No. 20-6663

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Benjamin Justin Braunke — PETITIONER
(Your Name)

vs.

The people of New York State — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

State of New York Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Benjamin Justin Braunke, BE3069
(Your Name)

4001 King Ave, P.O. Box 8800
(Address)

Corcoran, CA 93212-8800
(City, State, Zip Code)

(559) 992-8800
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QUESTION PRESENTED

Benjamin Brownlee was accused of strangling a fellow DOCCS inmate with a seatbelt while the two of them were being driven between prisons. That inmate and the two correction officers in the van were the only witnesses at his trial, which began more than 18 months after the incident, and more than a year after indictment.

Five days before trial, the prosecutor gave Mr. Brownlee's attorney a medical report describing the absence of observable injury to the inmate-complainant; she turned over color photographs depicting the absence of injury midway through her case-in-chief. Defense counsel complained that these late disclosures were *Brady* violations that impaired his ability to defend his client, and asked that the indictment be dismissed. The trial court denied that request. A jury acquitted Mr. Brownlee of both counts charged in the indictment, but convicted him of a lesser included offense. He now appeals.

The question presented is: Did the prosecution violate its duties under *Brady v Maryland* (373 US 83 [1963]) and its progeny by withholding the complainant's medical records until shortly before trial?

The trial court did not expressly rule that the late disclosure of the records was a *Brady* violation, though it offered defense counsel a remedy short of dismissal of the indictment, which counsel ultimately declined.

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

See Table of Authorities Cited

Brady v. Maryland 373 US 83 (1963)
Fuentes v. Griffin 829 F3d 233 (2016)
Kyles v. Whitley 514 U S 419 (1995)
Old Chief v. United States, 519 U S 172 (1997)
People v. Barto 144 AD3d 1641 (2016)
People v. Brown, 67 NY2d 555 (1986)
People v. Bryce, 88 NY2d 124 (1996)
People v. Cardwell, 78 NY2d 996 (1991)
People v. Cortijo, 70 NY 2d 868 (1987)
People v. Dreyden, 15 NY3d 100 (2010)
People v. Fuentes, 12 NY3d 259 (2009)
People v. Garrett, 23 NY 3d 878 (2014)
People v. Hines, 132 AD3d 1385 (2015)
People v. Hunter, 11 NY3d 1 (2008)

TABLE OF CONTENTS

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

CASES

STATUTES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[√] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix E to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[√] is unpublished.

The opinion of the Appellate Division Fourth Judicial Department court appears at Appendix C to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[√] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[✓] For cases from **state courts:**

The date on which the highest state court decided my case was July 14, 2020. A copy of that decision appears at Appendix E.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

PRELIMINARY STATEMENT

Benjamin Brownlee appeals from the June 3, 2015 judgment of the Monroe County Court (Christopher S. Ciaccio, Judge), convicting and sentencing him, after a jury verdict, on one count of criminal obstruction of breathing or blood circulation (Penal Law § 121.11 [a]). Mr. Brownlee was sentenced principally to one year in jail—time served, in effect, as he had spent nearly a year in custody awaiting trial.

No application for a stay of execution of this judgment pending appeal was made, nor was any order issued pursuant to CPL 460.50. There were no co-defendants.

STATEMENT OF FACTS

On the afternoon of November 12, 2013, two New York State correction officers were assigned to drive two inmates from Wende Correctional Facility, near Buffalo, to Marcy Correctional Facility, near Utica. The trip was interrupted by a disturbance in the back of the DOCCS van as it passed through Monroe County on the Thruway. According to the correction officers, one of the inmates, Benjamin Brownlee, strangled the other, Brandon Short, with a seatbelt until Short became unconscious. Officer Janine Samson, who was driving, pulled over; her partner, John Buczek, entered the rear compartment, fought with and restrained Mr. Brownlee; and the van continued its trip east. At the direction of their superiors, the officers detoured to Auburn Correctional Facility, where Mr. Brownlee, inmate Short, and Officer Buczek were examined for injuries and photographed. The two officers eventually drove Short the rest of the way back to Marcy, leaving Mr. Brownlee at Auburn.

A. Discovery and *Brady* Issues Addressed Prior to Trial

Six months later, Mr. Brownlee was indicted on one count each of assault in the second degree (Penal Law § 120.05 [3]), for causing injury to Officer Buczek, and strangulation in the second degree (Penal Law § 121.12), for strangling Short. He filed pre-trial motions seeking a bill of particulars, discovery, and *Brady* material, among other relief. The particulars sought included "[a] detailed description of the

physical injury allegedly caused by the Defendant" and specification of which result constituting strangulation in the second degree—stupor, loss of consciousness, physical injury, or physical impairment—Mr. Brownlee was alleged to have caused to inmate Short (Appendix ["A"] 23). The discovery demand requested production of, among other items:

- "[a]ny photograph . . . relating to the criminal action or proceeding which was made or completed by a public servant engaged in law enforcement activity" (A 24);

- "[a]ll photographs . . . used or made during the course of the investigation underlying the charges contained in the Indictment, for whatever purpose" (A 25); and

- "[a]ny and all documents, reports, notes, memoranda, or synopses detailing, in any fashion, the results of any physical or mental examination of the defendant . . . or any prospective witness" (A 29).

