

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID MCGUIRE,
Petitioner,

v.

STATE OF OHIO,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents this Court with the opportunity to explain and adopt a reasonable remedy for *Brady* violations that come to light prior to or during trial. At present, the jurisprudence regarding *Brady* violations has focused on the appellate standard for remedying a *Brady* violation that is discovered after trial. This case demonstrates the lack of guidance for *Brady* violations that are discovered prior to or during trial.

In this case, Defendant-Appellant David McGuire (“Mr. McGuire”) faced murder charges that had the potential to place him in jail for the rest of his life. Yet, through either corruption or mistake, the investigating officer who was first on the scene and alone with the body, Officer Kenneth Bolton, failed to turn on or save his body camera evidence. Then when it was revealed mid-trial that Officer Bolton was the subject of a public corruption investigation, the Cuyahoga County Prosecutor’s office flatly refused to turn over the exculpatory evidence of the ongoing investigation into Officer Bolton.

Faced with this *Brady* and discovery violation, the trial judge considered a mistrial, but notably did not order the government to turn over the *Brady/Giglio* evidence of police misconduct. Specifically, the court did not order the State to turn over the *Brady/Giglio* evidence regarding Officer Bolton who was at the center of all the suspicious issues regarding this missing body camera evidence.

This Court’s *Brady* current jurisprudence does not sufficiently address the issue of what is the appropriate remedy for pre or mid-trial violations. To address this violation the law should have required the trial court to tailor the remedy to

protect Mr. McGuire's constitutional right to due process and a fair trial. As such, the best way to ensure Mr. McGuire's constitutional right to a fair trial would have been to offer a remedy that included an order demanding that the government actually turn over crucial impeachment evidence of the primary investigating officer, Officer Bolton. Other possible remedies include instructing the jury on the government's decision to not turn over the evidence or giving an adverse inference instruction.

Accordingly, this case provides this Court with the opportunity to give teeth to the remedies for real-time *Brady* violations by explaining that, when a trial court is faced with a discovery violation, the remedy is not simply a redo with the same violation. In other words, a mistrial without ordering the state to turn over the exculpatory evidence, is insufficient. Instead the remedy in response to the present mid-trial discovery violation is to order a new trial *and* order the state to turn over its investigatory file for Officer Bolton. Without this remedy, the remedy of a mistrial was insufficient because a new trial would have been infected with the same discovery violation.

Based on this narrative, the question presented for review is:

When a discovery violation is discovered mid-trial, does a remedy that fails to order the disclosure of the withheld evidence violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution?

PARTIES TO THE PROCEEDINGS BELOW

The parties are the same as those listed in the caption.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Order of the Ohio Supreme Court summarily denying Petitioner David McGuire's memorandum in support of jurisdiction on August 15, 2018 is attached as Appendix A. *State v. McGuire*, 2018-Ohio-3258, 153 Ohio St. 3d 1462, 104 N.E.3d 792 (Table) (August 15, 2018).

The Opinion of the Ohio Eighth District Court of Appeals on direct appeal affirming Petitioner McGuire's conviction and sentence on April 12, 2018 is attached as Appendix B. *State v. McGuire*, Cuyahoga App. No. 105732, 2018-Ohio-1390 (April 12, 2018).

The Judgment Entry of the trial court, finding Petitioner McGuire guilty of Aggravated Murder, Murder, Felonious Assault, and Having a Weapon Under Disability, is attached as Appendix C. *State v. McGuire*, No. CR-16-604957 (Ohio Ct. of Common Pleas, March 31, 2017).

STATEMENT OF JURISDICTION

On April 12, 2016, the Grand Jury issued a four-count indictment charging Defendant-Appellant David McGuire with Aggravated Murder (count one), Murder (count two), Felonious Assault (count three), and Having Weapons Under Disability (count four). The first three counts carried one and three year Firearm Specifications pursuant to R.C. 2941.141(A) and R.C. 2941.145(A). Defendant pled not guilty and attorneys Thomas Rein and John Luskin were appointed to represent Defendant.

