STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Karen M. Fort Hood, P.J., Kirsten Frank Kelly and Pat M. Donofrio JJ.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff/Appellee,

Supreme Court No. 146523

v.
SCHUYLER DION CHENAULT,
Defendant/Appellant.
_______________________________________/

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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Statement of the Question

I.

Exculpatory evidence is not suppressed by the prosecution if disclosed during trial where defendant has sufficient time to make use of it by, if necessary, asking for a continuance, but defendant cannot convert his tactical decision not to seek a recess or continuance into a Brady claim. Here, that there were recordings of witness interviews was revealed during trial, and defendant did not ask for a continuance. The Brady issue is thus forfeited; does the content of the recordings demonstrate that counsel was not ineffective?

Amicus answers: "YES"

Statement of Facts

Amicus joints the statement of facts of the People as Appellee.

Argument

I.

Exculpatory evidence is not suppressed by the prosecution if disclosed during trial where defendant has sufficient time to make use of it by, if necessary, asking for a continuance, but defendant cannot convert his tactical decision not to seek a recess or continuance into a Brady claim. Here, that there were recordings of witness interviews was revealed during trial, and defendant did not ask for a continuance. The Brady issue is thus forfeited, and the content of the recordings demonstrate that counsel was not ineffective.

A. Introduction

In its order granting the defendant's application for leave to appeal, this court directed that certain issues should be addressed:

- (1) whether the Court of Appeals' decision in *People v. Lester,* 232 Mich.App. 262, 281, 591 N.W.2d 267 (1998), correctly articulates what a defendant must show to establish a *Brady* violation;
- (2) whether 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 the rule from *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); and
- (3) whether trial counsel rendered ineffective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), for failing to exercise reasonable diligence after learning of the existence of the videotaped interviews.[1]

Amicus will therefore address the *Brady* issue. But this is not a *Brady* case, it is an ineffective assistance of counsel case, and defense counsel was not incompetent for the reasons well stated by the People in their brief.

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[1] *People v. Chenault*, 494 Mich. 862 (2013).

B. There Was No Brady Violation Here

(1) *Brady* is inapplicable because the recordings were accessible in sufficient time for counsel to make use of them if he wished

Detective Wittebort testified that witness interviews were recorded, and that defense counsel and defense counsel should have them, but counsel said he did not. Wittebort said he had the original recordings, and dropped off copies for the trial prosecutor with the receptionist at the prosecutor's office. The prosecutor was as unaware of the tapes as was defense counsel. While it is unfortunate that the existence of the tapes was not made known to defense counsel—or the prosecutor trying the case—before trial, on occasion there may be "many a slip between cup and lip." But *Brady* does not require disclosure before trial, and the disclosure here was in sufficient time to satisfy *Brady*, assuming, for the sake of argument only, that the tapes constitute *Brady* material; that is, that they are exculpatory, and *material* as defined in *Brady* and its progeny. Defendant's *Brady* claim founders on this fundamental premise—there was no suppression of tapes *even if* they were exculpatory and material—and what remains is an ineffective assistance of counsel claim.

That the tapes were not available to defense counsel until Detective Wittebort revealed their existence during trial was a matter of inadvertence, rather than deliberate. *Brady* applies even if the "suppression"—which is a word of legal art, not requiring malicious intent—was inadvertent or innocent. But suppression there must be, and here there was not. That the interviews were recorded *was* revealed before the trial concluded. Though the question appears not to have been addressed in Michigan, many cases in the federal system hold that a late disclosure is nonetheless a disclosure, and *Brady* is thus not implicated, *so long as the evidence was not disclosed too late to be made use of by the defense during the trial*:

- If previously undisclosed evidence is disclosed during trial, *no Brady violation occurs* "unless the defendant has been prejudiced by the delay in disclosure."

  United States v. Garner, 507 F.3d 399, 405 (CA 6, 2007) (quoting *United States v. Word,* 806 F.2d 658, 665 (CA 6,1986)(emphasis supplied)

- The government responds by pointing out that *disclosure of impeachment information during trial is not a Brady violation* unless the disclosure comes too late to respond to it. *See United States v. Almendares,* 397 F.3d 653, 664 (8th Cir.2005). . . . The government's reasoning on this point is supported by the case law. "Where the prosecution delays disclosure of evidence, but the evidence is nonetheless disclosed during trial, *Brady is not violated.*" *United States v. Gonzales,* 90 F.3d 1363, 1368 (8th Cir.1996); *see United States v. Boykin,* 986 F.2d 270, 276 n. 6 (8th Cir.), *cert. denied,* 510 U.S. 888, 114 S.Ct. 241, 126 L.Ed.2d 195 (1993); *Nassar v. Sissel,* 792 F.2d 119, 121 (8th Cir.1986). We agree that the government should have produced this information before trial, but its inadvertent failure to do so did not require the district court to dismiss Porchay's indictment with prejudice.

