

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**January 2007 Term**

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**No. 31765**

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**FILED**

**May 10, 2007**

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RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**STATE OF WEST VIRGINIA,  
Plaintiff Below, Appellee,**

**V.**

**DENVER A. YOUNGBLOOD, JR.,  
Defendant Below, Appellant.**

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**ON REMAND FROM THE UNITED STATES SUPREME COURT  
Appeal from the Circuit Court of Morgan County  
Honorable David H. Sanders, Judge  
Criminal Case No. 01-F-28**

**REVERSED AND REMANDED**

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**Submitted: April 17, 2007**

**Filed: May 10, 2007**

**Robert C. Stone, Jr.  
Martinsburg, West Virginia  
Attorney for Appellant**

**Debra M.H. McLaughlin  
Morgan County Prosecuting Attorney  
Berkeley Springs, West Virginia  
Attorney for Appellee**

**CHIEF JUSTICE DAVIS delivered the Opinion of the Court.**

**JUSTICES MAYNARD AND BENJAMIN dissent and reserve the right to file a dissenting opinion.**

**JUSTICE STARCHER concurs and reserves the right to file a concurring opinion.**

## SYLLABUS BY THE COURT

1. A police investigator's knowledge of evidence in a criminal case is imputed to the prosecutor. Therefore, a prosecutor's disclosure duty under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L. Ed.2d 215 (1963) and *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982) includes disclosure of evidence that is known only to a police investigator and not to the prosecutor.

2. There are three components of a constitutional due process violation under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963), and *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982): (1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material, *i.e.*, it must have prejudiced the defense at trial.

**Davis, C.J.:**

The appellant, Denver A. Youngblood, Jr. (hereinafter Mr. Youngblood), was convicted in the Circuit Court of Morgan County of first degree sexual assault, second degree sexual assault, indecent exposure, two counts of brandishing a weapon, and wanton endangerment with a firearm. The circuit court sentenced Mr. Youngblood to 26 to 60 years imprisonment. The order of conviction and sentence was affirmed by a majority of this Court in *State v. Youngblood*, 217 W. Va. 535, 618 S.E.2d 544 (2005) (Davis, J. and Starcher, J., dissenting). However, the United States Supreme Court granted certiorari in *Youngblood v. West Virginia*, \_\_\_ U.S. \_\_\_, 126 S.Ct. 2188, 165 L. Ed.2d 269 (2006), vacated the judgment of the majority, and remanded the case for consideration of whether the State’s failure to turn over an evidentiary note violated the disclosure requirement of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L. Ed.2d 215 (1963). After carefully considering the supplemental briefs and the record submitted on appeal, and listening to the rearguments of the parties, the circuit court’s conviction and sentencing order is reversed and this case is remanded for a new trial on all charges.<sup>1</sup>

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<sup>1</sup>We wish to make clear that the original opinion filed by this Court resolved six assignments of error. The United States Supreme Court granted certiorari and vacated the judgment of this Court only as to one of the issues, i.e., the allegation of a *Brady* violation. Consequently, the resolution of the remaining five issues in the original opinion was not disturbed and remain the law of the case on remand to the circuit court. See *Santa Barbara County Water Agency v. All Persons and Parties*, 53 Cal. 2d 743, 745 (1960) (“Insofar as the prior opinion of this court affirmed the judgment of the trial court, and passed on the several issues involved other than the validity of the contracts, review was not sought or given by the United States Supreme Court. What was said [on] these issues is the law of the case . . . and is reaffirmed, and need not be restated here.”).

## I.

### FACTUAL AND PROCEDURAL BACKGROUND

Mr. Youngblood was prosecuted for allegedly forcing Katara N.<sup>2</sup> to perform oral sex on him on two occasions on or about July 28, 2000.<sup>3</sup> The first sexual assault occurred at Mr. Youngblood's home in Berkeley Springs, West Virginia. During this assault three other people were present in the home, but did not witness the alleged assault. The three other individuals were Joe Pitner, Kimberly K.,<sup>4</sup> and Wendy S.<sup>5</sup> When the first sexual encounter ended, Mr. Youngblood and Mr. Pitner left the home. The three young women thereafter went to a nearby house and made a 911 telephone call. It appears that the women told the 911 operator that they were at an unknown location and needed a ride home. After making the telephone call, the three women voluntarily returned to Mr. Youngblood's home.

By the time the women returned to Mr. Youngblood's home, Mr. Youngblood and Mr. Pitner had returned. All five individuals thereafter got into Mr. Youngblood's car

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<sup>2</sup>Katara was sixteen years old at the time of the incident, therefore we will follow our practice and not disclose her last name. *See State v. Steven H.*, 215 W. Va. 505, 507 n.1, 600 S.E.2d 217, 219 n.1 (2004).

<sup>3</sup>A complete recitation of the facts appear in *State v. Youngblood*, 217 W. Va. 535, 618 S.E.2d 544 (2005), and an abbreviated recitation of the facts are set out in *Youngblood v. West Virginia*, \_\_\_ U.S. \_\_\_, 126 S. Ct. 2188, 165 L. Ed. 2d 269 (2006).

<sup>4</sup>Kimberly was fifteen years old at the time.

