STATE OF MICHIGAN
BEFORE THE MICHIGAN JUDICIAL TENURE COMMISSION

Complaint against

Honorable Paul J. Cusick
Third Judicial Circuit Court
1441 St. Antoine
Detroit, Michigan, 48226

MSC No. 165050
Formal Complaint No. 104

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RESPONDENT PAUL J. CUSICK'S BRIEF IN SUPPORT OF THE JUDICAL TENURE COMISSION ADOPTION OF MASTER'S FINDINGS AND REPORT

Introduction

The evidence is clear that Paul Cusick faithfully executed his duties and responsibilities as an Assistant Attorney General and as Judge. He was truthful throughout this years-long process.

Regarding the *McCully* case, Cusick made clear in his notes to the Attorney General case file, in all correspondence, and within every court record that there would be absolutely no promises and no agreement in exchange for McCully's work as a CI. The *Kastigar* letter, signed by McCully and his attorney Fishman, contained express acknowledgements confirming the basis of the plea two months earlier that there was

not and would not be such an agreement. Yet, Sgt. Calleja just days later unilaterally wrote down a completely different statement on McCully's CI source card - which Cusick never saw.

Despite an incontrovertible record that shows no agreement with anyone, Disciplinary Counsel's theory was that an agreement was made with McCully and then another made with Loggie for McCully's sentencing benefit. This is inane.

While Disciplinary Counsel was able to inveigle various persons during ex-parte interviews into signing statements that there was "an exchange" or "deal" during the investigation, those witnesses all corrected this false notion by the time of the hearing. Even Sgt. Calleja admitted in his testimony that there was "no deal". Fishman expressly rejected the fabricated idea of an "exchange". And, as she always has insisted, Loggie confirmed there was no agreement in her testimony.

As made crystal clear during the proceedings, Cusick always followed office policy whenever there was an agreement with a defendant or witness. That policy was to seek written authorization for and to document the scope and extent of any such agreement and to have that confirmed in writing by the witness/defendant and their counsel. There was no agreement with McCully or Loggie. None. Still Disciplinary Counsel tried to manufacture an agreement that never existed.

Komorn admitted that he knew Loggie was a CI with signed documentation and purposely and strategically did not ask for that documentation. It is uncontested that neither CI source card was ever in Cusick's possession. Cusick did not withhold any information from Komorn. And Ms. Collins and the AG's office had access to all of the

information Cusick was given.

A process of answering nearly 1000 questions in various forms during the Disciplinary Counsel's investigation was complicated by the lapse of time but made completely unfair when Disciplinary Counsel withheld material exculpatory information. This omission made all the more fundamentally unfair when Disciplinary Counsel deceived key witnesses by withholding that same critical information from them. Those witnesses would later repudiate portions of the ex parte statements prepared by Disciplinary Counsel after learning the facts and circumstances purposely misrepresented and hidden from them by Disciplinary Counsel.

Cusick's answers to the letters and pleadings contain his best recollection regarding cases from many years ago. At trial, testimony and documents corroborated the answers. One key fact established is that Loggie's involvement was in no way contingent on McCully receiving a benefit. Cusick insisted this was true during the investigation. Fishman confirmed this in his testimony. Judge Groner's statements from the plea and sentencing matched the testimony of Fishman and Cusick. And no witness testified that it was contingent, or that McCully received a benefit.

Cusick has been adamant that he was unaware of any untruthful testimony by Ms. Loggie. This hearing established that she testified truthfully. The Master found Loggie's testimony "bears the hallmarks of truthfulness not deceit." Det. Brian Zinser believed that nothing needed correction after the preliminary examination. The secret tape recording of the jury room interview, concealed from Judge Kenny by Disciplinary Counsel during their several interviews, when brought to light, convinced Judge Kenny

that Loggie testified truthfully.

Cusick's objections during the preliminary examination were appropriate and used to protect the confidential informant privilege. Disciplinary Counsel's theory that Cusick made objections to protect McCully flew in the face of the fact that Cusick planned on calling McCully as a witness in the *Berry* case. It was months later, and only after Fishman suggested and his supervisors also counseled against it, that it was decided not to call McCully as a witness in *Berry*.

Disciplinary Counsel adopted the public statements of Komorn, despite knowing they conflicted directly with the secret jury room interview tape they alone were provided. Komorn admitted in these proceedings that his statements to Judge Kenny were purposefully not accurate. Disciplinary Counsel countenanced Komorn's false statements to Judge Kenny and to the Court of Appeals in the underlying matter and elevated that fake narrative to charges in the Complaint and the Amended Complaint – all the while knowing that Loggie told the truth and McCully had no deal.

Disciplinary Counsel manufactured sham statements from unsuspecting witnesses. They actively misled witnesses and Cusick by withholding material and exculpatory information, and upon belief, withheld that same information from this Commission in order to get the charges issued.

Disciplinary counsel must have misled this Commission into authorizing these charges and must have failed to advise you of the exculpatory nature of the evidence obtained during the investigation. This case reflects the intentional abandonment of the ethical and legal obligations of the Disciplinary Counsel as attorneys and as

prosecutors. You cannot undo what has been done, but you can affirm Master's recommendation to dismiss all charges and you can ensure the errors that led to this wrongfully filed matter are not repeated.

Master's Report and Findings

The Master, in a detailed and extensive report, dismissed all of the allegations as unproven. This should not come as a surprise as the charges are utterly unfounded.

The Master considered the claims and the documentary evidence in a context presented over more than 20 days of trial. There are about 4,000 pages of transcripts and nearly twice that number of pages of exhibits. He heard closing arguments that took nearly a full day and rendered his findings made only after deliberation with the aid of submissions from each party. The Master found certain witnesses credible and others much less so. He brought with him experience as a former prosecutor, a retired Judge, and as a Master in a prior contentious JTC matter.

Cusick acted properly and ethically throughout his service as an Assistant Attorney General and as a judge. There was not any violation of the rules as alleged by Disciplinary Counsel in the Formal Complaint.

In dismissing Count I, the Master noted, "No credible evidence has been presented that Brandy Loggie willfully lied or that Respondent encouraged her to testify to anything else other than the truth."[1] There was no support for the allegation of subornation. None. Indeed, the Master found specifically that Brandy Loggie's testimony at the preliminary examination bore "the hallmarks of truthfulness not

[1] Report of Master (Master), p3

deceit."

The testimony established and the Master accepted that "a person may have more than one reason for testifying."[2]

The Master expressly rejected Disciplinary Counsel's repeated contention and description of the Confidential Informant Source Card being tantamount to an agreement and that it was merely "a means of preserving information regarding contacts and credibility of the 'source.'"[3]

The Master next dismissed the claim of obstruction during the *Joslin* preliminary examination. He noted that across 45 pages of cross-examination by Komorn; Cusick interposed only eight objections, the majority were sustained.[4] The Master noted, "It is incomprehensible that sustained objections can be the basis of a complaint of ethical misconduct by an attorney."[5] The Master also specifically noted that, "Judge Gerou interjected sua sponte at least seven times to clarify questions asked by Mr. Komorn or to protect the witness from badgering."[6] In addition, he concluded, "When the impartial magistrate interjects at a rate equivalent to the prosecutor, it suggests that Mr. Komorn's questioning was both argumentative and confusing."[7]

The Master noted that Komorn elicited from Loggie on cross exam at the preliminary examination that she signed what Komorn characterized as confidential informant agreement (source card), and Komorn did not follow up on the terms of that

[2] Master, p8.
[3] Master, pp8-9.
[4] Master, p9.
[5] Master, p9.
[6] Master, p9.
[7] Master, p10.

"agreement".[8] Moreover, the Master emphasized that "When the officer in charge of the investigation (Zinser) offered to tell defense counsel 'everything about Brandy Loggie' but not in the presence of the defendant Amanda Joslin, Respondent did not object, and defense counsel never followed through."[9]

The Master found allegations that Cusick suborned perjury to be "meritless."[10]

Although extensive and serious allegations of obstruction during the cross-examination of Detective Zinser were leveled in the Formal Complaint and the Amended Formal Complaint, the Master determined these to be "abandoned" by Disciplinary Counsel by failure to advance any argument in support of these claims during the closing argument or in of the briefing that followed.[11]

Count II alleged subornation of perjury during the Circuit Court portion of the *Joslin* case. The allegations were based on Loggie's testimony at the preliminary examination. Disciplinary Counsel alleged the testimony was "… false, inaccurate, incomplete, and/or misleading …"[12] The entire count was dismissed with the notation, "As addressed in Count I, the Master concludes it was not."[13] In its Findings of Fact, the Disciplinary Counsel conceded there was no evidence Cusick suborned perjury. Yet, they buried this concession, as the Master notes, 23 pages into the Disciplinary Counsels' Findings of Fact.[14] As this was the apparent centerpiece of the Disciplinary

[8] Master, p14, citing PE Tr Ex 67a Bates 1334
[9] Master, p14, citing PE Tr Ex 67a Bates 1467.
[10] Master, p9.
[11] Master, p10.
[12] Master, p11.
[13] Master, p11.
[14] Master, p3.

Counsel's case, that they buried this concession in their Findings of Fact was, to the Master, at best, "confounding."[15]

Count III alleged improperly withholding evidence from attorneys in the *Joslin* and *Berry* cases at various points in time. The Master specifically cited to Cusick's credible testimony that he did not believe McCully had been involved in the Joslin matter.[16] He found that testimony bolstered by Loggie's real-time and repeated statements for why she decided to cooperate with the police.[17] He also concluded "… the only apparent involvement of McCully in the *Joslin* matter was his demurring to participate when requested by Sgt. Calleja and referring him to Ms. Loggie as he was afraid that he (McCully) would be recognized as a major supplier of marijuana."[18]

The Master found that as a matter of law McCully was not a res gestae witness, relying on a Court of Appeals decision from 2010 in *People v Paredes-Meza*.[19] He found no error in Cusick arguing forcefully to protect a confidential informant.[20]

After detailing the various facets of the allegation that Cusick purposely did not inform Dianna Collins, his successor within the Attorney General's office on *Joslin* and *Berry*, the Master dismissed those related charges. He cited to the fact that Ms. Collins had access to the information through the files and through her superiors who were kept advised of both matters and the *McCully* case.[21] The Master found, "There is no

[15] Master, p3.
[16] Master, p13.
[17] Master, p13.
[18] Master, p13.
[19] Master, pp15-16.
[20] Master, pp15-16.
[21] Master, pp19-20.

evidence to suggest that Respondent withheld evidence from her and that his actions impeded access to materials to the defense."[22] Certainly, if it was Cusick's plan to hide that information, he would not have put it in the official file accessible to his department heads and successor. These allegations are nonsensical.

In Count IV, the Master addressed the allegation that testimony in the *Berry* preliminary examination was obstructed as alleged. He noted the claims in that count "stands or falls based on whether Thomas McCully is deemed a res gestae witness."[23] He dispatches with this by citing *Paredes-Meza* and finding, "He was not."[24]

Count V contains an array of allegations that Cusick made misrepresentations in communications to the Commission and its staff during the investigation. The Master noted the considerable passage of time, more than 10 years from some of the events with a Pandemic during that time.[25] The Master detailed several prime examples of witnesses who were confused on important facts or who had faulty memories on key events testified to during the hearing.[26] He noted, "These examples demonstrate that when busy professionals are requested to recall specific events of isolated cases several years old faulty or incomplete memories are not unusual and cannot be relied upon to provide the basis for a charge of intentional misconduct."[27]

The Master pointed out that Sgt. Calleja's testimony could be viewed as not merely "confused or forgetful from time to time" but could be reflective of a bias that

[22] Master, p20.
[23] Master, p22.
[24] Master, p22.
[25] Master, p34.
[26] Master, pp25-28.
[27] Master, p28.

made it untrustworthy.[28] He highlighted Sgt. Calleja's refusal to accept that McCully had entered a plea without an agreement – despite the transcript that reflected that very fact.[29] The report punctuates this point by providing Sgt. Calleja's own words during his testimony, "I don't have to be right, but that's what I think."[30] The Master specifically and emphatically found that Sgt. Calleja, "cannot be relied upon to refute the Respondent, Judge Groner, Mr. Fishman, and McCully."[31]

The Master found all of the claims of misrepresentation, "[r]egardless of how many times the claims in this count are repackaged they remain not proven by a preponderance of the evidence."[32]

The Master concludes his report, "The Master presided over seven days of testimony by the Respondent. His demeanor was one all judges should strive to emulate. He was, in short, very credible."[33]

Statement of Facts

A. McCully's Drug Trafficking Organization.

In the years leading up to 2013, Tom McCully ran an expansive and complex marijuana grow and distribution organization.[34] Nicholas Stevens was in charge of distribution with the help of Troy Blay.[35] Ryan Goble was in charge of several facilities

[28] Master, p28.
[29] Master, pp29-30.
[30] Master, pp29-30.
[31] Master, p30.
[32] Master, p34.
[33] *Id*.
[34] Tennies, Hearing Volume (HrVol) 11 at 1969 lines 15-20, 1986 lines 7-9.
[35] McCully notes, Ex12, Bates 401.

on Detroit's east side.[36] Rachel Cooper managed the paperwork.[37] McCully's brother, Chris McCully, was an initial investor, grower, and logistics person.[38] Michael Mowry handled the financials.[39] Amanda Ward, Antuan Reed, and Emily Lennon ran "clip houses," i.e., houses in which the marijuana plants were processed for consumption.[40] Larry Weddington and Ted Roby produced wax, which is a highly concentrated form of marijuana.[41]

B. McCully began dating Loggie.

In December 2012, McCully met Brandy Loggie at Bogarts Lounge in Inkster, Michigan where she worked as an exotic dancer.[42] He went by the alias "Paul" and described himself to Loggie as a day trader.[43] That month Loggie became pregnant with McCully's child.[44]

In February 2013—over Valentine's Day weekend—McCully and Loggie took a trip to Lexington, Kentucky to meet someone named Alex Belt.[45] Loggie didn't know that the trip related to marijuana until she listened to McCully talk to Belt on the phone on the way down.[46] The Lexington Police Narcotics Enforcement Unit had intercepted an earlier shipment of marijuana from McCully to Belt and were watching.[47]

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[36] *Id.*
[37] *Id.* at Bates 397.
[38] Chris McCully Investigative Subpoena, Ex98, Bates 3981- 3997.
[39] McCully notes, Ex12, Bates 401.
[40] McCully notes, Ex12, Bates 401.
[41] *Id.*
[42] WWNTF Reports, Ex5, Bates 190; Loggie, HrVol 10, 1811.
[43] WWNTF Reports, Ex5, Bates 190.
[44] Loggie, HrVol 10, 1804 lines 1-5.
[45] Loggie, HrVol 10, 1807 lines 4-10; Police Reports, Ex1, Bates 6.
[46] WWNTF Report, Ex5, Bates 192; Loggie, HrVol 10, 1807 lines 11-19.
[47] Police Reports, Ex1, Bates 6; WWNTF Reports, Ex5, Bates 191.

