STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MSC No. 138577
COA No. 279017
LC No. 05-3228-01
Prior MSC No.135149
Prior COA No. 269198
Prior MSC No.130784

ALEXANDER ACEVAL,
Defendant-Appellant.
_____/

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DEFENDANT-APPELLANT ALEXANDER ACEVAL'S
MOTION
TO
COMPEL DISCOVERY
FROM WAYNE COUNTY PROSECUTOR AND ATTORNEY GENERAL OF "DISCOVERY" MATERIALS ALREADY PARTIALLY MADE PUBLIC AND ALSO ALREADY FULLY PROVIDED TO DEFENDANTS [FORMER] APA KAREN PLANTS, [FORMER] JUDGE WATERSTONE, AND INKSTER POLICE OFFICERS
IN PENDING CRIMINAL PROSECUTION AGAINST THEM
AND
TO EXPAND RECORD ON APPEAL

NOW COMES the defendant-appellant herein, Alexander Aceval, by and

through his attorneys, LAW OFFICES OF DAVID L. MOFFITT & ASSOCIATES, and for his Motion above-entitled, sets forth the following:

1. Defendant-appellant incorporates herein his simultaneously-filed Motion For Immediate Consideration, *etc.*, and particularly the Supplemental Brief In Support of Application For Leave To Appeal ["Supplemental Brief"], which should be closely considered herewith, word for word and paragraph for paragraph, the same as if set forth fully herein;

2. That subsequent to the 2-5-09 Opinion of the Court of Appeals ["COA"] in this matter, from which leave to appeal is presently sought, on 3-25-09, the Michigan Attorney General ["AG"] filed a series of felony criminal charges, including life offences, against APA Plants, Judge Waterstone and the Inkster police officers arising out of the instant matter;

3. That filings in the 36th District Court in the course of that pending criminal prosecution show that the AG conducted in 2008 to 2009 a series of interviews pursuant to MCL 767A.2 (2) investigatory subpoenas , under oath, of the following individuals:

Chad Povish, confidential informant and alleged drug vehicle driver;

Brian Hill, first and second trial witness;

WCPO ["Wayne County Prosecutors Office"] APA Paul Bernier, second trial prosecutor;

WCPO APA Elizabeth Walker, APA Karen Plants's supervisor;

WCCC Judge Mary Waterstone, first trial judge; criminal defendant;

WCPO APA Timothy Baughman, stated by Judge Waterstone in AG

materials to have provided “secret transcript” “solution” through APA Plants to “perjury problem;”

WCPO APA Nancy Diehl, noted by AG as “also consulted about the perjury;”

Inkster PO Sgt. Scott Rechtzigel;

Inkster PO Robert McArthur;

Inkster Police Department Lt. Kevin Smith, Commanding Officer overseeing the detective bureau and the narcotics unit

WCPO APA Theodore Sandberg , worked for APA Plants in WCPO Drug Unit

WCPO APA Frank Simone, worked for APA Plants in Drug Unit
WCPO APA Sarah DeYoung,,worked for APA Plants in Drug Unit

Warren PO Keith Keites, obtained grand jury subpoena to compel APA Plants to identify witness but APA Plants gave information to FBI on date she was scheduled to testify before grand jury

James Feineberg, first trial defense attorney;

Wyandotte District Court Judge Ronald Kalmbach;

WCPO elected Prosecutor Kym Worthy;

Wyandotte Police Department Detective Ferguson;

WCPO Chief Financial Officer Roslyn Gibson

See Exhibits “R, ” AG Investigatory Report, and Exhibit “V, ” a list of documents subpoenaed by the AG from the WCPO, to Supplemental Brief;

4. That transcripts of the interviews of confidential informant Chad Povish

[Exhibit “U”] and former WCCC Judge Mary Waterstone [Exhibits “O” and “P”] were obtained from the 36th District Court file by defendant-appellant, but, despite efforts

detailed in the Supplemental Brief, Issue IV, defendant-appellant has been unable to obtain from the WCPO prior and subsequently owed discovery [part of its 3600 page file turned over to the AG], or the from the AG the [8500 plus pages plus, it has stated] discovery that has actually been provided to criminal defendants APA Plants, Judge Waterstone, and the Inkster officers, in their pending criminal case;

