IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

ARNOLD BUCK,
Appellant,
v.
REPUBLIC OF PALAU,
Appellee.

Cite as: 2018 Palau 27
Criminal Appeal No. 17-002
Appeal from Criminal Action Nos. 16-053 & 16-108 (consolidated)

Decided: December 10, 2018

Counsel for Appellant ..... Danail M. Mizinov
Counsel for Appellee ..... Graham G. Leach

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice
JOHN K. RECHUCHER, Associate Justice
R. BARRIE MICHELSEN, Associate Justice

Appeal from the Trial Division, the Honorable Lourdes L. Materne, Associate Justice, presiding.

OPINION

PER CURIAM:

[¶ 1] Following a jury trial, Arnold Buck was convicted of trafficking and possessing a controlled substance. Mr. Buck appeals his convictions, asserting that they were obtained in violation of his Due Process rights under the Palau Constitution. For the reasons set forth below, we **VACATE** Mr. Buck's convictions in part, **AFFIRM** his convictions in part, **VACATE** his

sentence, and **REMAND** this case for proceedings consistent with this opinion.[1]

FACTS

[¶ 2] Arnold Buck was arrested and charged with three counts of Trafficking of a Controlled Substance in violation of 34 PNC § 3301(a)(b)(5) and three counts of Possession of a Controlled Substance in violation of 34 PNC § 3302(d)(1). *See* Tr. 79:9–21.[2] Mr. Buck's charges are related to three "controlled buys" of methamphetamine occurring on February 5th, March 14th, and August 19th of 2016. A controlled buy is a term used by Belau Drug Enforcement Task Force ("Task Force") officers to describe the procedure by which a confidential informant ("CI") purchases an illegal controlled substance from individuals under police investigation using marked bills. *See* Tr. 113:17–24, 280:17–23, 283:11–15.

[¶ 3] The prosecution based its case heavily on the testimony of two Task Force CIs, Mike Teman and Shaft Katosang. Mr. Katosang was the CI used for the February 5th and March 14th controlled buys (Criminal Case No. 16-053). *See* Tr. 284:8–16, 290:7–20. Mr. Teman was the CI used for the August 19th controlled buy (Criminal Case No. 16-108). Tr. 310:9–12. Both Mr. Katosang and Mr. Teman were given incentives to participate in the controlled buys, Mr. Katosang in the form of reduced criminal charges, Tr. 377:22–378:13, and Mr. Teman in the form of monetary compensation, Tr. 322:26–323:5.[3] Both men testified at Mr. Buck's trial regarding the controlled buys. While it is unclear what information was provided to the defense

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[1] Although Mr. Buck requests oral argument, we determine pursuant to ROP R. App. P. 34(a) that oral argument is unnecessary to resolve this matter.

[2] Mr. Buck's charges arise from two separate criminal cases which were consolidated prior to trial. Mr. Buck was charged with two counts of Trafficking of a Controlled Substance and Possession of a Controlled Substance in Criminal Case No. 16-053 and one count of Trafficking of a Controlled Substance and Possession of a Controlled Substance in Criminal Case No. 16-108.

[3] Task Force Officer Lebilau Sebalt testified that Mr. Teman was paid for his work with the Task Force generally and that he was paid for this specific buy, but he could not remember how much money Mr. Teman received. *See* Tr. 223:7–14. Mr. Teman testified that he is paid between $300 and $500 per buy, but did not testify how much he was paid for this specific buy. *See* Tr. 323:1–5.

regarding Mr. Katosang's immunity agreement, it is undisputed that the prosecution failed to disclose the payments that Mr. Teman received in exchange for his cooperation. *See* Appellee's Br. 7–8. This information was revealed mid-trial during the defense's cross-examination of Task Force Officer Sebalt. *Id.* at 8.

