IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia,

Plaintiff below, Respondent,

v.

Supreme Court No.: 20-0744
Case No. CC-41-2016-F-429
Circuit Court of Raleigh County

A.B.,

Defendant below, Petitioner.

PETITIONER'S SUPPLEMENTAL REPLY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

SUPPLEMENTAL REPLY ARGUMENT

The State below believed that confidentiality shielded its eyewitness from impeachment with juvenile records.[1] Due to this mistake of law,[2] it violated Petitioner's Sixth Amendment right to conflict-free counsel as Petitioner originally briefed,[3] and also the State's duty to disclose *Brady*[4] material under the Fourteenth Amendment, which the Court ordered the parties to address supplementally.

The State possessed substantial evidence with which unconflicted counsel could have impeached an important eyewitness.[5] Yet, the Supplemental Response echoes the mistake below.[6] It also argues the State did not violate its disclosure requirement because Petitioner possessed it through other means,[7] that the record shows no other suppressed evidence because the State has not disclosed anything else,[8] and the eyewitness who found Petitioner was inconsequential to the jury's verdict.

It is mistaken. A policy decision to label records confidential does not excuse the State's due process duty to disclose all favorable information.[9] That duty is independent of the defense investigation and the State's failure is material because Petitioner was unable to use the evidence at trial.[10] And here, the information would have impeached an eyewitness important to the State's theory.[11]

Brady and *Youngblood* command reversal under these circumstances even when the State fails in good faith.[12] But even when suppression is accidental, the effect on the trial's fairness is comparable to suborning perjury.[13] Petitioner therefore requests a new trial.

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[1] *See* A.R. 168; *but see State v. Tyler G.*, 236 W. Va. 152, 161–62, 778 S.E.2d 601, 610–11 (2015).
[2] *Id.*; *see also Davis v. Alaska*, 415 U.S. 308, 319 (1974).
[3] *See* Petr.'s Br. 1.
[4] *Brady v. Maryland*, 373 U.S. 83 (1963).
[5] *See* A.R. 143–44; A.R. 473 (abuse and neglect case); *compare* A.R. 1062–97 *with* A.R. 473–74.
[6] *See* Resp.'s Supp. Br. 3, n. 3; *but see* Resp. Br. 30 (discussing *Tyler G.*, cited *supra* at n. 1).
[7] Resp.'s Supp. Br. 9.
[8] Resp.'s Supp. Br. 11.
[9] *Davis*, 415 U.S. at 319
[10] *See State v. Cooper*, 217 W. Va. 613, 618, 619 S.E.2d 126, 131 (2005).
[11] *See* A.R. 443; A.R. 444; A.R. 445; A.R. 944; A.R. 946; A.R. 947; A.R. 957; A.R. 964.
[12] *Brady*, 373 U.S. at 87; *State v. Youngblood*, 221 W. Va. 20, 27–28, 650 S.E.2d 119, 127–28 (2007).
[13] *Id.* at 86.

1. The State must disclose all impeachment information in its possession.

As a preliminary matter, due process entitled Petitioner to all impeachment information the State possessed irrespective of whether the State considered it confidential.[14] The Response misreads *State ex rel. Lorenzetti v. Sanders*[15] as requiring courts to weigh confidentiality before permitting defendants to cross-examine with juvenile records.[16] This is incorrect.[17]

First, *Lorenzetti* concerns the disclosure of confidential information, not its use.[18] A party may cross a witness with any information actually known,[19] and confidentiality is not a basis for limiting confrontation.[20] Here, the State suppressed more than the juvenile record[21] and the parties on remand can ask the court to conduct a *Lorenzetti* hearing for information not already in the defense file. But it is unconstitutional to invoke confidentiality to limit Petitioner's use of information she already possesses.[22]

Second, *Lorenzetti* adopted the procedure from the United States Supreme Court's decision in *Ritchie*, *supra* at n. 17, which seeks to shield confidential non-*Brady* information while ensuring defendants receive all favorable, material evidence irrespective of confidentiality.[23] *Lorenzetti* directs courts to issue protective orders and ensure that parties respect confidential records they possess, not limit what the State must disclose or what the defense can use at trial.[24] *Lorenzetti* specifically provides that the State should disclose all "evidence [that] is relevant and material to the issues in the proceeding[.]"[25]

