PETITION APPENDIX TABLE OF CONTENTS

Order

Michigan Supreme Court
Lansing, Michigan

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

June 14, 2024

166366

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v SC: 166366
COA: 364083
Oakland CC: 2019-272265-FC

FLOYD RUSSELL GALLOWAY, JR.,
Defendant-Appellee.
_____/

On order of the Court, the application for leave to appeal the September 21, 2023 judgment of the Court of Appeals is considered, and it is DENIED, because

we are not persuaded that the questions presented should be reviewed by this Court.

VIVIANO, J. (*dissenting*).

I dissent from the decision to deny leave. This case raises two jurisprudentially significant issues that this Court should consider. First, whether the exclusionary rule should apply here in light of the civil and criminal liability that are available for the alleged officer misconduct at issue. It is well established that "[t]he suppression of evidence should be used only as a last resort." *People v Frazier*, 478 Mich 231, 247 (2007); see also *Herring v United States*, 555 US 135, 140 (2009) ("[E]xclusion has always been our last resort, not our first impulse[.]") (quotation marks and citation omitted). "Application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served, that is, where its deterrence benefits outweigh its substantial social costs." *Frazier*, 478 Mich at 249 (quotation marks, brackets, and citations omitted). The Supreme Court has "never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence." *Herring*, 555 US at 141 (quotation marks and citation omitted). Rather, " '[t]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs.' " *Id.*, quoting *Illinois v Krull*, 480 US 340, 352-353 (1987) (second alteration in original).[1]

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[1] As the Court of Appeals recognized, "[i]f a defendant's right to due process has been violated, then the next question is what remedy should be imposed? The remedy depends critically on the

Michigan statutes provide significant civil and criminal liability that deter a police officer from sharing confidential information gained from a polygraph examiner as a result of a polygraph examination, which is the alleged misconduct at issue here.[2]

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violation and context." *People v Joly*, 336 Mich App 388, 400 (2021); see also *People v Galloway*, unpublished per curiam opinion of the Court of Appeals, issued September 21, 2023 (Docket No. 364083), p 7 ("Having found a violation of due process, the question of the appropriate remedy remains."), citing *Joly*, 336 Mich App at 400.

[2] I also note that the polygraph profession is heavily regulated by a statute that proscribes the very conduct at issue in this case and contains several of its own enforcement mechanisms. MCL 338.1728(2) provides in part:

> Any principal, manager or employee of a licensed examiner who . . . divulges or otherwise discloses to other than clients . . . any information acquired by him or them during employment by the client *is guilty of a misdemeanor*, and shall be *subjected to immediate suspension of license* by the [State Board of Forensic Polygraph Examiners] and *revocation of license upon satisfactory proof of the offense*. [Emphasis added.]

This provides for criminal sanctions against a polygraph examiner, and immediate suspension and subsequent revocation of his or her license, when the statute is violated. MCL 338.1720 provides the board investigatory authority and, upon revocation, MCL 338.1721 even authorizes the board to seize an examiner's license if the examiner refuses to surrender it. (The board was abolished in 2007, but its functions were transferred to what was then the Department of Labor and Economic Growth and is now the Department of Licensing and Regulatory Affairs. See Executive Order No. 2007-24 and Executive Reorganization Order No. 2011-4.) These provisions are designed to deter polygraph examiners from disclosing and police officers from receiving privileged information, as occurred in this case, which significantly reduces the likelihood that a police officer would even be put in the

Specifically, MCL 338.1728(3) of the Forensic Polygraph Examiners Act, MCL 338.1701 *et seq*., provides that "[a]ny recipient of information, report or results from a polygraph examiner, except for the person tested, shall not provide, disclose or convey such information, report or results to a third party," and MCL 338.1729 provides that "a person violating this act . . . is guilty of a misdemeanor." Those statutory provisions expose an officer who conveys confidential information gained from a polygrapher to criminal liability, which is certainly a strong deterrent and reduces the incremental deterrence that the exclusionary rule would provide. Also, if an officer's conveyance of such information amounts to a due process violation, as the Court of Appeals panel held here, then the officer may be subject to § 1983 claim. See *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 195 (2008) ("42 USC 1983 is the all-purpose federal civil rights statute, providing a remedy for violations of the federal constitution and other federal law."). The Supreme Court has considered exposure to civil liability from a § 1983 claim in holding that the incremental deterrent effect of suppressing evidence that is discovered following knock-and-announce violations did not warrant suppression. *Hudson v Michigan*, 547 US 586, 598 (2006) ("As far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts."); see generally *id*. at 595-599. An officer's exposure to civil and criminal liability for engaging in the type of conduct at issue here would

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situation of having to decide between conveying probative, yet confidential information and respecting that privilege by not conveying the information.

appear to significantly diminish the incremental deterrence benefit of suppression in this case.

Against that marginal benefit, suppression carries substantial societal costs. The Court of Appeals affirmed the trial court's suppression of video footage that showed defendant near the victim's house on the night that she disappeared. This evidence is both reliable and probative, and its suppression will certainly impair the jury's truth-finding ability. Thus, I conclude the Court should grant leave to weigh the incremental benefit of suppression against the substantial societal costs in order to determine whether the exclusionary rule should apply in this case.

Second, this Court should consider whether there is a conflict between *Brady v Maryland*, 373 US 83 (1963), and *Joly*, 336 Mich App 388, lv den 508 Mich 971 (2021). Under *Brady*, if a government actor outside the investigative team for a particular case possesses material *exculpatory* information and fails to disclose it, there is no constitutional violation. By contrast, under the current Michigan regime created by *Joly*, a relatively recent Court of Appeals opinion, if a government actor outside the investigative team possesses *inculpatory* information but obtained it from a privileged source from which prejudicial evidence is collected, there is a constitutional violation and suppression ensues. The instant case involves a high-profile murder investigation. To the extent *Joly* is to be embraced under the facts of the instant case, such a determination should come from this Court. Likewise, only this Court can distinguish or limit *Joly*, or otherwise harmonize it with *Brady*.

For those reasons, I respectfully dissent from the Court's decision to deny leave.

ZAHRA, J., joins the statement of VIVIANO, J.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 14, 2024 *Larry S. Royster*
Clerk

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

UNPUBLISHED
September 21, 2023

v

No. 364083
Oakland Circuit Court
LC No. 2019-272265-FC

FLOYD RUSSELL GALLOWAY, JR.,
Defendant-Appellee.

Before: GADOLA, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

In this interlocutory appeal, the prosecution appeals by leave granted[1] an order suppressing evidence derived from a tip that was communicated to the Farmington Hills Police Department in violation of

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[1] *People v Galloway*, unpublished order of the Court of Appeals, entered February 9, 2023 (Docket No. 364083).

defendant's attorney-client privilege and right to due process. We affirm.

Defendant is charged with first-degree premeditated murder of Danielle Stislicki. Stislicki was last seen on December 2, 2016, leaving her workplace with defendant, a former security guard for the building, in the passenger seat of her vehicle. Stislicki did not attend a previously scheduled engagement that evening and has not been heard from since. Stislicki's parents reported her missing after they discovered her vehicle at her apartment parked in its normal spot the next day, along with her purse, identification, and credit cards.

Gary Mayer was the chief of police for the Troy Police Department at all times relevant to this case. On the evening of December 9, 2016, Mayer received a phone call from his long-time friend Jim Hoppe. Hoppe, a former FBI agent, said he had information about a security guard and a homicide, but could not share it unless his identity was kept confidential. Because of the substantial media attention surrounding Stislicki's disappearance, Mayer understood which case Hoppe was referring to. Mayer agreed to do his best to maintain Hoppe's confidentiality. Although Hoppe did not explain how he acquired the information at the time of this phone call, Mayer assumed Hoppe was sharing information Hoppe learned in his role as a polygraph operator for defense attorneys. After ending his call with Hoppe, Mayer contacted the Farmington Hills Police Department (FHPD) and relayed Hoppe's information to FHPD chief of police Charles Nebus. Mayer insisted that his source could

not be identified and did not share anything about the source with Nebus.

Without identifying Mayer's role in relaying the tip, Nebus recorded the following information on a tip sheet:

> A caller said the security guard did it. He drove the victims [sic] car from his house in Berkley to her apt., then walked to Tim Horton's at 10 and Halsted where he called Shamrock cab or something that sounds like Shamrock where he received a cab ride to within walking distance from his work where his car was parked. There should be evidence on or in the victims [sic] car. The subject threw the victims [sic] keys in a grassy area by the freeway while walking to Tim Horton's. The fitbit should be near the keys. The victims [sic] cell phone was placed in the trash inside Tim Horton's. The victims [sic] body should be inside a beige and brown comforter. Upon further questioning, the caller had no further information and wished to remain anonymous.

FHPD personnel investigated the tip that very evening and recovered Stislicki's keys and Fitbit, as well as surveillance footage of defendant's movements on the night of Stislicki's disappearance.

The lengthy evidentiary hearing focused primarily on what various officers and prosecutors knew regarding the source of the tip at any given time throughout the investigation. Although the Oakland County Prosecutor's office became aware that the tip likely came from a privileged source as early as

January or February 2017, no steps were taken to mitigate the breach of attorney-client privilege, nor did the FHPD attempt to identify Mayer's source. The issue was all but ignored until the Attorney General took over the case in early 2019. Special assistant attorney general Jaimie Powell Horowitz recognized that the identity of the tipster would present a problem for the prosecution and began to question Mayer about the tipster. When Mayer continued to refuse to name his source, Powell Horowitz initiated investigative subpoena proceedings and obtained an order compelling Mayer to reveal his source. Mayer was left with no choice but to name Hoppe and acknowledge that Hoppe was a polygraph operator for the attorney representing defendant in a separate matter.

The trial court determined that the government violated defendant's right to due process and that suppression of the evidence derived from the tip was necessary. It reasoned that Mayer was objectively aware of an attorney-client relationship, and Nebus was aware or should have been aware based on the totality of the circumstances. It also found that the government intentionally intruded into the privileged relationship by using the information shared by Hoppe to further its investigation, and that this intrusion caused defendant actual and substantial prejudice. The prosecution now challenges the trial court's decision to suppress the evidence.

We review de novo both a trial court's suppression of evidence and underlying questions of constitutional law. *People v Moorman*, 331 Mich App 481, 484-485; 952 NW2d 597 (2020). The trial court's factual findings are reviewed for clear error, which exists if this

court is left with a definite and firm conviction that the trial court made a mistake. *Id*. at 485.

This Court recently had cause in *People v Joly*, 336 Mich App 388; 970 NW2d 426 (2021), to consider the appropriate legal framework for determining whether breach of a defendant's attorney-client privilege rises to the level of violating due process. *Joly* acknowledged that the attorney-client privilege is firmly established in both common law and legislation, but is not a constitutional right. *Id*. at 397-399. Even so, caselaw across the country has long recognized that an egregious violation of the attorney-client privilege might be part of a broader claim that the government has violated a defendant's due process rights. *Id*. at 399-400. To determine if a breach of the attorney-client privilege rises to that level, *Joly* adopted the reasoning in *United States v Voigt*, 89 F3d 1050 (CA 3, 1996), which held that "only a finding of 'outrageousness' would warrant exclusion of evidence for a violation of due process." *Joly*, 336 Mich App at 401, 404. To establish outrageousness, the defendant must prove " '(1) the government's objective awareness of an ongoing, personal attorney-client relationship between [the attorney] and the defendant; (2) deliberate intrusion into that relationship; and (3) actual and substantial prejudice.' " *Id*. at 401, quoting *Voigt*, 89 F3d at 1067 (alteration in original). In reviewing this issue, this Court must exercise appropriate judicial restraint before reaching the extraordinary conclusion that the government action at issue was so offensive that it violated the defendant's constitutional right to due process. *Joly*, 336 Mich App at 404. See also *Voigt*, 89 F3d at 1065 (observing that due-process claims

premised on outrageous investigative techniques are only viable in the most extreme cases).

Concerning the first prong of the *Voigt* test, the prosecution maintains that none of the FHPD officers involved in the investigation had actual knowledge or reason to believe that the tip originated from a privileged source at the time they acted on the information and discovered incriminating evidence. In support of this position, the prosecution argues that Mayer's actions cannot be attributed to the government because he took no part in the investigation—he was distinct from the investigating agency and, according to the prosecution, none of his actions regarding the tip differed from what a private citizen could have done in the same circumstances. Like the trial court, we reject the prosecution's attempt to exclude Mayer's actions from our due-process analysis.

Regardless of the fact that Mayer was not affiliated with the FHPD, we must consider the totality of the circumstances and, thus, cannot simply ignore the fact that Mayer was a high-ranking law-enforcement officer with many decades of experience and at least some knowledge of attorney-client privilege. See *Joly*, 336 Mich App at 399 (noting that courts look to the totality of the circumstances in analyzing whether failure to observe fundamental fairness amounts to violation of due process). Mayer testified that he understood that communications between an attorney and client could not be shared and that the privilege extended to professionals employed by the attorney. Thus, assuming Mayer recognized that Hoppe acquired the information in the course of his work as a private polygraph operator for the defense, Mayer

would be aware that use of Hoppe's tip in the investigation would unlawfully breach defendant's attorney-client privilege. Such knowledge clearly distinguishes Mayer from the average citizen who might unwittingly share privileged information.

Moreover, we infer that the nature of Mayer's employment was a key factor in Hoppe's decision to entrust Mayer with the privileged information. Mayer testified that Hoppe was clearly emotional and conflicted about his disclosure, but felt the need to share the information because of an expected snowstorm. The only rational conclusion that can be drawn from these facts is that Hoppe was not telling Mayer what he learned during defendant's polygraph examination because of their longstanding friendship, but because Mayer was in a position to do something to preserve important evidence from getting lost or destroyed from the snow. This again distinguishes Mayer from the average citizen.

While we recognize that Mayer had no formal affiliation with the investigation, the prosecution's reliance on caselaw rejecting *Brady*[2] claims premised on evidence possessed by "uninvolved" government agencies is simply unavailing. The prosecution directs this Court's attention to *United States v Avellino*, 136 F3d 249, 255 (CA 2, 1998), wherein the federal court reasoned that

> knowledge on the part of persons employed by a different office of the government does not in all instances warrant the imputation of

[2] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

> knowledge to the prosecutor, for the imposition of an unlimited duty on a prosecutor to inquire of other offices not working with the prosecutor's office on the case in question would inappropriately require us to adopt a monolithic view of government that would condemn the prosecution of criminal cases to a state of paralysis. [Quotation marks and citation omitted.]

This passage makes clear why the same reasoning cannot be applied here. This is not a case in which the FHPD is being charged with knowledge or misconduct of a person without any known connection to the investigation—the very problem is that Mayer *was* involved in the investigation. He intentionally interjected himself into the matter when he conveyed Hoppe's tip to the FHPD. Mayer's involvement was certainly not a mystery to Nebus, the chief of the investigating agency and recipient of the second-hand tip, at any time.

The trial court did not clearly err by finding that Mayer had objective awareness of an ongoing attorney-client relationship. When he received the call from Hoppe, Mayer knew that Hoppe worked as a polygraph operator. Although Mayer initially testified that he was unsure whether Hoppe had already retired from the FBI at the time of the call, he later conceded that he knew Hoppe was then working for defense attorneys. It is immaterial that Hoppe did not expressly tell Mayer how he acquired the information, because the objective nature of the first *Voigt* prong does not require actual knowledge. See *Voigt*, 89 F3d at 1069 (reasoning that the due process claim failed

when record was devoid of evidence that the government "was or *should have been* aware of a personal attorney-client relationship") (emphasis added). See also *Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 47-48; 698 NW2d 900 (2005) (explaining that objective knowledge standard is implicated by "knew or should have known" language). Coupled with Hoppe's unexplained insistence on confidentiality, Mayer clearly should have known that Hoppe was sharing information he learned while acting as an agent of defense counsel. Mayer, at minimum, had objective awareness of the attorney-client relationship all along.