<sup>5</sup>Wendy had just turned eighteen years old at the time.

and drove to Mr. Pitner's home, which was also located in Berkeley Springs.<sup>6</sup> While en route to Mr. Pitner's home, Mr. Youngblood's mother was passing by in her vehicle and signaled for him to pull over. Mr. Youngblood's mother approached his car and informed him that she heard on her CB scanner that the police were looking for three women who made a 911 call. As Mr. Youngblood spoke to his mother, two police officers appeared. The officers approached Mr. Youngblood's car. One of the officers, A. Thomas, testified on direct and cross-examination regarding the encounter as follows:

Q. Do you know the individual that was stopped talking to Mr. Youngblood?

A. I believe it was his mother.

Q. So you approached the car?

A. Yes, ma'am.

Q. Was there any other officer with you that night?

A. Yes, ma'am, Officer Barney.

.....

Q. And you approached the vehicle?

A. Yes, ma'am.

Q. What did you do?

A. I talked to the driver, which is the Defendant. He had another male passenger on the front passenger side of the car. There was three females in the

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<sup>6</sup>There was evidence during the trial that at some point Katara was allowed to drive Mr. Youngblood's vehicle.

car. Basically, I has asked if they had come from that area and if they were the callers and what was going on and if they knew anything about it.

Q. Do you know what their response was?

A. I got the response of, you know, they weren't the ones that called and they didn't know what was going on.

....

Q. You asked the three girls in the back were they the ones that called the police or the ones that needed help?

A. Yes, sir, I did.

Q. And each of them said no?

A. Yes, sir.

Q. And did it appear to you that these girls were scared?

A. Looking back on it, no, not that I remember and that is why we thought that it was not part of what was occurring.

Q. Were they winking at you or trying to give you secret signals?

A. Not that I noticed.

Q. Doing anything to try to signal you?

A. Not that I noticed.

Q. But based upon your recollection everybody appeared to be fine.

A. Yes.

The two officers and Mr. Youngblood's mother left the scene. Thereafter Mr. Youngblood drove to Mr. Pitner's home. While at Mr. Pitner's home it was alleged that Mr.

Youngblood once again forced Katara to perform oral sex on him. This encounter was also not witnessed by the other three individuals present in the home. Shortly thereafter the women were driven to Hagerstown, Maryland and left there.

After the three women were dropped off, Katara went home. However, Wendy and Kimberly were taken to a sheriff's office by Wendy's mother.<sup>7</sup> Wendy and Kimberly informed the police that Mr. Youngblood gave them alcohol and carried a gun.<sup>8</sup> After statements were taken from Wendy and Kimberly, the police contacted Katara and took a statement from her. Subsequent to the investigation Mr. Youngblood was indicted in 2001 on sexual assault and other charges involving Katara, and on weapon charges involving Wendy and Kimberly. A jury convicted Mr. Youngblood of all charges and he was sentenced accordingly by the trial court.<sup>9</sup>

Subsequent to his conviction and sentence, Mr. Youngblood filed a motion for a new trial based upon newly discovered evidence. The evidence in question was a note that was found at the home where Mr. Pitner resided. The note was found by the owner of the

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<sup>7</sup>At the time that Wendy and Kimberly went to the sheriff's office, State Trooper A.T. Peer was present. As pointed out later in this opinion, Trooper Peer took over the investigation.

<sup>8</sup>Allegations were also made against Mr. Pitner.

<sup>9</sup>The original opinion filed by this Court indicated that Mr. Youngblood was indicted on seven counts, but the grand jury actually returned a six count indictment against him.

home, Patricia Miles.<sup>10</sup> The trial court held an evidentiary hearing on the motion. At that hearing Ms. Miles informed the court that the officer who investigated the case against Mr. Youngblood read the note and told her to throw it away. As discussed more fully in this opinion, the note contained language that could reasonably be interpreted as showing that Mr. Youngblood engaged in consensual sex with Katara—which was his defense at trial. The trial court ultimately denied the motion for a new trial on the grounds that the note only had impeachment value and that the investigating officer’s knowledge of the note could not be imputed to the prosecutor.

In Mr. Youngblood’s initial appeal to this Court, the majority of the Court found that the trial judge was correct in denying his motion for new trial based upon newly discovered evidence. The majority opinion did not address the issue in the context of a *Brady* violation. Subsequently, the United States Supreme Court granted certiorari, vacated the judgment and remanded the case for consideration of the *Brady* issue.

## II.

### DUTY ON REMAND AND STANDARD OF REVIEW

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<sup>10</sup>Ms. Miles is Mr. Pitner’s aunt.

This case is once again before this Court, as a result of the United States Supreme Court granting certiorari, vacating the judgment of the majority, and remanding the case.<sup>11</sup> The mandate issued by the United States Supreme Court stated that “the case is remanded to the Supreme Court of Appeals of West Virginia for further proceedings not inconsistent with the opinion of this Court.” The essence of the opinion issued by the United States Supreme Court is as follows:

The trial court denied Youngblood a new trial, saying that the note provided only impeachment, but not exculpatory, evidence. The trial court did not discuss *Brady* or its scope, but expressed the view that the investigating trooper had attached no importance to the note, and because he had failed to give it to the prosecutor the State could not now be faulted for failing to share it with Youngblood’s counsel.

A bare majority of the Supreme Court of Appeals of West Virginia affirmed, finding no abuse of discretion on the part of the trial court, but without examining the specific constitutional claims associated with the alleged suppression of favorable evidence. Justice Davis, dissenting in an opinion that Justice Starcher joined, unambiguously characterized the trooper’s

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<sup>11</sup>This disposition by the United States Supreme Court was through an order that is known as a “GVR” order. This type of disposition has been addressed as follows:

Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.

*Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167, 116 S. Ct. 604, 607, 133 L. Ed. 2d 545 (1996). It has been suggested that “such an order indicate[s], as a prima facie matter, that the judgment below is in error, but that the lower court remains free to reach whatever result it feels appropriate.” Shaun P. Martin, “Gaming the GVR,” 36 *Ariz. St. L.J.* 551, 564-565 (2004) (internal quotation marks omitted).

instruction to discard the new evidence as a *Brady* violation. The dissenters concluded that the note indicating that Youngblood engaged in consensual sex with Katara had been suppressed and was material, both because it was at odds with the testimony provided by the State's three chief witnesses (Katara, Kimberly, and Wendy) and also because it was entirely consistent with Youngblood's defense at trial that his sexual encounters with Katara were consensual.

....

Youngblood clearly presented a federal constitutional *Brady* claim to the State Supreme Court, as he had to the trial court. And, as noted, the dissenting justices discerned the significance of the issue raised. If this Court is to reach the merits of this case, it would be better to have the benefit of the views of the full Supreme Court of Appeals of West Virginia on the *Brady* issue. We, therefore, grant the petition for certiorari, vacate the judgment of the State Supreme Court, and remand the case for further proceedings not inconsistent with this opinion.

*Youngblood*, 126 S. Ct. at 2189-2190 (internal citations omitted).

In view of the opinion issued by the United States Supreme Court, we believe that three issues must be resolved: (1) whether the prosecution's disclosure duty under *Brady* includes evidence that is known only to police investigators, (2) whether the disclosure requirement under *Brady* includes disclosure of favorable impeachment evidence, and (3) whether the suppressed evidence violated the disclosure requirement of *Brady*. In resolving these three issues we do not believe that this Court is precluded from also considering the issues on independent State constitutional grounds under our decision in *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982). This is particularly so because in Mr. Youngblood's original brief and supplemental brief he argued both State and federal

constitutional grounds for a new trial. *See State v. Hershberger*, 462 N.W.2d 393, 396-397 (Minn. 1990) (“It is unnecessary to rest our decision on the [federal case that the United States Supreme Court asked us to consider on remand,] when the Minnesota Constitution alone provides an independent and adequate state constitutional basis on which to decide.”); *Pelliccioni v. Schuyler Packing Co.*, 356 A.2d 4, 6 (N.J. Super. Ct. App. Div. 1976) (“[S]tate courts, after a United States Supreme Court remand, are free to alter--subject only to the state’s jurisprudence--prior decisions in the case on state law so long as the altered decision is consistent with the federal Supreme Court’s ruling on the federal question presented and remanded.”); *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 251-252 (1991) (“The [United States] Supreme Court has specifically directed us to consider the case in light of *Milkovich*, and we comply with that direction, as courts throughout the Nation have done in similar circumstances. But that does not compel us to ignore our prior decision or the arguments fully presented on remand that provide an alternative basis for resolving the case.”).

Our review of the three issues will be in the context of the trial court’s ruling denying Mr. Youngblood’s post-trial motion for a new trial based upon a violation of *Brady* and *Hatfield*. As a general matter we have held that “[a] trial court’s order denying a defendant’s motion for a new trial is entitled to substantial deference on appeal.” *State v. Cooper*, 217 W. Va. 613, 616, 619 S.E.2d 126, 129 (2005). A claim of a violation of *Brady* and *Hatfield* presents mixed questions of law and fact. Consequently, the “circuit court’s

factual findings should be reviewed under a clearly erroneous standard and . . . questions of law are subject to *de novo* review.” *State v. Kearns*, 210 W. Va. 167, 168-169, 556 S.E.2d 812, 813-814 (2001). *Accord United States v. Risha*, 445 F.3d 298, 303 (3<sup>rd</sup> Cir. 2006); *United States v. Jernigan*, 451 F.3d 1027, 1030 (9<sup>th</sup> Cir. 2006); *United States v. Martin*, 431 F.3d 846, 850 (5<sup>th</sup> Cir. 2005); *United States v. Schlei*, 122 F.3d 944, 989 (11<sup>th</sup> Cir.1997); *United States v. Hughes*, 33 F.3d 1248, 1251 (10<sup>th</sup> Cir. 1994); *United States v. Rivalta*, 925 F.2d 596, 598 (2<sup>nd</sup> Cir. 1991).

### III.

#### DISCUSSION

##### *A. Knowledge of Evidence by the Police is Imputed to the Prosecutor*

In criminal proceedings the State is obligated to turn over documents and other matters in its possession, custody or control, if requested by a defendant pursuant to Rule 16 of the West Virginia Rules of Criminal Procedure. The record in this case discloses that Mr. Youngblood invoked Rule 16 and requested the State turn over and permit him to copy “all books, papers, [and] documents . . . which are within the possession, custody and control of the State, and which are material to the preparation of his . . . defense[.]” There is no dispute in this case that, notwithstanding Mr. Youngblood’s discovery request, the State failed to turn over the note that was found at Ms. Miles’ home. The State argues, and the trial court so ruled, that insofar as the police had knowledge of the note, such knowledge could not be imputed to the State for disclosure purposes under *Brady* and *Hatfield*. We disagree.

It is not relevant under *Brady* and *Hatfield* that the police, rather than a prosecutor, had knowledge of material evidence that was favorable to a defendant. The United States Supreme Court addressed this point in *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (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. But whether the prosecutor succeeds or fails in meeting this obligation, the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

The State of Louisiana [in this case] would prefer . . . [a] more lenient rule. It pleads that some of the favorable evidence in issue here was not disclosed even to the prosecutor until after trial, and it suggested . . . that it should not be held accountable under . . . *Brady* for evidence known only to police investigators and not to the prosecutor. To accommodate the State in this manner would, however, amount to a serious change of course from the *Brady* line of cases. In the State's favor it may be said that no one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it. Since, then, the prosecutor has the means to discharge the government's *Brady* responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.

