

**State of Michigan**  
**In the Court of Appeals**

**The People of the State of Michigan,**

Plaintiff-Appellant,

COA Case No. 370809

*v*

**Darrell Ewing,**

Defendant-Appellee.

3rd Circuit Court, Wayne County  
Case No. 10-001495-02

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**Defendant-Appellee's Brief on Appeal**

**Oral Argument Requested**

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## Statement of Jurisdiction

Mr. Ewing agrees with the prosecution's Statement of Jurisdiction.

## Questions Presented

- I. Whether the trial court abused its discretion by dismissing without prejudice where the prosecution's discovery violations deprived the court of confidence that a fair trial was possible.**

Trial court answers: No.

Defense-Appellee answer: No.

Prosecution-Appellant answer: Did not answer.

- II. Whether the trial court abused its discretion by dismissing without prejudice to remedy a fifteen-year pattern of discovery and due process violation.**

Trial Court answer: No.

Defense- Appellee answer: No.

Prosecution-Appellant answer: Did not answer.

- III. Whether dismissal is an appropriate remedy for the destruction of evidence under the Due Process Clause of the Michigan Constitution.**

Trial Court answer: Did not answer.

Defense-Appellee answer: Yes.

Prosecution-Appellant answer: Did not answer.

## Counter-Statement of Facts

In 2010, Darrell Ewing and Derrico Searcy were tried together for murder. *People v Searcy*, unpublished per curiam opinion of the Court of Appeals, issued August 29, 2013 (Docket Nos. 301751 and 301758) (*Searcy 1*) (Exhibit A), p 1. As this Court has recognized, the evidence against them “was by no means overwhelming” and “there was clearly a question about [its] reliability[.]” *People v Searcy*, unpublished per curiam opinion of the Court of Appeals, issued October 22, 2020 (Docket Nos. 351442 and 351446) (*Searcy 2*) (Exhibit B), p 10. The defense, meanwhile, showed that Mr. Ewing had an alibi and “[Tyree] Washington admitted to the crime” *Id.* at 11. “The jury was deadlocked until . . . extraneous information was brought into deliberations,” leading the jury to convict Mr. Ewing and Mr. Searcy. *Id.* at 10.

After nearly a decade of state and federal litigation, the convictions were vacated in 2019. *Id.* Five years after that, the case was set for retrial. But the retrial did not happen. Instead, the trial court dismissed this case without prejudice after “months and months and months” of specific discovery requests, which the prosecution “repeatedly and repeatedly and repeatedly rebuffed with responses of, it’s not in the file, we’ve turned over everything we’ve got[.]” (3.25.24 Tr. at 9-10.) The dismissal followed the prosecution’s alarming eve-of-trial acknowledgment that critical recordings existed but had not yet been found. After initially seeking more time to keep looking, the prosecution withdrew its request on the morning of trial and asked to proceed without the missing evidence. (*Id.* at 5.) The trial court found the prosecution’s request “incredibly concerning” and “[not] sufficient or enough to allow for Mr. Ewing and Mr. Searcy to have a fair trial.” (*Id.* at 12-13.)

### A. The Investigation

This prosecution arises from a December 2009 shooting on Detroit's East Side. The story goes as follows: J.B. Watson, Phillip Reed, and two other individuals were in a van stopped at the traffic signal at the intersection of Harper and Van Dyke. *Searcy 1*, unpub op at 2. At least some people in the van were associated with a group known as the Knock Out Boys. *Id.* Behind them was another car containing Raymond and Jendayi Love. *Id.* Finally, a turquoise Oldsmobile pulled up to the curb "about six or seven car lengths" behind. *Id.*; *Searcy 2*, unpub op at 2, 10 n 10. A man jumped out of the Oldsmobile and fired several shots into the van, killing Mr. Watson and injuring Mr. Reed. *Searcy 1*, unpub op at 2.

The Detroit police investigation was led by Officer in Charge (OIC) Theopolis Williams. (3.19.2024 Hrg. at 56-57.) Simultaneously, the FBI and United States Attorney's Office were engaged in their own investigation into the same shooting and related criminal activity. (*Id.* at 93-94)

Shortly after the shooting, police invited the Loves to view a photo array, including Darrell Ewing. (2.3.10 Prelim. V2 at 144-45). It appears that Mr. Ewing's photo was included because police suspected his association with a group known as the Hustle Boys, which had a dispute with the Knock Out Boys. *Searcy 1*, unpub op at 2. Whatever the reason, Mr. and Ms. Love identified Mr. Ewing as the shooter. (11.3.10 Tr. V6 at 15-16.) After viewing a separate photo array, Mr. Love also identified Mr. Searcy as the driver of the turquoise Oldsmobile. (11.2.10 Tr. V5 at 168-69.)

Days later, police arrested Mr. Searcy in a blue BMW. (11.1.10 Tr. V4 at 50-51.) No evidence was found at the time, but a later search

of the BMW turned up shell casings which the prosecution maintains are consistent with shell casings from the shooting. (*Id.* at 79-80.)

## **B. The Convictions**

In November 2010, Mr. Ewing and Mr. Searcy were tried for the murder of J.B. Watson and the assault of Phillip Reed. As this Court has already recognized, the “only significant . . . evidence” against them was (1) the Loves’ identifications, and (2) ballistics from the shell casings found in the blue BMW. *Searcy 2*, unpub op at 10 n 10. And as this Court has also observed, there are serious questions as to both.

To begin, “there was clearly a question about the reliability of the Loves’ observations, given the brief time that they viewed the perpetrators who were not previously known to them.” *Searcy 2*, unpub op at 10. The identification of Mr. Searcy as the driver of the turquoise Oldsmobile “was based on brief glances after a near collision,” while the identification of Mr. Ewing as the shooter “was based on brief observations by Mr. Love in his driver’s side mirror.” *Id.*

Beyond the Court’s concerns, there are other reasons to doubt the reliability of the eyewitness identifications. For instance, Raymond Love agreed that police told him, “We’re going to show you some photographs that we think is the shooter.” (11.3.10 Trial V6 at 16-17.) He said that “out of all the people that was in that picture, he was him.” (11.2.10 Tr. V5 at 195.) Although his testimony was inconsistent on this point, he said that police “asked me to look at it. And I looked at it and I picked out the wrong one—and I picked out the right one then.” (11.3.10 Tr. V6 at 18-19.) After Mr. Love identified Mr. Ewing, police told him he “picked out the right person[.]” (*Id.* at 23.) He acknowledged that Mr. Ewing was “close” and “resembles the shooter,” but “never said I was no hundred percent sure, no[.]” (*Id.* at 25-26.) He also testified, “Some things you

might not remember. Some things it might take you a couple days to remember.” (*Id.* at 75.) Mr. Love even agreed twice that he was “guessing” when he identified Mr. Ewing in the photo array. (*Id.* at 85.)<sup>1</sup>

Jendayi Love also provided questionable identification testimony. Ms. Love, who was under five feet tall and seated in the passenger seat of the car, claimed that she was able to see the shooter’s face through the interior rearview mirror. (*Id.* at 211, 214-15.) While she insisted at trial that it only took her “a couple of seconds” to identify Mr. Ewing in the photo array, she simultaneously agreed with her earlier testimony that it had taken her “close to five minutes[.]” (11.3.10 Tr. V6 at 227-230.)

As to the prosecution’s firearms toolmark evidence, this Court has noted that the blue BMW in which shell casings were found “was not the turquoise Oldsmobile involved in the shooting and Searcy did not own it.” *Searcy 2*, unpub op at 10 n 10.<sup>2</sup>

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<sup>1</sup> As illustrated by some of this testimony, stranger eyewitness identifications such as these—without safeguards such as sequential or double-blind administration—are among the least reliable types of evidence and the most common causes of wrongful convictions. See, e.g., Nat’ Institute of Justice, *To Err is Human: Using Science to Reduce Mistaken Eyewitness Identifications Through Police Lineups*, <<https://nij.ojp.gov/topics/articles/err-human-using-science-reduce-mistaken-eyewitness-identifications-through-police>> (accessed April 3, 2025); Nat’ Institute of Justice, *Police Lineups: Making Eyewitness Identification More Reliable*, <<https://nij.ojp.gov/topics/articles/police-lineups-making-eyewitness-identification-more-reliable>> (accessed April 3, 2025) (discussing evidence that “the double-blind sequential method—in which the administrator does not know the identity of the suspect—produced fewer false identifications than the traditional simultaneous method”).

<sup>2</sup> This type of toolmark evidence has been widely discredited as unreliable, particularly in the years since the original trial in this case.