[¶ 4] At the close of the prosecution's case-in-chief, the defense moved for a judgment of acquittal for all charges based on several different grounds, including an argument that Mr. Buck was improperly pre-targeted for a controlled buy, Tr. 428:1–14, and that the prosecution failed to disclose the payments made to Mr. Teman,[4] Tr. 433:4–434:17. Defense counsel first argued that Mr. Katosang's testimony should be excluded and a judgment of acquittal granted for the charges against Mr. Buck relating to his testimony about the February 5th and March 14th controlled buys because Mr. Katosang was promised immunity for setting up a controlled buy specifically targeting Mr. Buck. Tr. 428:4–18. Citing United States case law, defense counsel argued that, because of the strong incentive to fabricate evidence, Mr. Katosang's testimony was too unreliable and allowing it in violated Mr. Buck's Due Process rights. Tr. 428:21–429:12; Tr. 442:7–13. Relying on the prosecution's Due Process obligation to disclose evidence favorable to the defense ("*Brady* evidence"), defense counsel also requested that Mr. Teman's testimony about the August 19th controlled buy be excluded from the trial and the charges against Mr. Buck relating to Mr. Teman's testimony be dismissed via a judgment of acquittal. Tr. 434:12–25.

[¶ 5] The Trial Division denied the motions. The Trial Division first noted that there was "no rule saying that if a specific defendant is targeted then evidence to that fact should be excluded," Tr. 448:13-14, and regardless, there was evidence to support the conclusion that Mr. Buck was not pre-targeted, Tr. 448:22–24. The Trial Division then concluded that the defense had access

[4] Although defense counsel's motion for a judgment of acquittal preserved the *Brady* issue for appeal, counsel's objection to the prosecution's failure to disclose this evidence should have been made immediately upon its discovery. Had defense counsel done so, the Trial Division could have satisfied the requirements of *Brady* by offering the defense a continuance to evaluate the newly discovered evidence. *See United States v. Mathur*, 624 F.3d 498, 506 (1st Cir. 2010) ("The customary remedy for a *Brady* violation that surfaces mid-trial is a continuance and a concomitant opportunity to analyze the new information and, if necessary, recall witnesses.").

to Mr. Teman prior to trial and "[t]his information could have been elicited from Mr. Teman[] well before trial from the defense." Tr. 452:7–8.[5] The Trial Division further noted that excluding Mr. Teman's testimony was "not a remedy in this case" because "[h]is testimony is vital, if it is excluded, then the whole August 2016 or the charges relating to the August 2016 Controlled Buy would just fall apart." Tr. 452:15, 24–27. After the closing of the defense's case, defense counsel renewed its motion for a judgment of acquittal, which the Trial Division also denied. Tr. 484:18–486:2.

[¶ 6] The jury found Mr. Buck guilty on all six counts, and he was subsequently sentenced to fifty-seven years' imprisonment. Commitment Order and Sentencing Order 1–3. Mr. Buck timely appealed.

STANDARD OF REVIEW

[¶ 7] Whether suppressed evidence is material under *Brady* is a question of law, which we review *de novo*. *See Rengiil v. Republic of Palau*, 20 ROP 141, 143 (2013) (reviewing the failure to disclose exculpatory evidence *de novo*). We review the denial of a judgment of acquittal under a clearly erroneous standard. *Remengesau v. Republic of Palau*, 18 ROP 113, 119 (2011).

DISCUSSION

[¶ 8] Mr. Buck raises two separate grounds for relief in his appeal: (1) an affirmative defense of entrapment and (2) failure to disclose *Brady* evidence in violation of the Due Process clause of the Palau Constitution and the Rules of Criminal Procedure. We address each in turn.

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[5] We note that there is no due diligence requirement for *Brady* evidence. It is questionable whether defense counsel could have discovered this information prior to trial given that counsel attempted to interview Mr. Teman, but Mr. Teman refused to answer counsel's questions. *See* Tr. 328:2–329:6. But even assuming defense counsel could have discovered the information, counsel's ability to do so is immaterial. *Brady* is an affirmative obligation placed solely on the prosecution; it is the prosecution's responsibility to disclose material, favorable evidence to the defense, irrespective of the defense's ability to obtain it. *See, e.g.*, *Banks v. Dretke*, 540 U.S. 668, 696 (2004) (rejecting argument that no *Brady* violation occurred because the defense could have discovered the suppressed evidence by interviewing the prosecution's witness); *Strickler v. Greene*, 527 U.S. 263, 284–86 (1999) (same).

