STATE OF MICHIGAN
BEFORE THE MICHIGAN JUDICIAL TENURE COMMISSION

Complaint against

Honorable Paul J. Cusick
Third Judicial Circuit Court
1441 St. Antoine
Detroit, Michigan, 48226

MSC No. 165050
Formal Complaint No. 104

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RESPONDENT PAUL J. CUSICK'S COMBINED REPLY BRIEF
IN SUPPORT OF HIS
MOTIONS FOR SUMMARY DISPOSITION

The Commission made a key concession, and its other arguments fail. The Master should dismiss this case.

A. The Commission concedes there was never a deal.

The Commission has dialed back its allegations. It originally alleged that Cusick made a "deal" with Fishman that McCully would plead guilty as charged and would cooperate as a CI *in exchange for* a reduced sentence:

> 31. On about March 13, 2014, respondent and Mr. Fishman reached an agreement, **deal,** and/or

> understanding that Thomas McCully would plead guilty as charged in case no. 14-1140-FY and would "cooperate" with the Task Force **in exchange for** a favorable consideration/reduction/mitigation in his sentence.[1]

Now, when faced with direct evidence that there was never a sentencing deal, the Commission shifts ground. It concedes there was no "concrete sentencing deal." (Brief at 26). In fact, it even denies that it ever alleged a specific deal, despite alleging one in the quoted excerpt above.[2] (*Id*.)

Now the Commission attempts to reframe its allegations as an "arrangement." The alleged arrangement is that Cusick stipulated to Fishman's request to adjourn sentencing so that McCully could *attempt* to mitigate his sentence. This fails.

First, a person has a right to attempt to mitigate their sentence—and may attempt to do so in a variety of ways. MCR 6.425(D)(1)(c). A prosecutor, as a minister of justice, should not obstruct it. Second, a stipulation of time carries no exchange. And third, Michigan law has never held that a prosecutor must disclose that the prosecutor stipulated to an adjournment at the request of a defendant to allow for the exercise of the right to attempt to mitigate their sentence. The Commission seeks to prosecute Cusick for violating a rule made out of whole cloth. The Commission cites no case law in support of its theory. The Master should dismiss this case.

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[1] Complaint, ¶ 31 (emphasis added).

[2] See also, *id.*, at ¶¶ 39, 136(h), 138(e), 142(d), (f) where the Commission refers to a "deal."

B. The Commission plays a semantics game in an attempt to save its case.

The Commission plays a semantics game in an attempt to evade the fatal flaws in its case. It conceded that Cusick didn't give McCully a "concrete sentencing deal." (Brief at 26). Yet, the Commission still alleges that Cusick gave McCully "consideration in sentencing" *in exchange for* CI work. (Brief at 31).

But an exchange is a deal no matter how one labels it. *Kirchoff v Morris*, 282 Mich 90, 95 (1937) (holding that a contract requires, among other things, offer, acceptance, and consideration); *Fisk v Fisk*, 328 Mich 570, 574 (1950) (holding that a meeting of the minds upon all essential points is necessary to constitute a valid agreement). And irrespective of how the Commission labels it, it still can't establish that Cusick ever offered McCully a reduced sentence in exchange for CI work. The direct evidence establishes that there was no agreement—it even uses that exact word.

First, the plea hearing shows that there was never an agreement because McCully confirmed he was pleading blindly:

Court:	So you're pleading blind here, do you understand that?
McCully:	Yes, Your Honor.
Court:	Is that what you want to do?
McCully:	Yes, Your Honor.
Court:	Okay. No promises have been made to you?

McCully: No.

Court: No promises have been made to you as to sentence, correct?

McCully: Correct.[3]

Second, the *Kastigar* letter confirms that there was **no agreement**—even using the word "agreement:"

4. On March 13, 2014, your client pled guilty to 1 count of Conducting a Criminal Enterprise, MCL 750.159(i); 1 count of Conspiracy to Commit a Criminal Enterprise, MCL 750.159(i); and 1 count of Conspiracy to Deliver/Manufacture Marijuana, MCL 333.7401(2)(d)(iii) before the Honorable David Groner of the Third Circuit Court. His sentence is scheduled on June 17, 2014. There is no agreement between your client and the Michigan Attorney General's Office as to any sentence that may be imposed.

5. Other than what has been stated, there is no other agreement between your client and the Michigan Department of Attorney General or any other investigating agencies.