5. That the interviews of Povish and Judge Waterstone are highly probative

of the issues on appeal in this case, demonstrating

A. The revelation, from partial public disclosure of Attorney General [AG] investigatory materials in the pending criminal case against APA Karen Plants, Judge Waterstone, and Inkster Police Officers McArthur and Rechtzigel, of important statements of the each of defendants made under oath to the AG, proving defendant-appellants assertions on appeal herein, including:

(1). The unmistakable intent of APA Plants, contrary to the COA's 2-5-09 assertion to the contrary, to "avoid" or "prevent" conviction within the meaning of double jeopardy applicability/ prosecutorial misconduct cases;

(2). The clearly-stated motivation of Judge Waterstone to deliberately abuse her discretion to declare a mistrial on the basis of a "hung jury" manifest necessity where plainly, additional deliberation by the jury, if informed by *disclosure* of the perjury at trial, would have produced a verdict, and more significantly, a verdict in defendant's favor; particularly where such *disclosur*e would have revealed her criminal complicity in the perjury scheme;

(3). The conspirator-admitted necessity of the perjury scheme as the "only way to convict" defendant, showing the dispositive insufficiency of the evidence at the first trial for double jeopardy purposes in the absence of the perjured testimony;

(4). Proof of the extensively perjured nature of the second trial, and continuing misconduct of the WCPO in and through the second trial, that demonstrated that the second trial was not a

"remedy" to the first trial misconduct at all, just an extension and continuation of it, continuing to today, such that should bar re-trial;

B. The availability of a wealth of extensive additional such proofs, contained in the AG investigatory material, already provided as "discovery"to criminal conspiracy defendants APA Plants, Judge Waterstone and the officers, but denied by the WCPO and the AG to defendant-appellant to date, in support of the 1.–4. issues above;

6. Then as set forth in the Supplemental Brief, the already-obtained, publicly available material strongly supports defendant-appellant's position on appeal in this matter, but more importantly, demonstrates that the undisclosed/withheld additional material would be of great value in further proving defendant-appellant's position on appeal in this matter;

7. That the undisclosed/withheld additional material is exculpatory in nature and/or would clearly would mitigate the offense, as the issues presently stand on appeal;

8. That defendant-appellant, for all pertinent purposes the putative victim of the criminal conspirators' wrongful manipulation of his criminal case process, has been denied this exculpatory/mitigating material, that has otherwise been freely furnished to the criminal conspirators;

9. That this case represents the worst, most clearly proven, most publicized, judicial-prosecutorial-police public corruption case in this state' history, and defendant-appellant, for purposes of his own defense, for purposes of his unexpectedly being thrust into the unlikely role as point-man in enforcing the integrity of the law enforcement, the court system and the public's confidence in it, and to secure the degree of public disclosure necessary for full understanding of how this corruption came

about and how delayed and incomplete the official response to it has been, to the extent it bears upon double jeopardy applicability and potential re-trial, respectfully submits that this Honorable Court should facilitate through appropriate means defendant-appellant's obtaining of this discovery and investigatory material;

10. That facilitating obtaining the discovery/investigatory material may be through one and/or more of the following alternate means:

A. Remand of the case to the trial court to allow defendant to obtain the subject discovery, yet retaining jurisdiction in this Honorable Court, and additionally, [1] Affording defendant-appellant bond on appeal during the pendency of the trial court process [see previously-filed pending Motion For Bond Pending Appeal] and subsequent, if said process exceeds 60 days for reasons not chargeable to defendant-appellant; [2] Assigning a different Circuit Judge to hear the cause; [for reasons related in part in Issue I of the main Brief in Support of Application For Leave]; or

B. Requiring the direct production of the discovery material from the Wayne County Prosecutor's Office to defendant-appellant, under-oath, from the WCPO, of all hitherto undisclosed constitutionally-due discovery, requiring that it catalogue, under oath, any material withheld, destroyed, and/or for any other reason not produced;

C Requiring the direct production of the AG Investigatory discovery material from the Attorney General; or alternatively, upon the AG's clear and convincing demonstration of need, with an appropriate Protective Order pending determination of relevancy and portions for proposed use on leave to appeal sought; or

