

NO. 33314

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IN THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

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DAVID FARRIS,

Appellant,

v.

STATE OF WEST VIRGINIA,

Appellee.

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APPELLANT'S BRIEF

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Appeal from the Judgment of the Circuit Court of  
Mingo County, West Virginia

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M. Timothy Koontz, Esquire  
WV Bar No. 2089  
186 East Second Avenue  
Post Office Box 2180  
Williamson, WV 25661  
Telephone: (304) 235-2227

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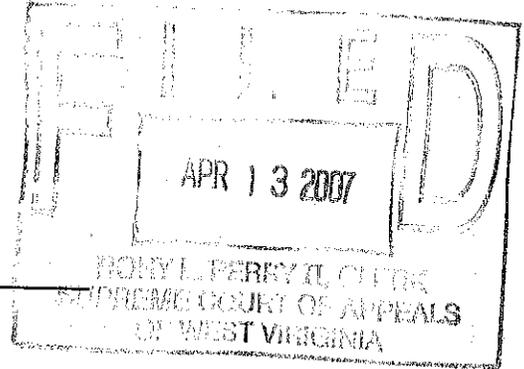


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## PROCEEDINGS BELOW

The Appellant, David Farris, was charged by Indictment No. 505-F69 with two counts of Sexual Abuse by a Parent, Guardian, or Custodian, in violation of W. Va. Code Ann. § 61-8D-5(o), and two counts of First Degree Sexual Assault, in violation of W. Va. Code Ann. § 61-8B-3. Farris's wife was a codefendant, but was not tried with Farris. Farris pleaded not guilty on September 22, 2005. The matter came on for trial before a jury on January 4, 2006, but ended in a mistrial based upon improper comments made by Appellant's counsel during closing arguments. On January 31, 2006, the matter came on for a second trial before a jury. On February 1, 2006, the jury returned a verdict against Farris of guilty on all four counts of the indictment.

On February 10, 2006, Farris filed a Motion for Post Verdict Judgment of Acquittal based on the insufficiency of the evidence, which was denied by the court by Order dated April 21, 2006. On March 10, 2006, Appellant filed an Amended Motion for New Trial, which was denied by the court by Order dated April 21, 2006. Farris was sentenced by the court by Order dated May 30, 2006. Appellant filed a Notice of Intent to Appeal on June 2, 2006. By Order dated February 15, 2007, this Court granted Appellant's Petition for Appeal. The appellate record was filed on February 27, 2007, and notice of the filing was received by Appellant on February 28, 2007.

## STATEMENT OF FACTS

The charges against Farris stem from allegations made by two minor complainants, Autumn B. and Shannon B., that sometime in September of 2004 Farris sexually abused them while he and his wife were babysitting them. The two alleged victims are sisters and were ages ten and nine, respectively, at the time of trial. (Trial Tr. 34, 52.) They both testified at both trials and gave pretrial statements to Nettie Goans, a Child Protective Services ("CPS") worker with Mingo County, and Robin Brozowski, a psychologist in Pikeville, Kentucky. The minors were also treated by Dorothy Holihan, a clinical psychologist in Kentucky. The victims' statements and testimony were inconsistent and contradictory, and contained different dates, locations, and circumstances concerning the alleged sexual abuse. The victims did not report the alleged abuse until November 1, 2004, when they related the allegations to their mother, Joyce Spradlin. (Trial Tr. 16.) The only medical or physical evidence presented by the State was the testimony of Dr. Holihan, a pediatrician who examined Autumn and Shannon on December 4, 2004, that an examination of Shannon's hymen indicated an abnormal finding that suggested a probable penetration injury. (Trial Tr. 130-32.) Dr. Holihan, however, testified that objects other than a penis could have caused the abnormality. (Trial Tr. 132-33.) No incriminating evidence was found during the execution of a search warrant at Farris's residence.

