No. 18-6752

In the Supreme Court of the United States

DAVID McGUIRE,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

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

LIST OF PARTIES

All parties appear in the caption of the cover page.

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JURISDICTION

Petitioner is seeking review from the April 12, 2018 decision of the Ohio Court of Appeals, Eighth Appellate District affirming Petitioner's conviction. *State v. McGuire,* 8th Dist. Cuyahoga No. 105732, 2018-Ohio-1390-, 2018 Ohio App. LEXIS 1529, 2018 WL 1778588. Petitioner sought discretionary review to the Ohio Supreme Court pursuant to Ohio Sup. Ct. P. R. 7.01. The Ohio Supreme Court subsequently refused jurisdiction pursuant to Ohio Sup. Ct. P. R. 7.08. *State v. McGuire,* 153 Ohio St. 3d 1462, 2018-Ohio-3258, 104 N.E.3d 792 (2018). The proposition of law raised in Petitioner's memorandum in support of jurisdiction to the Ohio Supreme Court was

> **A trial court's remedy for a discovery violation must be sufficiently tailored to address the violation.**

For the reasons discussed in the argument section, this Honorable Court should not grant the writ and exercise jurisdictional discretion over this matter. The state court of last resort in Ohio or the Ohio Supreme Court has not decided an important federal question in a way that conflicts with the decision of another state court of last resort. Nor has a state court decided a federal question in a way that conflicts with relevant decisions of this Court. The factors favoring review under Rule 10 are not present in this matter and this case is not the appropriate vehicle to resolve the constitutional issues raised by Petitioner.

CONSTITUTIONAL PROVISIONS

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 laws.

STATEMENT OF THE CASE AND FACTS

On the evening of March, 16, 2016, Sultan Muhammad was cooking dinner at the home he shared with Petitioner. Muhammad heard a car pull into the driveway. As he looked out the window, Muhammad saw McGuire and his cousin, Mac McGuire ("Mac") arguing. Muhammad observed McGuire enter the house and return outside. He then heard Mac say, "Dave, I don't got it, I don't got it." Muhammad watched as McGuire raised a gun and fired four bullets into Mac. Muhammad instructed his girlfriend to call 9-1-1.

Across the street, neighbor Cierra Gill heard shots. Gill waited about 4 minutes before she looked out her window, where she saw a car in McGuire's driveway and McGuire standing in the front yard with his hands on his head.

East Cleveland Police Officers Williams and Bolton were the first to arrive on scene, both equipped with body-worn cameras. Officer Bolton observed Mac was not breathing and called for EMS. Mac was transported to University Hospital, where he was declared dead.

An autopsy determined Mac's cause of death as multiple gunshot wounds to the abdomen and lower extremities. His death was ruled a homicide. A trace evidence expert from the medical examiner's office testified that based on his

observation of the gunshot wounds, the muzzle of the gun was between one and five feet away from Mac when it was fired.

Petitioner was indicted on four counts: aggravated murder, murder, felonious assault, and having weapons under disability. The aggravated murder, murder and felonious assault charges all contained 1- and 3-year firearm specifications.

During trial, defense counsel "Googled" a www.cleveland.com article concerning an ongoing investigation by the State into Officer Bolton. The State did not turn over information regarding its investigation into Bolton, which concerned a February 2017 traffic stop.

Officer Williams testified that he was wearing a body-camera when he responded to the scene. This was the first time the State and defense was made aware that body camera footage could potentially exist. No police report or record indicated the use of body-worn cameras. The trial court allowed the defense wide latitude in the cross-examination of Detective Harvey to develop a record on the issue. At the close of the State's case-in-chief, defense stipulated that a thorough search was made for body camera video of Officers Bolton and Williams but that no footage was located. The defense withdrew a previously made motion for mistrial and the trial court instructed the jury as follows:

> 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.

The jury returned guilty verdicts on all counts and Petitioner was sentenced to life imprisonment with first parole eligibility after 28 years.

