STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v

CR 2019-272593-FC
HON. VICTORIA VALENTINE

NICHOLAS MAXIMILLIA REMINGTON,

Defendant.
_____/

KAREN D. McDONALD (P59083)
OAKLAND COUNTY PROSECUTING ATTORNEY
1200 NORTH TELEGRAPH ROAD
PONTIAC, MI 48341

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ATTORNEY FOR DEFENDANT
_____/

PEOPLE'S BRIEF IN RESPONSE TO DEFENDANT'S SUPPLEMENT TO MOTION TO QUASH AND DISMISS WITH PREJUDICE

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This case was bound over on the charge of Delivery of a Controlled Substance Causing Death after preliminary examinations conducted in the 52-1 District Court on September 27, 2019, and October 16, 2019. Defendant filed a motion to quash on January 21, 2020. The People filed a response on March 16, 2020. Judge Alexander did not rule on the initial motion to quash and that is still pending before this Court. Undersigned Assistant Prosecuting Attorney was assigned this case on January 4, 2021. Former Assistant Prosecuting Attorney Beth Hand filed the initial response to Defendant's motion to quash and included a statement of facts. The People rely upon that portion of the brief and incorporate that herein. Defendant has also filed a motion to dismiss with prejudice. Both of Defendant's motions are based upon the same argument – that the

previously assigned Assistant Prosecuting Attorney failed to disclose certain pieces of exculpatory evidence. As such, this responsive pleading addresses both claims to avoid duplicative pleadings.

Defendant has provided a "scorecard," of the individuals in each of his motions to alert this Court to the parties involved in what has been stated as an attempt to provide context. While not disclosing all communications between undersigned Assistant Prosecuting Attorney and counsel for the Defendant, the People believe it is necessary to provide its own recap of relevant dates and contacts. The following information is submitted to this Court under information and believe that all are true and accurate:

January 4, 2021: Undersigned Assistant Prosecuting Attorney was assigned this file. A phone call was placed to defense counsel sometime between that date and January 6, 2021. Defense counsel followed up with the email attached to his motion as Exhibit A.

January 6, 2021 – January 27, 2021: In response to concerns expressed by defense counsel in his letter, undersigned A.P.A. contacted Detective Balog, the officer in charge of the investigation, to obtain a complete copy of all police reports so all parties could be assured discovery was complete.

January 28, 2021: A complete copy of the Novi Police Department report was obtained.

February 3, 2021: A packet of discovery, including supplemental reports #9 and #10 were mailed to defense counsel.

February 11, 2021: A pretrial conference was held before this Court. Defense counsel stated that he would be filing a motion regarding information learned through the discovery tendered.

March 2, 2021: Phone conversation occurred between undersigned A.P.A. and defense counsel. Defense counsel stated that he had never received supplemental reports #9 and #10, nor did former A.P.A. Hand disclose the contents of those reports to him.

March 3, 2021: Undersigned A.P.A. confirmed defense counsel's assertion that those reports were not included in any proof of service filed with either the District or the Circuit Court.

March 5, 2021: Undersigned A.P.A. had a phone conversation with defense counsel. Undersigned A.P.A. stipulated to the bond order signed by this Court on March 9, 2021, and suggested a remand to the District Court to cure any defect/violation incurred by nondisclosure of evidence referenced in supplemental reports #9 and #10.

Supplemental report #10 details a conversation between Ms. Linda Preka (decedent's mother), former A.P.A. Hand (married name of Wiegand) and the officer in charge of the investigation. *See* Exhibit 1. That report reflects that Ms. Preka was shown a snapchat message sent on the Defendant's account "Hulkolas," while the Defendant was incarcerated in the Oakland County Jail. As stated, it does not appear that the supplemental report, or information included in that supplemental report, was turned over to defense until undersigned A.P.A. obtained a copy from the Novi Police Department and mailed it in February of this year.

LAW AND ARGUMENT

The People must emphasize that this responsive pleading does not attempt to excuse or explain the nondisclosure of evidence favorable to the defense. The People acknowledge that the prior A.P.A. did not disclose the evidence referenced. The timeline referenced *supra* is not in dispute That is precisely why the People have stipulated to a remand to District Court, acknowledged that this remand will delay trial, acknowledged that the delay is attributable to the People, and stipulated to a bond modification. The dispute lies in the remedy. It is the People's position that neither dismissal nor a quash is warranted when an alternative remedy exists.