Farris's Amended Motion for a New Trial raised three issues: (1) the trial court improperly admitted testimony by Roby Pope Jr., Chief of Police in Williamson, West Virginia, and the investigating officer that vouched for the credibility of the victims, and (2)

a new trial was required based on newly discovered evidence that should have been disclosed by the Kentucky Department of Human Services pertaining to the interview of a third alleged victim, Barbara R., by psychologist Robin Brozowski, and (3) the failure on the part of the Commonwealth of Kentucky, in a "joint investigation," to disclose the foregoing exculpatory evidence violated *Brady v. Maryland*, 373 U.S. 83 (1963), and *State v. Ward*, 188 W. Va. 380, 424 S.E.2d 725 (1991). Issues (2) and (3) were based on the discovery by defense counsel following trial that during the interview of Barbara R., according to the report of Robin Brozowski, dated December 22, 2004,

Child reported, "It was said that David molested me . . . my cousin David . . . but he didn't." Child reported Joyce told her to "go along with the story" that David molested her or that she would make sure that she (child) was taken from her mother. Child reported she did not know "if she threatened her two girls or not." Child further described "the story" as "like he tongued me and stuff." She described "tongued" further as "he just licked me is what the story was supposed to mean." Child also reported touches did not happen to her but that "I don't know about Autumn and Shannon." Child reported Shannon "stuck a toothbrush up inside her (Shannon)." Refer to taped interview for additional information.

The report further indicates that the interview with Barbara R. was audiotaped, and the child "appeared competent related to knowledge of truth and lie."

In his post-trial motion, Farris asserted the case was a "joint investigation" between the State of West Virginia and the Commonwealth of Kentucky involving the alleged sexual abuse of three children, and that as part of the joint investigation several psychological and forensic evaluations were taken with the children. The two states shared documents and, prior to trial, defense counsel properly requested copies of all reports and examinations. Kentucky authorities, however, "cherry picked" the reports and provided only those reports

that were inculpatory, while not disclosing the above-mentioned report that was exculpatory, in violation of *Brady v. Maryland* and *State v. Ward*.

During the first trial, defense counsel offered Barbara R., who was eleven years old, as a witness. The court conducted a hearing in camera to determine whether she was competent to testify and ruled that she was not competent to testify.

During the first trial, defense counsel cross-examined Robin Brozowski about her interview of Barbara R. as follows:

Q Do you recall that both Autumn and Shannon identified another little girl who was present, a Barbara R. [REDACTED]

A In one of the notes one of the standard questions would be other kids there and the other kids that would have been and they did give Barbara R. [REDACTED] and then I add parenthesis, a cousin, so Autumn identified Barbara R. [REDACTED] as a cousin and they identified that Tina Farris was also there.

Q Do you recall during your forensic interview a Barbara R. [REDACTED]

A Yes.

Q Did you find her to be credible?

MS. MAYNARD: Objection, Your Honor. I wasn't aware there was a forensic interview of Barbara R. [REDACTED]. I've not been provided with copies of transcripts.

THE COURT: Approach.

(Bench Conference)

MS. MAYNARD: Your Honor, I would object to this line of questioning.

MS. VAN ZANT: Your Honor, I believe this witness will testify as to the credibility of Barbara R. [REDACTED]

MS. MAYNARD: I don't think she'll say that.

THE COURT: Let's get away from that. It wasn't provided.

(Bench conference concluded)

Q (Ms. Van Zant continuing) Did you make any findings whether or not Barbara R [REDACTED] had been assaulted?

A (Witness continuing) I don't have that information with me, in front of me. I would have to have it in front of me in order to testify.

(Trial Tr. from First Trial 129-30.)

On redirect examination, the prosecutor questioned Brozowski as follows:

Q Now, I want to talk to you a little bit about Barbara R [REDACTED]. Do you know when you did an interview with Barbara R [REDACTED]?

A Like I said, no; I do remember Barbara's name because it's on the tape and the kids indicated that she was [there]; however, any details—I know they specifically mentioned each other. Shannon and Autumn mentioned her and she mentioned them. That's about the extent to what I have without having something to refer to and listening to the tape again.

Q Do you remember specifically any red flags or concerns you had as you interviewed Barbara R [REDACTED] or do you have any recollection?