  United States, v. Porchay ,651 F.3d 930, 942 (CA 8, 2011)(emphasis supplied)

- *[T]here is no Brady violation so long as the exculpatory or impeaching evidence is disclosed at a time when it still has value. See United States v. Vgeri,* 51 F.3d 876, 880 (9th Cir.1995) (impeaching evidence disclosed during trial was still valuable because the defense could use it on cross-examination); *United States v. Gordon,* 844 F.2d 1397, 1403 (9th Cir.1988) (impeaching evidence disclosed after a witness had finished testifying did not constitute a *Brady* violation because the court had offered to recall the witness for further cross-examination in light of the new impeaching evidence).

  United States v. Houston, 648 F.3d 806, 813 (CA 9, 2011)(emphasis supplied)

- Assuming, without deciding, that the CAPRS Reports were favorable to Jeanpierre and material to his guilt, Jeanpierre has failed to prove that the government suppressed the CAPRS reports. *See Ladoucer,* 573 F.3d at 636. "Although a defendant's *Brady* rights are violated if he discovers information after trial which had been known to the

prosecution but unknown to the defense, *the same is not true,"* *where, as here, "the evidence is discovered during trial."* *United States v. Almendares,* 397 F.3d 653, 664 (8th Cir.2005) (quotation and citations omitted).

United States v. Jeanpierre, 636 F.3d 416, 422 -423 (CA, 2011)(emphasis supplied)

- We have previously held that "*Brady does not require pretrial disclosure*, and due process is satisfied if the information is furnished before it is too late for the defendant to use it at trial." *Id.* Here, Jeanpierre was given the opportunity to call any additional witnesses based on the content of the reports without objection from the government. He elected not to conduct any further inquiry of any witness based on this material. Thus, due process is satisfied. *See Almendares,* 397 F.3d at 664.

  United States v. Jeanpierre, 636 F.3d 416, 422 -423 (CA, 2011)(emphasis supplied)

- Under *Brady*'s framework, when evidence is made available at trial—at least under circumstances such as these—*there is no basis to assert that the government has suppressed it. See United States v. Smith,* 534 F.3d 1211, 1223 (10th Cir.2008) ("The *Brady* rule is not violated when the material requested is made available during trial."

  United States v. Brooks, __F.3d__ , 2013 WL 4566407, 14 (CA 10, 2013)(emphasis supplied)

- The evidence at issue here *was not suppressed at all. Though discovered during trial*, O'Hara had sufficient time to make use of the material disclosed. Delayed disclosure of evidence does not in and of itself constitute a *Brady* violation. . . . .

  United States v. O'Hara, 301 F.3d 563, 569 (CA 7, 2002)(emphasis supplied)

- "In situations ... in which a *Brady* disclosure is made during trial, the defendant can seek a continuance of the trial to allow the defense to examine or investigate. . . . Because the prosecution did not suppress any evidence, *Lawrence cannot convert his tactical decision not to seek a recess or continuance into a Brady claim* in this habeas petition.

Lawrence v. Lensing, 42 F.3d 255, 258 (CA 5, 1994)(emphasis supplied)

States that have addressed the point take the same approach:

- *Brady* is not violated, as a matter of law, when impeachment evidence is made " 'available to [a] defendant[ ] during trial' " if the defendant has "sufficient time to make use of [it] at trial."

  Commonwealth. v. Tuma, 740 S.E.2d 14, 18 (Va.,2013)

- Although the complete non-disclosure of significant exculpatory evidence often makes an easy case for a due process violation, delayed disclosure requires an inquiry into whether the delay prevented the defense from using the disclosed material effectively in preparing and presenting the defendant's case. *United States v. Ingraldi,* 793 F.2d 408 (1st Cir.1986). In *Ingraldi,* by failing to move for a continuance and then thoroughly cross-examining the witness, the defense counsel cured a potential *Brady* violation.

