No. 3-20-0121

In the
Appellate Court of Illinois
Third Judicial District

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee

v.

ISMAEL GOMEZ-RAMIREZ,

Defendant

(AMITA HEALTH ADVENTIST MEDICAL CENTER, BOLINGBROOK and ALEXIAN BROTHERS-AHS MIDWEST REGION HEALTH CO.,

Contemnors-Appellants)

Appeal from the Circuit Court for the Twelfth Judicial Circuit, Will County,
Case No. 2018 CF 1946
The Honorable Edward A. Burmila, Jr., Judge Presiding.

BRIEF OF *AMICI CURIAE* CHICAGO APPLESEED AND THE CHICAGO COUNCIL OF LAWYERS – THE COLLABORATION FOR JUSTICE

Joseph A. Roselius- ARDC #6300703
Michael Geller - ARDC #6305999
Eleni Christou - ARDC # 6332555
DLA PIPER LLP (US)
444 West Lake Street, Suite 900
Chicago, IL 60606
T 312.368.4000
E joseph.roselius@us.dlapiper.com
E michael.geller@us.dlapiper.com
E eleni.christou@us.dlapiper.com

I. POINTS AND AUTHORITIES

II. INTEREST OF AMICI CURIAE

Chicago Appleseed and the Chicago Council of Lawyers – the Collaboration for Justice – work to promote equity and full access to justice for all in the courts and the agencies which operate within them. Chicago Appleseed is a 501(c)(3) research and advocacy organization. The Chicago Council of Lawyers is a non-partisan public interest bar association. The Collaboration for Justice is a joint initiative of Chicago Appleseed and the Chicago Council of Lawyers which promotes systemic reforms addressing the intersection of social justice, racial justice, and economic justice with court systems. In this work, the Collaboration for Justice monitors the State's Attorney's Office and issues reports on its practices. The policies and practices of the State's Attorney's Office have a critical impact on the quality of justice within our courts. The Collaboration for Justice's history of examining the State's Attorney's Office and working with them to generate reforms gives rise to our brief on the issues raised by the State's Attorney's conduct in asserting Defendant's rights in this case.

III. ARGUMENT

In this case, the State relies on tortured, legally unsupported readings of two cases that have long been used to protect criminal defendants' rights to trample on those same rights. *Brady v. Maryland*, 373 U.S. 83 (1963), and *People v. Cochran*, 313 Ill. 508 (1924), are longstanding bastions against prosecutorial misconduct. Here, the State twists these cases to justify an improper search into a crime victim's records.

Brady requires that prosecutors share with the defense exculpatory evidence in the State's possession. 373 U.S. at 87. Here, the State seeks to use *Brady* to go on a fishing expedition through a crime victim's privileged medical records – without notice to the crime victim and over the objection of the medical provider – based on mere supposition that those records might contain exculpatory evidence (in addition to whatever inculpatory evidence the State may find).

Cochran is, at bottom, a case about prosecutorial honesty and integrity. Here, the State takes a single quote out of context, see 313 Ill. at 526, to suggest that the State should act on behalf of an unwilling defendant to seek out information that may or may not incriminate him. *Cochran* cannot and should not be distorted like this.

The Collaboration for Justice respectfully submits this *amicus* brief to urge the Court not to endorse the State's actions and, specifically, its improper reading of *Brady* and *Cochran*.

A. *Brady* ensures fairness by preventing asymmetrical knowledge; *Brady* does not grant the State the right to fish for inculpatory evidence in the guise of searching for exculpatory evidence.

Brady is rooted in preserving the fairness of criminal trials. *Brady*, 373 U.S. at 87–88 (citing *Mooney v. Holohan*, 294 U.S. 103 (1935)). *Brady* requires prosecutors share material, exculpatory evidence with the defense. *Id.* at 87. The rule applies to information known to the prosecutor but "unknown to the defense" because asymmetrical access to information serves as an obstacle to justice. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). Where a defendant knows of, or is expected to, discover information, it is not *Brady* material. *Boss v. Pierce,* 263 F.3d 734, 743 (7th Cir. 2001) (holding that "information the defense can be expected to discover" was not *Brady* material, as compared to material the defense "cannot be expected to discover" or was "unknown to the defense").

