

NO. 83981-6
(NO. 84283-3 CONSOLIDATED CASE)

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent

v.

LISA MULLEN, and
KEVIN DEAN,

Petitioners.

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2019 AUG 23 AM 8:05
DONALD L. CARPENTER
CLEM

SUPPLEMENTAL BRIEF OF RESPONDENT

SKAGIT COUNTY PROSECUTING ATTORNEY
RICHARD A. WEYRICH, PROSECUTOR

By: ERIK PEDERSEN, WSBA#20015
Senior Deputy Prosecuting Attorney
Office Identification #91059

Courthouse Annex
605 South Third St.
Mount Vernon, WA 98273
(360) 336-9460

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. ISSUES	1
II. FACTS.....	1
III. ARGUMENT.....	10
1. Legal standards applicable to Brady claim.....	10
2. The information was not favorable to defense because it was not exculpatory and had insignificant impeachment value.	12
3. The State did not purposefully or inadvertently suppress evidence.	14
4. Defense has not established that they were prejudiced by establishing that the confidence in the verdict was undermined.	16
5. Where defense the State was not aware of the importance of information, and defense was aware and could have obtained the information, defense cannot prevail on a Brady claim,.....	18
IV. CONCLUSION	20

TABLE OF AUTHORITIES

Page

WASHINGTON SUPREME COURT CASES

<u>In re Pers. Restraint of Benn</u> , 134 Wn.2d 868, 952 P.2d 116 (1998)	11, 19
<u>In re Pers. Restraint of Gentry</u> , 137 Wn.2d 378, 972 P.2d 1250 (1999).....	11
<u>State v. Lord</u> , 161 Wn.2d 276, 165 P.3d 1251 (2007).....	19
<u>State v. Thomas</u> , 150 Wn.2d 821, 83 P.3d 970 (2004).....	11, 19

WASHINGTON COURT OF APPEALS CASES

<u>State v. Sublett</u> , 156 Wn. App. 160, 231 P.3d 231 (2010).....	20
----------------------------------------------------------------------	----

UNITED STATES SUPREME COURT CASES

<u>Kyles v. Whitley</u> , 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).....	passim
<u>Strickler v. Greene</u> , 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).....	passim
<u>United States v. Agurs</u> , 427 U.S. 97, 49 L.Ed.2d 342, 96 S.Ct. 2392 (1976).....	14
<u>United States v. Bagley</u> , 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).....	10, 12

FEDERAL CASES

<u>Benn v. Lambert</u> , 283 F.3d 1040 (9 th Cir 2002) <i>cert. denied</i> 537 U.S. 942, 123 S.Ct 341, 154 L.Ed.2d 249 (2002).....	19
--------------------------------------------------------------------------------------------------------------------------------------------------	----

<u>Raley v. Ylst</u> , 470 F.3d 792 (9th Cir. 2006)	18
<u>Rhoades v. Henry</u> , 596 F.3d 1170 (9th Cir. 2010).....	18
<u>State v. Walters</u> , 351 F.3d 159 (5th Cir. 2003).....	19
<u>United States v. Bond</u> , 552 F.3d 1092 (9th Cir. 2009).....	19
<u>United States v. Brown</u> , 582 F.2d 197 (2nd Cir. 1978).....	18
<u>United States v. Campagnuolo</u> , 592 F.2d 852 (5th Cir. 1979).....	19
<u>United States v. Starusko</u> , 729 F.2d 256 (3rd Cir. 1984).....	19
<u>United States v. White</u> , 970 F.2d 328 (7th Cir. 1992).....	19
<u>United States v. Wolf</u> , 839 F.2d 1387 (10th Cir. 1988), <i>cert. denied</i> , 488 U.S. 923 (1988)	19
<u>United States v. Zuno-Acre</u> , 44. F.3d 1420 (9 th Cir. 1995) <i>cert.</i> <i>denied</i> , 516 U.S. 945 (1995)	16
<u>Williams v. Scott</u> , 35 F.3d 159 (5th Cir.1994)	20

I. ISSUES

1. Were opinions of and information reviewed by the State's accounting expert exculpatory or impeaching such that disclosure was required under Brady?

2. Where the State and the accountant were not aware of the defense contentions of the importance of certain information, was there a suppression of evidence under Brady?

3. Where the information opinion and information reviewed by the expert was at most cumulative and too speculative to be material, has the defense established prejudice as required under Brady?

