



IN THE SUPREME COURT OF THE STATE OF DELAWARE

TZE POONG LIU,)
)
 Defendant-Below,)
 Appellant,)
)
 v.) No. 121, 2014
)
 STATE OF DELAWARE,)
)
 Plaintiff-Below,)
 Appellee.)

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

On March 12, 1988, Tze Poong Liu (“Liu”) was arrested in connection with the March 9, 1988 attempted murder of William Chen (“Chen”) and murder of three members of Chen’s family. (A1). On June 1, 1991, following an almost three-month guilt-phase trial, a jury found Liu guilty of six counts of murder first degree, attempted murder first degree, two counts of conspiracy first degree, arson first degree, burglary first degree, and conspiracy second degree. (A20, D.I. 106). On direct appeal, this Court affirmed his convictions, except for the three conspiracy convictions the State conceded should have merged into one.¹

On November 23, 1994, Liu moved, *pro se*, for post-conviction relief. (A35, D.I. 193). Superior Court denied the motion on February 17, 1995.² That same day, Superior Court granted co-defendant Vicky Chao (“Chao”) a new trial based on the fact, as discovered and disclosed by the State during Liu’s 1991 trial, that Chen had not testified truthfully during Chao’s 1990 trial about the nature of his relationship with Chao.³ Liu appealed, *pro se*, from that 1995 order denying him post-conviction relief.⁴ Upon the advice of trial counsel, who had by then entered his appearance in the Rule 61 appeal, Liu dismissed his appeal so his counsel could

¹ *Liu v. State*, 628 A.2d 1376 (Del. 1993).

² *State v. Liu*, 1995 WL 413449 (Del. Super. Ct. Feb. 17, 1995).

³ *See State v. Liu*, 2012 WL 2192939, at *1 (Del. Super. Ct. Feb. 29, 2012).

⁴ *Liu v. State*, 2013 WL 411408, at *1 (Del. Jan. 31, 2013) (citing *Liu*, 2012 WL 2192939, at *1).

instead file a motion for new trial in Superior Court.⁵ Trial counsel did not file a motion for new trial.⁶ When Liu filed a *pro se* motion for new trial, Superior Court forwarded the motion to Liu's counsel, who took no action.⁷ (A37, D.I. 211 & 212).

In August 2007, Liu filed a second *pro se* Rule 61 post-conviction motion. (A40, D.I. 235). Superior Court appointed new counsel, who filed a restated second Rule 61 post-conviction motion in January 2008. (A40, D.I. 238 & 239). On February 29, 2012, Superior Court reduced Liu's three felony murder convictions to manslaughter based on *Williams v. State*,⁸ but denied Liu's other claims.⁹ (A44, D.I. 260).

On appeal, this Court concluded that trial counsel provided constitutionally ineffective assistance of counsel when he counseled Liu to withdraw his appeal of the denial of his first Rule 61 motion to pursue a motion for a new trial, where Liu withdrew his appeal, but trial counsel never filed a motion for new trial.¹⁰ As a remedy, this Court remanded the case "with leave for Liu, with the assistance of

⁵ *See id.*

⁶ *Id.*

⁷ *Id.*

⁸ 818 A.2d 906 (Del. 2002).

⁹ *Liu*, 2012 WL 2192939

¹⁰ *Liu*, 2013 WL 411408, at *2.

counsel, to file and prosecute a proper motion for a new trial in the Superior Court.”¹¹

Liu filed his counseled Motion for New Trial on September 20, 2013, and the State filed its response on November 8, 2013. (A46, D.I. 276 & 278; A48; A62). On February 14, 2014, Superior Court denied Liu’s motion.¹² Liu timely appealed and filed an opening brief. This is the State’s answering brief.

¹¹ *Id.*

¹² *State v. Liu*, 2014 WL 605455 (Del. Super. Ct. Feb. 14, 2014).

SUMMARY OF THE ARGUMENT

I. **Denied.** The Superior Court correctly found that Liu failed to show that he is entitled to a new trial. The State learned during Liu's trial that, despite his testimony to the contrary during the Chao trial, William Chen intended to testify that his sexual relationship with Chao continued after his marriage. The State timely disclosed the anticipated change in testimony to the defense. Even if the disclosure was delayed, there was no *Brady* violation because Liu had ample opportunity to use the information and earlier disclosure would not have created a reasonable probability of a different outcome at trial. Thus, Superior Court did not abuse its discretion or otherwise err in concluding that the interests of justice do not require a new trial.