The seminal case regarding disclosure of evidence is *Brady v Maryland* 373 US 83 (1963) which held "[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution." *Id* at 87. The *Brady* rule has been extended to information known to the police as well, imposing a duty on a prosecutor to "learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." *Strickler v Greene*, 527 US 263, 281 (1999). See also *Kyles v Whitley*, 514 US 419 (1995). To assert a successful *Brady* claim, a defendant must show the following: 1) the evidence is favorable to the accused, either because it is exculpatory, or because it is impeaching; 2) that evidence must have

been suppressed by the State, either willfully or inadvertently; and 3) prejudice must have ensued. *Strickler* at 281-282. As recognized by our Supreme Court in *People v Chenault*, 495 Mich 142, 149 (2014): "The Supreme Court of the United States held in *Brady* that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

There are two caveats found in *Brady* jurisprudence applicable to this well-settled rule of law. The first is that Brady does not extend to information that is available from another source, or if the defense was aware of the same information (*United States v Clark*, 928 F2d 733, 738, *Parker v Allen*, 565 F3d 1258, 1277 (2009), *United States v Zichittello*, 208 F3d 72, 103 (2000), *United States v Quintanilla*, 193 F3d 1139, 1149 (1999)). The second is that there is no duty to create evidence (*United States v Sukumolachan*, 610 F2d 685, 687 (1980), *Richards v Solem*, 693 F2d 760, 766 (1982).

As stated, these principles are well-settled, and the People certainly do not dispute them. The reason for the dispute as to remedy is simply because *Brady* is a **trial** right. *Brady* refers to a complete failure to disclose, not tardy disclosure. *Robertson v Lucas*, 753 F3d 606, 622 (2014). "*Brady* generally does not apply to delayed disclosure of exculpatory information, but only to a complete failure to disclose." *United States v Bencs*, 28 F3d 555, 560-561 (1994) (citations and internal quotation marks omitted).

Timing of disclosure was discussed in *People v Bosca*, 310 Mich App 1 (2015). In *Bosca*, medical records of witnesses who testified at the preliminary examination were not disclosed to the defense prior to the examination. Defense later asserted those records were exculpatory due to potential impeachment material contained therein. The Michigan Court of Appeals ruled that the failure to produce medical records prior to preliminary examination was not a *Brady* or discovery

violation because "[e]ven if the boys' injuries did not fully match their testimony, the discrepancy for purposes of the preliminary examination was irrelevant, as the district judge was not the ultimate finder of fact." *Id.* at 29-30. The Court of Appeals cited *People v Laws*, 218 Mich App 447, 452 (1996) in noting "where the evidence conflicts and raises a reasonable doubt regarding the defendant's guilt, the issue is one for the jury, and the defendant should be bound over." *Id.* Thus, while it is best practices to make disclosures of material as soon as possible, it does not appear to warrant dismissal or even retrial when the disclosure is late but made in time to prepare for trial.

In the instant case, Judge Reeds presided over the lengthy preliminary examination. He found that the evidence in fact did rise to the level of probable cause and bound the matter over for trial. On pages 5 and 6 of Defendant's brief in support of his motion to quash, Defendant suggested that Judge Reeds based his bind over decision on the snapchat records and arguments made by Ms. Hand regarding those records. A remand would serve to end speculation in that regard. While the People have agreed to remand this case so the defense can explore the information contained in the supplemental reports at the District Court level, the People expect Judge Reeds to reach the same conclusion – that a question of fact exists for the trier of fact and the case must be presented to a jury.

In his motion to dismiss, Defendant has cited to *United States v Coleman*, 862 F2d 455 (1988). Defendant's reliance upon this Second Circuit Court of Appeals case is misplaced as the United States Circuit Court did not issue a ruling consistent with Defendant's argument. In *Coleman*, Defendant was tried for a number of crimes in Federal District Court in Philadelphia, Pennsylvania. He was convicted at a retrial after the first trial resulted in a hung jury. Defendant claimed on appeal that the government's *Brady* violations from the first trial should have prevented the second trial from even taking place under the double jeopardy clause of the United States

Constitution. *Id.* 456-457. The Court, relying upon *Brady* itself and its progeny, disagreed. Citing to *Brady*, the Second Circuit recognized that the "aim of due process is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." *Id.* at 458, *Brady*, 373 US at 87. This is simply because the rule articulated in *Brady* is a ***trial*** right, a right to protect from an unfair ***trial***. Thus, while the material turned over to defense by the undersigned Assistant Prosecuting Attorney could be properly characterized as "*Brady* material," it does not follow that an untimely disclosure of said evidence authorizes a dismissal. This is especially true given the remedy proposed by the People.