The defense, meanwhile, presented testimony from two witnesses that Tyree Washington admitted to the shooting. One of the witnesses testified that Mr. Washington had bragged about the shooting when the two men were in jail together. *Searcy 2*, unpub op at 2. Mr. Washington claimed that he was riding in the back seat of a “green Aurora car,” driven by Adrienne Jackson and with William Beal in the front-passenger seat, when Mr. Washington “jumped out and shot the car up, the van up.” (10.26.2010 Tr. V2 at 209.)<sup>3</sup> The witness “also characterized Washington as Beal’s ‘flunky,’ meaning that Washington would do what Beal told him to do.” *Searcy 2*, unpub op at 2. The second witness to Mr. Washington’s admissions was Mr. Ewing’s cousin, who testified that she was dating Mr. Washington on the night of the shooting when he told her “he had just shot someone on Van Dyke and that Ewing had ‘nothing to do with it.’” *Searcy 2*, unpub op at 2.

In addition to testimony that Mr. Washington was responsible for the shooting, multiple witnesses testified that Mr. Ewing could not have been responsible because he was attending a funeral repast with family at the same time. *Id.* at 2, 10.

After several days of deliberations, the jury remained “hopelessly deadlocked.” (8.26.2019 *Remmer* Hrg. at 44.) The jury asked the court to

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See, e.g., Sinha, *Radically Reimagining Forensic Evidence*, 73 Ala L Rev 879, 927-928 (2022) (“firearms analysis serves as a useful case study for understanding how segments of the forensic community, aligned with law enforcement and insulated from the broader scientific community, have . . . manufacture[d] a perception that their method is reliable—thereby winning it widespread admissibility—despite significant data to the contrary.”)

<sup>3</sup> The Aurora was an Oldsmobile brand from 1994-2003. Wikipedia, *Oldsmobile Aurora*, <[https://en.wikipedia.org/wiki/Oldsmobile\\_Aurora](https://en.wikipedia.org/wiki/Oldsmobile_Aurora)> (accessed April 3, 2025).

declare a hung jury, but the court declined and instructed the jury to continue deliberations. *Searcy 2*, unpub op at 3. The following day, the jury found Mr. Ewing and Mr. Searcy guilty. *Id.*

Despite the convictions, Mr. Ewing and Mr. Searcy have unwaveringly maintained their innocence.<sup>4</sup>

### C. The Reversal of Convictions

Mr. Ewing and Mr. Searcy appealed their convictions, arguing in part that the jury conducted internet research and relied on extraneous influences to reach its verdict. See *Searcy 1*, unpub op at 6-10. This Court affirmed the convictions, see *id.*, and the Michigan Supreme Court denied leave to appeal. *People v Searcy*, 495 Mich 934 (2014); *People v Ewing*, 495 Mich 935 (2014).

Mr. Ewing and Mr. Searcy then sought federal habeas corpus relief. See *Searcy 2*, unpub op at 3, 4. Reaching Mr. Ewing's case first, the federal courts concluded that Mr. Ewing had established that jurors engaged in misconduct, and the Sixth Circuit Court of Appeals ordered Mr. Ewing's release from custody absent a state court evidentiary hearing to determine whether the jury's verdict was prejudiced by extraneous information. See *Ewing v Horton*, 914 F3d 1027, 1030-1032 (CA 6, 2019). Mr. Searcy was granted the same relief in his own habeas corpus litigation. *Searcy v Palmer*, unpublished order of the United

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<sup>4</sup> This case has been featured on multiple popular podcasts. See *Unjust & Unsolved* <<https://www.podchaser.com/podcasts/unjust-unsolved-1386741/episodes/8-darrell-ewing-77158504>> (accessed April 4, 2025), *Undisclosed* <<https://audioboom.com/posts/8145979-the-state-v-darrell-ewing-episode-1-the-repast>> (accessed April 4, 2025), and *Wrongful Conviction* <<https://audioboom.com/posts/8624354-502-maggie-freleng-with-darrell-ewing>> (accessed April 4, 2025).

States District Court for the Eastern District of Michigan, entered May 31, 2019 (Case No. 4:16-cv-13779).

Both cases proceeded to an August 2019 evidentiary hearing in the trial court. See *Searcy 2*, unpub op at 4. The trial court granted a new trial for Mr. Ewing and Mr. Searcy, *id.* at 5, this Court affirmed, *id.* at 11, and the Michigan Supreme Court denied the prosecution’s applications for leave to appeal. *People v Searcy*, 507 Mich 883 (2021); *People v Ewing*, 507 Mich 883 (2021). The cases were then set for retrial.

#### **D. The Discovery Problems**

In September 2021, Mr. Ewing, then represented by counsel, filed a Motion for Discovery in which he requested all materials provided under MCR 6.201(A) and MCR 6.201(B), as well as all *Brady* and *Giglio* materials. (9.2.21 Discovery Motion.)

In June 2023, the trial court held a final pretrial conference and entered an order scheduling the retrial for March 25, 2024, giving the parties nine months to prepare. (6.20.23 Scheduling Order.) That same day, Mr. Ewing, now representing himself, filed a Motion to Compel containing an itemized list of 24 pieces of evidence he sought from the prosecution. (6.20.23 Motion to Compel at 2-4.) Some of these requests were nonspecific as to substance, such as “[a]ll tips,” “[a]ll 911 calls,” “progress notes,” “ledger notes,” and “miscellaneous file.” (*Id.* at 3.) But many others were detailed inquiries based on new revelations since the 2010 trial, including previously withheld exculpatory evidence. These included the following five requests, each of which would later be cited by the trial court when dismissing this case:

- *Recording of Mr. Beal’s statement.* This is the “recording of Lasonya Dodson [Mr. Ewing’s mother] and William Beal, turned over to FBI . . . as well as the WCPO, where he

confessed to being involved.” (*Id.* at 3 ¶R.) It would establish Mr. Beal’s involvement in the shooting and contradict the prosecution’s theory.

- *Recording of Mr. Ewing’s interrogation.* This is “[a]ll reports, notes, and DVD recordings of all interrogations/interviews of all witnesses and Darrell Ewing.” (*Id.* at 3 ¶O.) Mr. Ewing maintains that during his interrogation, OIC Williams acknowledged Mr. Ewing’s innocence but threatened to pin this case on him if he did not cooperate against someone else.
- *Mr. Ewing’s January 28 interview.* This is “the reports/notes” from “the Jan. 28, 2010 interview of Ewing conducted by Theo Williams where it’s alleged ‘Ewing denied being a Hustle Boy.’” (*Id.* at 3 ¶P.) OIC Williams swore to the existence of this interview in a warrant affidavit, yet no record has ever been produced.
- *Federal investigation materials.* This is “Beal’s grand jury and *Kastigar* proceedings,” as well as “*Touhy* letters, correspondences and emails between . . . WCPO and . . . the FBI and United States Attorney’s Office.” (*Id.* at 3 ¶R, 2 ¶G, 2 ¶D.) There are indications that the federal investigation may have produced additional evidence that Mr. Washington and Mr. Beal were responsible for the shooting.
- *Mr. Washington’s 2010 confession to law enforcement.* This is “Washington’s exculpatory 2010 statement mentioned [in the prosecution’s January 2023 Answer filed in the Michigan] Supreme Court.” (*Id.* at 4 ¶X.) It suggests that the author of the prosecution’s 2023 brief may have been aware of yet another confession by Mr. Washington, much earlier than previously disclosed.<sup>5</sup>

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<sup>5</sup> As Mr. Ewing would explain in a later motion, the prosecution took the position in 2023 that Mr. Searcy (and by implication Mr. Ewing) was “aware before his original trial in 2010 that Washington had made a statement to law enforcement officers where he admitted to murdering the victim and denied that defendant was involved.” (11.16.23 Motion to Compel at 1-2 & Ex. A.) But the prosecution has never disclosed any such “statement to law enforcement officers,” at least not predating Mr. Washington’s 2017 Mirandized confession. Given all the other discovery problems in this case—including the still-unknown scope of who said

(*Id.* at 2-4.)

At a hearing in October 2023, the trial court considered Mr. Ewing’s Motion to Compel and gave the prosecution an opportunity to respond to each of Mr. Ewing’s requests. (10.10.2023 Hrg. at 23.) Some of these exchanges produced a commitment by the prosecution to provide new information (see, e.g., *id.* at 29, 37), while others resulted in non-responses, such as mere confirmation that police “went through the entire police jacket and uploaded everything they had to evidence.com.” (See, e.g., *id.* at 42.) And on several occasions, the prosecution indicated its willingness to keep digging or double check with police. (See, e.g., *id.* at 25, 28, 38, 42-43, 45, 49.) This includes most of the five items above.

