STATE OF MICHIGAN
IN THE OAKLAND COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

CASE#: 2019-272593-FC
Hon. Victoria A. Valentine

vs.

NICHOLAS REMINGTON,
Defendant.

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OPINION AND ORDER REGARDING FORMER ASSISTANT PROSECUTOR'S MOTION

At a session of said Court held on the
22th day of July 2021 in the County of
Oakland, State of Michigan

PRESENT: HON. VICTORIA A. VALENTINE

This matter before the Court is Former Assistant Prosecutor's Motion for Relief from Order. The Order from which relief is sought is the Court's May 21, 2021, Opinion and Order Regarding Defendant's Motion to Dismiss with Prejudice, which found *Brady*[1] and discovery violations had previously occurred.

Our Supreme Court held that "'[T]he suppression by the prosecution of evidence favorable

[1] *Brady v Maryland* 373 US 83 (1963).

to an accused upon request violates due process [(i.e. a Brady violation)] where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution,'" and irrespective of whether defense counsel exercised "reasonable diligence" to discover the evidence. *People v Chenault*, 495 Mich 142, 149, 152, 155 (2014), quoting *Brady v Maryland*, 373 US 83, 87 (1963).

"[I]t must be remembered that *Brady* is a constitutional mandate. It exacts the minimum that the prosecutor, state or federal, must do" to avoid violating a defendant's due process rights. United *States v. Beasley*, 576 F2d 626, 630 (CA 5, 1978).

"[E]xculpatory evidence falls within the Brady rule. *See Giglio v. United States*, 405 U.S. 150 (1972). Such evidence is "evidence favorable to an accused," Brady [v. Maryland], 373 U.S., [83] at 87, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. *Cf. Napue v. Illinois*, 360 U.S. 264, 269 (1959)." *United States v. Bagley,* 473 U.S. 667, 676, 105 S. Ct. 3375, 3380 (1985).

Pursuant to MCR 6.201(J), when a *Brady* violation is discovered, it is up to the court to fashion the appropriate remedy under MCR 6.201(J):

> (J) Violation. If a party fails to comply with this rule, the court, in its discretion, may order the party to provide the discovery or permit the inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances.

On March 19, 2021, Defendant filed a motion to dismiss based on what he alleged as "egregious and reprehensible" *Brady* violations. After hearing oral argument and reviewing the history of the case, this Court Ordered in part that:

> Pursuant to MCR 6.201, all discoverable information shall be turned over to Defense Counsel within 14 days of the date of this Opinion and Order;...

> An affidavit from both the former Assistant Prosecutor Hand, and the current Assistant Prosecutor Mark Keast shall be provided to Defense Counsel and filed with the Court within 7 days of the date of this Order, detailing all known evidence. The affidavit shall include a list of all evidence the current and former Assistant prosecutors have knowledge of that has any relation to this case. The affidavit shall also include the date of any disclosure or production to the Defendants' counsel of the evidence and a list of any information that has not yet been produced;

The former assistant prosecutor in this case, Beth Hand, objects to the portion of this Court's Order that compelled her to file and provide Defendant with a list of all evidence she had knowledge of and an affidavit that included the date of any disclosure or production to the Defendants' counsel of the evidence and a list of any information that has not yet been produced. Ms. Hand, through her counsel, argues that the "court simply has no jurisdiction to compel that lawyer to do any such thing."[2] Ms. Hand further argues that:

> the Court has jurisdiction to order the People to do certain things and comply with certain requirements. They are the party to the case, and they are represented by the Prosecuting Attorney. They have the ability to speak for themselves and the government as to any issues that are the subject of this case or of the Order, whether that is addressing any issues within the purview of the currently assigned assistant prosecutor or one previously assigned. But, with respect, this Honorable Court has no jurisdiction over Ms. Hand to direct her to do anything related to this case. It is beyond the court's jurisdiction to select former assistant prosecutors and require them to give sworn testimony by way of an affidavit, about facts or circumstances related to any individual prosecution. [3]

In this case Defendant Remington is charged with the delivery of a controlled substance causing death under MCL 750.317A.

