

ORIGINAL

No. 2012-0081 & 2012-0195

IN THE SUPREME COURT OF OHIO

APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 96373, 96374

STATE OF OHIO

Plaintiff-Appellant

-vs-

DEMETRIUS DARMOND and IRIS OLIVER

Defendants-Appellees

FILED  
AUG 06 2012  
CLERK OF COURT  
SUPREME COURT OF OHIO

MERIT BRIEF OF DEFENDANTS-APPELLEES

JOHN P. PARKER (S.C.R. #0041243)  
Attorney At Law  
988 East 185<sup>th</sup> Street  
Cleveland, OH. 44119  
216-881.0900  
johnpparker@earthlink.net  
Attorney for Defendant-Appellee  
Demetrius Darmond

JEFF HASTINGS (S.C.R. #0052140)  
Attorney At Law  
50 Public Square, Suite 3300  
Cleveland, OH. 44113-2289  
216.344.8300/216.696.1166(f)  
jhastings@hastingslegal.net  
Attorney for Defendant-Appellee  
Iris Oliver

KATHERINE MULLIN  
Assistant Cuyahoga County Prosecutor  
The Justice Center, 9<sup>th</sup> Floor  
1200 Ontario Street  
Cleveland, OH. 44113  
Attorney for Plaintiff-Appellant

PHILIP R. CUMMMINGS  
Assistant Hamilton County Prosecutor  
230 East 9<sup>th</sup> Street, Ste. 4000  
Cincinnati, OH. 45202  
Attorney for Amicus Curiae  
The Ohio Prosecuting Attorneys  
Association

**TABLE OF CONTENTS**

**PAGES**

TABLE OF AUTHORITIES.....iii

INTRODUCTION AND SUMMARY OF ARGUMENT.....1

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS.....4

LAW AND ARGUMENT.....5

CERTIFIED CONFLICT QUESTION: DOES THE HOLDING IN *LAKEWOOD V. PAPADELIS*, 32, OHIO ST. 3D 1, 511 N.E.2D 1138 (1987) APPLY EQUALLY TO INSTANCES WHERE THE STATE HAS COMMITTEED A DISCOVERY VIOLATION?.....5

PROPOSITION OF LAW I: THE HOLDING IN *LAKEWOOD* “. . . THAT A TRIAL COURT MUST INQUIRE INTO CIRCUMSTANCES SURROUNDING A DISCOVERY RULE VIOLATION AND, WHEN DECIDING WHETHER TO IMPOSE A SANCTION, MUST IMPOSE THE LEAST SEVERE SANCTION THAT IS CONSISTENT WITH THE PURPOSE OF THE RULES OF DISCOVERY” DOES NOT APPLY EQUALLY TO INSTANCES WHERE THE STATE HAS COMMITTEED A DISCOVERY VIOLATION BECAUSE SANCTIONS AGAINST THE STATE FOR A DISCOVERY VIOLATION DO NOT IMPLICATE AN INDIVIDUAL’S CONSTITUTIONAL GUARANTEES AS IT DID IN *LAKEWOOD* OR OTHER INSTANCES WHERE A CRIMINAL DEFENDANT COMMITTS A DISCOVERY VIOLATION. ....5

I. THE HOLDING IN *LAKEWOOD* IS DISTINGUISHABLE FROM THE CONFLICT CASES AS IT DEALT WITH A CRIMINAL DEFENDANT’S DISCOVERY VIOLATION AND NOT THE STATE’S.....6

II. THE CONFLICT CASES OF *STATE V. ENGLE* 166 OHIO APP.3D 262, 850 N.E.2D 123 AND *STATE V. SIEMER* 2007 WL 2541121 (OHIO APP. 1 DIST.) ARE DISTINGUISHABLE FROM *DARMOND* BECAUSE IN THOSE CASES THE TRIAL COURT DID NOT ADEQUATLEY INQUIRE AS TO THE CIRCUMSTANCES OF THE STATE’S DISCOVERY VIOLATION PRIOR TO IMPOSING ITS SANCTION.....8