On appeal, Petitioner claimed the State violated his right to a fair trial by withholding exculpatory evidence: (1) the non-existent body camera footage, and (2) evidence relating to an investigation of Officer Bolton. Applying a de novo standard of review, the Eighth District Court of Appeals of Ohio found McGuire failed to establish that either claim rose to the level of a due process violation under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Petitioner sought discretionary review from the Ohio Supreme Court raising as a proposition of law:

> **A trial court's remedy for a discovery violation must be sufficiently tailored to address the violation.**

REASONS FOR DENYING THE WRIT

I. The State of Ohio has established remedies for discovery violations which require the trial court to impose the least restrictive sanction for a discovery violation.

In *State v. Darmond,* 135 Ohio St. 3d 343, 2013-Ohio-966, 986 N.E.2d 971, the Ohio Supreme Court held that its earlier standard articulated in *Lakewood v. Papadellis,* 32 Ohio St. 3d 1, 511 N.E.2d 1138 (1987) applied to discovery violations of the state. The Ohio Supreme Court agreed that a, "trial court must inquire into the circumstances surrounding a discovery rule violation and, when deciding whether to impose a sanction, must impose the least severe sanction that is consistent with the purpose of the rules of discovery" applies equally to discovery violations

committed by the state and to discovery violations by a criminal defendant. The *Darmond* Court held that there are three factors a judge should consider when imposing a sanction: (1) whether the failure to disclose was a willful violation of Crim. R. 16, (2) whether foreknowledge of the undisclosed material would have benefited the accused in the preparation of a defense, and (3) whether the accused was prejudiced. *Darmond* citing *State v. Parsons,* 6 Ohio St. 3d 442, 6 Ohio B. 485, 453 N.E.2d 689.

To the extent that Petitioner federal question argues that discovery violations for *Brady* violations must be sufficiently tailored to the violation, Ohio already has a framework for trial court's to impose sanctions for discovery violations committed by both the prosecution and the defendant in a criminal case. Here, the trial court instructed the jury:

> "You have also heard evidence that two East Cleveland Police Officers who arrived first at the crime scene used body worn cameras. The East Cleveland Police Department was required to preserve the images and audio from those cameras. 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."

II. The issue as presented by Petitioner obscures the questions addressed by the appellate court.

Petitioner presents his issue as if he has demonstrated a *Brady* violation. However, with respect to the Bolton investigation, the court of appeals found no *Brady* violation. With respect to the body camera evidence, the court properly analyzed whether the government acted in bad faith with respect to the unavailability of the body camera evidence. While Petitioner states in his petition

that the "prosecution has not challenged the fact that it committed a discovery violation," it is abundantly clear that the government argued it did not violation *Brady* and the court of appeals found that any violation did not amount to a *Brady* violation. The arguments below mirror the arguments made by the State in the court of appeals.

A. The State did not violate *Brady* by failing to turn over body camera footage because the footage was not material and Petitioner experienced no prejudice.

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). The State of Ohio has codified the *Brady* rule in Ohio Rule of Criminal Procedure 16(B)(5), requiring that upon receipt of a written demand for discovery by the defendant, the prosecuting attorney shall provide any evidence favorable to the defendant and material to guilt or punishment. Crim. R. 16(B)(5). The Eighth District Court of Appeals of Ohio has interpreted the *Brady* disclosure requirement by noting that exculpatory evidence is defined as evidence favorable to the accused, which if disclosed and used effectively may make the difference between conviction and acquittal. *State v. Braun*, 2009-Ohio-4875, ¶ 70 (8th Dist.).

The defendant carries the burden to prove a *Brady* violation rising to the level of a denial of due process. *State v. Allen*, 2016-Ohio-7045, ¶ 11 (8th Dist.). There are three essential components of a *Brady* violation: (1) evidence at issue must be favorable to the accused because it is exculpatory or impeaching; (2) evidence must have been willfully or inadvertently suppressed by the state; and (3) prejudice ensued. *Id* at ¶ 12. 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. *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) 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).

This Court recently held that withheld evidence must be considered in the context of the entire record to determine whether a reasonable probability exists that the result of the proceeding would have been different. *Turner v. United States*, 137 S.Ct. 1885, 198 L.Ed.2d 443 (2017). In *Turner*, the Court examined the petitioners' claims that the prosecution violated the *Brady* rule by failing to turn over interview notes and the identities of certain individuals. The Court rejected the petitioners' claims, holding that the defense's alternative theory of the case would require persuading the jury that co-defendants falsely confessed and witnesses wholly fabricated their testimony. *Id.* Analogous to this case, the evidence in question in *Turner* was not material to guilt or punishment.