On the other hand, the trial court's determination that Nebus likewise had objective awareness is more tenuous. The trial court's finding regarding Nebus was premised on four factors: (1) Nebus recognized that Mayer's call regarding the "confidential" tip was unusual and urgent; (2) Nebus did not follow standard protocol for preserving the information when he excluded Mayer's name from the tip sheet and simply labeled the tip as anonymous; (3) Nebus later sought legal counsel regarding the tip; (4) and Nebus felt pressure to disclose Mayer's involvement to the Oakland County Prosecutor's office, thereby demonstrating "he knew what he was doing was wrong."

Confidential tips are not unusual in criminal investigations, and the government is often permitted to conceal the identity of confidential informants. See *People v James*, 327 Mich App 79, 90-91; 932 NW2d 248 (2019) (discussing that probable cause may be based, in part, on information from a confidential informant); *People v Henry (After Remand)*, 305 Mich

App 127, 156; 854 NW2d 114 (2014) (stating that the government is not obligated to identify confidential informants). There are any number of reasons a tipster might wish to remain unknown. To name but a few, the tipster might fear retribution, feel a degree of guilt about implicating a loved one, believe he or she might be implicated in the crime, or wish to avoid being labeled a "snitch." Without knowledge that the source was a private polygraph operator, the request for anonymity was not inherently suggestive of an ongoing attorney-client relationship or other form of privilege. In our view, the facts cited by the trial court imply only that Nebus suspected the tip was privileged. But there is a significant distance between mere suspicion that there was something suspicious about the tip and objective awareness that the tipster was an agent of defense counsel. Nonetheless, the trial court did not err with respect to its analysis of Mayer's knowledge, and that was sufficient to establish the first prong of the *Voigt* test.

The next prong of the *Voigt* test requires deliberate intrusion into the attorney-client relationship. *Joly*, 336 Mich App at 401. We agree with the trial court that the record demonstrates such deliberate intrusion. As to this issue, the underlying circumstances are analogous to *Joly*. In that case, the Jackson Police Department was investigating a suspected arson after the defendant's home was intentionally set on fire. *Id.* at 392. The defendant retained the Abood Law Firm as defense counsel, and the firm proactively advised the prosecutor's office of its representation before charges were filed. *Id.* When defendant's tablet computer was inspected by the Michigan State Police (MSP) forensic laboratory, a technician discovered an

e-mail between the defendant and an employee of the Abood Law Firm in which the people to whom the defendant had given incriminating evidence were identified. *Id*. at 393. Although the e-mail, on its face, appeared to be protected by attorney-client privilege, the technician provided it to the investigating detective, who then interviewed the people named in the e-mail and recovered the incriminating evidence. *Id*. Relative to second part of the *Voigt* test, this Court explained:

> [I]t was not the apparent *inadvertent* discovery of the privileged e-mail that is particularly troublesome here, but rather what happened after the discovery. After learning of the privileged e-mail, the detective did not attempt to segregate the e-mail, turn the case over to another detective or a different law-enforcement office, seek guidance from the court officer who signed the warrant, or work with the prosecutor to develop some other measure to separate the investigation from the privileged information that the detective learned from reading the e-mail (and could not realistically unlearn). Instead, the detective doubled down on the breach and used the privileged information to further his investigation of defendant. And the information in the e-mail was not incidental or only marginally material, but instead provided the key information—the location—that the detective did not previously have about the lawnmower and gas can. There was, in other words, a direct link between the detective's reading of the e-mail and his retrieval of both pieces of evidence. This can only be characterized as a deliberate intrusion

> into the substance of the attorney-client relationship. [*Id*. at 405-406.]

The same troubling response occurred in this case. Despite objective awareness that Hoppe's tip was protected by attorney-client privilege, Mayer immediately turned the privileged information over to the investigating agency with the expectation that the FHPD would investigate the tip and recover important evidence before it could be lost or destroyed by inclement weather. This is precisely what occurred; Nebus rallied his troops, the locations identified in the tip were searched, the FHPD found Stislicki's keys and Fitbit, and evidence regarding defendant's movements on the night of her disappearance was discovered. Like in *Joly*, this can "only be characterized as deliberate intrusion into the substance of the attorney-client relationship." *Id*. at 406.

The prosecution emphasizes that the FHPD had no reason to believe the tip was privileged when it followed-up on the information and again urges this Court not to impute Mayer's knowledge or conduct to the FHPD. But Mayer's involvement is the precise problem in this case. *Joly* theorized that a government actor who comes across privileged information should take mitigating steps like segregation of the information, transferring the case to a different investigator or office, or seeking guidance from a court officer or prosecutor. *Id*. at 405. Here, Mayer would not need to take such measures to avoid deliberate intrusion into defendant's attorney-client relationship. Had he simply held his silence, the FHPD's investigation would have continued in its normal course, free of any taint from Hoppe's disclosure of privileged

information. But like the detective in *Joly*, Mayer did the exact opposite and instead perpetuated the breach of privilege. Mayer gave the information to the FHPD to further its investigation in disregard of defendant's rights. Regardless of the fact that Mayer's own police department was otherwise uninvolved in the investigation, the plain reality is that a government actor recognized a breach of the attorney-client privilege and then took intentional steps to exploit it and thereby obtain incriminating evidence.

Although the prosecution does not challenge the trial court's finding regarding the final part of the *Voigt* test, it is readily apparent that the trial court did not err by concluding that the government misconduct resulted in actual and substantial prejudice to defendant. See *id*. at 401. While it is true that defendant was already suspected in Stislicki's disappearance before the tip came in on December 9, 2016, that was principally because he was the last person seen with her, there was evidence suggesting that she was in his home, and defendant appeared nervous and lied about his whereabouts when he was questioned. *People v Galloway*, 335 Mich App 629, 634; 967 NW2d 908 (2020).[3] Investigation of the privileged tip led to discovery of critical evidence that defendant tried to dispose of Stislicki's belongings shortly after she was last seen and conceal doing so, greatly strengthening the case against him. The tip and derivative evidence was

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[3] This was a previous appeal in this case regarding whether the prosecution could introduce evidence of defendant's prior conviction to prove motive, identity, or a common plan. This Court held that defendant's prior conviction could not be introduced because it was too dissimilar to the instant charge and thus would constitute inadmissible character evidence.

also incorporated in numerous search warrant affidavits, raising further questions about the extent of the taint in this case. Again, in line with *Joly*, the third element is easily satisfied here. *Joly*, 336 Mich App at 406. Because each prong of the *Voigt* test is satisfied, defendant demonstrated outrageous government conduct that violated his right to due process. See *id*. at 399-401.

Having found a violation of due process, the question of the appropriate remedy remains. See *id*. at 400. "When the violation occurs in the context of gathering pretrial evidence, courts have developed a remedy referred to as the 'exclusionary rule.' " *Id*. Under the exclusionary rule, "evidence that was obtained as a result of a fundamentally unfair investigatory process" is inadmissible at trial. *Id*. As the *Joly* Court noted, the exclusionary rule is designed to "compel respect for constitutional rights, deter violations of those rights, and preserve judicial integrity." *Id*.

The prosecution argues that suppression of evidence was not an appropriate remedy in this instance because the FHPD acted in good faith reliance on the tip, such that application of the exclusionary rule would not advance its most critical purpose—deterrence of police misconduct. As defendant correctly points out, the good-faith exception to the exclusionary rule has been developed almost exclusively in the Fourth Amendment context concerning unreasonable searches and seizures, making its application in this context uncertain. The limited scope of the exception is underscored by the fact that only one of the many authorities cited by the prosecution regarding good-

faith police activities addresses a legal issue distinct from Fourth Amendment principles.

That single case is *Michigan v Tucker*, 417 US 433; 94 S Ct 2357; 41 L Ed 2d 182 (1974), in which the Supreme Court considered whether the defendant was entitled to exclusion of a witness identified in the course of an interrogation that did not violate the defendant's Fifth Amendment right against compelled self-incrimination, but failed to fully satisfy the procedural safeguards designed to safeguard that right. At the outset of its analysis, the Supreme Court prudently observed:

> Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policeman [sic] investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose. [*Id*. at 446.]

The Court noted that its search-and-seizure precedent made clear that deterrence of police misconduct was the primary purpose of the exclusionary rule. *Id*. In other words, the exclusionary rule does not try to compensate a defendant whose rights have been violated, but rather to prevent police misconduct in the first instance by removing the incentive to resort to unlawful methods. *Id*. The Court then continued:

> By refusing to admit evidence gained as a result of such conduct, the courts hope to instill

> in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force. [*Id.* at 447.]

The Supreme Court ultimately determined that the witness the defendant identified during his interrogation should not be excluded from trial because the police acted in accordance with then-existing precedent when they questioned the defendant. *Id.* The Court also reasoned that the exclusionary rule was alternatively justified in the context of certain Fifth Amendment violations because the Self-Incrimination Clause endeavors to avoid convictions on the basis of evidence that is coerced and, therefore, inherently untrustworthy. *Id.* at 448-449. Yet the defendant in *Tucker* was not exposed to coercive pressures, nor did he make an unreliable confession. *Id.* at 448-449. Because none of the goals of the exclusionary rule would be advanced in *Tucker*, there was simply no reason to apply it.

The reasoning in *Tucker* is persuasive in this context as well, though not in the prosecution's favor. The prosecution again focuses too narrowly on what members of the FHPD knew at the time they acted on the tip. The deterrent purpose of the exclusionary rule is plainly implicated by willful police misconduct, and it is all but impossible to characterize Mayer's decisions in this case as anything but a knowing and intentional violation of defendant's attorney-client privilege. Allowing the evidence derived from Mayer's misconduct to be used at trial on the basis of the FHPD's "good

faith" would completely undermine the exclusionary rule. Rather than deterring police misconduct, such a ruling could actually encourage misconduct where FHPD officers could use information obtained in violation of attorney-client privilege, as long as Mayer never revealed the source. We conclude that the trial court did not err by excluding the evidence derived from Mayer's disclosure of the privileged information.

That said, we agree with the prosecution that the trial court's ruling regarding the extent of evidence to be excluded was over expansive as it relates to two categories of evidence: Stislicki's cell phone and "forensic data retrieved therefrom." Concerning the first item, the error is harmless because there is no indication in the record that Stislicki's cell phone was ever located. The tip reported that the cell phone was discarded in a trash can at Tim Hortons, and the trash was apparently emptied before the police searched that location on December 9, 2016. Inasmuch as Stislicki's cell phone is not in the possession of the FHPD or prosecution, it could not be admitted in evidence in any event. As to the second item, the "forensic data" retrieved from Stislicki's cell phone, it is unclear what specific evidence the trial court was referring to. Because Stislicki's phone was never recovered, no data could be extracted directly from the device. But to the extent that the trial court's ruling incorporated Stislicki's cell phone records or the pen register from her account, those documents were procured by search warrants executed before the privileged information was shared with the FHPD and not as a product of outrageous government misconduct. Such evidence should not be excluded on the basis of the due-process violation at issue in this appeal. We therefore remand

for the trial court to amend its opinion and order accordingly. In all other respects, we affirm. We do not retain jurisdiction.

Affirmed.

/s/ Michael F. Gadola
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly

Court of Appeals, State of Michigan

ORDER

People of MI v Floyd Russell Galloway Jr

Elizabeth L. Gleicher
Presiding Judge

Docket No. 364083

Colleen A. O'Brien

LC No. 2019-272265-FC

Sima G. Patel
Judges

The application for leave to appeal is GRANTED. The time for taking further steps in this appeal runs from the date of the Clerk's certification of this order. MCR 7.205(E)(3). This appeal is limited to the issues raised in the application and supporting brief. MCR 7.205(E)(4).

Elizabeth L. Gleicher
Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

February 9, 2023
Date

Jerome W. Zimmer, Jr.
Chief Clerk

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

Case No. 2019-272265-FC
v Hon. Phyllis McMillen

FLOYD GALLOWAY, JR.

Defendant.
_____/

At a session of said court,
Held: November 16, 202[2]
Present: Judge Phyllis McMillen

OPINION AND ORDER ON DEFENDANT'S CONSOLIDATED MOTIONS TO SUPPRESS EVIDENCE, QUASH THE INFORMATION AND DISMISS THE CASE FOR VIOLATION OF DEFENDANT'S STATE AND FEDERAL DUE PROCESS RIGHTS

I. FACTS AND PROCEEDINGS

This matter is before the Court on Defendant's consolidated motions to suppress evidence, quash the information and dismiss the case for violation of his state and federal due process rights. The Court conducted an evidentiary hearing spanning four days, to review the facts surrounding Defendant's claims of governmental misconduct. At issue is information

that former Troy Police Chief Gary Mayer received from Jim Hoppe, the polygraph examiner hired by Floyd Galloway's defense attorney, which was passed along to then Farmington Hills Chief of Police Charles Nebus and the officers of the Farmington Hills Police Department (FHPD) who were investigating this case.

The defense also alleges the destruction of FHPD emails after three years is a part of the violation of his due process rights because the defense will never know what emails there were, and what information they contained. Chief Nebus testified that FHPD personnel did communicate by email regarding this case.

Further, Defendant alleges the Michigan Attorney General's Office's treatment of a memorandum it received from Mr. Hoppe's attorney, Arthur Weiss, during the investigative subpoena process further violated Mr. Galloway's due process rights and was even more detrimental to his defense than the actions of Hoppe, Mayer and Nebus. The Memorandum includes a detailed list of 21 pieces of information attorney Weiss said were the details Hoppe obtained from Mr. Galloway during Mr. Galloway's private polygraph examination, which constitutes a line-by-line itemization of a potential defense. Special Assistant Attorney General (SAAG) Powell Horowitz has characterized the information received from Hoppe as a confession. Defendant argues the failure to segregate this privileged information and put a firewall around it allowed (or potentially allows) dissemination of the information beyond control, and at a minimum put the privileged information in the hands of the prosecution. No steps were taken by the Attorney General to mitigate the dissemination of the privileged

information to the prosecutors who would be responsible for litigating this case.

Defendant asks the court to dismiss the case on the basis of violations of his due process rights, or in the alternative, suppress evidence obtained directly as a result of the disclosure of the privileged information as well as evidence obtained pursuant to search warrants that were based on the privileged information, and to quash the information and bindover of the district court.

On December 9, 2016, Gary Mayer had been a police officer for approximately forty years and was then the Chief of Police for the City of Troy, having served in that position for approximately ten years. During his time in the department, he had served in investigations or as a detective for seven years. At 8:41 that evening, Mayer received a phone call from Jim Hoppe. Mayer had known Hoppe for 27 years and knew o Hoppe's career with the FBI, that he had specialized as a polygraph examiner, and that he was retired from the FBI. Mayer knew that Hoppe was a polygraph examiner working with defense attorneys. Mayer had gotten to know Hoppe personally through their sons playing soccer and the two men had coached together for years. Mayer described his relationship with Hoppe as both personal and professional, and indicated that Hoppe had called him on his cell phone provided by the police department.

Hoppe told Mayer that he had information about the security guard and the homicide, by which Mayer understood him to be referring to the Danielle Stislicki suspected homicide case that had garnered significant media attention. Hoppe told Mayer that he

had information to relay, it was very important, but he couldn't relay it unless Mayer could keep Hoppe's identity confidential. Mayer told him that he would do his best to keep his identity confidential.