D. Appointment as Special Master of the Hon. David L. Jordan of the District court For The City Of East Lansing, who heard the AG-filed "Petition For Authorization Of Investigative Subpoena" in "In the Matter Of An Investigation Of: Perjury And Obstruction Of Justice," E. Lansing D. Ct. No.08-9094 [Confidential Non-Public File], to hear the AG-related matter, this Honorable Court otherwise retaining jurisdiction; or

E Requiring the-camera production of all said material to this Honorable Court to conduct its own evaluation of the relevance and materiality of it to the issues subject of the leave to appeal process; or

F. A combination of one or more of the above, or other means appropriate in the premises, that obtain the result of the material becoming timely available to defendant-appellant to use in support of the instant Application for Leave to Appeal;

11. That the discovery material such as may be in possession of the WCPO is constitutionally due to defendant under well-known federal and state case law providing for a continuing duty of disclosure of discovery of such exculpatory and/or offense-mitigating materials;

12. That to the extent the AG also is listed as a prosecuting authority in every

COA published opinion, including the 2-5-09 COA Opinion appealed from herein, it ostensibly or actually shares the constitutional duty to comply with federal and state case law requiring production by the prosecuting authorities of exculpatory and/or offense-mitigating materials in its possession, control, or knowledge;

13. That the AG investigatory material has in part been publicly disclosed to the media and to the criminal defendants, who have shown little compunction or hesitation in publishing advantageous portions of it, and is reportedly on CD/DVD media, so its actual production is not physically or economically burdensome;

14. That the AG has signaled its intention to fully introduce into evidence at the scheduled 9-14-09 preliminary examination of the criminal defendants the entire Attorney Grievance Commission file regarding Karen Plants [that is part of the

discovery presently sought by defendant-appellant from the AG], including numerous interviews of WCPO personnel conducted by the Attorney Grievance Commission; *See Exhibit "S" to* Supplemental Brief , "People's Proposed Stipulation For Purpose *(sic)* Preliminary Exam, filed by the AG in *People v Plants, Waterstone*, *et al*, 36th D Ct No. 09-57635, p 2, Paragraph "f.," seeking stipulation to admission into evidence for the purposes of the 9-14-09 Preliminary Exam: "f. The entire Attorney Grievance Commission file regarding Karen Plants."

15. That doubtless additional material from the AG discovery package to the criminal defendants will be released publicly in the course of the conducting the scheduled 9-14-09 preliminary exam, and doubtless more, at subsequent proceedings, such that disclosure to defendant-appellant, who has timely need and good cause for seeking same, is not an issue so much of *whether* it will be published, but of *whether it can be timely obtained*;

16. That the instant Application For Leave To Appeal was filed 4-2-09, and that given the current approximate average time for decision upon such Applications, about 6 months, that only a little more than a month remains before the possible Application decision date, an extremely short time in which to have the instant Motion decided, to receive the disclosed material sought, if ordered, and, if compliance is actually made, to incorporate the material into an additional brief;

17. That defendant-appellant's Application for Leave may possibly be decided as early as the first week of October, 2009 , barely days after the scheduled 9-14 -09 preliminary examination, already having been adjourned almost 6 months, and defendant-appellant will not have the benefit of this plainly highly pertinent, probative

material prior to this Honorable Court's decision on his Application, if it is not produced at the earliest possible date;

18. That it is fundamentally unfair, in fact, now, likely criminal, for the WCPO never to have produced all known discovery material, and fundamentally unfair, though perhaps politically expedient, of the AG's office not to release to defendant-appellant the investigatory material already available to the criminal defendants, where the already -obtained material shows additional non-disclosure and misconduct on the part of the WCPO and its second-trial witnesses, where there is no question that the AG material would at the very least cast considerable light upon the subject events, and more likely dispositively prove the assertions of defendant-appellant on appeal, just as each successive stage of disclosure has tended to further support defendant-appellant's assertions on appeal in this mere-suspicion-to-actual-prosecution saga;