*Kyles*, 514 U.S. 419 at 437-38, 115 S.Ct. 1555, at 1567-68 (internal quotations and citations omitted).<sup>12</sup> The decision in *Kyles* stands for the proposition that “it is proper to impute to the

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<sup>12</sup>See 1 Franklin D. Cleckley, *Handbook on West Virginia Criminal Procedure* 302 (2d ed. Supp. 2006) (“A prosecutor's *Brady* disclosure duty . . . includes material that is known only to police investigators and not to [the] prosecutor; an individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf.”)

prosecutor's office facts that are known to the police and other members of the investigation team." *United States v. Wilson*, 237 F.3d 827, 832 (7<sup>th</sup> Cir. 2001). See also *Powell v. United States*, 880 A.2d 248, 254 (D.C. 2005) ("The government also concedes that the prosecutor's lack of actual knowledge, and therefore any bad faith, is not relevant to the *Brady* analysis. As the government points out in its brief, the MPD and the FBI were part of the government team and their knowledge is imputed to the prosecutors."). *Archer v. State*, 934 So. 2d 1187, 1203 (Fla. 2006) ("To comply with *Brady*, the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case and to disclose that evidence if it is material."); *Harrington v. State*, 659 N.W.2d 509, 522 (Iowa 2003) ("This test does not mean, however, that evidence unknown to the individual prosecutor is not considered suppressed. . . . Regardless of whether the prosecutor actually learns of the favorable evidence, the prosecution bears the responsibility for its disclosure."); *State v. Jones*, 891 So. 2d 760, 775 (La. Ct. App. 2004) ("[T]he State is not necessarily absolved of its responsibilities under *Brady* simply because the prosecution does not possess or have knowledge of evidence, because the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."); *Thomas v. State*, 131 P.3d 348, 353 (Wyo. 2006) ("We have applied *Brady* to hold that the duty to disclose exculpatory evidence . . . encompasses evidence known only to police investigators and not to the prosecution."); In the final analysis, "[t]he prosecutor cannot get around *Brady* by keeping [him]/herself in ignorance." *United States v. Hamilton*, 107 F.3d 499, 509 (7<sup>th</sup> Cir. 1997);

In view of the foregoing we hold that a police investigator's knowledge of evidence in a criminal case is imputed to the prosecutor. Therefore, a prosecutor's disclosure duty under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982), includes disclosure of evidence that is known only to a police investigator and not to the prosecutor. To the extent that the trial court found that the investigating police officer's knowledge of the note could not be imputed to the prosecutor, such ruling was error.

***B. The State's Duty to Disclose Favorable Impeachment Evidence***

During Mr. Youngblood's post-trial hearing for a new trial, the circuit court ruled that failure to disclose the note prior to trial was harmless, because it had only impeachment value. In other words, the circuit court took the position that if the State possesses material evidence which could be used by the defendant only for impeachment purposes, the State is under no obligation to turn over the evidence. We believe the circuit court's ruling is inconsistent with the due process requirements of both the federal and state constitutions.

To begin, the United States Supreme Court held in *Brady* that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith

or bad faith of the prosecution.” 373 U.S. at 87, 83 S. Ct. at 1196-97.<sup>13</sup> The requirement under *Brady* that evidence must be requested by a defendant was later modified in *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), where it was said that “there are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request.” *Agurs*, 427 U.S. at 110, 96 S. Ct. at 2401.

Although “*Brady* addressed only exculpatory evidence, this doctrine has been expanded to include impeachment evidence as well as exculpatory evidence.” *Thompson v. Cain*, 161 F.3d 802, 806 (5<sup>th</sup> Cir. 1998). The United States Supreme Court has expressly “disavowed any difference between exculpatory and impeachment evidence for *Brady*

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<sup>13</sup>A “bad faith” showing is necessary when a *Brady* violation involves “the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.” *Arizona v. Youngblood*, 488 U.S. 51, 57, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281 (1988). The facts in the instant case do not implicate the facts underpinning *Arizona v. Youngblood*. See Syl. pt. 2, *State v. Osakalumi*, 194 W. Va. 758, 461 S.E.2d 504 (1995) (“When the State had or should have had evidence requested by a criminal defendant but the evidence no longer exists when the defendant seeks its production, a trial court must determine (1) whether the requested material, if in the possession of the State at the time of the defendant’s request for it, would have been subject to disclosure under either West Virginia Rule of Criminal Procedure 16 or case law; (2) whether the State had a duty to preserve the material; and (3) if the State did have a duty to preserve the material, whether the duty was breached and what consequences should flow from the breach. In determining what consequences should flow from the State’s breach of its duty to preserve evidence, a trial court should consider (1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence produced at the trial to sustain the conviction.”).

purposes[.]” *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S. Ct. 1555, 1565, 131 L. Ed. 2d 490 (1995). See also *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380, 87 L. Ed. 2d 481 (1985) (“Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule. Such evidence is ‘evidence favorable to an accused,’ so that, if disclosed and used effectively, it may make the difference between conviction and acquittal.”). In sum, the essential elements of a *Brady* violation have been stated as follows:

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 State, either willfully or inadvertently; and prejudice must have ensued.