Hoppe then proceeded to provide Mayer with information. Mayer took notes while he was talking to Hoppe and placed them in a "staff inspection file" which, according to Mayer, is a file that is kept by the police department and not made a part of the public record. The file, labeled SI 16-56, stamped "Confidential", contains three pages of notes in Mayer's handwriting and one page with an email from Richard Hay to Mayer assigning the file number; it was admitted at the evidentiary hearing as Ex. 1.[1]

Mayer's notes reflect the following information received from Hoppe:

- He drove her car from house in Berkley back to her apartment.
- Goes to Tim Horton's 10 and Halstad
- Calls a cab Shamrock (Green
- Drives him to walking distance of his work
- Assure me that he did this

[1] Also in the "staff information file" is a note written by Mayer on 12-13-22, reflecting the fact that he had told Laurie Bluhm, the city attorney for the City of Troy, about the Farmington Hills case, the information he had, and what he relayed to the Chief Nebus. Mayer took the staff information file with him when he retired from the department.

- Good evidence outside
- Snow tomorrow
- When he walked from apartment to Tim Hortons he threw keys in grassy area by freeway
- Fitbit also
- Body wrapped in beige brown comforter from his bed
- Phone is in garbage at Tim Hortons inside
- He drove car

Mayer stated that the conversation was a quick one; "just in the amount of time it took to write this down. It was pretty quick. There was the concern about the snow, making sure that Farmington Hills was able to get there and get the evidence, so it was quick".

On cross examination, Mayer was asked: "Mr. Hoppe told you that he had information regarding a homicide, that he was torn and he knew he had to get the information out but he needed to remain confidential?" To which he responded "Sounds accurate. Yes". Mayer testified that it never entered his mind to pursue the idea that Hoppe was in possession of the information because he was involved in Danielle Stislicki's disappearance. On further cross examination Mayer was asked:

> *Ms. Michaels* [defense counsel]: You believed that he [Hoppe] had been working for an

attorney and that's how he got this information, correct?

A. I speculated that, yes.

Chief Mayer also stated on cross examination that he had been taught about the attorney client privilege while at the police academy, and that he understood that communications between clients and their attorneys were confidential. He also stated he knew that if somebody is hired by an attorney, that person becomes an agent of the attorney and that the information from that person can't be shared either.

Chief Mayer responded as follows to questions from the Assistant Attorney General:

Ms. Hagaman-Clark [Assistant Attorney General]: Did you know from your conversation with Hoppe that the information that he was providing to you came as a result of him conducting a polygraph?

A. I figured it. He didn't say it.

Q. You assumed it?

A. Yes.

On cross examination, the following exchange took place:

Ms. Michaels: You were protecting the information by not revealing the source, correct?

A. I don't understand the question.

Q. If you revealed who the source of the information was, you knew the information couldn't be used in a court proceeding, right?

A. I didn't know -- as I indicated before, I have my law enforcement training to guide with that stuff. So I just present information and the lawyers figure out what they're going to do with it.

Q. You had questions in your mind about fruits of the poisonous tree?

A. Yes.

Q. What did that mean to you?

A. It meant that perhaps the information couldn't be used if it was from a source that was found to be wrong – I'm not using the right term there, but that the information couldn't be used further.

Q. For what?

A. For evidence.

After hanging up from his conversation with Hoppe, Mayer attempted to call people he knew at the Farmington Hills police department. "I started with a lieutenant, [Jeff King] there was no answer. I worked to the commander, [Matt Koehn], there was no answer. And then I called Chief Nebus of Farmington Hills PD". Mayer stated he "was working up from the lower end of the chain of command".

Mayer testified that he needed to get the information to Farmington Hills as soon as possible due to a fear that the evidence would be lost to an impending snowstorm. The following exchange occurred on cross examination:

> *Ms. Michaels*: A minute ago you stated that, because there was a snowstorm coming, there was the need to find this evidence quickly, right?
>
> *A*. I did state that, yes.
>
> *Q*. Now, a snowstorm doesn't necessarily make a set of keys move from one place to another, does it?
>
> *A*. It depends on the proximity to the roadway, and snowplows, and things like that. Garbage, things being dumped.
>
> *Q*. A snowstorm, you know, also doesn't necessarily impact finding, you know, a Fitbit on the ground, right?
>
> *A*. As I said, if it -- depending on where it's located, it could end up being knocked away by snowplows, evidence disappears. The evidence in the trashcan would get dumped and put in a landfill somewhere. Security footage gets reused.

Mayer stated that before he provided Nebus with the information he had received from Hoppe, he told Nebus that the source needed to remain confidential. Mayer stated that Nebus said he would do the best he

could to keep it confidential, but that Mayer understood that he might not be able to do that. He might have to divulge Mayer's name, and he said, so be it. He stated he thought it was very important to get this evidence and this information out.

On December 9, 2016, Charles Nebus was the Chief of Police for Farmington Hills, a position he held for 10 years. Nebus retired in 2020. All told, Nebus worked for the Farmington Hills Police Department for 31 years, where he held a variety of jobs and ranks, including detective. Nebus took 6 years out of his career at Farmington Hills to serve as Chief of Police for the City of Farmington.

December 9, 2016 marked the end of the first week the department had been investigating the disappearance of Danielle Stislicki. Nebus testified that at approximately 9:00 p.m., while he was still in his office, he received a phone call from Chief Gary Mayer of the Troy Police Department. Nebus testified that Floyd Galloway had become a suspect in the disappearance of Danielle within the early days of the investigation. Nebus was acquainted with Mayer, the two both being chiefs and having sat on committees and attended conferences together.

Nebus recalled that "His call was very serious. I knew something was wrong. There was an urgency in his voice, and he told me he had information on ... the Stislicki investigation ... Not hi, how are you, what's going on, it was just immediately he said he had information -- some confidential information about the case".

When asked by the Assistant Attorney General what Mayer told him, Nebus responded:

> *A*. He told me that the -- that he had a source that he couldn't reveal to me.
>
> *Ms. Russo Bennetts*: Okay. Did you ask him who that source was?
>
> *A*. I don't really recall. I just know he made it very clear that he -- you know, he was very emotional about it – he could not reveal who the source was.
>
> *Q*. Okay
>
> *A*. It had to be confidential.

Nebus went on to say:

> *A*. He told me that the information he had was that a security guard did it who lived in Berkeley. That he drove – I'm trying to keep it in chronological order -- that he drove-- the suspect drove Danielle's car -- her Jeep – from his house in Berkeley to Independence Green apartments, and he left the car there -- her car there -- and there should be evidence on the inside or outside of the car. And that then the suspect, after leaving the car, walked to the area of 10 Mile and Halsted, which was in Farmington Hills by a Tim Hortons. And I remember I actually took the tip as 10 and Halsted, and that's what I put -- that's what I reported, but it actually is at 10 and Grand River.

Q. Okay.

A. But I put 10 and Halsted because that was what the tipster had reported.

Q. Is that what Mr. Mayer had told you?

A. Yes.

Q. Okay.

A. And I was told that -- by Chief Mayer -- that the suspect, as he walked along toward the path towards Tim Hortons from Independence Green, that he threw a Fitbit watch and a set of keys in a grassy area, and that he walked -- continued walking to the Tim Hortons, and at Tim Hortons he disposed of Danielle's phone in the trash.

Q. Okay.

A. At Tim Hortons. And he called a cab and it was a Irish shamrock -- it was something -- it was Shamrock Cabs or something like Shamrock Cabs that he called the cab from that location, and the cab picked him up, and the cab took him back to someplace where -- I think an office or someplace where he had his car parked.

Nebus stated that as he was talking to Mayer he was "quickly just writing down some very brief notes", which he then typed up on a "tip sheet". He stated that at some point he got rid of his original notes. Exhibit

4 is the tip sheet that Nebus typed.[2] He stated that he did not put on the sheet that the information he had received was from Chief Mayer. Rather, he wrote "Upon further questioning, the caller had no further information and wished to remain anonymous".

After ending the call with Mayer, Nebus took the following action: "I called -- my first objective was because it was snowing -- it was going to snow that night. I don't know if the snow had begun yet, but there was a weather forecast of snow and it was very cold. So my first rush--this was part of our conversation too, with Chief Mayer, actually -- was because -- that's probably the reason the -- conversation was shorter -- because it was going to snow and we were worried about finding the evidence – Fitbit and the keys. So I called a few members of my staff together and started to get people back to the office because everybody had been working long shifts day and night. It was the end of the week; it was a Friday. We were trying to get people back in the office so we could get people to go out and search. So I called some of my staff to my office".

When Nebus got off the phone with Mayer, he stated he called Assistant Chief Matt Koehn and Commander Dan Rodriguez, and possibly detectives Ryan Malloy and Chad Double, to his office to advise them of the information he had received from Mayer so they could "rally the troops and get out there and find this information". He stated, "I knew they were tired, I

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[2] According to the testimony of Commander Dan Rodriguez, Nebus did not type up the tip sheet until later that night or the next day, after the troops had investigated all of the information contained in the tip and retrieved the evidence.

knew the snow was coming, and I knew that, you know, they needed -- I needed to let them know that I had a source of information that was really good, that we had to really move on this .... This was a high priority tip and I needed to let them know it was high priority; that we've got to get out there and we've got to find this stuff".

Assistant Chief Matt Koehn was at the station when the call came in to Nebus. He noticed that he had a missed a call from Gary Mayer and returned the call. Mayer told him he had already spoken to Nebus and that Koehn should speak to him. Koehn then went to Nebus' office and learned of the content of Mayer's call. Koehn knew the information came from Gary Mayer. Koehn testified as follows:

> *Ms. Russo Bennetts*: Okay. And did you talk to Chief Nebus?
>
> *A*. I did.
>
> *Q*. What did he tell you, if anything?
>
> *A*. He told me that Chief Gary Mayer had gotten some information from a confidential source who had some information on the case, and that the information that he had was all he had, and he told me -- he told me that there was some information about the vehicle being taken back to the apartment in Farmington Hills, and a Fitbit, and a key being tossed over on 5 -- over on Grand River over M-5 been tossed in, and that the -- a cell phone was taken to a Tim Hortons.

Q. Okay. He told you that Chief Gary Mayer gave him this information?

A. Yes.

…

Q. You had already testified some of the information that you recalled Chief Nebus telling you that Gary Mayer had given him. Do you recall if Chief Nebus told you about whether there was a suspect in mind?

A. Yes.

Q. What did he say?

A. He said that Mr. Galloway was the suspect that committed the homicide.

Q. Was Mr. Galloway already a suspect or a person of interest in your investigation?

A. A person of interest

…

Q. Based on the specific -- specificity of the information in the tip, it's possible that the person who gave -- who -- who gave the information to Gary Mayer had an involvement in the disappearance of Danielle Stislicki?

A. That never occurred to me.

Chad Double had been working at the Farmington Hills Police Department for approximately 13 years

by December of 2016, eight of those as a detective. Double was in Chief Nebus' office on December the 9th, when he disclosed the information he had received from Chief Mayer. Although Double was not advised of the source of the tip, he recalls Nebus stated that it was a "reliable" source. Double knew within days of December 9 that the tip had been phoned in by Mayer.

Ryan Malloy was also present in Nebus' office when he shared the phone call from Mayer. Malloy recalls the following:

> *Ms. Russo Bennetts*: Was anyone else in the office?
>
> *A*. I don't know who was in there at the time. I know it ended up being myself, Lieutenant King, Commander Koehn, now Chief Koehn, sorry, and Chief Nebus, and then as we were talking, Detective Double, now Sergeant Double also responded.
>
> *Q*. There in Chief Nebus' office, did he provide you with any information?
>
> *A*. He did.
>
> *Q*. What did he say?
>
> *A*. He said he had received a phone call and that that person provided him information on a tip re -- related to Danielle Stislicki.
>
> *Q*. At that time, did Chief Nebus tell you who he had gotten the call from?

A. He said that he got a call from the -- the chief of Troy, who was a personal friend of his.

…

Q. Did he tell you there in the office what the information was that was provided?

A. He did.

Q. Do you recall what he told you?

A. Yes. I don't verbatim, I can't tell you off the top of my head everything that was said, but it was along the lines of is the security guard did it, he -- he wrapped her a tan/brown comforter, that he drove her vehicle back to her apartment in Farmington Hills, where he walked to Tim Hortons, he disposed of her keys and a Fitbit along the walk near a grassy area by M-5, and he walked to a nearby Tim Hortons, where he called a cab company that had a shamrock or something like a shamrock, and he used–and he called a cab from Tim Hortons and got a cab from Tim Hortons.

While Robert Gerak, Malloy, Koehn, and Rodriguez all admit they knew the information received by Chief Nebus had come from Gary Mayer, all stated they did not know the identity of Mayer's source.

The Farmington Hills officers did go out the night of December 9th and did retrieve the evidence that had been described in the calls from Hoppe to Mayer, and Mayer to Nebus. Chad Double, a detective

assigned to the case, described the evidence that was found as a result of the tip:

> *Ms. Hagaman-Clark*: And what did you find at Tim Hortons?
>
> *A*. We were able to view the surveillance video.
>
> *Q*. Did you do that with a search warrant or just on an ask?
>
> *A* On an ask.
>
> *Q*. And what, if anything, did you learn from the surveillance video?
>
> *A*. We -- we saw a person who we believed to be the Defendant walk in and order -- make an order.
>
> *Q*. In addition to making the order, do you observe him do anything else?
>
> *A*. He -- he asked to use the phone.
>
> *Q*. Do you see on the surveillance video whether or not he actually uses the phone?
>
> *A*. I don't recall. I don't -- I don't recall seeing that. I may have been doing other things. I don't think I ever saw that.
>
> *Q*. Okay. Anything else happen at the Tim Hortons?
>
> *A*. We talked to the staff who -- one person was working and remembered the incident.

Q. So you interviewed one -- one witness?

A. There was two witnesses there, but I think only one knew about the incident, so we only -- we only interviewed that person

Q. Was there any searches done on garbage cans outside?

A. Yes. There was a garbage can outside. We did search it. I believe it appeared that it had already been emptied.

Q. At the same time that you're at the Tim Hortons, is it fair to say that there are other police officers who are doing other things?

A. Correct.

Q. Like what?

A. Some people were checking the area again over at the apartment complex, there was -- people were walking the path from the apartment complex to the Tim Hortons, looking for any evidence that may have been thrown or discarded.

Q. To your knowledge, was any additional evidence recovered as it results -- as it relates to this specific tip?

A. Yes.

Q. What else?

> *A*. We -- after we left Tim Hortons, we then went to the gas station, I can't remember if it was a Marathon or a Shell, and we also observed video there of who we believed to be Mr. or the Defendant walk past the cameras on the outside there. After that, we had a large search party checking a fielded area behind the gas station, and a Fitbit and a pair -- and a set of keys was located

Robert Gerak had been a police officer for 12 years with the City of Detroit, and in December of 2016 had been with the Farmington Hills Police Department for approximately 10 years, working as a detective since 2015. Gerak, along with Ryan Malloy, are the officers in charge of the Stislicki investigation. Gerak was not on duty on December 9, 2016 when Mayer 13 called Nebus, he had not been called back in that night, and he didn't learn about the tip until he returned to work on December 10. He does not remember exactly when he learned that it had been Gary Mayer who called Chief Nebus, but it could have been as early as December. Gerak testified that he did not know the source of Mayer's information until the proceedings surrounding the investigative subpoena issued by the Attorney General in 2019.

Gerak was the affiant on 57 of the 79 search warrants issued in this case. On December 6, 2016, Gerak obtained a search warrant for a tracker on Floyd Galloway's car. On December 7, 2016 he obtained a warrant for Mr. Galloway's cell phone records, his car, and his home. Also on that day, he obtained a search warrant for Danielle Stislicki's cell phone records. On December 7 and 8, other officers obtained search

warrants for a sample of Mr. Galloway's DNA and to search his cell phone. On December 8, Gerak obtained an additional search warrant for Mr. Galloway's house which included the data on his internet router. On December 9, 2016, before the tip came in from Mayer, Gerak obtained 3 additional search warrants for Ms. Stislicki and Mr. Galloway's phones and for Mr. Galloway's Gmail address. Gerak testified that, except for the search warrant on Mr. Galloway's home, the Oakland County Prosecutor's office was not consulted on the drafting of any search warrant or the affidavits in support thereof.