Loggie and McCully met with Belt on February 14, 2013.[48] After that meeting, the Lexington Police Narcotics Enforcement Unit asked Belt to order an additional seven pounds of marijuana so they could do a controlled buy.[49]

C. Micah Delavale gets involved in the McCully's organization.

When Loggie returned home from Kentucky, Micah Delavale—the father[50] of Loggie's two older children—asked if he could make deliveries for McCully to earn extra money.[51] Loggie owned the house where Delavale and her kids lived, talked to him often.[52]

Loggie introduced Delavale to McCully.[53] She rented a minivan for Delavale who then transported the marijuana to Kentucky on February 26, 2013.[54] The Lexington Narcotics Enforcement Unit conducted the controlled buy from Delavale and arrested him.[55] Delavale called Loggie from jail in Kentucky.[56] She hired an attorney for him and posted his bail.[57] Soon thereafter, Loggie went through McCully's wallet and realized that his name was Tom, not Paul, that he was married, and that he had a criminal history.[58]

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[48] Police Reports, Ex1, Bates 6.
[49] *Id.*
[50] Delavale is the biological father to Loggie's daughter and the father figure to Loggie's oldest son. Loggie, HrVol 10, 1808 lines 22-23, 1919 line 18-1920 line 24.
[51] Loggie, HrVol 10, 1809 lines 12-24.
[52] *Id.* at 1809 line 2 -1810 line 20; PowerPoint, Ex3, Bates 168; WWNTF Reports, Ex5, Bates 190.
[53] *Id.* at 1810 lines 1-3; WWNTF Reports, Ex5, Bates 192;
[54] Loggie, HrVol 10, 1811 lines 2-5; PowerPoint, Ex3, Bates 141.
[55] PowerPoint, Ex3, Bates 141; Police Reports, Ex1, Bates 6.
[56] Loggie, HrVol 10, 1811 lines 9-13.
[57] *Id.* at 1811 lines 14-16.
[58] WWNTF Reports, Ex5, Bates 190.

D. Loggie only had a peripheral role in McCully's organization.

From February 2013 to July 2013, Loggie began seeing evidence that McCully ran a major marijuana business.[59] Nevertheless, Loggie's involvement remained peripheral. Chris McCully described the organizational structure during his investigative subpoena.[60] In his description, Loggie had no role.[61] In fact, when asked, he didn't recognize her name at first and simply identified her as Tom's girlfriend that he had met for about five minutes in all.[62]

E. McCully and Loggie are arrested.

McCully and Loggie were arrested on July 9, 2013 in a traffic stop in Woodhaven, Michigan, after leaving a hotel.[63] The Canton Police Department turned them over to Western Wayne Narcotics Task Force.[64] Loggie had a backpack that contained $7,022 in cash—which was her own tax refund[65]—and seven cell phones, among other things.[66] Because it was Loggie's tax refund, the money was not properly subject to forfeiture.[67] Tennies' testimony that the $7,200 was from Loggie's tax refund went unrebutted in this proceeding.

Officer Paul Tennies was the officer in charge of investigating the McCully DTO and interviewed Loggie in custody. At first, Loggie said she went to Kentucky to visit a

[59] *Id.* at 191.
[60] Chris McCully Investigative Subpoena, Ex98, Bates 3981- 3997.
[61] *Id.*
[62] *Id.* at 4005-4006; Pallas, HrVol 15, 2786 lines 3-13.
[63] WWNTF Reports, Ex5, Bates 183.
[64] *Id.*
[65] Tennies, HrVol 11, 1983 lines 6-18.
[66] WWNTF Reports, Ex5, Bates 183.
[67] MCL 333.7521(1)(f).

relative in February 2013.[68] But when the police confronted her with their knowledge of the trip, she confessed everything.[69] Loggie gave a good statement in Cusick's estimation and agreed to testify as a witness, and the decision was made not to charge her.[70]

F. Cusick was the Assistant Attorney General in charge of handling the McCully prosecutions.

Licensed since 2007, Assistant Attorney General Paul Cusick was the trial attorney assigned to prosecute members of the McCully drug-trafficking organization.[71] He worked in the criminal division of the Michigan Attorney General's office and handled about 40 cases at a time.[72] His direct supervisor was Bill Rollstin; above Rollstin was Richard Cunningham; and above Cunningham was Matthew Schneider.[73] Cusick needed their approval to file charges and make plea and sentencing agreements.[74] Cusick always followed office policies.[75]

Rollstin described Cusick as a very ethical, conscientious, and detailed assistant who outshone the other assistants that Rollstin supervised.[76] Cusick's secretary found him well-mannered and easy to work for.[77] Judge Kenny, before whom Cusick often appeared, had "no problem taking him exactly at his word."[78]

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[68] *Id.* at 191.
[69] *Id.*
[70] Tennies, HrVol 11, 1987 line 24 -1988 line 2; McCully Notes, Ex12, Bates 401.
[71] Cusick, Vol 1, 185 lines 20-23.
[72] *Id.* at 172 lines 12-16.
[73] Cusick, Vol 1, 183 lines 14-19; Rollstin, Vol 19, 3552 lines 16-19, 3454; Collins, HrVol 16, 2914 lines 15-25.
[74] Rollstin, Vol 18, 3446 lines 1-15
[75] Cusick, Vol 2, 353 line 19 – 354 line 15.
[76] Rollstin, Vol 19, 3588 line 1 – 3589 line 15.
[77] Hamilton, HrVol 8, 1401 lines 7-16.
[78] Kenny, HrVol 17, 3103 lines 2-22.

Cusick spoke with Rollstin, Tennies, and Assistant Attorney General Kim Mitseff about who to charge.[79] Mitseff was handling the civil forfeiture actions related to the McCully investigation, including Loggie's.[80] But Cusick doesn't recall ever talking to Mitseff about Loggie's civil forfeiture case.[81] Mitseff requested authority to resolve Loggie's forfeiture in December 2013, which her superiors approved in January 2014.[82] The Commission didn't call Mitseff to testify, and Cusick's testimony on this point is unrebutted.

Out of the 18 suspects,[83] Cusick recommended charging McCully, Goble, and Stevens, along with seven other individuals, with one count of conducting a criminal enterprise, one count of conspiracy to conduct a criminal enterprise, and one count of conspiracy to manufacture and deliver marijuana.[84] Cunningham, Cameron, and Chief Legal Counsel Matthew Schneider approved his request in December 2013.[85] Ten other individuals were granted immunity by the AG's office.[86] A total of 32 were subject to civil forfeiture actions.[87]

G. McCully hired Steve Fishman.

In July 2013, McCully hired Steve Fishman—a seasoned criminal defense

[79] Cusick, HrVol 2, 232 lines 1-12.
[80] *Id.* at 231 line 18 -232 line 3, 316 line 17 -317 line 5.
[81] Cusick, HrVol 2, 232 lines 18-21.
[82] Cusick, HrVol 2, 222 lines 9-21.
[83] McCully Notes with Handwriting, Ex12, Bates 401.
[84] McCully Request to Initiate, Ex13, Bates 403-406; Charging Documents, Ex14, Bates 407-416; Cusick, Vol 2, 246-254.
[85] Ex13, McCully Request to Initiate, Bates 403; Cusick, Vol 2, 246-254.
[86] Cusick, HrVol 2, 293 lines 13-19.
[87] Cusick, HrVol 1, 189 lines 3-22.

attorney—to represent him.[88] Goble hired Neil Rockind, and Stevens hired Christopher Kessel.[89]

H. Fishman tries to work out a deal, but abandons it.

McCully, Gobles, and Stevens waived their preliminary examinations and were bound over to circuit court before Judge Groner.[90]

Their attorneys began to negotiate possible plea agreements.[91] Attorney General policy held that agreements needed to be in writing with prior approval from Rollstin, Cunningham, and Cameron.[92] Cusick could extend offers from his superiors to Fishman and relay counterproposals, but he wasn't allowed to make plea and sentencing agreements on his own.[93]

Based on his prior criminal record, Cusick calculated McCully's sentencing guidelines at 72-150 months.[94] Fishman wanted to work out a binding plea and sentencing agreement for McCully and the plan was to get an agreement before March 6, 2013.[95] They discussed dropping two of the charges, and setting guidelines at 48 months.[96] Fishman said, "I think your superiors ought to seriously consider reducing the 48-month offer to no more than 36 months regardless of how the discussion" about McCully's fines went.[97]

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[88] Fishman, HrVol 20, 3714 lines 12-21, 3804 lines 10-17.
[89] March 6, 2013 transcript, Ex23, Bates 473-486.
[90] Cusick, HrVol. 2, 318 line 2 -319 line 9.
[91] *Id*. at 321 lines 3-6.
[92] Rollstin, HrVol 18, 3491 line 15 – 3492 line 16.
[93] *Id*.; Rollstin, HrVol 19, 3537 line 21 - 3538 line 2.
[94] Note to File, Ex88h, Bates 2708; Email to Fishman, Ex88i, Bates 2711; Note to File 88d, Bates 2700.
[95] Fishman email, Ex89g, Bates 2810;
[96] Note to File, Ex88h, Bates 2708.
[97] Fishman email, Ex89g, Bates 2810.

On March 6, 2013, the parties still hadn't worked out any agreement for McCully despite Fishman's hopes that they would.[98] That day Fishman was in the courtroom during Stevens' plea hearing. Stevens' attorney had worked out an agreement in which Stevens, who was already in prison for something else, would serve 51 months concurrent for one count of conducting criminal enterprise in exchange for dropping two charges.[99] Cunningham approved that deal[100] When Judge Groner heard the terms of the agreement, he observed that 51 months seemed excessive for a marijuana case. He related Stevens' deal to the infamous one in *People v Sinclair*, in which Sinclair was sentenced 10 years for smoking marijuana.

Fishman abandoned his plea negotiations with Cusick and advised McCully to plead guilty as charged. He knew that Judge Groner didn't think weed cases were a big deal and that, absent a sentencing agreement, he wouldn't send someone to prison for weed.[101] Perhaps county jail, but not prison.[102] Fishman also knew that "cooperators can wind up in a lot better position than people who don't cooperate."[103] Fishman's plan was to allow McCully to exercise his right to attempt mitigation by working with the police with the hope of getting a favorable sentence from Judge Groner.[104]

I. McCully pleaded guilty as charged.

Before McCully's plea hearing, Cusick and Fishman met with Judge Groner.

[98] Fishman email, Ex89g, Bates 2810.
[99] Stevens' Plea Form, Ex25, Bates 489.
[100] Stevens Request for Plea Authority, Ex21, Bates 453.
[101] Fishman, HrVol 20, 3784 lines 1-12, 3773, lines 7-18.
[102] *Id.* at 3783 lines 6-10.
[103] *Id*. at 3735 lines 12 - 3736 line 13
[104] *Id*.

Fishman explained that McCully was "pleading on the nose."[105] Judge Groner promised nothing.[106]

Once on the record at McCully's plea hearing, Fishman told Judge Groner that he and Cusick did their best to try to work out a deal but couldn't.[107] He stated that, "Mr. McCully understands there's no agreements *at all* and knows what's going to happen in terms of going forward."[108] Judge Groner confirmed McCully's understanding:

> Court: So you're pleading blind here, do you understand that?
> McCully: Yes, Your Honor.
> Court: Is that what you want to do?
> McCully: Yes, Your Honor.
> Court: Okay. No promises have been made to you?
> McCully: No.
> Court: No promises have been made to you as to sentence, correct?
> McCully: Correct.[109]

McCully pleaded guilty to all charges.[110] His statements on the record were consistent with his plea form that left the "Sentence Agreement" box unchecked.[111]

Goble and Stevens' plea forms had the "sentence agreement" box checked because they each made deals with the Attorney General's office.[112] That afternoon, after McCully's plea hearing, Cusick wrote in McCully's file that McCully pleaded guilty with no *Cobbs*:[113]

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[105] *Id.* at 3730 line 19 – 3731 line 17.
[106] *Id.*; McCully Plea Hearing Transcript, Ex100, Bates 4058
[107] McCully Plea Hearing Transcript, Ex100, Bates 4055-4056.
[108] McCully Plea Hearing Transcript, Ex100, Bates 4056 (emphasis added).
[109] McCully Plea Hearing Transcript, Ex100, Bates 4058-4059.
[110] *Id.* at Bates 4059.
[111] McCully Plea form, Ex27, Bates 491; Rollstin, HrVol 3495.
[112] Stevens Plea form, Ex25, Bates 489; Goble's Plea form, Ex26, Bates 490.
[113] Notes to File, Ex88b, Bates 2696-2697.

J. McCully wanted to exercise his right to attempt mitigation.

On March 27, 2014, Fishman, for the first time, suggested that McCully would be interested in providing information to the police.[114] Fishman told the Commission that his March 27, 2014, email represented the beginning of McCully's cooperation.[115] The Commission didn't produce this document until discovery and it was not available when Cusick answered the Request for Comments (now Exhibit 93). If he had that information, in response to Question 44(a) in the Request for Comments, Cusick would have highlighted that Fishman's offer for McCully to potentially cooperate occurred *after* McCully pleaded on March 13, 2014.[116]

On April 3, 2014, Fishman invited Cusick to his office to hear information that McCully wanted to share about other drug dealers and his willingness to become a confidential informant. Cusick "made no promises regarding anything and basically just listened."[117] Cusick doubted McCully's credibility and didn't know if WWNTF would even be interested in McCully's information.[118] Despite his skepticism, he passed it along to the police to see if they wanted to work with McCully.[119]

With McCully's credibility an open question, it was unclear whether Judge Groner would give him any credit for his attempt at mitigation.[120] As Judge Kenny explained, attempting mitigation isn't a guarantee of a reduced sentence because often

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[114] Fishman email, Ex101h with his note to JTC staff.
[115] *Id.*
[116] Response to Request for Comments, Ex93, Bates 3384. See also, *Id.*, Bates 3351, Introduction to Response to Request for Comments, stating: "Judge Cusick has only reviewed those documents provided by the JTC or that are attached as tabs hereto."
[117] Notes to file, Ex88l, Bates 2716.
[118] *Id.*
[119] *Id.*
[120] Kenny, HrVol 18, 3391 line 17 – 3393 line 1.

times a defendant isn't really able to do anything and they might not be able to convince the judge to reduce their sentence.[121] Fishman understood this, too. Of course, sentencing was up to the judge.

