S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED July 31, 1998
v DWIGHT CARVEL LOVE, Defendant-Appellee.	No. 202344 Recorder's Court LC No. 81-006966

Before: Cavanagh, P.J., and White and Young, Jr., JJ.

PER CURIAM.

The prosecution appeals by leave granted from the trial court's order granting defendant's motion for new trial. We have thoroughly reviewed the transcripts of defendant's trial and the evidentiary hearing held on defendant's motion for new trial and conclude that the trial court did not abuse its discretion in granting defendant's motion. We affirm.

In 1982, following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 48.548, assault with intent to murder, MCL 750.83; MSA 28.278, two counts of assault with intent to commit armed robbery, MCL 750.89; MSA 28.284, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Co-defendant Rex Love, defendant's brother, was acquitted of all counts. Defendant was sentenced to two years in prison for the felony-firearm conviction, and to life in prison for each of the remaining convictions. On appeal, this Court vacated one of the assault with intent to commit armed robbery convictions. *People v Love,* unpublished opinion per curiam of the Court of Appeals, issued June 30, 1983 (Docket No. 66559). After several unsuccessful post-trial motions for relief from judgment, defendant filed the instant motion for new trial.

Defendant's motion argued that he was entitled to relief based on newly discovered evidence and because he is actually innocent and his convictions represented a miscarriage of justice; he was denied his Sixth Amendment right to effective assistance of counsel by his trial counsel's failure to call an essential alibi witness; and he was denied due process because the prosecution failed to disclose to trial counsel evidence that was material, probative and exculpatory. Following an evidentiary hearing, the trial court granted defendant's motion for new trial.

A trial court may, in the interest of justice or to prevent a miscarriage of justice, grant a defendant's motion for a new trial. *People v Lemmon,* ___ Mich ___; ___ NW2d ___ (Docket No. 105850, issued March 24, 1998); MCL 770.1; MSA 28.1098; MCR 6.431. To obtain post-judgment relief, defendant is required to show good cause for failing to raise such grounds on appeal or in a prior motion, and actual prejudice. MCR 6.508(D)(3). A trial court may waive the good cause requirement if it concludes that there is a significant possibility that the defendant is innocent of the crime. *Id.* To show actual prejudice defendant must show that but for the alleged error, he would have had a reasonably likely chance of acquittal. MCR 6.508(D)(3)(b).

This Court's review of a trial court's decision regarding a motion for new trial is for abuse of discretion. *People v Leonard*, 224 Mich App 569, 578; 569 NW2d 663 (1997).

The trial court explained:

> On September 10, 1981, at approximately 2:15 a.m., James Connelly and Van David Nolf, left the Interchange Bar located at Holden and Trumbull in the City of Detroit. They were friends and regular patrons of the bar in question. The bar was located directly across the street from Defendant Love's apartment, which was above a lock shop owned by the Defendant's family. According to Nolf's trial testimony, two black males emerged from bushes located at or near the bar's parking lot, produced weapons, announced that it was a "police raid" and demanded money. Connelly told Nolf that it was a robbery and advised him to run. Connelly ran, only to be fatally shot by the person Nolf identified as the Defendant. Connelly died of multiple gunshot wounds. Nolf also ran, was apparently shot at, but was not injured.
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> At least one of the assailants ran in the direction of the building [in] which defendant lived, although no one saw anyone, including the defendant, enter that building. During a routine police canvassing of the neighborhood, the defendant and his live-in girlfriend, Jennifer Johnson, were questioned, but neither arrested nor charged. No charges were brought until Nolf identified Defendant Love as the shooter in a photo show-up conducted on September 29, 1981. (According to the police file, Love's photograph was included simply because he lived in close proximity to the crime scene). Nolf identified Love as the shooter in a live line-up conducted on October 19, 1981. Love was subsequently charged with the above mentioned offenses.
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> At Love's preliminary examination, he was represented by attorney Thomas Binion. During a recess in the proceedings, Nolf walked into a hallway, noticed several people talking and looking at him and recognized the person he believed to be the second assailant, the Defendant's brother, Rex Love. (Rex Love was subsequently acquitted on all counts at trial).
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> At trial, the evidence against Dwight Love consisted of the identification testimony of Nolf and the testimony of Love's girlfriend, Jennifer Johnson. Johnson testified that she'd made two statements—one indicating that she was in the same room with the

