STATE OF MICHIGAN

IN THE OAKLAND COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

CASE#: 2019-272593-FC
Hon. Victoria A. Valentine

vs.
NICHOLAS REMINGTON,
Defendant.

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OPINION AND ORDER REGARDING DEFENDANT'S MOTION TO DISMISS WITH PREJUDICE

At a session of said Court held on the 21st day of May 2021 in the County of Oakland, State of Michigan

PRESENT: HON. VICTORIA A. VALENTINE

This matter is before the Court on Defendant's Motion to Dismiss with Prejudice for the Prosecutor's failure to produce exculpatory evidence.

In 2019, Defendant Nicholas Remington was charged with delivery of a controlled substance, causing death, under MCL 750.317a, which provides as follows:

750.317a Delivery of schedule 1 or 2 controlled substance; death as felony; penalty.

> A person who delivers a schedule 1 or 2 controlled substance, other than marihuana, to another person in violation of section 7401 of the public health code, 1978 PA 368, MCL 333.7401, that is consumed by that person or any other person and that causes the death of that person or other person is guilty of a felony punishable by imprisonment for life or any term of years.

It is undisputed that on June 13, 2019, Defendant's counsel served a Discovery Request on the Oakland County Prosecuting Attorney Jessica Cooper, demanding the production of any discovery pursuant to MCR 6.201.

MCR 6.201. Discovery states in part:

> (B) Discovery of Information Known to the Prosecuting Attorney. Upon request, the prosecuting attorney must provide each defendant:
>
> (1) any exculpatory information or evidence known to the prosecuting attorney;
>
> (2) any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation;

On September 27, 2019, the preliminary examination commenced before the Honorable Travis Reeds. On October 16, 2019, at the conclusion of the preliminary examination and based upon the evidence presented, Judge Reeds bound Defendant Remington over on the charge of delivery of controlled substance causing death. Mr. Remington's bond was set at

$1,000,000.00. In 2021, after recognizing the discovery violations by the former prosecutor, the current Oakland County Prosecutor stipulated to the reduction of Defendant's bond to $10,000.

At the center of the Defendant's Motion to Dismiss is the former Assistant Prosecutor's violation of legal and ethical duties to produce evidence, including exculpatory information.

The Michigan Court of Appeals held in *People v. Dickinson*, 321 Mich. App. 1, 4, 909 N.W.2d 24, 28 (2017) that:

> There is no general constitutional right to discovery in a criminal case. The Michigan Court Rules govern the scope of discovery in a criminal case. MCR 6.201. MCR 6.201(B)(1) provides that the prosecution, upon request, must provide the defendant any exculpatory information or evidence. MCR 6.201(B)(2) provides that the prosecution, upon request, must provide the defendant with any police report concerning the case except for portions that concern an ongoing investigation. The prosecution bears responsibility for evidence within its control, even evidence unknown to it, and even where the nondisclosure was inadvertent and not intentionally withheld.

In the case before the Court, Defense counsel did in fact request discovery information. Therefore, pursuant to MCR 6.201(H), the Prosecutor had an ongoing continuing legal and ethical duty to turn over discovery promptly.

MCR 6.201(H) Continuing Duty to Disclose provides:

> If at any time a party discovers additional information or material subject to disclosure under this rule, the party, without further request, must promptly notify the other party. MCR 6.201(H)

Due to discovery concerns, on January 6, 2021, Defendants' counsel served a letter pursuant to *Brady v Maryland*[1], which addressed potential due process and discovery violations

[1] *Brady v. Maryland*, 373 U.S. 83, 84, 83 S. Ct. 1194 (1963).

committed by former Assistant Prosecutor Hand. Current Assistant Prosecutor, Mr. Keast, immediately addressed the issues set forth in the letter.[2] His response confirmed that Ms. Hand intentionally failed to produce a significant amount of discoverable evidence. As conceded by the current prosecutor's office, much of the evidence withheld by Ms. Hand is exculpatory.

> "[E]xculpatory evidence, falls within the *Brady* rule. See *Giglio v. United States*, 405 U.S. 150, 154 (1972). Such evidence is "evidence favorable to an accused," *Brady*, 373 U.S., at 87, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. Cf. *Napue v. Illinois*, 360 U.S. 264, 269 (1959)." *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380 (1985).

The concealed evidence includes, but is not limited to, a September 26, 2019 "Snapchat" from a "Hulkolas" account, which was allegedly the name of Defendant's snapchat account. The Snapchat account and its messages are at the center of the issues in this case. Ms. Hand's failure to produce the discovery and blatant misrepresentation to the Court at the preliminary exam, is nothing short of intolerable due process violations.

As stated in *People v Dobek*, "a prosecutor's role and responsibility is to seek justice and not merely convict."[3] And while, the prosecutor's knowledge of the information being withheld is not required under the rule, here, it is conceded that Prosecutor Hand had knowledge, and deliberately withheld evidence and information that was required to be produced.

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[2] Beth Hand was the former Assistant prosecuting attorney assigned to this case.
[3] *People v. Dobek*, 274 Mich. App. 58 (2007).