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[14] *Davis*, 415 U.S. at 319; W. Va. Trial Ct. R., 32.02.
[15] *State ex rel. Lorenzetti v. Sanders*, 238 W. Va. 157, 792 S.E.2d 656 (2016).
[16] *See* Resp.'s Supp. Br. 3, n. 3.
[17] *See Pennsylvania v. Ritchie*, 480 U.S. 39, 54 (1987) (distinguishing discovery and confrontation).
[18] *Lorenzetti*, 238 W. Va. at 159–60.
[19] *See* Syl. Pt. 4, *State v. Tyler G.*, 236 W. Va. 152 at Syl. Pt. 4.
[20] *Alaska*, 415 U.S. at 319; *see also Lorenzetti*, 238 W. Va. at 163.
[21] *See* A.R. 473 (court noted abuse and neglect proceeding); *compare, e.g.*, A.R. 1062–97 *with* A.R. 473–74 (State did not disclose psychological evaluation, involuntary commitment, or drug court records).
[22] *Davis*, 415 U.S. at 319; U.S. Const. Amend. VI.
[23] *See Lorenzetti*, 238 W. Va. at 163.
[24] *See id.* at Syl. Pt. 2; *see also* W. Va. R. Crim. P. 16(d); *Frank A. v. Ames*, 246 W. Va. 145, ____, n. 18, 866 S.E.2d 210, 227, n. 18 (2021).
[25] *Lorenzetti*, 238 W. Va. at 162–63.

And finally, the hearing below in no way conformed to *Lorenzetti.* The court did not review the actual materials, it ruled upon proffers.[26] Its review was not in camera, the parties were present.[27] And the court was not ruling whether information known to the State but not the defense was favorable and material; the purpose was to rule whether Petitioner could impeach an eyewitness.[28]

What took place below was not a *Lorenzetti* hearing. It was an attempt to whitewash an actual conflict that only made matters worse. It violated clearly decided constitutional rules[29] and this Court's procedures.[30] The State had an obligation to disclose all favorable, material evidence in its possession. Here, it did not.

2. Whether the State's failure is material depends on if the information was available to the defense at trial, and here trial counsel could not use it.

The Response declines to address the role defense diligence plays in *Brady* claims[31]—a circuit split this Court acknowledges is an open question.[32] It instead argues that because Petitioner's trial lawyer scoured her firm's files rather than erect a firewall,[33] *Brady* does not apply at all.[34] The Response is mistaken.

Diligence is relevant because Petitioner possessed some, though not all, of the suppressed information.[35] But courts are rethinking diligence rules[36] or are treating possession as affecting materiality.[37] If diligence applies at all, here the State's suppression was material because it prevented Petitioner from using the evidence at trial.

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[26] *Compare Lorenzetti*, 238 W. Va. 157 at Syl. Pt. 2 *with* A.R. 477–80.
[27] *Compare Lorenzetti*, 238 W. Va. 157 at Syl. Pt. 2 *with* A.R. 477.
[28] *Compare Lorenzetti*, 238 W. Va. 157 at Syl. Pt. 2 *with* A.R. 168, 473, 475–76.
[29] *See Brady*, 373 U.S. at 87; *Davis*, 415 U.S. at 319; *Ritchie*, 480 U.S. at 58.
[30] *See Lorenzetti*, 238 W. Va. 157 at Syl. Pt. 2.
[31] *See* Resp.'s Supp. Br. 10.
[32] *See Frank A.*, 866 S.E.2d at 226, n. 17; *see also* Pet. for Cert. at 17–25, *Blankenship v. U.S.*, Docket No. 21-1428 (U.S. May 5, 2022).
[33] A.R. 141; A.R. 143.
[34] *See* Resp.'s Supp. Br. 9–11.
[35] *See* A.R. 143–44; A.R. 473; *compare* A.R. 1062–97 *with* A.R. 473–74.
[36] *See, e.g., People v. Chenault*, 845 N.W.2d 731, 733 (Mich. 2014).
[37] *See Fontenot v. Crow*, 4 F.4th 982, 1066 (10th Cir. 2021).