defendant, heard the gunshots and looked out the window at the body with him; the other that she was asleep in another room, didn't hear the shots and was awakened by defendant and told to look out the window. Although Johnson never testified that the defendant told her what to say, she did testify that she was afraid of him, in part because they'd had a "fight" earlier that night. Although the prosecutor implied, apparently successfully, that the defendant coerced his girlfriend to "alibi" for him, nothing in her trial testimony actually implicated Dwight Love in the attempt[ed] robbery/murder.

I

The prosecution first argues that the trial court erred in concluding that the statement of Dannelle Fisher constituted newly discovered evidence because it was not a declaration against interest which would be admissible at retrial and because corroborating circumstances did not clearly indicate the trustworthiness of the statement.

Before a new trial is warranted, a defendant must demonstrate that the evidence (1) is newly discovered, (2) is not merely cumulative, (3) probably would have caused a different result, and (4) was not discoverable and producible at trial with reasonable diligence. *People v Miller (After Remand)*, 211 Mich App 30, 46-47; 535 NW2d 518 (1995). We review the trial court's determination that Fisher's statement was admissible under MRE 804(b)(3) for abuse of discretion and the trial court's findings of fact for clear error. *People v Barrera,* 451 Mich 261, 269; 547 NW2d 280 (1996).

The trial court concluded that Fisher's confession was newly discovered evidence that would be admissible under 804(b)(3). The trial court explained:

> Dannelle Fisher, who was incarcerated at the State Prison of Southern Michigan (hereafter "Jackson Prison"), allegedly, in an area physically segregated from the Defendant's cellblock, first supplied an affidavit in support of Defendant's request for post-judgment relief before Judge Edward Thomas. The affidavit was obtained through a prisoner, Ted Sullivan, after Sullivan sent a message to Love that Fisher had knowledge that the Defendant was innocent. The affidavit, however, claimed that two white males were the assailants. Judge Thomas found the affidavit lacking in credibility and denied relief.
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> In 1994, after learning that Fisher was incarcerated in Ionia, the Defendant contacted him. In September of that year, Fisher wrote to Love, indicating that he knew he (Love) was innocent. In 1995, Love's attorney, Sarah Hunter, interviewed Fisher. Fisher subsequently agreed to submit to a polygraph examination, administered by examiner William E. Robertson on July 27, 1995. According to Robinson's evidentiary hearing testimony, Fisher's claim that he was a [sic] innocent witness to the crime was deceptive; untrue. Fisher was not re-tested after Robertson told him that he'd failed the examination. However, Robertson conducted a post-test interview wherein Fisher admitted that he and a Butch Phillips committed the crimes in question.

Subsequently, both Attorney Hunter and Robertson interviewed Fisher, who told them (and later Commander Gerald Stewart of the Detroit Police Department and Investigator Richard Newcomb of the Wayne County Prosecutor's Office) that he and Phillips planned the crime after discarding the idea to rob a nearby Kentucky Fried Chicken restaurant. He claimed that he was crouched, hiding in the area while Phillips (who died in 1996 under circumstances unrelated to this case) produced a gun, attempted to rob Connelly and Nolf and shot and killed Connelly. Fisher also claimed that both of them were wearing similar dark clothing and that Phillips threw the gun in a manhole near the crime scene.

* * *

. . . the only trial testimony regarding the actual commission of the crimes was Nolf's. Nolf identified defendant as the shooter after giving a physical description that did not match the physical appearance of the defendant in important material respects. He also had a composite drawing of the shooter made by a police artist. Although he admitted that the drawing was not a good likeness of the shooter, he claimed that it was as close as he could get to the physical appearance of the shooter. Nolf described and the composite depicted, a man with a high prominent forehead, a narrow nose, somewhat thin lips, high cheekbones and pockmarked skin. That description is inconsistent with evidentiary hearing testimony regarding defendant's 1981 - 1982 physical appearance and his present physical appearance: a rather flat, small forehead, a broad nose, smooth skin, full lips and round cheekbones. He also described a scar above the shooter's lip and a milky, bluish coloration to his eyes, also inconsistent with the defendant's appearance.