4. Can a defendant prevail on a Brady claim where the defense was aware of their claim of significance of certain documents, but failed to attempt to obtain the documents?

II. FACTS

On January 3, 2006, after extensive pretrial discovery, pretrial proceedings and three years after charges were filed, Lisa Mullen and Kevin Dean were tried jointly before a jury for embezzlement from Frontier Ford in Anacortes. 1/3/2006 RP 3.¹ Mullen was tried for Theft in the First Degree, Conspiracy to Commit Theft in the First Degree, and Use of Proceeds of

Criminal Profiteering and Tampering with Physical Evidence. CP 1781-93.² Dean was tried for Theft in the First Degree, Conspiracy to Commit Theft in the First Degree, and Acquiring an Interest in Real Property through Criminal Profiteering. CP 978-88(Dean)³. Trial testimony was extensive.

Ron Rennebohm owned Frontier Ford. He worked his way up from a high school dropout and lot boy to purchasing the dealership in 1990. 1/18/06 RP 121-2, 130. Rennebohm was unable to read a corporate financial statement and essentially financially illiterate. 1/18/06 RP 162, 1/19/06 RP 155. Rennebohm could not read a profit and loss statement. 1/17/06 RP 158. So, Rennebohm relied on the skills of others to run Frontier Ford and monitor the financial side of the business. 1/18/06 RP 163-4, 217.

When he purchased Frontier Ford, Lisa Mullen was a bookkeeper and Rennebohm made her the comptroller. 1/18/06 RP 132. Kevin Dean was hired as general manager in August of 1996. 1/18/06 RP 152. Richard Rekdahl is an accountant employed by Clothier and Head who became Frontier Ford's accountant beginning in the early 1990's. 1/18/06 RP 217.

In 2002, Rennebohm hired a person to review the financial records at

¹ The State will refer to the transcripts using the date followed by "RP" and the page number. There are transcripts of 38 pretrial hearings, 23 trial days, and 5 post trial hearings.

² Although charged with some exceptional sentence aggravating factors, at trial the State withdrew some of the aggravating factors and predicate acts charged to support the use of criminal proceeds charge. CP 4361-74.

³ The State will refer to citations to Dean's trial court clerk's papers by including (Dean).

Frontier Ford. 1/19/06 RP 53, 61-2. Rennebohm eventually replaced Kevin Dean with that person. 1/19/06 RP 66-7. Days after Dean was fired, Rennebohm was given a package of information that he provided to his accountants that suggested some inappropriate financial dealings. 1/19/06 RP 66-7, 72. Shortly after, Mullen contacted Rennebohm upset and they met at a park. 1/19/06 CP 73-6. 1/19/06 RP 75. Mullen admitted she had stolen from him and that if he fired her, she could never pay him back. 1/19/06 RP 76. Mullen also told Rennebohm that in addition to \$60,000 that Dean owed there was an additional \$200,000 that Dean owed. 1/19/06 RP 76-7. After meeting with his accountants including Rekdal, Rennebohm went to the dealership and reported the theft to the Anacortes Police in June of 2002. 1/5/06 RP 71, 1/19/06 RP 78-9.

Shortly after Rekdal started investigating for the dealership, Mullen told Rekdal that she had lost her integrity. 1/24/06 RP 56. Mullen told Rekdal that if she didn't have a job, she couldn't pay it back. 1/24/06 RP 56. Rekdal investigated tracing activity in accounts of Dean, Rennebohm and Mullen. 1/25/06 RP 40. Employees at Frontier Ford had accounts receivable which allowed draws on salaries or loans from the dealership which were then deducted from salary. 1/9/06 RP 91; 1/18/06 RP 172.

Rekdal described the accounts and non-business transactions in the

accounts totaling \$1,271,130. 1/25/06 RP 181-2. Dealership sales were about \$80 million dollars annually, so the transactions went unnoticed. The transactions primarily involved Mullen using draws from accounts receivable of employees, including her own, to purchase personal property. Most transactions were done by Mullen herself but some were done by the bookkeeping staff she supervised. 1/27/06 RP 77. By transactions, Mullen removed debts reflected in accounts receivable by transferring funds from within dealership accounts and then aging or writing off the accounts.