"Due process requires that in a criminal prosecution, the government must disclose to the defendant evidence favorable to him if the suppression of that evidence would deny him a fair trial."[38] It is no cure that the defense did, or could have, obtained it elsewhere.[39] The duty to disclose is independent of any action by the defense.[40] But if the defense could have used the information at trial, then its suppression may be immaterial.[41]

Here, Petitioner's counsel possessed some of the *Brady* information but was unable or unwilling to use it at trial due to her conflict and her shared mistaken belief that the court could exclude it as confidential.[42] Therefore the suppression was still material because the State effectively deprived Petitioner of its use at trial.[43]

Further, the record shows additional undisclosed information.[44] The State turned over no records concerning drug court treatment, the involuntary commitment or psychological evaluation, or the abuse and neglect case in which the prosecutor represented DHHR.[45] The State argues that the record is incomplete,[46] and the fact that the State never disclosed anything else means it did not have anything else.[47] It is mistaken.

Under the rare procedural posture of this case, any problem with the record weighs in favor of remand so it can be corrected, not affirmance.[48] The Court has noted possible error. And the Response's reasoning that the State possessed nothing further because it disclosed nothing else misses the point of *Brady*. That isn't always a safe assumption.[49]

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[38] *U.S. v. Blankenship*, 19 F.4th 685, 692 (4th Cir. 2021).
[39] *Lewis v. Connecticut Com'r of Correction*, 790 F.3d 109, 121 (2d Cir. 2015).
[40] *See U.S. v. Agurs*, 427 U.S. 97, 106–07 (1976); *U.S. v. Bagley*, 473 U.S. 667, 682 (1985).
[41] *See, e.g., Fontenot*, 4 F.4th at 1066.
[42] *See* A.R. 141–43; *but see Davis*, 415 U.S. at 319; *Ritchie*, 480 U.S. at 57–58.
[43] *See Cooper*, 217 W. Va. at 618. (Disclosure must allow for its "*effective use*[.]") (*emphasis added*).
[44] *See* A.R. 473 (court notes abuse and neglect case); *compare* A.R. 1062–97 *with* A.R. 473–74.
[45] *See id.*; *see also* W. Va. Code § 49-4-501.
[46] *See* Resp.'s Supp. Br. 12.
[47] *See id.* at 11.
[48] *Cf. Wood v. Georgia*, 450 U.S. 261, 264–65 (1981) (*Sua sponte* noting a possible conflict and remanding with instructions for fact-finding to determine whether error occurred).
[49] *See, e.g., Buffey v. Ballard*, 236 W. Va. 509, 526, 782 S.E.2d 204, 221 (2015); *State v. Farris*, 221 W. Va. 676, 683, 656 S.E.2d 121, 128 (2007); *Youngblood*, 221 W. Va. at 33–34; *State v. Kearns*, 210 W. Va. 167, 169, 556 S.E.2d 812, 814 (2001); *State v. Hall*, 174 W. Va. 787, 791, 329 S.E.2d 860, 863 (1985); *see also State ex rel. Smith v. Sims*, 240 W. Va. 601, 605, n. 2, 814 S.E.2d 264, 268,

Due to the nature of *Brady* claims, The Supreme Court even exempts them from the normal exhaustion requirements for federal habeas.[50] The claim requires additional fact-finding of information uniquely under the State's control and largely unavailable to the defense.[51] That the State is still violating *Brady* is not a compelling reason to affirm.