For instance, when asked about the recording of Mr. Beal’s statement, the prosecution indicated, “I am not aware of a recording” but “I’ll look into it[.]” (*Id.* at 50.) When Mr. Ewing claimed that the same conversation “was actually transcribed, too” but “I never had a copy,” the prosecution had no response. (*Id.* at 51.) When asked about the recording of Mr. Ewing’s interrogation, the prosecution responded that “[t]he entirety of the police jacket has been turned over,” but then offered to “double check, your Honor, but it was my understanding that that was all addressed.” (*Id.* at 46-47.) When asked about Mr. Ewing’s January 28 interview, the prosecution responded simply that “I’m not aware of” this interview. (*Id.* at 48.) When asked about federal investigation materials, the prosecution disclaimed any ability to access the information until Mr. Ewing pushed back that “*Brady* specifically

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what (and when) in the federal investigation—Mr. Ewing was justifiably reluctant to give the prosecution the benefit of any doubt that this reference was a simple mistake.

prescribes obligation and duty on the prosecution to seek out any exculpatory information of anybody connected to the States’s case.” (*Id.* at 32, 34.) The prosecution then agreed to “look into it. If it’s available to me and if I’m able to obtain that I will provide it[.]” (*Id.* at 35.) And when asked about Mr. Washington’s 2010 confession to law enforcement, the prosecution indicated that it had access “the entire appellate file so I can look it up.” (*Id.* at 69.)

By the time the trial court covered all his requests, Mr. Ewing revealed his frustration with the lack of progress:

Excuse me. It seem like we just going through formalities here, but I think that the prosecution is just coming more in saying that, ah, no, I don’t know of any. They didn’t even respond on paper and now they get in here and just say, hey, I don’t know of anything[.]

(*Id.* at 63-64.) The trial court responded by reassuring Mr. Ewing that the prosecution “indicated that they’ve turned the—what they have over in full multiple times,” and “will make sure that they will double check, but they can’t turn over things that don’t exist.” (*Id.* at 65.)

In November 2023, the prosecution filed a Status Report “to formally document the responses to the twenty-four requests contained in the Motion to Compel[.]” (11.30.23 Status Report at 1.) The prosecution claimed to have asked police and federal authorities about a few items (*id.* at 3, 4), but most responses merely reiterated a lack of knowledge or assumptions about non-existence. For instance, as to the recording of Mr. Beal’s statement, the prosecution indicated that a “review of the file . . . did not reveal any recording of this conversation,” but “Det. Lisa Johnson is conducting a thorough search.” (*Id.* at 5.) As to the recording of Mr. Ewing’s interrogation, the prosecution referred to written reports but ignored Mr. Ewing’s request for “DVD recordings.”

(*Id.* at 4.) As to Mr. Ewing’s January 28 interview, the prosecution claimed not to be “in possession of any reports or notes responsive to this discovery request.” (*Id.*)<sup>6</sup> As to federal investigation materials, the prosecution simply referred to what was known in 2010, without describing any new steps to obtain information from federal authorities. (*Id.* at 2-3.) And as to Mr. Washington’s 2010 confession to law enforcement, the prosecution did not consult the author of the brief but simply reviewed the appellate record and “presume[d]” the reference was a mistake. (*Id.* at 6.)

In early February 2024, Mr. Ewing filed another Motion to Compel, this time identifying a shorter list of thirteen “critical and necessary” items that remained undisclosed despite “notes/reports prov[ing] the existence of the material.” (2.8.24 Motion to Compel at 1.) Along with some new items, Mr. Ewing reiterated his requests for four of the five items listed above, supported by an annotated copy of the prosecution’s Status Report to point out inaccuracies and inconsistencies in the prosecution’s positions. (*Id.* at 2-4 & Ex. A.)

At a hearing the following day, Mr. Ewing reminded the trial court that “I still have discovery issues and we going to trial next month.” (2.09.2024 Motion Hrg. at 14.) The court directed the prosecution to “[l]ook through whatever Mr. Ewing filed yesterday in terms of his motion to compel and I want that status report updated[.]” (*Id.* at 15.)

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<sup>6</sup> There appear to be two typographical errors in this Status Report, which refers to “DPD recordings” rather than DVD recordings, and Mr. Ewing’s “January 22” interview rather than his January 28 interview. (6.20.24 Motion to Compel at 3; 11.30.23 Status Report at 4.)

One week later, the prosecution filed another Status Report describing its efforts to locate the thirteen requested items. (2.16.24 Status Report at 1-3.) While the prosecution was responsive to some of the new requests, its explanations regarding the repeat items listed above were lacking. As to the recording of Mr. Ewing’s interrogation, the prosecution indicated that a “review of the police file did not reveal a formal video recorded statement associated with Mr. Ewing.” (*Id.* at 3.) As to the federal investigation materials, the prosecution explained that it was “not in possession” and “[t]he U.S. Attorney’s Office has not provided” the evidence. (*Id.* at 2.) As to Mr. Washington’s 2010 confession to law enforcement, the prosecution still “presume[d]” a mistake by observing that the “reference does not cite a particular statement, declarant, or date, beyond ‘2010’.” (*Id.* at 3.) And as to Mr. Ewing’s request for the recording of Mr. Beal’s statement, the prosecution made the following representation:

A copy of what appears to be a transcript of an undated phone call between Lasonya Dodson and William Beal was in the case file. While it was part of the prior discovery, it will be re-sent to standby counsel.

(*Id.* at 2.)

At a hearing the week before trial, there was a lengthy discussion about the recording of Mr. Beal’s statement, the transcript of that recording, and how either or both may have landed in the prosecution’s possession. At the outset, Mr. Ewing acknowledged that “the prosecution has turned over the transcript of that call,” but maintained that “they haven’t turned over the actual, ah, recording that David Cripps turned over to [prosecutor] Kam Towns back in 2009.” (3.19.2024 Hrg. at 21.) The prosecution picked up on this mention of Mr. Cripps, Mr. Ewing’s 2010 trial counsel, and later described the recording as

having been “obtained from Mr. Cripps.” (*Id.* at 24.) That reference prompted the following exchange between the trial court and Mr. Ewing:

THE COURT: Just one second. The audio recording was given to Mr. Cripps, your prior counsel?

MR. EWING: No, it was first given to FBI agents . . . . When this case actually occurred they came to my mother and said, hey, we know your son isn’t responsible for this crime, who would he talk to. My mother said, hey, if he will talk to anybody he will talk to me. I didn’t talk to anybody at that time. I didn’t know nothing.

What happens is . . . my mother has a meeting with William Beal. He said he had some information. A concerned mother wants to know what’s going on with her son. She goes and he gets to talking and saying that he was involved and she recorded the whole conversation and turned it over to the prosecution—well, to FBI agents first.

(*Id.*)

Exactly what happened to the recording after Ms. Dodson gave it to FBI agents is not entirely clear, but it appears that Mr. Ewing likely misspoke when he included Mr. Cripps in the equation.<sup>7</sup> In any event, there is proof that the recording made its way to the police, as Mr. Ewing realized while summarizing the transcript:

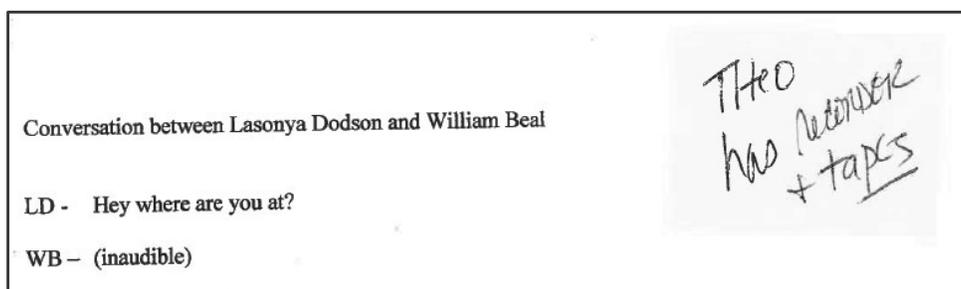
MR. EWING: Ah, if you look at—ah, my attorney just advised me that on here it says Theo—Theo Williams, who was the Homicide detective, has recording and tapes. That’s the note on there on the side of . . . . The note that’s attached onto the transcript that they turned over just recently says that Theo Williams, the officer in charge of this case, has the recording and tapes.

