

STATE OF MICHIGAN
IN THE THIRD JUDICIAL CIRCUIT COURT
FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff,

Hon. Thomas M.J. Hathaway
Case 04-012890-01-FC

v

THELONIOUS DESHANE-EAR SEARCY,

Defendant.

A TRUE COPY
Dawn M. James
DEPUTY COUNTY CLERK

OPINION AND ORDER GRANTING
DEFENDANT'S MOTION TO DISMISS

At a session of said Court held in the Frank
Murphy Hall of Justice on 10.3.2022

PRESENT: HON. Thomas M. J. Hathaway
Circuit Court Judge

PROCEDURAL POSTURE

On September 5, 2004, a shooting occurred near the Detroit City Airport at an event known as a "Black Party". Jamal Segars was shot to death while riding in his silver Corvette. Brian Miner, an acquaintance of Segars, had gotten into the passenger seat of Segars' Corvette moments before the shooting. Around 9:00 p.m., several eyewitnesses saw a man approach the back of the Corvette who began shooting. Miner was shot in the leg but survived. Segars died from multiple gunshot wounds, including one to the back of his head and one to the chest. Although some of the eyewitnesses believed that the gunshots came from two separate guns, the eyewitnesses did not see a second shooter.

Police Officers Micah Hull, Shawn Stallard, and Scott Herzog were in a semi-marked police car in the shooting at around 9:00 p.m. Officer Hull heard the first volley of shots but could not see a shooter or the Corvette. Officer Hull attempted to pull forward, but the police car was hit by a burgundy Marauder. Officer Hull and Officer Stallard were then able to see a man with a handgun shooting a second volley of shots. However, the officers could not tell if the shots came from the same gun as the first volley. Officer Hull ran after the shooter, who ran east on Whithorn Street. The pursuit was unsuccessful, however, because the shooter got into a car that sped away. The officers denied that they fired any shots and testified that they were only able to see the shooter's back. Casings from two different weapons were found at the scene, including seven .45-casings and eight .40-caliber casings.

Three eyewitnesses identified defendant as the shooter from a photographic lineup. On the morning of November 30, 2004, law enforcement went to an apartment in Clinton Township to locate defendant. After searching the apartment, they found defendant hiding behind a piece of drywall in a crawlspace. Officers also discovered a .45-caliber semi-automatic handgun on a dresser in the bedroom where defendant was hiding. Ballistics testing revealed that the .45-caliber casings found at the scene of the shooting were fired from that gun.

Defendant was charged with first-degree premeditated murder, pursuant to **MCL 750.316(1)(a)**, assault with intent to murder, pursuant to **MCL 750.83**, and possession of a firearm during the commission of a felony, pursuant to **MCL 750.227b**. The trial was held over the course of several days in May 2005. The prosecutor presented several witnesses, and four eyewitnesses identified defendant as the shooter at trial. One of the prosecutor's theories at trial revolved around a claim that defendant mistakenly shot the victims to kill Deanthony Witcher, who drove a Corvette that looked like the murder victim's Corvette. According to Witcher, in November 2003, defendant shot him in the hand and "through the back through the lung out [his] heart." Before defendant shot Witcher, he stated "I got to kill you." Although Witcher did not see or hear the shooting on September 5, 2004, he was in the area of the silver Corvette he often drove.

Defendant did not testify at trial. Instead, he presented the testimony of friends and family members. Indeed, his grandmother explained that the gun did not belong to defendant, and it had been left in her apartment by a man named Jeffrey Daniels, who had driven her home one day and was killed in September 2004.

The jury convicted defendant as charged with first-degree premeditated murder, pursuant to MCL 750.316(1)(a), assault with intent to murder, pursuant to MCL 750.83, and possession of a firearm during the commission of a felony, pursuant to MCL 750.227b. He was sentenced to life in prison without parole for the first-degree murder conviction, with sentences to be served concurrently with each other and consecutively to a sentence of two years' imprisonment for the felony-firearm conviction.