19. Then on July 8, 2009, the American Bar Association Standing Committee on Ethics and Professional Responsibility Released its Formal Opinion 09-454, Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense, noting the separate, distinct *ethical* duty of a prosecutor, even a prosecutor on a different case, to make pertinent disclosures to the defense of material that negates the guilt of the accused or mitigates the offense, independent of the *constitutiona*l duty of a prosecutor to provide discovery in a criminal case. See Exhibit "W" to Supplemental Brief;

20. That discovery on appeal, while unusual, is not unknown, and this Honorable Court may exercise its discretion to order what the ends of justice may

require, and may expand the record on appeal to include the already-obtained material, and ultimately, the sought material, particularly the AG interviews and AGC interviews, that have been reliably gathered by a law enforcement agency and a respected disciplinary agency, respectively;

21. That defendant-appellant accordingly respectfully requests this Honorable Court to enforce disclosure, under oath, from the WCPO of all hitherto undisclosed constitutionally-due discovery for use in the currently pending Application;

22. That defendant-appellant further additionally respectfully requests this Honorable Court to compel the disclosure from the AG of its investigatory material in this matter, all logically and ethically necessary to his defense, at the earliest possible time;

23. That defendant-appellant respectfully requests that the foregoing be accomplished at public expense, for reason that defendant-appellant is indigent, as set forth in his pending Motion For Waiver Of Fees And Costs, filed previously herein;

24. That defendant-appellant further additionally respectfully requests this Honorable Court to enter its Order that the record on appeal be expanded to include the already-obtained materials attached as Exhibits “O” through “W” hereto, and the additional transcripts of the second trial filed simultaneously herewith;

WHEREFORE, defendant appellant respectfully prays that this Honorable Court

enter its Order to enforce disclosure, under-oath, from the WCPO of all hitherto undisclosed constitutionally-due discovery, requiring that it catalogue, under oath, any material withheld, destroyed, and/or for any other reason not produced;

WHEREFORE FURTHER, defendant-appellant respectfully prays that this Honorable Court enter its Order to compel the AG to produce the 8000 plus-page investigatory material [that has been referred to between respective counsel as the "discovery package" for the defendants in *People v Plants, Waterstone*, *et al*] forthwith, and/or, alternatively, facilitate and/or secure through one and/or more means alternatively described in paragraph 10., above, the timely availability of same to defendant-appellant for use in the instant Application process;

WHEREFORE FURTHER, defendant-appellant prays that this Honorable Court enter its Order that same be accomplished at public expense, for reason that defendant-appellant is indigent;

WHEREFORE FURTHER, defendant-appellant prays that this Honorable Court that the record on appeal be expanded to include the already-obtained materials attached as Exhibits "O" through "W" hereto, and the additional transcripts of the second trial filed simultaneously herewith;

Respectfully submitted,

LAW OFFICES OF DAVID L. MOFFITT
& ASSOCIATES

By:_____
David L. Moffitt (P30716)
Attorney for Defendant-Appellant
Alexander Aceval

BRIEF IN SUPPORT
OF
MOTION
TO
COMPEL DISCOVERY

FROM WAYNE COUNTY PROSECUTOR AND ATTORNEY GENERAL OF "DISCOVERY" MATERIALS ALREADY PARTIALLY MADE PUBLIC AND ALSO ALREADY FULLY PROVIDED TO DEFENDANTS [FORMER] APA KAREN PLANTS, [FORMER] JUDGE WATERSTONE, AND INKSTER POLICE OFFICERS IN PENDING CRIMINAL PROSECUTION AGAINST THEM AND TO EXPAND RECORD ON APPEAL

A. Court Can Grant All Requested Relief And Fashion Appropriate Remedy Pursuant To MCR 7.316. For his Brief In Support hereof defendant-appellant Alexander Aceval respectfully directs this Honorable Court's attention to the Motions stated be to incorporated by reference herein, to the authorities referenced in the body of the Motion, to his Supplemental Brief dated evenly herewith, the additional authorities set forth below, and MCR 7.316, which provides in pertinent part as follows:

> "**MCR 7.316 Miscellaneous Relief Obtainable in Supreme Court**
>
> (A) Relief Obtainable. The Supreme Court may, at any time, in addition to its general powers:
>
> (1) exercise any or all of the powers of amendment of the court or tribunal below;
>
> * * *
>
> (3) permit the reasons or grounds of appeal to be amended or new grounds to be added;
>
> (4) permit the transcript or record to be amended by correcting errors or adding matters which should have been included;
>
> (5) adjourn the case until further evidence is taken and brought before it, as the Court may deem necessary in order to do justice;
>
> (6) draw inferences of fact;
>
> (7) enter any judgment or order that ought to have been entered, and enter

other and further orders and grant relief as the case may require; or . . ."