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<sup>7</sup> Undersigned counsel spoke with Mr. Cripps on March 24, 2025. He remembers this case well but has no recollection of any such recording.

MR. SAWYER: Yeah, that's correct. There was a sticky note on the file exactly as I copied it and shared it with defense. Ultimately I've been to DPD Headquarters multiple times. There's nothing in the police file nor on evidence there.

(3.19.2024 Hrg. at 25-26.) The top of the first page of the transcript appears as follows:



(Pros Appx 1.)<sup>8</sup>

Beyond establishing the prosecution's possession of the recording, this exchange revealed two big problems with the prosecution's Status Report one month earlier, where the prosecution innocuously represented that the transcript "was part of the prior discovery" but would be "re-sent[.]" (2.16.24 Status Report at 2.) First, it appears that the prosecution was just wrong, and the transcript was *never* disclosed until just before trial.<sup>9</sup> Second, the prosecution neglected to acknowledge

<sup>8</sup> It is unclear who created the transcript, or whether it accurately reflects the recorded conversation between Ms. Dodson and Mr. Beal.

<sup>9</sup> The appellate record does not establish conclusively when the prosecution first disclosed the transcript of Mr. Beal's statement, but counsel for Mr. Searcy (including one of Mr. Searcy's trial lawyers) insist it did not happen until March 2024. (Searcy Br. at 15.) Mr. Ewing also maintains that he did not receive the transcript until March 2024, though he had been told of its existence some time earlier. That would explain his mention of the transcript during the October 2023 hearing, where he said he "never had a copy" yet remained primarily focused on the underlying recording. (10.10.2023 Hrg. at 51.) In the March hearing

the sticky note until Mr. Ewing and his standby counsel noticed it at a hearing just days before trial.

Recognizing the significance of these revelations, the trial court pointedly asked the prosecution, “Did you ask or follow-up with the prior O.I.C. Williams about this particular issue?” (3.19.2024 Hrg. at 26.) The prosecution responded, “Not about this particular issue, no.” (*Id.*) The prosecution said police were unable to find the recording in evidence logs. (*Id.* at 26-27.)

The same hearing also included the following discussion of Mr. Ewing’s recorded interrogation:

THE COURT: Mr. Ewing, I’ll ask you, are you saying you’re just making a request to see if there’s any other Darrell Ewing interrogation videos or—

MR. EWING: No, first of all, I was interrogated, your Honor, by P.O. Williams and . . . what he said in the video I believe is paramount to the event because he told me that he knew I didn’t commit this crime, but if I don’t tell him who did it I was—he was going to do everything in his power to make sure I go down for it.

THE COURT: Do you know if it was recorded in any way?

MR. EWING: Yeah, he said it.

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as well, Mr. Ewing referred to “the transcript that they turned over just recently[.]” (3.19.2024 Hrg. at 26.) Under a charitable reading of the February 2024 Status Report, perhaps the prosecution *assumed* the transcript had previously been disclosed because it was mentioned at the October 2023 hearing.

(*Id.* at 56.) After confirming that the prosecution had not located any recording of this interrogation, the trial court asked, “Did you ask Officer Williams specifically?” (*Id.* at 57.) The prosecution had not. (*Id.*)

The trial court next turned to Mr. Washington’s 2010 confession to law enforcement. As before, the prosecution simply surmised that the language in its filing must have been a mistake since police were not aware of any such statement by Mr. Washington to law enforcement in 2010 or earlier. (*Id.* at 60-61.) Mr. Ewing countered that “asking DPD would be the wrong place,” since police were unaware of many facets of the parallel federal investigation. (*Id.* at 63, 68.) Rather than simply assuming a mistaken reference, Mr. Ewing suggested asking the author of the brief that referred to the confession. (*Id.* at 62.)

The trial court closed the March 19 hearing by admonishing the prosecution: “I’m not satisfied, really, with the responses I’m getting from the People on these[.]” (*Id.* at 93.) The court instructed the prosecution to follow up with federal authorities regarding “why this information has not been turned over,” as well as to confirm or refute the existence of Mr. Washington’s 2010 confession to law enforcement. (*Id.* at 93-94.) The court also directed the prosecution to “speak directly with Mr. Williams to get to the bottom of” the recording of Mr. Beal’s statement. (*Id.* at 94.) The court reiterated that these unresolved matters “cause concern to the Court,” and concluded, “I would like answers to these inquiries by the end of the week.” (*Id.* at 94-95.) The Court suggested the possibility of “a small evidentiary hearing pretrial on Monday to ask the O.I.C. some questions about this, if I see fit.” (*Id.*)

At the end of the day on Friday, March 22, the prosecution filed a “Status Report & Motion for Adjournment to Further Explore Discovery.” As to the recording of Mr. Beal’s statement, the prosecution

indicated that a search had not turned up “any such recording,” and that former OIC Theo Williams—whose name appeared on the yellow sticky note—“had no recollection of this particular recording.” (3.22.24 Status Rep. & Motion to Adjourn at 1.) Similarly, the prosecution had no updates on the federal investigation materials, and simply based its response (again) on the lack of information “in the People’s possession[.]” (*Id.* at 2.) But as to Mr. Ewing’s recorded interrogation, the prosecution had news:

On March 22, 2024, the now-retired officer in charge Det. Theo Williams indicated that he recalled attempting to take a statement from Mr. Ewing. He did not recall specifics of the interrogation beyond Mr. Ewing disclaiming any association with the Hustle Boys gang, before declining to talk further. He indicated that this would have been video recorded and burned to a disc before being entered into evidence at a DPD facility. The People are now attempting to locate this recording . . . .

(*Id.* at 2.) Based on “indications of evidence of a statement on video by Mr. Ewing, and similarly of Mr. Searcy,” the prosecution sought “an opportunity to discover[] if such evidence exists and share it with the defense.” (*Id.* at 3.) The prosecution therefore requested an adjournment of trial. (*Id.*)

### **E. The Dismissal Without Prejudice**

The following Monday morning, March 25, the parties appeared in the trial court. It was not immediately clear what direction the case would take—whether there would be a trial as scheduled, or a “small evidentiary hearing” about missing evidence as the court had suggested a few days earlier (3.19.2024 Hrg. at 95), or an adjournment as the prosecution had requested to conduct a meaningful search for missing evidence. In fact, none of those things happened.

At the start of the proceeding, the prosecution withdrew its request to adjourn. (3.25.24 Hrg. at 4.) This is not because missing evidence was located—the prosecution indicated that police “haven’t turned up anything over the course of the weekend that I’m aware of”—but rather because the prosecution was content to rely on “other sort of remedies to address throughout the course of the trial,” such as “a missing evidence instruction” or “I don’t know if it’s a Brady violation or anything of that nature.” (*Id.* at 4-5.)

The trial court was not impressed: “I get a motion on Friday at four twenty P.M. to adjourn the trial” for “evidence that for months since last June when Mr. Ewing first filed his motion to compel requested and addressed and demanded[.]” (*Id.* at 5.) “Now, we’ve had I don’t know how many hearings . . . and *I’ll just tell you the Court’s not satisfied with your position[.]*” (*Id.* at 5-6 (emphasis added).)

The trial court then listed a host of unresolved discovery issues including the recording of Mr. Beal’s statement, the recording of Mr. Ewing’s interrogation, Mr. Ewing’s January 28 interview, federal investigation materials, and Mr. Washington’s 2010 confession to law enforcement. (*Id.* at 5-7.) The court criticized the prosecution for its lack of diligence despite months of specific requests, hearings, and orders leading up to the trial date. (*Id.* at 8.) And although prosecutors requested some information from federal authorities, they “did not request the Kastigar letter specifically,” and although “the feds said they would look into it” that was “a number of months prior to the March hearing” and the prosecution “still hadn’t heard anything or received any information from the feds.” (*Id.*)

The court was also concerned by the prosecution’s pattern of responding “that the entirety of the police jacket has been turned over”

while simply “assuming” that any “recording[s] would have been included in the file if given to APA Towns”—an assumption that was destroyed by “a sticky note” that the prosecution did not locate until February and did not acknowledge until less than a week before trial. (*Id.* at 6-7, 9.)

As if that was not enough, the trial court was most troubled by the prosecution’s failure to consult with the original officer in charge of this investigation until one business day before trial, which gutted the prosecution’s credibility with respect to the existence of critical evidence:

The reason why I say all that is because then this leads to the Friday filing. The People are requesting an adjournment at four twenty P.M. on a Friday on the eve of trial with indications that we finally spoke to Officer Williams and he remembers having these recorded conversations with not only Mr. Ewing, but also Mr. Searcy.