A.	<i>State v. Engle</i> 166 Ohio App.3d 262, 850 N.E.2d 123.....	8
B.	<i>State v. Siemer</i> 2007 WL 2541121 (Ohio App. 1 <sup>st</sup> Dist.).....	8
C.	<i>State v. Darmond</i> 2011 WL 5998671 (Ohio App. 8 Dist.).....	9
III.	CRIM R 16(L) AND <i>LAKEWOOD</i> ALREADY PROVIDE THE TRIAL COURT WITH THE NECESSARY DISCRETIONARY AUTHORITY TO RESOLVE DISCOVERY DISPUTES BETWEEN THE PARTIES TO A CRIMINAL PROSECUTION.....	10
IV.	ABUSE OF DISCRETION STANDARD CONTINUES TO BE THE PROPER STANDARD OF REVIEW FOR A DISCOVERY VIOLATION.....	11
A.	APPLICATION OF THE TRIAL COURT’S DISCRETION IN <i>DARMOND</i> .....	12
B.	INTERPLAY OF CRIMINAL RULE 48(B).....	14
C.	HISTORY OF DISCOVERY/ BRADY VIOLATIONS IN CUYAHOGA COUNTY.....	15
D.	GOOD FAITH VERSUS BAD FAITH OF THE PROSECUTOR IS A RED HERRING.....	16
	CONCLUSION.....	17
	CERTIFICATE OF SERVICE.....	18

## TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGES</u>
<i>Berk v. Matthews</i> , (1991), 53 Ohio St.3d 161, 559 N.E.2d 1301.....	11
<i>Blakemore v. Blakemore</i> , (1983), 5 Ohio St. 3d 217, 5 Ohio B. 481, 450 N.E.2d 1140 (1983).....	11
<i>City of Lakewood v. Papadelis</i> , 32 Ohio St.3d 1, 3 511 N.E.2 1138 (1987)....	1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 15, 17
<i>D'Ambrosio v. Bagley</i> , (C.A. 6, 2008), 527 3d 489.....	16
<i>Keenan v. Bagley</i> , 2012 U.S. Dist. 57044.....	16
<i>Kyles v. Whitley</i> , 514 U.S. 419 (1995).....	16
<i>State v. Barnes</i> , 94 Ohio St.3d 21, 2002 Ohio 68.....	13
<i>State v. Brown</i> , 115 Ohio St.3d 55 (2007), 2207 Ohio 4837.....	16
<i>State v. Busch</i> . (1996), 76 Ohio St.3d 613.....	14
<i>State v. Crespo</i> , Mahoning Ap. No. 03 MA 11, 2004-Ohio-1576.....	2, 7, 10
<i>State v. Darmond</i> , 2011-Ohio-6160, 2011 WL 5998671 (Ohio App. 8 Dist.)... 9, 10, 12, 14, 17	1, 2, 3, 7, 8, 9, 10, 12, 14, 17
<i>State v. Engle</i> , 166 Ohio App.3d 262, 2006-Ohio-1884, 850 N.E.2d 123.....	1, 8, 9, 10
<i>State v. Glover</i> , 35 Ohio St.3d 18 (1988).....	11
<i>State v. Iacona</i> , 93 Ohio St.3d 83, 2001 Ohio 1292.....	16
<i>State v. Jones</i> , 183 Ohio Ap.3d 189, 2009-Ohio-2381, 916 N.E.2d 828.....	7, 10
<i>State v. Larkins</i> , 2006 Ohio 90, discretionary appeal not allowed, 109 Ohio St.3d 1495, 2006 Ohio 2762.....	15
<i>State v. Long</i> , 53 Ohio St.2d 91, 372 N.E.2d 804 (1978).....	13
<i>State v. Morris</i> , Slip Opinion No. 2012 Ohio 2407.....	9, 11
<i>State v. Parsons</i> , 6 Ohio St.3d 442 (1983) 453 N.E. 2d 689.....	11

*State v. Payne*, 114 Ohio St.3d 502, 2007 Ohio 4642.....13

*State v. Rodriguez*, 2008 Ohio 3377.....14

*State v. Russell*, 2011 Ohio 592.....15, 16

*State v. Sanders*, 92 Ohio St.3d 245, 2001 Ohio 189.....16

*State v. Siemer*, 2007-Ohio-4600, 2007 WL 2541121 (Ohio App. 1<sup>st</sup> Dist.).....8, 9

*State v. Siller*, 2009 Ohio 2874.....16

*Washington v. Texas*, (1967), 388 U.S. 14.....6

**RULES**

Ohio Criminal Rule 16.....6

Ohio Criminal Rule 16(L).....1, 2, 10, 14, 15, 17

Ohio Criminal Rule 48(B).....14

Ohio Criminal Rule 52(B).....13

**CONSTITUTIONAL PROVISIONS**

Sixth Amendment to the United States Constitution.....6

## INTRODUCTION AND SUMMARY OF ARGUMENT

This matter is before the Court as a certified conflict and as a discretionary appeal. The certified conflict question is: “Does the holding in *Lakewood v. Papadelis* 32 Ohio St.3d 1, 511 N.E.2d. 1138 (1987), apply equally to instances where the state has committed a discovery violation?” The answer to the certified conflict question is “no”. That is because in *Lakewood* it is clear this Court was protecting the defendant’s constitutional rights in fashioning a remedy for a discovery violation committed by the defendant.