A few days later on April 8, 2014, Sergeant Paul Calleja, who took over for Tennies, emailed Cusick for an update on the nine defendants to supplement his reports.[122] Cusick emailed back, enumerating the different outcomes for each defendant. When it came to McCully, Cusick wrote: "Pled guilty as charged to all three counts with *no promises* and *no Cobbs*. Sentence is June 17th."[123]

K. McCully signed his *Kastigar* letter. This cemented that there was "no deal" between McCully and anyone else.

On May 2, 2014, McCully and Fishman met with Calleja and Cusick to discuss McCully's potential CI work.[124] Cusick made no promises to McCully regarding his sentence and ruled out that an investigating agency had made McCully any agreement.[125] McCully and Fishman signed the *Kastigar* letter, which memorialized these terms:[126]

> 4. On March 13, 2014, your client pled guilty to 1 count of Conducting a Criminal Enterprise, MCL 750.159(i); 1 count of Conspiracy to Commit a Criminal Enterprise, MCL 750.159(i); and 1 count of Conspiracy to Deliver/Manufacture Marijuana, MCL 333.7401(2)(d)(iii) before the Honorable David Groner of the Third Circuit Court. His sentence is scheduled on June 17, 2014. There is no agreement between your client and the Michigan Attorney General's Office as to any sentence that may be imposed.
>
> 5. Other than what has been stated, there is no other agreement between your client and the Michigan Department of Attorney General or any other investigating agencies.

[121] *Id.*
[122] 4/8/14 email thread between Cusick and Calleja, Exhibit MM, Bates 1662.
[123] *Id.*
[124] *Kastigar* letter, Ex37, Bates 728-729 (emphasis added).
[125] *Id.*
[126] *Id.*

Rollstin confirmed that the Kastigar letter "supersed[ed] any agreement or anything the investigating agency had spoken to Mr. McCully about."[127] Unknown to Cusick, Calleja believed that an agreement different than what the *Kastigar* letter stated formed.[128] In fact, he believed that the Attorney General's office made sentence reductions—even though Cusick never told him this.[129] And he believed the purpose of the meeting was for Cusick to make a favorable sentence recommendation that the judge would automatically accept.[130] Calleja believed that Cusick—not Fishman—would be advocating for McCully.[131] Calleja communicated everything McCully did to Cusick.[132] Calleja didn't understand that the reason for the communication back to Cusick was so that Cusick would know whether Fishman's representations to Judge Groner in McCully's eventual sentencing memorandum were accurate.[133]

When asked during Cusick's disciplinary hearing why Calleja believed this when even the plea-hearing transcript stated that McCully had no agreement as to sentence, he testified that everyone in the transcript was a liar.[134] He testified that he knew better than all of the lawyers and Judge Groner: "Sorry to offend everyone in this room who's an attorney, but I know how things work[.]"[135]

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[127] Rollstin, Trial Vol 19, 3584 lines 9-12.
[128] Calleja, HrVol 9, 1637 lines 3-21.
[129] Calleja, HrVol 8, 1477 line 12 – 1478 line 7.
[130] *Id*.
[131] Calleja, HrVol 9, at 1773 line 16 – 1774 line 11.
[132] *Id.* at 1772 line 23 – 1773 line 2.
[133] Fishman, HrVol 20 3756 line 13 – 3757 line 6; 3823 line 15 – 3824 line 6.
[134] Calleja, HrVol 9, 1602 line 2 - 1603 line 4.
[135] *Id*. at 1601 line 13-24.

L. McCully signed his CI source card.

On May 12, 2014, McCully signed his CI source card.[136] A CI source card is not an agreement, but rather a way of keeping track of a CI's reliability and biannual LEIN and criminal intelligence checks [137]

The police protected source cards.[138] They kept source cards in a separate file from the discovery materials and produced them only on court order.[139] They did not forward them to the prosecuting attorney.[140] And they did not include them in a general discovery demand.[141] In fact, Fishman had not really seen one in 50 years of being a criminal defense lawyer.[142]

When submitting a source card to the Michigan State Police in Lansing, Calleja had to make sure the "Remarks" section of the source card was complete to obtain approval.[143] So when filling out that section on McCully's source card to obtain approval, Calleja wrote, "working for a reduced sentence, with Michigan AG office Paul Cusick."[144] Calleja's remarks contravene the *Kastigar* letter.[145]

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[136] McCully Source Card, Ex38, Bates 730.
[137] *Id.*; Zinser, HrVol 13, 2375 lines 11-13; Calleja, HrVol 9, 1644 line 2 – 1646 line 3.
[138] Tennies, HrVol 11, 2000 line 20 – 2001 line 9.
[139] Calleja, HrVol 9, 1649 lines 6-21.
[140] Tennies, HrVol 11, 2001 lines 7-9.
[141] Calleja, HrVol 9, 1649 lines 15-21.
[142] Fishman, Vol 20, 3851 line 24 – 3852 line 2.
[143] Calleja, HrVol 8, 1463 line 18 – 1464 line 4; Tennies, HrVol 11, 1999 line 16 – 2000 line 15.
[144] Calleja, HrVol 8, 1463 line 18 – 1464 line 4; McCully Source Card, Ex38, Bates 730.
[145] *Kastigar* letter, Ex37, Bates 728-729.

Calleja did not send the source card to Cusick.[146] He never sent any source cards to anyone at the Attorney General's office.[147] And police reports and search warrants used only CI numbers, never the name of the CI.[148]

M. McCully generated the Berry cases in Detroit and Livingston County.

One of the cases McCully generated was against Darryl Berry.[149] McCully told WWNTF that Berry was selling whole plants.[150] On August 6, 2014, Detective Lowes, an undercover police officer who reported to Calleja, went with McCully to Berry's storefront on Grand River Boulevard in Detroit, Michigan.[151] McCully and Lowes went inside where they spoke to multiple people.[152] McCully introduced Lowes to Berry, and Lowes made two purchases of marijuana—one for 91.1 grams and one for 56.8 grams.[153] Lowes also had a conversation with Berry about buying whole plants and put $500 down.[154]

On September 5, 2014, Lowes and McCully drove out to Berry's grow operation in Livingston County.[155] Lowes observed and walked through Berry's expansive grow operation behind his house, discussed Berry's inventory, and put $3,000 down on six plants.[156] Berry told Lowes that his plants would be ready for pick-up in October,

[146] Calleja, HrVol 8, 1466 lines 4-14.
[147] *Id.*
[148] See e.g., Pure Wellness Search Warrant, Ex57, Bates 1235, 1237-1238.
[149] Lowes, HrVol 11, 2016 line 4 – 2017 line 5.
[150] *Id.*
[151] *Id.* 2020 lines 6-20.
[152] *Id.*
[153] *Id.*, 2023 lines 2-9.
[154] *Id.* at 2021 lines 1-13; WWNTF Reports, Ex39, Bates 735.
[155] Lowes, HrVol 11, 2024 line 14 – 2025 line 24.
[156] *Id.* at 2025 line 17 – 2026 line 4, 2029 lines 2-10; WWNTF Reports, Ex39, Bates 735-736.

2014.[157] Berry mentioned to Lowes that he had 72 plants for $125,000 at another house that he wanted to sell as a whole.[158]

On September 24, 2014, Lowes called Berry, said he was in the area, and asked Berry if he could stop by to check on his plants.[159] McCully wasn't with him.[160] Berry agreed.[161] And Lowes stopped by Berry's house.[162] The two walked to Berry's outdoor grow operation.[163]

Berry confirmed which plants belonged to Lowes.[164] Lowes then asked if he still had the 72 plants for sale for $125,000, and Berry stated that someone bought all of those plants.[165] Berry told Lowes that he just sold yet another 100 plants, but had 36 plants growing in Ortonville and 24 growing just five minutes away.[166] Lowes asked Berry if all of the plants growing in his backyard facility were his, which Berry affirmed.[167] Berry also admitted that when he first started growing he knew he was only supposed to have 5 ounces but had 61 pounds that he sold to two guys.[168]

On October 13, 2014 Lowes went to Berry's place without McCully to pick up his plants.[169] Lowes backed his vehicle and trailer up to the outdoor grow operation and

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[157] WWNTF Reports, Ex39, Bates 736.
[158] WWNTF Reports, Ex39, Bates 735.
[159] Lowes, HrVol 11, 2030 line 15 – 2031 line 18; WWNTF Reports, Ex39, Bates 738
[160] *Id.*
[161] WWNTF Reports, Ex39, Bates 738.
[162] Lowes, HrVol 11, 2030 line 15 – 2031 line 18; WWNTF Reports, Ex39, Bates 738
[163] WWNTF Reports, Ex39, Bates 738
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.* at 739.
[169] Lowes, HrVol 11, 2030 line 15 – 2031 line 18; WWNTF Reports, Ex39, Bates 742.

loaded three of the original six plants in the trailer. Lowes gave Berry $6,000.[170] The parties agreed that Lowes still owed Berry $1,500.[171]

On December 19, 2014, Lowes texted Berry, telling him that he'd be by in the first week of January 2015 to pay his balance.[172] Berry texted back, "ok" and "thank you."[173] But in late December 2014, Berry called Lowes and told him that they were even on money and let him know that he'd advise Lowes in April of his new strains for the next grow season.[174]

N. Loggie becomes a CI.

Another one of the undercover operations the police asked McCully to do involved a cannabis dispensary in Canton Township, Michigan, called Pure Wellness.[175]

The owner, Amanda Joslin, filed a misleading business application.[176] When applying for her Certificate of Zoning Compliance, Joslin stated that Pure Wellness provided referral services for healthcare, educational, and employment resources.[177] When the Township conducted an inspection, they realized it was a marijuana dispensary.[178]

The Township asked Canton Police Department to get involved.[179] Canton Township police officer Brian Zinser, who was detailed to WWNTF,[180] headed the

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[170] WWNTF Reports, Ex39, Bates 742.
[171] *Id.*
[172] *Id.* at 744
[173] *Id.*
[174] *Id.* at 745
[175] *Id.* at 1495
[176] Zinser, HrVol 13, 2275 line 3-14.
[177] Pure Wellness Search Warrant, Ex57, Bates 1239.
[178] *Id.*
[179] Calleja, HrVol 8, 1494 lines 14-17.

investigation.[181] Zinser brought the issue to Calleja's attention, and they decided they needed a CI to do a controlled buy.[182]

Calleja asked McCully, who at first agreed to make the controlled buy.[183] But McCully was well known in the industry, and he became afraid that someone might recognize him and point him out.[184] Calleja couldn't recall how it happened, but Loggie's name came up.[185] Calleja claimed *for the first time* in this hearing that he told McCully that he'd try to get him a benefit for Loggie's work.[186] McCully asked Loggie if she could do the buys, telling her it would help his case.[187]

Loggie didn't like Pure Wellness.[188] She had been a patient there.[189] She felt they shorted her by sticking the wax to the paper bag, which couldn't be removed easily.[190] She also was trying to turn her life around since getting arrested and became incensed with the recklessness in which Pure Wellness sold marijuana.[191]

Lowes, during Cusick's disciplinary hearing, also recalled there may have been complaints about people smoking joints in their cars outside of Pure Wellness.[192] And Zinser confirmed that a school bus stop for a nearby apartment complex stood right

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[180] Calleja, HrVol 8, 1494 line 14 – 1495 line 2.
[181] *Id*.
[182] *Id.* at 1495 lines 2-8.
[183] *Id.* at 1495 line 23 – 1496 line 22.
[184] *Id*.
[185] *Id.* at 1497 lines 1-9.
[186] *Id.* This testimony contradicts what Calleja had told the JTC, that Cusick had approved Loggie before he spoke to McCully, see Para. 74 of Formal Complaint prior to amendment.
[187] Loggie, HrVol 10, 1843 lines 12-22.
[188] Loggie, HrVol 10, 1843 lines 23-25.
[189] *Id.* at 1839 lines 2-7, 1896 line 20 – 1899 line 1.
[190] *Id.* at 1839 lines 2-7, 1843 line 23 – 1845 6.
[191] *Id.* at 1894 lines 5-10, 1944 lines 4-19.
[192] Lowes, HrVol 11, 2049 lines 3-8.

across the street from Pure Wellness.[193]

O. Loggie agreed to work with the police.

Loggie called Calleja.[194] Calleja stated for the first time at this hearing that after he spoke with Loggie he then called Cusick to get his approval to credit McCully.[195] But this doesn't add up for many reasons.

First, Calleja never asked Cusick to approve credit for McCully with other work that McCully did because there was nothing for Cusick to approve. McCully was doing the work under his right to mitigation to convince Judge Groner that he deserved leniency. Calleja, for his part, would from time to time tell Cusick which specific investigations that McCully helped out on, to be used at sentencing.[196]

Second, in Calleja's January 2015 emails delineating McCully's work, Calleja felt the need to explain who Loggie was.[197] Had he received Cusick's approval, he wouldn't have needed the descriptions. Cusick would have already known.

Third, there is no evidence that Calleja ever got approval to use the other CI on Pure Wellness. Tennies explained that people can be CIs without needing prosecutorial notification if they haven't been charged.[198] Plus, WWNTF originally shopped the Joslin case to Wayne County for prosecution, not Cusick at the Attorney General's office.[199]

When asked why his testimony was different than what he'd stated for the

[193] Zinser, HrVol 13, 2333, lines 17-22.
[194] Calleja, HrVol 8, 1498 lines 19-23.
[195] *Id.* at 1498 line 24 -1499 line 9; 1499 line 22 – 1500 line 22.
[196] Calleja 1/16/15 email, Ex89t, Bates 2836; Calleja 1/26/15 email, Ex89u, Bates 2837.
[197] Calleja 1/16/15 email, Ex89t, Bates 2836; Calleja 1/26/15 email, Ex89u, Bates 2837.
[198] Tennies, HrVol 11, 1996 line 24 – 1997 line 11.
[199] Zinser, HrVol 13, 2335 lines 16-21; Joslin Preliminary Examination, Ex67b, Bates 1517.

previous two years Calleja testified that he had a cup of coffee that morning and magically remembered *portions* of his conversations with Loggie.[200] This does not explain the significant change in circumstances that his testimony presents. In the JTC's original charges, Calleja was alleged to have gotten pre-approval and told Loggie that Cusick had approved the deal. That is now dismissed original paragraph 74 of the Formal Complaint. The JTC amended the charge to reflect Calleja's actual testimony in this proceeding, by making the call to Loggie prior to talking to Cusick. That is the new paragraph 74. While Calleja would testify that he "believed" he told Cusick after the fact, but could not recall the exact words,[201] the problem with the new allegation is that there was no evidence that Loggie was ever informed subsequently of Cusick's alleged approval. No amount of coffee can fill that void in the JTC's theory. Calleja did not testify that he ever told Loggie that Cusick approved her working for McCully's benefit. Loggie never testified that she was told Cusick had approved her working for McCully's benefit.