I. Entrapment

[¶ 9] Mr. Buck argues that his convictions for Trafficking of a Controlled Substance and Possession of a Controlled Substance in Criminal Case No. 16-053 cannot stand on the basis of entrapment. Entrapment is an affirmative defense with two elements: "(1) improper governmental inducement of the crime, and (2) lack of predisposition on the part of the defendant to commit the criminal act." *Republic of Palau v. Lin Man Chuen*, 10 ROP 192, 192 (Tr. Div. 2002) (citing *United States v. Gamache*, 156 F.3d 1, 9 (1st Cir. 1998)). During trial, defense counsel argued that the testimony of Mr. Katosang should be excluded because "[h]e was told specifically that he had to set up a controlled buy against the defendant Mr. Arnold Buck" and such pre-targeting by police violated Mr. Buck's constitutional rights. Tr. 428:9–10; *id.* at 442:1–13. On appeal, Mr. Buck attempts to turn this argument into an entrapment defense. However, there is no evidence that defense counsel sought to present an entrapment defense and no such defense was ever presented to the jury. Therefore, this argument is waived on appeal. *See Orrukem v. Republic of Palau*, 11 ROP 177, 177 (2004) ("Because entrapment is an affirmative defense and was not raised at trial, Orruken could not raise an entrapment defense on appeal."). We affirm Mr. Buck's convictions in Criminal Case No. 16-053.

II. *Brady* Evidence

[¶ 10] Mr. Buck next challenges his convictions for Trafficking of a Controlled Substance and Possession of a Controlled Substance in Criminal Case No. 16-108, asserting the prosecution violated his Due Process rights by failing to disclose favorable impeachment evidence.

[¶ 11] Enshrined in the Fundamental Rights article of the Palau Constitution is one of the most important guarantees that a government owes to those it governs: "The government shall take no action to deprive any person of life, liberty, or property, without due process of law . . . ." *See* ROP Const. art. IV, § 6. It is from this guarantee that the *Brady* doctrine originates. This doctrine requires that the prosecution turn over any material evidence favorable to the defense, either because it is exculpatory or impeaches the credibility of a prosecutor's witness. *See Rengiil*, 20 ROP at 143–44 (citing *Ngiraked v. Republic of Palau*, 5 ROP Intrm. 159, 172 (1996)). Since first

recognizing that the Palau Constitution incorporates the *Brady* disclosure requirements in *Ngiraked*, this Court has repeatedly reaffirmed this doctrine and codified its requirements in the Court's Rules of Criminal Procedure. *See* ROP R. Crim. P. § 16(a)(1)(G) (requiring prosecutorial disclosure of "[a]ny material or information which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce the defendant's punishment thereafter"); *Dulei v. Republic of Palau*, 2017 Palau 29, ¶ 10 n.2 (2017) ("[T]he Republic has an affirmative obligation under the Due Process clause of Article IV, § 6 of our Constitution to turn over any exculpatory evidence . . . ."); *Rengiil*, 20 ROP at 143–44 (analyzing whether the prosecution violated *Brady* by failing to disclose certain documents); *Ngiraked*, 5 ROP Intrm. at 172 ("Although we have not before had occasion to consider whether the *Brady* rule applies to the due process clause of the Palau Constitution, we now conclude that it does.").

[¶ 12] Despite adopting the *Brady* doctrine over twenty years ago, this Court has had few opportunities to define its contours. In doing so today, we consult some of the seminal *Brady* cases in United States case law.[6] "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the [prosecution], either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999); *see also Ngiraked*, 5 ROP Intrm. at 172 & n.9 (adopting and defining the *Brady* doctrine as a rule in which "the suppression of exculpatory [or impeachment] evidence by the prosecution . . . violates the due process clause of the [Palau] Constitution where the evidence is 'material' to guilt or punishment").

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[6] Although this Court is not bound to the interpretation of United States law, we find it beneficial to look to for guidance in the existing jurisprudence interpreting *Brady*. As we noted in the very case that adopted the *Brady* doctrine:

> [W]here the courts of Palau face an issue of first impression, it is wholly proper, and indeed prudent, to tap the analytical resources that are available in the bodies of law developed elsewhere. Such authority is particularly valuable where . . . the Palau rule is identical to, and derived from, a foreign jurisdiction's statute or rule that has been the subject of extensive analysis and interpretation.

Ngiraked, 5 ROP Intrm. at 169 n.7.