In this instance, the state asks for the same protections when it commits a discovery violation. However when it comes to the constitutional protections afforded all of our citizens by the Bill of Rights the state is understandably treated differently than a defendant in a criminal prosecution. The Bill of Rights applies to individuals and protects the individuals from State action. As the Eighth District noted in *Darmond*, under the state’s desired application of *Lakewood* the trial court could **never** sanction the state by dismissing the criminal charges for a discovery violation because there would always be a less severe sanction available. *State v. Darmond*, 2011-Ohio-6160, 2011 WL 5998671 (Ohio App. 8 Dist.) at ¶ 18.

In the context of a discovery violation, the trial court under Crim R 16(L) “. . .may make such other order as it deems just under the circumstances ” and such sanction is within the sound discretion of the trial court and will not be overturned unless it was “unreasonable, unconscionable or arbitrary.” See *State v. Engle*, 166 Ohio App.3d 262, 2006-Ohio-1884, 850 N.E.2d 123, ¶ 7. Under Crim R 16(L) and *Lakewood*, a trial court

must protect the constitutional rights of a defendant to present a defense and balance the interest of the parties in fashioning a sanction for a discovery violation. When the state commits a discovery violation, the trial court must adequately inquire as to the circumstances of the state's discovery violation prior to imposing its sanction and fashion a sanction or order "as it deems just under the circumstances." *Lakewood* and Crim R 16(L), respectively. The decision in *Darmond* 2011 recognizes that. In *Darmond*, the Eight District, properly relying on *State v. Crespo*, Mahoning Ap. No. 03 MA 11, 2004-Ohio-1576 refused to apply "the least severe sanction" remedy in *Lakewood* to the State's discovery violation because it reasoned that while the holding in *Lakewood* requires a trial court to adequately inquire as to the circumstances of the state's discovery violation prior to imposing its sanction, the holding in *Lakewood* does not summarily require the trial court to apply "the least severe sanction" when the State commits a discovery violation. *Darmond* at ¶18.

#### **STATEMENT OF THE CASE**

On April 7, 2010 defendant-appellee DEMETRIUS DARMOND was indicted by a Cuyahoga County Grand Jury as the sole defendant in Case No. CR-10-535469 for one count of Drug Trafficking in violation of R.C. 2925.03(A)(2) with a Juvenile Specification, R.C. 2925.01(BB), a felony of the second degree; one count of Possession of Drugs in violation of 2925.11(A) a felony of the third degree; one count of possessing criminal tools in violation of R.C. 2923.24(A) a felony of the fifth degree and two counts of endangering Children R.C. 2919.22 misdemeanors of the first degree. (Tr. 25-

26) On August 9, 2010 Case No. CR-10-535469 was dismissed by the State of Ohio without prejudice. The reason the State of Ohio dismissed this case was “for further investigation”. *Darmond* at ¶2 Two days later, on August 11, 2010 a Cuyahoga County Grand Jury again indicted, DEMETRIUS DARMOND (in case CR-10-540709) with the very same charges as set forth above. However in this instance the Grand Jury also indicted his mother-in law, defendant-appellee IRIS OLIVER. Appellee OLIVER, a partially paralyzed 58 year old, was indicted as follows: with one count of Drug Trafficking in violation of R. C. 2925.03(A)(2) with a Juvenile Specification, R.C. 2925.01(BB), a felony of the second degree and one count of Possession of Drugs in violation of 2925.11(A) a felony of the third degree. (Tr. 26). In the CR 10-540709 the indictment contained a petition for forfeiture of a Verizon cell phone.

On August 25, 2010 defendant-appellee DARMOND, was for a second time arraigned and entered a plea of not guilty to the charges and for a second time posted his bond. On this same date defendant-appellee OLIVER entered a plea of not guilty at her arraignment. The case proceeded to a bench trial on February 1, 2011. During the testimony of the state’s first witness both the defendant-appellees trial attorneys moved the trial court to dismiss the charges for discovery violations that came to light almost immediately after the defendant-appellees jeopardy had attached and the state’s first witness began to testify. After hearing argument both on and off the record the Court granted the defendants-appellees’ motion to dismiss with prejudice.