In August 2015, Vincent Smothers, who was in prison and had already confessed to being paid to commit multiple murders in Detroit, wrote a letter to defendant admitting that he had killed the murder victim "during a botched robbery on Whitcomb and Conners [sic] across from the city airport." In December 2015, Smothers executed two affidavits, each detailing his involvement in the September 2004 crimes. Specifically, Smothers confessed that he shot the murder victim with a .40-caliber handgun. Smothers also implicated Daniels in the crimes, indicating that Daniels had fired a .45-caliber handgun near the murder victim's Corvette.

Smothers participated in an interview with Scott Lewis, a licensed private investigator, and a former journalist. During the interview, Smothers told Lewis that he had killed the murder victim and detailed the crimes and Daniel's involvement. Smother's statements to Lewis were largely consistent with the December 2015 affidavits, and Smothers executed another affidavit after his interview with Lewis.

In 2017, defendant filed his third motion for relief and motion for a new trial. On the first day of the hearing, Smothers testified that he murdered the murder victim on Conner Street near the Detroit City Airport on what he believed was September 6, 2004. He testified in detail about the way he and Daniels carried out the crimes and escaped from the scene. He also denied that he was promised anything in exchange for his testimony.

During the testimony of DPD Detective Patricia Little it was noted that an evidence envelope that contained a bullet that was removed from the murder victim's chest had conflicting descriptions. David Balash, who was qualified as a firearms expert at the evidentiary hearing, testified that the envelope contained a .40 S & W...fired bullet.

Although the trial court acknowledged that the bullet that was removed from the murder victim was at times mislabeled, the trial court found that it was clear that the envelope contained a .40-caliber bullet and that the police had simply made a labeling error.

Although the jury had a difficult time reaching a verdict on account of casings and the type of gun that was discovered, based on the evidence, the jury found defendant guilty as charged. Furthermore, although the jury disregarded the many witnesses who provided alibi testimony for defendant at trial, defendant avers that if the jury was aware that the bullet that was found in the murder victim was from a .40-caliber gun and that Smothers was taking responsibility for the crimes, they may have put more stock in defendant's alibi witnesses as a defense.

Accordingly, the Michigan Court of Appeals concluded that defendant has a reasonably likely chance of acquittal and therefore affirmed in part, reversed in part, and remanded for further proceedings consistent with its opinion on February 11, 2021¹.

STANDARD OF REVIEW

The standard of review is de novo for all issues of law on appeal. *People v Laws*, 218 Mich App 447; 554 NW2d 586 (1996). Factual findings are reviewed to see if they are clearly erroneous. **MCR 2.613(C)**; *People v Tracey*, 221 Mich App 321; 561 NW2d 133 (1997). Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made. *People v Lombardo*, 216 Mich App 500; 549 NW2d 596 (1996).

Now comes defendant with this Motion to Dismiss based on the prosecution's alleged numerous discovery violations. The Prosecution has filed a response.

ARGUMENT

Defendant argues the following issues in his motion to dismiss that this Court will address herein:

- I. Should the Court dismiss the instant motion based on the prosecution's failure turn over to the defense, before trial, several pieces of *Brady* evidence that exonerated defendant?
- II. Should the Court dismiss these charges based on the Due Process clauses of both the Michigan and United States Constitutions because the prosecution failed to preserve *Brady* evidence essential to the defense?

¹ *People v Thelonious Deshane-Ear Searcy*, unpublished opinion of the Court of Appeals, entered February 11, 2021 (Docket No. 34169).

III. Should the Court dismiss these charges where the prosecution elicited false testimony from a key prosecution witness, and failed to correct the false testimony, to obtain Searcy's conviction in violation of the Due Process Clause?

IV. Should the Court dismiss the instant charges based on the violation of defendant's Sixth Amendment right to a fair trial court conducted proceedings out of the presence of, and without knowledge of, the defense?