Brady addresses the imbalance of access to information, "recognizing that the prosecution has in its links to law enforcement agencies, an advantage in the acquisition of evidence." *People v. Ruffalo*, 69 Ill. App. 3d 532, 536 (1st Dist. 1979). *Brady* is a "manifestation of a principle that prosecutors must expose material weaknesses in their positions" in recognition of the prosecution's role of seeking out justice rather than convictions. *Long v. Pfister*, 874 F.3d 544, 549 (7th Cir. 2017) (*en banc*) (citing *Strickler v. Greene,* 527 U.S. 263, 281 (1999)).

Brady serves as a cornerstone of due process, ensuring that prosecutors engaged in the adversarial nature of litigation do not work "a miscarriage of justice." *United States v. Bagley*, 473 U.S. 667, 675 (1985); see also *id.* at 685–

96 (Stevens, J., dissenting) (stating that the purpose of *Brady* is "to give the criminal defendant the right to receive from the prosecutor, and the prosecutor the affirmative duty to turn over to the defendant, all information known to the government that might reasonably be considered favorable to the defendant's case."). The doctrine does not justify obtaining or searching privileged information.

In this case, the State seeks the victim's medical records precisely because the information contained in the records is not known to them. This indicates that *Brady* does not apply here for two reasons. First, the evidence sought is not *Brady* evidence because it is not known to or in possession of the prosecutor. Second, as a consequence, there is no information asymmetry for *Brady* to remedy. If the State already had the medical records and they included exculpatory evidence, *Brady* would compel disclosure. But the converse is not true. *Brady* does not compel discovery simply because the records might contain exculpatory evidence. Accordingly, *Brady* on its own terms does not apply to this case.

B. Allowing the State to use *Brady* to overcome privilege invites pretextual investigations.

The fundamental purpose of *Brady* is to balance an existing information asymmetry in criminal cases. Where no such asymmetry exists, as in this case, the potential for its abuse as a pretext becomes clear. The State claimed that, under *Brady*, it was obligated to "attempt to obtain [the] records [at issue]." (R

15/12–19, A 101; R 17/16–17, A 103). The State had no such obligation for several reasons.

First, the medical records in question are not *Brady* evidence. *Brady* evidence is evidence that is known to the prosecution but unknown to the defense. *Boss,* 263 F.3d at 743. *Brady* evidence includes not only what is in the possession of the prosecutors, but also includes all evidence known to others working on the government's behalf in the case. *Kyles*, 514 U.S. at 437. This includes police and other government agencies involved in the prosecution. *Crivens v. Roth,* 172 F.3d 991, 997–998 (7th Cir. 1999). Thus, prosecutors have a duty to "learn of favorable evidence known to other government actors." *People v. Beaman,* 229 Ill. 2d 56, 73 (2008). Even so, this does not extend to third parties outside of government. *United States v. Hach*, 162 F.3d 937, 947 (7th Cir. 1998). Furthermore, mere speculation that requested items may contain *Brady* material is not sufficient to require disclosure. *United States v. Presser,* 844 F.2d 1275, 1282 (6th Cir. 1988).

To be sure, *Brady* and its progeny do not create an affirmative duty for the prosecution to discover information which it does not possess. *United States v. Driver*, 798 F.2d 248, 251–52 (7th Cir. 1986) (citing *United States v. Beaver*, 524 F.2d 963, 966 (5th Cir. 1975), *cert. denied*, 425 U.S. 905 (1976)). Of course, that does not mean that the prosecutors can hide their heads in the sand if they are aware of specific exculpatory evidence in their files or the files of agencies they are working with. This notwithstanding, it is often fatal to a

Brady claim when a defendant fails to show that records are within the government's possession. *Hach*, 162 F.3d at 947 (citing *United States v. Skorniak*, 59 F.3d 750, 755–56 (8th Cir. 1995)) (stating that the prosecution has "no obligation to seek out such information from third parties").