STATEMENT OF FACTS

This case arises out of the March 9, 1988 murders of three generations of the Chen family – William Chen’s wife, daughter and mother – and the attempted murder of William Chen. In the early morning hours, a fire was deliberately set in the house in which the Chen family was sleeping. Fire marshals determined that there were three points of origin for the gasoline-fed flames: the garage, the back doorway, and, inside, in the downstairs living area. (B19-21). William Chen had seen a woman in the downstairs of his home right before the fire erupted. (B24). This led investigators to suspect Chao, Chen’s mistress. When the police tracked Chao down in New York City, she fingered Liu, a sixty-year-old New York taxi driver, as the person who had been with her in Delaware the night the Chen house exploded in flames. (State’s Exs. 97 & 98).

When questioned, Liu told the police that he had never been in Delaware. (B216). However, the jury heard about how Liu had driven Chao to Delaware on March 1, a week before the murders, and had waited in a nearby restaurant while Chao went to the Chen house with the ultimatum that if Chen did not return with her to New York, she would cause big trouble. (B111-115). The jury also heard that: Liu had asked the driver with whom he shared his cab to rearrange their schedules so Liu could have the cab the night of March 8 (B83); a toll collector at the Delaware Memorial Bridge had seen Liu, along with a passenger, come over

the bridge into Delaware in the early morning hours of March 8 (B116-119); shortly before the fire, a neighbor had seen a taxi, driven by a man and with a woman passenger, cruise up and down the streets in the Chen's neighborhood, checking house numbers. (B84-101). The jury also heard that: authorities found traces of gasoline on a pair of Liu's pants, a pair of shoes, a rag on the dash of his taxi and a blue tarp found in the trunk of his taxi (B120-129); and Chao had originally said that Liu had driven her in his taxi to Delaware, had stopped along the way to fill jugs with gasoline, and then had gone up to the Chen house with the jugs just before the fire erupted. (State's Exs. 97 & 98). With respect to the testimony at the heart of Liu's motion for new trial, Chen testified that he and Chao continued their sexual relationship after his marriage on more than the one occasion to which he testified at Chao's trial. (B49-56).

The prosecution proffered what motivated Chao and Liu to make their fateful trip: jealousy that had turned into homicidal hatred. Chao was driven by rage that her lover had returned to Delaware to stay with his young wife and family. Liu was angered by Chao's attention for Chen, a person he saw as an unworthy rival for Chao's affections. As Liu wrote after the murders, he had a "heart filled with passionate love" for Chao, and even though he "may lose his life because of it, [h]e had no regrets." (B130).

Liu's trial strategy was to argue that he was only a cab driver who drove Chao to Delaware, and to challenge the credibility of Chen and suggest that he might be responsible for the deaths of his wife, daughter and mother. This theme permeated the defense opening statement and continued through closing argument. In his opening statement, Liu's counsel stated that to prove Liu guilty as an accomplice the State had to prove that:

it would be Mr. Liu's conscious object or purpose to further or assist in the commission of the crime. Not that a person in any way did something, such as driving Vicky Chao to Delaware.... The Judge will then say to you, mere presence at the scene of the crime without proof of all of those elements does not support a finding of guilt. (B9-10).

Liu's counsel continued:

Mr. Chen is going to be up there for a while, and ask yourself, is this a person that I find credible? Or more properly, the defense would suggest to you, incredible, when you hear the variety of stories that he has to tell about time, and smoke, and what he was doing, and his relationship with Vicky....

But keep in mind that when faced with the opportunity to stand up for himself and deny that he assaulted Vicky Chao, or agree simply to have sex with her to get the charges dropped, William was right in the sack.

Ask yourself, ladies and gentlemen, when you hear some of William's testimony, when you see the ease in which Vicky Chao held herself out as Judy Chen, when you talk to the people who think Judy Chen, a/k/a Vicky Chao, and William were married, ask yourself, gee, did William really seem to want out of this relationship? Why was he always going back to New York?

