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.
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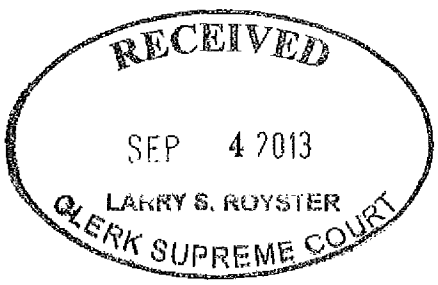
**Reply Brief On Appeal – Appellant**

**ORAL ARGUMENT REQUESTED**

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DOES THE COURT OF APPEALS' DECISION IN *PEOPLE v LESTER* INCORRECTLY ARTICULATE WHAT A DEFENDANT MUST SHOW TO ESTABLISH A *BRADY* VIOLATION?

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."

III.

WAS APPELLANT 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 IN OBTAINING THEM?

Defendant-Appellant says, "Yes."

I.

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

The Appellee points out that the United States Supreme Court "has never expressly articulated a four prong test. This is true. But, even more on point, it has repeatedly reaffirmed the three prong test. *Skinner v Switzer*, 131 S Ct 1289 (2011). Justice Ginsburg in writing for the 8-1 majority noted that under *Brady,* a defendant "must make each of three showings: (1) the evidence...is favorable to the accused because it is exculpatory or because it is impeaching; (2) the State suppressed the evidence, either willfully or inadvertently; and (3) prejudice... ensued. *Id.* at 1300. See *Strickler v Greene*, 527 US 263, 281-282 [1] (1999) and *Banks v Dretke*, 540 US 668, 691 (2004).

And contrary to the Appellee's contention on page 23 of its brief, the Court has specifically rejected a due diligence requirement because it would undermine the *Brady* rule. *Banks, Id. at* 694-696. In *Strickler, supra* at 284-287, the discussion of due diligence concerns procedurally defaulted issue under the federal habeas statute. It is not a discussion of due diligence in relation to discovering *Brady* material before or during trial.

The Appellee cites to *Kyles v Whitley*, 514 US 419, 437 (1995) for the comment that a showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation without more. *Kyles* was not referring to any diligence requirement. It was referring to the question of materiality - what would have been the effect of the suppressed evidence on the verdict. 514 US at 437.

The Appellee claims that the Lester due diligence requirement is not an expansion of *Brady* but "simply a clarification" of it. In view of the *Banks* Court's statement that a due diligence would undermine *Brady*, this court should reject the notion that it would clarify it.

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[1]In Appellee's Brief at page 42 fn47, it cites to these pages in *Strickler* for the proposition that due diligence is relevant to the determination of whether the evidence was suppressed. Appellee's cite is wrong. There is a discussion of due diligence on page 283 but it concerns whether the issue was procedurally defaulted for purposes of habeas review.

In fn 12 of its Brief, Appellee refers to cases which mention the defendant's ability to obtain the evidence. These cases are instances where the material was a matter of public record or the defense knew about it before trial. See for instance *State v Ellison*, 272 P3d 646 (Mont. 2012)(Defendant knew about if before trial); *State v Mullen,* 259 P3d 158 (Wash. 2011)(Evidence was part of a civil case available to the public). The Appellant does not contend that such material would fall under *Brady.*

Finally, Appellee refers to the Sixth Circuit as wavering on whether to adopt a due diligence requirement in *United States v Tavera* , 719 F.3d 705, 712 (6th Cir. 2013). But the *Tavera* Court stated the following:

> In sum, 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.** (emphasis added).

Contrary to the Appellee's characterization of a wavering Court, the Sixth Circuit is firm in its rejection of a due diligence requirement. This Court too should not waver. It should be firm in its rejection of the Appellee's request to undermine *Brady.* If a trial is to be a truth seeking procedure rooted in notions of fairness, this Court must continue to enforce a rule that seeks to make criminal trials fair.

The prosecution offers a frame work on page 5 of its Brief presumably to be used if this Court decides to imposes a due diligence requirement. Prong one concerns where the defense has already obtained the evidence itself. Then there is no *Brady* issues since *Brady* applies to evidence suppressed by the prosecution. Prong three concerns the government hiding evidence. Under *Brady*, government conduct is irrelevant. Questions as to whether the evidence was purposefully hidden or inadvertently hidden misses the point of *Brady. Brady* is not interested in punishing misconduct. It is interested in assuring a fair trial to the defendant. The second proposed prong is the due diligence requirement. The Appellee's proposal will place this court in conflict with the United States Supreme Court not just on the due diligence requirement but also on the issue of misconduct, thus further increasing the burden on the defense to show a *Brady* violation and decreasing the

chance of a defendant receiving a fair trial. The Court does not require a defendant to request the evidence in order for the prosecution's *Brady* obligation to kick in. It abandoned distinctions concerning, no request, general request, and specific request in *United States v Bagley*, 473 US 667, 682 (1985).