*Strickler v. Greene*, 527 U.S. 263, 281-282, 119 S. Ct. 1936, 1948, 144 L. Ed. 2d 286 (1999).

“This Court has incorporated into West Virginia jurisprudence the principles set forth in *Brady* and *Agurs*.” *State v. Salmons*, 203 W. Va. 561, 572, 509 S.E.2d 842, 853 (1998). We initially adopted *Brady* as part of our State constitutional due process in syllabus point 4 of *State v. McArdle*, 156 W. Va. 409, 194 S.E.2d 174 (1973), where it was held that “[a] prosecution that withholds evidence on the demand of an accused, which, if made available would tend to exculpate him, violates due process of law.” *McArdle* was modified in *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982), in response to *Agurs*, for the purpose of removing the requirement that material exculpatory evidence had to be requested. It was said in syllabus point 4 of *Hatfield* that “[a] prosecution that withholds evidence which if made available would tend to exculpate an accused by creating a reasonable doubt as to

his guilt violates due process of law under Article III, Section 14 of the West Virginia Constitution.”

As to the issue of disclosure of impeachment evidence, this Court has reversed several convictions on the basis of the State’s failure to disclose favorable impeachment evidence. *See State v. Kearns*, 210 W. Va. 167, 556 S.E.2d 812 (2001); *State ex rel. Yeager v. Trent*, 203 W. Va. 716, 510 S.E.2d 790 (1998); *State v. Hoard*, 180 W. Va. 111, 375 S.E.2d 582 (1988); *State v. Hall*, 174 W. Va. 787, 329 S.E.2d 860 (1985).<sup>14</sup> However, we have never formally recognized this issue under the due process clause of our State constitution. We do so today and hold that there are three components of a constitutional due process violation under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982): (1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material, *i.e.*, it must have prejudiced the defense at trial.<sup>15</sup>

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<sup>14</sup>*See also Salmons*, 203 W. Va. at 573, 509 S.E.2d at 854 (“In a third landmark case, *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), the United States Supreme Court held that there was no difference between exculpatory and impeachment evidence for Brady purposes.”); 1 Cleckley, *West Virginia Criminal Procedure* 756 (“In addition to purely exculpatory evidence, a defendant is entitled, upon request, to disclosure of information that might be used to impeach government witnesses.”).

<sup>15</sup>We should point out that in the original opinion in this case the majority incorrectly applied a principle of law concerning nonsuppressed newly discovered evidence. That principle of law states that a “new trial will generally be refused when the sole object of the

Having determined that favorable impeachment evidence is a component of *Brady* and *Hatfield*, it is clear that the trial court committed error in finding that failure to disclose the note was irrelevant because it merely had impeachment value.

### ***C. Application of Brady and Hatfield***

At this stage of our analysis we will now apply each of the elements of *Brady* and *Hatfield* to the facts of this case to determine whether Mr. Youngblood is entitled to a new trial.<sup>16</sup>

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new evidence is to discredit or impeach a witness on the opposite side.” Syl. pt. 1, *State v. Crouch*, 191 W. Va. 272, 445 S.E.2d 213 (1994). The *Crouch* standard has no application in the context of the constitutionally required disclosure under *Brady* and *Hatfield*. See *State v. Frazier*, 162 W. Va. 935, 942 n.5, 253 S.E.2d 534, 538 n.5 (1979) (“The newly discovered evidence rule contained in [*Crouch*] will not apply where the State has suppressed exculpatory material.”). “We have repeatedly recognized . . . the distinction between the disclosure of . . . evidence, which is constitutionally mandated under *Brady* and its progeny, and the production of evidence pursuant to a court order implementing discovery.” *State v. Fortner*, 182 W. Va. 345, 353 n.5, 387 S.E.2d 812, 820 n.5 (1989). In other words, newly discovered impeachment evidence that was suppressed within the meaning of *Brady* and *Hatfield* can form the basis of a new trial; whereas newly discovered impeachment evidence that was not suppressed within the meaning of *Brady* and *Hatfield* generally cannot form the basis of a new trial. See *State v. Stewart*, 161 W. Va. 127, 239 S.E.2d 777 (1977) (carving out exception to general rule that nonsuppressed newly discovered impeachment evidence cannot form the basis of a new trial).

<sup>16</sup>Our analysis of the impeachment evidence is in the context of the sexual assault charges and not the weapon related charges. However, because all of the charges were factually intertwined our resolution of the *Brady* and *Hatfield* issue impacts the disposition of all of the charges. As noted in the original majority opinion, the circuit court denied Mr. Youngblood’s pretrial motion to sever charges because the court “viewed all of the charges as interrelated and as parts of the whole picture of the case.” *Youngblood*, 217 W. Va. at 542 n.7, 618 S.E.2d at 551 n.7.

**(1) The evidence was favorable impeachment evidence.**<sup>17</sup> The first element under *Brady* and *Hatfield* that we must consider is whether the note provided favorable impeachment evidence for Mr. Youngblood.<sup>18</sup> See Syl. pt. 4, *State v. Bolling*, 162 W. Va. 103, 246 S.E.2d 631 (1978) (“Before prosecutorial error can occur under the doctrine of suppression of evidence, it must be shown that the evidence suppressed would be relevant to an issue at the criminal trial.”). We believe it does.