## STATEMENT OF THE FACTS

The defendant-appellees supplement the State of Ohio's *Statement of the Facts* with the following:

As for the three packages discovered by Agent Stipek on March 13, 2010 Special Agent Stipek did not remember the address on the first package but does recall it was addressed to Shontae Moore in the City of Cleveland. (Tr. 55) Special Agent Stipek did not remember the address on the third package but does recall it was addressed to Chapell Steelman in either Elyria or Lorain. (Tr. 59) She further testified that there was a delivery made in Lorain County and believed that an arrest of Steelman was made but was not 100% sure. (Tr. 71)

As for the four packages discovered by Agent Stipek on March 17, 2010 Special Agent Stipek did not remember the address on the packages but does recall one was addressed to Sheila Hartt in the City of Cleveland. (Tr. 63) One was addressed to Pamela Jones in either Lorain or Elyria. (Tr. 63) and one was addressed to Tamica Robinson in the City of Cleveland. (Tr. 63) Special Agent Stipek testified that all four delivery packages on March 17<sup>th</sup> were **similar to** (emphasis added) the three delivery packages on March 13<sup>th</sup>. (Tr. 64, 65).

Agent Stipek prepared seven separate reports for each package (Tr. 46, 66, 70) and then gave at least three of those reports to her supervisor. (Tr. 69).

The defense argued that the discovery of an additional five (similarly packaged) delivery packages all containing marijuana was exculpatory information that should have

been turned over by the State of Ohio and that the appropriate remedy was a dismissal. (Tr. 76, 77).

The trial court then spent much time considering how to proceed under the circumstances. The trial judge heard argument from both the state and defendant appellees OLIVER and DARMOND as to defense counsels motion for dismissal. (Tr. 76 - 88). The Court even permitted the parties a one hour break between argument. (Tr. 83).

The court stopped the proceedings at least three times to inquire of the witness in order to gain a better understanding of what information was withheld from defense counsel. There were at least three sidebar discussions held during the inquiry of the only witness. After all the effort and attention the Court demonstrated in considering the defendants motion to dismiss, the Court set forth on four pages of the record the basis of its decision. (Tr. 89-92)

### LAW AND ARGUMENT

**CERTIFIED CONFLICT QUESTION: DOES THE HOLDING IN *LAKEWOOD V. PAPADELIS*, 32, OHIO ST. 3D 1, 511 N.E.2D 1138 (1987), APPLY EQUALLY TO INSTANCES WHERE THE STATE HAS COMMITTEED A DISCOVERY VIOLATION?**

**PROPOSITION OF LAW I: THE HOLDING IN *LAKEWOOD* “. . . THAT A TRIAL COURT MUST INQUIRE INTO CIRCUMSTANCES SURROUNDING A DISCOVERY RULE VIOLATION AND, WHEN DECIDING WHETHER TO IMPOSE A SANCTION, MUST IMPOSE THE LEAST SEVERE SANCTION THAT IS CONSISTENT WITH THE PURPOSE OF THE RULES OF DISCOVERY” DOES NOT APPLY EQUALLY TO INSTANCES WHERE THE STATE HAS COMMITTEED A DISCOVERY VIOLATION BECAUSE SANCTIONS AGAINST THE STATE FOR A DISCOVERY VIOLATION DO NOT IMPLICATE AN INDIVIDUAL’S CONSTITUTIONAL GUARANTEES AS IT DID IN *LAKEWOOD* OR OTHER INSTANCES WHERE A CRIMINAL DEFENDANT COMMITTS A DISCOVERY VIOLATION.**

**I. THE HOLDING IN *LAKEWOOD* IS DISTINGUISHABLE FROM THE CONFLICT CASES AS IT DEALT WITH A CRIMINAL DEFENDANT'S DISCOVERY VIOLATION AND NOT THE STATE'S**

The answer to the certified conflict question is “no” and it is important to review and understand the rationale behind this Court’s holding in 32 Ohio St.3d 1, 3 511 N.E.2 1138 in answering the certified question. In *Lakewood*, defendant Papadelis had failed to comply with Crim R 16 because he did not disclose his witness list to the state before trial. The trial judge then, as a sanction, excluded the entire testimony which this Court found was “. . .obviously material and relevant to the offense charged.” *Lakewood* at 4. This Court further concluded that to deny Papadelis the presentation of his witnesses “. . .was to deny him the right to present a defense” as guaranteed by the Sixth Amendment of the federal Constitution and *Washington v. Texas* (1967), 388 U.S. 14. *Lakewood v. Papadelis*, 32 Ohio St.3d at 4. Thus, this Court in *Lakewood* had to fashion a remedy for a Rule 16 violation that did not infringe on the defendant’s constitutional right to present a defense. After recognizing the state’s interest in pre-trial discovery, this Court stated that “. . .any infringement on a defendant’s constitutional rights caused by the sanction must be afforded great weight. Consequently, a trial court must impose the least drastic sanction possible that is consistent with the state’s interest.” *Lakewood* at 5.