On April 15, 2016, Defendant filed an all-encompassing demand for discovery under Ohio Crim. R. 16 which included a specific request for "All evidence or information known or which may become known to the State of Ohio which may be favorable to Defendant and material to guilt or punishment, including information or evidence which could be used to obtain evidence that would diminish the credibility of any State's witness, as well as material relevant to guilt or punishment." (Demand for Discovery at p. 2.) On May 9, 2016, Defendant further filed a motion to order "all law enforcement officials to turn over any and all information they have pertaining to the above-captioned case" as well as a second demand for discovery which requested any video from the responding officers. Defendant also requested the appointment of a private investigator, Robert Turpin which was granted by the trial court. (Journal Entry July 2, 2016)

Trial commenced on March 24, 2017. On the first day of trial, the trial judge signed a material witness warrant for prosecution witness Sultan W. Muhammad. On March 31, 2017, the jury found Defendant guilty on all four counts and attendant specifications.

Mr. McGuire appealed to the Ohio Eighth District Court of Appeals which affirmed his conviction and sentence on April 12, 2018. *State v. McGuire*, Cuyahoga App. No. 105732, 2018-Ohio-1390.

Mr. McGuire then appealed to the Supreme Court of Ohio which, by order dated August 15, 2018, refused to accept jurisdiction over his appeal. *State v.*

McGuire, 2018-Ohio-3258, 153 Ohio St. 3d 1462, 104 N.E.3d 792 (Table) (August 15, 2018).

Jurisdiction is appropriate under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

United States Constitution, Sixth Amendment

“The Sixth Amendment guarantees the rights of criminal defendants, including the right to a public trial without unnecessary delay, the right to a lawyer, the right to an impartial jury, and the right to know who your accusers are and the nature of the charges and evidence against you. It has been most visibly tested in a series of cases involving terrorism, but much more often figures in cases that involve (for example) jury selection or the protection of witnesses, including victims of sex crimes as well as witnesses in need of protection from retaliation.” U.S. CONST. amend. VI.

United States Constitution, Fourteenth Amendment

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV.

STATEMENT OF THE CASE

I. PROCEDURAL BACKGROUND

On April 12, 2016, the Grand Jury issued a four-count indictment charging Defendant-Appellant David McGuire with Aggravated Murder (count one), Murder (count two), Felonious Assault (count three), and Having Weapons Under Disability (count four). The first three counts carried one and three year Firearm Specifications pursuant to R.C. 2941.141(A) and R.C. 2941.145(A). Defendant pled not guilty and attorneys Thomas Rein and John Luskin were appointed to represent Defendant.

On April 15, 2016, Defendant filed an all-encompassing demand for discovery under Crim. R. 16 which included a specific request for "All evidence or information known or which may become known to the State of Ohio which may be favorable to Defendant and material to guilt or punishment, including information or evidence which could be used to obtain evidence that would diminish the credibility of any State's witness, as well as material relevant to guilt or punishment." (Demand for Discovery at p. 2.) On May 9, 2016, Defendant further filed motion to order "all law enforcement officials to turn over any and all information they have pertaining to the above-captioned case" as well as a second demand for discovery which requested any video from the responding officers. Defendant also requested the appointment of a private investigator, Robert Turpin which was granted by the trial court. (Journal Entry July 2, 2016.)

The trial court on its own raised the issue of Defendant's competency to stand trial and referred Defendant to the Court Psychiatric Clinic. (Journal Entry August

24, 2016.) After holding a hearing, the trial court found Defendant competent to stand trial. (Journal Entry November 11, 2016.)

Trial commenced on March 24, 2017. On the first day of trial, the trial judge signed a material witness warrant for prosecution witness Sultan W. Muhammad. On March 31, 2017, the jury found Defendant guilty on all four counts and attendant specifications.

Mr. McGuire appealed to the Ohio Eighth District Court of Appeals which affirmed his conviction and sentence on April 12, 2018. *State v. McGuire*, Cuyahoga App. No. 105732, 2018-Ohio-1390. Mr. McGuire then appealed to the Supreme Court of Ohio which, by order dated August 15, 2018, refused to accept jurisdiction over his appeal. *State v. McGuire*, 2018-Ohio-3258, 153 Ohio St. 3d 1462, 104 N.E.3d 792 (Table) (August 15, 2018).