Defendant has also cited to *Virgin Islands v Fahie*, 419 F3d 249 (2005), a Third Circuit Court of Appeals case to support his request for dismissal with prejudice. The Defendant in that case was arrested after he was shot while sitting in a vehicle, drove himself to the hospital, and was interviewed by police. The police officer who took the report observed a sawed-off shotgun in the back of his vehicle. Defendant was charged with possession of that weapon. *Id.* at 250-251. During trial, an ATF agent disclosed that he had run the weapon through a trace system and discovered that the gun's registered owner lived in Virginia and it was not reported stolen. Defense counsel objected on the grounds that this was possibly exculpatory information and a *Brady* violation. *Id.* at 251. The trial court in the U.S. Virgin Islands agreed and dismissed the case with prejudice. *Id.* The U.S. Virgin Islands District Court Appellate Division agreed that nondisclosure of the report was *Brady* material and a discovery violation, but dismissal was an abuse of discretion. *Id.* at 252. The Third Circuit noted that the United States Supreme Court has not imposed the most severe penalty available (i.e. dismissal with prejudice) when prejudice to the defendant has not been demonstrated. *Id.* at 254.

In reversing the dismissal, the Third Circuit of the United States Court of Appeals relied extensively on *United States v Morrison*, 449 US 361 (1981). In *Morrison*, federal DEA agents

interviewed the defendant after she had been indicted and retained counsel. Those agents did so knowing the defendant had an attorney, and in the course of this meeting attempted to induce the defendant to cooperate. The agents did this on two separate occasions. *Id.* at 362-363. Morrison subsequently entered into a conditional guilty plea and filed an appeal to challenge the indictment solely on the basis of the agents' conduct. The Third Circuit agreed with the defendant and found a Sixth Amendment violation and dismissed the indictment as a remedy. *Id.* at 363-364.

The United States Supreme Court, in assuming *arguendo* a Sixth Amendment violation, reversed the Third Circuit. The Supreme Court first acknowledged that "Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *Id.* at 364. The Court analyzed this violation in the context of other constitutional violations from notable Supreme Court jurisprudence and stated "[s]imilarly, when before trial but after the institution of adversary proceedings, the prosecution has improperly obtained incriminating information from the defendant in the absence of his counsel, the remedy characteristically imposed is not to dismiss the indictment but to suppress the evidence or to order a new trial if the evidence has been wrongfully admitted and the defendant convicted." *Id.* at 365. Importantly, the United States Supreme Court opined that "[m]ore particularly, absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate. This has been the result reached where a Fifth Amendment violation has occurred, and we have not suggested that searches and seizures contrary to the Fourth Amendment warrant dismissal of the indictment. The remedy in the criminal proceeding is limited to denying the prosecution the fruits of its transgression." *Id.* at 365-366.

Thus, the remedy in this case is exactly what has been suggested by the People. There has been no prejudice to the Defendant. The instant case does not have a trial date set. The Defendant

has filed multiple motions in January of 2020, but at Defendant's choosing those were not heard by this Court's predecessor. When the undersigned A.P.A. was made aware of an alleged discovery violation a bond modification was agreed upon. Defendant now seeks a windfall when a specifically tailored remedy is available.

The accepted principle articulated in *Morrison*, i.e., that a remedy should fit the constitutional violation, has been accepted time and time again. *People v Acevel*, 282 Mich App 379 (2009) is illustrative as the Court of Appeals discussed the proper remedy when blatant prosecutorial, judicial, and police misconduct resulted in a Due Process violation. In this infamous case, an Assistant Wayne County Prosecuting Attorney failed to correct the record after a police officer and civilian witness committed perjury while testifying at a hearing and subsequent trial. *Id.* at 383-384. This suborning and/or permitting perjury deprived the Defendant an opportunity to mount an effective defense. The Court of Appeals was called upon to determine if this violation should bar a retrial, which as *Morrison* articulated is the standard remedy for such a violation. In finding that retrial is the correct result, the Court first opined:

> the crux of the due process analysis in cases of alleged prosecutorial misconduct is whether the defendant received a fair trial. The remedy when a defendant receives an unfair trial because of prosecutorial misconduct is a new and, presumably, fair trial. This remedy naturally flows from the type of harm that the defendant has suffered. It does not follow that a due process violation should bar retrial, because such a remedy would be unduly broad and would fail to address the specific harm the defendant has suffered. Specifically, barring retrial on the basis of due process grounds would amount to "punishment of society for [the] misdeeds of a prosecutor" because it would permit the accused to go free." Further, our Supreme Court has noted, "[T]he protections of substantive due process [do not] require recognition of a remedy for the harm incident to one or more mistrials [unless it also places a defendant in double jeopardy]." *Id.* at 391(internal quotation omitted)

The Michigan Court of Appeals further held:

> Nor do we find, as defendant urges, that the court's and the prosecutor's disgraceful conduct itself should warrant a bar to retrial. Assuming that the acts of the trial judge and the prosecutor in this case violated Michigan's Rules of Professional Conduct, MRPC 3.4, and Code of Judicial Conduct, Canon 3, and were clearly opprobrious, the remedy for their

wrongs is accomplished in other forums, such as the Attorney Discipline Board and the Judicial Tenure Commission. These codes, however, do not confer upon a defendant any type of constitutional right or remedy. Rather, the particular constitutional right determines the constitutional remedy and these codes play no part in such decisions. For these reasons, we do not take the opportunity here to create a new remedy for a due process violation arising out of prosecutorial and judicial misconduct. *Id.* at 392 (internal quotations omitted).

The situation in the instant case does not rise to the level of judicial, police, and prosecutorial misconduct found in *Acevel*. Even if it did, the remedy to such misconduct must be specifically and narrowly tailored to protect the accused's Due Process rights. The procedural posture of this case is crucial. A trial date has not even yet been given by this Court. The People have agreed to allow the defense the opportunity to present whatever evidence Defendant sees fit in front of Judge Reeds; and importantly, a bond modification has been agreed upon. Dismissal with prejudice or quashing the information is simply not the correct remedy. There is no doubt that the evidence at issue should be examined, cross-examined, explored, and weighed; and it will. When that occurs in front of the relevant fact-finder will serve to protect all of the Defendant's constitutional rights, which is the crux of Due Process and *Brady*. Dismissal is not warranted.

WHEREFORE, for the foregoing reasons, the People respectfully request that this Honorable Court deny the Defendant's Motion to Quash, deny the Defendant's Motion to Dismiss with Prejudice, and remand this case to the 52-1 District Court for a continued preliminary examination.

Respectfully submitted,

KAREN D. McDONALD
PROSECUTING ATTORNEY

By: _____
Marc A. Keast
Assistant Prosecuting Attorney

DATED: APRIL 9, 2021

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ATTORNEY FOR DEFENDANT

/

PEOPLE'S SUPPLEMENTAL BRIEF IN RESPONSE TO DEFENDANT'S SUPPLEMENT TO MOTION TO QUASH AND DISMISS WITH PREJUDICE

Upon review of the pleading filed entitled "People's Brief in Opposition to Defendant's Motion to Quash and Dismiss with Prejudice," undersigned A.P.A. determined that an amended first paragraph to page 3 should be submitted to this Court. Please allow the following to replace that paragraph:

Supplemental report #10 details a conversation between Ms. Linda Preka (decedent's mother), former A.P.A. Hand (married name of Wiegand) and the officer in charge of the investigation. *See* Exhibit 1. That report reflects that Ms. Preka was shown a snapchat message sent on the Defendant's account "Hulkolas," while the Defendant was incarcerated in the Oakland County Jail. According to the report, Ms. Preka showed that snapchat message to both A.P.A. Hand and Detective Balog. As stated, it does not appear that the supplemental report, or

information included in that supplemental report, was turned over to defense until undersigned A.P.A. obtained a copy from the Novi Police Department and mailed it in February of this year.

It should be noted that this information is accurately contained in the People's Exhibit 1.

Respectfully submitted,

KAREN D. McDONALD
PROSECUTING ATTORNEY

By: _____
Marc A. Keast
Assistant Prosecuting Attorney

DATED: APRIL 9, 2021

EXHIBIT ONE

will be logged into Novi PD evidence room after this process is completed.