That causes quite a concern to this Court especially when it appears . . . that the first time DPD or the Wayne County Prosecutor’s Office spoke with the original O.I.C. on the case—this is a fifteen year old case—was on the Friday before the Monday of the trial and that’s just not acceptable. . . .

[T]hese items have been requested for almost a year, for months and months and months and repeatedly and repeatedly and repeatedly rebuffed with responses of, it’s not in the file, we’ve turned over everything we’ve got . . . , but in all of those rebuffs it doesn’t appear that anyone ever spoke with O.I.C. Williams because now he says, oh, yeah, I did conduct those interviews.

(*Id.* at 10-11.)

Finally, the trial court made clear that these discovery problems cannot be viewed in isolation, but rather represent a pattern that threatened Mr. Ewing’s and Mr. Searcy’s right to a fair trial. “[T]he point

is, what about all the other items that Mr. Ewing, to a lesser extent Mr. Searcy, have been requesting over the pendency of this case?” (*Id.* at 11.) “What does that mean for what could potentially be in the federal case files” or “this recording of Miss Dodson and Mr. Beal” or “other types of video evidence or prior statements made by Mr. Washington[?]” (*Id.* at 12.) “[A]t the end of the day,” the court explained, “that is incredibly concerning to this Court. So as far as the Court’s concerned this situation is, in fact, a due process violation for both Mr. Searcy and Mr. Ewing.” (*Id.*)

At the trial court’s suggestion, Mr. Ewing and Mr. Searcy both moved for a dismissal. (*Id.* at 12.) The prosecution objected without a reason. (*Id.* at 13.) Defense counsel then pointed out that two of the prosecution’s key witnesses, including Raymond Love, had failed to appear for trial. (*Id.* at 14.) The prosecution responded that “I was going to at some point” request a due diligence hearing under MRE 804 regarding the prior testimony of missing witnesses. (*Id.*)

With that, the trial court dismissed the case without prejudice. The court did “not think it would be appropriate to rely on any sort of criminal jury instruction” as a substitute for still-missing evidence, and “frankly, doesn’t think that would be sufficient or enough to allow for Mr. Ewing and Mr. Searcy to have a fair trial.” (*Id.* at 13.)

## Argument

On appeal, the prosecution acknowledges that “the trial court did not cite” *Brady v Maryland*, 373 US 83 (1963), or *Arizona v Youngblood*, 488 US 51 (1988), but argues that these cases are the only conceivable grounds for the trial court’s dismissal and that “the trial court did not justify the dismissal under either test.” (Pros Br. at 8-10.) This argument mischaracterizes the trial court’s decision and misunderstands the law. The dismissal of this case without prejudice was appropriate and should be affirmed for at least three reasons.

First, the prosecution neglected its discovery obligations and rebuffed requests over nine months. The prosecution then acknowledged at the eleventh hour that it possessed two critical recordings but had not yet found them—and then sought an adjournment only to withdraw that request on the morning of trial. Having lost confidence that a fair trial was possible, the trial court properly exercised its discretion under MCR 6.201(J) to grant relief “it deems just under the circumstances.”

Second, as discussed more fully in the brief filed by Co-Defendant Derrico Searcy, dismissal was also appropriate given the extensive pattern of discovery and due process violations dating back to Mr. Ewing’s arrest in early 2010.

Third, even if analyzed as a destruction-of-evidence case as the prosecution suggests, dismissal is appropriate under the Due Process Clause of the Michigan Constitution based on a balancing of relevant factors.

Finally, if this Court finds that the dismissal was error on the existing record, it should remand for further review under the correct legal standards.

- I. **The trial court did not abuse its discretion by dismissing without prejudice because the prosecution’s discovery violations deprived the court of confidence that a fair trial was possible.**

### *Standard of Review*

MCR 6.201(J) provides that a trial court’s decision granting relief for a discovery violation is “reviewable only for abuse of discretion.” See also *People v Jackson*, 292 Mich App 583, 591 (2011). “An abuse of discretion occurs when the trial court’s decision is outside the range of reasonable and principled outcomes.” *Id.*

### *Discussion*

There are three ways of looking at this case. In the prosecution’s view, the only questions are whether there is proof that lost evidence is exculpatory or was destroyed in bad faith. This ignores the trial court’s reasoning, MCR 6.201(J), and the full scope of due process protections.

In Mr. Searcy’s view, the dismissal is easily justified under due process principles and MCR 6.201(J) based on the prosecution’s pattern of improperly withholding evidence for fifteen years. This is correct.

But a simpler and also correct way of looking at this case is to take the trial court at its word. For nine months until the eve of trial, the prosecution neglected and rebuffed specific discovery requests before finally revealing new information that made it impossible “for Mr. Ewing and Mr. Searcy to have a fair trial.” (3.25.24 Tr. at 13.) The prosecution moved for an adjournment before immediately withdrawing that request on the morning of trial. Under these circumstances, a dismissal without prejudice was an appropriate remedy, allowing the prosecution to conduct a diligent search for the missing evidence it just recently acknowledged, and recharge if appropriate.

**A. The trial court decided this case for discovery reasons.**

As an initial matter, it helps to understand the trial court's decision. The prosecution frames this as a "missing evidence" case, meaning a dismissal can only be justified under *Brady* or *Youngblood*. (Pros Br. at 9-10.) This characterization is flawed for several reasons, many of which are apparent from the prosecution's own arguments.

As the prosecution recognizes, "the trial court did not cite" *Brady* or *Youngblood*, and even its references to due process were "bland" and "generic." (Pros Br. at 8-9, 16.) The prosecution relies on these characterizations to argue that the trial court's analysis of *Brady* and *Youngblood* was sloppy and erroneous, but it also cuts another way: The trial court did not engage with these standards because they had nothing to do with the court's decision. The court's finding of a due process violation (or multiple violations) is entirely consistent with all the arguments raised by Mr. Ewing and Mr. Searcy, as well as the notion that the trial court was not even thinking about the *Brady* or *Youngblood* tests discussed in the prosecution's brief. See *People v Causey*, unpublished per curiam opinion of the Court of Appeals, issued March 4, 2021 (Docket No. 352550) (Exhibit C), p 5 ("the prosecution need not have committed a *Brady* violation for the trial court to have discretion under MCR 6.201(J) to fashion a remedy," including dismissal).

The prosecution also takes issue with the trial court's failure to hold a hearing or make the necessary finding that police intentionally destroyed the evidence in bad faith as required by *Youngblood*. (Pros Br. at 8-10.) But the reason the trial court did not hold a hearing or make such a finding is that its dismissal had nothing to do with the *Youngblood* standard. In fact, the dismissal *without prejudice* suggests

exactly the opposite—that the trial court assumed the prosecution still had control over the recordings and should try harder to find them before refiling charges. This makes even more sense considering the prosecution’s position below. After finally acknowledging immediately before trial that the recordings were within its control, the prosecution requested “an opportunity to discover[] if such evidence exists and share it with the defense.” (3.22.24 Status Rep. & Motion to Adjourn at 3.)

While the prosecution is correct that the record below does not reflect the careful application of *Brady* or *Youngblood*, its argument proves too much. The record shows that trial court dismissed this case for discovery violations.

**B. The prosecution violated its discovery obligations.**

“Upon request,” the prosecution must provide each defendant in a criminal case “any exculpatory information or evidence known to the prosecuting attorney,” MCR 6.201(B)(1), “any police report and interrogation records concerning the case,” MCR 6.201(B)(2), and “any written or recorded statements, including electronically recorded statements, by a defendant, codefendant, or accomplice pertaining to the case[.]” MCR 6.201(B)(3). The prosecution has 21 days to comply with a such a request, MCR 6.201(F), and a “[c]ontinuing [d]uty” to “promptly notify” a defendant of any new information that would fall within the scope of a prior request. MCR 6.201(H).

Mr. Ewing has formally requested discovery on multiple occasions, both before and after his conviction was vacated. This includes his Motion for Discovery filed in September 2021, where he sought all materials under MCR 6.201(A), MCR 6.201(B), *Brady*, and *Giglio*. (9.2.21 Discovery Motion.) It also includes his June 2023 “Motion to Compel and In Camera Review,” which discussed the legal right to

pre-trial discovery and sought an order requiring the prosecution to disclose 24 pieces of evidence, including the specific items cited by the trial court when this case was dismissed. (6.20.23 Motion to Compel at 1-6.) Both the trial court and prosecution treated Mr. Ewing's June 2024 motion as a discovery request, with the trial court directing the prosecution to respond specifically to each item requested. (See 10.10.2023 Hrg. at 23-70.) As such, Mr. Ewing's Motion to Compel served as a second discovery request giving rise to the prosecution's responsive obligations under MCR 6.201(B). See *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 326-327 (2002) (“[A]ppellate courts often look to the substance of a motion or ruling to determine its true nature, not its label.”).

