

1 early on the morning of April 10, 2016, the Defendant stole Ms. Chaves's purse while she was
2 playing cards in a friend's car-port.

3 Ms. Chaves, the alleged victim, and Department of Public Safety ("DPS") Officer Ralph
4 Rangamar were the first two witnesses to testify at the August 16, 2016 bench trial during the
5 Commonwealth's case in chief. The third witness to testify during the Commonwealth's case in
6 chief was Wilma Delotta, who testified that she was an eyewitness to the alleged incident. Ms.
7 Delotta testified that she was sitting at the same table as Ms. Chaves when the alleged incident
8 occurred. Ms. Delotta testified that she could not recognize who stole Ms. Chaves's purse because
9 she did not see the individual's face. Ms. Delotta testified that she was distracted by dogs fighting
10 under the table at the time of the alleged incident.

11 On cross-examination, Ms. Delotta testified that she viewed photos at DPS Headquarters,
12 but could not recognize anyone in the photos. The photo array mentioned by Ms. Delotta was not
13 provided to the Defendant. The Defendant orally moved for a mistrial, arguing that the
14 Commonwealth failed to provide exculpatory evidence to the defense, violating the *Brady* rule.³

15 The Court took a recess from the bench trial and took up an evidentiary hearing as to the
16 Defendant's motion for a mistrial. At the evidentiary hearing, the Court heard testimony from Ms.
17 Delotta and DPS Detective Andrew Taimano ("Det. Taimano") about the photo array.

18 Ms. Delotta testified that an officer, whose name she did not recall, took her statement, and
19 then showed her photos of various individuals. Ms. Delotta told the officer that she could not
20 recognize anyone. Ms. Delotta signed only her statement, and not a copy of the photo line-up.

21 Det. Taimano testified that he took Ms. Delotta's statement on April 12, 2016. Det. Taimano
22 further testified that he did not remember showing Ms. Delotta any photographs, and that he was

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24 ³ The *Brady* rule "requires prosecutors to disclose materially exculpatory evidence in the government's possession to the defense." *Commonwealth v. Guerrero*, 2014 MP 2 ¶ 7 (citing *Brady* 373 U.S. at 87).

1 surprised to learn that Ms. Delotta testified that she had been shown photographs. According to Det.
2 Taimano, if he shows a photo line-up to a witness, he only creates one photo line-up of twelve
3 people including the suspect. Det. Taimano also testified that, if there were a non-identification, he
4 would have had the eyewitness indicate the non-identification on the photo line-up.

5 Det. Taimano showed a photo line-up to the alleged victim, Ms. Chaves. The photo line-up
6 shown to Ms. Chaves was admitted during the August 16, 2016 hearing on the Defendant's oral
7 motion for a mistrial as Defendant's Exhibit A. The Court finds Det. Taimano's statement that he
8 creates only one photo line-up per case to be credible, so if any photo line-up was shown to Ms.
9 Delotta, it would most likely be the same photo line-up shown to Ms. Chaves.⁴

10 After hearing testimony from Ms. Delotta and Det. Taimano, the Court continued the bench
11 trial to September 23, 2016, and ordered the parties to submit supplemental briefs on the issue. The
12 Defendant filed his written Motion for Mistrial for Violation of *Brady* on August 24, 2016. The
13 Commonwealth filed its Opposition on August 31, 2016. The Defendant filed his reply on
14 September 7, 2016. The Court heard arguments on the supplemental briefs on September 14, 2016,
15 and continued the bench trial to October 31, 2016.

16 III. DISCUSSION

17 A. Whether the Commonwealth's Failure to Produce Ms. Delotta's Non-Identification 18 Involving a Photo Line-up Constitutes a *Brady* Violation

19 The *Brady* rule "requires prosecutors to disclose materially exculpatory evidence in the
20 government's possession to the defense." *Commonwealth v. Guerrero*, 2014 MP 2 ¶ 7 (citing

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22 ⁴Although the Commonwealth initially claimed to not have a copy of the alleged photo line-up shown to Ms. Delotta,
23 defense counsel stated at the September 14, 2016 hearing that he is not alleging that the Commonwealth destroyed or
24 failed to preserve the photographs. In cases where the government destroys or fails to preserve evidence, *Brady* does
not apply and a different set of tests have been outlined by the United States Supreme Court. *United States v. Femia*, 9
F.3d 990, 993 (1st Cir. 1993) (analyzing *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988)); *California v. Trombetta*, 467
U.S. 479, 479 (1984)); *Commonwealth v. Barcinas*, Crim. No. 15-0206 (NMI Super. Ct. Aug. 8, 2016) (Order at 4-5).