On the other hand, *Brady* and its progeny do not – as the State claims and circuit court held – create "a duty to . . . ferret out" exculpatory and other information. (R 11/8–9, A 97; R 31/21–32/1, A 117–18.). Thus, the disclosure requirement for the prosecution is strong but is often limited (and subject to abuse) depending upon the location of the material. See, *e.g.*, Hilary Oran, *Does Brady Have Byte? Adapting Constitutional Disclosure for the Digital Age*, 50 Colum. J.L. & Soc. Probs. 97, 120–25 (2016) (discussing how prosecutors need not review large discovery productions for *Brady* material as long as *Brady* material is not intentionally hidden)); Leslie Kuhn Thayer, *The Exclusive Control Requirement: Striking Another Blow to the Brady Doctrine*, 2011 Wis. L. Rev. 1027, 1036–38 (2011) (discussing how *Brady* material is often limited to evidence "within the exclusive control or possession of the government").

Second, and most important, the State's justification is simply unrealistic. The *Brady* doctrine unequivocally "does not require the government to gather information or conduct an investigation of the defendant's behalf." *United States v. Tadros*, 310 F.3d 999, 1005 (7th Cir. 2002); see also *Howard v. Lykowski*, 502 F. App'x 581, 583 (7th Cir. 2013) ("under *Brady* itself the state has no duty to search for exculpatory evidence");

United States v. West, 790 F. Supp. 2d 673, 678 (N.D. Ill. 2011) ("*Brady* does not require the government to conduct an investigation or gather information on defendants' behalf.").

The theory that the medical records potentially contained exculpatory information was raised by the defendant's counsel, who stated that reports indicated that the victim was drinking, "so her BAC could be in those medical records that could be *Brady* material." (R 19/11–14, A 105). There is no asymmetry of information here. The defendant not only knew that the exculpatory information may be found in the medical records, it is the party that first raised this possibility.

Indeed, the State hinted at its actual motive for seeking the medical records – to search for new inculpatory evidence – by saying to the circuit court, "assuming that there is relevant information, whether it's inculpatory or exculpatory, those records are then turned over to the attorneys." (R 15/21–24).

The Circuit Court utterly failed to justify its ruling or consider any of the above. The Circuit Court's order on the motion to quash the subpoena contains only a vague reference to Section 8 of the Illinois Constitution and the Sixth Amendment of the U.S. Constitution. (R 25/8–19, A 111). Its subsequent ruling on the motion for reconsideration was similarly lacking in legal analysis, stating simply that "[t]he State's Attorney has a continuing and ongoing duty to produce both inculpatory and exculpatory information . . . pursuant to the

Supreme Court Rules on discovery." (R 31/20–32/1, A 117–18). The Circuit Court provides no basis for its decision that the State has an obligation to discover new information. It does not. *Driver*, 798 F.2d at 251–52 (citations omitted).

Finally, public policy demands that this Court reverse. In this case, *Brady* is wielded as a sword by the prosecution, a tool to break privilege and obtain new evidence. Arming the state with such a weapon creates a risk of abuse and perverts the purpose of *Brady*. *Brady* creates a simple rule: if the State has it, it must disclose it. The rule proposed by the State and accepted by the Circuit Court is simply unworkable because the State cannot search for and identify all exculpatory evidence, no matter how privileged or how much inculpatory evidence comes along with it. The State does not have the resources, and the implications for privilege are immense. For one example, nothing in the State's proposed rule would bar discovery of the defendant's own medical records if there were some exculpatory evidence contained within. Indeed, taken to its logical conclusion, the State's rule would allow it to discover the privileged conversations between the defendant and his counsel so that it could disclose exculpatory evidence about the defendant's alibi. That simply makes no sense. See 24 Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Evid. § 5506 (1st ed. 2020) (stating that "the attorney-client privilege, like all privileges, may have to yield when it comes in conflict with

the constitutional right of a criminal defendant to produce evidence *in his own behalf*") (emphasis added).

The evidence sought by prosecutors plainly was not *Brady* material. It was not in the State's possession; it was not in the possession of an agency working with the state on the prosecution; and it was known to the defense. The theory that the State felt compelled to seek this specific information under an obligation to do so under *Brady* is not only legally incorrect, but also appears to be a pretextual attempt to obtain privileged information.