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<sup>17</sup>We limit our analysis to the issue of impeachment evidence, as opposed to exculpatory evidence, because that was the basis for the trial court’s ruling. However, “[w]e have recognized that evidence reflecting on the credibility of a key prosecution witness may be so material to the issue of guilt as to qualify as exculpatory matter which the prosecution is constitutionally required to disclose under *Hatfield*.” *State v. Fortner*, 182 W. Va. 345, 354, 387 S.E.2d 812, 821 (1989).

<sup>18</sup>Professor Cleckley has noted that there is a split of authority among federal courts as to whether or not evidence must be admissible to come under the requirements of *Brady*:

[S]ome courts have held that the prosecutor’s duty to disclose is limited to information which would be admissible as evidence. Other courts have held that the crucial question is whether the material would be likely to lead to admissible evidence as an end-product; if so, the prosecutor has a duty to disclose.

1 Cleckley, *West Virginia Criminal Procedure* 757. Under this Court’s prior case law the note was admissible for purposes of impeaching its author. We have held that “[p]rior inconsistent statements of prosecution witnesses in a criminal case are admissible for impeachment purposes without the need to lay any particular foundation for their admission.” Syl. pt. 5, *State v. Sette*, 161 W. Va. 384, 242 S.E.2d 464 (1978). See also *State v. Hall*, 174 W. Va. 787, 791, 329 S.E.2d 860, 864 (1985) (“Impeachment of a witness can occur by several methods. One is through cross-examination on a prior inconsistent statement. Another technique is to offer a witness whose testimony is inconsistent with the first witness’s.”).

During the trial Katara testified that Mr. Youngblood forced her to perform oral sex on him on two occasions. There was no evidence that Mr. Youngblood performed a sexual act on Katara. During the testimony of Kimberly and Wendy they both stated that Katara never informed them of any sexual act occurring between Mr. Youngblood and herself. The note that was found at Ms. Miles' home was inconsistent with the testimony of either Kimberly or Wendy.<sup>19</sup> The note, addressed to Mr. Pitner, stated the following:

This is for Joe! Only!

IMPORTANT

You can read it if you want!

How do you like what we did to your house!

You just got played!

In the long Run, you was the one who got f\*\*\*\*\*!

Throw everything away in your medicine cabinet!

Milk does a body good with TIDE!

F\*\*\* you a\*\*holes!!!!

I hope they kick you out

*Katara said Thanks for eating her p\*\*\*\*\* Denver [Mr. Youngblood]*

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<sup>19</sup>Because this writing was suppressed by the State, Mr. Youngblood has not had an opportunity to determine, through a handwriting expert or an admission, which girl wrote the note. During the post-trial hearing counsel for Mr. Youngblood asked for "leave of Court to get a handwriting expert to analyze this in conjunction with the statements that were given by [Kimberly and Wendy] so we can confirm, yes, it is indeed their handwriting." The trial court denied the request.

Hope you love the pictures  
Clean the microwave

I Brushed my a\*\* with all of yall's tooth Brushes!

Don't eat the ice cream because it has my p\*\*\*\* smell all in it!

Don't ever talk sh\*\* about me because pay backs are a b\*\*\*\*!!!

You smoked my boogers B\*\*\*\*!

(Emphasis added).

Clearly this note suggests that Katara told Kimberly or Wendy that Mr. Youngblood performed oral sex on her—and that she was grateful for this. Mr. Youngblood could have used this evidence during the trial not only to impeach Kimberly or Wendy, but to also explore a variety of questioning that logically flows from the statement allegedly made by Katara to Kimberly or Wendy.<sup>20</sup> Consequently, the note was favorable impeachment evidence to Mr. Youngblood. *See United States v. Arnold*, 117 F.3d 1308, 1317 (11<sup>th</sup> Cir. 1997) (“An analysis of the taped conversations provides favorable evidence to the defense, in terms of impeachment evidence and contradictions of the trial testimony

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<sup>20</sup>Of course, it is of no moment that the impeachment may only be of one of the two witnesses. The United States Supreme Court has made clear that “the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others[.]” *Kyles*, 514 U.S. at 445, 115 S. Ct. at 1571. *See also Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177, 3 L. Ed. 2d 1217 (1959) (“The jury’s estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant’s life or liberty may depend.”).

of the government's key witness.").

**(2) The evidence was suppressed by the State.** We have already determined that evidentiary knowledge by the police is imputed to the State. Consequently, the facts of this case clearly show that the State suppressed the note by abandoning it and attempting to have it destroyed.<sup>21</sup>

During the investigation into the charges against Mr. Youngblood, Trooper A.T. Peer went to the home of Ms. Miles. Trooper Peer had a search warrant and informed Ms. Miles that he needed to search her house for evidence pertaining to the charges against Mr. Youngblood.<sup>22</sup> After Trooper Peer concluded his search he left the home. Two days later Ms. Miles discovered that some of her food and household items had been tampered with during that time that Mr. Youngblood and the others were at her home. Ms. Miles stated that she also found the note in her telephone notebook. After Ms. Miles read the note she called Trooper Peer. Subsequently Trooper Peer came back to Ms. Miles' home. Ms.

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<sup>21</sup>We will note that evidence is considered suppressed when "the existence of the evidence was known, or reasonably should have been known, to the government, the evidence was not otherwise available to the defendant through the exercise of reasonable diligence, and the government either willfully or inadvertently withheld the evidence until it was too late for the defense to make use of it." *United States v. Knight*, 342 F.3d 697, 705 (7<sup>th</sup> Cir. 2003). Under the facts of this case we do not believe that, through the exercise of reasonable diligence, Mr. Youngblood would have uncovered the note prior to trial.

