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 BRIEF

Contains Confidential Information

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SUPPLEMENTAL ASSIGNMENT OF ERROR

Despite a specific *Brady*[1] request for its witnesses' juvenile records, the State withheld evidence on the mistaken belief that Petitioner could not impeach its juvenile witness with confidential information.

Did the State violate *Brady v. Maryland* and *State v. Youngblood*[2] by not disclosing evidence (I) Petitioner could use for impeachment, (II) that it possessed, and (III) would call into question the credibility of a witness central to its case?

STATEMENT OF THE CASE

Petitioner originally appealed arguing that her trial lawyer had an actual conflict of interest inconsistent with the Counsel Clause of the Sixth Amendment to the United States Constitution.[3] The record shows that besides this conflict, the State below believed that the juvenile records' confidentiality shielded witnesses from impeachment and relieved the prosecutor of any duty to disclose.[4] This Court ordered supplemental briefing on whether the State violated this Court's implementation of the *Brady* rule from *State v. Youngblood*.

Petitioner now argues that the State suppressed favorable, material evidence which provides an additional ground for reversal. She asks that the Court remand the case to circuit court with instructions to appoint conflict-free counsel and ensure the State's compliance with *Brady*, *Davis v. Alaska*,[5] and *Pennsylvania v. Ritchie*[6] prior to retrial.

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[1] *Brady v. Maryland*, 373 U.S. 82 (1963).
[2] Syl. Pt. 2, *State v. Youngblood*, 221 W. Va. 20, 650 S.E.2d 119 (2007) ("There are three components of a constitutional due process violation under [*Brady*]:(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.").
[3] *See* Petr.'s Br. 1.
[4] *Compare* A.R. 1062–97 (truancy/drug court files) *with* A.R. 473–74 (PDC's file also contained information regarding a psychological evaluation and commitment to Highland Hospital).
[5] *Davis v. Alaska*, 415 U.S. 308 (1974) (Sixth Amendment Confrontation Clause entitles defendants to impeach witnesses with juvenile records).
[6] *Pennsylvania v. Ritchie*, 480 U.S. 162 (1987) (Prosecutors must disclose exculpatory material from juvenile records, and to ensure confidentiality of non-exculpatory material may disclose everything to the trial court for an in camera screening).

a. Prior to discovering a conflict, defense counsel recognized that *Brady* entitled Petitioner to exculpatory juvenile records and made a specific request.

In September 2016, the State indicted Petitioner following the unintentional death of her five-month-old daughter.[7] Shortly afterwards, the parties exchanged discovery requests,[8] and the State filed a notice memorializing an open file agreement.[9]

Petitioner requested a W. Va. R. Crim. P Rule 16 witness list[10] and made a general *Brady* request.[11] In addition, Petitioner made several specific *Brady* requests regarding all State witnesses: 1) "Offers of Leniency[,]" 2) "Probation Reports[,]"3) "Investigations[,]" 4) "Prior False Statements[,]" 5) "Bias/Motive[,]" 6) "Medical/Psychiatric Condition[,]" 7) and—critically—"Juvenile & Criminal Records of State Witnesses[.]"[12]

Two weeks before trial, defense counsel sought to withdraw after discovering that her office represented a State witness.[13] The State opposed the motion as untimely because the witness's name appeared in discovery.[14] It equated an earlier-disclosed "contact list"[15]—an internal police document of officer contacts—with a Rule 16 disclosure "of all state witnesses whom the attorney for the state intends to call in the presentation of the case in chief[.]"[16] In actuality, the State did not notice its intent to call the witness in compliance with Rule 16 until January 28, 2020.[17] Defense counsel filed the motion three days later, and in the interim had consulted with the ODC, who disapproved of any further representation due to the actual, concurrent conflict.[18]

The court denied the motion to withdraw.[19]

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[7] A.R. 1039–40.
[8] A.R. 1348–63.
[9] A.R. 1347.
[10] A.R. 1350.
[11] A.R. 1354.
[12] A.R. 1354–57.
[13] A.R. 1041.
[14] A.R. 144–49.
[15] A.R. 1104–05.
[16] A.R. 148–149; *see also* W. Va. R. Crim. P Rule 16.
[17] A.R. 1366.
[18] *Compare* A.R. 1041 *with* A.R. 1366; A.R. 141.
[19] A.R. 159–62.

b. After discovering the conflict, defense counsel agreed with the State that it could not use juvenile records for impeachment.