This Court then adopted a balancing test and held that a trial court must inquire into the circumstances surrounding the discovery violation and must impose the least severe sanction consistent with the purpose of the discovery rules.<sup>1</sup> However, this Court “emphasized” that the balancing test “. . .should not be construed to mean that the exclusion of testimony or evidence is never a permissible sanction in a criminal case. It is only when exclusion acts to **completely deny defendant his or her constitutional right to present a defense that the sanction is impermissible.**” *Lakewood* at 5. (Emphasis added) Thus, this Court was protecting the defendant’s constitutional rights in fashioning the remedy for the defendant’s discovery violation.

The state asks for the same protections. . .yet the Bill of Rights applies to individuals and protects the individuals from state action. As the Eighth District noted *Darmond*, under the state’s desired application of *Lakewood* the trial court could **never** sanction the state by dismissing the criminal charges for a discovery violation because there would always be a less severe sanction available. *Darmond* at ¶ 18 See also *State v. Jones*, 183 Ohio Ap.3d 189, 2009-Ohio-2381, 916 N.E.2d 828, *State v. Crespo*, Mahoning Ap. No. 03 MA 11, 2004-Ohio-1576.

---

<sup>1</sup> In setting forth its balancing test in *Lakewood* this Court implies that its holding applies only to discovery violations by the defendant when it stated that “Factors to be considered by the trial court include the extent to which the **prosecution** (emphasis added) will be surprised or prejudiced by the witness’ testimony,. . .” *Lakewood* at 5.

**II. THE CONFLICT CASES OF *STATE V. ENGLE* 166 OHIO APP.3D 262, 850 N.E.2D 123 AND *STATE V. SIEMER* 2007 WL 2541121 (OHIO APP. 1 DIST.) ARE DISTINGUISHABLE FROM *DARMOND* BECAUSE IN THOSE CASES THE TRIAL COURT DID NOT ADEQUATELY INQUIRE AS TO THE CIRCUMSTANCES OF THE STATE'S DISCOVERY VIOLATION PRIOR TO IMPOSING ITS SANCTION.**

**A. *State v. Engle* 166 Ohio App.3d 262, 850 N.E.2d 123**

*Engle* is distinguishable from *Darmond* in that the Third District Court of Appeals (using an abuse of discretion standard) determined the trial court did not adequately inquire into the circumstances of the State's discovery violation prior to imposing its sanction. *Engle* at ¶ 9. That was not the case in *Darmond* ¶ 25. The Court then went on to state (citing *Lakewood*) that "(T)he trial court must find that no lesser sanction would accomplish the purpose of the discovery rules." *Engle* at ¶ 10.

**B. *State v. Siemer* 2007 WL 2541121 (Ohio App. 1<sup>st</sup> Dist.)**

In *Siemer* the First District Court of Appeals (using an abuse of discretion standard as in *Engle*) determined the trial court did not adequately inquire into the circumstances of the State's discovery violation prior to imposing its sanction. *Siemer* at ¶ 10. In *Siemer* the Court (citing via footnote the same quotation cited by *Engle* above) stated that ". . . *Lakewood* is nonetheless relevant and equally applicable to cases involving discovery violation committed by the state." *Siemer* at ¶ 9.

**C. *State v. Darmond* 2011 WL 5998671 (Ohio App. 8 Dist.)**

In *Darmond* the Court also recognized the trial court must adequately inquire into the circumstances of the state's discovery violation prior to imposing its sanction. Then after that analysis the Court applied the abuse of discretion standard to determine whether the sanctions were unreasonable, arbitrary or capricious. *Darmond* ¶ 18 In *Engle* and *Siemer* it appears that these appellate courts have adapted the rule (for a state discovery violation) that unless the less severe sanction to the state is adopted by the Court it is always an abuse of the trial court's discretion. Permitting *Lakewood* to be applied in such a rote fashion (for state discovery violations) precludes appellate courts from taking a deferential view under the abuse-of-discretion standard. As this Court stated in *State v. Morris*, Slip Opinion No. 2012 Ohio 2407, "It is not sufficient for an appellate court to determine that a trial court abused its discretion simply because the appellate court might not have reached the same conclusion or is, itself, less persuaded by the trial court's reasoning process than by the countervailing arguments. *Id* at ¶ 14.