The Master found Calleja's testimony unreliable and not credible on important facts.[202]

Cusick didn't recall Calleja ever requesting his permission to either use Loggie as a CI or to give McCully credit for her CI work.[203] And Cusick certainly never sought approval for or authorized any such arrangement,[204] nor did he approve it because he

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[200] Calleja, HrVol 8, 1543 line 2 – 1562 line 4; Calleja, HrVol 9, 1735 line 23 – 1736 line 10.
[201] Calleja, HrVol 8, 1498 line 24 -1499 line 9; 1499 line 22 – 1500 line 22.
[202] Master, pp29-30
[203] Cusick, HrVol 4, 719 line 23 – 721 line 17.
[204] Cusick, HrVol 3, 530 lines 7-25.

didn't have the authority.[205] Whether McCully received mitigation for Loggie's work was between McCully and Judge Groner—not Cusick. Neither the Attorney General's Office nor Cusick ever promised McCully anything,[206] except, that there were no promises.[207]

P. Loggie met with the police and signed her CI source card.

Calleja arranged to meet Loggie.[208] He testified that he would have told Zinser that Loggie had an agreement to help McCully.[209] Contradicting this, Zinser at Joslin's trial in September 2017, said he didn't know of any deal or agreement—only that McCully was her boyfriend.[210] In this hearing, Zinser did not testify that Calleja told him that there was an agreement.[211] *In fact, Calleja conceded that there was no deal with Loggie.*[212] Zinser, for his part, had no knowledge of McCully pleading guilty as charged and didn't know of any of McCully's conditions or benefits.[213]

On September 4, 2014, Loggie met with Zinser and Calleja to sign her source card behind a CVS pharmacy.[214] Like McCully, when Loggie signed her source card the "Remarks" section was not filled in.[215] Calleja did that later on.[216]

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[205] Cusick, HrVol 4, 721 lines 10-17.
[206] *Kastigar* letter, Ex37, Bates 728-729; McCully Plea Hearing Transcript, Ex100, Bates 4058-4059; Fishman, HrVol 20, 3730 line 17 – 3732 line 2; 3797 lines 3-6.
[207] *Id.*
[208] Zinser, HrVol 13, 2278 lines 18-22.
[209] Calleja, HrVol 9, 1674 lines 2-6.He contradicted this pages later, 1703 line 25 - 1704 line 12.
[210] Joslin Ex72d, Bates 2041-2042.
[211] Zinser, HrVol 2278 lines 9-17.
[212] Calleja, HrVol 9, 1703 line 25 – 1704 line 4.
[213] Zinser, HrVol 13, 2272 lines 22 -25, 2359 line 20 – 2360 line 1.
[214] Zinser, HrVol 13, 2279 lines 20-24; Loggie, HrVol 10, 1850 lines 15-22.
[215] Zinser, HrVol 13, 2281 lines 10-17; Loggie's Clean Source Card, Exhibit FFF, Bates 2007.
[216] Calleja, HrVol 8, 1504 line 19 – 1505 line 4; Loggie's Source Card, Ex55, Bates 1136.

Loggie testified that no one promised her anything:

Q: There was no agreement, correct?
A: Correct.
Q: In fact, as you sit here today, you know there were no promises ever; correct?
A: Correct.
Q: There were [sic] no agreement; correct?
A: Correct.
Q: No agreement with Thomas McCully; correct?
A: Correct.
Q: And no agreement with Brandy Loggie; correct?
A: Correct.
Q: No promises to you as to what would happen if you acted as a CI; correct?
A: Correct. [217]

Loggie told Calleja that she wanted to help the police because she was trying to turn her life around.[218] She told him that Joslin was allowing people to get high and drive off.[219] But Calleja didn't believe her.[220] He thought he knew better.[221] During Cusick's disciplinary hearing, Calleja admitted though, when going through Loggie's preliminary examination testimony against Joslin, that Loggie's testimony was consistent with what she told him.[222]

Q: Now we come back to page 23 and the answer that begins "Because it is dangerous."
A: Yes.
Q: "Because it is dangerous for her to sell that amount of marijuana to people who are driving around on the streets, like it is not safe." Do you see that?
A: Yes.
Q: That's consistent with what she told you on September 4th of 2014, correct?
A: Correct.[223]

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[217] Loggie, HrVol 10, 1926 line 18 – 1927 line 1.
[218] Calleja, HrVol 8, 1557 lines 3-13.
[219] *Id.* at 1507 line 16 – 1508 line 5.
[220] *Id.* at 1560 line 2 – 1562 line 4.
[221] *Id.* at 1506 line 24 – 1507 line 6.
[222] Calleja, HrVol 9, 1699 lines 15-25.
[223] *Id.*

Q. Loggie did a controlled buy at Pure Wellness.

The same day as signing her source card, Loggie conducted a controlled buy at Pure Wellness.[224]

R. Nothing happened on the Pure Wellness file, and the Township inquired.

After the September 2014 buy, the Joslin investigation sat dormant for four months.[225] Late in the afternoon on Friday, January 16, 2015, Calleja mentioned the investigation to Cusick when updating him on McCully.[226] In that email, Calleja enumerated various investigations relating to McCully and included Pure Wellness in the update, stating, "We have an ongoing MJ Dispensary in Canton that McCully generated and his girlfriend (Loggie on McCully's behalf) has done some CI work on."[227]

The January 16, 2015 email was to get the Attorney General interested in prosecuting the *Joslin* case.[228] Calleja misstated that McCully generated Pure Wellness. Canton Township generated the investigation.[229] Calleja wouldn't have needed to even tell Cusick about Loggie doing CI work at Pure Wellness—or explain her status as McCully's girlfriend—if he had already allegedly gotten his approval as he claimed during this hearing.

[224] Zinser, HrVol 13, 2281 lines 18-21; Pure Wellness Search Warrant, Ex57, Bates 1235
[225] Pure Wellness Search Warrant, Ex57, Bates 1235
[226] Calleja 1/16/15 email, Ex89t, Bates 2836.
[227] *Id.*
[228] Ex89t.
[229] Pure Wellness Search Warrant, Ex57, Bates 1239.

Cusick testified that he didn't register the parenthetical references[230]—as the JTC would have to concede this sometimes happens with emails. See *In re Cedric Simpson* case.[231] The parenthetical reference was not evidence that McCully had a deal. Indeed, based on the *Kastigar* letter – he did not and could not have any deal.

Cusick emailed back nine minutes later, thanking Calleja and advising him that he'd check with Cunningham about whether the office had any interest in what would become the *Joslin* case and get back to Calleja.[232]

Canton Township grew impatient and wanted to get Joslin's "illegal drug trafficking" out of their township.[233] So Calleja sent a follow-up email to Cusick and copied Cunningham, among others.[234] Calleja copied and pasted his words from the January 16 email referencing "ongoing MJ Dispensary in Canton that McCully generated and his girlfriend (Loggie on McCully's behalf) has done some CI work on."[235] And then said that Canton Township wanted to push shutting down Pure Wellness.[236]

S. In February 2015, the Attorney General opened a file on Joslin.[237] Calleja's email was *saved into the Joslin file*. Dianna Collins had access to the email when she took over the case.[238] The Joslin investigation heated up.

Detective Zinser conducted more surveillance on Pure Wellness in February 2015 and used a different CI to conduct controlled buy on March 9, 2015.[239]

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[230] Cusick, HrVol 4, 732 lines 12-21.
[231] JTC Formal Complaint No. 96.
[232] Calleja 1/16/15 email, Ex89t, Bates 2836.
[233] Calleja 1/26/15 email, Ex89u, Bates 2837.
[234] *Id.*
[235] *Id.*
[236] *Id.*
[237] Hot Print Notes to File on Joslin, Ex88w, Bates 2755
[238] Email to File, Ex88u, Bates 2750-2751; Collins, HrVol 15, 2802 lines 7-10.

T. On March 16, March 17, and March 18, 2015 Loggie made three additional controlled buys.[240] Cusick didn't know how to contact Loggie.

Before charging Joslin, Cunningham told Cusick to make sure Loggie would testify.[241] Cusick had a difficult time contacting Loggie.[242] He asked Calleja how to contact her, and Calleja gave him a number that turned out to be McCully's cell phone.[243]

Cusick called the number, and realizing that he had reached McCully, explained that he wasn't calling on McCully's case because he is represented by counsel, but he would like to get a hold of Loggie.[244] McCully told him that he would have Loggie call Cusick back.[245] Cusick recorded this entire transaction in the Legal Files for Amanda Joslin:[246]

This was saved, along with the January 26, 2015 email into Legal Files. Dianna Collins, who later took over the Joslin case, had access to McCully's first and last name, phone number, the fact that he had a pending criminal case, and his connection to Loggie.[247] In closing rebuttal-argument, JTC counsel suggested that Collins did not have access to the Legal File notes in the *Joslin* matter. That representation was inaccurate.

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[239] Pure Wellness Search Warrant, Ex57, Bates 1236-37.
[240] *Id.* at 1238-39.
[241] Notes to File, 88bb, Bates 2768.
[242] Cusick, HrVol 4 738 lines 23-25; Note to File 88bb, Bates 2769.
[243] Note to File, 88cc, Bates 2772.
[244] *Id.*
[245] *Id.*
[246] *Id.*
[247] Collins, HrVol 15, 2802 lines 7-10; Note to File, Ex88dd, Bates 2778.

Loggie called Cusick back the next day and confirmed that she'd be "more than willing to testify" and that Joslin had been introduced to her as the boss.[248] Loggie and Cusick didn't speak again until November 3, 2015.[249]

U. After charging Joslin, Cusick prepares for her preliminary examination.

Cusick charged Joslin on July 1, 2015 with one count of conducting a criminal enterprise and two counts of manufacturing and delivering marijuana.[250] Joslin hired attorney Sean Myers for only her arraignment.[251] Joslin then retained Michael Komorn to represent her post-arraignment.[252]

As part of discovery, Cusick sent Komorn the discovery, which is the materials provided by the police.[253] The police reports contained the CI numbers of the CIs who did controlled buys, and Komorn could see, if he wanted, that the police used two CIs:[254]

On Thursday, September 4th 2014 CI # 25540 made a controlled purchase of marijuana from the Pure Wellness marijuana dispensary located at 145 N. Haggerty Road.

In the morning hours of 3-9-15; I contacted Confidential Informant #25927 (hereinafter referred to as the "CI"). The CI advised by phone that he/she could purchase marijuana from the "Pure Wellness" dispensary in Canton, MI.

[248] Note to File, Ex88dd, Bates 2778.
[249] Loggie, HrVol 10, 1863 line 21 – 1864 line 22.
[250] Joslin Charging Documents, Ex60, Bates 1261-1264.
[251] *Id.* at Bates 1264; Komorn, HrVol 12, 2062 lines 4-9;
[252] *Id.*; Komorn, HrVol 12, 2060 lines 7-12.
[253] Komorn, HrVol 12, 2066 lines 2-4; Cusick, HrVol 4, 753 lines 3-12.
[254] WWNTF Reports, Exhibits 56, Bates 1140, 1151.

But, as Tennies confirmed, Loggie's CI source card and that of the other CI were protected in a separate file; for the CIs' safety, they weren't given to Cusick or provided in the discovery materials.[255]

V. Cusick signed a subpoena for Loggie to appear at Joslin's preliminary examination, but no one served it and Loggie never saw it.

In preparation of Joslin's preliminary examination on November 3, 2015, Cusick asked his secretary to prepare subpoenas for a list of people that may testify.[256] She prepared them, printed them, and gave physical copies to Cusick to review and sign.[257] Cusick signed them and, according to routine, would have sent them to the officer in charge to deliver.[258] Zinser testified during Cusick's disciplinary hearing that he didn't recall delivering any subpoenas and did not believe he delivered any subpoenas noting that it could have been Calleja's job.[259] Calleja testified that sometimes he served subpoenas "verbally" and didn't file a return of service.[260] Loggie didn't recall ever seeing a subpoena.[261] The Commission has no evidence showing that Loggie was ever served with a subpoena.

W. Before Joslin's preliminary exam, Loggie receives social media threats.

Unknown to Cusick, before her preliminary examination, Joslin found out that Loggie was a CI in her case and exposed and threatened Loggie and Loggie's infant son

[255] Tennies, HrVol 11, 2000 line 20 – 2001 line 9;
[256] Hamilton, HrVol 8, 1379 lines 17-22; Hamilton email and subpoenas, Ex66, Bates 1301-1315.
[257] Hamilton, HrVol 8, 1382 line 3 – 1383 line 9.
[258] Cusick, HrVol 4, 762 lines 3-9; Emails regarding subpoenas, Ex89rr, Bates 2878-2879; Hamilton email and subpoenas, Ex66, Bates 1301-1315.
[259] Zinser, HrVol 13, 2312 lines 15-20.
[260] Calleja, HrVol 8, 1524 lines 12-16.
[261] Loggie, HrVol 10, 1938 line 4 – 1939 line 17.

over social media.[262] Loggie told McCully about it and sent him screenshots to give to the police.[263] Calleja denies McCully told him about the threats.[264] Calleja didn't tell Zinser about them,[265] but Zinser knew of them by Joslin's trial in August of 2017.[266]

Loggie did not tell Cusick about the threats or send him any screenshots.[267] Zinser later claimed that Cusick knew about them.[268] But he couldn't explain how Cusick would have known.[269]

X. Loggie testified at Joslin's preliminary examination.

Cusick and Zinser met with Loggie before Joslin's preliminary examination at the 35th District Court to go over her anticipated testimony.[270] Cusick told Loggie to testify truthfully.[271] And Loggie didn't mention Joslin's threats.[272] The issue never come up.[273] And they didn't talk about McCully.[274] Loggie did, however, express animus towards Joslin for operating a bad business.[275] Loggie told Cusick that she was concerned that people were driving visibly high.[276]

During the exam, Cusick and Zinser sat at the prosecution's table.[277] And Cusick

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[262] *Id.* at 1942 lines 4-19.
[263] *Id.*
[264] Calleja, HrVol 9, 1725 line 1 – 1726 line 9
[265] *Id.*
[266] Zinser, HrVol 13, 2390 line 8 – 2392 line 10.
[267] Loggie, HrVol 10, 1942 line 7 – 1943 line 23.
[268] Zinser, HrVol 13, 2391.
[269] *Id.*
[270] Cusick, HrVol 7, 1249 line 18 – 1250 line 12.
[271] Cusick, HrVol 4, 782 lines 16-24.
[272] Loggie, HrVol 10, 1942 line 7 – 1943 line 23.
[273] Cusick, HrVol 7, 1249 line 18 – 1250 line 12.
[274] Cusick, HrVol 4, 749 line 17 - 750 line 10.
[275] *Id.*
[276] *Id.*
[277] Zinser, HrVol 13, 2296 line 20 – 2297 line 4

called Loggie as a witness.[278] In the first seconds of her direct exam, Loggie admitted to doing a controlled buy for Zinser.[279] Her testimony then implicated Joslin as the owner of Pure Wellness and Joslin's business as an unlawful marijuana dispensary.[280]

Komorn then cross-examined Loggie.[281] Komorn, in general, tended to speak fast and could be confusing at times.[282] And Komorn's cross-examination was haphazard. He asked Loggie questions multiple ways, asked the same question over and over again, and interrupted Loggie's answers.[283] Loggie tended to answer questions in a very literal way.[284]

Komorn asked 178 questions on cross-examination. On re-cross examination, Komorn asked 57 questions. Cusick made a mere 8 objections, during a total of 235 questions. That is an objection rate of less than 1 per 29 questions.