  State v. Caughron, 855 S.W.2d 526, 548 (Tenn.,1993)

- *It is well established that "[e]vidence known to the defendant or his counsel, or that is disclosed, even if during trial, is not considered suppressed as that term is used in Brady."* . . . Furthermore, we have stated: "*Brady* does not mandate pretrial disclosure in all cases. W. LaFave & J. Israel, Criminal Procedure (2d Ed.1992) § 20.7, p. 894. . . . the appropriate standard to be applied is whether the disclosure came so late as to prevent the defendant from receiving a fair trial . . . .The defendant bears the burden of proving that he was prejudiced by the failure of the state to make the disclosure earlier."

  State v. Thompson, 839 A.2d 622, 632 - 633 (Conn.App.,2004)(emphasis added)

- To prevail on a *Brady* claim where the State's disclosure is tardy, the appellant *must show that the late disclosure prejudiced him. Id. To show prejudice, the appellant must show a reasonable probability that, had the evidence been disclosed to the defense earlier, the outcome of the proceeding would have been different. . . .* Appellant has not satisfied his burden.

  In re A.C., 48 S.W.3d 899, 905 (Tex.App. , 2001)(emphasis added)

as have respected treatises:

- Though *Brady* itself involved a request for pretrial disclosure, lower courts agree that the *Brady* rule does not impose a general requirement of pretrial disclosure of exculpatory evidence that is material to the issue of guilt. Due process, it is said, requires only that *disclosure of exculpatory evidence be made in sufficient time to permit defendant to make effective use of that evidence at trial. This point in time has been described as "the point at which a reasonable probability will exist that the outcome would have been different if an earlier disclosure had been made.*"

  6 LaFave, Criminal Procedure (3rd Ed), § 24.3(b)(emphasis added)

- Evidence is deemed "suppressed" if the prosecution failed to disclose it before it was too late for the defendant to make use of the evidence . . . .

  2 Federal Practice and Procedure (4th Ed), § 256

Here, that witness statements were recorded was revealed by Detective Wittebort's testimony. The question then becomes whether that disclosure was prejudicial in that it was too late for the defendant to make use of it. Had counsel requested a continuance to review the recordings and his motion been denied, then a reasonable argument could be made that the disclosure was not in sufficient time for him to make use of the evidence. But defendant can "only litigate what happened,"[2] and counsel never requested a continuance. A continuance to review the recordings for possible impeachment use would have been sufficient in this case, and because defendant did not ask for a continuance he has forfeited any *Brady* claim that the recordings were made known too late to be of use. As the Fifth Circuit said in similar circumstances, defendant "convert his tactical decision not to seek a recess or continuance into a Brady claim."[3] Because, then, the existence of

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[2] *I.N.S. v. Delgado,* 466 U.S. 210, 221, 104 S.Ct. 1758, 1765, 80 L Ed 2d 247 (1984).

[3] *Lawrence v. Lensing,* 42 F.3d at 258.

the recordings was disclosed during trial, and defendant did not seek a continuance to review them, the question of whether the disclosure was too late, in that defendant did not have time to make reasonable use of them, is forfeited. The inquiry is not a *Brady* inquiry into whether suppression of favorable evidence has occurred, *Brady* being violated at "the point at which a reasonable probability will exist that the outcome would have been different if an earlier disclosure had been made,"[4] but an inquiry into whether counsel was ineffective "for failing to exercise reasonable diligence after learning of the existence of the videotaped interviews," which is the fourth question in this Court's order granting leave to appeal. For the reasons well stated by the People in their brief on the merits, counsel was not ineffective, given the content of the recorded statements.

(2) The Court of Appeals' decision in *People v. Lester,* 232 Mich.App. 262, 281, 591 N.W.2d 267 (1998) correctly articulates what a defendant must show to establish a *Brady* violation

In the *Lester* opinion the Court of Appeals said that" [i]n order to establish a *Brady* violation, a defendant must prove:

> (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.[5]

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[4] 6 LaFave, Criminal Procedure (3rd Ed), § 24.3(b). And see, among many others, *United States v. Olson*, 697 F.2d 273, 275 (CA 8,1983): ."We recognize that *Brady v. Maryland* and *United States v. Agurs* do not require the pre-trial disclosure of material evidence as long as the ultimate disclosure is made before it is too late for the defendant to make use of the evidence."

[5] *Lester* 232 Mich.App.at 281.