During the conflict hearing and at trial, it became apparent that the State had withheld material responsive to Petitioner's requests that it did not feel a duty to disclose.[20] Specifically, when defense counsel discovered the conflict, she reviewed her colleague's files and discovered information that was "absolutely" favorable to her current client that she had a "duty"[21] to use for impeachment.[22] The State had not disclosed any of this information despite claiming it had intended to call the witness for the past three years.[23]

The State introduced some, but not all,[24] of this evidence under seal for purposes of the conflict hearing.[25] It appears the State saw no conflict or duty to disclose in part because it believed its witness "could not by law be impeached by those matters."[26] It believed that the juvenile, by virtue of her status, could not be impeached without an in camera hearing to weigh her interest in maintaining the confidentiality of her juvenile records,[27] as opposed to a similarly-situated adult.[28]

Before discovering the conflict, defense counsel recognized that *Brady* applied to juvenile records.[29] But afterwards she agreed with the State that Petitioner's counsel would not otherwise have access to this information.[30] The State's theory was that Petitioner could not impeach its witness with juvenile records due to the "rules of confidentiality," and the court should hear proposed cross-examination in camera prior to permitting impeachment.[31] Conflicted counsel agreed,[32] and the State disclosed nothing further.

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[20] *See* A.R. 145–46; A.R. 473–74.
[21] A.R. 143–44.
[22] *See* A.R. 143.
[23] *See* A.R. 148–49.
[24] *Compare* A.R. 1062–97 (truancy/drug court files) *with* A.R. 473–74 (PDC's file also contained information regarding a psychological evaluation and commitment to Highland Hospital).
[25] *Compare* A.R. 145–46 and A.R. 1062–97 *with* A.R. 473–74.
[26] A.R. 145–46.
[27] *See* A.R. 145–46; A.R. 147; A.R. 168; A.R. 474.
[28] A.R. 147.
[29] *See* A.R. 1355 (requesting production of juvenile records per *Brady*).
[30] A.R. 143.
[31] A.R. 168.
[32] A.R. 168; A.R. 474–76.

SUMMARY OF ARGUMENT

When Petitioner requested the witness's juvenile records, the State had options. It could disclose all the files. It could study the files and only disclose those portions it considered material. It could ask the court to make that determination instead. At the barest minimum, it could disclose the records' existence so the parties could litigate the State's *Brady* obligation. It chose silence. "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable."[33]

Instead, defense counsel discovered the records through extraordinary diligence—along with a conflict that prevented her from using them. Below, the State faulted defense counsel for not discovering the conflict earlier. But if it had honored its clear duty under *Brady*, it would have revealed the conflict years earlier.

STATEMENT REGARDING ORAL ARGUMENT

The Court has granted a Rule 19 argument for the September 2022 term. Petitioner urges the Court to use this opportunity to make clear that Syllabus Point 2 of *State v. Youngblood* controls, not footnote 21.[34] Per the history, purpose, and practical implications of *Brady v. Maryland*, prosecutors must disclose any favorable, material information to defendants. They cannot avoid this obligation by guessing at what defense counsel has, or could have, uncovered through other means.

Petitioner therefore suggests the following original syllabus point:

1. This Court's holding in *State v. Youngblood*, 221 W. Va. 20, 650 S.E.2d 119 (2007), and the Supreme Court of the United States' holding in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), recognized that due process obligates the State to disclose favorable, material information to defendants even without a request. Due process imposes no duty upon defense counsel to first exhaust other means of investigation.

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[33] *U.S. v. Bagley*, 540 U.S. 667, 681 (1985) (quoting *U.S. v. Agurs*, 427 U.S. 97, 106 (1985)).
[34] *See Frank A. v. Ames*, 866 S.E.2d 210, 226, n. 17 (W. Va. 2021).

ARGUMENT

The State may not "deprive any person of life, liberty, or property, without due process of law[.]"[35] Thus, prosecutors have an "affirmative duty to disclose evidence favorable to a defendant[.]"[36] Irrespective of good or bad faith, the State violates the Fourteenth Amendment Due Process Clause if it fails to disclose evidence 1) in its possession, 2) that is favorable to the defense, and 3) is material—i.e., "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[37] "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable."[38] Prosecutors must turn over favorable, material evidence even if the defense never requests it.[39] Thus, prudent prosecutors err on the side of disclosure to avoid reversible error.[40]

The Court is addressing this issue in the first instance, and its analysis is plenary.[41]

I. The information suppressed by the State was favorable to the defense because Petitioner could use it for impeachment.

The first component of a *Brady* violation is that the suppressed information was favorable to the defense.[42] In terms of its effect on a trial's fairness, failing to make favorable evidence available to a criminal defendant is little different from securing a conviction by suborning perjury.[43] Here, the juvenile records were "absolutely" favorable to the defense because they impeached a State witness.[44]