The motion also asserted Mr. Brownlee's right to discovery of favorable evidence under *Brady v Maryland* (373 US 83 [1963]) and its state and federal progeny (A 34–40), citing to cases holding that "[t]he mandate of *Brady* extends beyond any particular prosecutor's actual knowledge – an individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police" (A 39; *see People v Wright*, 86 NY2d 591, 598 [1995]; *Kyles v Whitley*, 514 US 419, 437 [1995]).

The prosecutor responded to the demand for a bill of particulars by specifying that Mr. Brownlee "is alleged to have choked Brandon Short to the point of

unconsciousness or stupor" (A 55), but she did not expressly disclaim physical injury or impairment as a basis for the strangulation charge. Instead, this portion of Mr. Brownlee's demand, and his request for "[a] detailed description of the physical injury allegedly caused," were "[r]efused as beyond the scope of a bill of particulars" (A 55).

The prosecutor's response to the discovery demand read in its entirety:

> "To date, the People have provided all discoverable material in their possession pursuant to Article 240 of the CPL. The People are aware of, and will comply with, their continuing duty to disclose under this Article. To the extent that there may be photographs, video or audio tapes, property, or other evidence in this case in the custody of the arresting or investigating agency, the People are available, upon the defendant's request, to meet at a mutually convenient time and place to view or inspect such evidence. All other requests are refused as beyond the scope of discovery provided in Article 240."

(A 55–56.) Her response to Mr. Brownlee's *Brady* demand was that she "is presently unaware of any such *Brady* material" (A 58).

At a proceeding held just after the prosecution had filed this response, the court asked Mr. Brownlee's attorney whether any discovery issues required its attention. Counsel acknowledged that "some documents have been provided" but speculated that certain other documents, pertaining to DOCCS "administrative proceedings," existed but had not been provided (9/17/2014 Tr at 4 ["I know that there were some certain determinations that were made as a result of this alleged incident and I don't have anything from those."]). Counsel made clear that he was

not alleging "any willful failure to produce those" documents on the prosecutor's part; rather, he believed that he "may need a subpoena because DOCCS may not turn over voluntarily" (*id*). The prosecutor did not participate in this discussion. At the next appearance, seven weeks later, County Court scheduled trial for June 1, 2015—eight and a half months after the September 17 discovery discussion (11/5/2014 Tr at 4).

B. *Brady* Developments During Trial

On June 1, as the parties were about to begin jury selection, Mr. Brownlee's attorney told the court that the prosecutor had turned over "a fairly sizable chunk of documents late in the week last week," and that in reviewing them, he had learned for the first time of the existence of "photographs which were actually taken on the day of the offense" (6/1–6/3/2015 Tr ["T"] at 9). Upon his further request, the prosecutor had obtained and provided "photocopies" of these photographs that "are basically unusable" (T 9); the prosecutor agreed that they were "black and white and grainy" (T 11). Defense counsel argued that if the original-quality photographs could not quickly be located, "there is a material issue in terms of our ability to go forward . . . because again they are material to the allegations in this case" (T 9).

The prosecutor responded that "the material that was provided to counsel Wednesday of last week was all, to the best of my knowledge, *Rosario* material except for these photographs which, as he indicated, were not in any of the original

police packages. So, I did not know they existed until the middle of last week" (T 10). After receiving defense counsel's emailed request for the originals on Saturday, she had assigned an investigator "to spend today tracking [them] down" (T 10). The court asked her whether the defense had received "[m]edical records" and she answered, "No medical records for his client. There was no medical treatment provided" (T 11). The court then asked: "To the victims?" and the prosecutor answered, "Correct. He does have the medical records of Officer Buczek, who was also injured" (T 11).

The next morning, with jury selection complete, Mr. Brownlee's attorney complained that he had still not received the photographs, which, he emphasized,

> "are important in terms of the defense that we intend to present on behalf of Mr. Brownlee, given that my understanding is that the photographs do not -- that there were no injuries other than a minor scratch to the front of Mr. Short who is allegedly, now looking at the Grand Jury testimony, being strangled with this seatbelt for almost three minutes."

(T 227.) Counsel agreed with the court's characterization of why these photos would be helpful to the defense: "So, they depict the injury and your interpretation is they depict lack of injury?" (T 227).

