

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,

vs

Case No. 19-272593-FC

NICHOLAS MAXIMILLIAN REMINGTON,

Defendant.

MOTION TO DISMISS

BEFORE THE HONORABLE VICTORIA A. VALENTINE

PONTIAC, MICHIGAN - WEDNESDAY, APRIL 14, 2021

APPEARANCES:

For the People:

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WITNESS

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(None.)

EXHIBITS:

(None offered.)

1 Pontiac, Michigan

2 Wednesday, April 14, 2021

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4 (At 9:52 a.m., proceedings convened.)

5 THE CLERK: Your Honor, now calling the case
6 People v Remington, 2019-272593-FC.

7 MR. KEAST: Thank you. Good morning. Marc
8 Keast on behalf of the People.

9 MR. ROCKIND: Neil Rockind, P-number 48618. I'm
10 co-counsel for Nicholas Remington.

11 MR. LEWIS: Good morning, Your Honor. Randall
12 Lewis on behalf of Mr. Remington as well, co-counsel,
13 P46134.

14 THE COURT: Thank you.

15 Mr. Remington, your name for the record, please,
16 sir.

17 DEFENDANT REMINGTON: Nicholas Remington.

18 THE COURT: And who is Mr. Thom?

19 MR. KEAST: Mr. Thom is the victim's stepfather.

20 MR. THOM: Yes, Your Honor, James Thom.

21 THE COURT: Thank you, sir.

22 And Prosecutor McDonald, did you want to put an
23 appearance on?

24 MS. MCDONALD: Karen McDonald on behalf of the
25 People.

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THE COURT: Okay. Go ahead with the motion, please.

MR. ROCKIND: Judge, I don't know how much time you've allotted for us to have this conversation today, but this -- the discovery and due process violations that occurred in this case prior to Mr. Keast taking over the case, and really prior to -- I'll just say prior to Mr. Keast taking over the case, are abominable. They're some of the worst, most egregious discovery disclosures and failures that I've seen in 27 years. And I hate when lawyers go on and start to talk about their history or their experience or their -- you know, or their time, you know, their time practicing. I hate that because I always feel like that's just sort of a backdrop.

But early on in the case we began to experience and believe that there were discovery failures and that there were issues with the way that the case was being prosecuted. And we took great effort and great pains, went to great lengths I think, to detail in our motion the history, breaking down each and every one and how we ultimately came to those and how they continued to stack up one after the other.

So one of the things that I kind of want to fast forward to because it doesn't seem like -- one of the things that I want to fast forward to because it doesn't

1 seem like there's disagreement from the State based on the
2 State's responsive pleading, that we have -- that there
3 were discovery, we'll just say shortcomings. What I was
4 troubled by when I read the State's response, and I had
5 been in regular communication with Mr. Keast about this
6 case, what I was troubled by was that I didn't think the
7 State went far enough in attempting to explain it to the
8 Court.

9 I didn't think the State actually took a
10 position. It seemed like the position was, this occurred,
11 we know that this occurred, it was very -- yeah, it
12 happened, the information wasn't -- report number ten
13 wasn't disclosed and we're agreeing to a remand. But the
14 discovery abuses in the case and the due process abuses in
15 the case specifically relate to Brady material and
16 MCR 6.201 obligations that are placed upon the prosecutor.
17 Because they are more than just an advocate, they're more
18 than just an opponent in court, it's not just Neil versus
19 whoever the prosecutor is, or Randy versus whoever the
20 prosecutor is, it's actually -- it is that person
21 representing the State. And part of the people that
22 they're obligated to protect is the accused.

23 So when a prosecutor stands in court and says I
24 represent the People, (indiscernible) that body of people
25 which is not particularly capable of being identified.

1 They don't represent the victim. They don't represent the
2 decedent, even if that's how prosecutors have styled
3 themselves over the course of the last 20 years. They
4 represent the People. And the People includes
5 Mr. Remington. And it's part of their responsibility, it
6 was part of the original trial prosecutor's responsibility
7 to ensure that Mr. Remington received due process even if
8 the information that came across her desk or came to her
9 was unfavorable to the State.

10 And so when I read the State's response, and I
11 have a lot of respect for Mr. Keast, I am interested to
12 hear the Court press him, and I hope the Court does press,
13 because I think part of this issue, part of the Court's
14 ultimate conclusion in the case has to be why did this
15 happen. Part of the Court's ultimate decision making,
16 what has to go into the mix is, why did this happen, what
17 actually happened.

18 So let me fast forward to the end of sort of
19 where our brief ends and their brief ends. The People's
20 position seems to be legally in the case, and I don't want
21 to -- it seems to have the feeling of, no harm, no foul.
22 That currently is the way that their brief came across to
23 me. Which is, yeah, I know that my 350 pound lineman
24 jumped on top of the quarterback, and I know that it was
25 clearly after the whistle blew, and I know that there's

1 the -- but you know what, the quarterback will be able to
2 play in his career again so we can just, you know, don't
3 worry about it, you don't have to kick the guy out, you
4 don't have to suspend him, you don't have to actually fine
5 him, because he'll be able to, the quarterback will be
6 able to return to the game at some point.

7 But that's not the case here. Essentially, the
8 prosecutor's position is that there is no consequence to
9 the State for what was a clear discovery, due process
10 violation. So let me break it down. MCR 6.201, even if a
11 lawyer, a defense lawyer never asks for specific
12 information, MCR 6.201 places obligations upon the
13 prosecutor that include mandatory disclosure. Mandatory
14 disclosure of -- and this is a -- let me just provide it
15 specifically to the Court.

16 MCR 6.201 provides mandatory disclosure of the
17 names and addresses of -- and this is upon request. Under
18 (B) discovery of information known to the prosecuting
19 attorney. Upon request the prosecuting attorney must
20 provide each defendant any exculpatory information
21 evidence known to the prosecuting attorney. Any police
22 report and interrogation record concerning the case. Any
23 written or recorded statement. Any affidavit, warrant and
24 return pertaining to a search or seizure in connection
25 with the case.