Third, Cusick confirmed in a 4/7/14 memorandum to Paul Tennies that he made McCully no promises.[4]

Fourth, Cusick told Calleja that "Thomas McCully – Pled guilty as charged to all three counts *with no promises* and no *Cobbs*. Sentence is June 17th."[5]

Fifth, Judge Groner stated *yet again* at McCully's sentencing that "**there was no sentence agreement**."[6]

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[3] Attachment F, McCully Plea Hearing, 6-7.
[4] Attachment H, Cusick 4/7/14 email and memorandum to Paul Tennies.
[5] Attachment I, Cusick 4/8/14 email to Calleja (emphasis added).
[6] Attachment W, McCully Sentencing, 4.

So the direct evidence establishes there was never any agreement whatsoever and there was nothing for Cusick to disclose. The Commission's case fails for lack of any evidence of an agreement from any of the contracting parties.

C. The Commission mistakes McCully's CI work as evidence that Cusick promised McCully something.

The Commission thinks that because McCully performed CI work it necessitates the conclusion that he and Cusick had an agreement. Not so.

First, that's an invalid form of deductive reasoning, which the law prohibits. *Lowry v Enbridge Energy Ltd Partnership*, 500 Mich 1034 (2017); *West v General Motors Corp*, 469 Mich 177, 186 n 12 (2003) (holding that logical fallacies fail as a matter of law.) It's like assuming that since all terriers are dogs, all dogs are terriers.

Second, doing CI work doesn't guarantee anything. Though it may help someone mitigate their sentence, it may also hurt their chances at mitigation: it can reveal that someone lacks credibility, connections, or is still engaged in other criminal conduct. For example, McCully could have been a terrible CI, in which case his work wouldn't have been a mitigating factor for Judge Groner to consider. So the CI work in itself isn't evidence of an agreement because it could just as likely have hurt McCully instead of helping him.

Cusick, using the word "may," recognized that uncertainty by saying that the work "*may* mitigate [McCully's] sentence" in the legal file notes to which the Commission cites. (Brief at 31, emphasis added.) Whether McCully's CI work helped or harmed him

at sentencing depended on factors outside of Cusick's control and lay in the hands of Judge Groner.

Furthermore, CI work is but one factor of many that judges consider when crafting a sentence. Illness, age at the time of the crime, prior criminal history, level of remorse, victim impact, and dependent children, among other things, also factor in when a judge crafts a sentence. So, too, does the judge's view of the crime.

The Commission's response ignores this fact. It simply concludes that because McCully performed CI work he was **guaranteed** the exchange of a reduced sentence by Cusick. This fails as a matter of logic, as a matter of law, and as a matter of fact.

D. The Commission's *Kastigar*-letter argument fails:

The Commission doesn't want to face that the *Kastigar* letter, which the law treats as a contract, directly contradicts its primary allegation. See Complaint, ¶ 31. So it attempts to discount it. The Commission thinks that the words in the *Kastigar* letter don't count because a *Kastigar* letter is offered for immunity, not sentencing. (Brief at 30). It also says that the letter doesn't prove that there was no agreement because "the letter only states that a *specific* sentence has not been agreed upon." (Brief at 31). Not so.

First, the letter states in plain terms there is **no agreement** "as to **any** sentence that might be imposed."[7] It doesn't say "as to a specific sentence that might be imposed." So the Commission misrepresents the contents and nature of the letter.

[7] Attachment A, *Kastigar* letter (emphasis added).

Second, the *Kastigar* letter set forth both the terms of immunity for statements that McCully made in the course of his CI work and memorialized that he had no sentence agreement upon which he could rely in exchange for his work.[8] The letter states in express terms that there was no agreement on sentencing.[9] Both McCully and Cusick signed the letter.[10] Their signatures carry import and destroy any possibility that a separate "understanding" could have existed—either previously or contemporaneously with McCully's CI work. *Joseph v Rottschafer*, 248 Mich 606, 610 (1929) (holding that if parties enter a subsequent agreement on the same subject it extinguishes any prior agreement that contained terms inconsistent with the subsequent agreement); *Eastway & Blevins Agency v Citizens Ins Co of America*, 206 Mich App 299, 303 (1994) (holding that an implied term may not be used to replace or contradict an express term of the contract). See also *Int'l Transp Ass'n v Bylenga*, 254 Mich 236, 239 (1931) (holding that "one who signs a contract will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in its terms"); *Gardner v Johnson*, 236 Mich 258, 260 (1926) (holding that absent fraud, when a party signs a contract, it cannot avoid a term because it believed the contract said something different or was mere form).

[8] *Id.*
[9] *Id.*
[10] *Id.*

So the Commission's theory that Cusick and McCully had a different agreement other than that contained in the *Kastigar* letter fails under the basic principles of contract law.