Beyond the problems with the physical description which casts doubt on Nolf's perception, memory and credibility, Nolf contradicted himself as to the number of assailants and whether the second assailant was armed. Nolf testified at trial that there were two assailants, yet he gave descriptions of three assailants in a previously undisclosed police report contained in Defendant's exhibit #43. That same exhibit reveals that Nolf said he didn't know if the second man was armed; his trial testimony was that both suspects were armed. The description of the second man also varied in police reports. Again, see #43.

Had Nolf given consistent, unimpeached credible testimony, any inconsistency in Fisher's version would tend to discredit Fisher's statement. Nolf simply was a poor witness, particularly with respect to identification.

While it is true that Fisher's version didn't match the alleged "facts" in certain respects, it did match it in others. Phillips did have bumpy skin, had been shot in the past and had a mark or scar above his lip.

* * *

Certain details given by Fisher do ring true: His description of the proximity of the bar to his home in 1981, his knowledge of where the defendant resided in 1981, the motive for the robbery (that he was young, jobless with a baby on the way), his familiarity with "JC" (James Connelly) and his knowledge that ("JC") carried large amounts of money. More importantly, Fisher also put a Keith and Chauncey Taylor/Brown at the crime scene. Fisher couldn't have retrieved information regarding the Taylor's from the trial transcript because no trial testimony or exhibit mentioned them. It was only after disclosure of the "police file" in October 1996, that information regarding them came to light. In Defendant's exhibit "43, a suspect card pertains to a Chauncey Taylor of 1608 Holden. Another police report refers to an anonymous tip that a Keith and Chauncey Todd of the same Holden Street address were present at the shooting.

Fisher's statement/confession is newly discovered: (1) defendant did not know of Fisher or his alleged involvement until 1995, approximately fourteen (14) years after his conviction; (2) it is material and not merely cumulative or impeaching. Fisher claims not only that Love didn't commit the crime but implicates himself and others; (3) it probably would have caused a different result at trial, given the nature and substance of Nolf's testimony and the fact that no other evidence - confession by the defendant, trace evidence, guns and/or ammunition[,] separate eyewitness accounts - connect defendant to the crime; (4) it was not discoverable at the time of trial had Defendant exercised due diligence. Fisher's existence and his involvement were totally unknown to the defendant <u>and</u> the police before or at the time of trial. Fisher's statement is also admissible as a statement against his penal interest under <u>People</u> v <u>Barrera</u>, 451 Mich, 261.

MRE 804(b)(3) provides:

(3) State[ment] against interest. A statement which at the time of its making so far contrary to the declarant's pecuniary or proprietary interest or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate that trustworthiness of the statement.

The hearsay exception for statements against penal interest is premised on the unavailability of the declarant. Once Fisher invoked his Fifth Amendment right against self-incrimination, he became unavailable as a witness.

<u>People</u> v <u>Barrera</u>, 451 Mich 261[, 268]; 547 NW2d 280 (1996)[,] . . . defined the prerequisites to admissibility of a purported statement against penal interest [when offered to exculpate a defendant]: (1) was the declarant unavailable; (2) was the statement against penal interest; (3) would a reasonable person in the declarant's shoes believe the statement to be true; (4) were there corroborating circumstances clearly indicating the trustworthiness of the statement.

Fisher was unavailable as a witness as discussed above. The statement was against his penal interest. Although the mere fact that the declarant invokes his Fifth Amendment right not to testify does not make the statement against penal interest, "it is sufficient if the statement would be important evidence against the declarant." Barrera at 271 [sic 270], citing U.S. v Thomas, 571 F2d 285 (CA 5, 1978).

> In short, whether a declarant's statement was sufficiently against penal interest is whether the statement would be probative of an element of a crime in a trial against the declarant, and whether a reasonable person in the declarant's position would have realized the statement's incriminating element. If so, then the statement tended to subject the delcarant [sic] to criminal liability. [Barrera at 272.]

Here, the statement would subject the defendant to a variety of criminal charges - assault with intent to rob while armed and felony murder, among the most serious. The declarant certainly was aware of the incriminating nature of the statements because he was reluctant to talk to Attorney Hunter and Mr. Robertson regarding his involvement and sought immunity from the police/prosecution before talking to them.