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[35] U.S. Const. Amend. XIV; *accord.* W. Va. Const. Art. III § 10.
[36] *Kyles v. Whitley*, 514 U.S. 419, 432 (1995) (citing *Brady*, 373 U.S. at 86.
[37] *Kyles*, 514 U.S. at 433 (quoting *Bagley*, 473 U.S. at 685; *accord. Youngblood*, 221 W. Va. 20 at Syl. Pt. 2.
[38] *Bagley*, 540 U.S. at 68 (quoting *Agurs*, 427 U.S. at 106).
[39] *See Bagley*, 473 U.S. at 682.
[40] *See Buffey v. Ballard*, 236 W.Va. 509, 522, 782 S.E.2d 204, 217 (2015)(quoting *Cone v. Bell*, 556 U.S. 449, 470, n. 15 (2009)); *see also Kyles*, 514 U.S. at 437.
[41] *Cf. State v. Beck*, 241 W. Va. 759, 762, 828 S.E.2d 821, 824 (2019) (Court answers questions of law in the first instance *de novo*).
[42] *Youngblood*, 221 W. Va. 20 at Syl. Pt. 2.
[43] *See Brady*, 373 U.S. at 86.
[44] A.R. 143–44.

In *Youngblood*, this Court noted that the Supreme Court intentionally used the broad term "favorable" to characterize *Brady* information.[45] This includes exculpatory evidence, mitigation evidence as in *Brady* itself, and impeachment material.[46] Impeachment extends not only to prior inconsistent statements, but anything that could undermine witness credibility.[47] Defendants have a right to cross with information that would "show that a witness is biased, or that the testimony is exaggerated or unbelievable"[48]

And contrary to the State's belief below,[49] juvenile records can be a source of *Brady* impeachment material.[50] A state's policy decisions to make records confidential—juvenile, mental health, etc.—do not preclude defendants from impeaching credibility.[51] Favorable evidence against a juvenile witness creates the same duty as any other evidence.[52] If the State is concerned with inadvertently disclosing non-*Brady* material, it can ask the court to screen it.[53] But it may not remain mum, even in good faith.

Certainly, witnesses and the State have strong interests in keeping sensitive records safe,[54] but procedures exist to ensure against misuse. Prosecutors can screen material and only disclose true *Brady* information or request that the court do so.[55] The court can issue protective orders to prevent unauthorized dissemination.[56] Courts and parties can—and should—protect confidential materials. But in the final analysis, a witness's interest in avoiding embarrassment must always yield to the defendant's right to a fair trial.[57]

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[45] *See Youngblood*, 221 W. Va. at 27–28.
[46] *Id.*; *see also Giglio v. U.S.*, 405 U.S. 150, 154–55 (1972); *Kyles*, 514 U.S. at 433; *Bagley*, 473 U.S. at 676.
[47] *See, e.g., Giglio*, 405 U.S. at 154–55 (offer of leniency to key witness material).
[48] *Ritchie*, 480 U.S. at 51.
[49] *See* A.R. 145–46; A.R. 147; A.R. 168; A.R. 474.
[50] *See, e.g., State ex rel. Lorenzetti v. Sanders*, 238 W. Va. 157, 161, 792 S.E.2d 656, 660 (2016).
[51] *Cf. Davis*, 415 U.S. at 319.
[52] *See State ex rel. Lorenzetti*, 238 W. Va. at 158–59.
[53] *See id.* at Syl. Pt. 2; *see also Ritchie*, 480 U.S. at 58.
[54] *Ritchie*, 480 U.S. at 57.
[55] *See id.*
[56] *See Frank A.*, 866 S.E.2d at 226, n. 18.
[57] *Davis*, 415 U.S. at 319.

Here, defense counsel represented that the juvenile records "absolutely" contained favorable material.[58] The witness's truancy issues began in 2014, prior to Petitioner's case.[59] The court dismissed that petition when the parties agreed to homebound education.[60] However, the witness eventually returned to school because officials later disciplined her for cyber bullying a classmate and then reporting the student for threatening her.[61] In addition, the State filed a second truancy petition against the witness and her guardian in 2017, after Petitioner's case began.[62] In that second case, the State extended its witness a considerable benefit—juvenile drug court—and resolved her truancy twelve months before Petitioner's trial.[63] Based upon this and whatever else trial counsel discovered through her own efforts rather than the State's disclosure, Petitioner's counsel represented that she saw avenues for investigation and impeachment that she, as an advocate, was obliged to pursue.[64]

Counsel also found a mental health examination and psychiatric commitment, and the court below referenced an abuse and neglect case that could have contained favorable information.[65] However, conflicted counsel—who had an interest in not impeaching her firm's former client—did not press these *Brady* issues and instead readily agreed with the prosecutor that the juvenile records she originally sought under *Brady* were not subject to disclosure.[66] Upon remand the State and un-conflicted defense counsel can litigate whether these additional sources of evidence contain favorable information that the State must disclose prior to retrial.[67]

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[58] A.R. 143–44.
[59] *Compare* A.R. 1039–40 *with* A.R. 1066.
[60] A.R. 1063.
[61] A.R. 1096.
[62] A.R. 1074.
[63] A.R. 1083.
[64] *See* A.R. 143–44; A.R. 473–74.
[65] *Id.*
[66] *E.g.* A.R. 141; A.R. 168.
[67] *See Ritchie*, 480 U.S. at 57 and 60–61.