Defense counsel next asserted that medical records pertaining to Brandon Short, turned over six days earlier, constituted *Brady* material:

> "And on top of that, included in the *Rosario* material, Your Honor, was the first medical record that I received for Mr. Short which verifies that same thing. So, I'm not even going to be able to present that medically

> due to the late disclosure of that *Brady* material. I didn't have time to subpoena the person who reviewed this person, evaluated him . . . . Those are in that packet of *Rosario* material that [the prosecutor] and I talked about. That's not *Rosario*. That was *Brady* material, and that was supposed to be turned over a year ago."

(T 228.) Counsel further alleged that information contained in the prosecution's *Rosario* production—"that Officer Buczek has claimed a disability, almost a permanent disability as a result of all of these injuries and not just his hand" (T 229)—was *Brady* material because "[t]he addition of these injuries not previously claimed" created a

> "motive to lie and motive to fabricate, especially when you look at the way Officer Buczek threw these additional injuries in for the first time in the Grand Jury testimony, again which I received for the first time yesterday. So, there are numerous *Brady* violations here, Your Honor. There is injuries that are alleged outside the scope of the Bill of Particulars, and our ability to present a defense is now hurt because of our inability to follow through with any of this information that could be important to or crucial to the defense that we want to present on behalf of Mr. Brownlee."

(T 229–230.)

The prosecutor first addressed the still-missing photographs. Her investigator reported "that the original JPEG files have been deleted and that they are typically only kept for approximately ninety days" (T 230). She disagreed that the loss of this evidence "somehow infringes or impedes the defendant's ability" to contest the charges, because Brandon Short had stated "I did not receive any injuries to my neck" in a supporting deposition; accordingly, she argued, "there was never any

allegation that he had injury to the neck," and she did not "anticipate that Mr. Short would testify to anything beyond what is in his deposition" (T 231). The court asked her to be specific: "[W]hich aspect of strangulation is he going to testify to?" (T 232) "Loss of consciousness is what I anticipate," she said, but she would not commit to proceeding on that theory only: "If he testifies about physical injury, I anticipate it will be along the lines of what is in the deposition, that there were no injuries to the neck but he had back pain afterward" (T 232).

The prosecutor also justified her eve-of-trial disclosure of the photographs:

> "[T]he People were made aware of the existence of that package and those photographs the middle of last week by defense counsel. My understanding is his client let him know that those occurred, and I would submit that the People did not proceed in bad faith with regard to that. We did not have knowledge of that. And, in fact, the defendant had knowledge that those photographs were taken of him, as well. So, we have turned over everything we have."

(T 232.) Mr. Brownlee's attorney argued in response that the prosecutor's *Brady* obligations were not defined by what was in her physical possession, but extended to materials "in the control of any government agency" (T 233, 235–236). He disagreed that Mr. Brownlee's having been photographed while at Auburn Correctional Facility excused the prosecution's failure to preserve and disclose photos of inmate Short: "He was only there for the ones they took of him. He was not there for the ones of Mr. Short" (T 236). The remedy he sought for the *Brady* violations was dismissal of the indictment (T 237).

1. The court's proposed remedy for the missing photographs

County Court's first response to these *Brady* claims was to propose an adverse-inference instruction as "a way to compromise" the destruction of the color photographs (T 233). But it expressed uncertainty as to whether the photos were "really necessarily *Brady*" (T 233–234). At first the court's uncertainty was derived from its inability to know for sure what the photos depicted: "Do we know the photos don't show an injury?" (T 233). Later, the court seemed to be willing to assume that they did indeed depict the absence of injury,

> "but it doesn't necessarily follow that having the strap around his neck is going to cause an injury. If it was placed in such a way that it was -- let's say the edge of the strap was cutting into his neck. Let's say it was placed flush against his neck. Therefore, it is not necessarily an injury. So, I think one doesn't necessarily flow from the other. The fact that he doesn't have injuries doesn't mean that the strap wasn't around his neck. So, it strikes me as if the argument is going to be made it is not *Brady*. That's where the argument is. It is not necessarily *Brady* because you don't know having the strap around his neck necessarily causes that injury."

(T 238–239.) The prosecutor did not make this argument herself, but the court did adopt it as its ruling: "[I]t's a close call but I will rule that the photographs aren't necessarily *Brady* because it doesn't necessarily follow that having the strap around his neck is going to cause the injury, although it is certainly an argument that could have been made" (T 242).