1 *Brady*, 373 U.S. at 87). Under *Brady*, “the suppression by the prosecution of evidence favorable to
2 an accused upon request violates due process where the evidence is material either to guilt or to
3 punishment, irrespective of the good faith or bad faith of the prosecution.” 373 U.S. at 87.
4 Prosecutors are “responsible for ‘any favorable evidence known to others acting on the
5 government’s behalf in the case, including the police.’” *Strickler v. Greene*, 527 U.S. 263, 265
6 (1999) (quoting *Kyles v. Whitley*, 419 U.S. 419, 437 (1995)). A prosecutor’s duty under *Brady*
7 includes an “affirmative duty” to turn over *Brady* material, separate and independent from any duty
8 to provide discovery pursuant to Rule 16 of the Commonwealth Rules of Criminal Procedure.
9 *Commonwealth v. Campbell*, 4 NMI 11, 16 (1993); *Commonwealth v. Hong*, 2013 MP 19 ¶ 11.

10 To establish a *Brady* violation, a defendant must satisfy three requirements: “[t]he evidence
11 at issue must be favorable to the accused, either because it is exculpatory, or because it is
12 impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently;
13 and prejudice must have ensued.” *Strickler*, 527 U.S. at 281-282.

14 **1. Whether the Evidence is Favorable to the Accused**

15 First, the Court will address whether the photo line-up is “material either to guilt or to
16 punishment” and is thus *Brady* material. *Brady*, 373 U.S. at 87. A prosecutor’s disclosure
17 obligations under *Brady* extends not only to exculpatory material, but also “to materials that,
18 whatever their other characteristics, may be used to impeach a witness.” *Strickler*, 527 U.S. at 282.
19 Although the evidence suppressed by the government must be material, a “showing of materiality
20 does not require a demonstration by a preponderance that disclosure of the suppressed evidence
21 would have resulted ultimately in the defendant’s acquittal.” *Youngblood v. West Virginia*, 547 U.S.
22 867, 870 (2006) (quoting *Kyles*, 514 U.S. at 434).

23 In the Commonwealth, an *in camera* review of the evidence is the preferred method of
24 determining whether the evidence is *Brady* material. *Commonwealth v. Guerrero* 2013 MP 16 ¶ 7;

1 *Campbell*, 4 NMI at 17 (“Where the parties disagree on whether certain information is *Brady*
2 material, an *in camera* determination is the preferred means of resolving the dispute.”)

3 In *Commonwealth v. Adlaon*, the trial court dismissed the case “after the trial began but
4 before the end of the government’s case” after a *Brady* violation came to light. *Adlaon*, 4 NMI 171,
5 175 (1994). The Commonwealth Supreme Court vacated the dismissal, holding that “the trial court
6 erred in finding a due process violation because it *did not inquire into the nature of the documents*,
7 i.e., whether the documents are, in fact, exculpatory.” *Id.* (emphasis added).

8 The Court has been able to inquire into the nature of the photo line-up by hearing testimony
9 from both Ms. Delotta and Det. Taimano at the evidentiary hearing, obviating the need for an *in*
10 *camera* review. According to Ms. Delotta, she remembers being shown photographs by a DPS
11 officer, and telling the officer that she could not recognize the Defendant. The Court finds Ms.
12 Delotta’s testimony to be credible. Det. Taimano testified that he did not recall showing Ms. Delotta
13 a photo line-up, and that typically if a witness indicates that they cannot identify a suspect, he still
14 has the witness sign the photo line-up and indicate that he or she could not identify anyone. Det.
15 Taimano testified that typically, he creates only one photo line-up per case of twelve suspects. If
16 any photo line-up was shown to Ms. Delotta, it would most likely be the same photo line-up shown
17 to Ms. Chaves, admitted during the August 16, 2016 hearing on the Defendant’s oral motion for a
18 mistrial, as Defendant’s Exhibit A.

19 The Commonwealth argues that, since Ms. Delotta is not an identification witness, her non-
20 identification is not *Brady* material.⁵ The Defendant argues that any non-identification by Ms.
21 Delotta could be used to impeach Det. Taimano. The Court agrees. The non-identification could be

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23 ⁵ In its opposition, the Commonwealth directed the Court’s attention to *Commonwealth v. Lambert*, arguing that since
24 the witness in *Lambert* was not an identification witness, the non-identification was not *Brady* material. 584 Pa. 461,
476 (Pa. 2005)). The Court notes that in *Lambert*, the Pennsylvania Supreme Court held that the non-identification was
not *Brady* material since it was inadmissible and “inadmissible evidence cannot be the basis for a *Brady* violation.” *Id.*
at 476 (emphasis added).

1 used to potentially impeach witnesses at the bench trial. *Brady* material includes “materials that,
2 whatever their other characteristics, may be used to impeach a witness.” *Strickler*, 527 U.S. at 282
3 (citing *United States v. Bagley*, 437 U.S. 667, 676 (1985)). Thus, the non-identification involving
4 the photo line-up is *Brady* material and must be provided to the Defendant.

5 **2. Whether the Evidence Has Been Suppressed by the State, Either Willfully or**
6 **Inadvertently**

7 Next, the Court will turn to whether the photo line-up has been suppressed by the
8 Commonwealth, “willfully or inadvertently,” and the Defendant must have suffered prejudice.
9 *Strickler*, 527 U.S. at 281-282. As described above, the Court finds Ms. Delotta’s testimony that she
10 remembers being shown photos to be credible.⁶ Det. Taimano does not remember showing Ms.
11 Delotta the photos. Det. Taimano failed to note Ms. Delotta’s non-identification in his police report,
12 nor did he have her sign off on the photo line-up, nor did he turn this information over to the
13 prosecutor. Based on these facts, the non-identification was suppressed by the state. Based on Det.
14 Taimano’s testimony, the Court concludes that any suppression by Det. Taimano was inadvertent.
15 Although this suppression is inadvertent, any suppression of *Brady* materials is a violation,
16 regardless of whether it was inadvertent. *Strickler*, 527 U.S. at 281-282.