II. The State actually or constructively possessed the evidence, including both the juvenile records belatedly filed under seal, and evidence of the witness's mental health records, which it never disclosed.

The second component of a *Brady* violation is that the State actually or constructively possessed the evidence and failed to disclose it.[68] Here, defense counsel discovered at least a portion of the material when investigating her conflict.[69] And the State filed under seal some—but not all—evidence it ought to have possessed.[70] However, neither satisfied the State's duty under the suppression prong because 1) the State's duty to disclose exists independently of the defense investigation, and 2) Petitioner was effectively denied access to the *Brady* information because the court forced her to trial with a lawyer who could not ethically use it.

1. The State's disclosure obligation exists irrespective of what the defense could or should have discovered.

Though the case law is resolving in Petitioner's favor following the United States Supreme Court's decision in *Banks v. Dretke*,[71] a split still exists regarding defense counsel's obligation to independently discover *Brady* material.[72] This Court has thus far declined to explicitly rule whether *Brady* requires due diligence from defendants,[73] and Petitioner suggests that the Court use her case to join the growing number of jurisdictions that disavow the rule as inconsistent with *Brady's* purpose and unworkable in application.

"Well-established Supreme Court precedent holds that the prosecution has a clear and unconditional duty to disclose all material, exculpatory evidence [and] ... [t]he Supreme Court has never required a defendant to exercise due diligence to obtain *Brady* material."[74] The Supreme Court declined to adopt a diligence rule when the government

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[68] *Youngblood*, 221 W. Va. 20 at Syl. Pt. 2.
[69] *See* A.R. 141; A.R. 473–74.
[70] *Compare* A.R. 1062–97 *with* A.R. 473–74.
[71] *Banks v. Dretke*, 540 U.S. 668 (2004); *See, e.g., U.S. v. Tavera*, 719 F.3d 705, 712 (6th Cir. 2013).
[72] *See* Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of Brady Through the Defendant Due Diligence Rule*, 60 UCLA L. Rev. 138, 153–54 (2012).
[73] *See Frank A*, 866 S.E.2d at 226, n. 17.
[74] *Lewis v. Connecticut Com'r of Correction*, 790 F.3d 109, 121 (2d Cir. 2015).

asked it to in *U.S. v. Agurs*[75] and instead ruled that *Brady* requests only alert the State to the full scope of material evidence.[76] The duty to disclose is independent of any action by the defense.[77] In the nearly sixty-year history of *Brady*, the court has never approved of a diligence requirement.[78] And in *Banks v. Dretke*, the Supreme Court overruled the Fifth Circuit when it procedurally-barred a habeas defendant for failure to show due diligence.[79] Importantly, the *Banks* court noted the parallel analysis for the procedural bar and a substantive *Brady* claim.[80] The State's suppression of evidence excuses an inmate's failure to earlier raise a *Brady* claim irrespective of whether due diligence could have uncovered it sooner, *and also satisfies the suppression element of the Brady claim itself.*[81]

Notwithstanding this history, at first blush a due diligence requirement might appear neatly reciprocal: prosecutors must go out of their way to discover evidence the State constructively possesses,[82] so require defense lawyers to exercise a little leg work as well. However, *Brady* concerns the due process that the government owes its citizens before taking their liberty, not discovery exchanges between co-equal, private parties.[83] And not only is a due diligence requirement inconsistent with the history and purpose of *Brady*,[84] it convolutes the practical end and makes the State's compliance *more* difficult, not less. Pretrial, defense due diligence requires prosecutors to know the unknowable, and post-conviction it changes the analytical framework but still produces the same outcome.

