ORIGINAL

IN THE

SUPREME COURT OF OHIO

STATE OF OHIO	:	**NO. ~~2012-0081~~ 2012-0195**
Plaintiff-Appellant	:	
vs.	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District
DEMETRIUS DARMOND	:	
Defendant-Appellee	:	Court of Appeals Case Numbers: 96373 96374

REPLY BRIEF OF AMICUS CURIAE, THE OHIO PROSECUTING ATTORNEYS ASSOCIATION, IN SUPPORT OF STATE OF OHIO, APPELLANT

John Murphy
Executive Director of the Ohio Prosecuting Attorneys Association
196 East State Street, Suite 200
Columbus, Ohio 43215
(614) 221-1266

Joseph T. Deters (0012084P)
Prosecuting Attorney

Philip R. Cummings (0041497P)
Assistant Prosecuting Attorney

230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3012
Fax No. (513) 946-3021

COUNSEL FOR AMICUS CURIAE, THE OHIO PROSECUTING ATTORNEYS ASSOCIATION

William D. Mason (0037540)
Cuyahoga County Prosecutor

Katherine Mullen (0084122)
Assistant Prosecuting Attorney

The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

COUNSEL FOR PLAINTIFF-APPELLANT

Patricia Smith
Attorney at Law
4403 St. Clair Avenue
The Brownhoist Building
Cleveland, Ohio 44103

Jeffrey P. Hastings
Attorney at Law
50 Public Square, Suite 3300
Cleveland, Ohio 44113

COUNSEL FOR DEFENDANT-APPELLEE, DEMETRIUS DARMOND

RECEIVED
AUG 07 2012
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
AUG 07 2012
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

PAGE

STATE OF AMICUS INTEREST 1

AUTHORITIES CITED
Lakewood v. Papadelis, 32 Ohio St. 3rd 1, 511 NE2d 1138 (1987) 1

STATEMENT OF THE CASE AND FACTS 2

AMICUS CURIAE PROPOSITION OF LAW NO. 1

THE HOLDING IN *LAKEWOOD V. PAPADELIS* APPLIES EQUALLY TO INSTANCES WHERE THE STATE HAS COMMITTED A DISCOVERY VIOLATION 2

AUTHORITIES CITED
State v. Jennings, 1st Dist. No, C-030839, 2004-Ohio-3748 2
State v. Palivoda, 11th Dist. No. 2006-A-0019, 2006-Ohio-6494 2
State v. Shutes, 8th Dist. No. 86485, 2006-Ohio-1940 2
State v. Engle, 166 Ohio App.3d 262, 2006-Ohio-1884, 850 N.E.2d 123 2
State v. Thacker, 2nd Dist. Nos. 2004-CA-38 and 2004-CA-57, 2005-Ohio-2230 2
State v. Wilson, 6th Dist. No. L-02-1178, 2003-Ohio-2786 2
State v. Savage, 10th Dist. No. 02AP-202, 2002-Ohio-6837 2
State v. Hoschar, 5th Dist. No. 2001CA00322, 2002-Ohio-4413 2
State v. Pitts, 4th Dist. No. 99 CA 2675, 2000-Ohio-1986 2
State v. Crespo, 2004-Ohio-1576 2
State v. Jones, 183 OApp 3rd 189, 916 NE2d 828, 2009-Ohio-2381 4

CONCLUSION 5

PROOF OF SERVICE 5

STATE OF AMICUS INTEREST

The Ohio Prosecuting Attorneys Association ("OPAA") offers this amicus brief in support of the State of Ohio's contention that *Lakewood v. Papadelis*[1] applies to state discovery violations.

The Ohio Prosecuting Attorneys Association is a private non-profit membership organization that was founded for the benefit of the 88 elected county prosecutors. The founding attorneys developed the original mission statement, which is still adhered to, and reads: "To increase the efficiency of its members in the pursuit of their profession; to broaden their interest in government; to provide cooperation and concerted action on policies which affect the office of Prosecuting Attorney, and to aid in the furtherance of justice. Further, the association promotes the study of law, the diffusion of knowledge, and the continuing educations of its members."