B. State And Federal Prosecutorial Duty To Provide Discovery.

1. State Case Law And Constitutional Mandate To Provide Discovery. Fundamental fairness requires that Defendant be given access to statements of witnesses. *People v Dellabonda*, 265 Mich 486 (1933); *People v Walton*, 71 Mich App 478, 482 (1976). In *Walton*, the Court of Appeals succinctly stated the rationale permitting such discovery:

> "In analyzing necessity of producing witnesses' statements held by the Bureau, several interests need to be considered. First, fairness to the defendant and an adequate opportunity to prepare a defense, including preparation for cross-examination of a witnesses, requires that the defendant be given access to all relevant information .. statements by police officers have also been made available. Dellabonda, supra. It goes without saying that statements made by other witnesses are equally important for trial preparation. This is particularly true, as in the case at bar, where the inconsistent or conflicting statements may have considerable impact upon the determination of the credibility of the parties and witnesses and may therefore be determinative of the outcome of this prosecution. *Also, without an examination of the requested information, it is impossible to see if such information would be relevant and whether its suppression would lead to a failure of justice." [Emphasis added).*

The most significant point made in Michigan case law regarding the discovery of contents of police and prosecutor's files regarding pending criminal cases is articulated in *People v Johnson*, 356 Mich 619, 621 (1959):

> "The legal concept of a criminal trial has changes considerably in modern times. It seen less as an arena where two lawyer gladiators duel with the accused's fate hanging on the outcome and more as an inquiry primarily

directed to the fair ascertainment of the truth. (emphasis added)."

The Court of Appeals observed in *People v Walton, supra*, "The defendant's interest in adequately preparing for trial overshadows the interest of the police department in maintaining secrecy and confidentiality of witnesses' statements made to its investigators." 71 Mich App 471, at 482.

No privilege applies to keep these communications secret, *See MRE 501; People* v *Paasche*, 207 Mich App 698, (1994); Robinson & Longhofer, *Introducing Evidence*, ICLE 2d Ed, 2002, p45, and if applicable, same would likely yield in any case to constitutional confrontation clause rights, *e.g. People* v *Freeman* 406 Mich 514 (1979).

It is evident that from that day one of the arrest forward that concealment was underway, from the perjured statement of Povish, the coaching by APA Plants before preliminary exam, before the trial and during the trial, and her contacts with at least 2 WCPO higher-ups while it was going on, as well as through the second trial, given Povish's obvious and now-admitted perjury in the second trial, and the perjury of the officers in the second trial.

It is equally evident that tacit agreements were made with the second trial prosecutor to allow the officers' perjury in the second trial regarding their non-presence at the scene and regarding Aceval's alleged direct contact with the drugs. It is further equally evident that the obstruction of justice to permit the first-trial witnesses to testify in the second trial unscathed required the tacit agreement of the second trial prosecutor and higher-ups. Non-disclosure of these matters continues to date.

Thus all communications between the WCPO and all perjuring witnesses, and

within the WCPO in furtherance of the scheme, are unprivileged to the extent they were in furtherance, contemplation of, or part of execution of crime , fraud, or prospective crime or fraud. The AG's and the AGC's conducting and compiling of interviews regarding the scheme should not otherwise insulate them from disclosure.

Moreover, the defendant has a substantial need for this information, both based upon due process, to be able to prepare and present a defense, on appeal or otherwise, to be able to confront the witnesses against him, in the event of re-trial, and upon practical hardship. He plainly cannot obtain this information himself or from any other source, within the meaning of applicable court rules, and if ever, not otherwise within the time necessary to support his present Application.