The controversy in this case relates to the second requirement of the *Brady* rule as stated in *Lester*; that is, that *Brady* is not violated if the defendant possessed the evidence in question or "could have obtained it himself with any reasonable diligence." Amicus would again emphasize that this requirement of *Brady* as the test is stated by *Lester* is *not* implicated in this case. As *Lester*—and many cases from other jurisdictions, as amicus will show—states the test as requiring the defendant to show the he did not possess the evidence, nor could he have obtained it with reasonable diligence, the principle refers to obtaining the evidence *from a source other than the prosecution*. This principle must be distinguished from the test for suppression when evidence *is* disclosed, but during trial, rather than before trial. As has been seen, where exculpatory evidence is disclosed *by the prosecution*, the question is whether the disclosure was in sufficient time for defendant to make use of it, meaning disclosure before "the point at which a reasonable probability will exist that the outcome would have been different if an earlier disclosure had been made." Because defendant did not move for a continuance, he has forfeited examination of this point, and thus no suppression occurred here. The issue is whether counsel was ineffective for failing to ask for a continuance. Because there is no argument here that defendant could have obtained the recordings from a source *other* than the prosecution, the requirement that the defendant show the he did not possess the evidence, nor could have obtained it with reasonable diligence, is simply not an issue in this case. Nonetheless, where that point is controverted in a case, *Lester* correctly includes it.

A contest over the requirement that the defendant show that he did not possess the evidence, nor could he have obtained it with reasonable diligence, is almost always over the second clause—whether the defendant could have obtained the evidence [from a source other than the prosecution] with reasonable diligence. As federal courts have put this inquiry, the court asks whether the defendant "'has enough information to be able to ascertain the supposed *Brady* material on his own.' If so, there's no *Brady* violation."[6] For example, in one case the court found that a criminal history was not suppressed because the government had "disclos[ed] . . . all the information necessary for the defendants to discover the alleged *Brady* material."[7] The present case involves no such contest, there being no argument that the defense could have obtained the recordings independent of the prosecution with reasonable diligence; rather, the evidence was simply not suppressed because made available during trial, with the question of whether the disclosure was in sufficient time for the defendant to make reasonable use of the recordings forfeited by the defendant when no continuance was sought.

Cases are legion stating the *Brady* test as including the requirement that the defendant show that he did not possess the evidence in question, nor could he or she have obtained it with reasonable diligence. A Westlaw search, for example, of all the federal circuit courts of Brady /p "reasonable

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[6] *Milke v. Ryan*, 711 F.3d 998, 1017 -1018 (CA 9, 2013). And see, e.g., *United States v. Gasim Al-Dabbi*, 388 F.3d 1145, 1149 (8th Cir. 2004): Late disclosure of evidence that the government provided financial assistance to a witness did not violate *Brady* because "[w]hile the timing of the disclosure did not afford Al–Dabbi's attorney the benefit of the information in formulating his case, it did provide him with the opportunity to request a continuance or recess of the trial to prepare to cross-examine [the witness] effectively or otherwise make use of the information."

[7] *United States v. Bracy,*, 67 F.3d 1421, 1428–29 (CA 9, 1995).

diligence" results in 235 "hits."[8] The same inquiry as to all states results in 590 hits. These cases do not *add* a requirement to the *Brady* test as enunciated by the United States Supreme Court, but simply define that which constitutes *suppression* of evidence by the prosecution—if the defendant possesses the evidence, or could obtain it with reasonable diligence; that is, the prosecution had "disclos[ed] . . . all the information necessary for the defendant to discover the alleged *Brady* material" on his own, there is no suppression—by breaking this point out of the "suppression" prong and clearly enunciating it.[9] But whether enunciated separately, or implicitly included within the

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[8] Several examples among a multitude of cases includes the following: *Jarrell v. Balkcom,* 735 F.2d 1242, 1258 (CA 11, 1984)("*Brady* does not require the government to turn over information which, 'with any reasonable diligence, [the defendant] can obtain himself.' "; *United States v. LeRoy,* 687 F.2d 610, 618 (CA 2, 1982) ("evidence is not suppressed' within the meaning of *Brady* if the defendant knew or should have known of essential facts permitting him to take advantage of any exculpatory evidence'"); *United States v. Stewart,* 513 F.2d 957, 960 (CA 2,1975) (government not required to disclose a witness's prior testimony if the defendant is "on notice of the essential facts which would enable him to call the witness and thus take advantage of any exculpatory testimony that he might furnish"); *Grant v. Lockett,* 709 F.3d 224, 231 (CA 3, 2013) ("Grant's PCRA counsel was able to discover that Moore was on parole at the time of the shooting and when he testified against Grant. Grant's trial counsel could also have accessed Moore's criminal history through the records kept by the Clerk of Court. Indeed, it appears Grant himself obtained such records while in state custody. It is therefore clear that trial counsel could have discovered Moore's parole status had he exercised reasonable diligence. Accordingly, the District Court did not err in denying Grant's *Brady* claim on the merits without an evidentiary hearing").