Ryan Malloy was the affiant on 12 of the 79 search warrants. The 12 warrants upon which he was the affiant were written after the tip came in on December 9. In the affidavits written by Malloy, the information contained in the tip, as well as the evidence seized as a result of the tip, was included in the affidavits.

On January 12, 2016, Chief Nebus called Mayer and asked him to check with his source to see if there was any further information he could provide. Mayer then called Hoppe who reiterated the information that he had provided to Mayer on December 9. Mayer relayed this information to Nebus.

On December 13, 2016, Chief Mayer contacted Lori Bluhm, Troy City Attorney to advise her of the information that he had received and provided to Farmington Hills PD. Notes of this conversation are contained in Staff Investigative file 16-56. When questioned by defense counsel as to why he felt the need to provide the city attorney with this information, Mayer responded as follows:

> It was a homicide investigation and I was involved having information from a confidential source that I wanted to keep confidential because that's the agreement I had. So she would be my representation to assist me in keeping that confidential.

The first time Nebus sought legal counsel on the issue of the phone call and information he had received from Gary Mayer was approximately six weeks after the investigation started, and approximately five weeks after the call from Mayer. At that time, Nebus and others of his staff met, along with the State Police, at the Oakland County Prosecutor's Office to discuss the prioritization of evidence to be analyzed at the State Police Crime Lab. Nebus went to the meeting with the intent to inform the Prosecutor of the facts surrounding the tip received from Mayer. After the meeting with the State Police, Nebus met privately with Prosecutor Jessica Cooper and Chief Assistant Paul Walton and advised them about the phone call from Mayer. Concerning his disclosure of the information he had received from Mayer, Nebus stated:

> At that time, yes. I just felt it was about six weeks into the investigation and I needed to -- you know, they were -- the prosecutor and deputy prosecutor, they had been helping us with the case, were very interested in the case. I consider them partners in the case. I had been just holding this information very quietly amongst myself, and probably a couple of just staff members of the department, and I felt the need to tell them, so I told them where I -- about the tip and where I received it.

A "couple of weeks" after that meeting, Nebus had a phone conference with Cooper and Walton. In the interim, Nebus had consulted with an attorney. At the time of the recent evidentiary hearing, Nebus asserted his attorney-client privilege when asked about the purpose or content of that consultation and refused to answer the question. In the conversation with Cooper and Walton, Nebus stated they spoke about "what next steps we might need to take with that tip that came in. And I had some concern that we needed to find out who the source of the information was, and that's what we discussed". Nebus stated he did not know the identity of the person who provided Mayer with the information he relayed in his call to Nebus at the beginning of the investigation.

Nebus said Cooper and Walton agreed with him, that they needed to move on identifying the source of Mayer's information, and they asked Nebus to have Mayer call them so they could talk to him about the tip and who the source was. Nebus called Mayer and told him that the Prosecutor and Chief Assistant wanted to talk to him and told Mayer that he "felt very badly for him" because he knew he was going to have to divulge the source of the information.

After being contacted by Nebus, Mayer called the Oakland County Prosecutor's Office. He believed both Oakland County Prosecutor Jessica Cooper and Chief Assistant Paul Walton were on the call. Mayer stated they wanted him to divulge the source of his information and he told them he wanted to keep it confidential. He said there was talk about him being compelled to disclose his source. The following exchange

resulted from questions by the Assistant Attorney General:

> *Ms. Hagaman-Clark*: Did you ever provide them [Cooper and Walton] with any information in the form of a hypothetical?
>
> *A*. Yes.
>
> *Q*. Tell me about that hypothetical.
>
> *A*. I asked if -- I was concerned let me restate that. I was concerned. I relayed to him the concern that it could be -- in my limited legal expertise -- considered fruits of a poisonous tree. So I was concerned about that evidence being used like that.
>
> …
>
> *Q*. Did you expound on that concern and why you had that concern?
>
> *A*. No.
>
> *Q*. Now, in terms of a hypothetical, did you give them a hypothetical, or did you just simply say, I'm concerned that the source has this potential?
>
> *A*. Well, as -- as the conversation went on, there was a lot of discussion on their--on their point - on their part that I wasn't involved with. I was just on the phone while they were talking back and forth. When it was said that they could compel me to do it and -- I gave a hypothetical like, what if this person worked

> for the defense attorney. And then Mr. Walton said -- he was like oh -- like a spontaneous utterance like oh, and then he said something like, you got the polygrapher or private investigator. I didn't say anything.

Paul Walton was called to testify by the defense. The following exchange occurred on direct examination:

> *Ms. Michaels*: Early on in the investigation,[3] did you receive a phone call from then Chief Nebus to talk about an anonymous tip?
>
> *A*. Yes.
>
> *Q*. Did he -- what did he ask you or tell you with regards to this anonymous tip?
>
> *A*. It was my understanding this anonymous tip – or confidential tip -- came from another source that was a polygraphist.
>
> *Q*. When you say it was your understanding, did Chief Nebus tell you that he received this confidential tip from Chief Mayer?
>
> *A*. Yes.
>
> *Q*. Did Chief Nebus tell you that Chief Mayer got the information from this law enforcement polygraphist?

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[3] He later clarified that this occurred "after several meetings with ... their detective after the generation of the memo regarding the no body cases.

A. Yes. Or former law enforcement.

Q. Former law enforcement.
When Chief Nebus told you that he received information from Gary Mayer, who had received the information from the polygraphist, did Chief Mayer tell you what he did with that information?

A. Yes. He

Q. What did he tell you?

A.--he told me that he has not shared this information with his entire detective team, and that he has listed this as somewhat confidential or anonymous. I'm not sure as to which term he used.

Q. Did you advise him as to what steps he should take regarding this -- this tip that he now told you about?

A. Yes.

Q. What did you advise him?

A. To isolate that information, be careful how it's used, and if there's any evidence that has been obtained from that, to make sure that that is documented.

Q. Did you give him instructions as to what sort of documentation to make regarding this tip?

A. I don't know if I gave him specific instructions other than to make it very clear that this is coming from a -- a source that -- and I don't know if I used this with Chief Nebus -- but in essence, that was privileged information.

Q. Did you tell him to document it in police reports?

A. Yes.

Q. And to be clear; you told him he should share this information -- meaning that the source was a polygraphist? -- he should share this information with his detectives.

A. Yes.

Q. After that call with Chief Nebus, did you talk to Gary Mayer?

A. I did.

Q. When you talked to Gary Mayer did he also confirm that the information came from the polygraphist?

A. He did.

Q. Did he tell you who the polygraphist had been hired by?

A. No.

Q. Did you have reason to believe that the information was attorney-client privilege information?

A. I deduced that. But no, he did not state that.

Q. Did he say that he got the information from a polygraphist who got the information in the course of his duties as a polygraphist?

A. That was my understanding, yes.

Q. Did he state that to you?

A. I don't know if he stated that specifically, but that was my understanding.

…

Q. Can you tell us what you told Chief Nebus specifically around using or not using the information he received from this tip?

A. Verbatim, no. But I --

Q. In general.

A. In general. I told him that it was -- I had concerns that because it was from -- it was privileged information that it could have tainted the evidence that was recovered, and it -- excuse me. It would have affected the evidence that was recovered or used -- and it could taint other evidence if continued to be used.

…

Q. You've testified that Chief Nebus told you that the polygrapher is the one who was the source of this information.

A. Yes. Well, he told me that Gary Mayer said that the polygrapher is the source of the information.

…

Q. Is it your testimony that Chief Mayer confirmed it was in fact a polygrapher hired by the defense?

A. He confirmed that it was a polygrapher, yes.

Q. You surmised that it was somebody that had been hired by the defense.

A. Yes.

Nebus and Malloy deny they were ever told by the prosecutor that the privileged information should not be used, or that it should be sequestered to mitigate the taint of its privileged source. However, Nebus remembers the following from his conversation with Paul Walton:

Ms. Michaels: Paul said, we don't need to hurt someone's career or tarnish someone's reputation by outing them because we can't use the information anyway because it's privileged. Right?

A. He said it was likely. I don't know that I can't read the mind of the prosecutor, the lawyers. If it was or wasn't.

Q. Well, he told you it was likely privileged, right?

A. Likely doesn't mean -- in my mind, likely doesn't mean for sure.

Q. He told you it was likely privileged.

A. Yes.

Q. He believed it was likely privileged after his conversation with Chief Mayer, right?

A. Yes.

Q. Now knowing that it was likely privileged, you didn't want to know who it was, right?

A. I wouldn't really say that. If Chief Mayer wanted to tell me or the prosecutor wanted to tell me, they could have done that.

Q. Now if it was a privileged source, that would take [taint] the evidence that you found as a result of it. Right?

A. In my world yes it possibly could, yes.

Q. So the less you knew about the source of the information, the better. Right?

A. I wouldn't really characterize that – I'd say no, that's not true.

Q. Well, you didn't take any steps to find out who it came from, did you?

A. After those conversations, no.

Q. You did -- you did admit that it ran through your mind the possibility that it came from someone from the attorney's office; didn't you say that?

A. That was always a possibility, yes.

Q. And you entertained that as a possibility all the way through. Right?

A. There was many possibilities but that was one, yes.

Other members of the FHPD do recall that warning coming from the Prosecutor's Office. At the time of the hearing, Gerak testified:

> Every time we spoke with a prosecutor about the tip -- and I'm referring to Jason Pernick, Amy MacGregor -- whenever we would play a PowerPoint or discuss things with them, as soon as the mention of the tip came up, they were like, hold on a second, let's talk about this. And they always said the tip would be a problem, but they never said that it absolutely could not be used.

The prosecutor was not given the opportunity to provide any advice prior to the search conducted on December 9, 2016, where a substantial amount of evidence was obtained. Paul Walton testified that

Farmington Hills investigators were not presenting search warrant requests to the Oakland County Prosecutor's Office for review. Detective Gerak testified that with the exception of the warrant for Mr. Galloway's home, issued before the tip from Mayer, the FHPD was not consulting with the Oakland County Prosecutor's office before presenting search warrants to a magistrate, testifying as follows:

> *Ms. Michaels*: The search warrant is a duty of the police department, right?
>
> *A.* We do have the option to consult with the prosecutor. But the only time I believe that was done on this case was the original search warrant for his house on Oxford.
>
> *Q.* So after that very first search warrant, you -- you drafted the warrants and the--you or someone in your department drafted the warrants or search warrants and without review or input from the prosecutor's office, correct?
>
> *A.* I believe so.

Gerak testified that after learning that the information came from a privileged source, he continued to use the information in affidavits in support of search warrants, stating as follows:

> *Ms. Michaels*: Did you think about the possibility that this came from a privileged source?
>
> *A.* Yes.

> *Q*. What steps did you take to follow up on that feeling?
>
> *A*. None.
>
> …
>
> *Q*. After you learned that this information came from a privileged source, you continued to use this information in the affidavit in support of search warrants, didn't you?
>
> *A*. Yes.

Interestingly, when asked, both Chief Nebus and Chief Mayer testified that they did not know what a "*Franks*"[4] motion was.

The only official record created by Nebus to document the source of the information the Department was acting on was a tip sheet that he typed up sometime after the initial evidence identified by the tip was collected. He did not create a police report, but rather used a "tip sheet". Rather than list Mayer as the source of the tip, information that could be used to further investigate the tip, Nebus indicated that the tip was anonymous.

Virtually every member of the FHPD who testified acknowledged that the tip was unusual because it was so specific, and that one of the reasons for tracking down the source of anonymous tips is to determine if the information was coming from the perpetrator or

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[4] *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978).

an accomplice. Tracing phone records could lead to apprehending either. All of the investigating officers who testified stated that they did not attempt to follow up on obtaining the source of the tip to Mayer because Nebus resolutely told them there was no more information to be had from the source. Despite testifying that it would have been very helpful to know the source of the tip to Mayer, no officer sought a warrant for his phone records or took any other step to learn the identity of the source. In 2019, after taking over the investigation of the case, SAAG Powell Horowitz testified that she only had one question--who was the source of the tip? From December 9, 2016 to February of 2019, no one at the FHPD had taken any effort to track that information down.

At some point the Oakland County Prosecutor's Office received a phone call from the Attorney General's office to advise them that the Attorney General was taking over the case.

On January 21, 2019, Mayer received a call from SAAG Jamie Powell Horowitz, who had been placed in charge of the Stislicki case. Mayer stated Powell Horowitz said she wanted to move on the case and said she would subpoena Mayer, indicating that he would have to divulge the source of the information. Mayer told her he would check with the source of information to see if he wanted to become known, and then he called Mr. Hoppe. Hoppe said he'd let Mayer know and Mayer relayed that information to Powell Horowitz. There were some phone calls back and forth, and ultimately Hoppe said that he wanted to remain anonymous, so Mayer told Powell Horowitz that Hoppe wanted to remain anonymous, and Mayer

could not just give up his information; he'd have to be compelled to do it.

Ultimately Powell Horowitz issued an investigative subpoena. Mayer hired counsel and fought compliance with the subpoena, but ultimately was forced by court order to divulge Jim Hoppe as the source of his information.

Jamie Powell Horowitz (now Judge Horowitz) was brought on by Attorney General Dana Nessel as Special Assistant Attorney General assigned to the Stislicki case. In January 2019, the case was presented by the Farmington Hills Police Department to the Attorney General. Present at the meeting were two officers in charge of the case (Gerak and Malloy); Danielle Russo Bennetts; then Farmington Hills Police Chief Cunningham; Chief Assistant Attorney General Laura Moody; Attorney General Dana Nessel; Powell Horowitz and possibly some other prosecutors. Powell Horowitz testified that at the end of the meeting she had one question – who was tipster?, and stated that the tip needed to be vetted. The FHPD detectives at the meeting said they did not know the name of the person who called in the tip, that they received the information from their chief.[5] Powell Horowitz called Nebus, who told her that he did not know the name of the original tipster and that she needed

[5] It appears from Powell Horowitz's testimony that Gerak and Malloy were not forthcoming with her about the identity of the person who called in the tip, i.e. Gary Mayer. In response to her questions about whether they had pulled phone records to determine the identity, they stated their understanding was the tip was anonymous, and she would have to go to Nebus to get the information on how the tip was communicated to him.

to call Gary Mayer. From her discussions with Nebus, Powell Horowitz had the impression that he knew the information given to him by Mayer came from a privileged source.

> *Ms. Michaels*: Okay. So Chief Nebus told you on your second conversation that he believed the information came from a privileged source?
>
> *A*. That there may be some sort of privilege involved, but he wasn't sure.
>
> *Q*. Did you ask him how he knew that?
>
> *A*. I don't remember if we had any -- I mean, I think I just assumed that whatever Mr. Mayer told him was feeding his thoughts on the situation.
>
> *Q*. So you think that Mr. Mayer told Chief Nebus that it came from a privileged source?
>
> *A*. I'm speculating, but whatever happened, he had some sense of, there may be a privilege involved.
>
> *Q*. And did you know that Chief Nebus talked to his law department to determine his personal liability regarding sharing privileged information?
>
> *A*. No.

Eventually Powell Horowitz spoke to Mayer. She stated:

> I reached out to Mayer; he told me initially that he was not inclined to talk to us. I initially tried to appeal to his better reason and informed him that I needed to vet the tip, I needed to make sure we didn't have an accomplice. A defense attorney would most certainly be standing up in trial and asserting that there was somebody else involved in the case if we didn't – if we didn't ferret out what had happened. He assured me that there was no way that this person could possibly be involved in the case in any way, shape, or form; that this was a close personal friend of his. And I informed him the chief of police -- that this is not how investigations work; we don't just take our friend's word for it. There still has to be a proper investigation and the tip still needed to be vetted. I was not going to find myself standing in front of a jury telling the jury to just take the chief's word for it because he's a police chief.