In *Darmond* the appellate court correctly reviewed the trial courts decision under the abuse of discretion standard and determined that the trial court adequately inquired as to the circumstances of the state's discovery violation stating "The record here evidences that the trial court gave careful and deliberate consideration to the defense's request for a mistrial." *Darmond* ¶ 25. Further, the appellate court noted that under the state's desired application of *Lakewood* the

trial court could **never** sanction the State by dismissing the criminal charges for a discovery violation because there would always be a less severe sanction available. *Darmond* at ¶ 18 See also *State v. Jones*, 183 Ohio App.3d 189, 2009-Ohio-2381, 916 N.E.2d 828, *State v. Crespo*, Mahoning Ap. No. 03 MA 11, 2004-Ohio-1576.

**III. CRIM R 16(L) AND LAKEWOOD ALREADY PROVIDE THE TRIAL COURT WITH THE NECESSARY DISCRETIONARY AUTHORITY TO RESOLVE DISCOVERY DISPUTES BETWEEN THE PARTIES TO A CRIMINAL PROSECUTION.**

In the context of a discovery violation, the trial court under Crim R 16(L) “. . . may make such other order as it deems just under the circumstances”. It is within the trial court’s discretion to decide what sanction to impose for a discovery violation. *Lakewood v. Papadelis*, 32 Ohio St.3d 1, 3. Therefore, a trial court’s discovery sanction will not be overturned unless it was “unreasonable, unconscionable or arbitrary.” *State v. Engle*, 166 Ohio App.3d 262, 2006-Ohio-1884, 850 N.E.2d 123, ¶ 7.

Under Crim R 16(L) and *Lakewood*, a trial court must protect the constitutional rights of a defendant to present a defense and balance the interest of the parties in fashioning a sanction for a discovery violation. When parties to a criminal prosecution commit a discovery violation, the trial court must fashion a sanction or order “as it deems just under the circumstances.” Crim R 16(L). *Lakewood* creates context for the application of Crim R 16(L) and guidance to trial courts when fashioning a remedy for a defendant’s discovery violation. Crim R 16(L) also provides trial courts with the necessary flexibility and broad discretion to

fashion sanctions for state discovery violations “. . .it deems just under the circumstances.”

#### **IV. ABUSE OF DISCRETION STANDARD CONTINUES TO BE THE PROPER STANDARD OF REVIEW FOR A DISCOVERY VIOLATION**

Abuse of discretion involves more than an error in judgment; it connotes an attitude on the part of the court that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217,219, 5 Ohio B. 481, 450 N.E.2d 1140. When applying the abuse of discretion standard, a reviewing court may not substitute its judgment for that of the trial court. *Berk v. Matthews* (1991), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301.

A review under the abuse-of-discretion standard is a deferential review. “It is not sufficient for an appellate court to determine that a trial court abused its discretion simply because the appellate court might not have reached the same conclusion or is, itself, less persuaded by the trial court's reasoning process than by the countervailing arguments.” *Morris*, at ¶ 14.

In the context of a State discovery violation, this Court has held that it is only to inquire whether the trial court abused its discretion in fashioning a remedy. *State v. Parsons*, 6 Ohio St.3d 442, 445 (1983).

It should further be noted that a trial court is granted “great deference” in declaring a mistrial “in recognition of the fact that the trial judge is in the best position to determine whether the situation in his courtroom warrants the declaration of a mistrial.” *State v. Glover* 35 Ohio St.3d 18, 19 (1988).

**A. APPLICATION OF THE TRIAL COURT'S DISCRETION IN  
*DARMOND***

In *Darmond*, the trial court allowed the parties to argue their positions extensively on the record. The trial court took an hour recess to consider the various arguments. (Tr. 83) The trial court had “additional discussion in chambers” with the parties before making his decision and allowed the parties to place those discussions on the record. There was an extensive discussion of case law and the facts of this case and its implications. (Tr. 84-89)

The trial court then declared a mistrial. (Tr. 89) Moreover, the trial gave its reasons for the mistrial and discovery sanction while pointing out specific facts in this case. The trial court’s analysis consumes four pages of the transcript. (Tr. 89-92) In its analysis trial court found:

- a. that the number of other packages disclosed to the defense for the first time in trial could be inculpatory or exculpatory, and;
- b. that there were a number of items “important to the defense” to review or research, and;
- c. the agent for the state had “all the addresses” but did not bring them to court but they were at her office, and;
- d. the agent was able to point out similarities in names in seven or eight of the names with a possible relationship among them and possible prosecution of these individuals, and;
- e. there were possibly 6 additional police reports that the defense were entitled to, and,
- f. additional defense investigation was needed based on this undisclosed information, and;
- g. all seven boxes were similar in nature and the same size, and;

- h. all boxes were addressed and came from Phoenix or Tempe, Arizona from a Kinko's store; and,
- i. The trial court found that the State should have supplied "all the other information" i.e. the reports, the addresses, the names, the investigation, whether charges were filed, whether indictments were returned; and did some other person own up to this scheme that could have exonerated the defendants in this case.