[¶ 13] The first two elements of a *Brady* claim have clearly been established here. Evidence that Mr. Teman received monetary compensation in exchange for his assistance to the Task Force is demonstrative of a bias that could call into question the credibility of his testimony. Therefore, it is impeachment evidence that is favorable to the defense. And there is no dispute that the prosecution failed to disclose this evidence to the defense prior to trial. *See* Appellee's Br. 8 ("[Mr. Buck] discovered the information [regarding] Mr. Teman's payment during cross examination of Mr. Sebalt, the third of the Republic's witnesses."). Therefore, the evidence was suppressed.[7] The only remaining question is whether Mr. Buck was prejudiced by the suppressed of the impeachment evidence, *i.e.*, whether the evidence was "material."

[¶ 14] Prosecutorial suppression of *Brady* evidence only rises to the level of a constitutional Due Process violation if the evidence is "'material' to guilt or punishment." *Rengiil*, 20 ROP at 144 (quoting *Ngiraked*, 5 ROP Intrm. at 172). "Further, 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." *Id.* (internal quotation marks omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the proceeding. *Ngiraked*, 5 ROP Intrm. at 172 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).[8]

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[7] In a footnote, Appellee contends that "[i]t is unclear from the record if former Assistant Attorney General Robbins knew Mr. Teman was paid but it can be inferred he did not." Appellee's Br. 7 n.1. It is unclear to the Court why Appellee included this statement, but to the extent Appellee argues that this alleged lack of knowledge or bad faith relieves the prosecution of its disclosure obligations, he is mistaken. *See Kyles v. Whitley*, 514 U.S. 419, 437–38 (1995) ("[T]he 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. . . . [T]he prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.").

[8] Appellee argues that we should review the failure to disclose the impeachment evidence against Mr. Teman under a "more probable than not" harmlessness standard because the suppression is a "non-constitutional [error] as it is an alleged violation of the discovery rules of criminal procedure, ROP R. Crim. P. 16(a)(1)(G)." Appellee's Br. 7. However, this is a mischaracterization of Mr. Buck's argument. Mr. Buck is not asserting that the prosecution's failure to disclose the impeachment evidence was a violation of the Rules of Criminal Procedure. Instead, Mr. Buck argues that the impeachment evidence against Mr. Teman is materially favorable evidence that must be disclosed to him under the constitutional Due

[¶ 15] Here, the importance of Mr. Teman's testimony cannot be overstated. He was the prosecution's key witness for the August 19th controlled buy. As the Trial Division noted:

> Mr. Teman's testimony is crucial because without his testimony then there is no evidence linking to the defendant that—the drugs that were recovered. . . . His testimony is vital, if it is excluded, then the whole August 2016 or the charges relating to the August 2016 Controlled Buy would just fall apart.

Tr. 452:8–11, 452:24–27. We agree. Given the critical nature of Mr. Teman's testimony, any evidence undermining his credibility could easily mean the difference between a conviction and an acquittal. While there can be no serious dispute that the payments to Mr. Teman were material *Brady* evidence, Appellee argues that no *Brady* violation occurred because that "information was presented to the Jury during the course of the trial." Appellee's Br. 7. According to Appellee, "[i]f the error had not been discovered until after the completion of trial the result may be different but that is not the case here." *Id.* at 8.

[¶ 16] It is true that not every delayed disclosure of impeachment or exculpatory evidence constitutes a prejudicial *Brady* violation. *See United States v. Warren*, 454 F.3d 752, 760 (7th Cir. 2006) ("Late disclosure does not itself constitute a *Brady* violation."). However, neither is Due Process satisfied merely because the evidence was disclosed during trial. *See Blake v. Kemp*, 758 F.2d 523, 532 n.10 (11th Cir. 1985) ("In some instances disclosure of *Brady* material during trial may be sufficient. However some *Brady* material must be disclosed earlier. This is because of the importance of some information to adequate trial preparation." (alterations omitted)).[9]

Process doctrine developed under *Brady v. Maryland*, 373 U.S. 83 (1963) and adopted by this court in *Ngiraked*, 5 ROP Intrm. at 172. Therefore, this opinion addresses only whether the suppression of the impeachment evidence is a violation of Mr. Buck's constitutional Due Process rights. We do not address any purported violations of the Rules of Criminal Procedure.