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[75] *Agurs*, 427 U.S. at 101–02; *see also id.*, Brief for the United States at 9, (Feb. 5, 1976) (available at 1976 WL 181371).
[76] *See Agurs*, 427 U.S. at 106–07.
[77] *See id.*; *Bagley*, 473 U.S. at 682; *see also Banks v.* 540 U.S. at 695.
[78] *See People v. Chenault*, 845 N.W.2d 731, 738 (Mich. 2014) ("We believe that if the Supreme Court wanted to articulate a diligence requirement, it would do so more directly. It has not.").
[79] *Banks*, 540 U.S. at 675–76.
[80] *See id.* at 691.
[81] *Id.*
[82] *See Youngblood*, 221 W. Va. 20 at Syl. Pt. 1.
[83] *See State v. Hatfield*, 169 W. Va. 191, 204, 286 S.E.2d 402, 410 (1982) (distinguishing rule-based discovery from constitutionally compelled disclosure).
[84] *See Chenault*, 845 N.W.2d at 738.

For prosecutors, a due diligence requirement introduces a factor they must consider but cannot know. They weigh their duty under *Brady* pretrial, when the defense theory is a mystery.[85] They do not know what information the defense has independently uncovered—let alone what it *could* uncover through greater effort. The only purpose a defense *Brady* request serves is to ease compliance by alerting prosecutors to the scope of evidence the defense considers material.[86] Making the adequacy of the defense investigation a necessary but unknowable factor does the opposite.[87] Due diligence is a fuzzy standard applied to unknown variables that, at least among prudent prosecutors, does not reduce disclosures lest they risk avoidable reversals.[88]

One can only analyze due diligence with any sort of objectivity after the fact, not pretrial when prosecutors must decide their duty under *Brady*. But post-conviction, a due diligence requirement accomplishes little, since it shifts the analytical framework from *Brady* to ineffective assistance of counsel but always produce the same result.[89] The Sixth Amendment Counsel Clause sets the constitutional minimum standard for defense lawyers' investigations, and any *Brady* diligence standard cannot demand more skill or better judgment from counsel than it guarantees.[90] So if a defendant did not receive favorable evidence in time for trial, depending on where the blame lies he or she can establish either suppression by the State per *Brady*,[91] or the first prong of ineffective assistance per

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[85] *See Agurs*, 427 U.S. at 107–08.
[86] *See id.* at 682–83.
[87] *See Dennis v. Sec'y, Pennsylvania Dep't of Corr.*, 834 F.3d 263, 293 (3d Cir. 2016) ("Subjective speculation as to defense counsel's knowledge or access may be inaccurate, and it breathes uncertainty into an area that should be certain and sure.").
[88] *See Cone*, 556 U.S. at 470, n. 15 ("[T]he prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure.").
[89] *See Chenault*, 845 N.W.2d at 737 (Finding that the Sixth Amendment Counsel Clause adequately addresses any interests an added diligence requirement may serve).
[90] *See Tavera*, 719 F.3d at 712 ("But if the lawyer lost the benefit of *Brady* by his failure to 'seek' (as the Supreme Court describes it in *Banks*), the lawyer most certainly then would have been guilty of ineffective assistance of counsel.").
[91] *See Brady*, 373 U.S. at 86.

Strickland.[92] Under either scenario, the only obstacle to a defendant obtaining relief would be showing that the investigative failure affected the verdict.[93] But *Brady* and *Strickland* impose identical standards for prejudice.[94] Thus, whether a court applies *Brady* or *Strickland* is functionally immaterial—the State violates one or the other when the defendant lacks favorable, material evidence that it possessed pretrial.[95]

The only way to craft a diligence rule that does not fall victim to these practical problems is to make it so narrow as to have little real world effect.[96] the Second Circuit requires due diligence but the rule only applies to information *actually known* to the defense.[97] "This requirement speaks to facts already within the defendant's purview, not those that might be unearthed."[98] And the Second Circuit has expressly rejected state-law diligence rules that require anything more than this minimal showing.[99] Here, actual knowledge does not excuse the State because Petitioner's lawyer could not impeach the witness in any event. But even in other cases, it is better to address actual knowledge through the materiality prong than excuse prosecutorial conduct inconsistent with the State's clear duty under *Brady*.[100]