Despite ruling that the photos were not *Brady* material, the court fashioned a remedy for their spoliation, reasoning that "if it is not *Brady* it in the natural course

of discovery should have been turned over in a timely fashion" (T 242; *see* T 233 [court's comment that it "can't believe they aren't preserved . . . . It was clear that a crime had been committed, and they have to understand that they had a duty to preserve those JPEG files"]). The court resolved to give an adverse-inference instruction:

> "In essence it would be that there were photographs taken and that the People have not produced those photographs and you may draw an inference favorable to the defendant or unfavorable to the People based upon that missing information that may or may not have shown the extent of the injury sustained as a result of the strap being around . . . Mr. Short's neck."

(T 242–243.) The court instructed defense counsel to elicit testimony about the photos from inmate Short, so that this instruction would make sense to the jury (T 243–244). It also instructed the prosecutor to avoid eliciting testimony from Short "about any aspect of a neck injury" (T 238), and to prevent Officer Buczek from testifying that he sustained "permanent disability" or other injuries that the defense had learned of for the first time when his grand jury testimony was turned over as *Rosario* material (T 241–242).

2. The court's proposed remedy for the late-disclosed medical records.

At this point in the discussion, County Court had ruled that the missing photographs were not *Brady* material, but had not made a determination about the medical records. Mr. Brownlee's attorney continued to object that the proposed

remedies were inadequate in light of how the defense was hampered by the late disclosure of those records, and the court ordered an additional remedy:

> Mr. Vitale: [ ] it is not only the lack of, you know, swelling or anything on the neck but, you know, they did a full exam of Mr. Short, and in those medical records which I got last week it shows that he had full range of motion. It appears to me as if there is no petechial hemorrhaging, nothing in the eyes. Again there is not a lot of other factors that would be consistent with the defense Mr. Brownlee wants to present, which is that this individual was not strangled to the point he was unconscious.
>
> The Court: You can ask him all that.
>
> Mr. Vitale: I don't believe that Mr. Short is going to even understand what petechial hemorrhaging is if I ask him that or even the the [*sic*] significance of that or lack of that, especially when it comes to something like this. The diagnosis was that he was alert and oriented, which would go to the lack -- which is consistent with the fact that oxygen was flowing to the brain which is inconsistent.
>
> The Court: The records will come into evidence so you can refer to the records.
>
> Mr. Vitale: I can't get them into evidence because they are not certified, and I haven't been able to -- and because of the late disclosure I haven't been able to subpoena anybody to testify as to those records.
>
> The Court: Well, would there be any -- you can move to have those received in evidence and I can make that ruling and you can object, but I can rule that those records come in. Either that or I grant a continuance to issue a subpoena and get the records in pursuant to 45.18, I think, of the CPLR, I know that. So, I will rule that those records come in. So, you can cross-examine him in a manner you feel is going to be understood by him and we will go from there.

Mr. Vitale: Sure.

(T 244–245.) The court did not expressly rule that the medical records were *Brady* material or that their late disclosure constituted a *Brady* violation.

3. The photographs are located; defense counsel declines the remedy offered for the late-disclosed records.

The parties delivered opening statements and the first prosecution witness, Officer Buczek, was questioned and excused. Officer Samson, the driver of the van, was the second witness. After Samson's direct testimony had been completed but before defense counsel had cross-examined her, the color photographs of Short and Mr. Brownlee, presumed destroyed, were delivered to the courtroom; the prosecutor was "not aware of exactly where they came from" (T 316). Defense counsel agreed to cross-examine Samson first, then examine the photos over the lunch break, and he declined an offer to have Buczek recalled to the stand (T 317–318). After lunch, the court asked defense counsel whether there was "anything you wanted to bring to my attention" after having reviewed the photos, and counsel demurred (T 326).

Brandon Short was the third and final prosecution witness. On cross-examination, defense counsel showed him four photographs, which were received in evidence without objection (A 72–79); Short agreed that they were taken at Auburn, shortly after the incident on the Thruway, and that they depict "a scratch on the front of [his] lower neck" but no marks, bruising, swelling, or bloodshot eyes (T 348–351). Defense counsel also elicited testimony from Short about his physical

condition after the incident, without referencing the medical records or offering them in evidence (T 338–341). The only impairment Short claimed was "difficulty walking," which he experienced because Mr. Brownlee "lifted me up off the seat and he injured my back" (T 340–341).

The jury acquitted Mr. Brownlee of both crimes charged in the indictment, but convicted him of criminal obstruction of breathing or blood circulation (Penal Law § 121.11 [a]), a lesser included offense of strangulation in the second degree. After receiving the verdict, County Court promptly sentenced Mr. Brownlee to a year of jail time, the maximum term authorized, which he had already served in custody awaiting trial.

ARGUMENT

Point I: The Prosecution Violated Its *Brady* Obligations by Failing to Turn Over Medical Records Describing the Absence of Injury to Brandon Short Until Shortly Before Trial.