MCL 750.317A states:

> A person who delivers a schedule 1 or 2 controlled substance, other than marihuana, to another person in violation of section 7401 of the

[2] Non-Party Beth M. Hand's Motion for Relief from Order and Brief in Support of Motion, p. 6
[3] Non-Party Beth M. Hand's Motion for Relief from Order and Brief in Support of Motion, pp 4-5.

> public health code, 1978 PA 368, MCL 333.7401, that is consumed by that person or any other person and that causes the death of that person or other person is guilty of a felony punishable by imprisonment for life or any term of years.

As stated in MCL 750.317A, a "person who delivers a schedule 1 or 2 the controlled substance ... is guilty of a felony punishable by imprisonment for life or any term of years." MCL 750.317A.

Based upon the record and the prior court hearing transcripts, there appears to be at least one res gestae witness, Mr. Weidemeyer, who was part of an undocumented interview with former Assistant Prosecutor Hand and who allegedly indicated to Ms. Hand that he did not see Mr. Remington deliver drugs to Mr. Prika (the victim).

At a hearing in front of Judge Alexander the following was exchanged:

> THE COURT: Did you at some point confront him [Mr. Weidemeyer] with a different statement?
>
> MS. HAND: I confronted him with the fact that he-- he -- on several occasions he would -- he indicated that he had given -- that the defendant had given the drugs to the decedent, that's what he had told Detective Balog. And, when I asked him whether or not he -- how it was packaged, he changed how it was -- how it was packaged. And, then he started to say well he didn't see him give it to him. But, I didn't call him [Mr. Weidemeyer] as a witness, Judge. He's on -- he's -- he could be the defense witness in this case. I didn't call him as a witness for that reason.
>
> MS. HAND: It's a witness. It's a res gestae witness. It's only my witness if I call the individual to the stand. And, if I call Mr. Weidemeyer to the stand and said -- and he states for some miraculous reason yes I saw Mr. Remington give him the drugs and that -- he decides that's going to be his testimony for the day, then Mr. Rockind can certain impeach him with the fact that didn't he tell me on other occasions that he didn't give him the drugs.
>
> MR. ROCKIND: Judge, I'm not even following that.
> So, it sounds like the witness went from saying that Mr. Remington did something to saying that he didn't do anything and there was

> no disclosure of any of that. That's in the first meeting. And, the second meeting was they hadn't called Mr. Weidemeyer at the preliminary examination, she had a second meeting with Mr. Weidemeyer. Nobody advised us or apprised us that that meeting had taken place, and it's my understanding that there was even more that was said when Mr. Weidemeyer was even told that if he was lying he could go to prison. He actually indicated he wanted to -- he wanted to plead the Fifth, he was advised that he couldn't plead the Fifth. He specifically and repeatedly denied -- he said the truth is I didn't see him give drugs to Mr. Prika or Mr. Prika take drugs. None of that -- that's exculpatory, that's not protected by work product. That's exculpatory evidence that has not been disclosed.
>
> And, I am aware of the concern that Ms. Hand --
> that she might try to -- to say that somehow I I had witnesses to the conversations that I had with Mr. Weidemeyer and I had recordings with the -- of the conversations.
>
> * * *
>
> MR. ROCKIND: If you have recording's I'd love to hear 'em.
>
> MS. HAND: I don't have recordings, I had witnesses present with me for that very reason.
>
> MR. ROCKIND: And, we don't -- you've never disclosed who the second witness was.

Transcript Motion hearing, Judge Alexander, December 4, 2020 (pp 18-20).

Of concern is that discovery information was not documented nor disclosed despite Ms. Hand's acknowledgment that the witness' testimony was favorable to Defendant.