William Chen was not a supporting husband. He would go to New York, he would gamble on the horses, he would get money from Vicky Chao....

[When Chen called home for money for bail], they wouldn't send their nephew, their husband, their son, depending upon who ever he called, they wouldn't send him the money because they didn't believe him. When you hear everything that he has to say, ladies and gentlemen, you're not going to believe him either....

[After Chao was convicted,] [t]his woman was pacing back and forth, thinking that her life is going down the tubes, knowing that she was given up by William Chen at that point. She has now gone through an entire trial. She gets convicted, and she is being drug out of the courthouse to go to spend a night in jail before her penalty hearing, screaming in an uncontrolled wail. She says William Chen is the murderer. (B11-16).

After Chen testified differently than he had at Chao's trial about the nature of his relationship with Chao, the same themes continued through the defense closing. The defense theme remained that Liu was merely a cab driver:

Was the taxi seen in the neighborhood? Yes; yes.... Yes, it's likely Mr. Liu was in that cab. Probably. That wouldn't be an unfair finding by a jury to say Liu was in the cab. All right. The Judge is going to tell you that mere presence at the scene of a crime is not enough.... (B161).

What evidence does the State offer that Liu set the fire? Because he had gasoline detected on his pants?

The shoes, they say there was gasoline on the shoes.

They say there was gasoline on the maroon rag. As I say, this guy drives a taxi. He probably pumps his own gas. (B176-177).

Where out of all of this testimony that we talked about so far is Mr. Liu coming in? Because he drove a cab.... (B182).

Likewise, the defense theme that Chen lacked credibility and likely could be the murderer continued through the defense closing argument:

What about William? Can you believe some of the things William said? ... William was very good, if you remember, about remembering the month that Vicky was born, because he went up there for her birthday one time. Okay. He can tell you where she lived, in the moment of unbearable trauma and grief in the hospital. He remembered her phone number. Later on he was asked when his wife was born. He didn't know. How can you believe this guy and say, "I didn't have anything to do with it or I'm telling everything I know?" Do we have to prove to you as the defense that William Chen was involved? No. But, ladies and gentlemen, when you look at what he said, when these questions come up in your mind about his conduct in this case, that's where you have the definition of reasonable doubt. That's what reasonable doubt is.... (B160-161).

All those years William was able to deceive everybody. He carried the deceit, ladies and gentlemen, a year and a half further for the Chao jury and a year and a half further after that, until finally he admitted to you under oath it wasn't true [--] that he was having sex with Vicky Chao.... To William Chen \$32,000 [that he received after the deaths] is a windfall. It's better than hitting the jackpot. He can't make thirty-two thousand at the racetrack.... Does that mean that the defense is suggesting to you that you can find from the evidence on what William to [sic]? No, of course not. To make the State feel better, we'll give you a scenario, because now it looks like William could have done it. But you don't have to do that. The question is, is there reasonable doubt here?.... (B170-171).

[H]ow can you believe anything [Chen] says if he makes up a story like that, if he's going to tell you this, unless you want to look at the hidden, little points and decide just on your own, decide for making a decision on this case whether William Chen is dirty. William Chen is very dirty.... (B179).

Read Vicky Chao's letter to Mr. John Chen.

What did she write in there? That the mother should not have died. Whose keys fit the padlock? Who carried on affairs, both denied under oath? Who spent weekend after weekend arguing in the New York apartment away from their respective spouses, and one person beating the daylight out of the other? You can draw your own conclusions on what it proves. You can draw your own conclusions as to whether it proves Vicky is dirty.

What conclusions can you draw about Tze Poong Liu? ... Have they proved that Tze-Poong Liu has done it? Not in this case. Should you have problems with William Chen? Yeah, you should have big problems. (B199-200).

[Y]ou heard the live testimony about Vicky's screams [after being convicted] and being dragged downstairs to lockup, banging her head against the wall. She suddenly composed herself, thought about the Fire Marshal's report and said, "William Chen did it." (B201).

The jury was not persuaded by Liu's arguments and found that the State had proven all the charges beyond a reasonable doubt.