Brady v Maryland (373 US 83 [1963]) holds "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" (*id.* at 87). "To establish a *Brady* violation, a defendant must show that (1) the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material" (*People v Fuentes*, 12 NY3d 259, 263 [2009], *habeas corpus granted sub nom. Fuentes v Griffin*, 829 F3d 233 [2d Cir 2016]; *Strickler v Greene*, 527 US 263, 281–282 [1999]).

The application of this law to the facts presented here is straightforward. (1) Medical records describing the absence of injury to Brandon Short were favorable to the defense, both directly and as impeachment material. (2) The records were suppressed by the prosecution because they were not turned over until it was too late for defense counsel to effectively use them by securing the trial testimony of their author. (3) Mr. Brownlee was prejudiced by the untimely disclosure of the medical records, because there is at least a reasonable possibility that the jury, which

found him not guilty of both felony charges, would have voted a complete acquittal if his attorney had been able to call a medical witness to highlight the inconsistency between the absence of injury described in the records and Brandon Short's allegation that he was choked into unconsciousness for several minutes.

It would be impossible to fairly recount the parties' contentions and the trial court's rulings on Mr. Brownlee's *Brady* claims without reference to the photographs of Brandon Short, believed to be destroyed but finally obtained and turned over midway through trial. County Court's only explicit ruling on whether any *Brady* violation was committed at all pertained to the photos, not the medical records. This brief has accordingly described the course of events pertaining to the photos, and the argument that follows also addresses the court's *Brady* ruling on the photos for explanatory purposes.

To be clear, however, Mr. Brownlee is not asserting on this appeal that the mid-trial disclosure of the photographs constituted a *Brady* violation for which reversal is required. While the prosecution certainly had a duty under *Brady* to obtain and disclose them far earlier than it did, defense counsel's ability to use them in cross-examining Short dispelled the prejudice caused by their near-suppression, and so the third prong of the test is not satisfied. Mr. Brownlee's appellate argument is that the late disclosure of the medical records, only, constituted a *Brady* violation that prejudiced the defense and requires reversal of his conviction.

This brief first explains why the three components of a *Brady* violation are satisfied, then addresses remedies—why the partial remedy contemplated by the trial court for the records' late disclosure was inadequate to protect Mr. Brownlee's due process rights; why reversal of his conviction, at a minimum, is required; and why the indictment should be dismissed as well.

A. The Records Were Favorable to the Defense.

"Evidence is favorable to the accused if it either tends to show that the accused is not guilty or if it impeaches a government witness" (*People v Garrett*, 23 NY3d 878, 886 [2014] [quotation omitted]). "[T]he favorable tendency of impeachment evidence should be assessed without regard to the weight of the evidence as a whole," and "impeachment evidence may be considered favorable to [a] defendant even if it is not material to the defendant's case" (*id.* [quotations omitted]).

The medical records at issue here were favorable to Mr. Brownlee because they documented the absence of injury to Brandon Short immediately after he claimed to have been strangled. It does not matter, contrary to the prosecutor's argument below, that Short denied sustaining any injury to his neck in a supporting deposition (T 231). Any reasonable person, shown a photograph taken a few hours after its subject claimed to have been "strangled with [a] seatbelt for almost three minutes" to the point that he became unconscious (T 227), would expect to see visible signs of injury to the neck. Similarly, it would be reasonable to expect a

medical evaluation performed in the immediate aftermath of such a serious assault to document its effects—an argument defense counsel made with specific medical examples (T 244–245).

County Court, in ruling that the photographs were not *Brady* material, speculated that "the edge of the [seatbelt] strap" could have been "placed flush against [Short's] neck" in such a way that no visible marks would have been made (T 238–239). Even assuming this reasoning to be sound, it proves only that the photos were something less than irrefutable evidence of innocence, which is not the standard for determining whether a piece of evidence is favorable to the defendant. If Mr. Brownlee was accused of murder by poisoning, and a toxicology exam performed shortly after death revealed no evidence of any harmful substance, that report would not necessarily exonerate him—the prosecution might still be able to persuade a fact-finder that the victim was poisoned, even if their theory (like that of a seatbelt strangulation that leaves no trace) would not satisfy Occam's razor.* But they could not seriously argue that the toxicology report would not have to be disclosed as *Brady* material. The court's ability to imagine a scenario in which the photos would not conclusively establish Mr. Brownlee's innocence does not displace their favorable character.

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* "[T]he simplest of competing theories should often be preferred" (*United States v Santana-Dones*, 920 F3d 70, 83 [1st Cir 2019]).