1 Start with -- and what remedy, because this
2 really is sort of where the People's brief and the
3 defendant's brief seem to really diverge. Our belief is
4 that there is a consequence for pursuing Mr. Remington in
5 a criminal case, for permitting the preliminary
6 examination to go forward when the prosecutor has engaged,
7 the original trial prosecutor engaged in discovery and due
8 process abuses, where the information was not disclosed to
9 the defendant, was not disclosed to defense counsel, where
10 arguments were made that ended up contradicting and appear
11 to contradict the statements made by the information that
12 was received by the prosecutor.

13 Where there appears to be a concert in action,
14 or concerted action between the detective in charge of the
15 case and the prosecutor, where I don't believe that we've
16 even begun to scratch the surface about what culpability
17 the detective assigned to the case has. Because it
18 currently seems like he's going to take the Sergeant
19 Schwartz or Sergeant Schultz position that maybe, well, I
20 was just following orders. Which is nonsense because he
21 himself is a police officer, has his own obligations and
22 duties.

23 Where in the meantime, what are the consequences
24 for this violation of MCR 6.201? We clearly were not
25 given exculpatory information. We weren't given

1 exculpatory information that was handed directly to the
2 prosecutor. Now I know -- and I want to talk about what
3 that meant. One of the arguments that the prosecutor made
4 during the case in district court was that the messages on
5 Snapchat had to have come from Mr. Remington; they had to
6 have. At one point she made an argument, which I think
7 was misleading, I don't know if I'll chalk it up to -- we
8 can chalk it up to she just misspoke, or it could be that
9 it was deliberately misleading. I'm not -- again, I know
10 what the comment was.

11 The comment was, she made a comment about Mr.
12 Remington's device, that these messages came from his
13 device. The police never actually examined, never had,
14 never examined Mr. Remington's device. There's no
15 evidence of his device or a phone that had been seized
16 from him that had been examined in this case.

17 So put that aside for a second. What was there?
18 She made an argument that the messages on this Snapchat
19 account, this (indiscernible) Snapchat account, had to
20 have come from Nicholas because it was his account, etc.,
21 etc. In the meantime, she literally had been handed a
22 Snapchat exhibit or evidence by the decedent's stepfather
23 who -- was handed that in court. She was handed that -- it
24 was handed to her. And I do appreciate Mr. Keast
25 correcting his responsive brief. When the brief came to

1 us, I think it was confusing because it identified Ms.
2 Preka as a person, the decedent's mother, who had received
3 this Snapchat. That is not the case. I saw it. I talked to
4 Mr. Keast about it, whether he had some other information,
5 whether that was an oversight on his part.

6 He did correct it. We notified him of it and he
7 dutifully corrected that, which I appreciated, but it
8 doesn't -- it just makes it clear that Ms. Preka handed --
9 or excuse me, Mr. Thom handed to Ms. Hand, a Snapchat
10 exhibit or picture that occurred that was published while
11 Mr. Remington was in jail. There were -- that fact right
12 there, that fact undercuts the State's entire argument
13 that it made in the -- that it made in its responsive --
14 in its response to our motion to quash, and in its
15 argument to Judge Reeds.

16 I think the State's position is, well, you can
17 just remand it and we can have a do-over. I don't think
18 things work like that. And I don't think MCR 6.201
19 suggests that things work like that. And MCR 6.201, where
20 there is the obligation to disclose exculpatory
21 information or evidence known to the prosecutor, that
22 clearly wasn't done. There were -- and then any affidavit,
23 warrant and return pertaining to a search or seizure in
24 connection with the case, those weren't disclosed to us
25 either by the prosecutor.

1 So let me tell you what I think happened and
2 where I think this case should go. So for whatever reason,
3 whether it was gamesmanship, whether it was some
4 connection or affinity to the decedent, whether it was
5 something to do with me or Mr. Lewis, you know, I can't
6 begin to tell you, there was a failure on the part of the
7 State that was prosecuting this case against Mr. Remington
8 up until Mr. Keast took over the case. And that occurred
9 at critical stages of the proceedings. And that failure,
10 from my view, started early on in the case when we
11 received discovery information from the State, and I laid
12 it out in detail.

13 One of the things that I laid out in my pleading
14 was that there were -- when you put some of these pieces
15 together there are -- clearly there are inexplicable --
16 it's inexplicable, inexplicable, how the prosecutor could
17 have received some of this information -- how could she
18 think, for example, how could she seriously argue that a
19 phone that was found at the scene of the incident, that
20 was the decedent's phone that was seized by the police and
21 that was ultimately examined by the police, how could one
22 -- I mean, how is it conceivable to argue that that phone
23 and that the extraction from that phone is not
24 discoverable? It's a police report prepared by a police
25 officer.

1 But her position, when she was sitting at her
2 desk as I'm cross-examining the officer in charge of the
3 case, the detective, Detective Balog, her position was
4 they didn't have a chance to communicate or coordinate.
5 And if they did, I'd love to hear about it, because it
6 means that they had some plan. But I think that they were
7 essentially caught off guard with the way that I was
8 conducting the questioning. And as I asked him what
9 transpired, like -- because I thought it was just bad
10 police work, to be frank with you. I thought they'd just
11 given the phone back to the decedent's mother and just
12 said, hey, if you can find something on there, let us
13 know. Which would be horrible police work.

14 And as it turns out, what happened is the phone
15 was returned, then the phone was actually gathered again
16 by the police. It was actually subjected to an extraction
17 by a police officer. That officer actually created a
18 report. That report contains exculpatory evidence. And
19 then that was buried. And then when I present it to
20 officer, we had no idea at all. But the prosecutor knew.
21 It wasn't like she said, what report, what extraction,
22 what are you talking about, Mr. Rockind, I have no idea,
23 Your Honor, I need a break, can we approach, this is news
24 to me. She didn't do any of that. Her reaction was, it's
25 not discoverable.

1 Under MCR 6.201, she had a duty to provide that
2 to us because it was a report. And if she thought that it
3 wasn't discoverable and that she had -- there was a motion
4 she could have filed, which would have been to file a
5 motion for a protective order, which she didn't do. Stuff
6 was just shocking.