2. Federal Constitutional Mandates To Provide Discovery. In *Brady v Maryland*, 373 US 83, 87; 83 SC 1194, 10 LE2d 215 (1963),the Supreme Court held that the prosecution has a constitutional obligation under the Due Process Clause of the Fourteenth Amendment to disclose exculpatory evidence that is material to either guilt or punishment. The Court emphasized that the purpose of such a rule was "avoidance of an unfair trial to the accused." *Id.* The Supreme Court has held that the *Brady* rule extends to witness impeachment evidence. See *Giglio v. United* States, 405 U. S. 150, 154-155 (92 SC 763, 31 LE2d 104) (1972) (*Brady* violation found where government failed to disclose promise not to prosecute cooperating witness on whom government's case"almost entirely" depended)("When the reliability of a given witness may well be determinative of guilt or innocence, non disclosure of evidence affecting credibility falls within [the Brady] rule."

In order to make a *Brady* claim, three elements must be shown: (1) "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching"; (2) "that evidence must have been suppressed by the State, either willfully or inadvertently"; and (3) "prejudice must have ensued." *Strickler v Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936; 144 LEd2d (1999).

It is well-known, *see* Supplemental Brief, *passim*, that much was withheld by the WCPO at the second trial. Moffitt's motion for further disclosure the day he was ejected by Judge Jones sought to compel additional disclosure and to secure an evidentiary hearing to examine WCPO staff under oath to determine its existence and state of disclosure. The AG investigatory material will shed much light on what was with held, and who knew what and when, that would have refuted the prosecutions's second-trial testimony in defense of its perjury tactics in the first trial. It may well show that the sudden move to eject Moffitt was prompted by collusion between Judge Jones and the WCPO in the face of Moffitt's stated-in-motion intent to aggressively seek testimony from WCPO personnel. The AG and AGC have now, to some degree, done so; the defendant-appellant should receive the benefit of what he lawfully sought and is due.

The threat of incorrect jury verdicts is increased by tacit agreements because, when testifying, a witness whose agreement is tacit, rather than explicit, can state that he has not received any promises or benefits in exchange for his testimony. By definition, tacit agreements are not concrete or explicit. See *Blacks Law Dictionary* 325, 1465 (7th ed. 1999) (defining "tacit" as "[i]mplied but not actually expressed; implied by silence or silent acquiescence," and defining "tacit contract" as "[a] contract in which conduct takes the place of written or spoken words in the offer or acceptance (or both)"). And given

the absence of any formal arrangements, a witness's statement that he has no expectation of favorable treatment concerns only his subjective understanding. When a witness alleges he is testifying disinterestedly, he cannot typically be easily demonstrated to be giving false testimony *on that point.* If the tacit agreement is not disclosed, the defendant is left with only argument, not evidence, to attempt to counter the credibility that improperly accrues to the witness on account of his supposedly pure motive.

In order to guard against these dangers and facilitate *Brady's* ultimate purpose of ensuring fair trials, two types of evidence have been held subject to disclosure. First, any evidence that reasonably suggests that the prosecutor conveyed an expectation of favorable treatment to the testifying witness should be disclosed. See *US v Shaffer*, 789 F2d 682, at 690 (CA 9, 1986); *Reutter v Solem*, 888 F2d 578, 582 (1989) (holding that the state must disclose evidence of the witness's impending commutation hearing notwithstanding the district court's finding that no agreement existed between the state and the witness). This expectation creates the incentive for false testimony, and the jury should be allowed to consider this evidence and decide for themselves whether the prosecutor's conduct affected the witness's testimony, regardless of whether the witness acknowledges a subjective understanding that he is testifying pursuant to a quid pro quo exchange.

Second, the prosecution should be required to disclose any evidence in its possession that suggests that a witness actually harbored an expectation of favorable treatment, regardless of whether the prosecution created such an expectation. *See United States v Risha*, 445F3d 298, 303 n.5 (CA 5, 2006) ("There can be no dispute that the information in question is favorable to the defense because [the witness's]