Short's medical records are favorable to the defense because, as counsel argued, they "verif[y] that same thing" (T 228)—the absence of signs of injury one would expect the medical examination of a recently strangled person to reveal. The specific report in question, defense counsel claimed, "shows that he had full range of motion" and "no petechial hemorrhaging, nothing in the eyes" (T 244). "Having failed to dispute" this characterization of the report, "the People have impliedly conceded" its accuracy (*People v Wright*, 86 NY2d 591, 596 [1995]). And it would be more than reasonable for a fact-finder to conclude, from the absence of these indicia of injury, that Short was not strangled at all. Indeed, this Court has described similarly absent evidence as "compelling proof" that a defendant, convicted of falsely reporting an assault involving strangulation, "was not attacked as he had claimed" (*People v Barto*, 144 AD3d 1641, 1642 [4th Dept 2016] ["although defendant claimed to have been strangled with a ligature for approximately 30 seconds, there were no ligature marks on his neck and no petechial hemorrhage, which, according to the People's expert, one would expect to see on a person who had been attacked in that manner"]; *accord People v Oddone*, 22 NY3d 369, 374–377 [2013]).

B. The Records Were Suppressed.

The defendant's right to discover, and the prosecution's duty to disclose, extends to all favorable evidence that is "within the prosecution's custody,

possession, or control" (*Garrett*, 23 NY3d at 886)—and "[w]hat constitutes 'possession or control' for *Brady* purposes 'has not been interpreted narrowly' " (*id.* at 886–887, quoting *People v Santorelli*, 95 NY2d 412, 421 [2000]). The Court of Appeals, like the Supreme Court, has imposed on "the individual prosecutor" "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police" (*Garrett*, 23 NY3d at 887, quoting *Kyles v Whitley*, 514 US 419, 437 [1995]). "[W]hen police and other government agents investigate or provide information with the goal of prosecuting a defendant, they act as 'an arm of the prosecution,' and the knowledge they gather may reasonably be imputed to the prosecutor under *Brady*" (*Garrett*, 23 NY3d at 887, 888). The " 'duty to learn' . . . has generally been held to include information that directly relates to the prosecution or investigation of the defendant's case" (*id.* [collecting examples]).

The trial prosecutor in this case demonstrated that she was not aware of these principles. On the first day of trial, she told County Court that "the People were made aware of the existence" of the disputed evidence "the middle of last week by defense counsel" (T 231–232). In other words, she took the position that even after she had turned over voluminous discovery to the defense, less than one week before trial and ten months after indictment, she—and by extension "the People"—were not chargeable with knowledge of the contents of what she had produced until Mr. Brownlee's attorney called her attention to it (T 10 ["(T)he material that was

provided to counsel Wednesday of last week was all, to the best of my knowledge, *Rosario* material except for these photographs which, as he indicated, were not in any of the original police packages. So, I did not know they existed until the middle of last week."]).

Garrett, *Kyles*, and other federal and New York cases make clear that this is no defense to a *Brady* claim. "[R]eliance . . . on the trial prosecutor's lack of personal knowledge . . . is unavailing" (*Wright*, 86 NY2d at 598), because "negligent, as well as deliberate, nondisclosure may deny due process" (*id.*, quoting *People v Simmons*, 36 NY2d 126, 132 [1975]). The no-personal-knowledge argument is especially misplaced here because the prosecutor affirmatively represented that she could and would arrange access, upon request, to "photographs" and "other evidence . . . in the custody of the arresting or investigating agency" (A 55). If the photos, or indeed the medical report, had in fact been destroyed, Mr. Brownlee could persuasively have argued that the prosecution "prejudiced [his] ability to obtain the evidence before trial by misrepresenting that it had been preserved and would be available to him" (*People v Bryce*, 88 NY2d 124, 129 [1996]; *see id.* at 130 [rejecting prosecution's counter-argument that "defendant's inability to obtain the evidence was caused by his own delay"]). And it is irrelevant whether defense counsel availed himself of the opportunity to review discovery in the prosecutor's office, because "the People unquestionably have a duty to disclose exculpatory material in their control" (*People*

v Brown, 67 NY2d 555, 559 [1986]), and that duty it is not satisfied merely by inviting defense counsel to try to find *Brady* material for himself within even a small file.

Nor can the prosecution defend their failure to timely produce this favorable evidence on the ground that "they themselves could not obtain" it from federal or out-of-state agencies or officials (*cf. Santorelli*, 95 NY2d at 422)—after all, they *did* in fact obtain it. And whereas there was at least some explanation for why the photographs were not turned over until trial was underway, the prosecutor never claimed, and there is no reason to believe, that the medical report describing the absence of injury to Brandon Short was held back from her by police investigators. She failed to turn it over as *Brady* material because she was unaware that it was favorable to the defense, and further unaware that it was her duty to learn that it was.