Petitioner's assertion is that body camera footage would have assisted in his case of self-defense in the killing of Mac McGuire. This is contrary to Petitioner's position from the time of his arrest through the trial, where his claim was that he never possessed a gun and did not kill Mac McGuire at 1237 E. 146th Street. (Tr. 989, 992, 996-997, 1000, 1002). Detective Harvey spoke with Petitioner after the arrest. In the video-recorded interview, which was played to the jury, Petitioner explained to Detective Harvey that he was not at the house when the shooting occurred, but rather was miles away at a restaurant. (Tr. 886, 891). Any notion that body camera footage would show that Mac McGuire was potentially threatening Petitioner's life is without merit. Further, analogous to *Turner*, the State presented multiple witness with corroborating accounts.

Petitioner is unable to overcome the three-prong approach of *Bagley*. Petitioner cannot overcome his burden of proof in regard to the first prong, that the body camera footage is favorable and exculpatory. He alleges no facts developed on the record in support. Nothing on the record for this case or the State's case against Kenneth Bolton supports this assertion.

Petitioner cannot overcome his burden in regard to the third prong of prejudice ensuing. Petitioner's assertion that Mac McGuire's body position in the vehicle would possibly support a theory of self-defense and that body position would have been determined by the body camera footage is without merit. No facts were developed on the record or alleged in Petitioner's brief in regard to the position of Mac McGuire's body that would raise a reasonable probability the footage would undermine the

confidence in the verdict. Moreover, Mac McGuire was not dead when the officers made first contact and EMS did everything in their power to save his life. No facts were developed to support Petitioner's assertion that Officer Bolton called EMS in order to tamper with evidence. Any footage from the officers would not be material to guilt or punishment. No facts were developed on the record to suggest that the footage would show Officer Bolton tampering with evidence. As such, the lack of footage was not outcome determinative.

Sultan Muhammad was an eye witness to Petitioner's action and testified to that end. Defense counsel did not elicit any testimony that supported the notion that Petitioner did not commit the murder or that Petitioner acted in self-defense. If the body camera footage existed, Petitioner has been unable to show that it would present anything other than Officers Bolton and Williams arriving on scene, calling EMS, and taking statements from those present. By advancing a theory throughout the time leading up to trial that he did not do the shooting, Petitioner is unable to show how the lack of body camera footage caused prejudice, even more so with his theory of potential self-defense. There is no dispute that Petitioner was not on scene when the officers arrived. Petitioner has not alleged facts to overcome his burden that any witnesses gave inconsistent statements or that Officer Bolton somehow violated his due process rights.

Here, there is no evidence suggesting that the State ever possessed body camera footage from Officer Bolton or Officer Williams from the day of the murder, if they even existed. The parties stipulated that no such footage existed and the trial

court informed the jury of the stipulation during the charge. (Tr. 902-903, 932). "The state cannot be faulted for failing to disclose evidence it did not have." *State v. McClurkin*, 10th Dist. Franklin No. 08AP-781, 2009-Ohio-4545, ¶ 57. "Materials not possessed by the government cannot be suppressed within the meaning of *Brady*." *Id.*, quoting *State v. Zirkle*, 4th Dist. Meigs No. 95 CA 21, 1997 Ohio App. LEXIS 4173, *11 (Aug. 27, 1997).

The record in this case demonstrates that the State emailed Officer Bolton on April 6, 2016 requesting body camera footage he had from that day. Officer Bolton did not respond to that request. Upon subsequent requests, the State learned that no body camera footage from that day existed. This was a fair point for the defense to bring up at trial and on cross-examination, and the defense in this case did so. But the State's failure to provide evidence that does not exist is not a *Brady* violation. "The fact that a defendant wishes to have materials that may or may not exist, and may or may not be in the prosecutor's custody or control, does not demonstrate that such materials are *Brady* materials that the prosecutor has a duty to disclose." *McClurkin*, ¶ 57.