A I would need that here in order to be correct and answer correctly. I would rather listen to the tape first before I answer any question regarding Barbara. It has been a while. I don't remember the date I interviewed her, but it has been a while—I believe it was in March.

Q My last question; Were you able to determine based upon your interviews whether Barbara R [REDACTED] was actually at the house at the time that this abuse occurred to Autumn and Shannon B [REDACTED] or whether she was there on another occasion?

A No. In each of Autumn and Shannon's tapes they mention Barbara and that Barbara was there, but then at other times it would have been just David and Tina, so I don't get a clear indication of the time period or whether or not Barbara was there or if it was on different days.

(Trial Tr. 134-35.)

Appellant requested an evidentiary hearing on his motion, but the court refused to hold a hearing and denied the motion. The court did not address Appellant's claim under *Brady v. Maryland* but addressed the failure to disclose the report of Brozowski's interview of Barbara R. solely as a claim for a new trial based on newly discovered evidence and rejected such claim as not satisfying all five of the requirements for a new trial based on newly discovered evidence.

#### ASSIGNMENTS OF ERROR

1. The newly discovered evidence, Dr. Brozowski's report of her interview with Barbara R., requires a new trial.

The trial court found that evidence did not require a new trial.

2. The failure of the prosecutor to disclose the report to Appellant violated *Brady v. Maryland*, 373 U.S. 83 (1963), and *State v. Ward*, 188 W. Va. 380, 424 S.E.2d 725 (1991).

The trial court did not directly address the *Brady* issue but denied Appellant's motion for a new trial raising the issue.

3. The failure to conduct an evidentiary hearing on the motion for a new trial was an abuse of discretion.

The trial court did not directly address the issue but heard argument on the motion for a new trial and issued its order denying the motion without conducting an evidentiary hearing.

4. Testimony by Chief Roby Pope concerning the victims' credibility was improperly admitted into evidence.

The trial court held that the Appellant provided insufficient information upon which to review this claim and thus found it to be without merit.

## ARGUMENT

### I. THE NEWLY DISCOVERED EVIDENCE OF DR. BROZOWSKI'S REPORT OF HER INTERVIEW WITH BARBARA R. REQUIRES A NEW TRIAL.

In reviewing challenges to findings and rulings made by a circuit court in denying a defendant's motion for a new trial, the court applies a two-pronged standard of review. *State v. Cooper*, 217 W. Va. 613, 619 S.E.2d 126 (2005). As stated in *Cooper*:

We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.

619 S.E.2d at 129 (quoting *State v. Vance*, 207 W. Va. 640, 535 S.E.2d 484 (2000)).

The five-prong standard for granting a new trial on the ground of newly discovered evidence was set forth in *State v. O'Donnell*, 189 W. Va. 628, 433 S.E.2d 566, 570 (1993), as follows:

The five-prong standard for granting a new trial on the ground of newly-discovered evidence was restated in syllabus point one of *State v. King*, 173 W.Va. 164, 313 S.E.2d 440 (1984):

"A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been

discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side." Syllabus, *State v. Frazier*, 162 W.Va. [9]35, 253 S.E.2d 534 (1979), quoting, Syl. pt. 1, *Halstead v. Horton*, 38 W.Va. 727, 18 S.E. 953 (1894).

*Accord State v. Kennedy*, 205 W. Va. 224, 517 S.E.2d 457 (1999), *overruled on other grounds*, *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006).

In its Order denying Appellant's motion for new trial, the circuit court found that the report of Dr. Brozowski met three of the five requirements set forth in *O'Donnell* and *Kennedy*. The court found that the evidence was not cumulative but could be used for several purposes, including impeachment of the victims, providing an explanation or defense to the physical evidence, and could attack the conclusions of the experts in this matter, vis-a-vis the credibility of the minor victims. Thus, element three was met. The court also found that the evidence clearly had uses other than discrediting or impeaching an adverse witness and, thus, element five was met. The court, however, found that elements (1), (2), and (4) were not met. Such a finding was clearly erroneous.