II. STATEMENT OF FACTS

On March, 16, 2016, David McGuire (hereafter Appellant), lived at 1237 E. 146th Street in East Cleveland, Ohio. (Tr. 335–337.) Appellant lived on the third floor of the house and rented the second floor to Sultan Muhammad, who lived there with his girlfriend, Kristen Angel. (Tr. 476.) Around midday of March 16, 2016, Appellant met up with his cousin, Mac McGuire. (Tr. 345.) Appellant and Mac McGuire drove to Phateama Johnson's house, who was the girlfriend of Mac McGuire. (Tr. 615.) Appellant and Mac McGuire were arguing when they arrived. (Tr. 615.) After picking up Johnson, Appellant crashed the car into an electrical pole. (Tr. 621.) Appellant and Mac McGuire fled the scene. (Tr. 622.)

Later that evening, Muhammad was in the kitchen of the second floor of the house he shared with Appellant. (Tr. 346.) Around 8:00 p.m., as Muhammad was cooking dinner, Angel was in the bathroom, giving her daughter a bath before bedtime. (Tr. 484.) Muhammad heard a vehicle pull into the driveway and looked out the kitchen window, where he observed Appellant and Mac McGuire arguing. (Tr. 346-347.) Muhammad saw Appellant come into the house and heard him walk up the stairs, where he entered the third floor apartment. (Tr. 347.) After hearing Appellant rummage around on the level above him, Muhammad heard Appellant walk back down the stairs and watched him walk outside. (Tr. 347.) Muhammad, observing from the kitchen window, heard Mac McGuire say, "Dave, I don't got it, I don't got it." (Tr. 348.) Muhammad watched as Appellant raised a gun and fired four bullets into Mac McGuire. (Tr. 348.)

Across the street at 1252 E. 146th Street, Cierra Gill heard the shots as she sat in her living room, doing her daughter's hair. Gill did not hear screaming or any other noise so she waited about four minutes and then went to look out her window. (Tr. 455.) Gill observed the car in the driveway of 1237 E. 146th Street, and a man standing in the front yard with his hands on his head, whom she identified as Appellant (Tr. 459-460.) After watching Appellant shoot Mac McGuire, Muhammad instructed Angel to call 9-1-1. (Tr. 510-511.)

East Cleveland Patrol Officers Elshawn Williams and Kenneth Bolton were the first to arrive on scene. (Tr. 414.) Both officers were wearing body-worn cameras (BWC). (Tr. 436.) Officer Bolton informed Officer Williams that Mac McGuire was not breathing and possibly deceased (Tr. 415.) Officer Bolton called for EMS while

Officer Williams secured the area. (Tr. 415.) Mac McGuire was not deceased when EMS arrived and was taken to University Hospitals, where he died as a result of the gunshot wounds. (Tr. 597.) Special Agent Brenda Butler of the Ohio Bureau of Criminal Investigation responded to the scene to assist with forensic evidence collection. (Tr. 522.) SA Butler testified that the victim, Mac McGuire, was not on scene when she arrived because the priority of first responders is to perform life-saving measures. (Tr. 531.)

Dr. David Dolinak, a deputy medical examiner with the Cuyahoga County Medical Examiner's Office, performed the autopsy and determined that Mac McGuire had been shot four times and the cause of death was homicide from multiple gunshot wounds of the abdomen and lower extremities. (Tr. 649, 657.) Curtiss Jones, a trace evidence expert with the Cuyahoga County Medical Examiner's Office, testified that based on the gunshot wounds, the muzzle of the gun was between one and five feet away from Mac McGuire when it was fired. (Tr. 720.)

On April 4, 2016, the State requested body camera footage by email to Officer Bolton, who was mistaken for the lead detective on the case. (Tr. 692.) At trial, Officer Williams testified that he was wearing a BWC when he responded to the scene. (Tr. 436.) This was the first time in the prosecution of this case that either the defense or State of Ohio was made aware of the potential existence of body camera footage, as the State had no police report or record that indicated the use of BWC. (Tr. 472.) Detective Kevin Harvey was the lead investigator assigned to the case. (Tr. 786.) Detective Harvey was unaware that the responding officers

had BWC and failed to preserve or retain the footage. (Tr. 683). In response to the failure to preserve and provide body camera footage, the trial court allowed the defense wide latitude in the cross examination of Detective Harvey in order to develop a record on the issue. (Tr. 695.)