Judge Gerou interrupted Komorn 7 times, including to expressly stop his badgering Brandy.[285] Judge Gerou stated, "Hold on, hold on. Don't badger her, okay. I understand you are entitled to get an answer, give her time to answer."

Komorn asked Loggie if she was there by way of a subpoena to which she said, no.[286] This was true. Loggie doesn't recall ever seeing a subpoena.[287] And this wasn't false in Cusick's mind because he didn't know if Calleja served Loggie with a

[278] Joslin PE Transcript, Ex67a, Bates 1321
[279] *Id.*
[280] *Id.* at 1325-1331.
[281] *Id.* at 1333
[282] Komorn, HrVol 12, 2059 lines 17-23; Zinser, HrVol 13, 2328 lines 2-16; Collins, HrVol 16, 2996 lines 12-13.
[283] Loggie, HrVol 10, 1939 lines 14-19.
[284] Kenny, HrVol 17, 3136 lines 1-23.
[285] Exhibit 67 A at Trial, p.57.
[286] Joslin PE Transcript, Ex67a, Bates 1333
[287] Loggie, HrVol 10, 1938 line 17 – 1939 line 6.

subpoena.[288] And, it was entirely consistent with Loggie's voluntariness throughout.

Komorn then asked if Loggie was there voluntarily to which she said, yes.[289] Loggie was at the hearing because she wanted to be there.[290] To Cusick, this sounded true because Loggie told him on June 30, 2015 that she would be "**more than willing to testify**" against Joslin.[291] Zinser also observed that witnesses can voluntarily testify even if they'd received a subpoena.[292]

When Komorn asked who had told her about the date for the preliminary exam, Loggie said that she didn't know.[293] Then she guessed that maybe it could have been Cusick.[294]

Komorn then asked Loggie if she signed a confidential informant document at some point in time, to which she said, "I did:"[295]

This was true.[296] Cusick didn't know this, but did not object.[297] Instead of asking about any terms and conditions of that document or what her motivations were to become a CI, Komorn asked her an unrelated and confusing question posed in the negative about whether Loggie had been told that she wouldn't have to testify.[298] Loggie replied, "No, I was not told that."[299]

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[288] Cusick, HrVol 5, 804 line 21 – 805 line 6.
[289] Joslin, PE Transcript, Ex67a, Bates 1333.
[290] Loggie, HrVol 10, 1938 line 17 – 1939 line 6.
[291] Note to File, Ex88dd, Bates 2778 (emphasis added).
[292] Zinser, HrVol 13, 2314 line 6 -2315 line 9.
[293] Joslin, PE Transcript, Ex67a, Bates 1333.
[294] Loggie, HrVol 10, 1883 line 21 – line 15.
[295] Joslin, PE Transcript, Ex67a, Bates 1334.
[296] Loggie's Clean Source Card, Exhibit FFF, Bates 2007.
[297] Joslin, PE Transcript, Ex67a, Bates 1334.
[298] Joslin, PE Transcript, Ex67a, Bates 1334.
[299] *Id*.

Loggie's answer here was true: Cusick had expressly asked her whether she would be willing to testify.[300]

Komorn followed up with a fill-in-the-blank question: "And, your involvement with the police in terms of you becoming a confidential informant, was that ___" to which Loggie answered, "voluntarily." This was true: Loggie called Calleja.[301] She didn't have to work with the police—she chose to.

But apparently, Zinser, at some point—maybe here—allegedly leaned over and whispered to Cusick that Loggie's testimony was incorrect or needed to be clarified.[302] Zinser believed that that they called Loggie.[303]

Cusick never heard Zinser state anything about false testimony.[304] Cusick had no reason to doubt Loggie's testimony on this point.[305]

Komorn then asked "so you called the police with the intentions of wanting to get--," but Cusick objected under relevancy.[306] Komorn then explained that his question went to motive and bias and why she was testifying.[307] The judge asked Komorn how far he was going with it.[308] And Komorn said, "not far." **The judge allowed Kormorn leeway**, but advised not to get into the details of other operations:[309]

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[300] Note to File, Ex88dd, Bates 2778 (emphasis added).
[301] Calleja, HrVol 8, 1498 line 11.
[302] Zinser, HrVol 13, 2323 line 12 – 2324 line 16.
[303] *Id.* 2300 line 19 – 2301 line 3.
[304] Cusick, HrVol 4, 782 lines 1-15.
[305] *Id.*; Cusick, HrVol 7, 1290 line 8 – 1291 line 4.
[306] Joslin, PE Transcript, Ex67a, Bates 1335.
[307] *Id.*
[308] *Id.* at 1335.
[309] *Id.* at 1335-1336.

> Court: Well, I will give you a little leeway, but I don't want to get into details of other operations or anything.[310]

Komorn said he understood. But instead of asking Loggie about why she wanted to work with the police, he switched subjects and asked a new and different question about when Loggie contacted the police.[311] Loggie answered Komorn that she called the police in 2014. This was also true.[312]

Komorn then asked Loggie if there was something that occurred to make her call the police.[313] He did not clarify whether his question sought information about whether she was calling on Pure Wellness or why she contacted the Police on being a CI. She answered, "no." It wasn't false.[314] When asked at this hearing why she didn't mention McCully here, she explained that she wasn't asked.[315] Also, Loggie testified in this proceeding that she wasn't concerned with protecting McCully's identity during the preliminary examination.[316]

Komorn continued, asking Loggie about knowing Joslin through selling vape pens. And then he asked whether Loggie was an informant for other dispensaries as well.[317] This was immediately after the ruling by the judge not to discuss involvement in other investigations because of the confidential informer's privilege.

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[310] *Id.*
[311] *Id.* at 1336.
[312] Loggie's Clean Source Card, Exhibit FFF, Bates 2007; Calleja, HrVol 8, 1497 line 11.
[313] Joslin, PE Transcript, Ex67a, Bates 1336.
[314] Loggie, HrVol 10, 1885 line 22 – 1887 line 4; Joslin, PE Transcript, Ex67a, Bates 1336.
[315] Loggie, HrVol 10, 1887 line 3 – 1888 line 23.
[316] *Id.* at 1904.
[317] Joslin, PE Transcript, Ex67a, Bates 1337.

Komorn then asked the following.[318]

Komorn: You indicated that your reasons for being a confidential informant, working with the police, were because you decided to contact the police, is that right?
Loggie: Because it is dangerous for her to sell that amount of marijuana to people who are driving around on the streets, like it is not safe.

Loggie's testimony wasn't false.[319] Even Calleja testified that her testimony accurately reflected what she told him when she signed her source card.[320] And Loggie would tell Collins the same thing two years later.[321] And Zinser explained at Joslin's trial and in this proceeding that he didn't think this part of Loggie's testimony was false.[322] He explained that CIs have varying motivations.[323] He felt that Loggie's answer wasn't complete, but it wasn't false.[324]

Loggie's answer didn't sound false to Cusick.[325] It was the same thing she told him when he interviewed her moments before the hearing.[326]

Y. Zinser testified at Joslin's preliminary examination.

Zinser felt that he cured what he believed was Loggie's inconsistent testimony during his own.[327]

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[318] Joslin, PE Transcript, Ex67a, Bates 1337.
[319] Loggie, HrVol 10, 1893 1-15.
[320] Calleja, HrVol 9, 1699 lines 15-25..
[321] Collins, HrVol 16, 3011 lines 2-23.
[322] Joslin, Trial Transcript, Ex72d, Bates 2045; Zinser, HrVol 13, 2302 line 23 – 2304 line 12, 2370 line 6 - 2371 line 1.
[323] *Id.* at 2377 lines 12-24.
[324] *Id.* at 2302 line 23 – 2304 line 12, 2370 line 6 - 2371 line 1
[325] Cusick, HrVol 4, 779 line 12 – 780 line 9.
[326] *Id.* at 749 line 17 – 750 line 10.
[327] Zinser, HrVol 13 2399 lines 2-16.

During cross-examination, Komorn wanted to know if Loggie had been a CI previously.[328] Zinser offered to tell Komorn everything about Loggie when Joslin wasn't around:[329]

> Zinser: I will tell you everything about her, I am not going to do it here with the Defendant, you know, and the full circumstances with her.[330]

Cusick didn't object.[331] By the end of his testimony, Zinser felt that he had corrected any inconsistencies in Loggie's testimony and that there was nothing left to clarify.[332]

Z. McCully's sentencing was delayed.

McCully was an excellent CI.[333] In fact, he was the best CI with whom Calleja ever worked.[334] Fishman and Cusick stipulated to adjourn McCully's sentencing to allow McCully his right to mitigate.[335]

McCully kept an Excel spreadsheet that summarized the CI work.[336] By August 2015, six entries on the spreadsheet related to Loggie's work, including Pure Wellness.[337] Twenty four entries went to McCully.[338]

On August 6, 2015, Fishman sent Cusick the spreadsheet and also referenced the

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[328] Joslin, PE Transcript, Ex67a, Bates 1467.
[329] *Id.*
[330] *Id.*
[331] *Id.*
[332] Zinser, HrVol 13, 2344 lines 2-6.
[333] Calleja, HrVol 9, at 1619 lines 8-13; Fishman, HrVol 20, 3765 lines 16-24.
[334] Calleja, HrVol 9, 1619 lines 8-13.
[335] Fishman, HrVol 20, 3824 lines 7-24; Notes to File, Ex88b, Bates 2697-2698.
[336] Loggie, HrVol 10, 1837 lines 3-25; Fishman, HrVol 20, 3827 line 20 – 3828 line 1; Spreadsheet, Ex89ee, Bates 2854.
[337] Fishman, HrVol 3761 lines 4-15; 8/6/15 Fishman email, Ex89cc, Bates 2851.
[338] *Id.*

other list that McCully brought in when he started out as a CI.[339] Fishman did not use the spreadsheet or rely upon it.[340] He testified that Loggie "had absolutely nothing to do with Mr. McCully's cooperation."[341] Fishman intended to prepare a sentencing memorandum since McCully didn't have a deal.[342] Fishman wanted to make sure that Judge Groner knew about McCully's substantial CI work.[343] Fishman observed that McCully did "a ton of stuff" and "so much work that he did not need" Loggie's help in mitigation.[344] Fishman confirmed Loggie had nothing to do with McCully's case.[345] Nor did it matter who the judge was: McCully's substantial cooperation carried the day.[346] As Fishman put it: "It wouldn't matter if it was a cigar store Indian as the judge. [McCully] was going to get probation."[347]

On September 1, 2014, sentencing was adjourned by stipulation to January 7, 2016.[348] On September 14, 2015, Cusick noted in Legal Files that he personally had no objection to McCully getting probation due to McCully's help—not Loggie's help.[349] This is two months before the preliminary exam in Joslin.

November 24, 2015, in preparation for sentencing, Fishman contacted Cusick to get confirmation of McCully's work as a CI for sentencing memo.[350]

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[339] 8/6/15 Fishman email, Ex89cc, Bates 2851.
[340] Fishman, HrVol 20, 3755 lines 7-18.
[341] Fishman, HrVol 20, 3754 lines 17-24
[342] Fishman, HrVol 20, 3757 line 13 – 3758 line 3.
[343] *Id.*
[344] *Id.*
[345] *Id.* at 3749 line 21 – 3750 line 4, 3754 lines 17-24.
[346] *Id.* at 3765 lines 16-24.
[347] *Id.*; Note to File, Ex88b, Bates 2698.
[348] Stipulation, Ex28, Bates 495.
[349] Note to File, Ex88gg, Bates 2776
[350] Email, 89kk, Bates 2867.

Cusick doesn't recall seeing the spreadsheet.[351] There is no evidence that Cusick opened the spreadsheet or forwarded it to anyone. He spoke with Calleja who apprised him of McCully's substantial CI work.[352] Cusick then, after conversations with Rollstin and Cunningham, let Fishman know that they wouldn't object to probation in observation of McCully's substantial CI work.[353] When Fishman learned that the Attorney General's office wouldn't object to probation, he didn't see a need for a sentencing memorandum.[354]

On December 9, 2015, Fishman and Cusick met with Judge Groner in chambers to go over McCully's sentencing.[355] Rollstin explained that not objecting to probation didn't mean there was a deal:[356]

> Rollstin: [A]t the end of the day when we're in front of Judge Groner we know what [McCully's] done to mitigate, not objecting to probation is like not objecting to the time of day. Okay. I mean, Groner was going to give him probation all day along. There wasn't a quid pro quo, if you will, for us not objecting.
>
> ***
>
> Rollstin: There was not a quid pro quo for our not objecting. It was, you know, observation of what McCully had done.[357]

AA. Judge Groner sentenced McCully on January 7, 2016.

On January 7, 2016, Judge Groner sentenced McCully to one year of non-reporting probation.[358] Judge Groner put on the record that he spoke to the lawyers and that there was no sentence agreement:[359]

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[351] Cusick, HrVol 5, 991 lines 3-20.
[352] Note to File, Ex88hh, Bates 2717.
[353] Rollstin, HrVol. 19, 3579 line 10 – 3581 line 9; Notes to File, Ex88b, Bates 2698.
[354] Fishman, HrVol 20, 3830 lines 2-9.
[355] Notes to File, Ex88b, Bates 2698.
[356] Rollstin, HrVol. 19, 3579 line 10 – 3581 line 9
[357] *Id*.

The Court: The record should reflect that I've talked to the lawyers in the back about this and The People—off the record—did indicate to me there would be no objection to a probationary terms. *So there was no sentence agreement.* The Court is going to then place the Defendant on probation for

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One year non-reporting probation.[360]

BB. Berry prosecutions.