I. Superior Court correctly denied Liu’s motion for new trial.

Question Presented

Whether the Superior Court abused its discretion or otherwise erred in denying Liu’s Motion for New Trial premised on an alleged *Brady* violation when Liu failed to articulate how his defense would have changed if he had learned earlier that Chen was going to testify differently than he had in Vicky Chao’s trial, when the changed testimony supported Liu’s defense, and when there was other overwhelming evidence of Liu’s guilt separate from Chen’s testimony.

Standard and Scope of Review

This Court reviews a trial judge’s denial of a motion for new trial for an abuse of discretion¹³ and constitutional claims *de novo*.¹⁴

Merits of the Argument

Liu argues on appeal that the Superior Court erred in denying his Motion for New Trial that was based on the State’s mid-trial discovery and disclosure to Liu that Chen intended to provide testimony at Liu’s trial that differed from his testimony provided during the trial of Liu’s codefendant, Chao. Specifically, Chen testified at Chao’s trial that, except for one occasion, his sexual relationship with Chao ended upon his marriage. Chen testified at Liu’s trial that he and Chao had

¹³ *Swan v. State*, 820 A.2d 342, 350 (Del. 2003) (citing *Wilmington Country Club v. Cowee*, 747 A.2d 1087, 1092 (Del. 2000)).

¹⁴ *Atkinson v. State*, 778 A.2d 1058, 1061 (Del.2001) (reviewing *de novo* a defendant’s claim that the State failed to turn over *Brady* material).

sexual intercourse on more than one occasion after his marriage. Liu argues that Superior Court erred in denying his motion because “[t]he courtroom forensic skills of Liu’s counsel were no substitute for concrete evidence, which evidence only a time-consuming investigation could have developed.” (Op. Brf. at 10).

Liu’s argument on appeal suffers from the same fatal flaw as his argument to the court below – Liu’s claim that an investigation into the Chen/Chao relationship would have revealed unspecified evidence that would have altered the defense trial strategy in an unspecified manner is pure speculation. Superior Court correctly found that “[t]he interest of justice does not require a new trial”¹⁵ because “[d]efense counsel for Liu did not seek a continuance or make any comment whatsoever about needing to perform additional investigation,”¹⁶ the delayed disclosure did not cause a change to Liu’s trial strategy,¹⁷ “the delayed disclosure of the information did not create a reasonable probability of a different outcome,”¹⁸ and “there was overwhelming evidence of Liu’s guilt separate and apart from Chen’s testimony.”¹⁹ Accordingly, this Court should affirm.

¹⁵ *Liu*, 2014 WL 605455, at *5, ¶ 29.

¹⁶ *Id.* at *2, ¶ 6.

¹⁷ *Id.* at *4, ¶ 25.

¹⁸ *Id.* at *4, ¶ 27.

¹⁹ *Id.* at *5, ¶ 29.

The State timely disclosed Chen’s anticipated change in testimony.

Under *Brady v. Maryland*,²⁰ the State violates a defendant’s due process rights when: 1) evidence exists that is favorable to the accused, because it is either exculpatory or impeaching; 2) that evidence is suppressed by the State; and 3) there is a reasonable probability that the result of the trial would have been different if the information was disclosed to the defense.²¹ Evidence that a witness testified differently while under oath at an earlier trial is evidence that can be used to impeach the witness. Therefore, when the State learned mid-trial that William Chen intended to testify at Liu’s trial inconsistently with the testimony he provided at Chao’s trial, the State timely disclosed that information to the defense.

The State argued below that Liu failed to show that the State did not timely disclose the information, i.e, that Liu failed to meet the second “suppression” prong of *Brady*. Although Superior Court did not base its denial of Liu’s motion on this argument, this Court can affirm the denial of his motion on that basis.²² Superior Court’s factual findings support the conclusion that the State met its

²⁰ 373 U.S. 83 (1963).

²¹ *Wright v. State*, ___ A.3d ___, 2014 WL 2085826 (Del. May 19, 2014) (citing *Starling v. State*, 882 A.2d 747, 756 (Del. 2005)); *United States v. Bagley*, 473 U.S. 667, 683 (1985) (“Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule.”) (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)). *See also id.* at 683 (“The 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. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.”).