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 prosecution cites to *People v Banks*, 249 Mich App 247, 255 (2002) But the facts in Banks are a far cry from those before this Court. The one police report in *Banks* was actually disclose mid trial before the witness testified. The report essentially supported the prosecution's witness' testimony. In the case at bar, the secret recordings were not disclosed until well after the trial had concluded. The recordings contained evidence showing that one of the prosecution's two star witnesses had been offered immunity to a life offense in return for a statement. No other document revealed that anything was offered to the witness in exchange for his testimony. Another recording showed that the identification by the other star witness, who was the only uninvolved eyewitness, was not as strong as the witness testified to at trial. No other document revealed this information. These recordings were clearly *Brady* material.

The Appellee relies on Delaware jurisprudence to try and rebut the *Brady* claim. The two cases referred to are not on point. The first is *Dawson v State*, 673 A2d 1186, 1193 (Del. 1996). In that case, the statement was turned over to the defense before the witness testified. Although the statement shows that the witness had changed her testimony, the court found that the change of testimony continued to hurt the defense case. Thus, it failed to meet the requirement that the evidence be favorable to the defense. This case was also reversed on appeal to the United States Supreme Court, albeit on other grounds. See *Dawson v Delaware*, 503 US 159 (1992).

The other Delaware case, *Cabrera v Delaware*, 840 A2d 1256, 1269 (Del. 2004), was a partial disclosure case. A witness' statement was turned over to the defense. That witness, Powell,

testified favorably for the defense. The prosecution then used undisclosed material to impeach the witness. The Delaware court held that this was not *Brady* material because it was not **directly** favorable to the defense.

The use of the adverb "directly" does not add a requirement to *Brady*. Under no reading of *Brady*, would material impeaching a defendant-friendly witness be considered *Brady* material. When the category of "impeachment materials" was added to *Brady*, it was directed at evidence that would impeach a prosecution witness that had given inculpatory evidence against the defendant. *United States v Bagley*, 473 US 667(1985)(Automatic reversal required where undisclosed evidence could have been used by the defense to effectively impeach a government witness). Bagley does not categorize impeachment as either direct or indirect.

Of course, the undisclosed evidence in this case did directly affect the witness' testimony. It was not cumulative. It would not just have allowed counsel to better prepare for cross examination. The evidence was either exculpatory, such as Holloway's identification of the defendant as the shooter where no other disclosed material showed that she was uncertain of her identification. Or the evidence showed that Jared Chambers had a powerful motive to lie - fear of conviction of a life offense. This is bias evidence, more significant even than ordinary impeaching evidence such as a larceny conviction. It does not just attack the witness' general credibility. But even if it was "just" impeaching material, *Bagley* reminds us how important such material is.

The prosecution looks to *United States v Emor*, 573 F3d 778 (DC Cir. 2009), for support. But the only similarity between that case and appellant's is that recordings were involved. In *Emor*, the government found two recordings two weeks after trial and voluntarily brought them to the attention of the defense. In this case it took three FOIA requests and two motions for new trial to ferret them out and shake them loose from the clutches of an officer who laughed when he heard that people were looking for the recordings rather than disclose them. (Wittebort's Post Conviction Hearing Testimony; 178a). And also in contradistinction to *Emor*, the trial prosecutor actually argued that the defense could not bring a discovery motion post-conviction, meaning he had no responsibility to disclose any exculpatory evidence post-conviction. He further opined that the

attorney could be grieved for sending out such a subpoena. (06/09/10 Post-Conviction Motion Hearing; 142a-144a).

While it cannot be said definitively that the trial prosecutor knew of the importance of the contents of the recordings, Officer Wittebort must have known that he was concealing exculpatory evidence. And of course it is the prosecutor's obligation to learn of evidence favorable to the defense. *Kyles v Whitley,* 514 US 419, 437- 438 (1995).

Further, in *Emor*, the witness had been thoroughly impeached, even admitting that he had lied on numerous occasions. And some of the evidence had in fact been disclosed through a detective's summary.

In this case, impeachment of Holloway and Chambers was desultory at best. But with the suppressed evidence, both witnesses' credibility would have suffered fatal attacks because a motive for testifying falsely is shown by the recordings. Further Heather Holloway's identification of the defendant as the shooter would come under attack and would have raised a reasonable doubt in the jury's mind about who the shooter really was. 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 $1000 and the drugs. Instead Chambers became a star witness against the defendant claiming that he was the innocent bystander just 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 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 Transcript-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 Transcript 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 Transcript11; 58a).

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." (06/29/08 Holloway Transcript 23; 81a). In the second interview, the police again promise not to charge her with a drug offense. (07/02/08 Holloway Transcript; 97a).

In neither of her written statements does she offer a description of the shooter. But in the first recorded interview she describes the shooter as tall with a skinny face and light-complected. (06/29/08 Holloway Transcript; 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. (06/29/08 Holloway Transcript 29; 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. As the officer showed her the array, he had his finger on the photo of the defendant. After Holloway circled the defendant's photo, the officer told her she circled the right one and that he is light complected. (07/02/08 Holloway Transcript; 96a). The officer also told her that Jared Chambers identified the same person and "that was him for sure." (07/02/0 Holloway Transcript; 97a-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." (Appendix D: 07/02/0 Holloway Transcript; 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.