On February 2016, Cusick charged Berry in Genesee County and Livingston County for conducting a criminal enterprise and manufacturing and delivering marijuana for the dates of September 26 and October 13, 2014.[361]

In March 2016, Cusick charged Berry in Wayne County for manufacturing and delivering marijuana on August 6, 2014.[362] Berry hired Komorn to represent him.[363]

Cusick erroneously thought McCully was a res gestae witness in the Wayne County case and wanted him to testify, and he reached out to Fishman about McCully testifying.[364] Fishman didn't want to expose McCully out of concern for his safety and advised Cusick to drop the case.[365] Cusick went back to his supervisors who made the decision to dismiss the Wayne County case against Berry.[366] The case was dismissed

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[358] McCully Sentencing Transcript, Ex29, Bates 496-500.
[359] *Id.* at 499-500 (emphasis added).
[360] *Id.*
[361] Berry Genesee Charging documents, Ex42, Bates 945; Berry Livingston County charging documents, Ex43, Bates 952.
[362] Berry Wayne County Documents, Ex47, Bates 976-994.
[363] Discovery Request, Ex50, Bates 1008; Komorn, HrVol 14 2566.
[364] Cusick, HrVol 5, 820 line 4 – 821 line 10; Note to File, Ex88jj, Bates 2779; Fishman, HrVol 20, 3763 lines 1-20;
[365] *Id.*
[366] Note to File, Ex88jj, 2779; Berry Wayne County Dismissal, Ex46, Bates 975

before the preliminary examination occurred.[367] Komorn testified in this proceeding that he was aware of the dismissal before the preliminary examination.[368]

Berry had a preliminary examination in his Livingston County case at which Lowes testified.[369]

CC. Joslin "Section 8" Motion (June 27, 2016 hearing).

Meanwhile, Joslin's case continued before Judge Kenny in Wayne Circuit Court after being bound over.[370] Joslin testified at a hearing that marijuana sales were taking place at her dispensary.[371] On June 27, 2016, Komorn argued a motion for "Section 8 defense" under MCL 333.26428.[372] In preparation of this motion, Cusick filed a brief that relied on the police reports on Joslin but not Loggie's testimony from the preliminary examination.[373] Loggie testified at this hearing and admitted again that she was a CI and signed CI documentation.[374] Komorn didn't ask Loggie why she became a CI.[375] She explained that she had been to Pure Wellness about 24 times for her own personal use and stated again that Joslin shorted customers by sticking the cannabis wax to the paper.[376]

DD. Cusick became a Wayne County judge.

In 2016, Cusick received a judicial appointment to the criminal division of the

[367] Komorn, HrVol 14, 2566 lines 2-12.
[368] *Id.*
[369] Berry Preliminary Exam transcript, Ex52, Bates 1019-1125.
[370] Joslin 5/5/2016 hearing transcript, Exhibit LLL, Bates 2036-2081.
[371] *Id.*
[372] Joslin 6/27/16 motion hearing transcript, Ex69, Bates 1650-1768.
[373] People's Response to Section 8 hearing, Ex74e, Bates 2153
[374] *Id.* at 1745-1748, 1762.
[375] *Id.*
[376] *Id.* at 1766-1768.

Third Circuit Court. Before he left the Attorney General's office, Cusick put all of the case materials in banker's boxes for Dianna Collins who would take over for him.[377] For two weeks before Cusick left, the two went over the cases.[378] Collins took over his cases in late October/early November 2016.[379] Collins admitted that in all her previous criminal cases that involved CIs, she was never provided with the source card.[380]

EE. Collins prepared for the Joslin Trial.

Komorn never followed up or requested the CI documentation.[381] In August 2017, Joslin's case was headed to trial. Collins testified that she reviewed the preliminary hearing transcript.[382] She testified that she *knew* Loggie had been a CI "based on the transcripts."[383] But she also stated that she couldn't remember if the fact that Loggie was a CI was contained in the transcripts.[384]

She also testified that she didn't know when she met with Loggie on August 15, 2017, to prepare for trial, that Loggie had been a CI[385] even though this was in the transcripts.

On August 15, 2017, Collins and Calleja met with Loggie to go over her testimony for the upcoming Joslin trial.[386] When Loggie left, Calleja told Collins that it was a good thing that Loggie was working off her boyfriend's case or we wouldn't have

[377] Collins, HrVol 15, 2797 line 5 – line 20.
[378] *Id.*; *Id.* at 2799 line 17 – line 1.
[379] *Id.* at 2801 lines 3-5.
[380] *Id.* at 2844 line 3 – 2845 line 14.
[381] Komorn, Vol 12, 2225 line 18 – 2226 line 9.
[382] Collins, Vol 15, 2810 line 8 – 2811 line 2; Collins, HrVol 16, 2942 line 1 – line 15, 3025 line 22 – 3026 line 16.
[383] Collins, HrVol 16, 2942 line 1 – line 15.
[384] Collins, HrVol 15, 2810 line 8 – 2811 line 2.
[385] *Id.*
[386] Collins, HrVol 15, 2809 lines 1-14.

known about this dispensary or had a way to prosecute the dispensary."[387] Calleja's statement was false for three reasons.

First, Canton Township made WWNTF aware of Pure Wellness from a building inspection, not Loggie.[388] *Second*, the police used another CI on Pure Wellness, which was in the police reports for everyone, including Komorn and Collins, to see:[389]

> On Thursday, September 4th 2014 CI # 25540 made a controlled purchase of marijuana from the Pure Wellness marijuana dispensary located at 145 N. Haggerty Road.
>
> In the morning hours of 3-9-15; I contacted Confidential Informant #25927 (hereinafter referred to as the "CI"). The CI advised by phone that he/she could purchase marijuana from the "Pure Wellness" dispensary in Canton, MI.

And *third*, McCully no longer had a case to even work off because he was sentenced *eighteen* months earlier.[390] And when he did have a case Loggie wasn't obligated to "work the case off" under any kind of agreement because there wasn't one.[391]

Collins told her supervisors, and they told her to tell Komorn.[392] And on August 16, 2016, Collins emailed Komorn, stating "I have now learned that, in addition to the reasons for [Loggie's] cooperation that she stated on the record at the preliminary examination, her cooperation in this case was a benefit to her boyfriend who had a

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[387] Collins, HrVol 15, 2811 lines 6-12.
[388] Pure Wellness Search Warrant, Ex57, Bates 1239.
[389] WWNTF Reports, Exhibits 56, Bates 1140, 1151.
[390] McCully Sentencing Transcript, Ex29, Bates 496-500.
[391] *Kastigar* letter, Ex37, Bates 728-729; McCully Plea Hearing Transcript, Ex100, Bates 4058-4059; Fishman, HrVol 20, 3730 line 19 – 3731 line 17; 3797 lines 3-6.
[392] Collins, HrVol 15, 2828 line 16-20.

pending case at the time. I don't know his name yet…."[393]

The Joslin file contained Calleja's January 26, 2015 email mentioning Pure Wellness with the parenthetical "(Loggie on McCully's behalf)." Collins had McCully's **full name**, **telephone number**, and **that he had a pending case** in the legal file note.[394] But she didn't recognize this.

FF. Day one of the *Joslin* trial.

The next day Joslin's trial began.[395] Before calling the first witness, Komorn told Judge Kenny that he just learned that Loggie was working off a case for her boyfriend and had an "agreement."[396] He countered Collins' email by stating that Loggie's only reason for doing CI work was to help her boyfriend, "not in addition to" the ones she stated on the record.[397] Komorn stated that Loggie's answers during the preliminary examination were false.[398]

But Komorn didn't know anything about Loggie's reasons because he failed to explore them when the district court expressly gave him leeway,[399] including telling Komorn that he couldn't badger her but could ask Loggie about her motivations.[400] Even then, Komorn abandoned any inquiry about motivation and asked about weights of marijuana purchased.[401]

Collins disagreed with Komorn's characterization of Loggie's testimony as false:

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[393] Collins 8/16/27 email, Ex89aaa, Bates 2894.
[394] Email to File, Ex88u, Bates 2750-2751; Note to File, Ex88dd, Bates 2778.
[395] Joslin 8/17/17 transcript, Ex72a, Bates 1775.
[396] *Id.* at 1778.
[397] *Id.* at 1781-1782
[398] *Id.*
[399] Joslin, PE Transcript, Ex67a, Bates 1335-1336.
[400] Preliminary examination transcript, Ex67a, Bates 1372-1373.
[401] *Id 1373-74.*

> The one thing I would disagree with that he says, is one of the tings is that I do believe that the way the transcript reads, I don't consider what she did to be a lie in the sense that I think she was motivated for the reasons that she said she was to do it.
>
> She did voluntarily contact the police. So I don't think that certainly wasn't a complete answer. There's no question about that, but I don't think that anything that is in [the transcript] is a lie.[402]

Judge Kenny ordered Zinser, Loggie, Collins, and Komorn to use his jury to room to get the names, addresses, and incidents surrounding McCully.[403] Komorn asked if he could have a court reporter sitting in.[404] Judge Kenny said, no, because it would be like a deposition which wasn't allowed under the court rules.[405]

GG. The secret jury-room recording.

Loggie, Zinser, Komorn, and Collins went into the jury room attached to Judge Kenny's courtroom.[406] Komorn recorded it on his phone without telling anyone.[407] Judge Kenny later testified that Komorn's action was contemptuous.[408]

During the meeting Loggie admitted that McCully was her boyfriend and explained that he had a marijuana case similar to Joslin's.[409] She explained that there was **no agreement** and the reason why she agreed to do CI work was to help the police, which was true.[410] She explained that she wasn't involved in McCully's operation and

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[402] *Id.* at 1784.
[403] *Id.* at 1792
[404] *Id.* at 1793
[405] Kenny, HrVol 17, 3113 line 11 – 3114 line 13; Transcription of Recording, Exhibit YY, Bates 1696
[406] Komorn, HrVol 14, 2496 lines 2-12.
[407] Transcription of Recording, Exhibit YY, Bates 1696
[408] Kenny, HrVol 17, 3118 lines 2-18
[409] Transcription of Recording, Exhibit YY, Bates 1696
[410] *Id.* at 1694.

didn't know the specifics of McCully's organization, which Chris McCully confirmed.[411] She *again* stated that she was concerned with people driving from Pure Wellness high—just like she stated to Calleja when she signed her source card.[412] She openly acknowledged that she did CI work to help her boyfriend.[413] And she confirmed she never spoke to Cusick about her "agreement" and that no one told her not to mention it.[414]

Loggie confirmed her testimony during the preliminary examination was true.[415] Loggie then stated that she "**tried to be as open as possible**" during the preliminary examination to stop Joslin's threats.[416] In answer paragraph 104g(2) of the Formal Complaint, Cusick answered in the affirmative to the allegation that during the jury room interview, Loggie said she did not disclose that she signed a Source Card and worked with WWNTF to help McCully because she "felt harassed by Ms. Joslin . . ." When responding to the Formal Complaint, Cusick did not have the benefit of knowing what was in Loggie's mind. Now that Loggie has testified that that is not what she meant by the comment, Cusick's answer would have been simply to deny that allegation. Similarly, Judge Kenny, when he was finally given a transcription of the jury-room recording by defense counsel in this proceeding, testified that he interpreted

[411] Chris McCully Investigative Subpoena, Ex98, Bates 4005-4006.
[412] Calleja, HrVol 9, 1699 lines 15-25..
[413] Transcription of Recording, Exhibit YY, Bates 1696
[414] *Id.* at 1698.
[415] *Id.* at 1696.
[416] *Id.* at 1701.

Loggie's explanation as saying that she came forward to testify because she was being threatened and wanted it to stop.[417]

Zinser chimed in, explaining that Joslin had threatened Loggie on Facebook before the preliminary exam.[418] Zinser said Cusick was aware of it.[419] But later during his testimony he admitted that he never told Cusick and he couldn't explain how Cusick would have known about the threats.[420]

Loggie stated that she sent screenshots of the posts to "him," meaning Zinser.[421] She never sent screenshots to Cusick.[422]

HH. Komorn made false statements to Judge Kenny.

After the jury-room discussion, Komorn went on the record at the next hearing and stated that Loggie "admitted that she committed perjury at the preliminary exam. She admitted that she lied, she admitted she knew she was lying."[423] This was all false.[424] Komorn also accused Cusick of suborning perjury.[425]

Judge Kenny appointed counsel for Loggie and she pleaded her Fifth Amendment Right.[426] Judge Kenny testified during Cusick's disciplinary hearing, when presented with the transcription of Loggie's jury-room statements, that Komorn's

[417] Kenny, Vol 17, 3257 line 13 – 3260 line 9.
[418] Transcription of Recording, Exhibit YY, Bates 1701
[419] *Id.*
[420] Zinser, HrVol 13, 2391 line 8 – 2392 line 10.
[421] Transcription of Recording, Exhibit YY, Bates 1701; Loggie, HrVol 1954
[422] Loggie, HrVol 10, 1942 line 7 – 1943 line 23.
[423] Joslin 9/6/17 Transcript, Ex72b, Bates 1905.
[424] Transcription of Recording, Exhibit YY, Bates 1696
[425] Id. at 1914-1916.
[426] Joslin 9/6/17 Transcript, Ex72b, Bates 1905.

representations were "not accurate," "not true," and "recklessly inaccurate."[427] Judge Kenny explained that if he had known Loggie's answers, he would have had her come on the record and give all of her reasons for testifying.[428] Judge Kenny testified that his opinion during the trial that there was perjury would have been different if he had then received Loggie's jury-room statement.[429] Judge Kenny felt that Loggie was "trying to be open, trying to be truthful, but she seemed to give very literal answers."[430] Judge Kenny stated that this case was "not at all like *Karen Plants*," which was his case.[431] And Rollstin, who prosecuted Karen Plants, rejected any comparison.[432]

The Commission had seven to eight conversations with Judge Kenny and obtained two sworn statements all the while hiding the jury-room recording from him.[433] Cusick's counsel disclosed the recording to Judge Kenny days before he testified.[434] Nor did the Commission ever tell Collins that they had the recording or give her a transcription.[435]

II. Komorn's appellate briefing.

Judge Kenny convicted Joslin of the lesser charge of possession with intent to deliver, and Komorn appealed. His appeal brief was another round of misrepresentations to benefit his client. For example, Komorn told the Court of

[427] Kenny, HrVol 17, 3130 line 5 – 3136 line 23.
[428] *Id.* at 3136 lines 1-23.
[429] *Id.* at 3174 lines 7-12.
[430] *Id.* at 3136 lines 1-23.
[431] *Id.* at 3173 line 21 – 3174 line 6, 3171 lines 18-19.
[432] Rollstin, Vol 19, 3584 line 2 – 3585 line 16.
[433] Kenny, Vol 17, 3118 line 23 – 3120 line 9.
[434] *Id.*.
[435] Collins, HrVol 16, 2971 lines 9-22.