Recently, in *People v Burger,* the Court of Appeals dealt with a somewhat similar issue:

> Defendant's argument presumes that the disclosure of the fire chiefs' changes in opinion for the first time at trial amounts to a *Brady* violation. Defendant's presumption is correct. Generally, a criminal defendant does not have a constitutional right to discovery. *People v. Bosca*, 310 Mich. App. 1, 27, 871 N.W.2d 307 (2015). However, "a defendant's right to due process may be violated by the prosecution's failure to produce exculpatory evidence in its possession." *Id.* It is undisputed in this case that defendant learned for the first time at trial that the fire chiefs had changed their respective opinions regarding the fire's point of origin. In their original reports, which were disclosed to

> defendant, both chiefs opined that the fire had two points of origin. However, the chiefs later altered their conclusions, indicating that indeed, the fire had a single point of origin. We conclude that this information was suppressed, because it was not disclosed until the beginning of trial, and that it was material to defendant's case.

People v Burger, 331 Mich. App. 504, 518 (2020).

The disclosure of discovery and the preservation of due process is essential to the delivery of justice. The failure to provide discovery has become even more frustrated due to the departure of the previous Oakland County Prosecutor as well as the Assistant Prosecutor, Beth Hand.

In March of 2021, the current Prosecutor presented this Court with a Stipulated Order modifying the Defendants Bond which stated: "Evidence disclosed to the defense by the undersigned Assistant Prosecuting Attorney, which was not disclosed by the previously assigned Assistant Prosecuting Attorney, may necessitate a remand to the District Court and/ or further litigation that must commence prior to a trial."[4]

As such the Prosecutor and the Defense Counsel stipulated to reduce the Defendant's bond from One Million ($1,000,000.00) Dollars Cash/Surety to $10,000.00 cash/ surety.[5]

Consequently, as set forth in more detail in the Court's May 21, 2021 Opinion, the Court ordered all discoverable information be turned over to the Defendant. The purpose was to satisfy Defendant he had received all discoverable information, even if it was not documented by the previous Prosecutor in current Prosecutor's file.

Our United States Supreme Court held in *Kyles v. Whitley,* 514 U.S. 419, 437 (1995) that:

> On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a Brady violation, without more. *But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of*

[4] STIPULATION TO MODIFY DEFENDANT'S BOND STATUS p.1-2, dated March 10, 2021.
[5] STIPULATION TO MODIFY DEFENDANT'S BOND STATUS p.2, dated March 10, 2021.

all such evidence and make disclosure when the point of 'reasonable probability' is reached. (emphasis added).

Applied here, the Prosecution, who alone knows what is undisclosed, is complicated by the departure of the prior assistant prosecutor, Ms. Hand.

This court however did not enter a dismissal. A "[d]ismissal,[however] with prejudice is a severe remedy which can put a defendant in a "better position than he would have enjoyed had disclosure been timely made," and while such a remedy is within the trial court's discretion, it should not be granted lightly. *People v Taylor*, 159 Mich. App. 468, 487 (1987).

Therefore, while this Court has the authority to fashion an appropriate remedy for a discovery violation, this Court is also aware of its obligation to balance the interest of the Court with the interest of the public and the parties. "When determining the appropriate remedy for discovery violations, a trial court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances, including the reasons for noncompliance." *People v. Banks*, 249 Mich. App. 247, 252 (2002). As a result, this Court did not previously dismiss this matter; rather it remanded to the District Court once all the required discovery has been produced.

This Court sets aside the portion of its May 21, 2021 order requiring Ms. Hand to file and serve an affidavit. This Court remands this matter to the District Court, as previously provided. At that time, either party may determine the need to call Ms. Hand as a witness. This ruling does not excuse any discovery violation.

IT IS SO ORDERED.

SEAL OF THE CIRCUIT COURT OF OAKLAND COUNTY MICHIGAN

/s/ Victoria A. Valentine
HON. Judge Valentine
CIRCUIT COURT JUDGE