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[92] *See Strickland v. Washington*, 466 U.S. 668, 691 (1984) (adequacy of counsel's investigation often the crux of an ineffective assistance inquiry).
[93] *See Strickland*, 466U.S. at 691–92.
[94] *See Bagley*, 473 U.S. at 682.
[95] *See Grant v. Lockett*, 709 F.3d 224, 234 (3d Cir. 2013) (easily concluding counsel provided ineffective assistance of counsel after earlier finding that counsel could have uncovered *Brady* material through reasonable diligence); *Gantt v. Roe*, 389 F.3d 908, 916 (9th Cir. 2004) (declining to analyze whether counsel's failure to investigate favorable, material evidence was ineffective because it was already reversing for the State's failure to disclose it).
[96] *See Lewis*, 790 F.3d at 121 (State court unreasonably applies federal law to read a due diligence requirement into *Brady* requiring more diligence than actual knowledge).
[97] *See Lewis*, 790 F.3d at 121.
[98] *Id.* at 121.
[99] *Id.* at 117; *see also U.S. v. Rodriguez-Marrero*, 390 F.3d 1, 29 (1st Cir. 2004); *Boss v. Pierce*, 263 F.3d 734, 741 (7th Cir. 2001); *U.S. v. Stuart*, 150 F.3d 935, 937 (8th Cir. 1998) (no suppression where defense possessed all necessary predicate information); *U.S. v. Meros*, 866 F.2d 1304, 1309 (11th Cir. 1989); *U.S. v. Brown*, 628 F.2d 471, 473 (5th Cir. 1980) (no *Brady* claim where information was "fully available" to defendant pretrial).
[100] *See Fontenot v. Crow*, 4 F.4th 982, 1066 (10th Cir. 2021); *see also U.S. v. Blankenship*, 19 F.4th 685, 694 (4th Cir. 2021).

Rather, the better view is that *Brady* contains no such requirement.[101] In 2014 the Michigan Supreme Court rejected a diligence requirement in no uncertain terms.[102] Justice McCormack (now Chief Justice) wrote for the court that "a diligence requirement is not supported by *Brady* or its progeny."[103] It relied in part upon the United States Supreme Court's decision in *Banks v. Dretke*: "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed."[104] Following *Banks*' reversal of the Fifth Circuit's diligence ruling, many federal circuits have also backed away from requiring diligence.[105] The Sixth Circuit once imposed the requirement but reversed its position after *Banks*.[106] The Third,[107] Ninth,[108] Tenth,[109] and DC[110] Circuits concur. As noted, the Second Circuit rejects state-law tests that require greater diligence than the knowledge actually possessed by the defendant.[111] And finally, the Fourth Circuit recently ruled: "To be clear, the government's need to comply with its *Brady* obligations is not obviated by the defendant's lack of due diligence."[112]

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[101] *See Dennis*, 834 F.3d at 293 ("[W]e reject [due diligence] as an unwarranted dilution of *Brady's* clear mandate."); *see also State v. Bethel*, ___N.E.3d ___, ___ 2022 WL 838337, *4–5 (Ohio March 22, 2022); *State v. Wayerski*, 922 N.W.2d 468, 481 (Wis. 2019).
[102] *See Chenault*, 845 N.W.2d at 733.
[103] *Id.*
[104] *Id.* at 738 (quoting *Banks*, 540 U.S. at 695–96).
[105] *See Fontenot*, 4 F.4th at 1066 ("Following *Banks v. Dretke*, several circuits have held that a defendant's diligence in discovering evidence plays no role in a substantive Brady claim.").
[106] *See Tavera*, 719 F.3d at 712; *see also Banks*, 540 U.S. at 691 (noting that the federal habeas procedural bar the Fifth Circuit used to reject defendant's claim for want of diligence closely parallels the substantive elements of *Brady*).
[107] *Dennis*, 834 F.3d at 291 ("[T]he concept of 'due diligence' plays no role in the *Brady* analysis.").
[108] *See Amado v. Gonzalez*, 758 F.3d 1119, 1135 (9th Cir. 2014) ("The prosecutor's obligation under *Brady* is not excused by a defense counsel's failure to exercise diligence with respect to suppressed evidence.").
[109] *See Fontenot*, 4 F.4th at 1066.
[110] *See Levin v. Katzenbach*, 363 F.2d 287, 291 (D.C. Cir. 1966).
[111] *See Lewis*, 790 F.3d at 117.
[112] *Blankenship*, 19 F.4th at 694 (distinguishing *Banks* from cases where defendants deliberately ignore evidence to sandbag the State with a later *Brady* claim).

The prosecutor's duty to disclose for purposes of the suppression component is independent of any action by defense counsel.[113] Long-standing Supreme Court precedent holds that prosecutors must disclose helpful evidence *even without a request.*[114] This does not square with a due diligence requirement because, at a bare minimum, due diligence would entail asking for evidence.[115] Petitioner therefore suggests that the Court take this opportunity to affirmatively disavow diligence as a fourth-prong to the United States Supreme Court's three-prong *Brady* test.[116]

2. The State withheld vital evidence and effectively suppressed even what it placed on the record by denying Petitioner counsel who could use it.

The State suppressed considerable information about its juvenile witness within the meaning of *Brady* and *Youngblood.* Due process requires disclosure to ensure *the defendant's* right to a fair trial,[117] not merely that counsel lay eyes on it. The State does not comply with *Brady* if its putative disclosure does not allow the defendant to effectively use it at trial.[118]

Here, the conflict prevented Petitioner from using the evidence regardless of its eventual discovery. Defense counsel ethically could not use it,[119] and eagerly acquiesced to the prosecutor's efforts to exclude it.[120] So the State effectively suppressed everything by forcing Petitioner to trial with a conflicted lawyer, even as to the file excerpt it belatedly placed on the record.