7 That wasn't the least of it. At the time I
8 thought that was like the height of it, I thought, oh, my
9 God, this is serious. But, you know, the judge actually
10 orders that we're entitled to it, we address it. But it
11 continued. It continued with the prosecutor interviewing,
12 with Detective Balog, a witness who was -- an eyewitness,
13 the homeowner. Can we back up for a second? This is a case
14 in which they're claiming that my client, with three other
15 people in the home -- one now died -- that my client, in
16 front of two living witnesses, they're claiming that he
17 handed drugs to Mr. Preka. And the prosecutor chose not to
18 call either one of the eyewitnesses at the preliminary
19 examination. Just gamesmanship.

20 So then what happens is, we know, we have
21 information through our own investigation, of what took
22 place in an interview with Ms. Hand and the detective,
23 Detective Balog, and this witness. And I start questioning
24 the witness about it. And what happens? Ms. Hand -- you
25 know, I said did you -- because clearly if a witness tells

1 a detective or a prosecutor that they're not -- that there
2 are contradictions or inconsistencies or you're changing
3 your story, then I would say to you that what that --
4 that's exculpatory. That has to be memorialized. It has to
5 be turned over. You can't just sit on that and say I'm
6 going to put that in my back pocket and hide it.

7 Which is going to lead to a point in a second
8 about why this case needs to be dismissed, and that is
9 that we only found that out through our own investigation.
10 And when I questioned Detective Balog about that at the
11 preliminary examination, his response was -- I said, did
12 you say to Mr. Wiedenmeyer [ph] -- and I'm paraphrasing --
13 that he had -- he was changing his stories, or he had told
14 four or five different stories? And his response was so
15 cagey and so cute; I did not. And so then the question
16 was; well, did Ms. Hand? And then she objected to hearsay,
17 like she objected to her own statement to the witness as
18 hearsay, to keep it out.

19 But here's the thing; there was no report
20 prepared. It wasn't memorialized. It wasn't provided to
21 us. It wasn't disclosed to us. It wasn't produced in any
22 kind of -- there wasn't a contemporaneous, you know,
23 memorialization of the witness -- of what Ms. Hand said or
24 what Detective Balog said.

25 I will tell you that since that time, almost,

1 what is it, 18 months later or so, after I presented that
2 issue to Mr. Keast, Mr. Keast contacted the detective and
3 said to the detective, you need to memorialize that. And
4 he did in a report that has now been provided to us that
5 is about two or three lines, which I would even suggest
6 doesn't come anywhere near detailing the treatment and the
7 statements that Mr. Wiedenmeyer made to the detective and
8 to Ms. Hand.

9 I will say that I have a good faith belief,
10 based upon concrete evidence, that my office and us, what
11 we gathered during our investigation as to what
12 Mr. Wiedenmeyer was told and what he said and the pressure
13 that was put on him during that interview, I'm confident
14 that the only reason why Detective Balog prepared any
15 report at all, which was maybe a line or two, which isn't
16 even accurate by the way, was because the prosecutor said
17 you need to prepare some kind of report that details that.

18 How do you memorialize something two years
19 later? What's the point of having a witness in the room to
20 listen to the interview unless the point is to
21 contemporaneously memorialize and have the witness do it?
22 But nobody was claiming to be a witness until we pressed
23 him on it. This was a gross abuse of the power of the
24 prosecutor, and a gross abuse of the power of having a
25 police officer sit in as a witness.

1 Even if one could argue that it's work product,
2 which it's not, it's not work product for the detective.
3 The detective doesn't work for the prosecutor's office. He
4 has an obligation to memorialize exculpatory evidence,
5 too, he has a separate obligation. So why didn't he
6 prepare a report? Why was this report prepared when
7 Mr. Keast told him to, but why wasn't there one that was
8 prepared after the interview with Mr. Wiedenmeyer? I can
9 guess that the interview wasn't favorable to the State and
10 so there was no -- it wasn't memorialized. And had we not
11 actually done our own investigation it would have remained
12 hidden.

13 There is not a single bit of evidence to suggest
14 that the prosecutor at the time was going to disclose to
15 us any of the following:

16 There was no evidence she was going to disclose
17 to us that the cell phone had been returned to the State,
18 or to the police.

19 That the cell phone had been extracted, that
20 there was potentially exculpatory evidence on the cell
21 phone extraction.

22 That Mr. Wiedenmeyer had been interviewed. That
23 Mr. Balog had been present. That the witness had been
24 confronted, and had been confronted with an allegation
25 that he had changed his stories multiple times.

1 There is no evidence to conclude that she was
2 going to disclose any of that evidence to us because she
3 didn't disclose any of that evidence to us voluntarily or
4 willingly.

5 There's no evidence to suggest that she was
6 going to provide to us the evidence of her and Mr. Balog's
7 interviewing of any other witnesses in the case.

8 There's no evidence that she was going to
9 provide to us the Snapchat exhibit that was handed to her
10 by Mr. Thom. There's no evidence that we were going to
11 receive the Snapchat exhibit.

12 There's no evidence we were going to receive the
13 letters that were sent to Snapchat by Detective Balog. No
14 evidence we were going to see the affidavit in support of
15 a search warrant that was sent to Snapchat. No evidence we
16 were going to see what the return was. No evidence we were
17 going to see what conclusions Snapchat sent to them; any
18 information about the phones or the accounts that were
19 used, the WiFi accounts that were used. There is no
20 evidence that we were going to receive any of that.

21 In fact, I would go one step further that this
22 abuse is so bad, let me tell you why. Because there are
23 people, there are probably lawyers out there that would
24 have looked at the case that the prosecutor had presented
25 to Mr. Remington and may have suggested to him that he

1 enter a plea, that he try to do some kind of a Cobbs plea
2 or negotiate some kind of plea bargain. And somebody else
3 in Mr. Remington's shoes, who didn't have the lawyers who
4 are willing to go through this fight, and didn't,
5 honestly, have the benefit of a year of the pandemic to
6 battle and to watch the prosecutor, could have been
7 pressed by a trial judge focused on his or her calendar,
8 or his or her dashboard or scorecard or whatever other
9 thing that the Supreme Court calls it, and could have
10 pushed someone like Mr. Remington and us into an early
11 trial date and could have said -- and the prosecutor could
12 have then made some kind of plea and the person could have
13 taken it and they would stand convicted by plea with no
14 real right of appeal.