<sup>22</sup>Trooper Peer was specifically searching for semen that Katara stated she spat out in a trash can at the residence.

Miles gave the following testimony regarding Trooper Peer and the note:

Q. Is that the note that you presented to Trooper Peer when he came to your house?

A. Yes, it is.

Q. On the second time?

A. Yes, it is.

Q. Did you actually give it to him or let him look?

A. I gave him the notebook. It was in the notebook, it wasn't like this, it was in the notebook. I actually gave it to him and he read it and he said just throw everything away. I said, just throw everything away. My nephew, Joe Pitner, was incarcerated and I kept the note, I never threw the notebook way with this paper, I put it underneath my cabinet.

Ms. Miles' testimony about Trooper Peer's review of the note and instructions to throw it away were corroborated by her daughter, who was present at the time:

Q. Do you have any idea whether or not Trooper Peer read that note?

A. Yes, I do.

Q. You know?

A. I was standing there when he read it.

Q. Okay. He read it out loud?

A. No, he didn't, he read it to himself.

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Q. Was there discussion about throwing things away or throwing articles away?

A. He told her just to go ahead and throw the milk away and throw the

notebook away.

Q. Do you recall hearing that?

A. Yes.

During Trooper Peer's post-trial testimony he did not deny reading the note, nor instructing Ms. Miles to throw it away. Instead, Trooper Peer alleged that he had no recollection of the incident.<sup>23</sup> Contrary to the State's position, neither *Brady* nor *Hatfield* yield to a claim of failed recollection. The uncontradicted recollection of events by Ms. Miles and her daughter provide the type of testimony that *Brady* and *Hatfield* must yield to.

The testimony of Ms. Miles and her daughter inform this Court that the State was in possession of the note and ordered that it be destroyed. We are deeply troubled by the State's conduct in this matter. This issue is not a fleeting matter of possible inadvertence. The record in this case shows that Trooper Peer personally obtained the search warrant, specifically seeking evidence of the alleged sexual assault. The record also clearly shows that when Trooper Peer obtained the search warrant he knew the name of the complaining

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<sup>23</sup>The State has attempted to characterize Trooper Peer's second visit as a new investigation regarding a complaint of vandalism. We do not interpret Ms. Miles' testimony as indicating she called Trooper Peer to report a vandalism incident. Ms. Miles' testimony clearly indicates that she was not moved to call Trooper Peer until after she discovered the note. Insofar as the note also had her nephew's name on it, Mr. Pitner, she was concerned about the note being relevant to charges that were pending against Mr. Pitner. In fact, in testifying as to what she did with the note after Trooper Peer told her to destroy it, Ms. Miles stated that "I put it underneath the cupboard to show my nephew when he got out of jail[.]"

witness, Katara, and the defendant, Mr. Youngblood. Thus, when Trooper Peer returned to Ms. Miles' home and read the note containing the first name of Katara and Mr. Youngblood, and a reference to sexual conduct between the two, we must, in the absence of any rebuttable evidence, presume that he knew the note was evidence involved with his investigation.<sup>24</sup> Consequently, we believe the evidence supports finding that the State suppressed the note by failing to keep it and ordering its destruction.

**(3) The evidence was material.** Our final inquiry is whether or not the suppressed note was material to Mr. Youngblood's defense.<sup>25</sup> That is, was the defense prejudiced by the failure to disclose the note. The State argues that the note was not material and could not have changed the outcome of the trial in any way. We disagree.

This Court has recognized, along with the United States Supreme Court, that “[t]he 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.” *State v. Fortner*, 182 W. Va. 345, 353, 387 S.E.2d 812, 820 (1989) (quoting *United States*

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<sup>24</sup>It is obvious that Ms. Miles, who was not a trained police officer, believed the note was significant to the investigation and therefore did not throw it away as ordered by Trooper Peer.

<sup>25</sup>Mr. Youngblood did not testify at trial nor did he call any witnesses. He presented his defense through cross examination of witnesses called by the State.

*v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481 (1985)). Additionally, it has been said that “a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal.” *Kyles*, 514 U.S. at 434, 115 S. Ct. at 1565. All that is required is a “showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Id.* at 435, 115 S. Ct. at 1566. Finally, the suppressed evidence “must be evaluated in the context of the entire record.” *Agurs*, 427 U.S. at 112, 96 S. Ct. at 2402.

In this case the record shows that Mr. Youngblood drove Katara and the other passengers to two different residences. At the first residence, Mr. Youngblood’s home, Katara alleged that he forced her to perform oral sex on him. Immediately after this incident Mr. Youngblood and Mr. Pitner left the residence. Although Mr. Youngblood and Mr. Pitner were gone, Katara allegedly did not inform Wendy or Kimberly that she was forced to engage in sexual conduct with Mr. Youngblood. Further, all three women left the residence and went to a nearby house and called 911 to seek assistance in getting home. No mention was made to the 911 operator, nor the owner of the home, that Katara was forced to perform a sex act on Mr. Youngblood. All three women returned to Mr. Youngblood’s home. Thereafter Mr. Youngblood and Mr. Pitner returned and all five individuals drove off together en route to Mr. Pitner’s home. While driving to Mr. Pitner’s home, Mr. Youngblood’s mother stopped him and engaged in a brief conversation. At no time during

this incident did Katara state that she was the victim of sexual assault. Further, two police officers arrived on the scene in response to the 911 call. Katara and the other two women denied having called 911. More importantly, Katara never informed the police that she was forced to engage in a sexual act with Mr. Youngblood. Eventually all five individuals ended up at Mr. Pitner's home. While at the residence Mr. Youngblood again allegedly forced Katara to perform oral sex on him. Subsequently, the women were taken to and abandoned in Hagerstown. Immediately after being dropped off at Hagerstown, Katara left without telling Wendy or Kimberly that she was the victim of a sexual assault. The police became involved after Wendy's mother took her and Kimberly to a sheriff's office to complain that Mr. Youngblood gave the two women alcohol and that he had a gun. Insofar as Katara was also with the women during this incident, the police contacted her. It was during the investigation of the complaint of contributing to the delinquency of a minor that Katara first mentioned that she was the victim of a sexual assault.