Additionally, there is no evidence suggesting that body camera footage would be exculpatory, even if it did exist. "Assuming, arguendo, the State failed to disclose evidence, the record herein does not demonstrate such evidence was favorable to appellant. Without some record demonstration of this element, we are left to speculate whether the evidence complained of would be exculpatory to appellant;

therefore, we cannot find a Brady violation[.]" *State v. Jennings*, 5th Dist. Fairfield No. 99CA62, 2000 Ohio App. LEXIS 2597, *10-11 (June 8, 2000).

The facts of this case are similar to *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032. In *Hancock*, the defendant argued that the State failed to provide in discovery videos from the prison at which the murder occurred. The defendant claimed "that these videotapes constituted undisclosed *Brady* material and that the court should have reviewed the prosecution's file to determine whether more such material existed." *Id.*, ¶ 65. The Ohio Supreme Court rejected the defendant's *Brady* claim, finding that it "rests upon multiple layers of speculation." *Id.*, ¶ 66. The Ohio Supreme Court found that the defendant failed to "substantiate his claim that the state withheld any videotapes containing evidence favorable to the accused and material either to guilt or punishment." *Id.* The court based this finding in part on testimony "that the prison's videotaping system was not even operational on November 13, 2000[,]" the day of the murder. *Id.* Because Hancock's argument was "purely speculative," the Ohio Supreme Court rejected his *Brady* claim. *Id.*, ¶ 68, quoting *State v. Hanna*, 95 Ohio St.3d 285, 2002-Ohio-2221, 767 N.E.2d 678, ¶ 60.

McGuire's *Brady* claim is speculative for the same reasons, and on two different levels. McGuire merely speculates that (1) the body cam video exists, and (2) that if it exists, it might be exculpatory. "A *Brady* violation may not rest upon a claim that is 'purely speculative.'" *State v. McClurkin*, 10th Dist. Franklin No. 08AP-781, 2009-Ohio-4545, ¶ 57, quoting *Hanna*, ¶ 60.

As such, the State did not violate *Brady* by failing to produce body camera footage.

B. The State was under no obligation to provide impeachment material for Kenneth Bolton.

Ohio Rule of Criminal Procedure 16(B)(2) provides that the State is required to turn over criminal records of the defendant, a co-defendant, and the record of prior convictions that could be admissible under Rule 609 of the Ohio Rules of Evidence of a witness in the State's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal. Crim. R. 16(B)(2). The Supreme Court of the United States has held that when the reliability of a given witness may well be determinative of guilt or innocence, the prosecution's nondisclosure of evidence affecting credibility justifies a new trial, under the due process clause, irrespective of the prosecution's good faith or bad faith. *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Under *Giglio*, the government is required to turn over to a criminal defendant any impeachment evidence that is likely to cast doubt on the reliability of a witness whose testimony may be determinative of guilt or innocence. *United States v. Valdes*, 214 Fed.Appx. 948, 951 (11th Cir. 2007), citing *United States v. Jordan*, 316 F.3d 1215, 1226 n.16, 1253 (11th Cir. 2003) (holding that *Giglio* requires the government to provide impeachment information about testifying witnesses, and the informant did not testify as a witness at trial).

Federal courts have consistently held that *Giglio* only applies to witnesses who testify at trial because it specifically deals with impeachment material. See *United*

States v. Green, 178 F.3d 1099, 1109 (10th Cir. 1999) (holding that *Giglio* did not apply when the government "did not ever call" its confidential informant as a witness); *United States v. Mullins*, 22 F.3d 1365, 1372 (6th Cir. 1994) (finding "no authority that the government must disclose promises of immunity made to individuals the government does not have testify at trial," and holding that a grant of immunity could not be "favorable to the accused as impeachment evidence because the government did not call [the witness] and, thus, there was no one to impeach").

The State did not violate *Giglio* because Kenneth Bolton did not testify at trial, nor was he ever considered to be a witness in the State's case-in-chief. Moreover, Bolton's guilty plea, was completely unrelated to the March 2016 murder or the subsequent investigation. Bolton's deviant sexual behavior in February 2017 does not equate to tampering with evidence or conspiring with Sultan Muhammad in March 2016. Bolton had already been terminated from the East Cleveland Police Department by the time trial began and the State had no intention of calling him as a witness even before the trial prosecutors learned of the investigation. Defense counsel's attempts at trial to argue wrongdoing by the State were not persuasive in obtaining a mistrial and Petitioner's arguments on appeal was also found to be unpersuasive. The *Giglio* case law is clear that the government is under no obligation to turn over impeachment evidence for a witness who does not testify.