The trial court then dismissed the case and concluded that the State would be barred from a future prosecution and jeopardy attached.

The State of Ohio did **NOT** (emphasis added) object to the trial court's decision. (Tr. 92). The State's failure to object results in a forfeiture or waiver of its right to appeal. See Crim R 52(B); typically, if a party forfeits an objection in the trial court, reviewing courts may notice only plain error. *State v. Payne*, 114 Ohio St.3d 502, 2007 Ohio 4642. Even if a forfeited error satisfies Crim R 52(B), it does not demand an appellate court correct it. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002 Ohio 68. As this Court observed in *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978) "Notice of plain error under Crim R 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." It is clear that the trial court exercised sound discretion and used a "sound reasoning process" and afforded the parties a fair opportunity to argue the relevant case law and facts; moreover, the trial court clearly set forth its rationale and the facts it relied upon in reaching its decision.

As the Eighth District Court of Appeals concluded, "On the record before us, we cannot find the trial court abused its discretion, especially in light of the fact that the state had

already indicted and dismissed charges against Darmond for “further investigation” and then two days later re-indicted him and Oliver, his mother in law.” *Darmond* at ¶ 26.

Clearly, The trial court did not abuse its discretion and there was no manifest miscarriage of justice in this case.

### **B. INTERPLAY OF CRIMINAL RULE 48(B)**

Trial courts are granted sound discretion under Crim R 16(L) to fashion a sanction for discovery violations “just under the circumstances.” The discretion includes the dismissal of the case and barring future prosecution. The authority to dismiss charges is consistent with the trial court’s authority under Crim R 48(B) to dismiss a case.

Under Crim R 48(B), a trial court may dismiss an indictment over the objection of a prosecutor but must state its findings of facts and reasons for dismissal. Moreover, the trial court may do so “in the interest of justice.” *State v. Busch* (1996), 76 Ohio St.3d 613; *State v. Rodriguez*, 2008 Ohio 3377 (¶ 9-10).

As the *Busch* opinion makes clear:

“trial courts are on the front lines of administration of justice in our judicial system, dealing with the realities and practicalities of managing a caseload and responding to the rights and interests of the prosecution, the accused, and victims. A court has the ‘inherent power to regulate the practice before it and protect the integrity of its proceedings.’

*Busch* at 615.

In this case, the State did **NOT** object to the dismissal. (emphasis added) Nonetheless, the sanction imposed by the trial court is completely consistent with *Busch* and Crim R 48(B). The trial court was in the best position to respond to the rights and interests of the prosecution and the defense, knew the history of the case including the fact that the state

had dismissed the case once before for further investigation but yet still did not know about the items in question and still did not disclose to the defense that which it was required to do even though it was given a second chance. Further, the trial court gave all the parties the opportunity to argue its position and the trial court stated its reasons on the record.

### **C. HISTORY OF DISCOVERY/ BRADY VIOLATIONS IN CUYAHOGA COUNTY**

A trial court's discovery sanction must be "just under the circumstances." Crim R 16(L). In this case, it is relevant to recall the history of discovery/Brady violations in Cuyahoga County and important to note that Cuyahoga County has a checkered history when it comes to discovery/Brady violations. This history is well known by the trial judges and must be considered when reviewing the decision of the trial judge.

An example of one case that this trial judge was familiar with, in particular, because it was tried in his court room is *State v. Russell*, 2011 Ohio 592 (police and prosecutor failed to turn over material and exculpatory evidence which resulted in a new trial).

The Eighth District Court of Appeals has also specifically upheld the dismissal of an indictment for discovery violations in *State v. Larkins*, 2006 Ohio 90, discretionary appeal not allowed, 109 Ohio St.3d 1495, 2006 Ohio 2762. In *Larkins*, the State also argued that the trial court erred in dismissing the indictment under *Lakewood* but the Court of Appeals rejected the same argument made here and concluded that the state's position "...would nullify the court's discretion to craft a sanction tailored to the specific facts of an individual case." *Larkins* at ¶ 40. The Court of Appeals further found the trial court did not abuse its discretion by dismissing the indictment. *Larkins* at ¶ 52.