²² *Torrence v. State*, 2010 WL 3036742, at *2 (Del. Aug. 4, 2010) (citing *Unitrin, Inc. v. American Gen’l Corp.*, 651 A.2d 1361, 1390 (Del. 1995)).

obligation to disclose the information timely to the defense upon learning the information mid-trial. Superior Court found, and Liu does not dispute on appeal, the following facts: After the second day of trial on Tuesday, March 12, 1991, the State met with Chen to prepare Chen to testify.²³ At that time, Chen disclosed to the State that, even though he testified to the contrary at Chao's trial, he had sex with Chao on more than one occasion after his marriage.²⁴ Trial continued on Monday, March 18, 1991.²⁵ The State called Chen as the second witness on March 18th.²⁶ At some point prior to Tuesday, March 19, 1991, the State disclosed Chen's intended change in testimony to Liu's counsel.²⁷ Liu's cross-examination of Chen began in the afternoon of Wednesday, March 20, 1991 and continued, with interruption for other witnesses, through Thursday April 4, 1991.²⁸ Based on these facts, this Court can hold that the State's mid-trial disclosure of information learned mid-trial was timely and, therefore, that the State did not suppress *Brady* information.

²³ *Liu*, 2014 WL 605455, at *2, ¶¶ 2 & 3, and *4, ¶ 21. Below, the State provided Superior Court with a 1991 calendar containing notations of various events identified from the docket and transcripts. A copy is included at B1.

²⁴ *Id.* at *2, ¶ 3.

²⁵ *Id.* at *2, ¶ 4. There was no trial on March 13, 14 or 15 because Liu's counsel was ill. ("I'm trying to remember what day it was that we had our last trial testimony last week before [Liu's counsel] got [sick].") B36; Defense Closing, ("We had some time when I was out sick.") B149.

²⁶ *Id.* at *2, ¶ 4.

²⁷ *Id.* at *4, ¶¶ 18 & 20.

²⁸ *Id.*

Even if the State’s disclosure was delayed, Superior Court correctly found “Liu’s motion fails under the third prong of the *Brady* violation analysis.”²⁹

Delayed disclosure of *Brady* material does not automatically justify a new trial. Instead, as this Court has noted, “[w]hen a defendant is confronted with delayed disclosure of *Brady* material, reversal will be granted only if the defendant was denied the opportunity to use the material effectively.”³⁰ In other words, “[n]o reversible error exists where the defense ‘has not demonstrated that the tardy disclosure prevented it from effectively presenting the evidence.’”³¹ “[T]he belated disclosure of impeachment or exculpatory information favorable to the accused violates due process [only] when an ‘earlier disclosure would have created

²⁹ *Id.* at *4, ¶ 16.

³⁰ *Rose v. State*, 542 A.2d 1196, 1199 (Del. 1988) (citing *United States v. Johnston*, 784 F.2d 416, 425 (1st Cir. 1986); *United States v. Mitchell*, 777 F.2d 248, 256 (5th Cir. 1985) (defendant’s due process rights not violated by delayed access to sentencing reduction materials which were sealed by court order, when materials released in time for effective use during cross-examination of witness at trial); *United States v. Higgs*, 713 F.2d 39, 44 (3d Cir. 1983) (accused’s due process rights to fair trial satisfied when material which could be used to impeach witness’ credibility was disclosed on day witness was scheduled to testify); *United States v. Pollack*, 534 F.2d 964, 973-74 (D.C. Cir. 1976) (disclosure by government must be made at such time as to allow the defense to use favorable material effectively in presentation of case); *Criminal Procedure Project*, 75 Geo. L.J. 940 (1987)). *Accord Pilot v. State*, 1996 WL 415905 (Del. July 12, 1996) (holding defendant failed to establish reversal was required where State disclosed mid-trial an evidence log that revealed discrepancy in chain of custody of cocaine; defendant had ample opportunity to use information and failed to establish that outcome of trial would have been different if evidence log was disclosed earlier); *Warren v. State*, 1993 WL 445479 (Del. Nov. 1, 1993) (affirming conviction despite delayed disclosure on day of trial that victim told police the perpetrator resembled her local grocer, because earlier disclosure was unlikely to have altered the result of trial because the victim’s statement was played for the jury and defense counsel could have cross-examined the victim regarding the statement).