The fact that Officer Bolton had been fired from the East Cleveland Police Department and was under investigation was not suppressed because it was publicly-available information prior to trial. "Brady does not apply to materials that are not

'wholly within the control of the prosecution.'" *United States v. Delgado*, 350 F.3d 520, 527 (6th Cir.2003), quoting *Coe v. Bell*, 161 F.3d 320, 344 (6th Cir.1998). "Because Brady is concerned only with cases in which the government possesses information that defendant does not have, the government's failure to disclose potentially exculpatory information does not violate Brady 'where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information' or where the evidence is available to defendant from another source." *United States v. Cottage*, 307 F.3d 494, 500 (6th Cir.2002), quoting *United States v. Clark*, 928 F.2d 733, 738 (6th Cir. 1991) (internal quotations omitted).

Here, the fact that Officer Bolton had been fired from the East Cleveland Police Department and was being investigated by the Cuyahoga County Prosecutor's Office was published in an article on Cleveland.com on March 6, 2017. (Tr. 743). This was more than two weeks before trial began on March 24, 2017. The State made no attempt to hide this fact. McGuire cannot claim that an investigation revealed and detailed on Cleveland.com was information "wholly within the control of the prosecution[,]" or a case in which "the government possesse[d] information that [the] defendant [did] not have[.]" *Delgado* at 527; *Cottage* at 500. Rather, the fact that Officer Bolton had been fired and was under investigation was available to McGuire through another source – as defense counsel demonstrated during trial by locating the article on his computer. (Tr. 743).

Moreover, any attempt to cross-examiner Officer Bolton about his conduct during an unrelated traffic stop eleven months after the murder would have only

created a dispute about a purely collateral matter. Even if the information at issue did not pertain to a purely collateral matter, there is no reasonable likelihood that impeaching Officer Bolton with evidence of his subsequent misconduct would have affected the jury's decision. Officer Bolton's testimony was so unimportant to this case that the State did not even call him as a witness at trial. His role in the case can hardly be described as so important that any impeachment of his credibility on a collateral matter unrelated to the charges in the indictment was reasonably likely to affect the outcome.

It is also difficult to see how the unrelated investigation into Officer Bolton's conduct during a traffic stop could be relevant to this case. The murder in this case occurred on March 16, 2016. The State emailed Officer Bolton requesting his body cam footage on April 4, 2016. The traffic stop that became the subject of the investigation into Officer Bolton did not occur until February 23, 2017. Officer Bolton was therefore not under investigation either on the day he responded to the scene or at the time the State requested his body camera footage. The fact that Officer Bolton later committed serious acts of misconduct, and was then investigated for that misconduct, could not possibly have impacted his actions on the day he responded to the crime scene, nor could they have motivated his response (or lack thereof) to the State's request for the body camera video.

As such, the State was under no obligation to provide impeachment material on Kenneth Bolton. Furthermore, it cannot be demonstrated that the Petitioner suffered any prejudice.

CONCLUSION

For all of the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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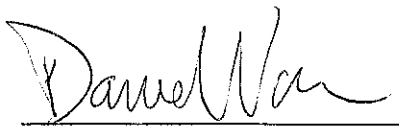
PROOF OF SERVICE

Pursuant to Rules 29.3 and 29.5(b) of the Rules of the Supreme Court of the United States, Daniel T. Van, counsel of record for Respondent and a member of the Bar of this Court, hereby certifies that on January 22, 2019, he served John Q. Lewis, Jon W. Oebker and Zachary J. Adams, by placing in the United States Mail, postage pre-paid, properly addressed to the attorneys at Tucker Ellis LLP, 950 Main Avenue, Suite 1100, Cleveland, Ohio 44113, a copy of the Brief in Opposition to Petition for Writ of Certiorari.

All parties required to be served in this case have been served.

Respectfully submitted,



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