E. The Commission's reliance on Gobles and Stevens sentences fail.

The Commission thinks that because Judge Groner sentenced Gobles and Stevens to jail it shows that he would have sentenced McCully to jail, too, had it not been for McCully's alleged agreement with Cusick. (Brief at 32). The reverse is true.

Gobles and Stevens entered into plea agreements with Cusick that called for jail time. Judge Groner was merely enforcing the terms of the contracting parties' agreements. Fishman, on the other hand, advised McCully to reject Cusick's plea agreement, plead blindly, and do CI work *with the hope* of mitigating his sentence. So the only things that Gobles and Stevens sentences show are that (1) Cusick wanted jail time for *all* of the defendants in this case, and (2) Judge Groner was willing to enforce the parties' negotiated agreement.

F. The Commission relies on outdated statements based on incomplete or false information.

The only evidence the Commission has of any alleged agreement comes either directly or indirectly from Calleja—who falsely assumed that Cusick offered McCully a reduced sentence in exchange for CI work. The Commission has no evidence from any non-Calleja source to establish an agreement.

The Commission also attempts to rely on outdated statements from Judge Groner and Fishman. The Commission drafted those statements using their own version of the facts and obtained signatures from Judge Groner and Fishman without providing them with all of the documentary evidence. In fact, neither individual ever had the benefit of reviewing the plea hearing transcript because the Commission withheld that until March 2023 even though it possessed it for three years. Both Judge Groner and Fishman provided new, superseding statements when given additional information.

The Commission now says that Master cannot consider the superseding statements because that would be weighing credibility, which would be inappropriate for summary disposition. (Brief at 34). Even if it were the case, it would likewise require the Master to disregard Judge Groner and Fishman's original affidavits, too—leaving the Commission without their preferred testimony.

But it's not the case, and the Commission is simply wrong. The new affidavits are superseding statements, not supplemental statements, and they fully supplant the original ones in evidence.

G. The Commission misstates Cusick's *Brady* argument in an attempt to avoid it.

The Commission says that Judge Cusick's motion for summary disposition seeks dismissal under the materiality component of *Brady*. (Brief at 36-39). It doesn't.

Materiality is the **third** prong of *Brady*. Judge Cusick's motion seeks dismissal under the **second** prong of *Brady*. And for that matter, the Commission doesn't even state *Brady*'s rule accurately. (Brief at 42).

i. The interplay between *Brady*, *Turner*, and MRPC 3.8(d).

Recall that to establish a *Brady* due process violation, a defendant must show three things: (1) the prosecution has suppressed evidence; (2) that evidence is favorable to the accused; and (3) that evidence is material to the outcome. *People v Christian*, 510 Mich 52, 76 (2022), citing *People v Chenault*, 495 Mich 142, 150, (2014); *Strickler v Greene*, 527 US 263, 281-282 (1999). The second prong of *Brady* requires a prosecutor to disclose favorable evidence. *Id.* Favorable evidence means evidence that either impeaches a witness or exculpates the accused. *Strickler*, 527 US at 281-282.

MRPC 3.8(d) mirrors the second prong, requiring a prosecutor to turn over either exculpating or mitigating evidence.

> (d) make timely disclosure to the defense of all evidence or information known to the prosecutor **that tends to negate the guilt** of the accused **or mitigates the degree of the offense**. . . .[*Id.*]

Because the rule mirrors the constitutional requirement under *Brady*, if evidence isn't favorable under *Brady*, then it's not favorable under MRPC 3.8(d) relieving a prosecutor of the duty to turn over the evidence. It also follows that if evidence isn't

favorable, then by definition it can't be material to the outcome. That was the case in *Turner*.

Turner v US, 137 S Ct 1885 (2017) dealt with the **second** prong of *Brady*, i.e., whether the evidence constitutes favorable to even require disclosure, but it did so through the lens of the third prong of materiality. From the vantage point of materiality, it essentially looked in the rear-view mirror at the second element and found that the evidence was "too little, too distant, and too weak" from the main evidentiary points to be favorable and thus material under *Brady*. *Id.* at 1894. *Turner* observed that if the evidence isn't sufficiently favorable, i.e., it's too weak, then it's not material. It also observed that to determine whether the withheld evidence is too weak or distant requires a fact intensive query on the weight the evidence would have carried, had it been disclosed. *Id.* at 1888, 1894.