Witnesses testified Dean and Mullen were romantically involved while employed at Frontier Ford including living together for 2 or 3 months in 1998. 1/6/06 RP 151; 1/13/06 RP 47-8. Two accounts clerks testified that every month they gave the receivable statements to Dean and Mullen. 1/6/06 RP 145, 1/12/06 RP 56-7. And every month Dean carefully looked at the statements like a credit card statement. 1/12/06 RP 56-7.

Corroborating the financial records reviewed by Rekdal showing hundreds of thousands of dollars of non-business purchases, the State provided testimony from others tracing activity to Mullen by receipts, checks, and even pictures. 1/6/06 RP 180 (writing checks to herself and debiting amount to Dean's account receivable); 1/9/06 RP 15-23 (purchase of more than \$33,000 in jewelry in a 20 month period); 1/11/06 RP 169-75

(purchases of clothing totaling nearly \$32,000 in seven months); 1/11/06 RP 181-84 (purchases of stuffed toy rabbits totaling \$19,622); 1/13/06 RP 140-50 (purchases at St John Boutique totaling nearly \$75,000 over four months), 1/17/06 RP 34 (a single purchase of jewelry totaling \$17,500).

The jury convicted Mullen as charged. CP 4435-7. The jury entered special verdicts finding twenty three predicate acts of crimes of theft and three other crimes to support the criminal profiteering charge totaling \$241,458. CP 4439-41, 4443-65. Dean was convicted of Theft in the First Degree and Conspiracy to Commit Theft in the First Degree. CP 1030, 1031(Dean). Mullen and Dean both stipulated the crimes were major economic offenses. CP 4466,⁴ CP 1032(Dean).

Three months following trial Mullen and Dean raised a claim of failure of the State to provide exculpatory information consisting of information known by Rekdal. 5/19/2006 RP 5-10. To support the claim the defense filed an extensive declaration providing records from a civil action between Rekdal's firm and Frontier Ford. CP 4866-6696⁵. Mullen and Dean's claim was that the expert was aware of a billing scheme regarding warranty contracts sold at the dealership and that Rennebohm received funds

⁴ The trial court dismissed the charge of Tampering with Physical Evidence at trial. 1/31/06 RP 54.

as a result of that scheme not reported as income. Ten months after the verdicts, the trial court heard the motion. 11/15/06 RP 2-84.

At trial, Lisa Mullen actually testified about the billing scheme involving PIFI⁶ which she claimed was used to create income from extended service policies on the vehicles that was unreported. 2/1/06 RP 27-8. She explained that the dealer inflated the plan cost and the dealer was then either paid back in cash, or given a loan paid back with the proceeds of the inflated cost. 2/1/06 RP 27. Mullen claimed she worked on the PIFI loans with Rennebohm and that Frontier Ford received no benefits. 2/1/06 RP 27. After attributing the conduct to Rennebohm, Mullen stated that the purpose of the process was a tax evasion scheme.⁷ 2/1/06 RP 28. On cross examination by the State, Mullen testified that Rennebohm told her to divert PIFI income to his home. 2/1/06 RP 69-70. Mullen volunteered that the “PIFI thing is huge.” 2/1/06 RP 70. Mullen attempted to characterize PIFI as a kickback. 2/2/06 RP 7). On examination by Dean’s counsel, Mullen described the scheme. 2/2/06 RP 114-118. Mullen explained that it inflated the price of the service contract and, the business that took the service

⁵ This pleading is title Declaration of John W. Murphy was filed September 12, 2006. The pleading totals 1,800 pages and has 126 exhibits attached.

⁶ CP 1220. NWC/PIFI stands for National Warranty Company/Payment Insured Plan.

⁷ Rekdal’s deposition relied upon in defense’s Brady motion indicated that PIFI was in the business of extended service contracts and that it was “not uncommon for them to either loan individuals money or dealerships money. CP 6575.

contract sends a check called a pack which goes to the car dealer himself. 2/2/06 RP 117. Mullen also claimed at trial the transactions were done with Rennebohm's approval because the intent was to "hide the profits" of Frontier Ford from Mr. Rennebohm's business partner, Ragnar Pettersson. 1/31/06 RP 120; 2/1/06 RP 42.

Despite an awareness of the importance of the claimed scheme to the defense, the defense did not present any documents, corroborating evidence or any experts explaining the relevance of the claimed PIFI scheme.