Our courts have held that the withholding of exculpatory evidence by the prosecutor after discovery has been requested, constitutes a *Brady* Violation. *People v. Dickinson,* 321 Mich. App. 1, 4, 909 N.W.2d 24, 28 (2017).

The information that has now been provided shows CR No. 190015581-010, created by Det. Balog, that on 9/27/2019 (Start date of the Preliminary Examination) former Assistant Prosecutor Hand was provided a Snapchat that was sent on 9/26/2019 from the "Hulkolas" account.[4] The undisclosed "snap" was shown to former Assistant Prosecutor Hand by Jamie Thom, the decedent's step-father.[5] The Snapchat stated, "To all 5,000 of you beautiful motherfuckers I need ketamine, who got? Thanks, nick".[6] **Defendant Nick Remington, however, was in jail on 9/26/2019 and did not have access to Snapchat or this "Hulkolas" account from jail.** This evidence is in direct contravention of the claim of the assistant former prosecutor. This evidence was not produced until 2021 when the current Assistant Prosecutor, Mr. Keast, tendered the discovery to Defense counsel.

[4] People's Br. Filed in Resp. to Supp. Mot. pp 11-12, Apr. 9, 2021.
[5] *Id.* at 12.
[6] *Id.*

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

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

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

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

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

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

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

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

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

Despite the discovery failures by Ms. Hand, on 9/27/2019 she argued to the Court at the Preliminary Hearing:

> MS. HAND: Judge, for – for counsel to say that there's no – nothing in evidence to suggest that the defendant was the person using this account, Snapchat is a – an application that's on your cell phone... So to say it's not him and that somebody else got ahold of his account and made these admissions, you know, flies in the face of – of logic and it flies in the face of the evidence that's presented.[7]

Prosecutor Hand argued to Judge Reed on 09/27/2019, that it was not logical that other people could post on "Hulkolas" account, despite the exculpatory evidence that was not produced.

Incredibly, at the continuation of the preliminary examination on October 16, 2019, and while wrongfully withholding the 9/26/2019 Snapchat, former Assistant Prosecutor Hand mislead Judge Reed by stating "The Snaps are in evidence."

> MS. HAND: Well, Judge, he doesn't have to reopen the proofs to do that. The Snaps are in evidence. The Court has already admitted them. He wants to sit here and argue to the Court each of them, there's no – there is no need to reopen proofs. And I would indicate, Judge, that it does go to the weight, not the admissibility and the – the records are complete. There is a certification indicating that they are.[8]

There is no question that *Brady* violations and numerous discovery violations knowingly occurred in this case. Intentionally denying defendant a fair trial undermines the legitimacy of the criminal justice system and has a rippling effect on the community's trust in the legal process.

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[7] Prelim. Exam. Hr'g Tr. at 162:21-163:9, Sept. 27, 2019.
[8] Prelim. Exam. Hr'g Tr. at 162:12-19, Oct. 16, 2019.

Pursuant to MCR 6.201(J), when a *Brady* violation is discovered, it is up to the court to fashion the appropriate remedy under MCR 6.201(J).

> (J) Violation. If a party fails to comply with this rule, the court, in its discretion, may order the party to provide the discovery or permit the inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances.

Therefore, this Court orders that:

- Pursuant to MCR 6.201, all discoverable information shall be turned over to Defense Counsel within 14 days of the date of this Opinion and Order;
- All Snapchat evidence relating to the "Hulkolas" account is excluded as it is unreliable;
- An affidavit from both the former Assistant Prosecutor Hand, and the current Assistant Prosecutor Mark Keast shall be provided to Defense Counsel and filed with the Court within the 7 days of the date of this Order, detailing all known evidence. The affidavit shall include a list of all evidence the current and former Assistant prosecutors have knowledge of that has any relation to this case. The affidavit shall also include the date of any disclosure or production to the Defendants' counsel of the evidence and a list of any information that has not yet been produced;
- And, while this Court finds no fault in the handing of the Preliminary Examination by the experienced and esteemed Judge Reed, the Court finds that in the interest of justice, this case shall be remanded to District Court and shall be heard by a new judge.

This opinion does not address any Motions or issues previously filed by Plaintiff but adjourned by Plaintiff's counsel.

For the reasons stated above, Defendant's Motion to Dismiss with Prejudice is Granted in Part and Denied in Part.

Dated: 5/21/2021

Victoria A. Valentine

HON. VICTORIA A. VALENTINE (P58546)
CIRCUIT COURT JUDGE

STATE OF MICHIGAN

IN THE 52-1 DISTRICT COURT FOR THE CITY OF NOVI

STATE OF MICHIGAN,

v Docket No. 19-0002619

NICHOLAS REMINGTON,
Defendant.
_____/

PRELIMINARY EXAMINATION

Volume I of II

BEFORE THE HONORABLE TRAVIS REEDS

Dearborn, Michigan - Friday, September 27, 2019

APPEARANCES:

For the People:	MS. BETH HAND P47057 1200 N. Telegraph Road Pontiac, MI 48341 248-858-0656
For the Defendant:	MR. NEIL ROCKIND P48618 36400 Woodward Ave. Suite 210 Bloomfield Hills, MI 48304 248-208-3800
	MR. RANDALL LEWIS P46134 2000 Town Center Southfield, MI 48075 248-263-6800
Recorded by:	MS. CAROL HUNT CER 7445 248-305-6502
Transcribed by:	MS. NICOLE R. OLSON CER 7173 313-943-4223

The fact of the matter is - is that there is no evidence that Mr. Remington sent those other than the claim that it just had to be him because it – it's his account. And the fact of the matter is that there – nothing ties him to those specific messages on that specific day. There were other people that were in the house that day.