Prosecutors must disclose information that is, or ought to be, in their possession.[52] Given the degree of supervision the State provided during drug court,[53] it is inconceivable that it would not possess the eyewitness's treatment records from that proceeding or from the mental hygiene commitment, where a magistrate found that her drug addiction made her a danger to herself or others.[54] And in the abuse and neglect case, the prosecutor represented DHHR and thus possessed records from that proceeding.[55] This is common sense, not speculation. Much more likely is that the State below made the same mistake as with the juvenile file. It felt no duty to review these records, much less disclose them to ensure a fair trial.[56] As this Court has noticed a possible *Brady* error, it can review the legal issues in the first instance and remand to the circuit court to resolve any outstanding factual issues.[57]

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n. 2 (2018); *State ex rel. Games-Neely v. Overington*, 230 W. Va. 739, 749, 742 S.E.2d 427, 437 (2013); *State v. Adkins*, 223 W. Va. 838, 843, 679 S.E.2d 670, 675 (2009); *Matter of Investigation of W. Virginia State Police Crime Lab'y, Serology Div.*, 190 W. Va. 321, 323–24, 438 S.E.2d 501, 503–04 (1993); *State v. Thomas*, 187 W. Va. 686, 692, 421 S.E.2d 227, 233 (1992).

[50] *See Strickler v. Greene*, 527 U.S. 263, 283 (1999).

[51] *See Banks v. Dretke*, 540 U.S. 668, 691 and 696 (2004).

[52] *See Youngblood*, 221 W. Va. at 26–27; *see also Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

[53] *State ex rel. Games-Neely v. Yoder*, No. 16-0505, 2016 WL 6651595, at *1 (W. Va. Nov. 10, 2016) (memorandum decision) (noting that drug court involves prosecutor's consent); *see also* {FACT SHEET} Supreme Court of Appeals of WV, Division of Probation Services, *Juvenile Drug Court* (2019) (available at: http://www.courtswv.gov/lower-courts/juvenile-drug/FY2019JDCFactSheet.pdf) (last accessed Apr. 18, 2022).

[54] *See* W. Va. Code § 27-15-4(d) (prosecutors privy to mental hygiene proceedings); W. Va. Code § 27-5-2 (requiring probable cause finding that the respondent is a danger to herself or others due to mental illness or substance abuse); *see also* Associated Press, *Raleigh County Opens Drug Court to Help Addicts*, Charleston Gazette-Mail (Published Feb. 27, 2016) (Updated Nov. 21, 2017) (available at: https://www.wvgazettemail.com /news/raleigh-county-opens-drug-court-to-help-addicts/article_62947c7c-24f1-5189-953e-72ad2c54a986.html) (last accessed Jun. 7, 2022) (quoting the prosecutor as saying the program should screen for violence).

[55] *See* W. Va. Code § 49-4-501.

[56] *See, e.g.*, *See* A.R. 168.

[57] *Cf. Wood*, 450 U.S. at 264–65; *see also Lorenzetti*, 238 W. Va. 157 at Syl. Pt. 2.

3. The suppressed information would have impeached a key State eyewitness.

Due to the State's mistaken belief Petitioner could not lawfully impeach its eyewitness, it withheld information from multiple sources that called into question her credibility.[58] The Response argues the eyewitness was unimpeachable because she said she was sober during the in camera hearing[59] and that her testimony was inconsequential and cumulative.[60] However, this overlooks that to convict, the jury needed to draw inferences and commit to a verdict. The eyewitness was a powerful one for the State yet went unchallenged by defense counsel.[61]

The Response does not contest the myriad (though non-exhaustive) ways unconflicted counsel could have attacked the eyewitness's credibility had the State complied with *Brady*.[62] Rather, it argues that Petitioner could not impeach the eyewitness because, in camera, she testified she was reliable.[63] But defendants need not take a witness's word they are telling the truth.[64] Testimony is not self-authenticating[65] and witness credibility is always at issue.[66] Confrontation is the most basic presupposition underlying the adversarial system.[67] This argument is not persuasive.