Powell Horowitz stated she continue to try to talk Mayer into cooperating, telling him "this is going to be really bad for – it's going to be a bad look for you if -- if it --if we have to come into court like we are now and say we had to actually subpoena a former chief of police to cooperate in a homicide investigation". Mayer continued to refuse to cooperate, and finally an investigative subpoena was issued compelling Mayer to testify and divulge the source. Mayer fought the subpoena but ultimately Mayer testified that the source was the polygrapher, James Hoppe, who worked for attorney John Dakmak who, at that time, was

representing Mr. Galloway in a sexual assault case that occurred in Wayne County.

During Powell Horowitz's testimony, an additional issue was addressed. During the investigative proceedings in Wayne County to force Mayer to divulge his source, an attorney for Hoppe submitted a memorandum that purported to contain additional information that Mr. Galloway disclosed to Hoppe during the polygraph examination. Disclosure of this information would be an additional breach of the attorney client privilege. Judge Powell Horowitz testified that she put the memorandum in the Attorney General's file on the Stislicki case, and that it was assessable to other attorneys in the office, particularly those attorneys working on the case. No "firewall" was created to keep the memo from being reviewed by other prosecutors. Nor was the case transferred to prosecutors who had not reviewed the memorandum. Additionally, investigative officers of the FHPD were present in court when arguments took place concerning the memorandum, and no instruction was given to them not to use the information in further investigations.

On March 4, 2109, the Attorney General filed her complaint against Floyd Galloway for first degree murder, in the 47th District Court. After being charged, Mr. Galloway was provided with a court-appointed attorney. Before the preliminary examination, he hired private counsel. After the bindover and a substantial number of pretrial motions, filed under seal, that went up on appeal, an appearance for Mr. Galloway was filed by his current attorney, Ellen Michaels. Judge Powell Horowitz provided all defense

attorneys with all information concerning the investigatory subpoena and the fact that James Hoppe was the source of the information presented to Chief Nebus by Chief Mayer. These proceedings ensue.

II. ANALYSIS

A. Motion to Suppress Evidence

Under our state and federal Constitutions, a person cannot be deprived of life, liberty, or property without due process of law. Const. 1963, art. 1, § 17; U.S. Const., Ams. V and XIV, § 1. In the context of criminal proceedings, the "denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." This is a relatively high bar—only if "the absence of that fairness fatally infected" the judicial process will there be a violation of due process. In analyzing the issue, courts look to the "totality of circumstances."[6]

The defense acknowledges at the outset that Mr. Galloway's state and federal constitutional rights *to counsel* are not implicated in this matter as the rights do not attach until charges are filed, a preliminary hearing, indictment, information, or arraignment[.]"[7]

Similarly, Mr. Galloway acknowledges that the state and federal constitutional protections against self-incrimination do not apply because the substance of neither the original tips nor the proffered

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[6] *People v Joly*, 336 Mich App 388, 399; 970 NW2d 426 (2021), app den 508 Mich 971 (2021) (citations omitted).

[7] *See*, *e.g.*, *Rothgery v Gillespie Co*, *Tex*, 554 US 191, 198; 128 S Ct 2578; 171 L Ed 2d 366 (2008) (citations omitted).

information in Mr. Weiss's April 1, 2019 Memorandum are admissible at trial.

What is at issue is Defendant's claim that the actions of the government, undertaken by Troy Chief of Police Gary Meyer, Farmington Hills Chief of Police Charles Nebus, officers of the Farmington Hills Police Department, and the Attorney General failed to observe that fundamental fairness essential to the very concept of justice, by knowingly intruding on his attorney client privilege and using that information to locate evidence and undermine his right to a fair trial.

Both parties cite the case of *People v Joly*, 336 Mich App 388; 970 NW2d 426 (2021)[8] as the Michigan courts' embodiment of state and federal cases across the country that address violation of the attorney-client privilege. In *Joly*, the defendant was being investigated for arson of her home and, as a result, the police had been looking for her lawnmower and gas can as evidence. The police obtained search warrants for the defendant's home and electronic devices, from which the police recovered a tablet. An analyst searched the tablet and came across several emails, including one addressed to an employee of the Abood Law Firm. At the time of the searches and the tablet analysis, the defendant had retained the Abood Law Firm to represent her in the matter and the representation had been communicated to the Jackson County Prosecutor's Office. One of the parties to the recovered email was the defendant's attorney from the Abood Law Firm. The email stated to whom the defendant

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[8] Referred to by Defendant throughout his brief as "*Joly II*", the Court will refer to this case as simply *Joly*.

had given her lawnmower and gas can. The police then interviewed the people mentioned in the email and retrieved the lawnmower and gas can.

The defendant moved to suppress the lawnmower and gas can as fruit of the poisonous tree because the police had violated the defendant's attorney-client privilege, and thereby due process, by intentionally viewing and using the email to obtain the physical evidence.

On its second trip to the Court of Appeals, the *Joly* Court found "[t]he government knowingly breached defendant's attorney-client privilege. Rather than try to mitigate the breach, the government deliberately used information obtained from the privileged communication to obtain incriminating physical evidence. The government then charged defendant with several crimes and made clear it intended to use the physical evidence at trial. Thus, the record on appeal confirms that the government knew of the privilege; deliberately intruded into it; and defendant was actually and substantially prejudiced". 336 Mich App at 391.

The Court first noted

> The prosecutor is correct to point out that the attorney-client privilege is not a constitutional right. *See Lange v. Young*, 869 F.2d 1008, 1012 n. 2 (C.A. 7, 1989). Violation of the privilege is not, by itself, tantamount to a due-process violation and alone does not warrant suppression of derivative evidence. *See Marsack*, 231 Mich. App. at 3 79, 586 N.W.2d 234. Similarly, violation of a defendant's statutory privilege does not, by itself, warrant

> suppression of evidence, as the Legislature has not seen fit to provide that remedy for a breach of MCL 767.5a. *See People v. Hawkins*, 468 Mich. 488, 507, 668 N.W.2d 602 (2003). These arguments only go so far, however, as violation of the common-law/statutory privilege can be one part of a broader claim that the government has violated a defendant's right to due process. Caselaw has long recognized that outrageous misconduct by the government in detecting and obtaining incriminating evidence can rise to the level of a due-process violation. *See*, *e.g.*, 28 *Rochin v. California*, 342 U.S. 165, 172-173, 72 S. Ct. 205, 96 L.Ed. 183 (1952); *Kennedy*, 225 F.3d at 1194. [*Id* at 400]

In the *Rochin* case cited in the above passage from *Joly*, the United States Supreme Court acknowledge that while the country's criminal justice system is largely left to the states, it too, has responsibilities in settling the extent to which the Due Process clause, as applied to the states by operation of the Fourteenth Amendment, limits "the conduct of criminal proceedings by the States. As stated by the Court in *Rochin*:

> Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice ... even toward those charged with the most heinous offenses.' [342 US at 169 (citation omitted)].

The *Rochin* Court ultimately concluded that the facts of the case before it compelled a conclusion that the "proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting *[sic]* crime too energetically. This is conduct that shocks the conscience". *Id.* at 172. The Court held that the government had obtained defendant's conviction "by methods that offend the Due Process Clause," and reversed the judgment of conviction. *Id.* at 174.

The Supreme Court also suggested in *dicta* in its 1973 case *United States v Russell*, 411 US 423, 431-432; 93 S Ct 1637; 36 L Ed 2d 366 (1973) that it "might someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction[.]"

While both parties cite *Joly* in support of their respective positions, that case is not factually identical to the present case. That every case is made of different facts was recognized by the United State Supreme Court in *Rochin*, where the Court stated:

> Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.' See Mr. Chief Justice Hughes, speaking for a unanimous Court in Brown v. State of Mississippi, 297 U.S. 278, 285—286, 56 S.Ct. 461, 464—465, 80 L.Ed. 682. [342 US at 173]

Despite being different, the facts of this case are strikingly similar to *Joly*, and easily analyzed using the conclusions reached by the Court of Appeals. In *Joly* the Court clearly held that a violation of the common-law/statutory attorney-client privilege can be one part of a broader claim that the government has violated a defendant's right to due process, stating that "[c]aselaw has long recognized that outrageous misconduct by the government in detecting and obtaining incriminating evidence can rise to the level of a due-process violation." 336 Mich App at 399-400 (citations omitted).

Based on its review of other caselaw, the *Joly* Court found that the three-part test set forth in *United States v Voigt*, 89 F3d 1050 (CA 3, 1996) was a reasonable test to use when analyzing claims of a violation of due process based on intrusion into the attorney-client privilege, and adopted it as its own. That test states that only a finding of "outrageousness" would warrant the exclusion of evidence for a violation of due process, and that "[t]o make a colorable claim of "outrageousness," a defendant must show all of the following: "(1) the government's objective awareness of an ongoing, personal attorney-client relationship between [the attorney] and the defendant; (2) deliberate intrusion into that relationship; and (3) actual and substantial prejudice." *Joly*, 336 Mich App at 401.

As stated by the Court in *Joly*:

> ...the *Voigt* test is—itself—the measure of whether government action was outrageous or not. If a defendant satisfies all three elements, then the defendant has shown that the government's actions were "outrageous" for

> purposes of due process. There is, in short, no additional showing, no "part four" that needs to be proven, for a defendant to show that the government's actions were outrageous in this context. [336 Mich App at 407].

Whether outrageous government misconduct exists turns on the totality of the circumstances. *United States v Tobias*, 662 F 2d 381, 387 (CA 5, 1981), cert denied, 457 US 1108 (1982).

The defense submits that the government's conduct in his case combined to result in "outrageousness" sufficient to support dismissal of the charge against Mr. Galloway. He alleges his due process rights have been violated from almost the time the FHPD began investigating Ms. Stislicki's disappearance through the day he submitted this consolidated motion and brief.

Specifically, Mr. Galloway argues that he was irredeemably deprived of his due process rights through the conduct and inactions of the chiefs of the Troy and Farmington Hills Police Departments in their handling of knowingly privileged information provided by a private defense polygrapher. He was further deprived of his due process guarantees through the blanket destruction by the FHPD of emails concerning his case that the testimony established must have existed. Regarding the destruction of the emails, Defendant argues the FHPD' s conduct far exceeds mere negligence, it amounts to misfeasance, if not malfeasance, because the wholesale destruction of the emails appears to be in violation of the department's record and destruction policies. Finally, Mr. Galloway argues he was stripped of his due process rights in

investigating, developing and presenting a defense by the Michigan Attorney General's Office's misfeasance or outright refusal to even explore, let alone undertake, steps to segregate the privileged contents of attorney Weiss's memorandum in recognition that they are, in fact, privileged. Mr. Galloway sets forth separately each category of government conduct he alleges have stripped him of his due process rights.

In response, the Attorney General argues that the government did not deliberately intrude into Galloway's attorney-client relationship. She argues that that in *Joly*, the detective intentionally viewed the email with the law firm and, objectively knowing that that information came from a privileged source, acted on the information to recover physical evidence. Deliberate, proactive intrusion is required. She argues that in stark contrast to *Joly*, here the police did not procure or seek out the information; it was brought to them via a tip. In *Joly*, the email was discovered through a search of the defendant's home, which yielded the tablet on which the email was located. In this case, however, Hoppe called in the tip out of the blue—there was no law enforcement involvement to bring about the tip. The Attorney General argues that *Joly* does not speak to Galloway's contentions regarding deletion of emails and this point does not otherwise entitle Galloway to relief. She argues the email issue is simply a perpetuation of Galloway's longstanding discovery objections. Regarding the Weiss memorandum, the Attorney General argues that Galloway essentially contends that the People had a duty to somehow prevent the memorandum from being filed in the first place or to thereafter mitigate its proliferation or effects but that is not the

case. The People had no power or obligation to control what Weiss filed or how he filed it. Once the proceedings were made public, the People had no ability or duty to hide the contents of the memorandum. It was a matter of public record at that point. The Attorney General also argues that Defendant's motion must be denied for lack of standing, inevitable discovery of the evidence from the tip, and because there was no violation under *Franks v Delaware* to which the good faith exception also applies.

The Court will first address Defendant's motion to suppress evidence. Because the Court must ultimately decide if the government's conduct meets the three-part test set forth in *Voigt* and *Joly*, the Court will use the test as a framework for analysis.

1. The government's objective awareness of an ongoing relationship covered by the attorney-client privilege.

Defendant argues that, as developed throughout the evidentiary hearing in this case, when Gary Mayer was chief of the Troy Police Department, a sworn law enforcement officer "(read: government)", he allowed his friend, private polygraph operator Jim Hoppe to give him details about an investigation being conducted by another police agency, the FHPD, knowing that Hoppe obtained the information during the private polygraph process of Mr. Galloway, information that Hoppe obtained in unequivocal violation of Mr. Galloway's attorney-client privilege.

Mr. Galloway submits that Chief Mayer should have stopped Mr. Hoppe cold at the very moment it became clear he was listening to privileged

information and told Mr. Hoppe he could neither advise nor help him. Instead, Chief Mayer heard Mr. Hoppe out and then, almost immediately, contacted the FHPD and in a conversation with FHPD chief Charles Nebus, repeated the information.

Defendant argues it is equally clear from the record that Chief Nebus at least suspected early on that the information in Chief Mayer's possession had come from a privileged source. Eventually, many FHPD law enforcement officers knew that the tip from Mr. Hoppe to Chief Mayer arose from privileged communications. Witness after witness testified to that awareness. Soon the privileged nature of the information as well as its likely source made its way to the Oakland County Prosecutor's Office.

Former Chief Oakland County Prosecutor's Office Assistant Paul Walton testified that "early on" in FHPD's investigation of the disappearance of Danielle Stislicki he had a conversation with Chief Nebus regarding the matter. During the conversation, then-Chief Nebus disclosed that he had "received a confidential tip "from a person in law enforcement that was a polygraphist [*sic*.]" or "former law enforcement."

Mr. Walton told Chief Nebus that because of the way in which the evidence was obtained, it could "taint other evidence if it continued to be used." Finally, he told Chief Nebus that the information was, in essence, privileged and directed him to note the privileged nature of the source in reports and tell his detectives to do the same.

The Defendant argues that *why* Chief Mayer decided to violated Mr. Galloway's attorney client

privilege to pass along Jim Hoppe's advice to Chief Nebus is irrelevant. *Why* Chief Nebus made the same decision is equally irrelevant. The fact is that each governmental official decided to violate Mr. Galloway's attorney-client privilege, and went to significant lengths to obscure that fact, particularly Chief Mayer. For the purposes of this issue, in violating Mr. Galloway's privilege knowingly, the chiefs' violations extend beyond intrusions into Mr. Galloway's attorney-client privilege into intrusion into his constitutional due process rights.

In response, the Attorney General argues that in stark contrast to *Joly*, here the police did not procure or seek out the information; it was brought to them via a tip. In *Joly*, the email was discovered through a search of the defendant's home, which yielded the tablet on which the email was located. In this case, however, Hoppe called in the tip out of the blue-there was no law enforcement involvement to bring about the tip.

The Attorney General further argues that the investigating agency—Farmington Hills Police Department—had no objective knowledge that the original tip came from a privileged source. In *Joly*, it was made clear that the "law firm proactively advised the prosecutor's office of the representation," the "e-mail in question was clearly addressed to a member of the Abood Law Firm, and the detective testified that he knew that defendant and defendant's attorney were parties to the e-mail." Those factors provided objective knowledge that the interaction was privileged.