C. Precedent does not support the State's reading of *Brady*.

The State's reading of Brady is unprecedented in the most literal sense – it has not identified a single case which supports its argument that *Brady* may justify a breach of privilege to obtain evidence.

The Circuit Court's order does not cite any such case.

The *amici* are not aware of any such case.

This result comes as no surprise. As explained above, *Brady* remedies asymmetrical access to information, recognizing the position of power held by prosecutors and ensuring they put justice ahead of winning cases. *Brady* was not meant to be used in this way. The lack of case law using *Brady* in this way confirms that the State's and the Circuit Court's unorthodox approach is a misuse of the doctrine.

D. *Cochran* has never been used as a justification for prosecutors to obtain evidence, let alone privileged evidence.

Even if the State could use *Brady* in this way, and it cannot, the State faces a more fundamental problem: the State cannot and should not be allowed to act on the defendant's behalf if the defendant chooses not to do so himself. This is particularly true where the State's action is designed to implicate the defendant. The State's entire claim to Defendant's standing under the Sixth Amendment rests on a statement taken out of context from a nearly century old case, *People v. Cochran*: "The state's attorney in his official capacity is the representative of all the people, including the defendant, and it was as much his duty to safeguard the constitutional rights of the defendant as those of any other citizen." 313 Ill. 508, 526 (1924).

Cochran stands for precisely the opposite of the principal claimed by the State. In *Cochran*, the defendant was tried and found guilty for the murder of his wife. *Id.* at 510. Part of his defense was that he had been driven insane as the result of drinking intoxicating liquor. *Id.* at 517–18. The defendant had a history of mental illness and previously had been committed to an insane asylum on account of heavy drinking. *Id.* at 517. The defendant allegedly was drunk the day of the shooting, which may have negated his intent to commit the crime. *Id.* at 517, 519–20. The prosecution called the defendant as a witness before the grand jury, "ostensibly" as a witness against the person who sold him alcohol. *Id.* at 525. Rather than confine his questions to that issue, the prosecutor interrogated the defendant on "the vital point in this case; i. e., his

mental condition at the time of the shooting." *Id.* at 525. The prosecution then used the defendant's grand jury testimony against him at trial. *Id.* at 526.

The specific context – the sentences directly before and after the portion quoted by the State in this case – demonstrate that *Cochran* does not support the State's position. As the Court noted, before the defendant's grand jury testimony, the defendant was told he did not have to testify and that his testimony could be used against him and the assistant state's attorney told him "that he would not be asked anything connected with the shooting." *Id.* It is with this specific and unique background that the Illinois Supreme Court used the language that the State has misinterpreted:

> The state's attorney in his official capacity is the representative of all the people, including the defendant, and it was as much his duty to safeguard the constitutional rights of the defendant as those of any other citizen. Taking Cochran before the grand jury, and, under guise of examining him as to the guilt of some one else, procuring from him statements having a bearing upon the vital question in his case, and then using them as evidence against him upon the trial of his case, was a violation, not only of the promise given him while before the grand jury, but was a violation of his constitutional rights.

Id. at 526–27.

Cochran focused on prosecutorial honesty and integrity. *Cochran* demands that the State not use a pretext of protecting the defendant's rights to convict him. It does not stand, as the State claims, for the premise that the State may claim standing for the defendant in seeking evidence which the defendant knows full well exists.

Few cases cite the language in *Cochran* referenced by the State, and the cases that do are cases where prosecutors used unlawful means to obtain incriminating evidence. See*, e.g., People v. Sweetin*, 325 Ill. 245, 248 (1927) (citing *Cochran*, 313 Ill. at 528, in support of the statement that "[t]he end never justifies the use of unlawful means"); *People v. Oden*, 20 Ill. 2d 470, 483 (1960) (citing *Cochran*, 313 Ill. at 528, in support of the holding that a prosecutor should have deleted prejudicial matter from written statements provided to the jury). We are unaware of any case that cites *Cochran* as a justification for a prosecutor's request to break privilege in search of evidence.