So we object to a bind over, your Honor. And I – and I'll reserve any – I don't want to waive any of the objections that we raise. Obviously, we raised substantial objections, excuse me, to the admission of the Snapchat records and I don't want to waive that for purposes of – of argument later on, your Honor.

THE COURT: Just so that I'm clear and make sure that I didn't miss something during the testimony, was there any evidence proffered that – of the Snapchat username of the decedent?

MS. HAND: No, there was not. And may I just briefly respond?

THE COURT: Yes, please.

MS. HAND: Judge, for – for Counsel to say that there's no – nothing in evidence to suggest that the defendant was the person using this account, Snapchat is a – an application that's on your cell phone. And that you send and receive these – these chats and these videos via

cell phone and the defendant even in one of the – like I indicated earlier, in one of the Snap videos – the – the Court I'm sure is aware of selfies. He's actually photographing himself in a mirror holding his cell phone and then sending – sending the - the story. So to say it's not him and that somebody else got ahold of his account and made these admissions, you know, flies in the face of – of logic and it flies in the face of the evidence that's presented.

Also in those messages, your Honor, there is people asking – I – I can't remember if they're asking for his name or his user and it – he – he responds, Nicholas Remington. So there is no doubt that this account holder and the user of this account was, in fact, the defendant when you look at the totality of the circumstances.

THE COURT: Okay. So, I'm going to need to go through these a little bit more closely.

MS. HAND: Please.

THE COURT: So, I just want to make sure, because they're voluminous, so far what I – I'm concerned with, and I want to look and see if the – I'm assuming that the argument about admissibility is because since you both have gone through this voluminous messaging back and forth, that there is a question of fact assuming that the messages are from the defendant and that the messages from

STATE OF MICHIGAN

IN THE 52-1 DISTRICT COURT FOR THE CITY OF NOVI

STATE OF MICHIGAN,

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NICHOLAS REMINGTON,
Defendant.
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PRELIMINARY EXAMINATION

Volume II of II

BEFORE THE HONORABLE TRAVIS REEDS

Dearborn, Michigan – Wednesday, October 16, 2019

APPEARANCES:

For the People:	MS. BETH HAND P47057 1200 N. Telegraph Road Pontiac, MI 48341 248-858-0656
For the Defendant:	MR. NEIL ROCKIND P48618 36400 Woodward Ave. Suite 210 Bloomfield Hills, MI 48304 248-208-3800
Recorded by:	MS. CAROL HUNT CER 7445 248-305-6502
Transcribed by:	MS. NICOLE R. OLSON CER 7173 313-943-4223

It reveals that the records that contain – that are purported to contain and to be sufficiently trustworthy to rely on are not, in fact, trustworthy. They're not, in fact, sufficiently trustworthy to rely on for business records.

So, to the extent that I can, I do want to reopen the proofs and I do want to go through each of these individual Snaps and point out the omissions if the Court will – will – will entertain that - that motion, if it will --

THE COURT: Okay, response, Ms. Hand?

MS. HAND: Well, Judge, he doesn't have to reopen the proofs to do that. The Snaps are in evidence. The Court has already admitted them. He wants to sit here and argue to the Court each of them, there's no – there is no need to reopen proofs. And I would indicate, Judge, that it does go to the weight, not the admissibility and the – the records are complete. There is a certification indicating that they are.

Sometimes, Judge, you might text somebody and in the middle of the text decide to pick up the phone and call them. That doesn't mean that the text portion of it is not reliable, it just means that maybe there was another conversation by virtue of another form of media, whether it's verbal or otherwise that may have occurred in the

interim. It doesn't make your records not reliable.

THE COURT: Okay, the motion to reopen the proofs is denied. You can certainly argue anything you want to by way of – of objection to the bind over. So, Ms. Hand, at this point I assume you're moving to bind over?

MS. HAND: Well, I thought I – I am, your Honor, if I didn't.

THE COURT: All right. Okay, now your response, Mr. Rockind?

MR. ROCKIND: Judge, I object to the bind over. The – the entirety of the – the case is – are these Snapchats. We presented the Court with, I think, sufficient information to warrant the Court to – to – to disregard and to refuse to admit the Snapchats, and when I moved to reopen the proofs I don't – I don't think it was lost on the Court that my purpose in doing that was for us to address again the issue of admissibility of these Snapchats.

This – the contention is is that these Snapchats are as reliable as business records for – for foundational purposes as medical records, as weather records, as records that we rely on – that business rely on every day. Snapchat is not relying on and no one at Snapchat is relying on the actual content of these Snapchats. There