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[113] *See Dennis*, 834 F.3d at 290.
[114] *See Bagley*, 473 U.S. at 682.
[115] *See Dennis*, 834 F.3d at 293 ("Adding due diligence ... to the well-established three-pronged *Brady* inquiry would similarly be an unreasonable application of, and contrary to, *Brady* and its progeny.").
[116] See Chenault, 845 N.W.2d at 738–39.
[117] *See Brady*, 373 U.S.at 87 ("we now hold that the suppression by the prosecution of evidence favorable *to an accused* upon request violates due process[.]) (*emphasis added*).
[118] *Cf. U.S. v. Smith Grading & Paving, Inc.*, 760 F.2d 527, 532 (4th Cir. 1985) (citing *U.S. v. Higgs*, 713 F.2d 39 (3rd Cir.1983)) ("No due process violation occurs as long as *Brady* material is disclosed to a defendant in time for its *effective* use at trial.") (*emphasis added*).
[119] *See* A.R. 143; *see also* WV RPC Rule 1.9.
[120] *See* A.R. 168; A.R. 473–74.

And the State did not disclose all that it knew or should have known.[121] After defense counsel discovered the non-disclosure, the State said it introduced the witness's entire juvenile file at the conflict hearing.[122] However, its exhibit did not include all that conflicted counsel had discovered.[123] Counsel said she wanted to cross-examine the witness upon her drug use, truancy, psychological evaluation, and commitment to Highland Hospital.[124] Yet the file the State represented as exhaustive makes no mention of an evaluation or commitment.[125]

It is inconceivable that the State, who was monitoring its witness/juvenile defendant through drug court, would be unaware of a commitment, which in the absence of *Brady* compliance Petitioner can only presume was pursuant to an involuntary mental hygiene.[126] To be eligible for drug court, the State must agree to the diversion.[127] Juvenile drug court involves "intensive supervision" and "individualized outpatient substance abuse treatment[.]"[128] The State or its agents[129] responsible for implementing the drug court should have known that a mental hygiene commissioner had found probable cause to commit a drug court participant to in-patient care as a danger to herself or others due to mental illness or *substance abuse disorder*.[130] Such a development would be too crucial to treatment to go unnoticed.

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[121] *See Youngblood*, 221 W. Va. 20 at Syl. Pt. 1.
[122] A.R. 146–47.
[123] *Compare* A.R. 1062–97 *with* A.R. 473–74.
[124] A.R. 473–74.
[125] *Compare* A.R. 146–47 *with* A.R. 1062–97.
[126] *See* W. Va. Code § 27-5-1 (prosecuting attorney invited to attend any mental hygiene proceeding).
[127] *Cf* W. Va. Code § 62-15-4(d) (adult drug court requires prosecutor's agreement); W. Va. Code § 62-15B-2(b) (family drug court requires prosecutor's agreement); *State ex rel. Games-Neely v. Yoder*, No. 16-0505, 2016 WL 6651595, at *1 (W. Va. Nov. 10, 2016) (Memorandum Decision) (prosecutor agreed to juveniles' participation in drug court).
[128] {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).
[129] *See Youngblood*, 221 W. Va. 20 at Syl. Pt. 1.
[130] *See* W. Va. Code § 27-5-2.

Upon remand, the circuit court and parties can litigate the degree to which the former prosecutor violated *Brady* and what information the State must disclose before retrial. But it is evident from the current record that the State, without regard to good or bad faith, failed to disclose all that Due Process required of it.

III. The suppressed evidence was material because it impeached the credibility of a witness central to the State's case.

The final component of a *Brady/ Youngblood* error is materiality.[131] To satisfy materiality, Petitioner need not prove a different outcome, or even that a different outcome is more likely than not.[132] Evidence is material if "there is *a reasonable probability* that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[133] To make this analysis regarding impeachment evidence, courts must discount the testimony of the witness impeached.[134]

There is a reasonable probability that Petitioner would have received a more favorable outcome if unconflicted counsel had access to all *Brady* material because the witness was central to the State's case and the suppressed evidence undermined her credibility. First, the witness was critical to the State's case. Petitioner's counsel also had a conflict with a second potential witness, but the State chose not to call him to avoid the conflict.[135] But it needed the witness at issue here to prove causation and criminal neglect.[136] If the State thought it could dispense with putting a juvenile on the stand, it likely would have.