[9] The Tenth Circuit aptly articulated the problems with limiting *Brady* violations to post-trial disclosures in *United States v. Burke*, 571 F.3d 1048, 1054 (10th Cir. 2009) (alterations omitted):

"[E]xculpatory evidence must be produced by the prosecution in time for effective use at trial." *McMeans v. Brigano,* 228 F.3d 674, 684 (6th Cir. 2000) (internal quotation marks omitted). Therefore, we must ask whether there is a reasonable probability that the result of the trial would have been different if the prosecution had disclosed the payments made to Mr. Teman before the third day of a four-day trial. We conclude there is.

[¶ 17] Knowing prior to trial that the prosecution's key witness was "being paid to produce evidence," *see* Tr. 223:22–25, opens an entirely new area of investigation into the legitimacy of the investigation and possible defense strategies. And while the defense was able to elicit some impeachment evidence, it remains unclear how much Mr. Teman was paid for this controlled buy, how many other controlled buys he participated in, how many of those controlled buys he received payment in, whether the payment agreement included a requirement that Mr. Teman testify, or dozens of other questions that could bring the credibility of Mr. Teman's testimony into question. It is impossible to know what information could have been discovered if the prosecution had complied with its Due Process obligations and given the defense more than twenty-four hours to properly investigate such critical evidence. But we are convinced there is a reasonable probability that a good defense attorney could have raised reasonable doubt in at least one juror.

> It would eviscerate the purpose of the *Brady* rule and encourage gamesmanship were we to allow the government to postpone disclosures to the last minute, during trial. As the Second Circuit noted in *Leka v. Portuondo,* 257 F.3d 89, 101 (2d Cir. 2001), the belated disclosure of *Brady* material "tends to throw existing strategies and trial preparation into disarray." It becomes "difficult to assimilate new information, however favorable, when a trial already has been prepared on the basis of the best opportunities and choices then available." *Id.* . . . If a defendant could never make out a *Brady* violation on the basis of the effect of delay on his trial preparation and strategy, this would create dangerous incentives for prosecutors to withhold impeachment or exculpatory information until after the defense has committed itself to a particular strategy during opening statements or until it is too late for the defense to effectively use the disclosed information. It is not hard to imagine the many circumstances in which the belated revelation of *Brady* material might meaningfully alter a defendant's choices before and during trial: how to apportion time and resources to various theories when investigating the case, whether the defendant should testify, whether to focus the jury's attention on this or that defense, and so on. To force the defendant to bear these costs without recourse would offend the notion of fair trial that underlies the *Brady* principle.

[¶ 18] We are troubled by another aspect of Appellee's argument. In essence, Appellee contends that Mr. Buck would have been better off if he had not discovered the suppressed evidence until after his trial. This is a dangerous argument to make. It asks this Court to sanction the government's attempted suppression of a criminal defendant's Due Process rights merely because that defendant was savvy enough to uncover the suppressed evidence mid-trial. This, we refuse to do. *See Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process. . . . Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation.").[10]

[¶ 19] Having found that the prosecution's suppression of Mr. Teman's compensation violated Mr. Buck's constitutional Due Process right to *Brady* evidence, we turn now to the relief he is entitled. Mr. Buck asks this Court to dismiss the charges against him "in the interest of Justice." Appellant's Br. 22. While we are troubled by the Attorney General's actions, we do not believe such an extreme sanction is warranted in this case. Instead, we vacate Mr. Buck's convictions in Criminal Case No. 16-108 and remand the case to the Trial Division for a new trial. *See Monroe v. Angelone*, 323 F.3d 286, 293 n.3 (4th Cir. 2003) ("[A] *Brady* violation usually entitles a defendant to a new trial.").

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[10] The Attorney General would do well to remember its role as a representative of the Republic of Palau and its duty to the Palauan people:

> The [Attorney General] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935).

CONCLUSION

[¶ 20] We **VACATE** Mr. Buck's convictions for Trafficking of a Controlled Substance and Possession of a Controlled Substance in Criminal Case No. 16-108, **AFFIRM** his convictions for Trafficking of a Controlled Substance and Possession of a Controlled Substance in Criminal Case No. 16-053, **VACATE** his sentence, and **REMAND** this case for proceedings consistent with this opinion.

SO ORDERED, this 10th day of December, 2018.

ARTHUR NGIRAKLSONG
Chief Justice

JOHN K. RECHUCHER
Associate Justice

R. BARRIE MICHELSEN
Associate Justice