Barrera discusses the extent of corroboration required with respect to statements against penal interest: the court should ask for sufficient corroboration to permit a reasonable man to believe that the statement might have been made in good faith and that it could be true. The court in Barrera concluded:

> In short, the defendant's constitutional rights to present exculpatory evidence in his defense and the rationale and purpose underlying MRE 804(b)(3) of ensuring the admission of reliable evidence must reach a balance. We believe they may be viewed as having an inverse relationship: the more crucial the statement is to the defendant's theory of defense, the less corroboration a court may constitutionally require for its admission. [*Id.* at 279.]

In the case at bar, the evidence revealed that he [Fisher] knew James Connelly, that he planned the robbery[,] that he lived near the crime scene and defendant's apartment and that he had a motive to commit the crime.

Of course, Fisher's statement is crucial to the defendant's theory of the case. Fisher implicated himself and exculpates the defendant consistent with the defendant's alibi defense.

Fisher's statement is admissible as a statement against penal interest.

The trial court's decision does not demonstrate an abuse of discretion.

II

The prosecution next argues that the trial court erred in considering polygraph results regarding defendant, who did not testify at trial, on the question whether Fisher's statements claiming culpability for the instant offense met the standard for newly discovered evidence. We disagree.

Polygraph results may be considered by a trial court when deciding whether to grant a post-conviction motion for new trial, provided certain enumerated conditions are met. *People v Barbara,* 400 Mich 352, 412-413; 255 NW2d 171 (1977).

The prosecution does not argue that any of the conditions enumerated in *Barbara, supra* at 412-413*,* are not met here, rather the prosecution argues that the trial court could consider only polygraph results of witnesses, and not of defendant. *People v McKinney,* 137 Mich App 110, 115-116; 357 NW2d 825 (1984), allows admission of a defendant's polygraph examination in a pre- or post-trial proceeding at which the question presented is a legal one and not one of the defendant's factual guilt or innocence. Here, where the court was making a determination whether to grant a motion for new trial, the court had discretion to consider the results of a polygraph examination. *Barbara, supra,* 411-412.

We conclude that the trial court did not abuse its discretion in considering defendant's polygraph examination results.

III

The prosecution next argues that the trial court erred in finding defendant's trial counsel rendered ineffective assistance.

A defendant claiming ineffective assistance of counsel based on defective performance has the burden of showing that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that but for the unprofessional errors the result of the proceeding would have been different. *People v Mitchell,* 454 Mich 145, 157-158; 560 NW2d 600 (1997). The defendant has the burden of overcoming the presumption that the challenged action constituted sound trial strategy. *Id.* In order to overcome this presumption, a defendant must show that counsel's failure to call the witness deprived him of a substantial defense that would have affected the outcome of the proceeding. *People v Daniel,* 207 Mich App 47, 58; 523 NW2d 830 (1994).

At defendant's preliminary examination, Ernest Johnson testified that he had known defendant for about four months and that defendant lived above his store. Johnson testified that on the evening in question he was in his store, in which he lived, and that he heard a shot sometime after 2:00 a.m. Johnson testified that defendant lived directly above him, that "the whole man's apartment is over my place", that there were wooden steps leading to defendant's apartment and wooden floors in defendant's apartment, that the steps and building were shaky and that he could hear whenever anyone went up the stairs and moved around in defendant's apartment. Johnson testified that he could hear defendant's television and could hear if defendant moved around. Johnson testified that defendant usually came in his store and bought pop and played a video game, and that on the evening in question

defendant had been in his store around 11:00 p.m. Johnson testified that he heard defendant go upstairs after that, and heard him moving around. Johnson testified that at the time he heard the shot he did not hear anyone run into the building, and did not hear anything after the shots were fired.