Not only did the prosecution fail to provide the requested discovery within 21 days as required by MCR 6.201(F), it “repeatedly rebuffed” discovery requests with canned responses of “it’s not in the file, we’ve turned over everything we’ve got[.]” (3.25.24 Tr. at 9-10.) But it turned out that more evidence *was* in the file, including a transcript of Mr. Beal’s statement and a sticky note indicating the prosecution’s possession of the accompanying recording. It also turns out that greater diligence in speaking with OIC Williams may have led to the discovery of even more evidence to which Mr. Ewing and Mr. Searcy were entitled, including recordings of their own interrogations.

The prosecution’s failure to locate and disclose the Beal transcript sooner, along with its failure to speak with OIC Williams until one business day before trial and the lack of *any* meaningful response to other discovery requests, demonstrates a lack of diligence that is utterly incompatible with MCR 6.201 and the due process rights it protects. As such, there was ample basis for the trial court’s finding that the prosecution violated its discovery obligations in this case. See *People v*

*Dickinson*, 321 Mich App 1, 19 (2017) (“Even though the prosecution lacked knowledge of the existence of the second report until it was first revealed at trial, the prosecution’s failure to discover and disclose the report to the defense likely constituted a discovery violation.”) (citing *People v Chenault*, 495 Mich 142, 150 (2014)).

**C. The dismissal without prejudice was appropriate.**

Under MCR 6.201(J), a trial court has broad discretion to oversee discovery and remedy violations, “reviewable only for abuse of discretion.” Beyond the specific remedies provided in the rule, a court may “enter such . . . order as it deems just under the circumstances.” *Id.* “When determining the appropriate remedy for discovery violations, the trial court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances, including the reasons for noncompliance.” *People v Banks*, 249 Mich App 247, 252 (2002). This “requires inquiry into all the relevant circumstances, including the causes and bona fides of tardy, or total, noncompliance, and a showing by the objecting party of actual prejudice.” *People v Davie (After Remand)*, 225 Mich App 592, 598 (1997) (internal quotations omitted).

*Davie* provides an instructive example of this balancing inquiry. There, although both of the defendants requested discovery from the prosecution through the typical channels, discovery was not timely provided because it was “not ready, or had been misplaced.” *Id.* at 596. Finally, two days before trial, discovery was provided to one of the defendants but not the other. *Id.* at 596-97. Because the prosecution’s conduct deprived the defendants of a meaningful opportunity to prepare, the trial court dismissed the charges. *Id.* at 597. This Court affirmed, finding that the trial court did not abuse its discretion. *Id.* at 599. The Court explained that “[w]hile the prosecutor and the public had an

interest in seeing this matter proceed to trial, the court had a great interest in forcing present and future compliance” with discovery rules. *Id.*

Interestingly, the trial court in *Davie* neglected to specify whether its dismissal of charges was intended to be with or without prejudice, which left the matter to be decided by this Court. *Id.* “Generally,” the Court explained, “dismissal for failure to comply with the court rules is presumed to be a dismissal with prejudice.” *Id.* at 600 (citations omitted). As such, the Court gave no indication that a dismissal with prejudice would have been an abuse of the trial court’s discretion. See *id.* But because the trial court was silent on the matter, and based on the parties’ mutual reliance on routine discovery practices, the Court found that a dismissal without prejudice would be more appropriate under the circumstances. *Id.* Thus, as *Davie* makes clear, trial courts enjoy wide latitude in deciding what relief is appropriate for all types of discovery violations, up to and including dismissal.<sup>10</sup>

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<sup>10</sup> This Court has routinely affirmed the dismissal of criminal charges for discovery violations in unpublished decisions. See, e.g., *People v Winbush*, unpublished per curiam opinion of the Court of Appeals, issued February 6, 2007 (Docket No 265567) (Exhibit D), p 3 (prosecution sought a “less severe remedy of granting a continuance of the plea-offer deadline,” but this Court rejected that suggestion because “the prosecution had demonstrated that it was not able to comply”); *People v Smith*, unpublished per curiam opinion of the Court of Appeals, issued October 13, 2015 (Docket No 322283) (Exhibit E), p 3 (defendant appealed his conviction arguing that earlier dismissal should have been *with* prejudice, but this Court disagreed because that “would be the most severe sanction possible”); *People v Canfield*, unpublished per curiam opinion of the Court of Appeals, issued May 15, 2018 (Docket No 340598) (Exhibit F), p 3-4 (affirming dismissal without prejudice after the prosecution was unable to secure and produce witness records despite several adjournments); *Causey*, unpub op at 5-6 (recognizing a trial

The trial court in this case exercised that discretion appropriately, particularly given the circumstances facing the court on the morning of March 25, 2024. By then, the court had overseen “months and months and months” of discovery problems, which the prosecution had “repeatedly and repeatedly and repeatedly rebuffed with responses of, it’s not in the file, we’ve turned over everything we’ve got[.]” (3.25.24 Tr. at 9-10.) The prosecution finally acknowledged just a few days before trial that at least two critical pieces of evidence existed but had not yet been located. The prosecution at first sought an adjournment to keep looking, but then immediately withdrew that request and asked to proceed with “a missing evidence instruction” in lieu of the evidence itself—even “if it’s a *Brady* violation or anything of that nature.” (*Id.* at 5.)

Finding the prospects of a murder trial under these circumstances “incredibly concerning” and incompatible with an opportunity “for Mr. Ewing and Mr. Searcy to have a fair trial” (*id.* at 12-13), the court instead dismissed the case without prejudice. Several considerations demonstrate why this was an appropriate exercise of the court’s broad discretion under MCR 201(J).

*First*, by requesting an adjournment on the eve of trial, the prosecution made clear its belief that additional evidence may exist within police custody that would be responsive to Mr. Ewing’s discovery requests, including recordings of interrogations and a third-party statement implicating someone else in the shooting. Yet by withdrawing its request on the morning of trial, the prosecution demonstrated that on second thought, it does not care to keep looking, and would just as

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court’s discretion to dismiss with prejudice for a discovery violation, but remanding because the trial court relied on two legal errors in doing so).

soon try this case on a limited record. The prosecution’s shifting position shows exactly why a lesser remedy, such as a *sua sponte* adjournment of trial, would have been pointless under these circumstances. After nine full months of inaction and deflection, nothing suggested that more time would fix the problem.

*Second*, by dismissing the case *without prejudice*—a detail the prosecution neglects to mention—the trial court left the door open for the prosecution to conduct a meaningful search for missing evidence and initiate this prosecution again if it so wishes. As Mr. Searcy aptly points out, this modest “middle-of-the-road” remedy may not be what anyone wanted from the trial court, and that alone suggests it was a sound exercise of discretion. (Searcy Br. at 26)

*Third*, even ignoring the prosecution’s conduct over the past fifteen years, its actions and representations leading up to the date of retrial provided ample grounds for a meaningful remedy under MCR 6.201(J). This includes the prosecution’s apparent failure to speak with OIC Williams until one business day before trial, for which the trial court was understandably exasperated. (3.25.24 Hrg. at 10-11.) It also includes the February 2024 Status Report, which represented—apparently incorrectly, see *supra* n 9—that the transcript of Mr. Beal’s statement “was part of the prior discovery,” yet did *not* acknowledge the newly discovered sticky note that confirmed Mr. Ewing’s contention that the prosecution had possession of the corresponding recording. (2.16.24 Status Rep. at 2.) This conduct invited a dismissal of charges, if not worse.

*Fourth*, these same factors prejudiced Mr. Ewing and Mr. Searcy in a manner that easily justified the trial court’s remedy. The prosecution had nine months in which to conduct a diligent investigation

and find the evidence Mr. Ewing was seeking, or at least provide a satisfying explanation as to why the evidence was not available. The prosecution easily could have provided more information sooner, including in its final Status Report filed five weeks before trial. Instead, the prosecution hamstrung the defense by waiting until the eleventh hour to reveal its likely possession of three critical recordings. As the trial court recognized, this made it impossible for Mr. Ewing and Mr. Searcy to conduct a meaningful investigation into the prosecution's disclosures and prepare adequately for trial. More importantly, it deprived Mr. Ewing and Mr. Searcy of the actual recordings, which are necessary to their defense and which could easily tip the scales in a case like this.