Appeals that Loggie lied about seeing Joslin come and go ten times from Pure Wellness.[436] But Loggie never provided that testimony—Zinser did.[437]

Komorn also told the Court of Appeals that Zinser agreed with him that Loggie committed perjury.[438] But this was false: Zinser said he "didn't know [Loggie's testimony] to be completely untrue" and that without exact knowledge of what the agreement was, he couldn't say "yes or no."[439] The Court of Appeals reversed Joslin's conviction on other grounds for lack of sufficient evidence.[440]

Law & Analysis

The gravamen of all of the JTC's charges is that Cusick "knowingly", "intentionally" and "purposely" committed the violations cited at Counts I-V. As explained in the Michigan Rules of Professional Conduct, "'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question." While a person's knowledge can be inferred from circumstances, the burden is on the JTC to show "actual knowledge of the fact in question." Disciplinary Counsel did not prove this. No witness testified that Cusick ever said that McCully had a deal or that he was crediting to McCully any CI work done by Loggie. To the contrary, Fishman confirms that neither he nor Cusick gave McCully any credit for Loggie's CI work. And, Judge Groner's statements that there was no deal in the sentencing transcript are unrebutted.

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[436] Komorn, HrVol 14, 2556 line 3 -17.
[437] *Id.*
[438] *Id.* at 2256 line 24 – 2559 line 10.
[439] Joslin 9/25/17 hearing, Ex72d, Bates 2045.
[440] Pallas, HrVol 15, 2658 lines 2-8.

The Michigan Supreme Court recently affirmed that the applicable definition of the term misrepresent is "to give a false or misleading representation of usu[ally] with an intent to deceive or be unfair" and that the definition of "mislead" is "to lead in a wrong direction or into a mistaken action or belief often by deliberate deceit[.]" These definitions generally include an actual intent to deceive. The Court added, "Even though there may be some instances in which a misrepresentation and a misleading statement are not based on an actual intent to deceive, we believe that, at a minimum, there must be some showing of wrongful intent. In this case, respondent merely speculated as to her intent, and other than the possibility that the guess was self-serving, which the Commission acknowledged and rejected[.]" See *In re Green*, CITE, quoting *In re Gorcyca*, 500 Mich 588, 639; 902 NW2d 828 (2017), quoting Merriam-Webster's Collegiate Dictionary (11th ed).

A. The suborning perjury charges fail (Counts I and II).

The subornation charges clearly and absolutely fail. This is finally conceded by Disciplinary Counsel (in footnote 12 buried at page 23 of their Proposed Findings of Fact and Conclusions of Law).[441] It is troubling that Disciplinary Counsel relied on the false representations of Komorn, well aware they were false, and that these counts were ever authorized, presented, and argued.[442]

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[441] Master, p3.

[442] During Closing Argument counsel argued for a finding of perjury at no less than 7 separate times. These include as an example, Disciplinary Counsel argued, "Counsel spoke a lot about subornation of perjury. [Respondent] stood by while perjury happened. He didn't correct it. He didn't check on it afterwards. He never disclosed any of the information on McCully." And, "In light of counsel's stressing the subornation of perjury, read that complaint, read the allegations that are under that heading. I think we have established this case." Tr, 3932, 4006-4007, 4015, and 4016.

Similarly, the Commission has failed to establish any facts supporting its charge of suborning perjury during the Circuit Court proceedings in *Joslin*. The Master found this charge to be abandoned.[443]

B. The withholding charge fails (Count III).

The Commission admitted on May 1 during oral argument on the motions that Michigan does not impose a greater ethical burden on prosecutors than the United States Constitution does.[444]

Nevertheless, the Commission charges Cusick with a *Brady* withholding violation for failing to disclose to that Cusick offered McCully a reduced sentence in exchange for CI work. This fails.

1. McCully's right to mitigation didn't need to be disclosed.

The evidence confirmed that Cusick never offered McCully a reduced sentence in exchange for CI work. McCully's plea hearing transcript,[445] McCully's plea hearing form,[446] McCully's *Kastigar* letter,[447] the April 8, 2014 email from Cusick to Calleja,[448] Cusick's April 3, 2014 Note to File,[449] McCully's sentencing transcript, Fishman's testimony,[450] and Rollstin's testimony[451] all confirmed that Cusick never offered McCully a reduced sentence in exchange for CI work. There was never any agreement that **obligated** McCully to do anything.

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[443] Master, p10.
[444] May 1, 2023 Motion Hearing Transcript, 63-64.
[445] McCully Plea Hearing Transcript, Ex100, Bates 4058-4059.
[446] McCully Plea form, Ex27, Bates 491; Rollstin, HrVol 3495.
[447] *Kastigar* letter, Ex37, Bates 728-729.
[448] 4/8/14 email thread between Cusick and Calleja, Exhibit MM, Bates 1662.
[449] Notes to file, Ex88l, Bates 2716.
[450] Fishman, HrVol 20, 3757 line 13 – 3758 line 3
[451] Rollstin, HrVol 19 3579 line 7 – 3581 line 7.

Fishman testified he stopped negotiating with Cusick and decided to advise his client to plead on the nose. Fishman testified that he advised McCully to do CI work under his right to mitigate to try and convince Judge Groner to give a lenient sentence. Fishman explained that McCully's work was done with the hope of leniency from the Court.

Michigan holds that a prosecutor has no obligation to disclose future possibility of leniency. *People v Atkins*, 397 Mich 163, 173 (1976).

In *Atkins*, the CI was charged with breaking and entering. He was never promised leniency but still chose to do CI work before his sentencing. *Id.* at 168. The CI testified against one of his targets (Atkins), after which the prosecutor dismissed the CI's breaking-and-entering charge as a reward for the CI's help. *Id.* at 168-169.

The issue in *Atkins* was whether the prosecutor was required to disclose that possibility of future leniency during Atkins' trial. *Atkins* held that if a CI was granted immunity or other leniency **to secure** the CI's testimony, then that had to be disclosed to the jury. *Id.* at 173. But future possibilities of leniency did not require disclosure because it could be viewed as vouching for the witness's credibility—i.e., that they were making good of their life and should be believed:

> Indeed, if a prosecutor were required to volunteer that, *although there was no agreement*, he intended to recommend some sort of consideration for a witness because the witness was testifying in this and other cases or had corrected his past misdeeds, could this not be viewed as vouching for that witness' credibility? The focus of required disclosure is not on factors which may motivate a prosecutor in dealing subsequently with a witness, but rather on facts which may motivate the witness in giving certain testimony.

C. The res gestae charge fails (Count IV).

McCully wasn't a res gestae witness in *Berry*. So Cusick didn't need to disclose him. This charge should be dismissed.

Res gestae means "the thing done" in Latin. A res gestae witness is a person who witnessed first-hand some event in the continuum of the criminal transaction **whose testimony would aid in developing full disclosure of the facts, i.e., the thing done, at trial**. *People v Long*, 246 Mich App 582, 585 (2001). Under MCL 767.40a, a prosecutor needs to disclose all res gestae witnesses known to the prosecutor. The purpose of the statute—providing notice to the accused of potential witnesses—is satisfied when the individual testifies at a preliminary examination, even when the witness is not disclosed in an information. *People v Callon*, 256 Mich App 312, 327 (2003).

But not all eye-witnesses are res gestae witnesses. *People v Jackson*, 30 Mich App 438 (1971). *Jackson* held that if the eye-witness's testimony would be merely cumulative to other testimony at trial, then the eye-witness's testimony wouldn't aid in developing the facts at the trial and therefore the eyewitness didn't constitute a res gestae witness. *Id.*

In *Jackson*, the defendant robbed a Secretary of State's office at gun-point. Six people witnessed the armed robbery. *Id.* at 439. But the prosecution only indorsed three of those witnesses as res gestae witnesses. The defendant claimed the prosecutor erred by not naming all six witnesses. *Id.* at 440. *Jackson* disagreed. It held that just because the witnesses were present didn't mean that their testimony would develop the res gestae at trial. *Id.*

People v Jones, 52 Mich App 522, 527 (1974) reiterated *Jackson's* holding in describing a prosecutor's duties: "Only if their testimony casts some light upon the res gestae do such persons become res gestae witnesses and therefore the subject of the prosecutor's duty to indorse and produce." *Id.*

People v Parades-Meza, unpublished per curiam opinion of the Court of Appeals, issued July 8, 2010 (Docket No. 291067) applied this rule in the context of a CI who witnessed the same events as two undercover officers. *Parades-Meza* held that the CI was not a res gestae witness, even though he was an eyewitness: "[T]here was no evidence presented that the CI witnessed any events leading to defendant's arrest that were **not also** witnessed by agents Schmidt and Defreitas." *Id.* at 2. Thus, "**the CI's testimony would not have aided in developing a full disclosure of the facts because other witnesses addressed anything the CI would have testified to** in the continuum of the criminal transaction**."** *Id.* The same result applies here. **(Tab A)**

Here, McCully witnessed the *same* events as Detective Lowes on August 6, 2014, and September 5, 2014. And he wasn't present for the September 24, 2014, or October 13, 2014 dates when Lowes went to Berry's Livingston County operation. So Lowes, who was present at every event, could address anything in the continuum of the criminal transaction. McCully's testimony wouldn't have cast any light on what happened and would have been merely cumulative. *Jones*, 52 Mich App at 527. Although the Wayne County *Berry* case was dismissed, Komorn received *all* police reports regarding the investigation during his representation of Berry in Livingston

County, including reports that identified the use of a CI in Detroit on August 6, 2014.[452] He in fact received more discovery in the Livingston County case than what he was entitled. Further, Cusick acknowledged during the preliminary examination in the *Berry* Livingston County case that he dismissed the Wayne County *Berry* case because he believed the identity of the CI would need to be disclosed.[453] So, Komorn knew there was a CI. He could have filed a motion to compel the identification of a confidential informant, but did not do so.

Nevertheless, McCully's testimony wouldn't have aided in developing the facts at trial. And he wasn't a res gestae witness. *Jackson*, 30 Mich App at 440; *Long*, 246 Mich App at 585; *Paredes-Meza*, unpub op at 2. Cusick had no duty to disclose him. MCL 767.40a.

Disciplinary Counsel also argue that McCully was a res gestae witness in the *Berry* Detroit case. This also fails.

What constitutes a res gestae witness is a matter of law. McCully wasn't a res gestae witness because his testimony wouldn't have aided in developing the facts at trial. Lowes could address anything that McCully would have testified to in the continuum of the criminal transaction. *Jackson*, 30 Mich App at 440; *Paredes-Meza*, unpub op at 2.

D. The Misrepresentations to the Commission charge fails (Count V).

Count V should be dismissed because Cusick never misrepresented any fact to

[452] Komorn, HrVol 14, 2141 lines 15-25; 2142 lines 1-9; 2143 lines 4-10.
[453] Cusick, HrVol 4, 699 line 10 – 700 line 19.

the Commission. All of Cusick's answers in the May 10, 2021 Request for Comments and 28-Day letter were truthful. Cusick provided truthful answers throughout this process. Those answers are corroborated by the testimony of Judge Kenny, Fishman, Rollstin, among others, as well as the underlying sentencing and plea hearing transcripts, and other admitted evidence. Disciplinary Counsel simply doesn't like Cusick's answers because his answers don't match the false narrative they adopted from Komorn, who embellished misinformation from Calleja to benefit his client, and perpetuated in their prosecution of this case.

Conclusion

The Master listened to Cusick's testimony for seven days. Cusick's candor was on full display, and he was in the position to evaluate Cusick's truthfulness and credibility as compared to Disciplinary Counsel's main witnesses: Komorn and Calleja. On close review of the facts under the case law, his decision that Cusick committed no ethical violations is the only fair and just result. All charges should be dismissed.

Respectfully submitted,

COLLINS EINHORN FARRELL PC

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October 23, 2023

STATE OF MICHIGAN
BEFORE THE MICHIGAN JUDICIAL TENURE COMMISSION

Complaint against

Honorable Paul J. Cusick
Third Judicial Circuit Court
1441 St. Antoine
Detroit, Michigan, 48226

MSC No. 165050
Formal Complaint No. 104

JUDICIAL TENURE COMMISSION
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PROOF OF SERVICE

Sherrie Marinkovich being sworn, states that on ***October 23, 2023,*** I served **RESPONDENT PAUL J. CUSICK'S BRIEF IN SUPPORT OF THE JUDICAL TENURE COMISSION ADOPTION OF MASTER'S FINDINGS AND REPORT** and this Proof of Service via email:

Cass Swastek Administrative Counsel Michigan Judicial Tenure Commission SwastekC@courts.mi.gov	Margaret Rynier Disciplinary Counsel Michigan Judicial Tenure Commission RynierM@courts.mi.gov
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/s/ Sherrie L. Marinkovich
Sherrie L. Marinkovich

TAB A

2010 WL 2696652
Only the Westlaw citation is currently available.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff–Appellee,
v.
Pedro PAREDES–MEZA, Defendant–Appellant.

Docket No. 291067.
|
July 8, 2010.

Wayne Circuit Court; LC No. 08–012357.

Before: METER, P.J., and SERVITTO and BECKERING, JJ.

Opinion

PER CURIAM.

***1** Defendant appeals as of right his jury trial conviction of possession with intent to deliver 50 to 449 grams of cocaine, MCL 333.7401(2)(a)(iii). He was sentenced to 2 to 20 years' imprisonment for the conviction. We affirm.

Defendant's first issue on appeal is that the trial court erred in refusing to order an *in camera* review of the testimony of the confidential informant ("CI") or the CI's file. We disagree.

A trial court's decision regarding whether to order the production of a confidential informant is reviewed for an abuse of discretion. *People v. Poindexter,* 90 Mich.App 599, 608; 282 NW2d 411 (1979). An abuse of discretion occurs only when the court chooses an outcome outside the principled range of outcomes. *People v. Miller,* 482 Mich. 540, 544; 759 NW2d 850 (2008).