ANALYSIS

On September 5, 2004, APA Patrick Muscat completed an "Investigator's Report" in which he identified Thelonious Searcy, 6'3", 165 lbs., 24-year-old black male, as the "defendant" based on Investigator Don Olsen's description (Exhibit C, Investigator's Report date 9/05/04). In his report, Muscat listed Brian Miner as "complainant #2". APA Muscat recommended that defendant be charged with first-degree murder, assault with intent to murder, and felony-firearm.

There is also an "Investigator's Report Supplement" that indicates that Officers Stafford, Herzog, and Hull will testify to observing a black male fitting defendant's description firing shots. (Exhibit D of Investigator's Report Supplement). However, the homicide file also contains a handwritten note addressed to "Dale" [Collins] in which an unknown author indicates that he "t/t (talked to) officers, they couldn't pick out defendant from '6-pack' still need to t/t (talk to) PO Hull [.] He chased after Def[endant]". The handwritten note continued to state, "this case is about being at the wrong time, place, your [compl] was driving the exact vehicle as Deanthony and even looked like him." (Exhibit E, handwritten note contained in homicide file).

CRIME SCENE INVESTIGATION

Shortly after the shooting, DPD evidence technician Velma Tutt was dispatched to the crime scene (Trial Tran Vol. 2, pp 20-21. Tutt identified and placed into evidence several bullet casings that were in and on Segars' Corvette. All the spent casings were .40-caliber casings from Smith & Wesson, while the bullet casings recovered from "across the street" near the party store were .45 caliber casings from two different manufacturers. Tutt also placed into evidence a video tape from the [unmarked] scout car at the scene.

Evidence technician Officer Deborah Stinson was dispatched to St. John Hospital to process gunshot residue on Segars' hands and face. While in the room she located "a piece of copper "frag" and placed it into evidence."

WITNESS STATEMENTS

Several police officers canvassed the crime scene and interviewed the following witnesses: Chela Holmes (who identified the shooter as a black male in his 20s, about 5'5"-5'6", medium build wearing a white t-shirt, black pants), Doris Houchins, and Crystal Edmonson. Also interviewed was Dwayne Lee Dye who said the shooter had on a white shirt with blue stripes and light blue jeans. Investigator Dale Collins interviewed Kimberly Jefferies Stringer who described the shooter as a black male age 30-35, 6'1", 119 lbs., "[carmal] color skin" wearing a shirt white. Other individuals who were interviewed included Latasha Boatright and Brian Miner who both claimed to not see the shooter.

When Investigator Collins showed Latasha Boatright a photo lineup, she identified photo #1 "D-Anthony" as someone she knows and saw the night of the shooting on Conner driving his gray Corvette. Kimberly Stringer also recognized Deanthony Witcher from the photo lineup from driving his Corvette the night of the murder.

Investigator Dale Collins interviewed Deanthony Witcher who claims that "Shawn" threatened him and shot Witcher in the wrist over what Witcher claims was a \$600 gambling dispute. (Exhibit U.)

WAYNE COUNTY MEDICAL EXAMINER

Wayne County Chief Medical Examiner, Carl J. Schmidt, M.D., performed an autopsy on Segars and concluded that the cause of death was seven gunshot wounds. The bullets were given to Sgt. Moore and logged into evidence by Investigator Olsen.

WITCHER'S SUSEQUENT ARREST

In the early morning hours of November 18, 2004, Officer Micah Hull stopped Deanthony Witcher driving a blue Corvette at an excessive rate of speed down Hoover southeast of 8 Mile Road. (Exhibit Y). On November 19, 2004, Wayne County APA Kathleen Mc Clorey denied a warrant and declined to prosecute Witcher for the CCW charge relating to his arrest because there was insufficient evidence tying Witcher to the

gun found in the Corvette. (Exhibit Z). The warrant denial form was printed out on April 21, 2005, at 12:29 p.m., but was never disclosed to the defense.