The post trial motion was based substantially on a Declaration of John Murphy (Lisa Mullen's trial counsel) including 126 exhibits. CP 4866-6696. The motion was based most almost solely on exhibit 120.⁸ That document is a transcript of depositions taken by the attorney for Frontier Ford of Rekdal regarding his dealings with Frontier Ford. CP 4867. The deposition was taken for a case between Frontier Ford and Clothier & Head and began on January 31, 2006. CP 4870-1. In the transcript, Rekdal explained when he first noted the issue of the PIFI reporting some time after June of 2002. CP 6514 (pages 154-6). Rekdal said he did not know why the loans involving PIFI were not on the books of Frontier Ford. CP 6514 (page 155). When he resumed his depositions on February 7, 2006, after Mullen

had testified in the criminal trial, Rekdal was again being deposed and explained that his belief regarding whether money left Frontier Ford without the authorization of Rennebohm was not necessarily changed as a result of the information he gathered after trial. CP 6564 (pages 246-7). He also said he did not know whether the PIPI issue had anything to do with the non-business activity of Mullen and Dean. CP 6582 (page 313).

Also relied upon by defense in the Brady claim was a declaration of Richard Rekdal regarding what he knew and when he knew it. Rekdal's declaration was prepared by the State in response to the motion for a new trial. CP 1262-75. The declaration shows Rekdal was not aware of the extent of the claim of underreporting income on tax returns until after the trial. CP 1266 at paragraph 2, lines 3-4; CP 1267 at paragraph 1, lines 3-4.

Rekdal describes that he obtained two schedules from PIPI prior to trial. CP 1266. Those two schedules had about eight pages of summary activity between Frontier Ford and two other businesses of which only one was owned by Rennebohm. CP 1266. The schedules were obtained from PIPI. CP 1266. Based upon the schedules, Rekdal determined that some funds were not reported as income. CP 1266-7. At the time Rekdal could not determine whether this was error or oversight by Frontier Ford, or

⁸ Because this clerk's paper is more than 1,800 pages long, the State will reference to the

whether the lack of reporting was intentional. CP 1267. In late March of 2006, after trial, Rekdal reviewed more PIPI obtained by his attorney. CP 1267, 1273. Based upon that review and considering the testimony from Mullen at trial, Rekdal said that he formed the opinion after trial that there was an intent not to disclose income. CP 1267. Rekdal did not say in the deposition that he could actually determine if Rennebohm was the person who had the intent not to disclose income. CP 6565 (page 247).

In the declaration supporting the State's Brady response, Rekdal explained how as a result of the embezzlement, Rennebohm incurred a tax liability of more than \$262,000 and that the tax liability was far greater than the tax liability he would have been avoiding. CP 1268, 1269 at paragraph 2. Finally, Rekdal said that his testimony would not change from that provided to the jury at the criminal trial. CP 1274 at paragraph 4.

The prosecutor also provided a declaration in response to the defense motion that explained his awareness of issues relating to PIPI before trial. CP 1219-27. The prosecutor had not received any documents relating to PIPI. CP 1220. And, defense had actually questioned Ron Rennebohm about the PIPI in a deposition in 2003. CP 1226.

The trial court denied the motion by written ruling. CP 7182-4, CP

exhibit number in the clerk's paper and the transcript page number where applicable.

1278-80(Dean). The trial court found the information was “available to both sides in advance of trial and, in the case of PIP/NCW, probably better understood by the defense than the State.” CP 7184, CP 1280(Dean). The trial court found it “would be hard pressed to find that the evidence might have changed the outcome of the trial.” CP 7183-4, CP 1279-80(Dean). Mullen and Dean appealed denial of the motion and convictions.

On October 26, 2009, the Court of Appeals issued an unpublished opinion affirming convictions of Mullen and Dean. The Court of Appeals decision held that the information from the accountant was cumulative and too speculative to be material. Opinion at pages 2, 16, 17. The Court of Appeals also noted defense could have obtained the evidence before trial. Opinion at pages 2, 15.

III. ARGUMENT

1. Legal standards applicable to Brady claim.

The Constitution requires “disclosure only of evidence that is both favorable to the accused and ‘material either to guilt or to punishment.’” United States v. Bagley, 473 U.S. 667, 674, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), *citing* Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215(1963)). “[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove

helpful to the defense.” Kyles v. Whitley, 514 U.S. 419, 436-37, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

A successful Brady claim requires a three-part showing: (1) the evidence in question was favorable to the defendant, meaning that it had either exculpatory or impeachment value, (2) the State suppressed the evidence, either purposefully or inadvertently, and (3) the defendant was prejudiced by suppression. Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). “The government has no obligation to produce information which it does not possess or of which it is unaware.” Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995).