Generally, a prosecutor is not required to disclose the identity or testimony of confidential informants as a result of the "informer's privilege." *People v. Sammons,* 191 Mich.App 351, 368; 478 NW2d 901 (1991). However, if the defendant demonstrates a possible need for the informant's testimony, the trial court should order the informant produced and conduct an *in camera* hearing in order to determine whether he could offer any testimony helpful to the defense. MCR 6.201(C); *People v. Underwood,* 447 Mich. 695, 706; 526 NW2d 903 (1994). Determining whether there is a need depends on the circumstances of the case. *Underwood,* 447 Mich. at 705, citing *Roviaro v. United States,* 353 U.S. 53; 77 S Ct 623; 1 L.Ed.2d 639 (1957). To determine the need, a court should consider "the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors ." *Underwood,* 447 Mich. at 705, citing *Roviaro,* 353 U.S. at 62.

Defendant argues that the testimony of the CI could corroborate defendant's belief that the alleged recording between the CI and defendant occurred between the CI and someone other than defendant. And, furthermore, that the CI could support defendant's argument that he was merely present in the vehicle and did not possess the cocaine. Both arguments ignore the fact that the trial court listened to the tape-recorded conversation and did not find it exculpatory. In fact, the trial court noted that at least once during the recording, the CI refers to the person with whom he is talking as "Pedro," defendant's first name. Moreover, defendant has provided no evidence that the conversation was with someone other than him or that the CI's testimony would show that defendant was merely present when the drugs were found. In fact, Department of Homeland Security Agent Jeffrey Schmidt testified that when he approached the vehicle in which defendant was a passenger, he observed defendant shoving a bag of what turned out to be cocaine into the glove compartment of the vehicle. There is direct evidence, through the testimony of Schmidt, that defendant possessed the cocaine. The trial court did not abuse its discretion in refusing to hear the *in camera* testimony of the CI or to do an *in camera* review of the CI's file.

***2** Defendant's next issue on appeal is that he was denied a fair trial where the trial court refused to order the prosecution to disclose the identity of the CI, despite the fact that the CI was actually a *res gestae* witness, given that he was present when defendant was arrested. We disagree. A trial court's decision regarding whether to order the production of a confidential informant is reviewed for an abuse of discretion. *Poindexter,* 90 Mich.App at 608. Constitutional issues are reviewed de novo on appeal. *People v. Gillam,* 479 Mich. 253, 260; 734 NW2d 585 (2007).

A prosecutor is not obligated to produce *res gestae* witnesses, but has a continuing duty to advise the defense of all known *res gestae* witnesses, and to provide reasonable assistance to the defense in locating witnesses upon request of the defense. MCL 767.40a; *People v. Kevorkian,* 248 Mich.App 373, 441; 639 NW2d 291 (2001).[1] A *res gestae* witness is a person who witnessed some event in the continuum of the criminal transaction whose testimony would aid in developing a full disclosure of the facts at trial. *People v. Long,* 246 Mich.App 582, 585; 633 NW2d 843 (2001). The purpose of the requirement that the prosecutor list known *res gestae* witnesses is to notify the defendant of the existence of the witnesses and their *res gestae* status. *People v. Gadomski,* 232 Mich.App 24, 36; 592 NW2d 75 (1998). However, there is no requirement that the prosecutor use due diligence to discover the names of witnesses. *Gadomski,* 232 Mich.App at 36.

As noted above, a prosecutor need not disclose the identity of confidential informants. *People v. Cadle,* 204 Mich.App 646, 650; 516 NW2d 520 (1994), overruled in part on other grounds *People v. Perry,* 460 Mich. 55; 594 NW2d 477 (1999). However, a prosecutor should disclose the identity of an informant if the disclosure of an informant's identity or the contents of his communication is relevant and helpful to the defense, or is essential to a fair determination of the case. *Cadle,* 204 Mich.App at 650.

Based on the testimony of agent Schmidt, defendant argues that the CI was a *res gestae* witness whose identity should have been disclosed to him. We disagree. First, there is no evidence that the CI was a *res gestae* witness. Agent Schmidt testified that the CI was in the car with him and Immigration and Customs Enforcement Agent Leslie Defreitas, but there was no evidence presented that the CI witnessed any events leading to defendant's arrest that were not also witnessed by agents Schmidt and Defreitas. Thus, the CI's testimony would not have aided in developing a full disclosure of the facts because other witnesses addressed anything the CI would have testified to in the continuum of the criminal transaction. Moreover, once again, based on the 1986 amendments to MCL 767.40a, the prosecution is not required to produce all *res gestae* witnesses for the defendant, but is only required to identify known *res gestae* witnesses and those witnesses it intends to call at trial, and to provide reasonable assistance to defendant to find requested witnesses. *Burwick,* 450 Mich. at 289. The CI in this case was not being called by the prosecution and is protected by the informer's privilege. As the trial court found, the disclosure was not required because it was not helpful to the defense and was not essential to a fair determination of the case. Therefore, we conclude the prosecution did not have a duty to disclose the CI's identity to defendant. Defendant's argument that disclosure is required because the CI was a *res gestae* witness is without merit.

***3** Defendant also argues that the trial court erred in allowing agent Defreitas to testify regarding impermissible hearsay. We disagree. Generally, review of evidentiary decisions is for an abuse of discretion. *People v. Starr,* 457 Mich. 490, 491; 577 NW2d 673 (1998). An abuse of discretion occurs only when the court chooses an outcome outside the principled range of outcomes. *Miller,* 482 Mich. at 544.

Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. MRE 801(c); *People v. Breeding,* 284 Mich.App 471, 487; 772 NW2d 810 (2009). Hearsay is inadmissible unless it falls within an exception provided in the rules of evidence. MRE 802; *People v. Stamper,* 480 Mich. 1, 3; 742 NW2d 607 (2007). A statement not offered for the truth of its contents is not hearsay. MRE 801(c); *People v. Mesik (On Reconsideration),* 285 Mich.App 535, 540; 775 NW2d 857 (2009). A statement offered to prove an effect on the listener, rather than its truth, is admissible, when the effect is relevant. *People v. Fisher,* 449 Mich. 441, 449; 537 NW2d 577 (1995).

In this case, Defreitas testified, in response to a question about why he was at a specific location on July 28, 2008, “I had received information about a narcotics transaction.” He then went on to detail what he did after reaching the location. Agent Defreitas's testimony did not amount to impermissible hearsay. He did not testify to exactly what the CI stated. Moreover, the testimony was not offered to prove the truth of the matter asserted but, instead, was offered to explain why Defreitas had gone to a certain area of Detroit and set up surveillance around defendant's home. Therefore, the trial court did not abuse its discretion in admitting the statement into evidence.

Defendant further argues that the trial court clearly erred in denying defendant's motion to suppress seized evidence, as agents Schmidt and Defreitas initiated an illegal stop of the vehicle in which defendant was a passenger. We disagree.

A trial court's findings of fact regarding a motion to suppress evidence are reviewed for clear error, but the application of constitutional standards regarding searches and seizures to

essentially uncontested facts is entitled to less deference, and the trial court's ultimate ruling is reviewed de novo. *People v. Williams,* 472 Mich. 308, 313; 696 NW2d 636 (2005). A finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake was made. *People v. Milstead,* 250 Mich.App 391, 397; 648 NW2d 648 (2002).

Both the United States Constitution and the Michigan Constitution guarantee the right against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. The Michigan Constitution is generally construed to provide the same protection as the federal constitution in this regard. *People v. Chowdhury,* 285 Mich.App 509, 516; 775 NW2d 845 (2009). Whether a search or seizure is reasonable depends upon the circumstances of each case. *People v. Brzezinski,* 243 Mich.App 431, 433; 622 NW2d 528 (2000). Generally, a search conducted without a warrant is unreasonable unless there was both probable cause and exigent circumstances that established an exception to the warrant requirement. *Brzezinski,* 243 Mich.App at 433.

***4** Under certain circumstances, an officer may stop and briefly detain a person on the basis of reasonable suspicion that criminal activity may be occurring. *People v. Oliver,* 464 Mich. 184, 193; 627 NW2d 297 (2001), citing *Terry v. Ohio,* 392 U.S. 1, 30–31; 88 S Ct 1868, 20 L.Ed.2d 889 (1968). Fewer facts are needed to establish reasonable suspicion when a person is in a moving vehicle rather than in a house, but a minimum threshold of reasonable suspicion must be established to justify an investigatory stop, even if a person is in a vehicle or on the street. *Oliver,* 464 Mich. at 192. A police officer may make a stop on the basis of information provided by a confidential informant, rather than on the basis of personal observation, if the information is sufficiently reliable. *People v. Tooks,* 403 Mich. 568, 576; 271 NW2d 503 (1978), citing *Adams v. Williams,* 407 U.S. 143; 92 S Ct 1921; 32 L.Ed.2d 612 (1972). With regard to whether information from an anonymous informant has sufficient indicia of reliability to allow police officers to make an investigatory stop, a court should consider the reliability of the particular informant, the nature of the particular information given, and the reliability of the suspicion. *People v. Horton,* 283 Mich.App 105, 109; 767 NW2d 672 (2009).

Defendant argues that the CI here did not provide reasonable suspicion because he was not a known informant, and agents Defreitas and Schmidt prior to their effectuating the stop of the vehicle did not corroborate the information he provided. We disagree.

Agent Defreitas testified at the preliminary examination that he received information from the CI that defendant would be leaving his residence at 2420 Livernois Avenue and proceeding to an address to pick up a large quantity of cocaine. Agent Defreitas further testified that he took steps to verify the information from the CI. He verified defendant's name and the address given to him by the CI. Moreover, Defreitas conducted surveillance on the address given by the CI and found a vehicle belonging to defendant, which the CI correctly stated was a white Chevy Avalanche.[2] Agent Defreitas also testified that he had tape-recorded conversations between the CI and defendant, which further corroborated the information from the CI. The trial court listened to these conversations through an *in camera* review and indicated that the CI referred to the person he was speaking with as "Pedro," defendant's first name, and that there was no exculpatory evidence in the tape recording. Agent Defreitas further testified that the surveillance teams saw defendant leave his residence in a vehicle shortly after the CI had told agent Defreitas defendant would be leaving. Another agent saw someone from the vehicle enter a residence on Morrell Street. Agents Defreitas and Schmidt saw the same vehicle, empty, parked outside of a residence on Morrell Street. They later saw defendant again as a passenger in the same vehicle, at which time agents Defreitas and Schmidt effectuated a stop.

***5** Defreitas and Schmidt had a reasonable suspicion that a crime was occurring, sufficient to stop the vehicle in which defendant was a passenger. Again, the CI correctly gave them the name and address of defendant and the make and model of defendant's car. Moreover, the CI told the agents when defendant would be leaving his home and for what purpose. The information provided by the CI was further corroborated by tape-recorded conversations between defendant and the CI. Defendant's characterization of the evidence, that "[t]his informant could have been anyone playing a practical joke intended to harass and embarrass [defendant], or this informant could have been merely trying to get [defendant] in trouble with INS," does not comport with the evidence presented at the preliminary examination. The CI gave Defreitas and Schmidt significant information, all of which was verified prior to the stop. It did not merely amount to a practical joke and, given that defendant had legal status in the United States, it was not intended to get defendant in trouble with ICE. Therefore, the trial court did not err in denying defendant's motion to suppress the evidence.

Finally, defendant argues that the trial court denied defendant a fair trial when it refused defendant's discovery request for the tape-recorded conversation. We disagree. Constitutional issues are reviewed de novo on appeal. *Gillam,* 479 Mich. at 260.

There is no general constitutional right to discovery in a criminal case. *People v. Stanaway,* 446 Mich. 643, 664; 521 NW2d 557 (1994). However, defendants have a due process right to obtain evidence in the prosecutor's possession, which is favorable to the defendant and material to guilt or punishment. US Const, Am XIV; Const 1963, art 1, § 17; *Stanaway,* 446 Mich. at 666, citing *Brady v. Maryland,* 373 U.S. 83, 87; 83 S Ct 1194; 10 L.Ed.2d 215 (1963). Exculpatory information is material if it would raise a reasonable doubt about the defendant's guilt. *Stanaway,* 446 Mich. at 666. The prosecutor must disclose such evidence to the defendant regardless of any request for disclosure. *Id.*

In order to establish a *Brady* violation, "a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different ." *People v. Lester,* 232 Mich.App 262, 281; 591 NW2d 267 (1998). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Lester,* 232 Mich.App at 281, citing *United States v. Bagley,* 473 U.S. 667, 682; 105 S Ct 3375; 87 L.Ed.2d 481 (1985).

Defendant has failed to show there was a *Brady* violation. In particular, defendant has failed to show that the tape-recorded conversation with the CI contained exculpatory evidence. In fact, the trial court determined, after performing an *in camera* review of the recording, that it did not contain exculpatory material and may have contained inculpatory material. As a result, defendant cannot show a reasonable probability that the outcome of the trial would have been different if he had received the tape-recorded evidence. Therefore, no *Brady* violation occurred.

***6** Defendant further argues that Michigan allows for liberal discovery, which means that the trial court should have allowed defendant access to potentially inculpatory material, i.e., the tape-recorded conversation. MCR 6.201 governs discovery in criminal cases. Under MCR 6.201, while there is some mandatory discovery, not all information is discoverable. MCR 6.201(C). In fact, evidence that is protected under the constitution, a statute or a privilege is not discoverable, unless it is reasonably probable that the evidence is necessary for the defense. MCR 6.201(C)(1) and (C)(2). As noted above, evidence from a confidential informant is protected by the informer's privilege. *Sammons,* 191 Mich.App at 368.

In this case, the tape-recording was privileged and defendant has failed to show that the tape-recording was necessary for his defense. In fact, based on the *in camera* review by the trial court, it appears that the tape-recording might have been damaging to defendant's defense. Therefore, the trial court did not err in refusing to produce the tape-recording.

Affirmed.

All Citations

Not Reported in N.W.2d, 2010 WL 2696652

Footnotes

1 Prior to the amendments in 1986, MCL 767.40a was interpreted as requiring the prosecution to endorse and produce all *res gestae* witnesses. *People v. Burwick,* 450 Mich. 281, 287; 537 NW2d 813 (1995). After the amendments, the prosecutor no longer has a duty to produce *res gestae* witnesses. *Burwick,* 450 Mich. at 289. Instead, he or she has an obligation to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request. *Burwick,* 450 Mich. at 289. The Michigan Supreme Court in *Burwick* held that with 1986 amendments" [t]he Legislature has thus eliminated the prosecutor's burden to locate, endorse, and produce unknown persons who might be *res gestae* witnesses and has addressed defense concerns to require the prosecution to give initial and continuing notice of all known *res gestae* witnesses, identify witnesses the prosecutor intends to produce, and provide law enforcement assistance to investigate and produce witnesses the defense requests." *Burwick,* 450 Mich. at 289.

2 The white Chevy Avalanche belongs to defendant, but it was not the vehicle that was stopped by Defreitas and Schmidt. That vehicle was a green Windstar van. It is unclear from the record who owns that vehicle.

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