³¹ *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994) (quoting *Dickens v. State*, 437 A.2d 159, 162 (Del. 1981) and citing *Stokes v. State*, 402 A.2d 376, 378-81 (Del. 1979)).

a reasonable doubt of guilt.”³² Where there is “significant evidence, independent of the undisclosed testimony” that is sufficient to sustain the conviction, there is no such prejudice from a delayed disclosure.³³

Superior Court correctly found that the mid-trial disclosure did not prejudice Liu and did not create a reasonable probability of a different outcome.

Superior Court found, and Liu does not dispute on appeal, that when the State disclosed to the court that the State believed Chen would testify differently than he had during the Chao trial and had previously advised Liu’s counsel of such,³⁴ Liu’s counsel “did not seek a continuance or make any comment whatsoever about needing to perform additional investigation.”³⁵ Indeed, Liu’s trial counsel did not contradict the State’s representation that Liu’s counsel “had ample time to make use of the evidence.” B36. To the contrary, the comments of Liu’s counsel reflect that he was prepared to cross-examine Chen and believed that such examination would render Chen a suspect in the murders.³⁶ Superior Court

³² *United States v. Burke*, 571 F.3d 1048, 1054 (10th Cir. 2009) (quoting *United States v. Young*, 45 F.3d 1405, 1408 (10th Cir. 1995), and citing *United States v. Fallon*, 348 F.3d 248, 252 (7th Cir. 2003) (key inquiry is “whether earlier disclosure would have created a reasonable doubt of guilt”).

³³ *Saunders v. State*, 2013 WL 6157181, at *3 (Del. Nov. 20, 2013) (quoting *Seacrest v. State*, 679 A.2d 58, 64 (Del. 1996) (internal quotations omitted)).

³⁴ *Liu*, 2014 WL 605455 at *2, ¶¶ 5 & 20.

³⁵ *Id.* at *2, ¶ 6.

³⁶ When the Court was discussing with counsel whether the change in testimony was perjury, counsel who was appointed to represent Chen regarding whether to testify asked, “Does [Chen] become a suspect in these murders now?” Liu’s counsel replied, “Not until I’m done with him.” B38.

correctly concluded that “Liu’s counsel attacked Chen’s credibility in a vigorous cross-examination.”³⁷

Although Liu now characterizes the disclosure of Chen’s perjury at Chao’s trial as a “mid-trial surprise,” Liu’s counsel, who had attended portions of Chao’s trial and had also read the Chao trial transcripts,³⁸ appeared not to have been surprised that Chen’s prior testimony regarding the discontinuation of sexual relations was not true. In his closing argument, Liu’s counsel argued:

When did William finally decide to tell anybody he was having sex with Vicky after he got married? After he looked like a total fool in front of Vicky’s jury, trying to say he never had sex with her after they got married, except the one time. Did anybody believe that? No.³⁹

Moreover, trial testimony revealed that Liu had pre-trial knowledge of the nature of the relationship between Chen and Chao: Liu lived in Apartment 2C with Chen for a period of time after Chen’s marriage; Liu witnessed arguments between Chen and Chao; and Liu intervened on Chao’s behalf on 3 occasions by attacking

³⁷ *Liu*, 2014 WL 605455, at *2, ¶ 9.

³⁸ B6 (The prosecutor noted: “At [the July 1989 Chao trial], [Liu’s counsel] was present, listened to my opening statement and I believe he has indicated and represented to the Court and has read much if not all of the transcripts of the Chao trial...”) & B7 (In arguing a motion in limine, Liu’s counsel stated: “In my experience, *and reviewing the transcripts and sitting through the trial*, that the State intends to ask excessively disproportionate questions and repetitive questioning in terms of location, descriptions of bodies, asking police officers the description of the body, repeatedly, only as to the baby as opposed to the other decedents.”) (emphasis added); B8 (In discussing chain of custody evidence during the Chao trial, Liu’s counsel stated “And since my review of the record indicates the State didn’t play fast and loose with the rules...”).

³⁹ B156.