Finally, the records were suppressed for *Brady* purposes despite their disclosure several days prior to trial. Defense counsel persuasively explained why the late disclosure would prejudice his client: it was too late to arrange for the report's author or another expert witness to testify at trial, and Short himself did not have the necessary basis of knowledge for counsel to establish through him, for instance, "what petechial hemorrhaging is" and whether one would expect to see it in a person who had recently been strangled to the point of unconsciousness for several minutes (T 228, 244–245).

In these circumstances, it cannot be said that Mr. Brownlee "[was] given a meaningful opportunity to use the allegedly exculpatory material to cross-examine the People's witnesses or as evidence during his case" (*People v Cortijo*, 70 NY2d 868, 870 [1987]; *cf. e.g. People v Hines*, 132 AD3d 1385, 1385 [4th Dept 2015]). To hold that the records were not suppressed, on the theory that a hastily-prepared cross-examination of Short himself was all that was necessary to obtain their benefit, would unfairly minimize the ability of a zealous and capable defense counsel to present his or her own case. The proper analysis requires consideration of how valuable the records might have become if Mr. Brownlee's attorney had been provided the opportunity "to develop this line of defense further by obtaining in time for trial a [medical] opinion that was obtainable only after the belated discovery of the withheld" records (*Fuentes v Griffin*, 829 F3d 233, 252 [2d Cir 2016]).

C. There Is a Reasonable Possibility That Mr. Brownlee Would Have Won a Complete Acquittal If the Records Had Been Turned Over in Time for His Attorney to Make Effective Use of Them.

The last of the three "essential components of a *Brady* violation" is that "prejudice must have ensued" from the suppression of favorable evidence (*Strickler*, 527 US at 280, 282). The prejudice component is also known as "materiality": "prejudice arose because the suppressed evidence was material" (*Fuentes*, 12 NY3d at 263 [paraphrasing *Strickler*'s third prong]). "In New York, where a defendant makes a specific request for a document, the materiality element is established

provided there exists a 'reasonable possibility' that it would have changed the result of the proceedings" (*Garrett*, 23 NY3d at 891–892, quoting *Fuentes*, 12 NY3d at 263).

Although New York courts refer almost uniformly to "*Brady* material" and "*Brady* violations," the New York Constitution's protection of the defendant's due process right to disclosure of favorable evidence is not coterminous with that of the federal Constitution. The Supreme Court has held that the federal Due Process Clause mandates reversal of a conviction due to a *Brady* violation only if the defendant can show a "reasonable probability" of a different verdict—one "sufficient to undermine confidence in the outcome"—and that this standard is appropriate in (or at least "sufficiently flexible to cover") all cases, regardless whether the defendant made a specific request for the *Brady* material at issue, a general request for all material to which he was entitled under *Brady*, or no request at all (*United States v Bagley*, 473 US 667, 681–682 [1985]).

The Court of Appeals, however, has declined to adopt *Bagley* as a matter of state constitutional law, reasoning that "[w]here the defense itself has provided specific notice of its interest in particular material, heightened rather than lessened prosecutorial care is appropriate" (*People v Vilardi*, 76 NY2d 67, 77 [1990]). Applying a "reasonable possibility" standard in specific-request cases "encourages compliance" by prosecutors with their *Brady* obligations, while "a backward-

looking, outcome-oriented standard of review that gives dispositive weight to the strength of the People's case clearly provides diminished incentive for the prosecutor, in first responding to discovery requests, thoroughly to review files for exculpatory material, or to err on the side of disclosure where exculpatory value is debatable" (*id.*).

The facts of this case suggest that the prosecutor's incentive to properly identify and turn over *Brady* material was not felt as strongly as it should have been. Fortunately, application of the "reasonable possibility" standard compels a reversal that ought to underline the importance of heeding the *Vilardi* Court's warnings in future cases: "[S]uppression, or even negligent failure to disclose, is more serious in the face of a specific request in its potential to undermine the fairness of the trial" (76 NY2d at 77). Mr. Brownlee is entitled to the more favorable standard because his pre-trial motions specifically requested disclosure of any photographs "relating to" the incident or "used or made during the course of the investigation," as well as "[a]ny and all documents . . . detailing, in any fashion, the results of any physical or mental examination of the defendant . . . or any prospective witness" (A 24–25, 29; *see People v Scott*, 88 NY2d 888, 891 [1996] ["That the defense did not know the precise form of the document does not alter the fact that the request provided particularized notice of the information sought."]).

The jury's verdict—which acquitted Mr. Brownlee of the assault charge based

on his struggle with Officer Buczek, as well as the felony strangulation charge—shows that this was a very close case. Buczek, Samson, and Short all testified that Short was strangled into unconsciousness, but the jury rejected that testimony when it convicted Mr. Brownlee only of a lesser included offense that requires no degree of injury or impairment at all. This verdict "implies that it did not wholly believe or disbelieve" any of the People's witnesses (*People v Hunter*, 11 NY3d 1, 4 [2008]). The Court of Appeals in *Hunter*, evaluating the proof in a mixed-verdict case, concluded that the suppressed *Brady* material "would have added a little more doubt to the jury's view of the complainant's allegations," and that, even under the more demanding standard, it was "reasonably probable that a little more doubt would have been enough" (*id.* at 6).