With respect to elements (1) and (2), the court found that Appellant had actual knowledge that Brozowski had interviewed and conducted a forensic evaluation of Barbara R. before his second trial. According to the circuit court:

This information was obviously known to the Defendant before the original trial, as the Defendant planned to call Barbara R. as a witness. Additionally, defense counsel referenced the forensic interview during the cross examination of Ms. Brozowski during the State's case in chief. See Transcript at 129, 134. Therefore, the fact that a forensic evaluation was performed is clearly not newly discovered evidence.

(Order dated Apr. 21, 2006 at 8-9.) The court further found that Appellant "was not diligent in ascertaining and securing this evidence" nor has he "made a sufficient showing that the new evidence is 'such that due diligence would not have secured it before the verdict,' as required under the second element of the *State v. Kennedy* test, 205 W. Va. 224, 517 S.E.2d 457." (Order at 9.) Of course, the circuit court failed to conduct an evidentiary hearing on the motion for a new trial, so Appellant did not get an opportunity to present evidence on these points.

The circuit court's finding that Appellant knew of the report and could have obtained it prior to trial is clearly erroneous. No evidentiary hearing was held on this matter and the circuit court based its ruling on the fact that Appellant planned to call Barbara R. at the first trial and referred to Dr. Brozowski's interview of Barbara R. during cross-examination at the first trial. While defense counsel may have been aware of the interview generally, she was not aware of the report and its contents, nor could have been, since the State failed to disclose the report despite Appellant's request for disclosure of all such reports and all exculpatory evidence. Moreover, defense counsel was diligent before the first trial in securing the report.

She made every effort to obtain all reports from Kentucky authorities and had no reason to believe there were reports that were not turned over to her by the prosecution.

Prior to the first trial, defense counsel, Mr. Foley, filed an Omnibus Motion requesting, inter alia, full disclosure of all discoverable materials, including all materials under *Brady v. Maryland*, 373 U.S. 83 (1963), and *State v. Ward*, 188 W. Va. 380, 424 S.E.2d 725 (1991). (See Order Denying Motion for New Trial dated Apr. 21, 2006 at 1-2.) Mr. Foley withdrew as defense counsel on October 19, 2005 due to a conflict, and Susan Van Zant was appointed as substitute defense counsel. (*Id.* at 1.) On October 25, 2005, the State filed its Disclosures pursuant to the Omnibus Motion. (*Id.* at 2.) The Disclosures include, inter alia, videotapes, audiotapes, and reports of forensic interviews made with Shannon B. and Autumn B., by Big Sandy Area Child Advocacy Center, Inc., but the Disclosures did not include any material concerning Barbara R. (*Id.*)

Although defense counsel questioned Dr. Brozowski at the first trial about her interview of Barbara R., Dr. Brozowski's answers did not indicate that she prepared a report or that there was any exculpatory material obtained from the interview. To the contrary, Dr. Brozowski testified that she could not remember any substantive details of the interview. Such testimony clearly gave the impression that the report was not exculpatory but, instead, was inconsequential. Indeed, Dr. Brozowski did not even indicate that there was a report but said that the interview was audiotaped and that she would have to listen to the tape in order to answer any questions concerning the interview. (Trial Tr. 134-35.) Of course, although defense counsel may have been misled by Dr. Brozowski's testimony, the prosecutor was

under a duty pursuant to *Brady v. Maryland* to obtain and examine the audiotape and report, which she failed to do. The foregoing facts and circumstances demonstrate that defense counsel discovered the report only after the second trial and that she was diligent in ascertaining and securing all exculpatory evidence and that despite exercising due diligence she could not secure it before the verdict.

With respect to the fourth element of the test—that it must be such as ought to produce an opposite result at a second trial on the merits—the circuit court found as follows:

The proffered evidence contains two items that could be used to bolster Mr. Farris's defense, specifically, the "child reported Joyce told her to 'go along with the story' that David molested her or that she would make sure that she (child) was taken from her mother," and "Child reported Shannon "stuck a toothbrush inside her (Shannon.)" Report of Dr. Brozowski.

