense was required to exercise due diligence in asking to interview a co-defendant in order to establish a *Brady* violation. *Tavera* explained that in *Banks* "[t]he Supreme Court rejected [a due diligence] requirement in no uncertain terms." *Id.* at 711. Therefore, the court concluded, "we follow the Supreme Court in *Brady*, *Strickler*, and the recent *Banks* case, and decline to adopt the due diligence rule that the government proposes based on earlier, erroneous cases." *Id.* at 712. *Tavera* is further proof that *Lester*, even if it had been correct when it was decided, is inconsistent with the Supreme Court's subsequent holding in *Banks* and should therefore be overruled.

II. The *Brady* Rule Is Crucial in Protecting Against Wrongful Convictions, And *Lester*'s Defendant Diligence Requirement Increases the Risk of Wrongful Convictions by Weakening *Brady*.

Even if the Court of Appeals had the discretion to add a due diligence requirement to the United States Supreme Court's *Brady* rule, this Court should reject such a requirement because it increases the risk of wrongful convictions of innocent persons. This section provides examples that prove the point.

Edward Honaker was convicted of kidnapping and sexual assault in Virginia in 1985. *See* Barry Scheck *et al.*, *Actual Innocence: When Justice Goes Wrong and How to Make it Right*, 223 (New American Library, 2003); *see also* The National Registry of Exonerations (http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3304).

Honaker was fortunate to be eventually exonerated by DNA evidence. Without DNA, relief from Honaker's wrongful conviction and life sentence would have come down to a *Brady* claim involving the failure of the police to turn over an interview of a key eyewitness in which she said she did not get a good look at the suspect and described a car not matching the one that Honaker drove. *Actual Innocence* at 223. The defense also would have learned that the victim had been hypnotized, a fact not discovered until a secondary investigation many years later by *pro bono* counsel. *See* Exonerations Registry, *supra.*

Under a due diligence rule such as the one in *Lester*, a prosecutor would argue, and a reviewing court would likely find, that Honaker's wrongful conviction should be upheld because he could have discovered all of this information before trial if his attorney had just asked the victim and witness the right questions. If the defendant diligence rule allowed the prosecution to escape its disclosure duty in such a case (and had the magic bullet of DNA not been available), Honaker would have remained wrongfully imprisoned today despite his actual innocence and despite the prosecutor's failure to disclose material and exculpatory information. Gamesmanship would prevail over truth and an innocent man would remain in prison.

Closer to home, Dwayne Provience was convicted of second-degree murder in Detroit in 2001. *See Provience v City of Detroit*, ___ Fed Appx ___; 2013 WL 3357994 (CA 6 July 5, 2013) (denying qualified immunity to police detective who allegedly withheld exculpatory evidence in violation of *Brady*). The Court of Appeals affirmed his conviction and this Court denied leave to appeal. However, nearly a decade later, Provience was able to prove his innocence, based in large part on the discovery of documents and information the prosecution and police possessed at the time of trial, but had failed to disclose to the defense. *Id.* at *2. In fact, the prosecution had argued in another murder trial that a different man was responsible for the crime for which Provience had been convicted. Further, the prosecution had suppressed a

police report indicating that another person was responsible for the murder for which Provience was serving 32-62 years. *Id.*

Hypothetically, Provience could have obtained all this information at the time of trial, had his defense team looked hard enough. His attorney could have interviewed every police officer in the precinct to find the one who possessed the relevant exculpatory information. He could have talked to the mother of every neighborhood thug, to find the one who would reveal to him, as she eventually did reveal years later to the Innocence Clinic, that her son had been hired by the true murderers to kill one of the witnesses who would have exculpated Provience. These things were hypothetically out there for Provience to find. But it makes no sense to expect a defendant in his shoes to expend such vast resources to find these things. And certainly not when one considers the alternative: All of the evidence was in the prosecution's file, and could easily have been turned over with almost no effort. Fortunately for Provience, *Lester* never became an issue, and Wayne County Circuit Court Judge Timothy Kenny granted relief after the prosecution stipulated to a new trial.

But another Michigan defendant has not been so lucky in attempting to litigate *Brady* claims in a post-conviction motion. Donyelle Woods, also represented by the Clinic, was convicted of murder based on the weak and wavering testimony of one highly intoxicated witness, who has now recanted. *See People v Woods*, Wayne Cty Cir Ct No. 03-11636 (July 17, 2011)(Opinion denying defendant's motion for relief from judgment). Following Woods's conviction, four key pieces of material and exculpatory evidence that should have been disclosed to the defense were discovered:

1. The state knew, but failed to disclose to the defense, that the star witness had at least one outstanding warrant for her arrest at the time of trial.

2. The state knew, but failed to disclose to the defense, police progress

notes indicating that the office in charge of the investigation had a theory of the case that would be exculpatory to Woods, and attempted to "round up" and "pressure" witnesses into implicating Woods.

3. The state had, but failed to disclose to the defense, a letter indicating that the victim had been stabbed in the neck by an alternate suspect in the days leading up to his murder.

4. The police knew, but failed to disclose to the defense, that the true eyewitness to the crime was killed in a shooting entirely unrelated to Woods (though the prosecutor continued to falsely argue that Woods had killed the witness in order to silence him).

Id. at 2.

The Clinic has taken Woods's case because it is convinced he is actually innocent of the crime for which he is convicted, and these *Brady* claims are crucial to his ability to win relief. However, the trial court has denied these claims, in part based on *Lester*'s diligence requirement. *See id.* at 7, 8, 9 (holding that three of the *Brady* claims fail because defendant, allegedly, could have independently obtained the evidence that the prosecution failed to disclose). Even under *Lester,* the trial court is wrong because Woods satisfies any diligence requirement the Court may choose to impose. Beyond that, however, his case makes clear why no such defendant diligence requirement should exist at all. All of the evidence listed above was in the prosecutor's possession, was material and exculpatory to Woods, and could have been turned over to the defense with minimal effort. **To hold that *Brady* would condone the prosecution's failure to disclose in cases such as Woods, Provience, and Honaker is to virtually overrule *Brady*.**

The prosecution should be required to meet its *Brady* duty to actually turn over the evidence, instead of withholding it and then later arguing that the defendant could have somehow obtained the evidence himself. *Brady* gives prosecutors the duty to disclose what they have, regardless of what they think the defendant can get on his own.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court overturn the relevant part of *Lester*, hold that the due diligence rule has no place in the *Brady* context and bring Michigan in line with the due process requirements of *Banks* by mandating that prosecutors disclose all material and exculpatory evidence, even if the defendant hypothetically could find the evidence independently.

Respectfully Submitted,

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