There is a reasonable probability that had the concealed evidence been disclosed, Schuyler Chenault would have been acquitted

The Appellee counters that there is a due diligence requirement for the defense to investigate. Since the defendant has no burden of proof at trial, it does not have to investigate. While there is a

duty to investigate, it is part of defense counsel's Sixth Amendment obligation to render effective assistance. But that is a different issue. The Appellee relies on cases that discuss due diligence of counsel but the discussions are in regard to the requirements of appellate counsel raising and preserving issues in state court so that a federal habeas court may review them.

Contrary to the Appellee's allegation, the defense was not relying on the prosecution to investigate the case for it. It was relying on the prosecution to fulfill its historic duty to disclose to the defense evidence it has that it knows to be exculpatory or impeaching. It was relying on the prosecution's implicit representation when it turns over evidence, that it has no more *Brady* material to disclose. The alternative to reliance on, and confidence in, the word of a government official is open file discovery. But of course that would not have accomplished anything in this case. The recordings were not in the prosecutor's file. They were in the officer's file, an officer who had no idea what *Brady* material was. (Wittebort 5; 151a). The trial prosecutor commented that even if he knew about the recordings, he wouldn't have asked for them, an indication he does not understand what his obligation is under *Brady*. (06/09/10 MT 10; 146a). So open file discovery does not resolve this problem. Faithfulness to the letter of the law would have.

In its brief, Appellee continues to needlessly bash the trial judge, but offer no specifics of what the judge could not remember from a trial which had occurred a year earlier or how the need to have his memory refreshed harmed his ability to decide this issue. Its description of the trial court's opinion as "cursory" is erroneous in view of the on the record discussion the court engaged in over a two-day period. (02/29/12 Court Colloquy; 183a-193a). On the second date, there were 54 pages of argument partially reproduced in Appellee's Appendix. (03/08/12 Argument and Ruling 182b-188b). It stoops to attacking the trial judge for a failure in remembering a detail of the trial, yet wants to excuse Wittebort's testimony because he has so many cases.

Defendant's burden under *Brady* is to show that there was a reasonable likelihood of a

different outcome. He did not have to prove materiality even by a preponderance of the evidence.[2] The test is one of probability. *Kyles, supra* at 434. The trial court's decision was well within the reasonable range of outcomes.

On all other issues, Appellant relies on his principle brief in reply.

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 IN OBTAINING THEM.**

Appellant requested a *Ginther* hearing in the trial court and it was denied. A hearing was only authorized on the *Brady* issue. The Court of Appeals also denied a request to remand the case to the lower court to hold a *Ginther* hearing. Appellee relying on *People v Mitchell*[3], 454 Mich 145, 169 (1997), contends that there can't be a finding of ineffectiveness where trial counsel has not testified to explain his conduct. Such an interpretation would result in a paradox. If the hearing is denied and the attorney never testifies, but the record shows a clear Sixth Amendment violation, then despite this, the defendant's Sixth Amendment right is never reviewed.

*Ginther* hearings are necessitated by the need to expand the record below. If the issue is apparent from the record, then the issue is reviewable. In this case, we know that trial counsel thought the evidence was important because he requested it in a post trial motion. The Court does not have to defer to his decision to not ask for a continuance because he did not investigate the recordings to see if the evidence would benefit the defense. This Court is only required to defer to the strategic choice, to the extent that it was supported by investigation. *Strickland v Washington*, 466 US 668, 689-691 (1984).

Appellee claims that trial counsel is excused from asking for a continuance and discovering

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[2] On the prejudice prong of *Strickland*, a more likely than not standard was rejected in *Nix v Whiteside*, 475 US 157, 175 (1986).

[3]The holding in *People v Mitchell* has been reversed. The Sixth Circuit found that the defendant had experienced not ineffective assistance of counsel but the complete denial of the right to counsel. *Mitchell v Mason*, 325 F3d 732(6th Cir. 2003).

the secret video recordings because Koch, a non witness gave a written inculpatory statement some months later to an FBI agent. The difference is that the Holloway and Chambers had already inculpated the defendant. Nothing they said could hurt him anymore than there testimony did. Counsel had a Sixth Amendment duty to listen to those recordings to see if they contained exculpatory evidence or impeaching evidence.

It would never be a "reasonable belief" for counsel to think those recordings contained only non *Brady* material. The reasonable belief is that those recordings were hidden from the defense because they would have hurt the prosecution's case. After all, if they helped the prosecution, the prosecution would have offered them in evidence.

Defense counsel walked away from evidence that was exculpatory and impeaching Had defense counsel used this evidence, there was a reasonable likelihood of a different outcome but for counsel's deficient performance. For the reasons stated in the principle brief, the outcome of this trial would have been different.

On all other issues, Appellant relies on his brief filed in support of the application.

**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: September 3, 2013