There is no Brady violation, however, "if the defendant, using reasonable diligence, could have obtained the information" at issue. In re Pers. Restraint of Gentry, 137 Wn.2d 378, 396, 972 P.2d 1250 (1999), quoting In re Pers. Restraint of Benn, 134 Wn.2d 868, 916, 952 P.2d 116 (1998); accord, State v. Thomas, 150 Wn.2d 821, 851, 83 P.3d 970 (2004), (abrogated in part on other grounds, Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)).

Impeachment evidence falls within Brady's definition of evidence favorable to the defense, but in such cases the petitioner must prove the undisclosed evidence was material to the outcome of trial in order to

demonstrate a Brady violation. Bagley, 473 U.S. at 676-77.

To establish materiality, the petitioner must demonstrate a reasonable probability that the undisclosed evidence would have produced a different result. Strickler v. Greene, 527 U.S. at 281-82. Evidence is material “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” Bagley, 473 U.S. at 682. In applying this “reasonable probability” standard, the “question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) The Court must consider the undisclosed evidence in light of all the evidence presented by the prosecution, including forensic and other physical evidence and the testimony of other witnesses. Kyles at 292-94. “[T]he question is whether ‘the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.’” Strickler, 527 U.S. at 290.

2. The information was not favorable to defense because it was not exculpatory and had insignificant impeachment value.

Evidence is favorable to the accused if it is exculpatory or

impeaching. Strickler v. Greene, 527 U.S. 263, 281-2, 119 S.Ct. 1936, 144 L.Ed.2d 286(1999).

The State and defense have markedly different interpretations of the importance of PIFI schedules. Defense claims this information impeached Rennebohm by showing he was engaged in a tax evasion scheme and thereby corroborated Mullen. This claim is based the statement in Rekdal's deposition of "I don't know what to believe anymore." CP 6565 (page 246).

The State contends at best a slight change in opinion of Rekdal at one point when confronted with new information and not impeachment. Rekdal's skepticism about whether the tax evasion was intentional was based on information from Mullen's trial testimony. CP 6904. In Rekdal's deposition in response to the motion, he did not vary his opinion from trial that this was non-business activity. CP 6564-5 (pages 246-7), CP 6583 (page 313), 1/25/06 RP 134, 164. 174-5. Rekdal concluded in his declaration that his testimony at trial would not have deviated. CP 6911.

Even if the defense claim that Rennebohm authorized PIFI activity that does not establish that Rennebohm was willing to have Mullen obtain almost \$1.2 million dollars out of the business over the course of 4 years in addition to other salary. As Rekdal's declaration explains that makes no sense because Rennebohm caused a tax liability as a result of the

embezzlement far exceeding any tax benefit from tax evasion. CP 6905-6.⁹

3. The State did not purposefully or inadvertently suppress evidence.

The record does not support a claim of purposeful suppression. Mullen and Dean claim Rekdal was aware of the existence and importance of the information and thereby failed to disclose. The determination of the trial court that State and Rekdal were not aware of the importance of the information is established by the declarations of Rekdal and the prosecutor.

Of the three types of situations where a Brady claim might arise, the present claim at best falls within the third category where the claim is that the government “failed to volunteer exculpatory evidence never requested, or requested only in a general way.” Kyles v. Whitley, 514 U.S. at 433 (noting that even that situation there was a duty on the, “though only when suppression would be ‘of sufficient significance to result in the denial of the defendant’s right to a fair trial.’” *citing* United States v. Agurs, 427 U.S. 97, 49 L.Ed.2d 342, 96 S.Ct. 2392 (1976)).