At the close of the State's case-in-chief, the defense stipulated that a thorough search was made on March 30, 2017 for body camera video of Officers Bolton and Williams from March 16-17, 2016, but no footage was located. (Tr. 902-903, 932.) Further, the defense withdrew the previously made motion for a mistrial. (Tr. 903.) During the charge to the jury, the trial court stated, "The State of Ohio was obligated to provide all of those recordings to counsel for the defendant. Those obligations were not met. You may consider these failures and draw any reasonable inference from them when deciding whether the State of Ohio has proved the charges beyond a reasonable doubt." (Tr. 935.)

REASONS FOR GRANTING THE WRIT

A remedy that fails to cure a discovery violation discovered mid-trial violates the Due Process Clause of the United States Constitution.

I. Introduction

Petitioner David McGuire faced murder charges that had the potential to place him in jail for the rest of his life. Yet the collective actions of the police and prosecutors prevented Mr. McGuire from preparing and presenting an entire defense. This issue was discovered mid-trial, but the trial court failed to cure this blatant *Brady* violation. By not curing the *Brady* problem, the trial court cemented the *Brady* violation and denied Mr. McGuire his constitutional right to a fair trial.

As the defense attorneys prepared for trial, Mr. McGuire's lawyers did not know that the East Cleveland police officers failed to collect and preserve crime scene evidence and the one officer who was a common denominator to the mistakes made by the police was himself under investigation for public corruption by the Cuyahoga County Prosecutor. It was not until trial that the defense team uncovered the collective actions by the State of Ohio of failing to collect and preserve evidence regarding the crime scene and deliberately concealing the investigation of the officer who was involved in those decisions. The State's failure to disclose this exculpatory evidence prevented the defense team from developing and presenting a trial defense based on a theory of lost or destroyed evidence by the police. And the trial court's remedy for the State's discovery violation was wholly ineffective to ensure a fair trial for Mr. McGuire.

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 punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial. *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Evidence is "material" within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. *Id.* at 682. In other words, favorable evidence is subject to constitutionally mandated disclosure when it could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. *Kyles v. Whitely*, 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). A criminal defendant cannot have a fair trial if the government's actions eliminate the opportunity to develop a defense theory. As explained by this Court: "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the Government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Id.*

II. Officer Bolton's Role in Preventing Mr. McGuire's Defense.

The position of the victim's body and whether the victim had a gun were crucial to the defense Mr. McGuire wanted to present. Two East Cleveland Police Officers – Officer Kenneth Bolton and Officer Elshawn Williams – were first on the scene. None of the responding officers took photographs of the victim's body and the body camera videos that were created are inexplicably unavailable. This issue of why there is no photographic or video evidence was not discussed prior to trial. At trial, one common factor to these issues was revealed – they all involved East Cleveland Police Officer Kenneth Bolton.

a. Officer Bolton was the first officer on the scene and alone with the body.

Officer Bolton was the first responder to the scene and was alone with body before Officer Williams approached. (Tr. 414, 438.) Officer Bolton stayed with the body while Officer Williams canvassed the area. (Tr. 415.)

b. Officer Bolton did not take any pictures of the body, did not instruct Officer Williams to do so, and had the body removed before BCI arrived to take pictures.

Officer Bolton did not take pictures of the victim's body. Officer Bolton did not tell the second officer on the scene, Officer Williams, to take pictures of the body. When asked, "How come you didn't take any pictures?" Officer Williams responded, "I just wasn't tasked to take photos." (Tr. 435.) Officer Williams testified the victim was not breathing and not moving. (Tr. 426.) Eventually, BCI Special Agent Brenda Butler arrived on the scene after the body was removed and began to take photographs. She testified that typically if a victim is dead on the scene, their

body is left there to be documented as part of the scene. (*Id.*) Officer Bolton made the decision to have the victim's body removed from the scene. (*Id.* at 446.)

c. East Cleveland Police Policy required Officer Bolton to turn on his body camera during a homicide investigations.

Officer Bolton was equipped with a body camera and East Cleveland Police Department policy requires body cameras to be turned on during a homicide investigation. However, it is unclear whether Officer Bolton complied with this policy and turned on his body camera during his investigation of this homicide scene. (Tr. 766.)

d. Officer Bolton received the email for the body camera videos.