That's what's going on here. First, Cusick never made any sentencing agreement with McCully. So Cusick couldn't possibly have withheld evidence of an agreement because one didn't exist. Thus, he didn't violate prong two of *Brady* under the Constitution or its ethical counterpart in MRPC 3.8(d) or any of the other charges for that matter. The Master should dismiss on this alone. But even assuming for the sake of argument that Loggie did CI work to help McCully with his alleged agreement, that evidence still wasn't sufficiently favorable to require disclosure under the Constitution or MRPC 3.8(d).

ii. Theoretical application of *Brady*, *Turner*, and MRPC 3.8(d) here assuming, for the sake of argument, an agreement existed.

Loggie's testimony at the November 3, 2015, preliminary exam placed Joslin at the scene of the criminal transaction occurring at Pure Wellness. Loggie admitted, when asked under oath, that she was a CI. That admission carried the greatest impeachment evidence, if there was any. Her reasons for agreeing to do CI work wouldn't have cast further doubt on whether she saw Joslin at Pure Wellness during her controlled buys. In fact, Loggie's motivations wouldn't have had any bearing on whether Joslin was there that day. In other words, McCully's situation wouldn't have encouraged Loggie to lie about whether she saw Joslin at Pure Wellness because McCully's mitigation didn't turn on who the government accused in the Pure Wellness matter. So Loggie wouldn't have received any benefit for lying.

This is why *Atkins* supports Cusick. McCully's situation wouldn't have encouraged Loggie to testify *a certain way*. *People v Atkins*, 397 Mich 163, 173 (1976) ("The focus of required disclosure is . . . on facts which may motivate the witness in *giving certain testimony*.") (emphasis added).

To prove the truth of this argument, assume that Loggie admitted during the preliminary exam that she agreed to do CI work at Pure Wellness to help out her boyfriend out on his upcoming sentencing. Would that have cast any additional doubt on whether Joslin was at Pure Wellness on the days Loggie made the controlled buys? No. Absolutely not. Thus the alleged withheld evidence was too weak to have qualified

as impeachment evidence. So it wasn't sufficiently favorable under *Turner* to require disclosure under *Brady* or MRPC 3.8(d).

The Commission repeatedly misstates Cusick's argument, erroneously thinking that Cusick argues about whether the withheld evidence would have resulted in new trial. That's not Cusick's argument. Cusick's argument is that the evidence wasn't sufficiently favorable to begin with.

H. The Commission's res gestae argument fails.

The Commission thinks a person constitutes a res gestae witness if they can test the credibility of another witness. (Brief at 43). But that's not the definition of a res gestae witness. The Commission also thinks that a person constitutes a res gestae witness even their testimony would be cumulative. (Brief at 45). But again, that's not the definition of a res gestae witness.

A res gestae witness is a person who witnessed first-hand some event in the continuum of the criminal transaction whose testimony **would aid in developing full disclosure** of the **facts** at trial. *People v Long*, 246 Mich App 582, 585 (2001). The rule doesn't concern itself with developing a witness's credibility—only the facts. *Id.* In fact, res gestae means "the thing done" in Latin. *Wex Law Dictionary* (2022). "The thing done" is about facts, not credibility. So the Commission is wrong.

Moreover, case law teaches that if a CI witnesses **the same events** that law enforcement also witnesses, then the CI is not a res gestae witness. *People v Paredes-Meza*,

unpublished per curiam opinion of the Court of Appeals, issued July 8, 2010 (Docket No. 291067) (holding that CI didn't constitute a res gestae because he did not witness "any events leading to defendant's arrest **that were not also** witnessed by" law enforcement, so his testimony wouldn't have aided in developing full disclosure of the facts). Here, McCully witnessed **the same events** that Detective Lowes witnessed, so his testimony wouldn't have aided in developing any of the facts. It would have merely been cumulative. So he doesn't constitute a res gestae witness.

Last, the Commission thinks that because Cusick originally thought that McCully was a res gestae witness that means McCully was, in fact, a res gestae witness. But the Commission is wrong yet again. Case law defines what constitutes a res gestae witness—not Cusick. And under the case law, McCully didn't constitute a res gestae witness. So the Master should dismiss the res gestae charge.

Conclusion and Request for Relief

This case has several fatal flaws. The Commission now concedes that there was never a concrete sentencing deal and now shifts ground. It alleges that Cusick failed to disclose that he stipulated to adjourn sentencing. That's not a violation under Michigan law.

On the other hand, the Commission still alleges—albeit by different names—that Cusick offered McCully a reduced sentence in exchange for CI work. But the direct

evidence establishes that there was never an agreement, and the Commission's theory of another concurrent "arrangement" fails under the basic principles of contract law.

Nor can the Commission establish that under case law McCully constituted a res gestae witness. And it failed to rebut Cusick's *Brady* argument because it misstated Cusick's argument and rebutted an argument that Cusick never made.

This case should be dismissed.

Respectfully submitted,

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