15 And all this evidence would have been hidden
16 because there's no reason, there's not one single thing
17 that anybody could point to. I will turn the podium over
18 to Mr. Keast, or anybody else, to point to one single fact
19 that reveals that Ms. Hand was going to disclose any of
20 this to us.

21 What happened was the opposite. There was a
22 shadow investigation going on by Ms. Hand and Mr. Balog.
23 It was done in the darkness. It was done in the dark. It
24 was done quietly. What do I think happened? I think that
25 when Ms. Hand got that document from Mr. Thom, and she

1 turned it over -- because there was clearly documentation
2 that it was turned over to the detective. What I think
3 happened? I think they went into panic mode. You can't
4 tell me that Mr. Balog and her didn't actually
5 communicate. Because at that point all she had to do was
6 send it to Mr. Lewis or I; we were in regular
7 communication with Ms. Hand about a variety of cases. We
8 were never told that.

9 So what I think happened? They then
10 investigated. Rather than tell us, they actually went and
11 got a search warrant. Think about this, Judge. The police
12 went and got a secret search warrant. Not from Judge
13 Reeds, who was presiding over the case, but they got a
14 secret search warrant from a magistrate in the
15 52-1 District Court. What were they -- what was the --
16 what crime were they investigating? When you make an
17 application for a search warrant you've got to make an
18 argument that there's some crime you're investigating.
19 What crime were you investigating?

20 What they were investigating, what they had
21 probable cause to believe, was that they had been handed
22 exculpatory evidence. And what they wanted to do, was they
23 wanted to have a judge issue them a search warrant that
24 they could then send to Snapchat that Mr. Lewis and I
25 wouldn't be aware of, and that they could investigate this

1 exculpatory evidence and try to defuse the timebomb that
2 had been thrown into their case. They wanted to hand us
3 the bomb, they wanted to defuse it, and they wanted to
4 hand it to us and say, here you go.

5 And I believe that's why we didn't hear anything
6 about it until I ultimately (indiscernible) Mr. Keast with
7 my Brady letter and all the other issues that I raised,
8 where we started going back and forth about the absence of
9 -- the failures on the part of the State up to this point.

10 THE COURT: Okay. Mr. Keast.

11 MR. ROCKIND: And I want to say one thing,
12 Judge. Mr. Keast's position seems to be that -- the reason
13 why we've asked for the remedy we've asked for is because
14 there's no evidence, Mr. Keast wasn't present for the
15 investigation or the proceedings that were handled by
16 Ms. Hand, so he can't say, as much as I have respect for
17 him and think he's an honorable guy, and I do believe that
18 about him, he can't say what was told to Ms. Hand, what
19 Ms. Hand knew, what wasn't memorialized, what wasn't
20 written down, what wasn't disclosed, what wasn't shared,
21 what was hidden.

22 And he can't say the same thing about Mr. Balog.
23 Because Mr. Balog was, from our perspective, he was in
24 lockstep with Ms. Hand. Reports not being prepared. Things
25 being done out of order. Search warrants being applied for

1 to investigate the source or origin or impact of
2 exculpatory evidence. Four (indiscernible) witnesses being
3 interviewed before the exam but no reports being prepared
4 for four or five months. You're telling me that there are
5 two officers, one prosecutor, and one detective, both
6 experienced, that are just -- both happen to be acting in
7 a way, when you look at it from 20,000 feet, appears to be
8 in lockstep to keep the information from the accused, but
9 were doing it sort of absentmindedly, like they just
10 didn't know that it was happening? That just doesn't --
11 that defies common sense.

12 So when the State says that the remedy here is
13 to remand, I think the State sells short what other
14 information is out there. Where does Mr. Remington, where
15 does Mr. Lewis, where do we go to know that all of the
16 information that we're entitled to has been turned over?
17 Because all we have, when it comes to Brady material and
18 Brady evidence, is trust. All we can do is trust.

19 So as much as I trust Prosecutor McDonald, and I
20 do, it's not her fault; as much as I trust Mr. Keast, and
21 I do, it's not his fault; those that were involved in the
22 Brady and due process and discovery abuses have no
23 reliability, no credibility, and we do not trust them as
24 sources of this information.

25 So even if they were to come to the court, or to

1 swear or to take some oath, absent God standing over them
2 with a thunderbolt in His finger ready to thunderbolt them
3 if they lie, I don't trust what those two individuals,
4 Mr. Balog or Ms. Hand, would say. We have no way of
5 knowing what other information has been suppressed. And
6 there is very good reason to believe that other
7 information has been suppressed because it was suppressed.

8 So what does MCR 6.201 say? MCR 6.201 says that
9 where there is a violation, a party fails to comply with
10 this rule, the court, in its discretion, it is your
11 discretion, may order a whole variety of things, and among
12 the relief that you're entitled to -- among the things,
13 among the arrows in your quiver, prohibit the party from
14 introducing in evidence the material not disclosed or
15 enter such other order as it deems just under the
16 circumstances.

17 So what is just? The Snapchat evidence in this
18 case -- so we believe justice is to dismiss the case. That
19 is the just result. If the Court were to somehow think
20 that that is not just, and I think that is the clear
21 remedy that is appropriate in this case, the Snapchat
22 evidence is garbage. It is unreliable. It is, for all the
23 reasons that we put into our pleading that we're not
24 litigating at this point.

25 But the Court has -- the evidence that wasn't

1 disclosed to us, in part, undercuts the Snapchat evidence.
2 You have the power to exclude the Snapchat evidence and
3 say it's not coming in. Want to make your case? You make
4 your case with witnesses, go ahead.