The trial court concluded that defendant's trial counsel was ineffective in not subpoenaing Johnson for trial or seeking to admit Johnson's preliminary examination testimony at trial:

> Ernest Johnson, who had a store beneath the defendant's apartment, testified at the preliminary examination that on the night of the robbery/murder he was in fact in that shop located directly beneath defendant Love's apartment. Ernest Johnson testified the stairs leading to the upstairs apartment were creaky and he did not hear the stairs or see defendant come into the shop.
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> Ernest Johnson was not subpoenaed for trial nor was his preliminary examination testimony sought to be admitted in lieu of live testimony.
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> On the first day of trial May 17, 1982 Attorney Wilson told the court:
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> > I had something in my mind as to other additional witnesses <u>that I did not think of until over the weekend when</u> I reviewed the examination of Dwight Love held in regard to this matter.
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> Wilson then asked the court to require the prosecutor to endorse Mr. Johnson as a witness and produce him for trial. When the court denied the motion, Mr. Wilson indicated he would produce Mr. Johnson. Ernest Johnson was never called and no reason was given at trial or at the evidentiary hearing for the failure to call him. Additionally, nothing in the trial record discloses that the defendant agreed to waive the appearance testimony of Johnson.
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> . . . . Mr. Wilson's evidentiary hearing testimony reveals that he couldn't say why he didn't call Ernest Johnson as a witness, particularly where his theory of the defense was alibi to establish that the defendant was not present at the robbery/murder but was instead in his apartment. He also couldn't recall specifically talking to defendant Love about not calling Johnson.
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> Further, he could not remember whether or not he thought it was important to "bring Johnson in". But significantly, he thought it was important enough to ask that the court require the prosecutor to endorse him as a res gestae witness.
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> Obviously, where, as here, the evidence identification against the defendant is both inconsistent and weak, alibi testimony is important: (1) to corroborate defendant's theory (2) to undercut the credibility of the identifying witness.

> At the evidentiary hearing on defendant's motion for new trial, Investigator Newcomb testified that there were other stairs leading to defendant's upstairs apartment and other ways to enter the building itself. The people argue essentially that this "evidence" undermines the significance of Ernest Johnson's testimony and thus the importance of producing Johnson as an alibi witness.
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> In a case with more reliable identification testimony and/or trace evidence, or a murder weapon or inculpatory statements, the argument might have more merit. In the case at bar Nolf's memory and descriptions were deficient.
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> The failure to call Johnson cannot reasonably be dismissed as trial strategy; both common sense and the trial record reveal otherwise. Wilson realized his error, albeit at the eleventh hour in failing to produce and present Mr. Johnson. Also no motion was made to admit Johnson's preliminary examination testimony into evidence per MRE 804(b)(1).
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> In People v Pickens 446 M[ich] 298, 521 NW2d 797 (1994)[,] which adopted Strickland v Washington, 466 US 668, 104 S Ct 2052, 80 L[E]d 2d 674 (1984), a defendant is denied effective assistance of counsel where an attorney's performance is deficient and there is a reasonable probability that but for the error, the outcome would have been different. Given the nature and quality of Nolf's identification testimony and the complete lack of other evidence, a different result was very probable.
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> Even an experienced, reputable attorney can, in a given case "drop the ball" and perform below the standard of reasonably competent counsel guaranteed by the [S]ixth [A]mendment. In this case, defendant was denied effective assistance of counsel. [Emphasis in original.]

Johnson supplied an important link in the chain of events, given the prosecutor's theory at trial that defendant ran into his apartment building after shooting Connelly and given that defendant's defense at trial was alibi and trial counsel's theory of the case was that defendant was not present at Connelly's shooting and was in his apartment. Trial counsel testified at the evidentiary hearing that Johnson's testimony would be helpful to what trial counsel had considered defendant's "strong" alibi defense, but he could not recall if Johnson was around or not.

We review the trial court's decision for abuse of discretion, *Leonard, supra,* 578, recognizing that defendant has the burden of showing ineffective assistance and overcoming the presumption that the challenged outcome was sound trial strategy. *Mitchell, supra*, 156-158.

We conclude that the trial court did not abuse it discretion in concluding that defendant overcame the presumption that the challenged error was trial strategy, *People v Johnson,* 451 Mich 115, 124; 545 NW2d 637 (1996), and that given the nature and quality of Nolf's identification testimony and the absence of other evidence, there was a reasonable probability that but for trial counsel's failure to subpoena or move for admission of Johnson's preliminary examination testimony, the result would have been different.