Chen.⁴⁰ From Liu's letters introduced at trial, it appears he was aware that Chen and Chao's relationship after Chen's marriage included sexual relations.⁴¹ Even if Liu was unaware that Chen and Chao's relationship included sexual relations, Liu failed to explain why the mid-trial disclosure (that Chen would testify that he and Chao had sex after his marriage on more than the one occasion to which he admitted during Chao's trial) prompted the need for investigation into the relationship beyond any investigation that might have been called for before that disclosure. This is particularly true because, as detailed in the Statement of Facts, Liu's defense was premised, in large part, on suggesting that he was only a cab driver and it was Chen and Chao who committed the murders.

Superior Court's conclusion that Liu was not prejudiced by the mid-trial disclosure is also supported by the lengthy course of the trial. Liu's trial (excluding jury selection) spanned 11 weeks. From opening statements on March 11, 1991 through closing statements on May 28, 1991, there were 36 days of trial.⁴² Even if Liu's counsel did not learn of the change in Chen's testimony until March 19th, he had more than 2 weeks before Chen's cross-examination concluded and

⁴⁰ See, e.g., B66-82.

⁴¹ B219 (referencing State's Ex. 106 – note found in Liu's apartment that stated: “Now the reality is right before my eyes. She is deceiving and using me. She supports *her lover* with my money and totally ignores my existence.”) (emphasis added).

⁴² See Chart of transcripts provided to court below (B2-5).

more than 2 months before the defense began its case⁴³ to have his investigator perform any additional investigation prompted by the disclosure.⁴⁴ Furthermore, when counsel and the Court discussed scheduling on May 13, 1991, and the State advised that it would likely rest the following Monday, May 20, 1991, Liu's counsel made no mention of needing any additional time for investigation before beginning the defense case. Because Liu's counsel requested additional time when he believed it was needed during trial,⁴⁵ one can reasonably conclude from the lack of a request for a continuance related to Chen's change in testimony that Liu did not require any additional time to be able to use that information to his advantage.

Moreover, Liu failed to articulate any evidence or information that he would have uncovered or how his trial strategy would have changed if the Court had *sua sponte* continued the trial. Liu's bald statement that "[t]he details of the Chen/Chao relationship necessarily would have to have been thoroughly investigated prior to trial to prove any theory that Chen and Chao had combined to

⁴³ Liu's cross-examination of Chen began in the afternoon of Wednesday, March 20, 1991, continued on Monday, March 25, 1991, was interrupted for the rest of that week because of witness scheduling issues, and then continued on Monday, April 1, 1991 through Thursday April 4, 1991. The State rested and the defense case began on May 20, 1991. (B1-5).

⁴⁴ Before trial began, Liu's counsel advised the Court that his investigator, Carl Kent, would be attending the trial from time to time. (B8). The presence of a defense investigator at trial presumably means that the investigator would have been available to perform a mid-trial investigation. In any event, both below and now on appeal, Liu cannot identify with any degree of specificity any investigation that would have been conducted but for the lack of an unrequested continuance. *Compare* Motion for New Trial (A48-61) *with* Op. Brf.

⁴⁵ *See, e.g.*, B18 (Liu's counsel requested overnight to review a videotape the State sought to play for the jury) & B131-43 (Liu's counsel requested a 1-day delay of trial to obtain an undisclosed document that either "prove helpful to the defense if it said one thing, but I [can't] disclose what it [is] because it could significantly backfire").

commit the arson” (Op. Brf. at 9) is insufficient to show prejudice. “To justify imposition of a remedy, the defense must articulate ... the reasons why the delay should be regarded as materially prejudicial.”⁴⁶ But, Liu failed to identify a single additional document, a single additional witness, or even a single additional question of Chen, Chao or any other witness at trial that he would have presented had the trial been continued. At most, the evidence further investigation would have uncovered would have been circumstantial evidence of what Chen admitted at Liu’s trial – that his sexual relationship with Chao continued after his marriage.

Superior Court’s conclusion is further supported by its finding that “[t]he delayed disclosure did not cause Liu to change his defense or trial strategy. In fact, the extent of the relationship between Chen and Chao also was consistent with Liu’s strategy and defense. Chen’s change in testimony was consistent with Liu’s strategy that Chen’s credibility should be rejected by the jury.”⁴⁷ Thus, Superior Court did not abuse its discretion when it concluded that the delayed disclosure did not prejudice the defense.