5 I know Mr. Keast says that you also have the
6 power to remand the case. You do, but circumstances have
7 changed. Let me tell you one of the concerns I have about
8 a remand as a remedy. Some people choose to let the
9 criminal justice process play itself out. I encourage
10 people to do that. Some people don't and they choose to
11 pursue a civil remedy. They choose, for whatever reason,
12 to attempt to file lawsuits. And in this case, the
13 decedent's family has done just that.

14 One of the issues early in the case was a
15 communication by Ms. Preka to one of the witnesses that I
16 think is, were it to be played in open court, or were
17 Ms. Preka to be questioned about it, I think it would be
18 revealed to be evidence of obstruction and witness
19 tampering. It was a 40-minute or so recording. I mentioned
20 it in my pleading. That phone call included threats,
21 intimations, intimidation of a witness. That was turned
22 over to us.

23 As it turns out, since that time the Preka
24 family, or the Thom family, have filed lawsuits against
25 Mr. Remington, Mr. Wiedenmeyer, Mr. Gibrotz [ph], the

1 other individual who was present. So that is a change in
2 the dynamic. Because now, as opposed to having just
3 witnesses come to court, now you have witnesses who also
4 face lawsuits and have lawyers. And I don't know whether
5 the assistant prosecutor who handled the case previously
6 was aware of that or involved in that. Certainly, if I
7 were the prosecutor, I would discourage anybody, a
8 complainant or a decedent's family, from filing a lawsuit
9 because it could only make things worse, which it has.

10 But, you know, I don't know that a remand just
11 solves it. There's a consequence here. The consequence is
12 dismissal. And if the Court, for whatever reason, thinks a
13 dismissal is too far of a reach -- which I don't in this
14 case given the pattern -- then it is, at a minimum, the
15 suppression of all the Snapchat evidence.

16 So I'm interested to hear the prosecutor's
17 response. And I will share with the Court -- again, I know
18 that these abuses occurred before Mr. Keast took over the
19 case. He and I probably disagree about the culpability of
20 Detective Balog. He may view Detective Balog as someone
21 who is -- you know, was unaware of these things or was
22 just following orders or was doing his job. I don't. And
23 so --

24 THE COURT: Let me hear from Mr. Keast.

25 MR. ROCKIND: Sure.

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MR. KEAST: Thank you, Judge.

The first line to my response makes clear that I, neither myself nor Prosecutor McDonald, condones anything that happened prior to January 1 of 2021, and let me just reemphasize that, Judge. My first line: The People must emphasize that this responsive pleading does not attempt to excuse or explain the non-disclosure of evidence favorable to defense.

I absolutely agree with Mr. Rockind that this evidence should have been turned over in 2019. There is no argument there. I included a list of communications between myself and Mr. Rockind. I generally do not do that, but I wanted the Court to make clear the timeline from when I took over this case and when Prosecutor McDonald took over the office in general.

I turned over everything as soon as I was made aware of Mr. Rockind's concerns. And I'm not saying that to be self-serving, Judge, I just want the record to be clear.

Now, my sole argument rests with the remedy that the defense is requesting. Not that a violation occurred, but the remedy. And the remedy I have suggested wasn't picked out of thin air. It's based upon the law. When the Court reads Brady v Maryland, and every case that's come down since then, when the Court reads the cases regarding

1 prosecutorial, judicial, police misconduct, the Court will
2 find that a remedy is specifically and narrowly tailored
3 to the violation. And again, these aren't remedies that
4 I'm just suggesting or throwing out there. I'm not
5 suggesting it's a do-over, no harm, no foul. My remedy is
6 consistent with the law.

7 Now, there's a few cases I want to point out to
8 the Court. The most specific case is from the Michigan
9 Court of Appeals. It's in my brief. It's regarding blanket
10 judicial and prosecutorial misconduct. It's a case from
11 Wayne County where the assistant prosecuting attorney --

12 THE COURT: What's the name of the case?

13 MR. KEAST: I'll spell it for you, Judge.
14 A-C-E-V-E-L. It's on page 8 of my brief.

15 In that case the Wayne County assistant
16 prosecuting attorney conspired to commit perjury with
17 witnesses, as well as the judge on that case. That
18 prosecutor, and that judge I believe, were both prosecuted
19 for those crimes.

20 Now, that violation I use as the benchmark for
21 the worst that a prosecutor and a judge can do. They
22 conspired with each other to commit a crime, as well as
23 with a police officer who was assigned to the case. In
24 that case the Court of Appeals ruled that there was no bar
25 to a retrial. In effect, there was no dismissal with

1 prejudice because the remedy tailored was specific to the
2 violation.

3 When we talk about a due process violation --
4 and when favorable evidence to the defense is suppressed,
5 it is a due process violation, make no bones about that,
6 Judge. But when there is a due process violation the cure
7 to that violation is a fair trial. What I have suggested
8 would be, in effect, a fair trial.

9 Now, this evidence appears to have been
10 disclosed to assistant prosecuting attorney Beth Hand and
11 the detective on September the 27th, 2019, as they were
12 leaving the courthouse of the 52-1 District Court after
13 the first date of preliminary examination. That should
14 have been turned over immediately, but it wasn't.

15 Judge Reeds continued the examination October
16 the 16th, 2019. At that examination, Mr. Rockind did not
17 have the benefit of learning this exculpatory information
18 so he couldn't make a motion to reopen proofs. I believe
19 he should. That is why I'm suggesting that this case go
20 back to the district court and the district court judge
21 now have the opportunity to hear the defense arguments in
22 this matter, Judge.

23 And Mr. Rockind has made a lot of statements
24 about I can't say what was in Detective Balog's mind, I
25 can't say what was in Ms. Hand's mind. That's correct. I

1 can only tell you how I handled the case and how I would
2 have handled the case. I can't argue that there was a
3 violation, Judge, because there was. There's no doubt
4 about that. But the situation we're faced with now is the
5 remedy. And I do acknowledge in my responsive pleadings
6 that this Court does enjoy broad discretion when
7 fashioning a remedy. My brief simply is pointing out to
8 this Court that the remedies typically given by courts in
9 these situations are exactly the remedy that I have
10 suggested.