And second, the suppressed information would have cast doubt on her credibility. Defense counsel below represented, as an officer of the court, that the information she discovered through extraordinary diligence was "absolutely" helpful to Petitioner and

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[131] *See Youngblood*, 221 W. Va. 20 at Syl. Pt. 2.
[132] *See Kyles*, 514 U.S. at 433.
[133] *Id.* (quoting *Bagley*, 473 U.S. at 685 (*emphasis added*); *accord. Youngblood*, 221 W. Va. 20 at Syl. Pt. 2.
[134] *Cf. Juniper v. Zook*, 876 F.3d 551, 568 (4th Cir. 2017) (courts should discount impeached witness's testimony when evaluating materiality).
[135] *See* A.R. 144–45.
[136] *See* W. Va. Code § 61-8D-4a; W. Va. Code § 61-8D-1(7).

that she had a positive duty to use it.[137] At trial, the State and defense counsel—both of whom had an interest in excluding the testimony—presumed that the only possible relevance would be if drug use had clouded the witness's perceptions of what she said she saw.[138] This is incorrect. Present drug use could also influence her memory at trial even if she was lucid the day she perceived it. And even though she had completed drug court, a defendant need not take the State's word for it that its witnesses are credible. That's what cross-examination is for.[139]

In addition, unconflicted counsel could have used the witness's school disciplinary reports and truancies to investigate her reputation for truthfulness.[140] And besides the hospital commitment and psych eval that trial counsel discovered, drug court itself would have involved months if not years of treatment records.[141] Unconflicted counsel could have requested that the circuit court review these records in camera to determine whether they included evidence to which Petitioner was entitled.[142] But not if the State fails to disclose the witness's participation far enough in advance of trial to be used effectively.[143]

Finally, besides the reliability of the witness's perceptions, credibility of her present testimony, and reputation for untruthfulness, the witness may have subjectively felt biased or beholden to the State. Treatment is not easy or quick, nor are all defendants suitable candidates for drug court. But for many, it is a preferable opportunity over adjudication or

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[137] A.R. 143–44.
[138] A.R. 479–80.
[139] *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 317 (2009) ("The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. ... Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.")
[140] *See* WVRE 608.
[141] *Compare* A.R. 1085 (petition alleging truancy in 2017) *with* A.R. 1083 (dismissal of 2017 truancy in 2019 per drug court completion).
[142] Syl. Pts. 1 and 2, *State v. Roy*, 194 W. Va. 276, 460 S.E.2d 277 (1995).
[143] *See Smith Grading & Paving, Inc.*, 760 F.2d at 532.

conviction.[144] The witness needed the State's agreement to participate.[145] According to the State's timeline, it entered this agreement knowing it intended her to testify here.[146] And over the course of treatment—which ended just a year earlier—the witness was in a non-adversarial relationship with the State (at the State's total discretion).[147] During that period, the witness derived benefit and avoided sanction by complying with the State's rules and pleasing its representatives. Irrespective of good or bad faith on the State's behalf, reasonable jurors could have questioned whether the witness still felt that pull.

The record shows that an unconflicted advocate could have directly used or further developed the information suppressed by the State. But Petitioner did not have unconflicted counsel, and the State denied her the ability to confront a key witness with impeaching information known to it but withheld from Petitioner.

CONCLUSION

If the State had responded to Petitioner's specific requests pretrial, there would be no reason to disturb this conviction. There'd have been no *Brady* violation. The parties would have discovered the conflict years before trial instead of weeks. And any other conceivable trial error likely would have been harmless. Instead, Petitioner to receive justice, she and her family must undergo trial all over again because the State believed *Brady* and *Youngblood* did not apply to juvenile records.

Petitioner urges the Court to reverse her conviction and provide needed guidance to avoid this problem in the future.

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[144] *See* {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).

[145] *Cf* W. Va. Code § 62-15-4(d) (adult drug court requires prosecutor's agreement); W. Va. Code § 62-15B-2(b) (family drug court requires prosecutor's agreement); *State ex rel. Games-Neely v. Yoder*, No. 16-0505, 2016 WL 6651595, at *1 (W. Va. Nov. 10, 2016) (unpublished) (prosecutor agreed to juveniles' participation in drug court).

[146] *See* A.R. 148–49.

[147] *See* {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).

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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 *"Supplemental Petitioner's Brief"* and *"Appendix Record"* to the following:

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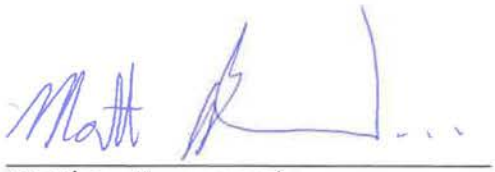

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