The prosecution also argues that this claim is barred by MCR 6.500 *et seq*. because defendant did not show cause for failing to raise it in a timely fashion "if it is viewed as now somehow different than the previous claim on the same point, made and rejected by the trial court and the Court of Appeals." The prosecution notes that plaintiff first raised the ineffective assistance of counsel issue in a previous motion for post-judgment relief, but argues that defendant did not at that time claim that trial counsel had said he would bring Johnson in.

Although the prosecution correctly argues that the trial court made no express finding that defendant had shown good cause under MCR 6.508(D)(3), it is clear from the trial court's opinion and order granting defendant's motion for new trial that the trial court concluded that there was a significant possibility that defendant was innocent of the crime. The trial court could thus waive the good cause requirement. MCR 6.508(D).

IV

The prosecution's final argument is that the trial court erred in finding that a constitutional discovery violation had occurred at trial.

A criminal defendant has a due process right of access to certain information possessed by the prosecution. *Brady v Maryland,* 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963); *People v Canter,* 197 Mich App 550, 568-569; 496 NW2d 336 (1992). Whether defendant's due process rights were violated is a question of law, which we review de novo. *People v Connor*, 209 Mich App 419, 423; 531 NW2d 734 (1995). The Constitution is not violated every time the prosecution fails to disclose evidence that might prove helpful to the defense. *Kyles v Whitley*, 514 US 419; 115 S Ct 1555; 131 L Ed 2d 490, 507 (1995). Constitutional error results from the suppression of evidence favorable to the defense when there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* at 505-506. A reasonable probability of a different result exists when the prosecution's suppression of evidence undermines confidence in the outcome of the trial. *Id*. at 506; *People v Fink,* 456 Mich 449, 454; __ NW2d __ (1998). The suppressed evidence should be considered collectively rather than item-by-item. *Kyles, supra* at 507; *Fink, supra* at 454.

The prosecutor's obligation is set forth in *Kyles:*

> The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation and is of course most prominently associated with this Court's decision in *Brady v Maryland,* 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194 (1963). . . . *Brady* held 'that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' 373 US, at 87, 10 L Ed 2d 215, 83 S Ct 1194. In *United States v Agurs,* 427 US 97, 49 L Ed 2d 342, 96 S Ct 2392 (1976), however, it became clear that a defendant's failure to request favorable evidence did not leave the Government free of all obligation. There, the Court distinguished three

situations in which a *Brady* claim might arise: first, where previously undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was perjured, second, where the Government failed to accede to a defense request for disclosure of some specific kind of exculpatory evidence, and third, where the Government failed to volunteer exculpatory evidence never requested, or requested in a general way. The Court found a duty on the part of the Government even in this last situation, though only when suppression of the evidence would be 'of sufficient significance to result in the denial of the defendant's right to a fair trial.'

In the third prominent case on the way to current *Brady* law, *United States v Bagley,* 473 US 667, 87 L Ed 2d 481, 105 S Ct 3375 (1985), **the Court disavowed any difference between exculpatory and impeachment evidence** for *Brady* purposes, and it **abandoned the distinction between the second and third *Agurs* circumstances, i.e., the 'specific-request' and 'general- or no-request' situations**. *Bagley* held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

Four aspects of materiality under *Bagley* bear emphasis. **Although the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal** (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant). *Id.,* at 682, 87 L Ed 2d 481, 105 S Ct 3375 (opinion of Blackmun, J.) (adopting formulation announced in *Strickland v Washington,* 466 US 668, 694, 80 L Ed 2d 674, 104 S Ct 2052 (1984). *Bagley's* touchstone of materiality is a 'reasonable probability' of a different result, and the adjective is important. **The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the Government's evidentiary suppression 'undermines confidence in the outcome of the trial.'** *Bagley,* 473 US, at 678, 87 L Ed 2d 481, 105 S Ct 3375.

The fourth and final aspect of *Bagley* materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item-by-item. As Justice Blackmun emphasized in the portion of his opinion written for he Court, the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense. *Id.*, at 675, and n 7, 87 L Ed 2d 481, 105 S Ct 3375. We have never held that the Constitution demands an open file policy . . .