expectation of leniency in the state proceedings could have been used to impeach him."); *Todd v Schomig*, 283 F3d 842, 849 (CA 7, 2002) ("Todd cannot prove an agreement existed. He argues that at the very least [the witness] had an 'expectation' of benefit. But what one party might expect from another does not amount to an agreement between them. And Todd does not argue that the state knew of [the witness's] expectation." (emphasis added). In the instant case, it is evident that in the second trial the first-trial perjuring witnesses testified in the second trial without prior prosecution, enhancing their credibility to the jury, plainly with some sort of pre-arrangement with higher-ups in the WCPO. *See* Supplemental Brief, p25; Exhibit "H,"Worthy Response To AGC RFI Response, p5, paragraph 1.][<u>][</u>"A decision was made. . . that everything should be turned over to the defense on the retrial, including the sealed ex parte in camera records, <u>that Judge Waterstone would need to be a witness</u>. . ."]. Of course, it is now known that not "everything" was turned over to the defense. [Emphasis added].

Brady's concern is not with prosecutorial bad faith, but with accurate outcomes. *See* 373 U.S. at 87; *see also US v Bagley*, 473 US at 675; 105 SCt. 3375, 3379, 87 LEd2d 481. Even if the prosecution was wholly innocent in creating a witness's unfounded impression that favorable testimony would be rewarded, and thus disclosed nothing, that impression nevertheless has the ability to color the witness's testimony in favor of the prosecution. The prosecution should not be able to knowingly suppress evidence of what may have been the basis of a witness's expectation of favorable treatment merely because the prosecution did not willfully cultivate it.

The trial prosecutor did not disclose any such arrangements with the first trial witnesses for their prosecution-free testimony in the second trial, unfairly enhancing

their credibility. *See Shaffer*, *supra*, 789 F2d 682, at 688-89 (finding materiality where the evidence impeached a witness whose credibility was vital to the outcome of the trial); *Reutte*r, *supra*, 888 F2d at 581-82 (finding a reasonable probability of a different outcome where the jury was not informed of the existence of an impending commutation hearing of a key witness).

The second trial perjury of Povish and the officers, and the obvious obstruction of justice to allow prosecution-free second trial testimony of Judge Waterstone, Povish and the officers, requires full disclosure, no doubt best contained in the AG investigatory material.

C. Post-Trial Discovery Of Exculpatory Material Even Of Third-Party Files Is Consistent With Fundamental Fairness. While discovery generally takes place in the trial arena, there is nothing which limits discovery solely to the trial. *See, e.g. State v Robertson*, 263 Wis 2d 349, 661 NW2d 105, 108 (2003) (granting post-conviction access to a complainant's psychological records in a CSC case).

Courts around the country have granted discovery as part of the post-conviction process. This issue has most frequently come up in cases where the Defendant wishes to conduct DNA tests of the prosecution's evidence in order to prove that (s)he was not the perpetrator of the crime. There can, however, be no meaningful difference between a desire to examine records of the AG which is investigating the exact same conduct at issue in the instant matter, and whose records have already been convincingly demonstrated to bear directly and dispositively on the issues at bar, and review of DNA evidence, especially when its comes to what the WCPO was ordered by the trial court to furnish in the first place–the discovery– and where the AG information will show

what the WCPO did not produce in the second trial, and the continuing pattern of misconduct that would if known possibly have prevented a second trial, and now, perhaps a third trial.

In *Dobbs v Vergari*, 149 Misc.2d 844, 570 NYS2d 765 (NY Supp, 1990), the Court recognized the inherent authority of an a trial court to grant post-conviction access to evidence containing DNA so that an accused might prove his or her innocence. The Court started by recognizing this inherent power based in the trial court:

> 'On the merits, it is well-established that, notwithstanding the absence of a statutory right to post-conviction discovery, a defendant has a constitutional right to be informed of exculpatory information known to the State, *Brady v Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 LEd.2d 215; *People v Robinson*, 133 A.D.2d 859, 520 N.Y.S.2d 415; *People v Lumpkins*, 141 Misc.2d 581, 587, 533 N.Y.S.2d 792). This rule devolves from the fundamental right to a fair trial mandated by the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution, *United States v Agurs*, 427 U.S. 97, 107, 96 S.Ct. 2392, 2399, 49 LEd.2d 342; *Pennsylvania v Ritchie*, 480 U.S. 39, 56, 107 S.Ct. 989, 1001, 94 LEd.2d 40; *United States v Bagley*, 473 U.S. 667, 675, 105 S.Ct. 3375, 3379, 87 LEd.2d 481; *Brady, supra* 373 U.S. at 86, 83 S.Ct. at 1196), and imposes a constitutional duty on the prosecution to disclose to the defense evidence favorable to the defendant that is material to either guilt or punishment, *Bagley, supra* 473 U.S. at 674-675, 105 S.Ct. at 3379- 80; *Brady, supra,* 373 U.S. at 87, 83 S.Ct. at 1196. The purpose of requiring disclosure is "not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur," *Bagley, supra* 473 U.S. at 675, 105 S.Ct. at 3391."