Here, by contrast, the Attorney General argues the only person who knew that the source of the tip

was privileged was Mayer, until he was legally compelled to disclose the source via the investigative subpoena in 2019. Witness after witness from the Farmington Hills Police Department testified that they did not know the identity of the original tipster until 2019 at the earliest, with some not finding out until these proceedings in 2022—including Nebus. Moreover, she argues, the manner in which the tip came to Farmington Hills did not objectively indicate its now-known privileged status. Nebus received a call from Mayer with information about an ongoing case, which would not have been unusual given their positions in law enforcement. Even the fact that Mayer told Nebus that Mayer's source wished to remain confidential also is not unusual in law enforcement. Indeed, the law recognizes a privilege for informants to keep their identities confidential. *Roviaro v United States*, 353 US 53, 58–59; 77 S Ct 623; 1 L Ed 2d 639 (1957). The information provided to Nebus was not obvious to have come from a privileged source. It was even contemplated whether the source was an accomplice. In short, no reasonable person would have concluded from this information that it must have come from a privileged source, and certainly not in the same way that one could easily reach that conclusion about the email in *Joly*.

The Attorney General argues at best, Galloway can only point to speculation that the source was privileged. Some witnesses testified at the instant proceedings that they wondered who the source was, even whether the source was privileged. But no one except Mayer truly knew.

The Attorney General notes Galloway also points to the fact that Mayer was "a sworn law enforcement [officer] (read: government)," and that as such he knew the source of the tip to be privileged. But because Mayer worked for a different law enforcement agency unconnected to the Stislicki investigation, Mayer did what the detective in *Joly* should have done, i.e., "tum the case over to another detective or a different law- enforcement office", in this case, the agency investigating the case, the Farmington Hills Police Department. The Attorney General argues this disconnect between the tip coming to Mayer and Mayer then passing it, anonymously, to Farmington Hills lessens any "outrageousness" in this case compared to *Joly*. That is, the agency that acted on the information was utterly unaware that the original tipster was privileged. She argues the actions in this case were not "brazen," as were those in *Joly* because, there, it was the same agency that both deliberately intruded into the privileged relationship and acted on that information. She argues this case did not suffer from the same objective knowledge that was present in *Joly*, and thus the result should not be the same.

There can be little question that Chief Gary Mayer knew that the information he received from Jim Hoppe came from a privileged source. At the time of the evidentiary hearing, Chief Mayer responded as follows to questions from the Assistant Attorney General:

> *Ms. Hagaman-Clark*: Did you know from your conversation with Hoppe that the information that he was providing to you came as a result of him conducting a polygraph?

A. I figured it. He didn't say it.

Q. You assumed it?

A. Yes.

The Attorney General appears to concede this point and argues that because Mayer did not disclose Jim Hoppe's name and privileged relationship to the FHPD, he was somehow cleansing the information of its privileged source. That specific issue will be addressed below, but as to the first prong of the *Voigt/Joly* test, the Court finds that there was an objective awareness of an ongoing, personal attorney-client privilege. Gary Mayer was the Chief of Police for the City of Troy, and at the time the information came into his possession, he was serving in a governmental capacity.

Even if he claims Hoppe did not tell him he had been hired to conduct a defense polygraph examination on the Defendant, he had all of the facts to be objectively aware. As discussed in *Voigt*, 89 F3d at 1069, objective knowledge is established by proof that the government is *or should be aware* of the attorney-client relationship. Mayer knew that his friend was a polygraph examiner hired by defense attorneys. The information was extremely specific and was coupled with Hoppe's insistence "the security guard did it". Hoppe's insistence on confidentiality was also evidence of the source of his information, as Hoppe was violating not only his ethical duties, but the laws of the State of Michigan, MCL 338.1728. Absent Hoppe being present during the commission of the crime, the rational inference was that the information came from

a defense polygraph exam, and as stated by Mayer, he assumed that it did.

As with Mayer, the testimony of Charles Nebus shows that he had objectively ascertained that he was receiving information from a privileged source. On December 9, 2016, Nebus was a veteran police officer, having served in law enforcement for 37 years, 16 of which he served as Chief of the City of Farmington or Farmington Hills.

Nebus recalled that on December 9, when he got the call from Mayer, "His call was very serious. I knew something was wrong. There was an urgency in his voice, and he told me he had information on ... the Stislicki investigation ... Not hi, how are you, what's going on, it was just immediately he said he had information -- some confidential information about the case". When asked what Mayer told him, Nebus responded:

> *A*. He told me that the -- that he had a source that he couldn't reveal to me.
>
> *Q*. Okay. Did you ask him who that source was?
>
> *A*. I don't really recall. I just know he made it very clear that he -- you know, he was very emotional about it - he could not reveal who the source was.
>
> *Q*. Okay
>
> *A*. It had to be confidential.

The fact that Nebus did not follow any standard protocol for preserving the information he had received from Mayer further leads to the conclusion that he was objectively aware of the privileged source of the information. Rather than prepare a report, or even a tip sheet that reflected that the information he had received came from a call from Mayer, Nebus doubled down on the efforts to hide the privileged source of the tip, and on a tip sheet, labeled the tip from Mayer as anonymous.

The first time Nebus sought legal counsel on the issue of the phone call and information he had received from Gary Mayer was approximately six weeks after the investigation started, and approximately five weeks after the call from Mayer. At that time, Nebus and others of his staff met, along with the State Police, at the Oakland County Prosecutor's Office to discuss the prioritization of evidence to be analyzed at the State Police Crime Lab. Nebus went to the meeting with the intent to inform the Prosecutor of the facts surrounding the tip received from Mayer. After the meeting with the State Police, Nebus met privately with Prosecutor Jessica Cooper and Chief Assistant Paul Walton and advised them about the phone call from Mayer. Nebus stated:

> At that time, yes. I just felt it was about six weeks into the investigation and I needed to -- you know, they were -- the prosecutor and deputy prosecutor, they had been helping us with the case, were very interested in the case. I consider them partners in the case. I had been just holding this information very quietly amongst myself, and probably a couple of just

> staff members of the department, and I felt the need to tell them, so I told them where I -- about the tip and where I received it.

It is clear, from the weight that Nebus felt as a result of his decision not to reveal the source of his information, that he knew that what he was doing was wrong; that he was in possession of privileged information.

The Attorney General and the various members of the Farmington Hills Police department put great stake in the fact that they profess to not know the name of the privileged source. To begin, once the information was disclosed to Mayer and he acted on it by turning the information over to the investigating agency, his refusal to name his source is irrelevant. Additionally, even if Nebus and FHPD did not know the identity of the source, it is clear they all knew that the information was likely from a protected source. Thus, they also had "objective knowledge" that they were dealing with privileged information.

Though resolute in their testimony that they did not know the name of the source of Mayer's information, Nebus, Dan Rodriguez and Matt Koehn all testified that the information was extremely specific, causing them to consider whether it came from a privileged source. They were also aware that the information had been phoned in by the Troy Chief of Police. As Nebus testified, it "never crossed [his] mind" that Mayer had gotten the information from an accomplice, lending further to the inference that the information came from a protected source.

During the course of his testimony at the evidentiary hearing, Nebus repeatedly said that he knew some day he would "have to tell the truth". When pressed to explain what he meant by that remark, the following exchange occurred:

> *Ms. Michaels*: But you did keep saying, we would have to tell the truth. What--what truth were you holding back, back in 2016?
>
> *A*. There was no truth being held back. Well, we hadn't shared; he was going to have to say who the source of the information was, and I was going to have to someday testify that I got the information from him.
>
> *Q*. Because you didn't document in the tip that you got the information from him.
>
> *A*. I documented in the tip that the source had wished to remain anonymous.
>
> *Q*. I'm going to ask that again. You didn't document in the tip that the information came from Gary Mayer?
>
> *A*. Correct.

The standard to determine whether the government knew of the ongoing privileged relationship between Hoppe and the Defendant is whether the government was "objectively aware". *Joly*, 336 Mich App at 435. The Attorney General seems to misunderstand this term and argues that by simply withholding Hoppe's name and relationship to the Defendant, Mayer was free to disclose the information Hoppe had

given him to the FHPD. To begin, this argument assumes Mayer's knowledge of the privileged relationship is not relevant, but it is. His testimony reveals that he was objectively aware of the ongoing privileged relationship. The analysis of the government's knowledge of an ongoing privileged relationship could stop there, but in this case, that knowledge extended to the FHPD. The testimony of Nebus, Rodriguez, Koehn and others all shows an objective awareness that the information came from a privileged source. As stated by the Court in *Rochin*, *supra*, there has been a showing that government actors were aware *or should have been aware* of the privileged nature of the information they had received.

The Attorney General's argument amounts to an assertion that a wink and a nod was sufficient to insulate the information from its privileged source. The evidence supports the conclusion that both the Troy Chief of Police Gary Mayer, the Farmington Hills Chief of Police Charles Nebus and the Farmington Hills Police Department were objectively aware of an ongoing personal attorney-client relationship which covered James Hoppe's relationship to the Defendant.

2. Intentional intrusion into the privileged relationship

It is deeply troubling and difficult to understand why Mayer took the action of passing the information from the defense polygraph examiner to the investigating agency, knowing that he could compromise the evidence that might be obtained as a result of their gaining this privileged information. On cross examination, the following exchange took place:

Ms. Michaels: You were protecting the information by not revealing the source, correct?

A. I don't understand the question.

Q. If you revealed who the source of the information was, you knew the information couldn't be used in a court proceeding, right?

A. I didn't know -- as I indicated before, I have my law enforcement training to guide with that stuff. So I just present information and the lawyers figure out what they're going to do with it.

Q. You had questions in your mind about fruits of the poisonous tree?

A. Yes.

Q. What did that mean to you?

A. It meant that perhaps the information couldn't be used if it was from a source that was found to be wrong – I'm not using the right term there, but that the information couldn't be used further.

Q. For what?

A. For evidence.

That a chief of police, after forty years of law enforcement experience, seven as a detective and ten as a chief, would find it necessary to "just present information and the lawyers figure out what they're going to do with it" might be excusable if that is what he had

done. However, instead of consulting a lawyer, he immediately called the investigating agency and disclosed the privileged information. He didn't even start at the top, which in other circumstances might have allowed a more astute chief to shield his investigators from the information; Mayer started his phone calls substantially down the chain of command.

Nor, when given the opportunity, was he forthright with the prosecutor who had jurisdiction over this case. In a phone call with Paul Walton, Oakland County Chief Assistant Prosecuting Attorney, Mayer recounts:

> Well, as -- as the conversation went on, there was a lot of discussion on their -- on their point - on their part that I wasn't involved with. I was just on the phone while they were talking back and forth. When it was said that they could compel me to do it and -- I gave a hypothetical like, what if this person worked for the defense attorney. And then Mr. Walton said -- he was like oh -- like a spontaneous utterance like oh, and then he said something like, you got the polygrapher or private investigator. I didn't say anything.

In a theme that is disturbingly prevalent in this case, Mayer, very shortly *after* he passed on the information to Farmington Hills Police, did call a lawyer. The purpose of his phone call was not, however, to check on whether he should have taken the action he did, and perhaps take mitigating action; rather, his purpose for calling the lawyer was to line up representation, in case someone attempted to force him to disclose that the source of his information was his friend

Jim Hoppe. On December 13, 2016, Chief Mayer contacted Lori Bluhm, Troy City Attorney, to advise her of the information that he had received and provided to Farmington Hills PD. Notes of this conversation are contained in Staff Investigative file 16-56. When questioned by defense counsel as to why he felt the need to provide the city attorney with this information, Mayer responded as follows:

> It was a homicide investigation and I was involved having information from a confidential source that I wanted to keep confidential because that's the agreement I had. So she would be my representation to assist me in keeping that confidential.

As with Mayer, Nebus did not put on the brakes and insist that Mayer reveal the source so he could make a rational decision about how to respond to the information, or contact the Prosecutor for advice, or refuse to pass on the information until he knew that it wasn't privileged. Rather, he took down the information and gave the command, in his words to "rally the troops". After evidence had been seized based upon the information, Nebus took steps to conceal the source by typing up a tip sheet that stated the information came from an anonymous source. That Nebus knew his actions would prevent or at least prolong the discovery of the violation of Defendant's rights is clear. When asked why he didn't list Mayer as the source of his information in a report or on the tip sheet, he stated,

> If that was put on here then there would have been a whole multitude of people who would have known the tip was from Chief Mayer,

> and things would have started to spill and where this came from and -- you know, I was trying to respect the confidential nature of the phone call hoping to get more information, you know, from the chief.

Nebus also recounts an emotional, even tearful, conversation with Mayer when he told him that he was letting the Oakland County Prosecutor know that the original tip was not anonymous but had been phoned in by Mayer. About that phone call Nebus stated:

> .... What it -- what was happening there is I told Gary that, you know, I -- I felt bad that I let him know because he didn't know that -- until now that I had divulged--it was me telling him for -- you know, that I told Prosecutor Cooper and Paul Walton about him being the person, and I wanted to let him know that I had done that because that was hard to tell him. And he said that
>
> that he was going to call Paul immediately during our conversation, and I noted that. And at first I was thinking to myself -- because I wanted to -- this fellow chief that I was going to accompany, maybe I would accompany him or go with him to a meeting or something. And I thought to myself, that wasn't right because he was trying to keep the confidential person that -- the source of this information, he was trying to keep it private.
>
> And it really wasn't my business to be there, it was you know, because of me telling the

> prosecutor about it, they wanted to talk to him to find out who the source of the information was.

To say the source of the information that he had passed on to his officers "really wasn't [his] business" is a staggering admission that he was willing to let his feelings for Mayer interfere with his duties as a chief law enforcement officer, sworn to uphold the Constitution of the United States and the Constitution of the State of Michigan. As Chief of Police, he was still in charge of an ongoing investigation that he was obligated to recognize would be compromised by the use of privileged information.

The Attorney General seeks to differentiate this case from *Joly* by arguing that the police did not procure or seek out the evidence, rather, the information was brough in through a tip. This argument is premised upon the theory that because Chief Mayer did not solicit the phone call from Jim Hoppe, it was okay for him to ignore the obvious privileged nature of the information and pass it on to the investigating agency. While the facts in this case differ from those in *Joly*, they are not distinguishable on that basis. Both cases are premised on the inadvertent discovery of privileged information. In *Joly*, the email was inadvertently discovered during the properly conducted search of a tablet; in this case through an unsolicited call from Jim Hoppe.

The Attorney General argues that unlike *Joly* this case does not suffer from the "doubl[ing] down" on the privileged information that existed in *Joly*. Ironically, in support of this argument, the Attorney General states in her brief that "the Court of Appeals in *Joly*

was concerned with "what happened *after* the discovery" of the privileged email. 336 Mich App at 405 (emphasis in original). With this the Court agrees. What happened after the inadvertent discovery is exactly what the *Joly* court based its decision on. In *Joly*, the Court of Appeals outlined the steps the detective could have taken to mitigate, rather than exacerbate the breach. where the Court said":

> After learning of the privileged e-mail, the detective did not attempt to segregate the e-mail, tum the case over to another detective or a different law-enforcement office, seek guidance from the court officer who signed the warrant, or work with the prosecutor to develop some other measure to separate the investigation from the privileged information that the detective learned from reading the e-mail (and could not realistically unlearn). [*Id.*]

After citing this passage, the Attorney General in her brief states, that the Court of Appeals noted that the detective (in *Joly*) instead "doubled down on the breach and used the privileged information to further his investigation of the defendant" *Id*. She then argues "[t]hat is not what happened in this case. When the tip came in from Hoppe to Mayer…Mayer turned the information over to different a law-enforcement office, by anonymously passing the information to the agency investigating the Danielle Stislicki disappearance." It is difficult to understand how turning the information over to the agency that is conducting the investigation would be protecting that agency from the privileged information. Mayer's actions did not shield

the investigating agency from the privileged information, it disclosed it to them.