The Response also argues that the eyewitness's testimony was inconsequential and cumulative,[68] but the record shows otherwise. The eyewitness was the first fact witness called by the State, following a record custodian who laid a foundation for her 911 call.[69] Only the eyewitness herself could testify to the scene as she found it—her guardian, upon

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[58] *See, e.g.*, A.R. 473; *compare* A.R. 1062–97 *with* A.R. 473–74.
[59] Resp.'s Supp. Br. 15.
[60] Resp.'s Supp. Br. 14–15.
[61] A.R. 481.
[62] *Compare* Petr.'s Supp. Br. 15–17 *with* Resp.'s Supp. Br. 14–16.
[63] Resp.'s Supp. Br. 15.
[64] *E.g.* WVRE 607; *see also Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 317–18 (2009) ("Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.") (Quoting *Crawford v. Washington*, 541 U.S. 36, 61–62 (2004)).
[65] *See* WVRE 902.
[66] WVRE 611(b).
[67] *See Crawford*, 541 U.S. at 43.
[68] Resp.'s Supp. Br. 14–15.
[69] *See* A.R. 470; A.R. 459–69.

whom the Response relies,[70] did not even attempt to describe the bed or her actions in as frightening detail as the eyewitness herself could.[71]

The Response suggests that the eyewitness's testimony was cumulative with other witnesses such as the medical examiner,[72] but it has the cart before the horse. The ME needed the eyewitness's statements to reach an inculpatory conclusion, not the other way around.[73] Standing alone, the medical evidence showed accidental asphyxiation.[74] The ME could only opine the child was overlain by reference to the police reports going back to the eyewitness's discovery.[75] Without relying on witness reports, he could not elaborate on causation beyond accidental asphyxiation.[76]

One other key difference separates the testimony the Response relies upon from that of the eyewitness. Defense counsel subjected the guardian and ME—in fact all the other fact witnesses[77]—to "the crucible of the judicial process so that the factfinder [could] consider ... after cross-examination ... where the truth lies."[78] Only one fact witness—with whom defense counsel had a conflict and for whom the State suppressed impeachment material—went unchallenged before the jury.[79]

The full quality of the eyewitness's testimony, rather than its mere quantity, may be lost given the cold record.[80] But the emotional impact the eyewitness provided was not lost on the trial prosecutor.[81] If the eyewitness had so little value as the Response argues, the State could have gone without her testimony—just as it did with another juvenile to

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[70] *See* Resp.'s Supp. Br. 15.
[71] *Compare* A.R. 471–72 *with* A.R. 489.
[72] *See* Resp.'s Supp. Br. 7.
[73] *See* A.R. 646.
[74] *Id.*
[75] A.R. 646–67.
[76] *Id.*
[77] Trial counsel also did not cross-examine a records custodian. A.R. 433.
[78] *Briscoe v. LaHue*, 460 U.S. 325, 334 (1983) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 440 (1976)).
[79] *See* A.R.433; A.R. 600.
[80] *See* Resp.'s Supp. Br. 3.
[81] *See* A.R. 959; *see also* A.R. 944; A.R. 946; A.R. 947; A.R. 957; A.R. 964.

avoid a similar problem.[82] It did not. It compelled a child to testify.[83] Through tears,[84] the eyewitness described the scene as she said she recollected it.[85] Her experience and her testimony carry much greater significance than the Response attributes. Left unconfronted, it likely left an imprint on the jury as well. There is, therefore, a reasonable probability that if the State had honored *Brady*, and Petitioner's counsel been able to impeach its eyewitness, the result of the proceeding would have been different.[86]

CONCLUSION

In rebuttal closing argument, the prosecutor asked jurors: "Do you have any doubt as to ... the believability of that little girl?"[87] How could they? The State hid the evidence. And the defense lawyer had an incentive not to expose it.

Respectfully submitted,
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[82] *See* A.R. 144–45.
[83] A.R. Certified Docket Sheet, line 155.
[84] A.R. 471; *see also* A.R. 946–47 (prosecutor in closing asking jury to consider the eyewitness's demeanor).
[85] A.R. 471–73.
[86] *See Kyles*, 514 U.S. at 433.
[87] A.R. 964.

CERTIFICATE OF SERVICE

I, Matthew Brummond, counsel for Petitioner, Ariel Ladawn Bennett, do hereby certify that I have caused to be served upon the counsel of record in this matter a true and correct copy of the accompanying *"Petitioner's Supplemental Reply"* to the following:

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