The above facts must be considered along with the following key points. Mr. Youngblood's defense to the sexual assault charges was that he and Katara engaged in consensual sex.<sup>26</sup> Katara testified at trial that Mr. Youngblood forced her to perform oral sex

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<sup>26</sup>During Mr. Youngblood's initial interview with the police he denied having any sexual contact with Katara. However, for purposes of the trial, his defense was that the sexual conduct was consensual. Mr. Youngblood's counsel informed the jury during closing arguments that:

You have got to determine was this consensual. You need to determine

on him twice. Katara failed to testify that oral sex was performed on her. Katara testified that she did not inform Wendy nor Kimberly about the forced sex. Both Wendy and Kimberly testified that Katara did not inform them that she was sexually assaulted.

For the purposes of this opinion, the note contains three critical pieces of evidence that the jury did not hear.<sup>27</sup> First, the note clearly suggests that Katara informed either Wendy or Kimberly that she engaged in sexual conduct with Mr. Youngblood, which would be inconsistent with Wendy or Kimberly's testimony and the testimony of Katara. Second, contrary to Katara's testimony, the note suggests that Mr. Youngblood performed oral sex on her. Finally, the note suggests that Katara was pleased with the oral sex performed on her, i.e., that the sexual conduct was consensual.<sup>28</sup> Insofar as the note was suppressed, the jury was never able to assess the credibility of each of the State's three key witnesses, through effective questioning that would have naturally flowed from the introduction of the note through its author. This is particularly crucial because the State's case was weak, in light of evidence showing that Katara had an opportunity to flee and

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based upon Katara['s] actions, how she behaved that night, as described by herself and her friends, as to whether or not this seemed to be someone exhibiting signs of being subject to this act of forced oral sex with a gun pointed at her head[.]

<sup>27</sup>We do not intend to import any validity to contents of the note, that is an issue that must be litigated during the retrial.

<sup>28</sup>Although we have pointed out three issues that flow from the note, there are other ways in which this note could have been used. However, it would be improper for this Court to set out a laundry list of potential ways in which the note may be used.

protect herself after the first alleged sexual assault when she went to a nearby house, and when two police officers stopped and spoke with her. In view of all the evidence in the case, we believe that there is a reasonable probability that, had the note been disclosed to the defense, the result of this proceeding would have been different.<sup>29</sup> See *State v. Kearns*, 210 W. Va. 167, 169, 556 S.E.2d 812, 814 (2001) (“In view of the clear contradictory nature of the non-disclosed statement and [the] potential impact of its revelation to the jury . . . on the assessment of the credibility of the [victim’s] testimony, this Court believes that the State’s withholding of the statement did violate the appellant’s constitutional rights[.]”); *State v. Hall*, 174 W. Va. 787, 791, 329 S.E.2d 860, 863 (1985) (“Viewing the record as a whole, we conclude that the jury’s verdict might have been different had the jury been allowed to hear Green’s prior inconsistent statement.”). Therefore, we find that the State’s failure to turn over the note violated *Brady* and *Hatfield*.<sup>30</sup> Thus, the trial court erred in denying Mr.

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<sup>29</sup>It has been held “that once *Brady* error is found to be material, further harmless error review is unnecessary[.]” *United States v. Ellis*, 121 F.3d 908, 916 (4<sup>th</sup> Cir. 1997). See also *Salmons*, 203 W. Va. at 573, 509 S.E.2d at 854 (“[O]nce a reviewing court applying [*Brady*] has found constitutional error there is no need for further harmless-error review.”).

<sup>30</sup>We wish to make clear that our standard under *Hatfield* may be higher than *Brady*. That is, “[d]isposition of [Mr. Youngblood’s] federal due process rights, under [*Brady*], does not necessarily resolve his right of due process under [*Hatfield*].” *State v. Osakalumi*, 194 W. Va. 758, 765, 461 S.E.2d 504, 511 (1995). Therefore, should the United States Supreme Court grant certiorari again and find that the failure to disclose the note did not violate *Brady*, we wish to make clear that we unequivocally find that *Hatfield* has been violated. “This Court has . . . held that ‘[t]he provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution.’” *State v. Mullens*, \_\_\_ W. Va. \_\_\_, \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_, slip op. at 42 (No. 33073 February 28, 2007) (quoting Syl. pt. 2, *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979)). This is to say “that West Virginia is free to adopt protections of its

Youngblood's motion for a new trial.

#### IV.

#### CONCLUSION

The circuit court's order convicting and sentencing Mr. Youngblood is reversed and this case is remanded for a new trial on all charges.

Reversed and Remanded.

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own, so long as West Virginia does not diminish federal rights.” *State v. Flippo*, 212 W. Va. 560, 580 n.25, 575 S.E.2d 170, 190 n.25 (2002) (quoting *State v. Carrico*, 189 W. Va. 40, 44, 427 S.E.2d 474, 478 (1993)).