This case will set the standard by which state discovery violations will be reviewed. Prosecutors statewide understandably have a great interest in the outcome – as they believe the "least restrictive sanction" standard of *Lakewood* is appropriate for both the state and the defense in every case. Consistent application of a uniform standard of review for discovery violations is in the best interests of the Courts of Ohio and their litigants.

[1] 32 Ohio St. 3rd 1, 511 NE2d 1138 (1987)

STATEMENT OF THE CASE AND FACTS

Amicus adopts by reference the statement of case and facts contained in the State of Ohio's Merit brief.

AMICUS CURIAE PROPOSITION OF LAW NO. 1

THE HOLDING IN *LAKEWOOD V. PAPADELIS* APPLIES EQUALLY TO INSTANCES WHERE THE STATE HAS COMMITTED A DISCOVERY VIOLATION.

Amicus urges this Court to declare *Lakewood* equally applicable to instances of state discovery violations for several good reasons.

First, it is simply a good general-purpose-easy-to-apply rule. As stated in the second syllabus paragraph of *Lakewood* it reads:

> A trial court must inquire into the 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.

This court wrote the rule, ostensibly, to have general applicability to all cases of discovery violations – whether committed by the State or defense. Nothing in the verbiage of the case suggests this Court meant the holding to be limited to the facts of *Lakewood* or to just defense discovery violations.

It is precisely because the standard is clear and fair that most appellate districts have naturally and appropriately interpreted *Lakewood* to apply equally to state discovery violations.[2]

---

[2] See *State v. Jennings*, 1st Dist. No, C-030839, 2004-Ohio-3748; *State v. Palivoda*, 11th Dist. No. 2006-A-0019, 2006-Ohio-6494; *State v. Shutes*, 8th Dist. No. 86485, 2006-Ohio-1940; *State v. Engle*, 166 Ohio App.3d 262, 2006-Ohio-1884, 850 N.E.2d 123; *State v. Thacker*, 2nd Dist. Nos. 2004-CA-38 and 2004-CA-57, 2005-Ohio-2230; *State v. Wilson*, 6th Dist. No. L-02-1178, 2003-Ohio-2786; *State v. Savage*, 10th Dist. No. 02AP-202, 2002-Ohio-6837; *State v. Hoschar*, 5th Dist. No. 2001CA00322, 2002-Ohio-4413; *State v. Pitts*, 4th Dist. No. 99 CA 2675, 2000-Ohio-1986.
Even the 7th district, in *State v. Crespo* 2004-Ohio-1576, noted:
To the extent that *Lakewood* stands for the proposition that a trial court should weigh the interests of the state prior to considering a sanction against the state, it is applicable. The trial court should the apply the least severe sanction appropriate to the circumstances of the case, the severity of the offending conduct, and the impact of the offending conduct upon the ability of an accused to present a defense.

And there is no good policy reason to treat the parties differently or apply different standards in reviewing discovery violations.

As all Ohio courts acknowledge, the very purpose of the criminal rules and especially the discovery rules is to produce a fair trial. Implicit in this concept is that the same standard must be used when weighing either party's violation. True fairness would lose its meaning if this Court were to sanction a more stringent standard for one side than the other.