For all these reasons, the trial court properly balanced the interests of the court, the public, and the parties to fashion an appropriate remedy. The dismissal without prejudice was a sound and unremarkable exercise of the court's broad authority to grant whatever relief "it deems just under the circumstances." MCR 6.201(J). Just as this Court has affirmed many similar dismissals in the past, it should do so here.

**II. The trial court did not abuse its discretion by dismissing without prejudice to remedy a fifteen-year pattern of discovery and due process violations.**

***Standard of Review***

A trial court's dismissal of charges is reviewable for abuse of discretion. See *Jackson*, 292 Mich App at 591. "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id.*

## *Discussion*

While the discovery violations described above provide the simplest basis to affirm the trial court's exercise of discretion under MCR 6.201(J), there are many other reasons as well. As discussed more fully in the brief filed by Mr. Searcy, the trial court's decision followed the prosecution's extensive fifteen-year pattern of withholding exculpatory evidence, depriving Mr. Ewing and Mr. Searcy of due process and providing ample additional support for the dismissal.<sup>11</sup>

As Mr. Searcy points out, “[t]he defense made its first of several broad requests for exculpatory evidence back in 2010, before the first trial.” (Searcy Br. at 26.) Despite the prosecution's ongoing disclosure obligations under MCR 6.201 and the due process clauses of the federal and state constitutions, “numerous pieces of exculpatory information were provided *years* too late,” including the following:

- (1) Tyree Washington's 2017 *Mirandized* confession (known since 2017 but disclosed in 2021, five months *after* the defendants' new pretrial proceedings had begun);
- (2) the Adrienne Jackson vehicle report (known since 2010 but disclosed in 2021);
- (3) the informal summary of the Beal/Dodson recordings (known since 2010 but disclosed in 2024);
- (4) forensic evidence and police reports linking William Beal to the murder weapon (known since 2010 but disclosed in 2024); and
- (5) evidence of the Officer-in-Charge intimidating a witness to implicate Mr. Searcy (known since 2010 but disclosed in 2024).

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<sup>11</sup> This section relies on many of the facts and arguments contained in Mr. Searcy's brief. Because the lower court records are largely identical and the cases have been consolidated on appeal, this brief avoids unnecessary overlap and duplicity by adopting the facts and certain arguments raised by Mr. Searcy. The arguments are only summarized here for presentation and preservation purposes.

(*Id.*) The prosecution’s actions and inactions with respect to all this evidence gives rise to multiple grounds for relief.

First, for the same legal reasons explained above, the prosecution also violated its discovery obligations under MCR 6.201 with respect to several pieces of evidence that were withheld as early as 2010, and the trial court’s dismissal without prejudice was an appropriate remedy for the entirety of that conduct. As Mr. Searcy points out, the prosecution “committed *years*—not weeks or months—of discovery violations depriving Mr. Searcy and Mr. Ewing of material guaranteed to them under Michigan law.” (*Id.* at 31.) While Mr. Ewing maintains that the eve-of-trial discovery violations alone were sufficient to justify the trial court’s exercise of discretion under MCR 6.201(J), they only represented one chapter in a much lengthier and more problematic story, the proverbial last straw. This argument is explained more fully in Section II of Mr. Searcy’s brief, which Mr. Ewing adopts in full.

Second, while *Brady* and *Youngblood* provide two lines of authority for analyzing different types of federal due process violations, they are not exclusive. As Mr. Searcy persuasively argues, “neither the *Brady* doctrine nor the *Youngblood* doctrine capture the full panoply of wrongdoing” at issue in this case, including the prosecution’s “repeated suppression of exculpatory evidence,” its “numerous misrepresentations to the trial court and the defense,” and its “lack of diligence in responding to numerous of the defense’s discovery requests.” (*Id.* at 21.) This lengthy pattern of misconduct “left the trial court with no confidence that a fair trial was still possible,” making a dismissal on due process grounds not only appropriate but necessary. (*Id.*) Indeed, as the trial court explained, “this situation is, in fact, a due process violation for both Mr. Searcy and Mr. Ewing.” (3.25.24 Hrg. at 12.) This argument

is explained more fully in Section I of Mr. Searcy’s brief, which Mr. Ewing adopts in full.

Finally, although the typical remedy for a *Brady* violation is a new trial (which Mr. Ewing and Mr. Searcy have already been granted for other reasons), Mr. Searcy is correct that a “trial court has broad authority to fashion a [different] remedy,” particularly where the “late disclosure [has] cause[d] the exculpatory value of the information to be lost or significantly diminished.” (Searcy Br. at 36.) That is precisely what has happened here:

First, late disclosure of Adrienne Jackson’s Aurora meant that the defense could not ask Jendayi Love—one of the few eyewitnesses who testified at the first trial—if that was the vehicle she saw the day of the shooting, because Jendayi Love died before the new pretrial proceedings. . . . Second, the apparent loss of the Beal/Dodson tapes meant impeaching William Beal or introducing his statements to a jury became functionally impossible.

(*Id.* at 34-35.) Under the circumstances of this case, the dismissal of charges was an appropriate remedy for the prosecution’s pattern of *Brady* violations. This argument is explained more fully in Section III of Mr. Searcy’s brief, which Mr. Ewing adopts in full.

**III. Dismissal is an appropriate remedy for the destruction of evidence under the Due Process Clause of the Michigan Constitution.**

*Standard of Review*

Questions of constitutional law are reviewed *de novo*. *People v Lockridge*, 498 Mich 358, 373 (2015). This includes an interpretation of the Michigan Constitution. *People v Stovall*, 510 Mich 301, 312 (2022).

## *Discussion*

While this Court need not reach the prosecution's arguments on appeal, Mr. Ewing will nevertheless respond. The prosecution contends that although "the trial court did not cite" *Brady* or *Youngblood*, these cases provide the only conceivable grounds for dismissal, and the trial court neglected to make the necessary findings to support such an outcome. (Pros Br. at 8-10.) While the prosecution is correct that the trial court did not make explicit "findings" for purposes of a *Brady* or *Youngblood* analysis, that does not mean the prosecution wins. Even assuming the permanent loss of evidence occurred here, dismissal without prejudice is an appropriate remedy under the Due Process Clause of the Michigan Constitution. See Const 1963, art 1, § 17. Or, if this Court disagrees, it should reject the prosecution's request for relief and remand this case for further consideration under the appropriate legal standards.

**A. Michigan should adopt a more flexible balancing test for cases involving the destruction or permanent loss of evidence.**

It appears that the prosecution may have permanently lost up to three critical recordings it once possessed, and that it may now be impossible to prove the exculpatory value of those recordings. While there have been no findings to that effect, Mr. Ewing will entertain the premise for the sake of this argument. The first recording is the conversation in which William Beal admitted to his involvement in the shooting. The second recording is Mr. Ewing's interrogation in which OIC Williams acknowledged Mr. Ewing's innocence and threatened to pin this case on him if he did not cooperate. And the possible third recording is the interrogation of Mr. Searcy, which OIC Williams has suggested likely exists.

Mr. Ewing acknowledges that the trial court has not made a finding as to whether the recordings were destroyed in bad faith as required by *Youngblood*. See 488 US at 58. Be that as it may, this case provides Michigan with an opportunity to join ten other states by looking past *Youngblood* and adopting a more sensible balancing test under our state Constitution, one with “the central objective . . . to protect the defendant’s right to a fundamentally fair trial.” *State v Ferguson*, 2 SW3d 912, 917 (Tenn 1999).

In *Youngblood*, the United States Supreme Court held that “unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.” 488 US at 58. Justice Stevens concurred, agreeing that the failure to preserve potentially exculpatory evidence did not violate *Youngblood*’s right to a fair trial, but not joining the Court’s opinion because “there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair.” *Id.* at 60-61 (Stevens, J., concurring). Justice Blackmun, joined by Justices Brennan and Marshall, dissented, pointing out the “inherent difficulty” of proving bad faith and arguing that “[r]egardless of intent or lack thereof, police action that results in a defendant’s receiving an unfair trial constitutes a deprivation of due process.” *Id.* at 66 (Blackmun, J., dissenting).