LAB ANALYSIS OF VIDEO EVIDENCE

On March 11, 2005, Officer Stephen Yakimovich of DPD's Forensic Services Section, conducted lab analysis of two VHS tapes that purportedly captured several "still images" of a suspect from "original video" footage and printed such photos. The still photos directly follow the lab analysis of the two VHS tapes. However, neither tape was produced to defendant prior to his trial.

TRIAL TESTIMONY

Once the jury was brought into the room at trial, APA Muscat read the names of potential prosecution witnesses. At the end of the first day of trial, the prosecution advised the Court that Deanthony Witcher wanted to assert his Fifth Amendment right against self-incrimination. However, the court ultimately heard the testimony of Witcher notwithstanding his original desire to assert his Fifth Amendment rights.

Witcher testified that on May 4, 2005, he was called to the stand to testify that he knew defendant from the neighborhood and that he had a dispute with him that resulted in defendant getting shot in the hand by defendant. After the alleged shooting on November 16, 2003, Witcher claimed that he was receiving further threats from defendant, and that defendant threatened to kill him.

Witcher then testified that he was driving his Silver Corvette around Conner and Whithorn on September 5, 2004. Although Witcher didn't see or hear the shooting he started getting phone calls from people checking on his wellbeing after the shooting. Witcher identified a picture of Sears' Corvette as "identical" to Witcher's. On cross examination, Witcher admitted that although he did not want to testify, he did so. He further denied that anybody had made promises to him to get him to testify. Defense counsel asked Witcher if he might be involved in other crimes, to which he responded "no". Then defense counsel also asked if Witcher had ever been involved in other crimes, arrests and convictions or anything involving deception or falsehood or fraud to which Witcher responded "never".

The next testimony was from Officer Micah Hull who was driving the unmarked car and heard the shots fired. Although Hull described the shooter as a black male around 6 feet tall, 200 lbs., he could not identify defendant as the shooter.

WAYNE COUNTY MEDICAL EXAMINER

Dr. Carl Schmidt, the Wayne County Medical Examiner testified that he recovered four bullet fragments from the victim's body. He also stated that he turned the evidence over to DPD Detective David Moore.

OFFICER BULGARELLI AND FIREARMS EXAMINER KEVIN REED

Bulgarelli testified that on November 30, 2004, he and approximately 12 other officers arrested defendant at an apartment in Clinton Township where he discovered a .45-caliber semi-automatic handgun in the apartment. The court heard arguments as to admission of the gun placed into evidence by Bulgarelli. Trial Trans Vol 4, p. 4.

Reed testified that he performed firearm examinations and tool make identification for the City of Detroit, and that he had been doing so for one year after receiving on the job training using a comparison microscope. *Id.* at 31. Although Reed did not have any certification for being qualified in this area, the prosecution moved to qualify Reed as an expert witness in the field of firearms and tool mark identification. *Id.* at 32-33. Over the defense objections, the court qualified Reed to testify as an expert. *Id.* at 34.

Reed testified that several of the .45-caliber shell casings found at the crime scene were fired from the handgun were recovered from the apartment where defendant was arrested. At the conclusion of this testimony, the prosecution rested their case.

DEFENSE CASE

Several alibi witnesses each of whom testified that they were with and saw defendant at a family cook out at the home of Corrinia Searcy. Corrinia Searcy is defendant's cousin who lives at Balfour and Grayton in the City of Detroit.

The defense also called Edna Richardson, defendant's grandmother, to testify. According to Richardson, she lived in the apartment in Clinton Township where defendant was arrested. Richardson testified that the gun that was confiscated from her apartment at the time of defendant's arrest belonged to Jeffrey Daniels. Richardson asked Daniels to pick up the gun, however Daniels was killed in September 2004.

CLOSING ARGUMENTS

The prosecution argued that defendant ran up and unloaded rounds of bullets that killed Segars, who was in the wrong place at the wrong time. Trial Trans Vol V, pp 8-9. The prosecution argued further that "the victim died from seven gunshot wounds."