11 Thank you, Judge.

12 MR. ROCKIND: Judge, I have a couple of
13 responses. I'm hoping that you're not done with
14 Mr. Keast, because one of the issues under MCR 6.201,
15 under subsection (J), there is a specific question about
16 willful violation. The State hasn't addressed, one,
17 whether, from their perspective, this was a willful
18 violation. We've made our arguments that it certainly
19 appears to be and that the detective in charge of the case
20 certainly appears to have culpability. Quite candidly, I
21 think if the detective were to testify in the case, he
22 probably has Fifth Amendment rights as well given what I
23 think are -- what is evidence of obstruction.

24 But there is a case, I know the Plants case, the
25 Acevel case that Mr. Keast is talking about, was a case in

1 which the head of a drug unit in Wayne County, whose name
2 was Karen Plants, Karen Plants had a witness on the
3 witness stand who was an informant and she apparently had
4 concerns that the informant would be potentially harmed by
5 Mr. Acevel or others because of the way that the defense
6 lawyer was conducting questioning, and he was trying to
7 get police officers to disclose the identity of the
8 informant or trying to get this witness on the witness
9 stand to admit that he was in fact the informant.

10 And she went and met with Judge Mary Waterstone,
11 and met with them privately. She had a private meeting
12 with the judge, totally ex parte, met with that judge,
13 talked about this specific issue. I think the detective
14 may have actually been involved. And they created this
15 separate record, and it was all done on a separate secret
16 record, and then the instruction was to this witness that
17 he was to lie about whether he was in fact the informant.
18 So the idea was that -- so that was the concert in action,
19 the obstruction, the subornation of perjury, all of that
20 was what was at issue in that case.

21 Mr. Acevel was actually convicted at a trial,
22 and then there was a remand, and the issue was really over
23 this one specific issue. There was no claim anywhere else
24 in the case, was no repeated historical discovery and due
25 process abuses like we see in this case. There was no

1 attempt to hide who a witness was. There was no attempt to
2 hide who the exculpatory -- or hide exculpatory witness
3 interviews. There really was one issue, that the
4 prosecutor and judge, I mean I don't want to make light of
5 it, but it was that, was this informant, this witness on
6 the witness stand, was he in fact the informant. And they
7 were bothered by the fact that the defense lawyer at the
8 time was pressing and pushing on that issue.

9 So even in that case there's no other claim that
10 other, as far as I know, that other evidence had been
11 excluded, that there was a historical pattern of discovery
12 abuses. If there had been a historical pattern of
13 suppression of favorable evidence -- there isn't even an
14 argument that that's even favorable evidence, who the
15 informant is.

16 This is the suppression, a historical pattern of
17 the suppression of arguably favorable evidence, and of
18 evidence under 6.201.

19 First, there was the suppression of the -- there
20 was the argument that we weren't entitled to the
21 extraction. That's nonsense. There isn't a single person
22 that I think would actually agree with that. I don't
23 think even Mr. Keast or Ms. McDonald would agree with
24 that. It's nonsense. I mean, the police get a phone from
25 the decedent that was at the scene; there may be a break

1 in the chain of custody because the phone was given back
2 to the family then returned to the police department. But
3 then there's an extraction done by a police officer. That
4 is -- there is an obligation to disclose that.

5 And your remedy, if you don't think that you
6 should have to disclose it, is not to say that it's not
7 exculpatory. Your remedy is to seek a protective order.
8 And nobody would have granted one because it's evidence
9 found at the scene of the alleged crime. And the phone did
10 contain exculpatory evidence. And under the protective
11 order, I don't want to go into it, but the Court, I think,
12 has an idea of what it is. We're dealing with an overdose
13 case. There's evidence on the phone that I think that is
14 arguably exculpatory evidence. And it was known to the
15 police and to the State. That was suppressed.

16 A witness, an eyewitness changing his story in
17 the presence of the prosecutor and the investigator, that
18 was suppressed. That continued to remain -- the only
19 reason why I know about it is because we did our
20 investigation, but it was suppressed by the State. It was
21 suppressed by the prosecutor, and it was suppressed by the
22 detective. And if the argument is, is that the detective
23 is somehow blameless in all of this, then that really does
24 a disservice to what it means to be a police officer and a
25 detective and to have a separate obligation.

1 I mean, if the prosecutor says go out and shoot
2 this person in the hallway, I presume that the officer
3 would turn to the prosecutor and go, Ms. Hand, I'm not
4 going to go out and shoot that guy in the hallway; that
5 would be a crime, that would be illegal. Well, I want you
6 to go take this evidence and I want you to shred it. I
7 would hope that a detective would say, I'm not going to go
8 shred that, Ms. Hand; that would be wrong, I can't shred
9 this stuff.

10 So to say, come on, interview this guy, but
11 there are no notes; we don't have any notes of this
12 interview with this witness. We're interviewing the
13 witness for trial purposes. We don't even have a trial
14 date. This is the argument that we're told now. We're
15 interviewing this witness, Mr. Wiedenmeyer, before the
16 preliminary examination, we're interviewing him, the
17 detective and I, says Ms. Hand and Mr. Balog, we're
18 interviewing him because it's for trial purposes. They
19 didn't call him at the exam. Which is probably not a
20 coincidence. And they had Mr. Balog there for what reason;
21 to be a witness to what he said? A witness to what?

22 THE COURT: All right, Mr. Rockind.

23 MR. ROCKIND: Yes, Your Honor.

24 THE COURT: You've made all these arguments.

25 MR. ROCKIND: I want to make -- there is a case,

1 People v Obispo, O-B-I-S-P-O, and it's 225 Mich App 592,
2 and that is a Court of Appeals case. I haven't Shepardized
3 it, so if it's been reversed that would suck for us, but
4 it is a case -- I'm being honest, I'm sharing with the
5 Court, in that case the prosecution, there were discovery
6 issues in the case and it turns out that there was a
7 discovery order and I think there was (indiscernible)
8 discovery order that was served on the police department,
9 went to the police department, and then the judge made a
10 -- the judge concluded that based upon the gravity and
11 egregious nature of the discovery violations that the case
12 ought to be dismissed.