Despite Officer Bolton's failure to document – through video or photographic evidence – the appearance of the body and crime scene when he was alone with the body, the record indicates that body camera evidence “should” exist because the second responding officer, Officer Williams, testified that his body camera was turned on and “there should be” body camera footage from him. Officer Williams testified that after every shift - including this case –his body camera video is “downloaded by a supervisor.” (Tr. 435 ln 22 to 436 ln. 5.) However, any body camera footage from Officer Williams was not turned over to the defense prior to trial. The State attempted to rectify this discovery violation during trial by going back and retrieving any East Cleveland body camera footage from the particular day when this homicide investigation occurred. Notably, the State was able to retrieve the body camera footage from other East Cleveland Officers from March 16,

2016, yet the body camera evidence from Officer Williams that date was still unable to be retrieved. (Tr. 932.) The State was not able to provide an explanation as to why Officer Williams's body camera footage, and not the other footage from that day, was unable to be retrieved. The Prosecutor did, however, explain that the April 4, 2016 email from the Prosecutor's Office to the East Cleveland Police Department requesting the body camera videos was sent to one particular East Cleveland police officer - Officer Kenneth Bolton. (Tr. 691, 692.)

e. The Cuyahoga County Prosecutor investigates Officer Bolton.

While Officer Bolton was knee-deep in the failure to develop and/or failure to preserve and/or destruction of body camera and photographic evidence, the Prosecutor's Office was investigating him for violating two women's civil rights while on duty as a police officer. Specifically, in the time leading up to Mr. McGuire's trial, Officer Bolton was being investigated for sexually assaulting two women after a traffic stop.

f. The Prosecutor's Office never disclosed its investigation of Officer Bolton.

The Prosecutor's Office never informed the defense team about the Bolton investigation. It was not part of pretrial discovery and the State did not notify the defense at trial. The defense only learned of the Bolton investigation by conducting its own Google search midway through trial after a number of witnesses, including Officer Williams, had already testified.

g. The Bolton Investigation – what we know and what we don't know.

The Prosecutor's office never turned over any evidence of the Bolton investigation. To this day, the defense knows very little – only what is publicly available on the docket for *State of Ohio v. Kenneth Bolton*, CR-17-616289. We do know that Officer Bolton was fired and charged with two counts of gross sexual imposition, two counts of abduction, and two counts of interfering with civil rights. After the trial in this case, Officer Bolton plead guilty to Gross Sexual Imposition and Interfering with Civil Rights. Unfortunately, the record also reveals that corruption is not new to the East Cleveland Police Department as three other East Cleveland officers, who were not involved in the McGuire investigation, were sentenced to prison in the 2016 after investigators found search warrants containing false information regarding suspected drug dealers. (Tr. 749–750.)

While Mr. McGuire's trial and appellate attorneys knew nothing about this investigation prior to trial and almost nothing about this investigation midway through trial, one important fact from the Bolton investigation was disclosed: during the traffic stop in which Officer Bolton sexually assaulted two women, he turned off his body camera. (Tr. 759–760.)

h. The Cuyahoga County Prosecutor listed Officer Bolton first on its witness list but did not inform the defense team that Officer Bolton was under investigation.

In its brief, the State defends its discovery violation by claiming that Officer Bolton was “[n]ever considered to be a witness in the State's case-in-chief.” Appellee's brief at p. 10. The record contradicts the State's claim. Leading up to

trial, as Mr. McGuire's defense lawyer attempted to put together his defense, the State filed its trial witness list. Within this pleading, the State listed Officer Kenneth Bolton as the first witness on its trial witness list. Even though Officer Bolton was first on the witness list, the Cuyahoga County Prosecutor did not inform the defense team that it was investigating Officer Bolton for a violation of civil rights while in uniform.

III. The Trial Judge's remedy for the discovery violation was ineffective.

The issue in this case is not whether the State committed a discovery violation. The trial judge found the failure to inform the defense team was a discovery violation and the State did not and has not challenged this finding.

Thus, against the backdrop of the failure to preserve evidence of the crime scene, the unexplained failure to produce the body camera footage, and the deliberate decision to withhold information that Officer Bolton was under investigation, the trial judge simply allowed the defense team to cross-examine Detective Harvey and did not order prosecution to turn over the exculpatory evidence regarding Officer Bolton.