However, the forensic bullet evidence according to the prosecution, "shows in this case that the gun that was found in Mr. Searcy's home on November 30th, excuse me, in a home where he was staying on November 30th was fired at the scene. Officer Reed testified to that." *Id.* at p. 15. In fact, the prosecution noted that, based on Reed's report, "you couldn't match the gun to the bullets because the bullets were so damaged." *Id.* As such, there was no confusion about whether it came from that gun. Evidence Technician Velma Tutt just said she couldn't make a comparison to the bullet.

JURY DELIBERATIONS

The jury began deliberations on May 6, 2005 (Trial Trans Vol 5, p. 86). It received a note from the jury regarding the caliber of the bullet found in the deceased and evidence technician Tutt's testimony. At 2:35 p.m., the jury returned to the courtroom with a guilty verdict on all counts.

POST-TRIAL TESTIMONY AND EVIDENCE

Several years after defendant was convicted, convict Vincent Smothers confessed to the shooting death of Segars. Smothers signed several affidavits detailing the events of the shooting and that he acted with now deceased accomplice Jeffrey Daniels.

Defendant's counsel, upon sending a subpoena to the City of Detroit, obtained, among other things, a VHS tape from a store located at 11742 Conner (Exhibit K); Laboratory Analysis from two VHS tapes that captured several "still images" that were printed (Exhibit AAI); several "still image" photos that appear to have been taken from the in-car video from Officer Hull's unmarked police cruiser; and the DPD arrest report of Witcher indicating that Witcher was arrested by Hull for carrying a concealed weapon in his vehicle (Exhibit Y).

EVIDENTIARY HEARING

During the first day of his evidentiary hearing Vincent Smothers confessed to shooting Segars. He provided numerous details of the crime including the fact that he used a .40-caliber handgun. He stated that he had an accomplice named Jeffrey Daniels who fired a .45-caliber gun near Segars' Corvette.

During this evidentiary hearing, defendant offered a DPD report that showed conflicting evidence detailing the fact that the same piece of evidence contained both a .9 mm shell casing and a .40-caliber bullet fragment.

Considering this discrepancy, the prosecution called DPD Detective Patricia Little to testify to the evidence envelope in question. Upon further examination, the envelope contained a .40 caliber bullet fragment that was taken from Segers' body. Indeed, in its Opinion Granting defendant's Motion for Relief from Judgment, the Court of Appeals addressed the discrepancy stating that the suppression of the bullet type taken from the victim was squarely exculpatory to the defense. Dr. Carl Schmidt testified that he removed four bullets from the murder victim's body so they could be turned over to law enforcement. The bullet that was removed from the victim's body was labeled as "E07191604" and was described by the morgue as a "bullet" from the murder victim's chest. However, it was also labeled by the police department as a 9-millimeter casing. These are entirely inconsistent descriptions.

In this case, defendant argues and this Court agrees that there can be no question about the materiality of the suppressed evidence. Having failed to produce any discovery related to the source of these bullets, the defense was completely unaware that the bullets from the victim's body were found to be fired from a .40-caliber-type gun.

Defendant now seeks dismissal of the criminal charges pending against him based on: (1) the prosecution's failure to turn over, prior to the first trial, *Brady* material which would have exonerated defendant; (2) the prosecutor's failure to preserve certain *Brady* material which also would have exonerated defendant; and (3) the violation of defendant's sixth amendment right to the assistance of counsel.

Per defendant's supersession of *Brady* evidence argument, this Court agrees. Defendant avers that the prosecution's failure to turn over, prior to the first trial, *Brady* material which would have exonerated defendant. Specifically, defendant argues the following were suppressed by the police /prosecution: (1) the type of bullet removed from the victim; (2) a VHS Tape from inside the party store; (3) the criminal arrest record of Witcher months before defendant's trial.