Secondly, a uniform standard would ensure a more efficient application of discovery rules and predictability of sanctions and outcomes. Under the *Lakewood* standard, judicial discretion should always be exercised to fairly weigh the various complexities and unique circumstances presented by each discovery violation. (Indeed, this Court provided guidance as to what factors to consider in assessing a discovery violation years before *Lakewood.* In *State v. Parson* (1983) 6 OS 3rd 442, 453 NE2d 689, this Court reviewed a state discovery violation. In *Parson*, the state inadvertently failed to provide the defense with a statement made by a co-defendant. Applying an abuse of discretion standard, the Court noted that a trial court is "not bound to exclude [nondisclosed discoverable material] at trial although it may do so at its option. Alternatively, the court may order the noncomplying party to disclose the material, grant a continuance in the case or make such other order as it deems just under the circumstances." *Id.* This Court then considered whether the trial court abused its discretion. In doing so, this Court considered whether or not the violation was willful and if the defendant was prejudiced as a result of nondisclosure.) The point is that any discovery violation (committed by either State or defense) is best evaluated within the framework of the same standard. To establish a different standard for the defense than for the state is to needlessly invite confusion and uncertainty.

Lastly, when the *Lakewood* standard has not been used in cases of State discovery violations, unfairness has resulted. The core purpose of the discovery rule is to ensure a fair trial. This contemplates there be a trial. *Lakewood* was decided the way it was because the trial court in that case had excluded all the defendant's witnesses – in effect denying him the right to present a defense. That was unfair. Papadelis had the right to present his version of the facts – just as the prosecution did. This Court re-established fairness with the *Lakewood* standard, and ensured Papadelis would get his opportunity to present his case.

When appellate courts have eschewed application of the *Lakewood* least-restrictive-sanction standard in cases of State discovery violations – unfairness has resulted. For example, in *State v. Jones*[3], the 8th Appellate District upheld a sanction against the state despite acknowledging that it "destroyed any reasonable possibility of effective prosecution" – and this despite the fact that the trial court did not think the discovery violation was willful. Unconstrained by the *Lakewood* standard of balancing interests, the 8th District deprived the people of the State of Ohio from their day in court.

And again here, the 8th District Court has barred the people of Ohio from prosecuting Darmond despite the fact that there was no willful violation and only mere speculation that foreknowledge would have had any benefit to Darmond. The State was unaware that law enforcement officers interdicted addition similar packages. Darmond was not on trial for the additional packages and, as noted by the court, there was an equal likelihood that the packages would have been inclupatory. Despite the minimal importance of the additional packages, the trial court imposed the most severe sanction possible on the state without consideration of readily available alternatives. The *Lakewood* standard could have preserved the opportunity of the people of the State of Ohio to have their day in court.

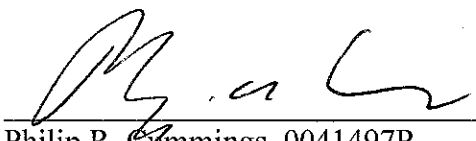
[3] 183 OApp 3rd 189, 916 NE2d 828, 2009-Ohio-2381

CONCLUSION

In sum, amicus urges this Court declare the *Lakewood* standard applicable to State discovery violations and also urges this Court to caution trial courts to only order complete exclusion of evidence in the most extreme cases of willful, intentional misconduct. Unconstrained by *Lakewood*, some courts are arbitrarily depriving the people of this state of their right to the fair trial the discovery rules were designed to ensure both sides.

Respectfully,

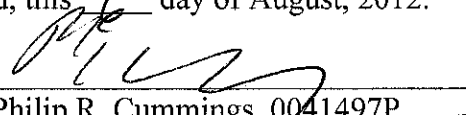
Joseph T. Deters, 0012084P
Prosecuting Attorney



Philip R. Cummings, 0041497P
Assistant Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
Phone: 946-3012
Attorneys for Plaintiff-Appellant, State of Ohio

PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Reply Brief, by United States mail, addressed to Patricia Smith, Attorney at Law, 4403 St. Clair Avenue, The Brownhoist Building, Cleveland, Ohio 44103, and Jeffrey P. Hastings, Attorney at Law, 50 Public Square, Suite 3300, Cleveland, Ohio 44113, counsel of record, this 6 day of August, 2012.



Philip R. Cummings, 0041497P
Assistant Prosecuting Attorney