The information pertained to the defense of theft of permission and therefore lack of intent to defraud. As to the PIPI, the only documents

⁹ Mullen notes in her Petition for Review that defense requested PIPI documents, Health Insurance Authorization and detailed Clothier & Head Billing records. Mullen Petition for review at page 15. But the petition refers to “[citation]” and does not cite to any portion of the record. Rekdal actually testified at trial about the medical insurance. 1/25/06 RP 114-6

Rekdal obtained were eight pages of schedules used to prepare Rennebohm's tax return. CP 6903. Rekdal did not provide the information and could not determine whether the non-reporting of the income was intentional or oversight. CP 6904. After reviewing trial transcripts, he was able to determine that the non-reporting was intentional. CP 6904. He did not have the information to form the opinion before trial and only came to evaluate the PIPI after having reviewed further information from subpoenas obtained directly from PIPI by Rekdal's own counsel's subpoenas. CP 6904, 6911. Information was not suppressed because Rekdal was unaware the evidence had any potentially exculpatory value and his opinion was formed after trial.

Futhermore, Rekdal was not a member of the typical prosecution team for the purpose of Brady. He also had never been an expert witness in a criminal proceeding. CP 6790-1 (pages 342-3).¹⁰

In Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), the court indicated that the standard extends beyond just the prosecutor handling the case. "This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Kyles v.

(testifying that the amount of medical insurance was higher than Frontier Ford handbook amounts, not run through payroll and other discrepancies in bookkeeping entries).

Whitley, 514 U.S. at 437. Kyles explained the purpose was because “the police investigators sometimes fail to inform a prosecutor of all they know” and that placing the burden on the prosecutor insures communication of relevant information. Kyles v. Whitley, 514 U.S. at 438. Kyles involved a case of nondisclosure by police. Numerous cases apply this standard to impute the knowledge of law enforcement to the prosecution or consider them part of the prosecution team. Strickler v. Greene, 527 U.S. 263, 116 S.Ct. 1936, 144 L.Ed.2d 286 (1999), United States v. Zuno-Acre, 44. F.3d 1420 (9th Cir. 1995) *cert. denied*, 516 U.S. 945 (1995).

The State contends extending this principal to a person not traditionally part of the prosecution team would not foster the communication that Kyles encourages.

4. Defense has not established that they were prejudiced by establishing that the confidence in the verdict was undermined.

In evaluating claimed prejudice and the "reasonable probability" standard, the "question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct.

¹⁰ The Court of Appeals assumed without deciding that the accountant was a person to whom the Brady duty extends. Court of Appeals Opinion at page 5.

1555, 131 L. Ed. 2d 490 (1995).

Having heard the trial and evaluated the defense motion, the trial court determined it would be “hard pressed to find the evidence might have changed the outcome of the trial.” CP 7183-4, CP 1279-80(Dean). The Court of Appeals determined that the evidence was too speculative or cumulative to be material under Brady.

The information does not show that Rennebohm knew he was under-reporting income. Since Rennebohm relied on others to handle his accounting, it is highly likely that under-reporting of income by the PIPI scheme was done intentionally by others. If it was not intentional it does not establish that Rennebohm was defrauding others as defense claims.¹¹

Further as noted by the Court of Appeals, defense admitted a transcript in which Rennebohm admitted to signing a false note to protect the dealership from his wife in their property settlement. Admission of Rekdal’s opinion would be cumulative of impeachment evidence already admitted. Further despite Mullen’s testimony at trial that PIPI was huge, neither Rekdal or Rennebohm were questioned on that issue by defense at trial.

After full review of the records by Rekdal, he showed the defense

¹¹ Rekdal’s deposition indicates that when Rennebohm became aware of the under-reporting of income by the PIPI accounting, Rennebohm did include that within his income and amended his tax return to do so. CP 6576-7 (pages 289, 93-4).

arguments pertaining to the PIFI do not make logical sense. A person would not be so driven to try to avoid debts and taxes at every step that he would incur a greater tax debt. CP 6906.

The confidence in the trial was not undermined.

5. Where defense the State was not aware of the importance of information, and defense was aware and could have obtained the information, defense cannot prevail on a Brady claim.

Mullen and Dean claim the failure to gather the information is not recognized as a factor in a Brady claim.¹² Mullen specifically claims that Strickler v. Greene limits the evaluation of Brady to the three components. Mullen Petition for review at page 14. But Strickler specifically indicated that because it was not raised, they did not address the impact of a showing that the defense was aware of the documents and could reasonably discover how to obtain them. Strickler v. Greene, 527 U.S. at 288.