[9] "Defendant's *Brady* claim is without merit when the file at issue was a matter of public record and could have been obtained upon request, 'especially when the file pertains to an alleged co-conspirator and the charges against the co-conspirator are so closely related to the conspiracy with which the defendant is charged.'" *United States v. Infante,* 404 F.3d 376, 387 (CA 5, 2005); "[B]ecause the evidence was available to Spirko from other sources than the state, and he was aware of the essential facts necessary for him to obtain that evidence, the *Brady* rule does not apply." *Spirko v. Mitchell,* 368 F.3d 603, 611, (CA 6, 2004); "The prosecution is not required to furnish a defendant with exculpatory evidence that is fully available to him through the exercise of due diligence. *Wright v. Hopper,* 169 F.3d 695, 702 (CA 11,1999); "Brady rights are not denied where the information was fully available to the defendant and his reason for not obtaining and presenting such information was his lack of reasonable diligence." *United States v. Dean,* 722 F.2d 92, 95 (CA 5, 1983).

"suppression" prong of the test, the principle remains the same.[10] One excellent treatise makes the point:

> The Brady standard is often expressed in three prongs: (1) the evidence at issue is material and favorable to the defendant; (2) the evidence was suppressed by the government, intentionally or not; and (3) the defendant was prejudiced to the point that there is a reasonable probability that the evidence suppressed, had it been disclosed, would have led to a different result for the defendant. The standard can also be split into four prongs, *but the substance of the test remains the same.*[11]

C. Conclusion

Whether stated as containing three "prongs" or "four,"[12] whether that defendant must show that he or she did not possess the evidence in question, nor could have obtained it with reasonable diligence, is considered implicit within the requirement of prosecution suppression, or broken out and stated as a "prong" of the test, the "substance of the test remains the same." Here, there is no contest over this part of the test, for the evidence was not suppressed because disclosed during trial, and at a time where defendant could have made use of it had he requested a continuance to review

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[10] Defendant relies heavily on *United States v Tavera*, 719 F.3d 705 (CA 6, 2013). The case is an outlier on the issue. Even the dissenting judge, who plainly favored the principles stated by the majority, said the majority opinion created new law, and that "it is up to this Court sitting en banc or the Supreme Court, not this panel, to decide whether the applicable Sixth Circuit case law has unduly strayed from the Supreme Court's holding in *Brady*." 719 F.3d at 718.

[11] 3 *Federal Practice and Procedure* (4th Ed.), § 586 (emphasis supplied).

[12] See e.g. *United States v. Svete*, 521 F.3d 1302, 1313 (CA 11, 2008), rev'd on other grounds 556 F.3d 1157 (11th Cir. 2008) (en banc), panel opinion on new trial issue reinstated, 565 F.3d 1363 (11th Cir. 2009)."To establish a Brady violation, [defendant] must show (1) that the government possessed evidence favorable to the defendant; (2) that the defendant 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 revealed to the defense, there is a reasonable probability that the outcome of the proceedings would have been different."

it. But he did not, and that issue is thus forfeited.[13] The question becomes whether counsel was ineffective in not requesting a continuance, and amicus can add nothing to the fine arguments of the People in their issue II on that question.

[13] Amicus would also note that the recordings appear not to meet the *Brady* definition of "material" exculpatory evidence, as the People argue in their Issue II.

Relief

WHEREFORE, the amicus requests that the Court of Appeals be affirmed.

Respectfully submitted,

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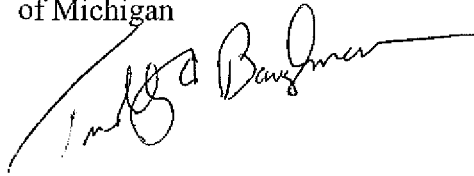

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