Other cases cite *Cochran* for the principle that failure to warn witnesses or defendants of their constitutional right against self-incrimination can be fatal to a grand jury indictment. See *People v. Jackson*, 23 Ill. 2d 263, 266 (1961) (citing *Cochran*, 313 Ill. at 528); see also *O'Neal v. State*, 468 P.2d 59, 68 (Okla. Crim. App. 1970) (citing *Cochran*, 313 Ill. at 528); *State v. Fary*, 19 N.J. 431, 437–38 (1955) (citing *Cochran*, 313 Ill. at 528). All of these cases warn against prosecutorial misconduct. None of them give prosecutors the right to engage in evidentiary fishing expeditions in the guise of the defendant's Sixth Amendment rights.

Importantly, *Cochran* is cited in Rule 3.8 of the Illinois Rules of Professional Conduct, which governs the conduct of prosecutors. *Cochran* is quoted "to remind prosecutors that the touchstone of ethical conduct is the duty to act fairly, honestly, and honorably." Ill. R. Prof'l Conduct 3.8 cmt. 1 (eff. Jan.

1, 2010). The State uses *Cochran* for an entirely different purpose – to access inculpatory evidence under the guise of seeking exculpatory evidence.

IV. CONCLUSION

The prosecution's use of *Brady* and *Cochran* is truly unprecedented in the most literal sense. It misuses a doctrine meant to counterbalance the State's recognized "advantage in the acquisition of evidence." *Ruffalo*, 69 Ill. App. 3d at 536. As a doctrine meant to bolster the role of the prosecutor as an agent of truth and justice, its distortion into a tool used against both the defendant and the victim's wishes is incompatible with its purpose. Additionally the use of *Cochran*, a case incorporated into the Illinois Rules of Professional Conduct to remind prosecutors to act "fairly, honestly and honorably," to justify the abuse of the *Brady* doctrine is itself a gross distortion of what *Cochran* stands for and the proper role of a prosecutor in society. The Collaboration for Justice respectfully requests that this Court reverse the ruling below and reaffirm the commitment to fairness and justice set forth in cases like *Brady* and *Cochran*, rather than allow the State go on a fishing expedition in privileged medical records.

Dated: July 10, 2020

Respectfully submitted,

AMICI CURIAE
CHICAGO APPLESEED AND THE
CHICAGO COUNCIL OF LAWYERS –
THE COLLABORATION FOR JUSTICE

By: /s/ Joseph A. Roselius
One of Their Attorneys

Joseph A. Roselius – ARDC #6300703
Michael Geller– ARDC #6305999
Eleni Christou– ARD # 6332555
DLA PIPER LLP (US)
444 West Lake Street, Suite 900
Chicago, IL 60606
T 312.368.4000
E joseph.roselius@us.dlapiper.com
E michael.geller@us.dlapiper.com
E eleni.christou@us.dlapiper.com

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 14 pages.

/s/ Joseph A. Roselius

CERTIFICATE OF FILING AND SERVICE

I, Joseph A. Roselius, an attorney, hereby certify that on July 10, 2020, I caused the **Brief of *Amici Curiae* Chicago Appleseed and the Chicago Council of Lawyers – the Collaboration for Justice** to be filed with the Clerk of the Appellate Court of Illinois, Third District, by using the Odyssey eFileIL system.

I further certify that the following participants in this matter are registered service contacts on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

Thomas D. Arrado
State's Attorneys Appellate Prosecutor's Office
tarado@ilsaap.org

John W. Whitcomb
Joseph T. Monahan
Monique C. Patton
Monahan Law Group, LLC
jwhitcomb@monahanlawllc.com
jmonahan@monahanlawllc.com
mpatton@monahanlawllc.com

Sarah L. Beuning
Illinois Coalition Against Sexual Assault
sbeuning@icasa.org

Steven F. Pflaum
Dana Engel
Neal, Gerber & Eisenberg LLP
spflaum@nge.com
dengel@nge.com

I further certify that the following participants in this matter are not registered service contacts on the Odyssey eFileIL system, and thus were served on July 10, 2020, by transmitting a copy from my e-mail address to the e-mail address of record designated for each of those participants:

Daniel M. Walsh
Law Offices of Daniel M. Walsh
dan@attorneydanwalsh.com

Alexandra Molesky
Will County State's Attorney's Office
amolesky@willcountyillinois.com

/s/ Joseph A. Roselius