“The reaction to the *Youngblood* decision was immediate and scathing.” Glasner, *Youngblood in Practice: How the Bad Faith Standard Preserves Wrongful Convictions and Creates Perverse Incentives*, 75 Rutgers U L Rev 1307, 1316 (2023) (collecting articles). Commentators recognized that “[p]roving bad faith, as defined in *Youngblood*, is almost impossible.” Paul, *Destruction of Exculpatory*

*Evidence: Bad Faith Standard Erodes Due Process Rights*, 21 Ariz St L J 1181, 1195 (1989). Time has validated these concerns, with one 2007 study identifying only *seven* of 1,675 *Youngblood* cases in which courts made a finding of bad faith. Chen, *The Youngblood Success Stories: Overcoming the “Bad Faith” Destruction of Evidence Standard*, 109 W Va L Rev 421, 422 (2007). Just as the concurring and dissenting justices predicted, the *Youngblood* standard has proven impractical and incapable of protecting due process and fair trials.

The criticism of *Youngblood* was not limited to the academic literature. Just one year after the decision, the Delaware Supreme Court rejected the new federal standard in favor of a more flexible balancing test under its state constitution. *Hammond v State*, 569 A2d 81, 87 (Del 1989). That test measures three factors:

(1) the degree of negligence or bad faith involved, (2) the importance of the missing evidence, considering the probative value and reliability of secondary or substitute evidence that remains available, and (3) the sufficiency of the other evidence used at trial to sustain conviction.

*Id.* at 86-87 (citations omitted).

Delaware is not alone. At least nine other state supreme courts have interpreted their state constitutional due process provisions to be more flexible and protective than *Youngblood*. See *Throne v Dep’t of Pub Safety*, 774 P2d 1326, 1330-32 (Ala 1989); *State v Smagula*, 578 A2d 1215, 1217 (NH 1990); *Commonwealth v Henderson*, 582 NE2d 496, 496-97 (Mass 1991); *Ex Parte Gingo*, 605 So2d 1237, 1241 (Ala 1992); *State v Delisle*, 648 A2d 632, 642-43 (Vt 1994); *State v Morales*, 657 A2d 585, 592-94 (Conn 1995); *State v Osakalumi*, 461 SE2d 504, 507-14 (W Va 1995); *State v Okumura*, 894 P2d 80, 98-99 (Haw 1995); *Ferguson*, 2 SW3d at 914-18.

While these courts have engaged in varied analysis, “the Delaware analysis has been the most commonly adopted to date.” Glasner, *Youngblood in Practice*, 75 Rutgers U L Rev at 1320. That is also the approach favored by at least one commentator. See Bay, *Old Blood, Bad Blood, and Youngblood: Due Process, Lost Evidence, and the Limits of Bad Faith*, 82 Wash U L Rev 241, 309 (2008).<sup>12</sup> More recently, two scholars have proposed different variations of a burden-shifting framework typically found in civil litigation. Glasner, *Youngblood in Practice*, 75 Rutgers U L Rev at 1332-1339 (discussing burden-shifting approach of *McDonnell Douglas Corp v Green*, 411 US 792, 802 (1973)); Elfarissi, *Note: Reimagining Youngblood’s Bad Faith Requirement: Safeguarding Bad Faith Requirement: Safeguarding Criminal Defendants’ Due Process Rights Through a Burden-Shifting Framework*, 123 Mich L Rev 51, 71-76 (2024).

Under any of these *Youngblood* alternatives, the dismissal of charges against Mr. Ewing and Mr. Searcy is the appropriate outcome. Consider the three-factor balancing approach under *Hammond*, for example. See 569 A2d at 86-87. First, while there may not be direct proof of subjective bad faith in the destruction of evidence, there are abundant reasons to find that police and prosecutors acted recklessly or grossly negligent with respect to the preservation *and timely disclosure* of critical evidence in a murder case. This is particularly true given the years-long pattern of discovery and due process violations described

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<sup>12</sup> This article was quoted and cited approvingly by then-Chief Judge Elizabeth L. Gleicher in a recent opinion concurring in the peremptory reversal of a conviction. *People v Vagasky*, COA Dkt No. 360680 (Mich App April 25, 2023) (Exhibit G.), Peremptory Order Vacating conviction (Gleicher, concurring) While it was ultimately unnecessary to revisit the *Youngblood* standard in *Vagasky*, the instant case may present that opportunity.

above and in Mr. Searcy's brief. Second, the missing recordings are immensely important to buttress Mr. Ewing's and Mr. Searcy's defense that Tyree Washington is responsible for this shooting, and there are no viable and reliable alternative methods of proof. Both OIC Williams and Mr. Beal would face potential criminal exposure for acknowledging their statements on the missing recordings, and while there exists an informal transcript of Mr. Beal's admission, it would be impossible to establish its authenticity, accuracy, and admissibility. Finally, there is a dearth of evidence of guilt, along with serious questions about its reliability, as this Court already found in *Searcy 2*. It is not difficult to see how the missing evidence could affect the outcome of trial.

To be clear, Mr. Ewing acknowledges binding precedent that the *Youngblood* bad faith standard governs claims of this nature in Michigan, at least where raised under the Due Process Clause of the Fourteenth Amendment. See, e.g., *People v Antsey*, 476 Mich 436, 461 (2006); *People v Dickinson*, 321 Mich App 1, 16 (2017); *People v Heft*, 299 Mich App 69, 79 (2012); *People v Hanks*, 276 Mich App 91, 95 (2007). He does not ask this Court to overrule binding precedent, but rather to consider for the first time whether the Due Process Clause of our state Constitution, Const 1963, art 1, § 17, should be interpreted in a manner that provides greater flexibility and protection than the federal *Youngblood* standard. At the very least, he wishes to preserve this argument, as this case may present our Supreme Court with an appropriate opportunity to consider an important question of state constitutional law if necessary. See *Sitz v Dept of State Police*, 443 Mich 744, 775-76 (2001) ("Our commitment to the protection of liberty was further demonstrated when the Supreme Court of Michigan adopted an exclusionary rule in 1919, 42 years before it was mandated by federal law.") (citing *People v Marxhausen*, 204 Mich 559, 563 (1919)); *People v*

*Cavanaugh*, 246 Mich 680, 686, (1929) (extorting a confession by holding as person without access to parent or counsel violates the constitutional guarantee of due process).

**B. If this Court agrees with the prosecution, the proper remedy is to remand for further consideration under *Brady* and *Youngblood*.**

Finally, the gist of the prosecution’s argument on appeal is that because the trial court made no finding about the exculpatory value of the recordings under *Brady*, see 373 US at 87, or the bad faith of police under *Youngblood*, see 488 US at 58, this Court should “reverse the trial court’s order of dismissal, reinstate the charges . . . , and order that this case be set for trial.” (*Id.* at 18.)

Even if the prosecution is right on the law, it is wrong on the remedy. The only appropriate relief in this case would be to remand for consideration under the correct legal standard, not to assume what facts would or would not be established at a hypothetical hearing. Perhaps evidence can be produced to satisfy the trial court that the missing recordings *are* exculpatory under *Brady*, or *were* destroyed with the intent to deprive Mr. Ewing and Mr. Searcy of their use. But no such hearing has ever taken place, or even argument on these questions.

If this Court reaches the prosecution’s arguments and finds that the trial court’s dismissal was not appropriate, it should remand for further review under the appropriate legal standards.<sup>13</sup> MCR

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<sup>13</sup> The prosecution argues that “[t]he People specifically asked for a due diligence hearing and were denied.” (Pros Br. at 10.) The apparent implication is that the trial court misapplied *Brady* and *Youngblood* by refusing to hear evidence and make rational findings before dismissing the case. But this mischaracterizes the proposed due diligence hearing, which had nothing to do with missing recordings or dismissal but rather

7.216(A)(5) (“The Court of Appeals may, at any time, in addition to its general powers, in its discretion, . . . remand the case to allow additional evidence to be taken[.]”); *Causey*, unpub op at 4 (“[W]here the trial court does have the discretion to fashion a remedy for this discovery violation under MCR 6.201(J), remand is required to allow the trial court to exercise its discretion free from legal error.”).

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was mentioned as an aside when defense counsel noted that two of the prosecution’s key witnesses had failed to show up for trial. (3.25.24 Hrg. at 14.) In other words, the trial prosecutor was merely noting that “*if* the Court proceeded further”—i.e., *not* dismissed the case—he would “ask for a due diligence hearing under [MRE] 804,” which deals with prior testimony of unavailable witnesses. (3.25.25 Hrg. at 14.)

## Conclusion and Relief Requested

For the reasons above as well as those in Mr. Searcy's brief, Mr. Ewing respectfully asks this Court to affirm the trial court's dismissal of this case without prejudice, or remand for further review under the appropriate legal standards.

Respectfully submitted,

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<p>Counsel certifies that this brief contains 11,715 countable words in the Statement of Facts, Argument, and Relief Requested sections, including footnotes and text contained in embedded graphics. See MCR 7.212(B)(2), (3).</p>
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