The Attorney General seems to have completely missed the point of the *Joly* Court's recitation of what could have been done with the privileged information, by arguing that Mayer acted properly by turning the privileged information over to another agency (the FHPD), without disclosing its privileged source. Nothing in *Joly* states that the *privileged information* should be turned over to another agency, it is the *investigation* that must be turned over, and the privileged information withheld from the new agency or investigators.

As recognized by the Court in *Joly*, "[t]here are systems that can be put in place to screen out privileged materials proactively ... though no system is fool-proof. In the case where a potentially privileged communication does get caught up in an otherwise lawful search, there are also steps that can be taken to identify and segregate privileged information from the rest, including filter agents or taint teams". 336 Mich App at 405 (citation omitted). Nothing of that sort was done in this case, making it exactly on point with *Joly*.

Neither Mayer nor Nebus did anything to shield the investigators from the privileged information. Rather, they "doubled down" and promoted the investigators taking action on the information. Chief Nebus further "doubled down" when he participated in the efforts to mask the breach of privilege by listing the tip as "anonymous". Both Mayer and Nebus, rather than shutting down the breach, perpetuated and enabled further use of the privileged information, while

masking its origins. Nebus became a willing participant in the actions that subverted the Defendant's rights. He colluded with Hoppe and Mayer to hide both of their roles in the investigation and the violation of Defendant's rights.

3. Actual and substantial prejudice to the defendant

As to the third element of the *Voigt/Joly* test, there is no question that the Defendant has suffered actual and substantial prejudice. Prejudice as a result of interference in the attorney client privilege may manifest itself in a number of ways, including use of evidence gained through the interference, use by the prosecution of confidential information regarding defense plans and strategy, or destruction of the attorney-client relationship. *United States v Marshank*, 777 F Supp 1507, 1521 (ND Cal, 1991). Prejudice may also result from "other actions designed to give the prosecution an unfair advantage at trial." *Id.*

By the time Nebus acted upon his conscience and informed the Prosecutor of where the information came from, it was already too late. Not only had crucial evidence been collected on December 9, but affidavits for search warrants had used the privileged information to establish probable cause for additional searches. Consulting the Prosecutor should have been the first thing Nebus did after receiving the information from Mayer. At that time it would have been possible to undertake the mitigation factors that have been recognized in many cases to shield the investigation from privileged information which came into the hands of investigators inadvertently. See *Joly*, 336 at 405; *United States ex rel Shiflet v Lane*, 815 F 2d 457,

466 (CA 7, 1987); *United States v Segal*, 313 F Supp 2d 774 (ND Ill, 2004). Instead, when he received the information, Nebus ignored the problem it presented and doubled down by acting on the information without any filter, and in addition, hiding the fact that the information had been obtained from Mayer. Even after being told by Paul Walton that the information likely came from a protected source, neither Nebus nor anyone else at the FHPD did anything to protect the ongoing investigation by taking mitigating actions.

Absent a ruling from this Court, the prosecution intends to introduce the evidence that was collected in the days following the December 9 phone call from Hoppe, as well as the evidence obtained by the approximately 67 search warrants that contained the privileged information.

The Attorney General has argued that the Defendant does not have standing to challenge the recovery of physical evidence owned by Danielle Stislicki, basing her argument on the Fourth Amendment, and cases decided on that basis. However, the Defendant has not alleged a violation of his Fourth Amendment rights, and therefore that argument is inapposite.

The Attorney General has also argued that the evidence that was obtained as a result of receipt of the privileged information would inevitably have been discovered, citing portions of the preliminary exam transcript that described helicopter and foot searches across all of metro Detroit, the canvassing of the area around Danielle's apartment and dumpster searches in the area of M-5, 10 Mile Road/Grand River, and 11 Mile Road on the day Danielle went missing. The fact

that those searches were conducted and were not fruitful deflates the argument. Absent the very specific information received from Jim Hoppe, it was *not* inevitable that the evidence would be discovered. The Court takes judicial notice of the dense commercial district where the Tim Horton's is located. Additionally, the explanations used by Mayer and Nebus to support their immediate action on the information defeats the argument. Hoppe was urgent in his disclosure of the information, Mayer in his transmission to Nebus, and Nebus in his rallying the troops to investigate based on the information because there was a winter storm predicted that would make likelihood of discovery of the evidence thereafter, in their belief, greatly diminished if not impossible.

This case is not factually similar to those cited by the Attorney General in support of her argument on the inevitability of discovery, and the Court does not find that the items located as a direct result of the tip would inevitably have been discovered.

While the appellate courts for the State of Michigan have only addressed the issues presented in this case once, the United States Supreme Court and other federal courts have had several opportunities to address the impact of a violation of the attorney-client privilege on a defendant's due process rights. It will be difficult for persons not directly involved in the justice system to grasp the magnitude of the violation that law enforcement engaged in, and why it should result in a suppression of evidence.

As stated by the Court in *Joly*, our judicial system is predicated on the adversarial process. Brought here by English colonists and subsequently evolved over

the centuries, it "is grounded on competing factual and legal arguments presented by adverse parties." *In re Smith*, 335 Mich App 514, 521; 967 NW2d 857 (2021). "This adversarial process requires several components to achieve its public end. These include, among other things, a neutral arbiter, even-handed procedures, rational evidentiary rules, and well-prepared advocates. With respect to the latter, for an advocate to be well-prepared, the advocate must have the opportunity to be well-informed by the client." *Joly*, 336 Mich App at 396.

In Michigan, the attorney-client privilege has both common-law and statutory roots. The privilege has long been recognized as part of our state's common law. *Passmore v Estate of Passmore*, 50 Mich 626, 627; 16 NW 170 (1883). Additionally, our Legislature codified the privilege in the state's criminal code. MCL 767.5a(2). The privilege is extended to those employed by attorneys, and in the case of a polygraph examiner, also codified in the state's criminal code. MCL 338.1728. Our rules of evidence provide for the privilege, MRE 501, and our professional rules of conduct give practical guidance for the implementation of the privilege, MRPC 1.6 and 1.9. "This is all to say that the attorney-client privilege is a cornerstone of our system of jurisprudence". *Joly*, 336 Mich App at 397.

The confidentiality imposed by the system on lawyers is inviolate. As stated by the Court in *Marshank*, 777 F Supp at 1522–1523:

> confidentiality of the attorney-client relationship is severely compromised, if not destroyed, when, after representing a client, a lawyer

> joins in the criminal prosecution of that client with respect to the identical matter about which the attorney originally counseled the client. Such switching of sides is fundamentally unfair and inherently prejudicial. Without question, the client's right to a fair trial, secured by the due process clauses of the fifth and fourteenth amendments, is compromised under these circumstances.

The polygraph examiner, James Hoppe, was employed by the defense and as such was bound not only by the provision of MCL 338.1728 but also by the attorney-client privilege that attached between Mr. Galloway and his attorney. Mr. Hoppe performed the service that he was paid for, then rather than keep that information confidential, he switched sides and called the police. "Without question, the client's right to a fair trial, secured by the due process clauses of the fifth and fourteenth amendments is compromised under these circumstances". *Id.*

The appropriate remedy for a Fifth Amendment violation is generally suppression of the evidence. *United States v Rogers*, 751 F2d 1074, 1078 (CA 9, 1985). Suppression is an appropriate remedy where the court can identify and isolate the evidence obtained in violation of the defendant's Fifth Amendment due process rights. The prosecution is thus denied "the fruits of its transgression" and the due process right to a fair trial is preserved. *Id.* at 1078; *Marshank*, 777 F Supp at 1521-1522. As stated by the Court in *Joly*:

> Furthermore, as the U.S. Supreme Court observed in *Swidler & Berlin v. United States*,

> 524 U.S. 399, 408, 118 S. Ct. 2081, 141 L. Ed. 2d 379 (1998), "[T]he loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place .... [S]o the loss of evidence is more apparent than real." If courts are unwilling to suppress evidence when a breach of the attorney-client privilege results in a violation of due process, then the privilege's role in our adversarial system will be eroded. Accordingly, to promote respect for constitutional rights, deter violations of the same, and preserve judicial integrity, we conclude that the trial court properly suppressed the derivative evidence. [336 Mich App at 409]

Evidence seized as a direct result of tip

There are obvious pieces of evidence that must be suppressed, including Danielle's Fitbit, car keys, and cellphone, along with evidence obtained by forensic examination of the phone; the surveillance footage and phone records from Tim Horton's, surveillance footage from the gas station; and information obtained from the Green Cab company. The Court does not have a complete list of the evidence collected in this case and recognizes there may be other items that fall into this category.

Evidence sought to be suppressed pursuant to *Franks v Delaware*

Additionally, the defense has asked that evidence obtained by search warrants that contained the privileged information be suppressed pursuant to *Franks*

v Delaware, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978). Nearly 80 search warrants were issued in this case based on the affidavits of FHPD personnel[9]. Defendant states that in not one of the affidavits submitted after FHPD personnel learned that the information was actually twice removed, i.e., a tip was provided to Chief Mayer who forwarded the tip to Chief Nebus, did the affiants seeking those warrants clearly identify for the examining magistrate the full nature of the "anonymous" information. Even more outrageous, he argues, is the fact that once FHPD personnel became aware that the information originated from an attorney-client protected process, the affiants declined to include that information in their warrant requests.

Defendant argues the holding in *Franks v Delaware*, *supra* has been expanded to include omissions of material facts, the situation presented by Mr. Galloway's case.[10] Mr. Galloway submits that he has more than completely established that the FHPD personnel refused or neglected to *ever* advise the examining magistrate of the extraordinary facts surrounding the privileged information. He argues that being deprived of this information brings into question the decision of the magistrate to issue the warrants. Defendant asks that should the Court conclude that suppression of less than all of the evidence obtained via search

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[9] Eleven of those search warrants were issued before the receipt of the privileged information, and evidence obtained pursuant to those warrants is not subject to suppression on these grounds.

[10] *People v Kort (On Remand)*, 162 Mich App 680; 413 NW2d 83 (1987), abrogation on other grounds recognized by *People v Russo*, 439 Mich 584; 487 NW2d 698 (1992).

warrants is warranted, it seek the parties' input on what evidence to suppress.

In response, the Attorney General states it is important to note that there is "a presumption of validity with respect to the affidavit supporting the search warrant." *Franks*, 438 US at 171. To attack that validity, "[t]here must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof." *Id*. And even if such falsehoods or recklessness are established, the reviewing court must determine whether there remained sufficient probable cause for the warrant even without the compromised information. *Id*.

The Attorney General states it is also important to note that, in the case of a tip, the substantiation of the tip by recovery of evidence consistent with the tip renders any further focus on the tip "inappropriate" and "unnecessary." *People v Keller*, 479 Mich 467, 477; 739 NW2d 505 (2007). That is, even if "the anonymous tip prompted the investigation," police observation that confirms the tip is the basis of probable cause, not the tip itself. *Id*. at 483.

Here, the Attorney General argues, the police substantiated the tip by recovering Danielle's Fitbit and keys by the roadway, and by obtaining video-surveillance footage and phone records from Tim Horton's and transport records from the Green Cab Company. Those points were all outlined in the tip. The police included the content of the tip *and* the evidence recovered from it in search-warrant affidavits after receiving the tip, and there were no misrepresentations or material omissions. The affidavits stated that police

"responded to the area of Grand River and Halsted in response to a phoned-in tip." None of that information was incorrect: the tip was phoned from Hoppe to Mayer to Nebus, and that is the area where police searched. And the evidence recovered rendered the tip itself immaterial for the purposes of future warrants. *Keller*, 479 Mich at 477.

The Attorney General argues Galloway would like this Court to believe that the statements in the affidavits were false because the police knew the original tipster was a privileged source and yet failed to either identify that in the affidavits or omitted the tip from the affidavits. But the testimony at the instant proceedings has shown that allegation to be false. None of the affiants knew the source of the tip until 2019 at the earliest. Thus, there is no basis on which to conclude that the officers violated *Franks*.

Moreover, the Attorney General argues, the officers were acting in good faith. "Under the good-faith exception, evidence obtained through a defective search warrant is admissible when the executing officer relied upon the validity of the warrant in objective good faith." *People v DeRousse*, ___ Mich App ___; ___ NW2d ___ (2022). This exception exists because there is "potential for the exclusionary rule to impede the truth-seeking function of the judiciary, resulting in guilty parties either evading punishment altogether or receiving favorable plea bargains." *People v Goldston*, 470 Mich 523, 530; 682 NW2d 479 (2004).

Finally, the Attorney General argues, even if the content of the tip and the physical evidence recovered from it were omitted from the affidavits, the warrants were otherwise supported by probable cause. As

noted, Galloway was a suspect in this case by December 6, 2016, three days before the tip was received. By that time, eleven search warrants had already been issued *without* the tip. There is no reason to believe that future warrants including that same information would not have been issued absent the tip and the evidence recovered from it. The record simply does not support such a contention. Accordingly, there were no deficiencies in the search warrants or the supporting affidavits, and even if there were, the warrants were still supported by probable cause.

For the reasons already stated in this opinion, the Court finds the privileged information should not have been included in the affidavits for search warrant. The Court agrees that a *Franks*-type analysis is necessary to determine if the search warrant affidavits support a probable cause determination, when the privileged information is removed from the affidavit. In order to make further rulings however, the Court will need additional analysis and argument from the parties. A briefing schedule will be issued after consulting with the parties.

B. Motion to Dismiss

1. FHPD's destruction of emails

The defense submits that the Court should consider the FHPD's practice of destroying emails concerning its cases and investigations that are more than three years old as part of its due process calculation. While it is true that if the emails have been destroyed, the defense will never know what they contained, the Court is having a difficult time determining how the destruction of the emails has prejudiced

the Defendant. Communications about who knew what, and when, were relevant to the Court's determination of the government's intrusion into Mr. Galloway's due process rights, but the Court has decided that matter without the need to consider the destruction of emails. Thus, the Court is unclear on what further prejudice the Defendant suffered as a result of the destruction of the emails. For this reason, the Court does not find that there is a remedy that warrants an analysis of this issue.

2. The Attorney General's neglect or failure to undertake to protect the facially privileged contents of attorney Arthur Weiss' memorandum on behalf of his client, Jim Hoppe

The Defendant argues that while representing Jim Hoppe in the investigative subpoena proceeding in this case, Hoppe's attorney, Arthur Weiss, filed a memorandum addressing legal issues that arose during the very specialized criminal process. In the memorandum, attorney Weiss set forth a detailed list of 21 pieces of information he represented, as Mr. Hoppe's attorney and, obviously, as an officer of the court, contained all the details Mr. Galloway provided during his private polygraph.

SAAG Powell Horowitz testified during the August 5, 2022 hearing that she remembered receiving and reviewing the memorandum. She then put it in her file, a file that could be accessed by anyone in the office as long as they asked to do so. Ms. Powell Horowitz identified a number of individuals who could have accessed the memorandum, including Criminal Division supervisor Richard Cunningham, Chief

Assistant AG Laura Moody, AAGs Scott Shimkus, Sunita Doddamani, Donna Pendergast and, of course, Attorney General Nessel. Furthermore, the Defendant argues, the tainted information has been passed on to a new AAG, Ms. Russo-Bennetts, who may well have involved other office personnel. The defense also notes that at least two of the AG's investigators are not only aware of the information at issue but have continued to investigate the case after learning of it.

Defendant argues Ms. Powell Horowitz should have been aware of the need to take steps to assure that access to the memorandum was restricted, if not precluded.