13 The prosecution argued that the trial court's
14 dismissal of the charges against (indiscernible) Obispo
15 was inappropriate under the circumstances. We
16 (indiscernible) a trial court's (indiscernible) regarding
17 the appropriate remedy for non-compliance with a discovery
18 order for an abuse of discretion and there are several
19 cases cited. The exercise of discretion involves a
20 balancing of the interest of the courts, the public and
21 the parties. It requires inquiry into all the relevant
22 circumstances, including the causes and (indiscernible) of
23 tardy or total non-compliance in a showing by the
24 objective party of actual prejudice, which I think we've
25 done.

1 And in that case, on the basis of our review of
2 the record we conclude the trial court did not abuse its
3 discretion in dismissing the charges against defendant in
4 response to the prosecutor's complete failure to ensure
5 the defendant was provided with timely discovery. We do
6 not believe the trial court's dismissal of the charges was
7 unwarranted or unnecessarily harsh.

8 Mr. Remington, going forward, and I say this on
9 behalf of Mr. Lewis and I, we simply have -- we have no
10 way of knowing, even were this case to be dismissed
11 without prejudice and reauthorized, we have no way of
12 knowing what other evidence was suppressed. Because we
13 were the source of identifying that there was some
14 suppression of exculpatory evidence. So again, we renew
15 our motion to have the case dismissed with prejudice.

16 If the Court is seeking an alternative other
17 than suppression of evidence, then I would suggest to the
18 Court that suppression of all of the Snapchat evidence in
19 the case. That's not our preferred remedy, but that is
20 another remedy. I believe a simple remand to begin the
21 process anew, I think is not a sufficient remedy given the
22 gravity of the due process violations that have occurred
23 in this case.

24 THE COURT: Okay. Anything further, Mr. Keast?

25 MR. KEAST: Judge, I did my best to brief the

1 issue in my responsive pleading. You know, a few things I
2 do want to address is that counsel brought up 6.201(J).
3 It's not either one of the parties' responsibility, duty,
4 or even our jobs, to suggest what's willful; it's the
5 court, respectively. So it's not my position to suggest
6 what is willful or what's not willful, for one reason, and
7 one reason alone; it's the court that must fashion the
8 remedy in this case.

9 But also, Judge, as a practical matter, as I
10 stated, the very first sentence in my brief, the first
11 thing I put on this record is that I cannot get in the
12 heads of the individuals who were on this case, Judge. I
13 can only talk -- deal with what I have done, and, you
14 know, make analogy to the law and what the Supreme Court
15 and the Court of Appeals have determined to be the
16 appropriate remedy. I included that in my brief. I'm
17 happy to answer any questions, Judge.

18 MR. ROCKIND: And I know they can't, Judge. But
19 the people that took over Enron, for example, they could
20 have been the most honorable people in the world, they
21 were still handed -- they were still handed all of the
22 violations and abuses that occurred before they took over.
23 We aren't faulting Ms. McDonald or Mr. Keast. We're just
24 saying that Mr. Remington is not lost in this mix, this
25 impacts him. Because it's not Mr. Keast or Ms. McDonald's

1 fault, they're the ones who are left to sort of sweep up
2 the remains here, but Mr. Remington is the one who has
3 suffered throughout this because of those abuses. And
4 there is a price to be paid and the People are the one
5 that have to pay that price. And that price is dismissal.

6 THE COURT: Prosecutor McDonald, anything you
7 want to state for the record?

8 MS. MCDONALD: No, Your Honor. I have confidence
9 in Mr. Keast that he articulated our position accurately.

10 THE COURT: All right. Thank you.

11 With regard to this matter, have the attorneys
12 had an opportunity to speak with regard to a remedy for
13 this matter without the Court going at the motions?

14 MR. KEAST: Judge, when this information was
15 first made to light, I believe I included that in my
16 brief, my suggestion to counsel was the remedy early on,
17 and then counsel indicated he was going to file this
18 motion.

19 THE COURT: But your remedy, sir, was to have it
20 remanded to the district court with regard to having a
21 preliminary examination.

22 MR. KEAST: That's correct, Judge. I included
23 the timeline in my brief. When Mr. Rockind spoke with me
24 on March the 2nd and made me aware of the information he
25 had not received from Ms. Hand, I confirmed it March the

1 3rd. I spoke with my office, Prosecutor McDonald, and we
2 agreed to stipulate to the bond modification, which this
3 Court signed, and also communicated to counsel the -- our
4 suggested remedy to the case.

5 THE COURT: And as Mr. Rockind has indicated,
6 the only information that he's now received is information
7 that he's uncovered has existed. He has no assurances,
8 (indiscernible) information or discovery that wasn't
9 disclosed and that's what the concern is with regard to
10 how this case is proceeding. I understand it's no fault of
11 our current new prosecutor or yourself, sir, and that
12 you're left to clean everything up.

13 MR. KEAST: That's correct, Judge.

14 And regarding Mr. Rockind's concern, I think the
15 same could be said for every single criminal case that's
16 ever issued in this state or in this country. Discovery
17 goes through the prosecuting attorney governed by specific
18 rules, not just the Code of Criminal Procedure, but the
19 Michigan Court Rules, as well as Brady and our own ethical
20 obligations. When violations are uncovered, as in the
21 Michigan Court of Appeals case (indiscernible) Karen
22 Plants, there are ramifications for the individuals who
23 violate those. Ms. Plants and Judge Waterstone did face
24 those violations, or those potential avenues of
25 discipline.

1 I have the same responsibilities. And I can tell
2 the Court that, as I indicated in my motion, I received an
3 entire copy of the police reports and they all have been
4 turned over in accordance with MCR 6.201. I do agree, if I
5 received something that I believe is non-discoverable or
6 it's privileged, the proper remedy for myself would be to
7 file a motion for a protective order. Meaning that, hey,
8 Mr. Rockind, I have this, I don't think you're entitled to
9 it, but it's potentially exculpatory, so the judge should
10 rule, yourself Judge, should rule on what's turned over.