The same is true here. The jury declined to credit the testimony of all three witnesses that Short lost consciousness. If it had also heard testimony from the person who evaluated Short that day, or another competent medical expert, about the indicia of injury that should have been, but were not, present, there is at least a reasonable possibility that its skepticism of the degree of injury would have extended just slightly further, to skepticism that Mr. Brownlee placed a seatbelt around Short's neck for any length of time (*see Fuentes*, 829 F3d at 249–252).

D. The Conviction Should Be Reversed and the Indictment Dismissed.

When the prosecution's failure to disclose material to which the defense is

entitled, under *Brady* or by statute, is discovered before a verdict has been rendered, "[i]t is for the trial court, in the exercise of its discretion, to choose a remedy" (*People v Williams*, 7 NY3d 15, 19 [2006]), and the trial court's decision "is not to be disturbed unless it is determined that there has been an abuse of that discretion" (*People v Jenkins*, 98 NY2d 280, 284 [2002]). The "reasonable possibility" and "reasonable probability" standards, on the other hand, govern the determination by an appellate or post-conviction court whether reversal of a conviction already obtained is required to remedy a *Brady* violation.

Here, the trial court ruled that the photographs depicting the absence of injury to Brandon Short were not *Brady* material, but it also announced that it would give an adverse-inference instruction as a sanction for the photos' (presumed) spoliation. When they were discovered after proof had already begun, the plan for the adverse-inference instruction seems to have been abandoned without comment or protest—it would not, after all, have made any sense to the jury. As for Short's medical records, the trial court never made an express ruling whether they were *Brady* material, but it did order a remedy: it promised defense counsel that it would admit those records into evidence under the business records exception to the prohibition against hearsay, notwithstanding counsel's observation that they were not admissible as business records because they were not certified.

The trial court's proposed remedy of admitting the medical report regardless

of evidentiary obstacles was not sufficient to overcome the prejudice to Mr. Brownlee of its delayed disclosure. As defense counsel maintained from the outset, the exculpatory value of that document was not intrinsic, but required work on his part to be properly exploited. Only a qualified witness could provide testimony that would impress the significance of the report's findings upon the jury, and counsel had no realistic chance of securing that testimony at trial because the report was withheld from him for so long. The fact that he declined the trial court's offer to admit the report into evidence is an indication not that Mr. Brownlee suffered no prejudice, but that the remedy offered was of little value. Just as the prosecution "is entitled to prove its case free from any defendant's option to stipulate the evidence away" (*Old Chief v United States*, 519 US 172, 189 [1997]), the defendant has a right (of constitutional dimension, moreover) to present exculpatory and impeaching evidence in the manner his counsel deems most likely to sway a jury. "[T]he offering party's need for evidentiary richness and narrative integrity in presenting a case" (*id.* at 183) cannot be displaced by a court's instruction to present it some other way, so as to more conveniently remedy a problem of the opposing party's creation.

But this Court need not determine whether the trial court's choice of remedies for discovery (or possibly, combined discovery and *Brady*) violations was an abuse of discretion, because it can more accurately perform the "necessarily fact-specific" task of evaluating the impact of the disputed evidence on the course of proceedings

with "the benefit of a full trial record" (*People v Cardwell*, 78 NY2d 996, 998 [1991] [quotation omitted] [explaining why appellate courts should embrace, not reject, the benefit of hindsight in determining whether a defendant was prejudiced by the denial of a motion for severance]). Mr. Brownlee contends that application of the three-prong *Brady* test compels the conclusion that a *Brady* violation occurred, and if the Court agrees on all three points—that evidence that was both favorable and material was suppressed—it has no discretion to order a remedy short of reversal.

The Court should, however, exercise its discretion to order a further remedy: that the indictment be dismissed as well. Dismissal is appropriate here because Mr. Brownlee has already served the maximum jail sentence that could be imposed for conviction of criminal obstruction of breathing or blood circulation, a misdemeanor, which is all that remains of the indictment after the jury's acquittals (*see e.g. People v Dreyden*, 15 NY3d 100, 104 [2010] [ordering reversal of conviction for criminal possession of a weapon in the fourth degree and dismissing accusatory instrument "since defendant has already served his sentence"]).

CONCLUSION

The judgment of conviction should be reversed and the indictment dismissed.

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Respectfully submitted,

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CONCLUSION

The Judgment of conviction should be reversed and the indictment dismissed.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: September 9 2020