The *Dobbs* Court went on to note that where there is evidence with a high exculpatory potential, the Court should not deny the Defendant access to this vital evidence:

> "[W]here evidence has been preserved which has high exculpatory potential, that evidence should be discoverable after conviction. Due Process is not a technical conception with a fixed content unrelated to time, place and circumstances (Cafeteria Workers v McElroy, 367 U.S.

> 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230). It is flexible and calls for such procedural protections as the particular situation demands (Morrissey v Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484). Clearly, an advance in technology may constitute such a change in circumstance (People v Molina, 121 Misc.2d 483, 493, 468 N.Y.S.2d 551, rev'd on other grounds, 128 Misc.2d 638, 494 N.Y.S.2d 606)."

The *Dobbs* Court further cautioned that courts should not place overly high hurdles or burdens in the defendant's path to obtain such potential exculpatory evidence.

. This Court should grant defendant-appellant the means to gain access to these critical materials, either through itself, through remand to the trial court, or through its own *in-camera* review. It is sure to provide a first class demonstration just why the policy considerations behind double jeopardy and due process exist, and how, specifically, they need to be enforced, now, lest the state become a public corruption holiday destination, in the perjury-as-usual-gee-we-made-it-a-lunch-box-lecture milieu of the WCPO. *See, e.g.*, Exhibit "H,"Worthy Response To AGC RFI Response, p 6, last line; Exhibit "R, " AG Investigatory Report, p 6 of 7: "[Ms. Worthy] went on to explain that . . . Baughman had prepared a "lunch time lecture" on what to do when *something like this* happens. . . .These materials are also made a part of the case file. "][Emphasis added]. It is unlikely that the lunch lecture materials directed that the second trial be conducted in the corrupt way it was, or that they counseled continuing a cover-up even until today.

This Honorable Court should be apprised, before it makes its decision, of just what potentially explosive, scandalous, as-yet-undisclosed factual situations are involved in this case that will continue to savage the public's trust in the law

enforcement system and the judiciary, rather than base conclusions on the absence of evidence of wrongful intention that is belied from the conspirators' own mouths in the media barely a month or so later. If the sought material can establish such compelling evidence, and it undoubtedly will, the law should provide some mechanism for its disclosure to the defense on appeal, particularly where it is now clear much was withheld.

WHEREFORE, defendant appellant respectfully prays that this Honorable Court

enter its Order to enforce disclosure, under-oath, from the WCPO of all hitherto undisclosed constitutionally-due discovery, requiring that it catalogue, under oath, any material withheld, destroyed, and/or for any other reason not produced;

WHEREFORE FURTHER, defendant-appellant respectfully prays that this

Honorable Court enter its Order to compel the AG to produce the 8000 plus-page investigatory material [that has been referred to between respective counsel as the "discovery package" for the defendants in *People v Plants, Waterstone*, *et al*] forthwith, and/or, alternatively, facilitate and/or secure through one and/or more means alternatively described in paragraph 10., above, the timely availability of same to defendant-appellant for use in the instant Application process;

WHEREFORE FURTHER, defendant-appellant prays that this Honorable Court enter its Order that same be accomplished at public expense, for reason that defendant-appellant is indigent;

WHEREFORE FURTHER, defendant-appellant prays that this Honorable

Court that the record on appeal be amended/expanded to include the already-obtained materials attached as Exhibits “O” through “W” hereto, and the additional transcripts of the second trial filed simultaneously herewith;

Respectfully submitted,

LAW OFFICES OF DAVID L. MOFFITT
& ASSOCIATES

By:_____
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