11 But defense counsel indicating the concern that
12 you can never know what's in a prosecutor/police file,
13 that's uniform through every single criminal case and
14 that's why we have specific rules governing the disclosure
15 of certain material.

16 MR. ROCKIND: My counter to that is that when a
17 case begins there is a general -- there's a trust factor.
18 And the trust factor is between the defense, the court,
19 and the prosecutor. And that trust factor is, is that
20 just out of paranoia saying I don't trust that you've
21 given me everything isn't going to fly, because if they
22 have some facts, you have to have some fact-based
23 reasoning.

24 So with Mr. Keast, were he on the case, I would
25 have, from the beginning, I would have no reason, unless I

1 were presented with one, nor would Mr. Lewis unless he was
2 presented with one, believe that Mr. Keast was holding out
3 on evidence or holding -- or directing the detective to do
4 something that was inappropriate. But we're not in that
5 circumstance. The court rules -- like I said, it's not
6 like all of a sudden when you take the court rules in your
7 hand as a lawyer, that if you breach the court rule, if
8 you breach 6.201 all of a sudden, you know, like a flag
9 goes up behind Ms. Hand's chair, or that she gets shocked
10 all of a sudden. We're not, like a Kewpie doll, where, you
11 know, every time we mention her name she's saying ouch
12 somewhere else in the universe.

13 The fact of the matter is, is that the only way
14 that we have trust that the prosecutor is fulfilling his
15 obligation, or her obligation under 6.201, and under the
16 Brady rules, is if there's voluntary compliance. And we
17 know there wasn't voluntary compliance. We know there was
18 the opposite, there were breaches and violations of 6.201
19 and Brady. They were done right to our face. They were
20 done to Mr. Lewis' face. They were done in the presence of
21 the court. So no, I'm sorry that -- I know Mr. Keast says
22 that there is a process involved, but that process is
23 based on trust, and that trust has been broken.

24 So what's the aftermath? Mr. Keast says that
25 he's given us everything that the police department

1 presented to him. I understand that, except the police
2 department is not without fault here as well. There are
3 reports that were prepared of interviews that occurred --
4 reports generated five months after an interview with a
5 witness. And the report --

6 THE COURT: With regard to the reports that were
7 given five months post the interview, was anything, to
8 your knowledge, relied upon with regard to the drafting of
9 those reports?

10 MR. KEAST: I can't speak to that, Judge. The
11 report that counsel is speaking of right now, that
12 occurred before I came on the case. There was a report
13 that I asked the detective to author when Mr. Rockind made
14 me aware of an interview that Detective Balog and Ms. Hand
15 had with that witness. I asked him if he had written a
16 supplemental report regarding that; he indicated he did
17 not. I told him to write one and send it to me. When he
18 did, I turned it over to defense counsel. That's with the
19 witness, last name Wiedenmeyer.

20 The interview regarding witnesses --

21 THE COURT: Were there notes taken?

22 MR. KEAST: Excuse me, Judge?

23 THE COURT: Were there notes taken?

24 MR. ROCKIND: Testimony was no.

25 THE COURT: Okay.

1 MR. KEAST: I don't have any notes of those.

2 THE COURT: I'm sorry?

3 MR. ROCKIND: Mr. Balog testified that no notes
4 were taken. Ms. Hand didn't take any notes. He didn't take
5 any notes. This was of a witness who could have been
6 called at the preliminary examination, but remember, the
7 reasons for interviewing this witness at that time
8 changed. At one point it was -- Mr. Balog testified at the
9 preliminary examination that it was an informal interview.
10 I don't know what that actually means. That's not a term
11 that I'm familiar --

12 THE COURT: Mr. Rockind.

13 MR. ROCKIND: Yeah

14 THE COURT: Thank you, I was asking the
15 questions.

16 MR. ROCKIND: I'm sorry.

17 THE COURT: Mr. Keast, with regard to the
18 information, were there notes taken by anybody?

19 MR. KEAST: I don't have any indication that any
20 notes were taken, Judge. I couldn't find any --

21 THE COURT: (Indiscernible).

22 MR. KEAST: I'm sorry. I couldn't find any notes
23 in the file I inherited. I asked the detective if he took
24 notes; he indicated he did not, so I had him write a
25 supplement. Now, albeit, that supplement was authored

1 some year and a half after the actual interview.

2 THE COURT: Right. So what was it based upon,
3 memory?

4 MR. KEAST: Correct.

5 THE COURT: Okay. And what about the witness;
6 did the witness have notes?

7 MR. KEAST: I don't know that, Judge. I can tell
8 you what I've been informed, but I don't -- I hesitate to
9 tell this Court yes or no with any definitive answer on a
10 question like this when I wasn't present two years ago. I
11 was informed no, but that's all I can say.

12 THE COURT: I know, but it begs the question of,
13 has everything been revealed. And, you know, prosecutors,
14 they play an immense role in the judicial system. They
15 play an immense role in protecting the public on all
16 sides. I'm relieved that Prosecutor McDonald and yourself,
17 sir, are now involved and attempting to remedy the issues
18 that you see as a breach of the justice system. So I am
19 very pleased about what's happened since this has come to
20 light. But it's definitely very heavy, with regard to
21 what's happened.

22 MR. KEAST: I agree, Judge.

23 THE COURT: The Court will issue a ruling.

24 MR. KEAST: Thank you, Judge.

25 We are scheduled for a pretrial tomorrow. Would

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the Court like to continue that or schedule a new date?

THE COURT: Sure would, continue it. Thank you.

MR. KEAST: Thank you, Judge.

MR. ROCKIND: We'll be on tomorrow as well?

THE COURT: Yes, sir.

MR. ROCKIND: Okay, Your Honor. Thank you.

(At 10:45 a.m., proceedings concluded.)

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CERTIFICATION

I certify that this transcript, consisting of 44 pages, is a true and accurate transcription, to the best of my ability, of the video proceeding in this case before the Honorable Victoria A. Valentine on Wednesday, April 14, 2021, as recorded by the clerk.

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/s/ Cheryl McKinney, CSMR-5594
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