To the contrary, the prosecution argues that defense counsel who had the autopsy report about the bullets, could have ascertained, by process of elimination, that the .40-caliber bullets had to have come from the victim's body. However, the Court disagrees as the Michigan Supreme Court rejected a diligence requirement as part of a *Brady* violation. In *People v Chenault*, 495 Mich 142, 152 (2014), our Supreme Court

concluded that “[w]e disagree with the prosecution’s suggestion that the diligence requirement is consistent with the *Brady* doctrine generally.” In the instant case, the prosecution is asking the Court to ignore binding precedent and impose a diligence requirement to reject defendant’s *Brady* argument. However, this Court declines the prosecution’s suggestion to decide against precedent.

Defendant argues further, and this Court agrees that under Michigan law, the following “true *Brady* violation”, (1) that the prosecution has suppressed evidence, (2) that such evidence is favorable to the accused, and (3) that such evidence is material. *People v Chenault*, 495 Mich 142, 149-50 (2014).

Here, the record shows that the prosecution sought to introduce, over defense objections, evidence relating to the forensic testing of the handgun found in the apartment where defendant was arrested. Moreover, at no time was the defense made aware that the bullets taken from the victim’s body did not match the gun that was placed into evidence. In fact, to the contrary, when the jury specifically asked what caliber type bullets were removed from the victim’s body, they were told that the bullets were too deformed to determine the caliber type.

At the time of the trial, the prosecution’s forensic examiners were aware of the bullet caliber type removed from the victim’s body and that it did not match the handgun offered at trial. Defendant argues and this Court agrees that there is nothing more exculpatory than this single piece of evidence which was suppressed from the defense and the jury.

Importantly, it should be noted that the two DPD forensic firearm analysts, David Pauch and Kevin Reed, who processed the bullets taken from the victim’s body have been associated with other wrongful conviction cases.

Similarly, the VHS tapes confiscated by Officer Zwicker was clearly *Brady* material that should have been given to the defense. Defendant argues that the VHS tapes that were confiscated are another reason why his case should be dismissed. Indeed, both Edmonson and Holmes told Officer Zwicker that they saw the shooter run into the corner store. Zwicker went to the store to confiscate a VHS tape that he placed into evidence. To date, this tape has never been produced or viewed by the defense.

At trial APA Muscat went on the record and stated, “in regard to discovery, there has been some off the record conversations about an in-store video. I’ve never seen a copy of that video and I have been told by [Sgt] Anderson that there is not a copy

in the Detroit Police's possession. So, I want to make that clear for the record." Trial Trans Vol 1, p. 119. Clearly, this is not accurate.

While Yakimovich's report lists only one evidence tag (ET #07170504), the dash-cam video from the cruiser, clearly the still images of an individual matching the shooter's description taken from the inside of the store we not taken from the dash cam of the cruiser.

On the second page of Yakimovich's report, he indicates that two VHS tapes were recorded, and one was turned over to Sgt. Anderson. Given these facts, the VHS tapes confiscated were clearly *Brady* materials that should have been produced. These tapes could have exonerated defendant.

Defendant argues further that the suppression of the VHS tape placed into evidence constitutes a gross abuse of the State's power of prosecution insofar as it denied defendant the ability to use this evidence in his defense. Just like the suppression of the bullet removed from the victim, the suppression of the VHS tape should further compel the court to dismiss the charges.

Separately from defendant's claim pertaining to the suppression of the VHS tape taken from the store, defendant seeks dismissal of his charges based on the prosecution's failure to preserve such evidence. Indeed, the Supreme Court held in *Arizona v Youngblood*, 488 US 51, 109 S Ct 333 (1988), that when the state fails to disclose to the defendant exculpatory evidence, the good or bad faith of the state is irrelevant to a claim based on the prosecution's loss (or failure to preserve) evidence. *Id.* at 337.

Defendant bases his next argument on the suppression of the prosecution's star witness, Deanthony Witcher's prior criminal record. The City of Detroit produced a "Hit Report" for Witcher reflecting multiple arrests and charges for serious crimes including murder, carrying concealed weapons, and armed robbery (Exhibit P). Witcher's report was printed out just days after Seger's shooting. This report was never turned over to the defense. Defendant avers that the suppression of this evidence is another gross violation of defendant's constitutional rights.