17 **3. Whether the Defendant is Prejudiced**

18 Exculpatory material must be “produce[d] in time for the defendant’s effective use of those
19 materials at trial.” *Hong*, 2013 MP 19 ¶ 12 (quoting *Campbell*, 4 NMI at 16). There is no *Brady*
20 violation so long as “the delayed disclosure of evidence was still ‘of value to the accused.’” *Id.* at ¶
21 15 (quoting *United States v. Davenport*, 753 F.2d 1460, 1462 (9th Cir. 1985). “A *Brady* claim will
22 have no merit where the disclosure of material evidence did not come too late to deprive the

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24 ⁶ Ms. Delotta is a friend of the alleged victim, Ms. Chaves. Thus, Ms. Delotta would have no incentive to lie by saying that she could not identify the Defendant.

1 defendant of a fair trial . . . Generally, a defendant must be tried and convicted before any due
2 process violation becomes of consequence.” *Campbell*, 4 NMI at 15 (internal quotation marks
3 omitted) (citation omitted).

4 Here, the Defendant received knowledge of the non-identification with a photo line-up
5 while Ms. Delotta was testifying during the bench trial. Based on the testimony, Ms. Delotta was
6 shown the same photo line-up as Ms. Chaves.⁷ The Defendant received this information mid-trial,
7 on August 16, 2016. The bench trial has been continued twice, ultimately being scheduled for
8 October 31, 2016, more than two months after the initial trial date.

9 In *Commonwealth v. Hong*, the Defendant was provided with *Brady* material, letters to an
10 Federal Bureau of Investigation (“F.B.I.”) agent, after the discovery deadline, but twenty-nine days
11 before trial. 2013 MP 19 ¶ 2. At trial, Hong’s counsel cross-examined the F.B.I. agent about the
12 letters. *Id.* ¶ 16. Although the evidence in *Hong* was provided one month prior to trial, Hong had
13 “more than sufficient time . . . to prepare an adequate defense.” *Id.* ¶ 16. Here, although the
14 disclosure occurred during trial, the trial has been continued for over two months as a result. The
15 two month continuance in the present case is a longer time period than the twenty-nine days in
16 *Hong*, despite occurring during trial.

17 Here, the Defendant has been prejudiced by not receiving information regarding the non-
18 identification. Although some prejudice has been cured by the two month continuance of the trial,
19 the Court acknowledges that two witnesses have already testified during the Commonwealth’s case-
20 in chief, and Ms. Delotta is still on the stand, as the bench trial has been continued. The Defendant
21 argues that allowing the trial to proceed would require him to quickly change his trial strategy,
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24 ⁷ The Court again notes that the Defendant, through counsel, expressly stated that he is not alleging that the photo line-
up shown to Ms. Delotta was destroyed, and is not making a motion pursuant to *Youngblood*, 488 U.S. at 58, and
Trombetta, 467 U.S. at 479.

1 which the Court acknowledges would be difficult with multiple witnesses having already testified.
2 Thus, the Court will address this particular source of prejudice.

3 **B. To Remedy the Non-Disclosure, the Court Will Allow the Re-Call of Any Witnesses**
4 **Who Have Already Testified During the Commonwealth’s Case in Chief**

5 The Court has “broad discretion” to remedy a *Brady* violation before a defendant is actually
6 prejudiced. *Campbell*, 4 NMI at 16. The Defendant, in his written motion, moved for a mistrial. At
7 the September 14, 2016 motion hearing, the Court asked the Defendant about any remedies short of
8 mistrial. The Defendant then asked, in the alternative, for the exclusion of the testimony of both Ms.
9 Chaves and Ms. Delotta. The Commonwealth argued that a continuance would be the proper
10 remedy.

11 The Court has already continued this case, with a continuation of the bench trial occurring
12 over two months after the August 16, 2016 bench trial. This ample amount of time would allow the
13 defense counsel to shift gears in his defense strategy, if necessary. The Court acknowledges that a
14 number of witnesses have already testified and concludes that an appropriate remedy is required.

15 Thus, the Court will allow the re-call of any witnesses who have already testified in the
16 Commonwealth’s case in chief, so that the Defendant may properly cross-examine them about Ms.
17 Delotta’s non-identification.

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1 **IV. CONCLUSION**

2 Accordingly, the Defendant's motion for mistrial is **DENIED**. A continuance of the bench
3 trial and re-call of witnesses will cure the law enforcement officer's failure to provide exculpatory
4 evidence.

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6 **IT IS SO ORDERED** this  day of October, 2016.

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11 **JOSEPH N. CAMACHO**
12 Associate Judge
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