“[W]here the defendant is aware of the essential facts enabling him to take advantage of any exculpatory evidence, the Government does not commit a Brady violation by not bringing the evidence to the attention of the defense.” Raley v. Ylst, 470 F.3d 792, 804 (9th Cir. 2006), *quoting* United States v. Brown, 582 F.2d 197, 200 (2nd Cir. 1978); *accord*, Rhoades v. Henry, 596 F.3d 1170, 1181-82 (9th Cir. 2010). Brady does not compel the

government “to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself.” United States v. Starusko, 729 F.2d 256, 262 (3rd Cir. 1984) (*quoting* United States v. Campagnuolo, 592 F.2d 852, 861 (5th Cir. 1979)¹³

Some cases even treat this “due diligence” requirement as a fourth element of a Brady claim. *See e.g.*, State v. Walters, 351 F.3d 159, 169 (5th Cir. 2003) (“To establish a Brady violation, a defendant must show that: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the petitioner; (3) the evidence was material either to guilt or punishment; and (4) nondiscovery of the allegedly favorable evidence was not the result of a lack of due diligence.”).

Washington also has the same requirement. State v. Lord, 161 Wn.2d 276, 293, 165 P.3d 1251 (2007); State v. Thomas, 150 Wn.2d 821, 851, 83 P.3d 970 (2004), In re Pers. Restraint of Benn, 134 Wn.2d 868, 916-7, 952 P.2d 116 (*quoting* Williams v. Scott, 35 F.3d 159, 163 (5th

¹² Dean Petition for Review at pages 13-6

¹³ See also United States v. Bond, 552 F.3d 1092, 1097(9th Cir. 2009) (“We decline to extend Benn beyond cases in which the government has affirmatively misled the defendant by a selective disclosure of information.” referring to Benn v. Lambert, 283 F.3d 1040 (9th Cir 2002) *cert. denied* 537 U.S. 942, 123 S.Ct 341, 154 L.Ed.2d 249 (2002)); United States v. Wolf, 839 F.2d 1387, 1391 (10th Cir. 1988), *cert. denied*, 488 U.S. 923 (1988) (“If the means of obtaining the exculpatory evidence has been provided to the defense, however, a Brady claim fails, even if the prosecution does not physically deliver the evidence requested.”). United States v. White, 970 F.2d 328, 337 (7th Cir. 1992) (“While the Supreme Court in Brady held that the government may not properly conceal exculpatory

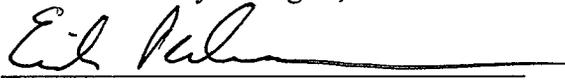
Cir.1994)), State v. Sublett, 156 Wn. App. 160, 200, 231 P.3d 231 (2010).

In the present case, the defense was aware of the issue of the PIPI schedules. During a deposition, defense had asked Mr. Rennebohm about those schedules. CP 6897. Defense counsel for both Mullen and Dean presented testimony at trial from Mullen about those schedules. The un rebutted claim by Mullen's testimony was that the tax evasion scheme involving PIPI was done at the direction of Mr. Rennebohm. 2/1/06 RP 27-8, 69-70, 2/2/06 RP 114-8. Despite the fact that the defense was aware of this claim and their allegation that it was "huge" defense made no attempt to actually gather the schedules from PIPI prior to trial. The civil attorney representing Rekdal's accounting firm was readily able to gather all the relevant PIPI schedules by subpoena. CP 6909-10.

IV. CONCLUSION

For the reasons set forth above, this Court must affirm the Court of Appeals and the convictions of Lisa Mullen and Kevin Dean.

Respectfully submitted this 20th day of August, 2010.

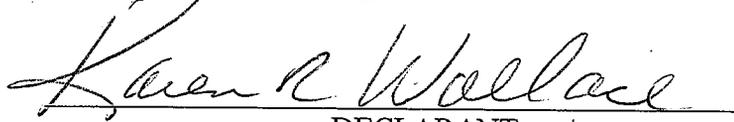
By: 
ERIK PEDERSEN, WSBA#20015
Senior Deputy Prosecuting Attorney
Attorney for Petitioner, State of Washington
Office Identification #91059

evidence from a defendant, it does not place any burden upon the government to conduct a defendant's investigation or assist in the presentation of the defendant's case.'").

DECLARATION OF DELIVERY

I, Karen Wallace, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: , addressed as Craig D. Magnusson and Jennifer Castro, addressed as Magnusson Law Office, 800 Bellevue Way, N.E., Suite 400, Bellevue, WA 98004-4273 and Gregory C. Link, addressed as Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 20th day of August, 2010.



DECLARANT