The Court agrees with defendant's argument that the prosecution bears the brunt of its failure to turn over exculpatory evidence since the prosecution and investigating officers were aware of the material facts that were withheld from the defense. Accordingly, the price to be paid for this failure falls on the prosecution.

Here, another theory of the prosecution's case was based on the claim that defendant meant to shoot Witcher but mistakenly shot Segars who drove a Corvette similar to Witcher's. Defendant argues that had defense counsel been given the "Hit Report" his counsel could have impeached him on account of Witcher being a career criminal.

On the other hand, the prosecution suggests that neither Witcher's prior arrests or charges were relevant to show his bias or motive for testifying. However, this Court opines that Witcher did, indeed, have ample bias and motive to testify against defendant because there was testimony at trial that defendant had been threatening Witcher over a gambling debt. Trial Trans Vol 3, pp. 74-76. Furthermore, considering that defendant had previously shot Witcher in his hand (which resulted in sending Witcher to the hospital), there exists motive for Witcher to testify against defendant.

The Court opines that Witcher's credibility would have been wholly impeached if the defense had been given Witcher's prior arrest record. The untruths told in Witcher's testimony regarding his prior criminal history would have been exposed. Instead, the prosecution allowed these blatant lies to stand.

This Court agrees with defendant's claims that the use of perjured testimony and/or the prosecution's failure to correct false testimony to obtain a conviction is prohibited. See *Naque v Illinois*, 360 US 264, 269 (1959). This can be seen by the fact that defense counsel repeatedly attempted to cross examine Witcher about his past criminal activity. When questioned, Witcher denied involvement in criminal activity. Trial trans Vol 3, p. 87. However, the Hit Report contradicts Witcher's answers. (Exhibit P). Indeed, the prosecution's failure to correct Witcher's false testimony violated defendant's rights to due process and helped the prosecution secure a conviction.

Finally, defendant argues that dismissal of the charges is appropriate given the severe and deliberate violations of defendant's due process rights that denied him a fair and impartial trial. This Court finds the following violations of defendant's due process rights: (1) the prosecution was aware of Witcher's criminal history on account of DPD's Hit List containing his infractions; (2) the prosecution intentionally violated defendant's rights under *Brady* by suppressing the forensic analysis of the bullet taken from the victim's body which was not consistent with the gun offered at trial as belonging to defendant; (3) the prosecution suppressed the VHS tape; (4) the prosecution suppressed the criminal history and arrest record of the prosecution's key witness, Deanthony Witcher.

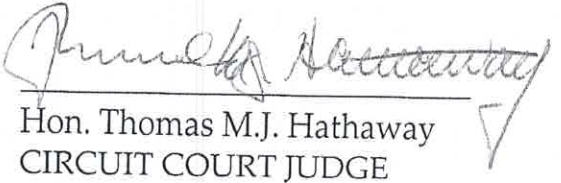
Importantly, this Court notes that the prosecution contends that there is no evidence to "definitively establish that there was a VHS recording confiscated from the store located at 11742 Conner" (Prosecution Brief, p. 38). However, there is an evidence tag from Officer Zwicker documenting its existence.

This Court **concludes** that the damage caused by the suppression and withholding of the exculpatory evidence cannot be cured. Therefore, it holds that dismissal of the charges is appropriate given the severe and deliberate violations of defendant's due process rights that denied him a fair and impartial trial. Accordingly, this Court **GRANTS** defendant's Motion to Dismiss.

CONCLUSION

For the reasons explained above, this Court **GRANTS** defendant's Motion to Dismiss with prejudice.

DATE 10/3/2022


Hon. Thomas M.J. Hathaway
CIRCUIT COURT JUDGE

PROOF OF SERVICE

I certify that a copy of the above instrument was served upon the attorneys of record and/or self-represented parties in the above case by mailing it to the attorneys and/or parties at the business address as disclosed by the pleadings of record, with prepaid postage on _____.

Name _____