A capital case from Cuyahoga County in which this Court found a discovery/Brady violation which contributed to a new trial is *State v. Brown*, 115 Ohio St.3d 55 (2007), 2207 Ohio 4837. Other well known cases from Cuyahoga County reversed for discovery/Brady violations include *D'Ambrosio v. Bagley* (C.A. 6, 2008), 527 3d 489; *State v. Siller*, 2009 Ohio 2874, and *Keenan v. Bagley*, 2012 U.S. Dist. 57044.

**D. GOOD FAITH VERSUS BAD FAITH OF THE PROSECUTOR IS  
A RED HERRING**

The State argues that there was no bad faith by the individual prosecutor responsible for this case. However, prosecutors have a duty to learn of any favorable evidence known to others acting on the government's behalf including the police. *State v. Sanders*, 92 Ohio St.3d 245, 2001 Ohio 189; *State v. Russell*, 2011 Ohio 592, ¶ 36. The individual prosecutor is presumed to have knowledge of all information gathered in connection with the government's investigation for purposes of determining whether a Brady violation occurred. *State v. Iacona*, 93 Ohio St.3d 83, 2001 Ohio 1292, *Russell*, supra at para. 36; *Kyles v. Whitley*, 514 U.S. 419 (1995).

The prosecution is held responsible for knowing what is in the police file. *Russell* at 37. Any argument by the state that the trial court should take into account the individual prosecutor's good faith is misdirected. In this case it is especially important to note, as did the Eighth District Court of Appeals, that the case had been dismissed once already for "further investigation" and then re-indicted two days later. It begs the question as to how many opportunities the state receives to do their job correctly when it should have

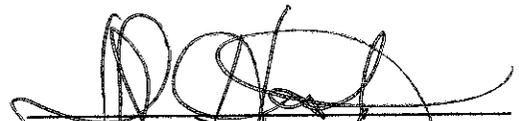
been done correctly the first time. A trial judge must be able to dismiss an indictment as an appropriate sanction for a discovery/ Brady violation. See *Larkins*, supra.

**CONCLUSION**

In light of the foregoing, defendant-appellees DARMOND and OLIVER respectfully request that this Honorable Court answer the certified conflict question in the negative and rule that the holding in *Lakewood v. Papadelis* does not apply equally to instances where the State has committed a discovery violation and hold that under Crim R. 16(L) and the guidance in *Lakewood* the trial court must adequately inquire as to the circumstances of the state's discovery violation prior to imposing its sanction and the trial court's decision will continue to be reviewed under and abuse of discretion standard. Further, that this Honorable Court affirm the decision of the Eighth District Court of Appeals in *Darmond*.

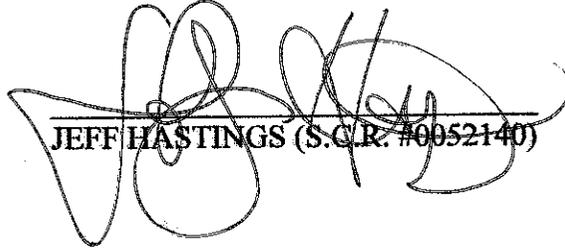
Respectfully submitted,

  
JOHN P. PARKER (S.C.R. #0041243)  
Attorney At Law  
988 East 185<sup>th</sup> Street  
Cleveland, OH. 44119  
216-881.0900  
johnpparker@earthlink.net  
Attorney for Defendant-Appellee  
Demetrius Darmond

  
JEFF HASTINGS (S.C.R. #0052140)  
Attorney At Law  
50 Public Square, Suite 3300  
Cleveland, OH. 44113-2289  
216.344.8300/216.696.1166(f)  
jhastings@hastingslegal.net  
Attorney for Defendant-Appellee  
Iris Oliver

**CERTIFICATE OF SERVICE**

A copy of the foregoing was served on, Katherine Mullin, Assistant Cuyahoga County Prosecutor 1200 Ontario Street 9<sup>th</sup> floor Cleveland, OH. 44113 and Phillip R. Cummings Assistant Hamilton County Prosecutor 230 East 9<sup>th</sup> Street, Ste. 4000 Cincinnati, OH. 45202 Attorney for Amicus Curiae The Ohio Prosecuting Attorneys Association 44119 this ~~16~~<sup>17</sup> day of August, 2012.

  
JEFF HASTINGS (S.C.R. #0052140)