> While the definition of *Bagley* materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached. **This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.** But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, see *Brady,* 373 US, at 87, 10 L Ed 2d 215, 83 S Ct 1194), the prosecution's responsibility for failing to disclose known favorable evidence rising to a material level of importance is inescapable. [131 L Ed 2d at 505-508. Some citations omitted. Emphasis added.]

In *Kyles,* the evidence the State had never disclosed included contemporaneous eyewitness statements taken by the police following the murder; statements made to the police by an informant who was never called to testify; a computer print-out of license numbers of cars parked at the crime scene on the night of the murder, which did not include the defendant's license number; and evidence linking the informant to other crimes at the crime scene and to an unrelated murder. *Kyles,* 131 L Ed 2d at 502. The defense's theory was that Kyles had been framed by the informant. *Id.* at 503.

The trial court's opinion and order in the instant case states:

> On the last day of the testimonial phase of the evidentiary hearing, information contained in a "miscellaneous police file" that had not been previously been disclosed to the defense (or to the prosecutor, apparently) was revealed. Among other things, it included a letter from defendant to Jennifer Johnson, defendant's 1981 statement to the police, suspect cards and other information regarding Keith and Chauncy Taylor, information that a Darryl Camper might have been involved in the crime and his physical resemblance to Rex Love, Dwight Love's brother.
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> Obviously, the foregoing information was not disclosed to trial counsel before or at trial. Had it been counsel could have admitted to [sic] and/or a subpoena (or attempted to) Rosemary Franklin who was said to have information regarding Darryl Camper. Given the circumstances of Nolf's identification of Rex Love, and Rex Love's physical similarity to Camper (both were missing upper teeth) Nolf's ability to identify the assailants would have been further impeached. Although it would impeach the defendant's evidentiary hearing testimony, defendant's statement of October 9, 1981 was consistent with Jennifer Johnson's statement that she was awakened after defendant heard the shots. This evidence would undermine the people's theory that defendant told Jennifer Johnson to lie about whether or not she was sleeping when shots were fired.

> The people contend (1) defense counsel should have presented her discovery request/order to the police department as is normally done. However, under [MCR] 6.201, once the discovery request is made, the people (and its agent, the police) have a duty to provide discovery [and the people further argue] (2) that all of the discovery was presented to trial counsel before trial. This is inconsistent with common sense and Defense Exhibit #9 which reflects the discovery provided trial counsel. Brady v Maryland[,] 373 US 83,, [sic] 93 S Ct 1194; 10 L Ed 2d 215 (1963)[,] is the landmark case regarding suppression or withholding of evidence. The recent case of Kyler [sic Kyles] v Whitley, [514] US [419]; 115 S Ct 1555; 131 L Ed 2d [490]; 60 USLW 4303 (1995) followed the principle adopted in Brady - suppression of evidence material to either guilt or punishment violates due process.
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> The evidence withheld was material, would undermine confidence in the verdict and denied defendant a fair trial.

We agree with the trial court that the record does not support the prosecution's argument that the police's "miscellaneous file" was provided to defendant's trial counsel. Although a discovery order was entered in 1981, there is no indication in the record that trial counsel had access to any of the documents in the police's miscellaneous file.

The undisclosed evidence included evidence about a number of other suspects and eyewitnesses to the shooting, as well as names of persons who had information about the commission of the crime. The evidence included reports that Darryl Camper had bragged about committing the crime and a report that Keith and Chauncey Taylor/Ladd, both of whom were named by Fisher as being at the scene, were with Darryl Camper when he committed the crime. Also included in the police miscellaneous file was a bus driver's statement about a man who witnessed the entire shooting having said that there were as many as three to six youths present at the scene who appeared to be aware of the plan to commit the robbery.

The trial court did not abuse its discretion in concluding that the evidence withheld was material and that there was a reasonable probability of a different result because the government's evidentiary suppression undermines confidence in the outcome of the trial. *Kyles, supra,* 131 L Ed 2d at 506. The prosecution had a duty under *Kyles* to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.

In sum, we conclude the record does not demonstrate that the trial court abused its discretion in granting a new trial. Affirmed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Helene N. White
/s/ Robert P. Young, Jr.