Likewise, Superior Court correctly concluded that the disclosure did not create a reasonable probability of a different trial outcome. In reaching that conclusion, Superior Court found:

⁴⁶ *United States v. Burke*, 571 F.3d 1048, 1056 (10th Cir. 2009).

⁴⁷ *Liu*, 2014 WL 605455, at *4, ¶ 25.

The State presented sufficient evidence for Liu's conviction independent of Chen's testimony. Liu was a New York City taxicab driver. Liu had rearranged his schedule with the driver with whom he shared his taxicab so that Liu could have the cab for the night on which the murders took place. A neighbor of Chen's testified at Liu's trial that the neighbor saw a yellow taxicab early on the morning of the murders on the street adjacent to Compass Drive, the street on which Chen lived and where the crimes occurred. The neighbor testified that he observed the taxicab driving slowly down the cul-de-sac and saw the lights of the taxicab being extinguished. The neighbor testified that the occupants of the taxicab seemed to be looking for a specific house. The neighbor saw the taxicab turn onto Compass Drive and drive up to Chen's house. A forensic chemist testified that traces of gasoline were found in Liu's taxicab, on Liu's pants, and on Liu's shoes. A toll collector for the Delaware Memorial Bridge who was working on the morning of the arson and murders stated that he saw Liu driving a taxicab with a passenger after they crossed the bridge.⁴⁸

Superior Court correctly concluded that because "[t]here was overwhelming evidence of Liu's guilt separate and apart from Chen's testimony," "the interest of justice does not require a new trial."⁴⁹

*Leka*⁵⁰ provides no support for Liu's claim.

This case is not like *Leka* relied on by Liu. (Op. Brf. at 11). In *Leka*, the defendant was convicted of one count of second degree murder and two counts of criminal possession of a weapon, offenses arising out of a shooting on a Brooklyn street. The prosecution's case consisted chiefly of the eyewitness testimony of a

⁴⁸ *Liu*, 2014 WL 605455, at *4, ¶ 27.

⁴⁹ *Id.* at *5, ¶ 29.

⁵⁰ *Leka v. Portuondo*, 257 F.3d 89 (2d Cir. 2001).

man and a woman who were passing by on the sidewalk during the shooting.⁵¹ The Second Circuit granted habeas relief based on the prosecution's failure to disclose anything more than the name and address of an off-duty police officer, who had witnessed the murder and whose observation "casts doubt on the testimony of both eyewitnesses presented by the prosecution at trial.... [and] were favorable to the defense."⁵² Although the Second Circuit discussed delayed disclosure, as Liu quotes, the Second Circuit granted habeas relief based on the prosecution's failure to make a specific disclosure of what the off-duty officer had seen.⁵³

These are not the facts present in Liu's case. As discussed above, the State disclosed William Chen's perjury in the earlier Chao trial during Liu's when it learned the information. Moreover, the new information did not "throw [Liu's] existing strategies and preparation into disarray."⁵⁴ Superior Court correctly found

⁵¹ *Id.* at 91.

⁵² *Id.* at 99. During plea negotiations, the State advised the defendant that the off-duty officer could identify the defendant as the shooter, but did not provide the officer's name. *Id.* at 93. Three days before trial, the State provided the officer's name and advised the defense that the officer would not identify the defendant, but did not advise the officer had any knowledge helpful to the defense. *Id.* After the defense bungled an attempt to interview the officer, the State obtained a protective order precluding the defense from contacting the officer until the defense began its case. *Id.* at 94 & 99. The off-duty officer was not called as a witness by either the State or the defense. *Id.* at 94-95.

⁵³ *Id.* at 100 ("In this case, of course, the prosecutor never made specific disclosure of what Garcia had seen. There is no doubt that the prosecutor had that information from the beginning of the case: Garcia was a police officer who witnessed a murder. And it is clear that the information was favorable to the defense. So there is really no question but that the government suppressed information that it was required to turn over.")

⁵⁴ *Id.* at 101.

that Liu's opportunity to use the information was not impaired and that there is no reasonable probability that an earlier disclosure would have made any difference in the outcome of his trial.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Superior Court.

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CERTIFICATE OF SERVICE

I, Karen V. Sullivan, Esquire, do hereby certify that on May 27, 2013, I have caused a copy of the State's Answering Brief to be served electronically upon the following:

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