This remedy of merely allowing the cross examination of Detective Harvey as opposed to ordering the disclosure of the exculpatory evidence was wholly ineffective. The victim was gone by the time Detective Harvey arrived on the scene. (Tr. 768.) Detective Harvey did not view the body. Detective Harvey did not view the interior of the car or glove box before Officer Bolton was alone with the victim's

body. Detective Harvey knew nothing about the investigation into Officer Bolton. Detective Harvey knew nothing about the missing body camera evidence.

IV. The State insulated its discovery violation by not turning over evidence to establish prejudice under *Brady*.

Throughout the appeals in this case, the prosecution has not challenged the fact that it committed a discovery violation. Rather, the government has simply claimed that Mr. McGuire is unable to establish prejudice. Whether the government's argument is valid is impossible to determine because, normally when a *Brady* claim is litigated on appeal the parties know the undisclosed evidence and can analyze whether the defendant was prejudiced. The problem with the government's argument in this case is that its continued failure to disclose the contents of the Bolton investigation have insulated its own discovery violation and eliminated any opportunity for Mr. Bolton to establish prejudice resulting from the discovery violation.

V. The elimination of a potential trial defense denied Mr. McGuire a fair trial.

The cascading effect of the State's investigatory malfeasance and discovery decisions denied Mr. McGuire a fair trial. *Kyles, supra*. First, through simple dereliction of duty, the police failed to take pictures of the victim at the crime scene. Then, through either inadvertence or a deliberate decision, Officer Bolton's body camera was not turned on. Then, through inadvertence or deliberate destruction, the body camera footage from Officer Williams was the only body camera footage from that particular day that was unable to be retrieved. On top of these occurrences, the Cuyahoga County Prosecutor decided not to inform the defense

team that Officer Bolton was under investigation at the time of trial. The actions of the State painted the defense in a corner prior to trial. Any opportunity to mount a trial defense based on a theory of lost or destroyed evidence by the police the State actions eliminated that possibility.

VI. A new trial with the same discovery violation was an insufficient remedy.

The possible remedies offered by the trial court including the cross examination of Detective Harvey or a mistrial were wholly insufficient to protect Mr. McGuire's constitutional rights. The State has never turned over evidence regarding the Bolton investigation and the trial court refused to order the State of Ohio to turn over this evidence. Thus, any mistrial would have left Mr. McGuire facing a new trial that contained the exact same discovery violations – no body camera video and no Bolton impeachment evidence. In other words, the suggested remedy of a mistrial was no remedy at all.

VII. Any remedy must address the discovery violation and ensure Mr. McGuire's Constitutional right to a fair trial.

At trial, the prosecution indicated it would not turn over the impeachment evidence regarding Officer Bolton. And questions still remain as to what happened to the body camera video. To remedy this violation the trial court must tailor the remedy to protect Mr. McGuire's constitutional right to a trial. As such, the only way to ensure the *Brady* violation is adequately cured is to not simply a grant a mistrial with the same discovery violation. Instead, an effective remedy would have included a specific order that the State of Ohio comply with its discovery obligation

and turn over the Bolton investigation evidence. To do otherwise renders the Constitution and the *Brady* rule meaningless.

VIII. It is imperative that this Court accept this case in order consider and set forth the appropriate remedy for a *Brady* violation this is discovered prior to or during trial.

Brady and its progeny is well settled law. The vast majority of *Brady* cases involve withheld evidence that is discovered post-trial. This case highlights a gap in the *Brady* jurisprudence. The gap exists on the issue of what is the proper remedy to protect a defendant's right to fair trial when the discovery violation is discovered mid-trial and the government refuses to turn the evidence over. The facts of this case highlight this gap because there was a refusal to turn over *Brady/Giglio* evidence, the government refused to turn over the evidence during trial, and the proposed remedies did not order the disclosure of the evidence and, as a result, the proposed remedies were insufficient to protect Mr. McGuire's right to a fair trial. By accepting this case, this Court can consider the range of potential remedies for mid-trial *Brady* violations and explain which remedies are necessary in order to protect a defendant's Constitutional right to a fair trial.

CONCLUSION

The Court should grant certiorari in this case to address the need for the remedy for a Brady violation to adequately cure the constitutional violation.

Respectfully Submitted,

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