The defense acknowledges that when SAAG Horowitz Powell became fully aware that the original material came from a privileged source, she moved quite quickly to pursue the details of what had transpired, talking to witnesses and pursuing an investigative subpoena proceeding, and the defense lauds Ms. Powell Horowitz for her quick actions in addressing the matter. But, the defense argues, her focused, thorough, and speedy actions to determine without doubt who was Chief Mayer's source and what was that person's relationship to or involvement in the case begs the question: why did she take no actions to segregate or restrict access to the contents of Mr. Weiss's memorandum, thereby preventing the dissemination of the information beyond control? She did not take any steps to initiate a firewall around the Weiss memorandum, did not approach or seek advice from the elected Attorney General -- the state's chief prosecutor who brought her in to handle the case -- nor did she seek

advice from anyone else, and apparently did not even raise the issue with the chief of the criminal division.

Mr. Galloway suggests that the following exchange about Powell Horowitz's possession of Mr. Weiss's memorandum during his attorney's cross-examination of Powell Horowitz is telling:

> *Ms. Michaels*: My question is this; you, as the attorney general prosecuting the case, were now in possession of everything that my client allegedly told the polygrapher, correct?
>
> *A.* So, I had an alternate statement. We had actually- - because of the Wayne County case [against Mr. Galloway] - - had looked into sex trafficking scenarios, and this information had been - - had been looked into.

Defendant points out the exchange is interesting because while counsel's question was fairly general, Powell Horowitz's answer was very specific, not to mention non-responsive. Counsel had not brought up any of the specific contents of attorney Weiss' list of details Hoppe obtained from Mr. Galloway. Rather than answer that question, however, Powell Horowitz interjected the issue of sex trafficking and claimed the issue had already been explored.

Mr. Galloway argues this exchange is also disturbing as it reflects without doubt that the SAAG was aware of the memorandum's specifics, particularly the references in the document to sex trafficking. But her testimony suggests that she did not appreciate the significance of the knowledge. When defense counsel asked Powell Horowitz if she was correct that

in his memorandum Arthur Weiss "put[ ] in everything that Mr. [Hoppe] learned from Mr. Galloway," Powell Horowitz replied "Correct."

Defendant states that contrary to Russo-Bennetts' repeated assertions that the contents of the Weiss memorandum were hearsay and, therefore, not admissible, Russo-Bennetts admitted the document herself. And hearsay has nothing to do with its role in the due process analysis before this Court. Defendant argues it is impossible to believe that the prosecution fails to appreciate that Weiss' detailed, 21-point itemization of everything his client told him that Mr. Galloway had said during his polygraph constituted a line-by-line itemization of a potential defense. Information that was in its possession at least three years before any likely trial date.

Defendant argues that perhaps unwittingly, Powell Horowitz precisely characterized the information in the memorandum. On direct examination she said that had predecessor defense counsel William Mitchell and Sharon Woodside filed "motions," the "reality" would be "then it's public knowledge that [Mr. Galloway] confessed."

To assure that there was no confusion about the nature of the Weiss memorandum's contents, defense counsel asked her if essentially the memorandum contained everything that Mr. Hoppe had learned from Mr. Galloway "when [Hoppe] was doing this polygraph exam hired by the defense attorney," the witness said, "Correct."

The Defendant points out the prosecution could not have sat in on Mr. Galloway's polygraph, could not

have learned, detail by detail, what Mr. Galloway might assert at trial because it would be a flagrant violation of Mr. Galloway's state and federal constitutional rights to remain silent. However the prosecution appears to have no qualms about its possession of the very same information, only written out rather than heard. Mr. Galloway submits that the government treated Mr. Hoppe as a *de jure* confidential informant. Clearly Mr. Hoppe saw it that way and so did Chief Mayer, who was fully aware that Mr. Hoppe obtained the information passed to Chief Nebus in his capacity as the defense polygraph examiner.

Furthermore, Defendant argues, the Attorney General's Office undertook no steps to segregate or restrict access to the information from the time it received the April 19, 2019 memorandum through the date of Powell Horowitz's testimony on August 5, 2022.

Mr. Galloway submits that the government's conduct in this case as to the original tip, but even more crucially, as to then-SAAG Powell Horowitz's review of "everything that Mr. Galloway had told Hoppe" in attorney Weiss's memorandum, then simply placing the memorandum in her file, exceeded the conduct that the *Joly* Court held was fatal to the prosecution.

Defendant argues the *Joly* decision is binding precedent on the issues presented in this argument. In *Joly*, the Court suppressed the derivative evidence relying, at least in part, on a federal case out of the Third Circuit, *United States v Voigt*, 89 F3d 1050 (CA 3, 1996). All of the arguments as to how the government should act when becoming aware they possess privileged information applies to the prosecutor, as

well as the police. The Defendant argues the Attorney General's Office is guilty of the same failures as the police. The information in the memorandum is not "incidental or only marginally material." Therefore, as the *Joly* Court held, the Attorney General "deliberately intruded into the substance of the attorney-client relationship."

The Defendant argues that the Court in *Joly* pointed out the steps that the Attorney General should have taken when she became aware that she was in possession of privileged information in the following passage:

> [T]he record shows that the government deliberately intruded into the attorney-client relationship. …It appears ... that an MSP technician came across the privileged email in the course of searching through other, nonprivileged e-mails. In this day and age of electronic communications, it is not particularly surprising that law enforcement will occasionally come across a privileged communication that is mixed in with other, non-privileged materials. *There are systems that can be put in place to screen out privileged materials proactively*, *see Taylor*, 764 F. Supp. 2d at 233-235, though no system is fool-proof. *In the case where a potentially privileged communication does get caught up in an otherwise lawful search*, *there are also steps that can be taken to identify and segregate privileged information from the rest*, *including filter agents or taint teams*. [*Joly*, 336 Mich App at 405 (citation omitted; emphasis added)]

In light of the potential that law enforcement may inadvertently discover privileged information, the *Joly* Court found "particularly troublesome" the government's conduct "*after the discovery*". The Court explained its concerns:

> After learning of the privileged e-mail, the detective did not attempt to segregate the e-mail, tum the case over to another detective or a different law-enforcement office, seek guidance from the court officer who signed the warrant, or work with the prosecutor to develop some other measure to separate the investigation from the privileged information that the detective learned from reading the e-mail (and could not realistically unlearn). Instead, the detective doubled down on the breach and used the privileged information to further his investigation of defendant. And the information in the e-mail was not incidental or only marginally material, but instead provided the key information—the location—that the detective did not previously have about the lawnmower and gas can. There was, in other words, a direct link between the detective's reading of the e-mail and his retrieval of both pieces of evidence. This can only be characterized as a deliberate intrusion into the substance of the attorney-client relationship. [*Id*.]

The Defendant notes that the *Joly* Court turned to the appropriate remedy for violating defendant's due process rights, and held that the trial court's

"suppression of the physical evidence was appropriate." *Id* at 407. The Court noted that,

> with respect to the violation itself, although presented in a rather matter-of-fact set of stipulated facts, *a moment's reflection shows how brazen the government's actions were in this case*. *The government knew of the attorney-client relationship*; it searched defendant's e-mails knowing of this relationship; *it found a privileged communication; it took the information gleaned from the e-mail and used the information for its investigation*; based on the information, it found two critical pieces of physical evidence; and it informed the trial court that it intended to use the physical evidence at trial notwithstanding the breach. *At each step*, *the government could have paused and made a different decision*, *one that respected the privilege or at least sought to mitigate the damage from the breach*, *but this it did not do*. [*Id*. at 408 (emphasis added)]

The defense argues that the Attorney General's conduct in this case was even more brazen. Then-SAAG Powell Horowitz came into possession of "a privileged communication" – what she characterized as a confession – then, "at each step" after coming into possession of the information, the Attorney General's Office "could have paused," could have "made a different decision," a decision that "respected the privilege or at least sought to mitigate the damage from the breach." However, like the prosecution in Ms. Joly's case, the Attorney General "did not do" so.

Defendant states there is no possible way to remedy the fact that a significant number of Attorney General personnel are aware of the details of Mr. Galloway's "confession." The situation is the classic one of the already-rung bell in that it cannot be undone. Given the Supreme Court's references to the possibility that government conduct that violates an accused's due process rights could warrant dismissal of the charges against the accused and the fact that the defense can conceive of no possible remedy to address this "outrageous," and apparently ongoing, behavior, Mr. Galloway requests that this Court dismiss the charge against him.

In response to this argument, the Attorney General contends that the Defendant's motion to dismiss for failure of the Attorney General to mitigate the disclosure and effects of the memorandum is not supported by the *Joly* case because this issue was not contemplated or addressed in *Joly*. The Attorney General states that Galloway has conceded that "the controlling case as to these issues" is *Joly*. Yet, *Joly* does not speak to the alleged distribution of information by third parties, such as, in this case, Arthur Weiss.

The Attorney General argues, with respect to the Weiss memorandum, Galloway essentially contends that the People had a duty to somehow prevent the memorandum from being filed in the first place or to thereafter mitigate its proliferation or effects. The People are unaware of any such duty, and Galloway does not cite any authority imposing such a duty, including *Joly* itself. Weiss represented Hoppe, and the People had no power or obligation to control what Weiss filed or how he filed it. And, in any event, Weiss

filed his memo to protect the identity of his client under the informant's privilege, intending the memo to be confidential. See *Roviaro*, 353 US at 58–59. But disclosure was ultimately compelled by court order, and the seal was eventually lifted, also by court order. Once the proceedings were made public, the People had no ability or duty to hide the contents of the memo. It was a matter of public record at that point. And, again, *Joly* does not speak to this issue whatsoever.

The Court agrees with Defendant that the actions of the Attorney General are subject to the same *Voigt/Joly* test as used for determining whether the conduct of the police violated Defendant's due process rights. While *Joly* did not directly address the action of the prosecutor, several cases relied upon by *Voigt* and *Joly* do. See *United States v Schell*, 775 F2d 559 (CA 4, 1985); *Marshank*, 777 F Supp at 1521 (interference with the attorney-client relationship would give the prosecution an unfair advantage at trial).

That the actions of the Attorney General meet the first and third prong of the test is clear. As to the first prong, there can be little argument that the Attorney General knew she was dealing with information covered by the attorney-client privilege upon receipt of the Weiss memorandum. Likewise, it is clear the prejudice to the Defendant is that the prosecution now has, as described by the defense, "detail by detail, what Mr. Galloway might assert at trial". Placing this information in the hands of the adversary is both "fundamentally unfair and inherently prejudicial". *Marshank*, 777 F Supp at 1522-1523.

As to the second prong of the test, contrary to the Attorney General's assertion that she had no duty to mitigate the government's receipt of the memorandum by initiating mitigation procedures, that argument is in direct contrast to what the Court in *Joly* found to be the government's deliberate intrusion into the attorney-client relationship. As both sides have noted, the Court in *Joly* acknowledged that the receipt of the privileged information was unintentional, as was the receipt of the memo in this case, however, the *Joly* Court found "particularly troublesome" the government's conduct "*after the discovery*". 336 Mich App at 405.

As the Court pointed out in *Joly*, there were many things the government could have done once they came into possession of the privileged information "that respected the privilege or at least sought to mitigate the damage from the breach", such as segregating the privileged information or engaging filter agents or taint teams, none of which were done in this case.

While the Attorney General did not take any steps to mitigate the receipt of the privileged information, and the memorandum could have been accessed by any number of people in the Attorney General's office, it is unclear exactly which employees of the Attorney General's Office have seen the memo. Jamie Powell Horowitz has seen the memorandum, but she no longer works as a Special Assistant Attorney General and will not play a role in the trial of this case. Danielle Russo Bennetts has seen the memo, but beyond that, the record is unclear.

While dismissal of the indictment is appropriate where continuing prejudice from the constitutional violation cannot be remedied by suppression of the evidence, *Marshank*, 777 F Supp at 1521-1522, it is still possible for the Attorney General's Office to acknowledge the impact of its possession of the privileged information and to take steps to mitigate the receipt of that information. The Court is willing to entertain mitigation measures undertaken by the Attorney General before deciding that the charges against the Defendant should be dismissed.

C. Motion to Quash the Information

Defendant argues it is a matter of black-letter law that a decision to bind an accused over on felony charges must be premised only on admissible evidence. Given that the defense asserts that at least some of the evidence seized pursuant to omissions from affidavits submitted in support of search warrants must be suppressed, assuming the Court declines to dismiss the charge against Mr. Galloway for the government's repeated and continuing violation of his state and federal due process rights, if the suppressed evidence contributed to the bindover its suppression may invalidate the district court's ruling.

Defendant states that, as with the *Franks* issue, without knowing what this Court's decision will be as to the charge generally and the search warrant affidavits specifically, it is impossible to address at this time whether the evidence produced at the preliminary examination in this matter is sufficient to support holding Mr. Galloway to answer for capital charges once the suppressed evidence is omitted. Similar to its request as to the *Franks* issue, the defense requests that

if the Court suppresses evidence as obtained pursuant to one or more invalid search warrants, the Court direct the parties to then submit briefs on the effect of the suppression on the bindover of Mr. Galloway, if any.

The Attorney General did not respond to this argument except to argue that Defendant should not be allowed any additional briefing.

As with the issues raised in Defendant's request to suppress based upon *Franks*, the Court does not have a sufficient record to rule on this motion at this time. Defendant may renew his motion at any time.

III. CONCLUSION

A. Motion to Suppress Evidence

For the reasons set forth above, the Court finds that Gary Mayer, Charles Nebus and other members of the Farmington Hills Police Department were objectively aware that they had inadvertently been provided with information that was covered by an ongoing attorney-client privilege. Once the information was in hand, rather than pausing and making a different decision, one that respected the privilege or at least sought to mitigate the damage from the breach, the police intentionally intruded on the privileged relationship and used the information to locate and seize evidence. As a result of the interference in the attorney-client privilege, the Defendant has suffered actual and substantial prejudice. Evidence seized as a result of the information was used at the Defendant's preliminary examination to obtain a bindover, and is intended to be used at trial to prove his guilt. The

Court concludes that the Defendant has established the three factors required by *United States v Voigt*, *supra*. Pursuant to *People v Joly*, *supra*, "the *Voigt* test is—itself—the measure of whether government action was outrageous or not. If a defendant satisfies all three elements, then the defendant has shown that the government's actions were "outrageous" for purposes of due process". The Court finds the actions of the government were outrageous.

1. Evidence seized as a direct result of obtaining the privileged information.

As a remedy for the government's violation of Defendant's due process rights, Defendant's motion to suppress is ***granted*** as to evidence that was seized based directly upon the use of the privileged information. Specifically, Danielle Stislicki's Fitbit, keys, and telephone and forensic data retrieved therefrom; the testimony of persons working at Tim Horton's who observed the Defendant; surveillance footage and phone records from Tim Horton's; surveillance footage from the gas station near Tim Horton's; and information obtained from the Green Cab company. The Court will consider additional evidence that falls in this category.

2. Evidence seized pursuant to search warrants that contained or built upon the privileged information.

The Court has not had the benefit of analysis and argument from the parties concerning evidence seized as a result of search warrants that contained or built upon the privileged information. The parties are directed to submit their analysis of search warrant

affidavits and evidence seized for a determination of whether the affidavits, after removing the privileged information, support a determination of probable cause for the issuance of the warrant.

B. Motion to Dismiss

Regarding the Defendant's motion to dismiss for the Attorney General's failure to mitigate her receipt of privileged information, the Court finds that the first and third prongs of the *Voigt* test have been met, but on this record the Court lacks sufficient evidence to determine whether the government intentionally intruded into the privileged information. Additionally, the Court leaves open the possibility that the Attorney General will take measures to mitigate her receipt of the privileged information, which could impact the Court's decision. The motion to dismiss is ***denied without prejudice.***

C. Motion to Quash the Information

On this record, the Court lacks sufficient information to entertain Defendant's motion to quash the information. The motion to quash the information is ***denied without prejudice.***

IT IS SO ORDERED.

Phyllis McMillen
Phyllis McMillen, Circuit Judge (P28180)