EVIDENCE LOGGED: I placed Denis Preka's cellular telephone and a digital copy into Novi PD property on 07/01/2019.

CR No: 190015581-008 Written By: NOBALOGS (00214) Date: 08/13/2019 10:24 AM

08/12/2019: During the course of this investigation, I, Detective Balog was able to identify the SNAP CHAT user mharrington1234. This is the user that Remington corresponded with On March 19, 2019, sending Hulkolas, (Remington) a snap chat, asking **"U give that kid meth"?** Hulkolas, (Remington) answers back **"Methylone some moll".** This subjects name is Matthew Connor Harrington DOB

INTERVIEW WITH MATTHEW HARRINGTON: I contacted Harrington by telephone on 08/12/2019. I spoke with him about his correspondence with "Hulkolas" on March 19, 2019. Harrington stated that "Hulkolas" is a guy he knew by the name of Nick Remington, whom he had worked with in the past. Harrington recalled that on March 19, 2019 he had observed videos that "Hulkolas" had displayed on a group SNAP CHAT involving a guy possibly on drugs. Harrington stated that he had sent "Hulkolas", (Remington) a snap chat message in response, saying **"U give that kid meth"?** Harington could not remember if "Hulkolas" (Remington) responded back to him or not.
I asked Harrington if he would be willing to testify in court to this fact, and he advised that he would.

CR No: 190015581-009 Written By: NOBALOGS (00214) Date: 09/30/2019 08:04 AM

09/30/2019: I sent SNAP CHAT a second preservation letter request for the SNAP CHAT account HULKOLAS, after information was obtained that new SNAPS have been disseminated from this account, while the suspect/account owner has been in Oakland County Jail. A search warrant and or subpoena shall be sent to SNAP CHAT at a later date for requested preservation information.

CR No: 190015581-010 Written By: NOBALOGS (00214) Date: 10/03/2019 08:08 AM

INFORMATION: On 09/27/2019 The preliminary exam was held on this matter at 52-1 District Court. After the hearing, the Oakland County Prosecutor, Beth Wiegand was shown a new SNAP Chat on Nick Remingtons (HULKOLAS) SNAP CHAT account by the victim Preka's step

father Jamie Thom. Thom advised Wiegand that he was sent this SNAP CHAT by one of Denis Preka's friends named Avery Eckert on 09/26/2019.

SNAP CHAT: The SNAP CHAT shown to Prosecutor Wiegand consisted of a cartoon/bitmoji image of a male subject inside a jail style cage with the words "To all 5,000 of you beautiful motherfuckers I need ketamine, who got? Thanks, nick". See attached photocopy of the SNAP CHAT.

SNAP CHAT PRESERVATION LETTER 09/30/2019: After learning of this new SNAP CHAT, and knowing that Nick Remington is in Oakland County Jail and should not have access to a cellular phone or computer, I sent SNAP CHAT INC. a preservation letter requesting the company preserve all snaps related to the account (HULKOLAS) from the time frame of August 1, 2019 until October 1, 2019.

SEARCH WARRANT: On 10/03/2019 I obtained a search warrant for the Snap Chat information of (HULKOLAS) reference the preservation letter sent. I am awaiting this information.

SEARCH WARRANT INFORMATION: At this time, no information has been obtained that can identify the publisher of the SNAP CHAT cartoon/bitmoji that was sent above. No identifying information from SNAP CHAT or phone carrier services is available as to whom sent this SNAP CHAT.

ORIGINAL 911 CALL: A CD copy of the original 911 call was placed into evidence on 10/03/2019.

CR No: 190015581-011 Written By: NOBALOGS (00214) Date: 01/07/2020 01:54 PM

08/21/2019: I, Detective Balog along with Oakland County Prosecutor Beth Wiegand responded to the University of Michigan campus in Ann Arbor to speak with subject Joshua Anapoell. Anapoell had been interviewed by University of Michigan Police back in December of 2017 when Nicholas Remington was the victim of a drug related robbery, University of Michigan report #1790303767. In the University of Michigan report, Anapoell states that he spoke with Remington shortly after Remington had apparently been robbed. Anapoell stated that Remington told him that he, (Remington) had just been punched in the face and "they" took his money and phone, but didn't get his drugs. Anapoell stated that Remington showed him a baggie of white powder, all the while he was speaking to Anapoell. Anapoell also indicated in this report that Remington was known to be selling drugs in the Dorms.