In making the determination whether the evidence would produce an opposite result, "courts evaluate the new evidence in light of the entire record." *State v. Stewart*, 161 W.Va. 127, 137, 239 S.E.2d 777, 783 (1977) (quoting C. Wright & F. Elliot, 2 Federal Practice and Procedure § 557 (1969)). The jury had the opportunity to hear the testimony of the victims, the victims' mother, and the Defendant. The proffered evidence does not directly contradict anything presented in the record. In evaluating the proffered evidence in the context of the complete record in this instant matter, the Court **FINDS** the evidence is not of such character and import that, even if given particular weight by the jury, the opposite result would have occurred.

(Trial Tr. 10.) This finding is erroneous and overlooks the importance of the report. The report indicates that Joyce Spradlin coerced Barbara R. to "go along" with the fabrication that Appellant sexually abused her and Spradlin's daughter and Spradlin threatened that if Barbara R. did not, Spradlin would make sure Barbara R. was taken from her mother. The obvious implication is that Spradlin coerced her own impressionable daughters to "go along" with the fabrication of abuse, as Appellant contended at trial.

The evidence is also important in that Barbara R. stated that she did not know of any instances of abuse of Autumn and Shannon by Appellant. Autumn and Shannon, however, indicated that Barbara R. was present at least on some occasions of alleged abuse. Thus, this evidence, again, directly contradicts their testimony.

The report thus seriously discredits the victims' testimony and Joyce Spradlin's testimony indicates that Joyce Spradlin coerced her daughters into falsely accusing Appellant. The report also provides an innocent explanation for the physical evidence of probable penetration that supported the allegation of abuse since Barbara R. stated that Shannon "stuck a toothbrush inside her (Shannon)." This evidence would have completely undermined the State's evidence and witnesses and supported Appellant's testimony. In addition, the report also concluded that Barbara R. "appeared competent related to knowledge of truth and lie"; thus, she was competent to testify. This conclusion could have been used by Appellant's expert, Dr. Saars, in his evaluation of Barbara R.'s competency to testify. Clearly, then, the evidence was such as ought to produce an opposite result at a retrial on the merits.

An analogous situation was presented in *State v. O'Donnell*, where the court reversed the decision of the circuit court and remanded the case for entry of an order awarding a new trial based on newly discovered evidence consisting of a letter from defendant's wife, the victim, corroborating the defense of consent to sexual assault charges. This letter from defendant's wife, which she sent him after his conviction, indicated that she had falsely accused him and lied at trial. The court found that the letter met the test for the grant of a

new trial based on newly discovered evidence. With respect to element (4) of the test, the court stated:

This Court noted in syllabus point 2 of *State v. Stewart*, 161 W.Va. 127, 239 S.E.2d 777 (1977), that to be admissible newly-discovered evidence must be of the type "as ought to produce an opposite result at a second trial on the merits." *Id.* at 128, 239 S.E.2d at 779. The facts of *Stewart* compelled us to conclude "that there is a substantial likelihood that this newly-discovered evidence 'ought to produce an opposite result' on retrial." 161 W.Va. at 141, 239 S.E.2d at 785. Similarly, because the newly-discovered evidence at issue corroborates the Appellant's defense to the sexual assault charges in such a manner that if one believes Mrs. O'Donnell authored the letter one is more inclined to accept the defense's theory of the case, this Court concludes that the newly-discovered evidence creates a "substantial likelihood" that Appellant would be acquitted on retrial. *Id.*

433 S.E.2d at 572.

Similarly, in *State v. Stewart*, 161 W. Va. 127, 239 S.E.2d 777 (1977), cited by the court in *O'Donnell*, the newly discovered evidence consisted of testimony from the State's paid informant, who indicated that reports from which the trooper, the State's chief witness, derived his testimony incriminating the defendant in the drug offense, were routinely altered and falsified. The defense was based on alibi. The court found that the new evidence satisfied element (4) of the test, stating:

Here the principal witness for the state, Caldwell, is severely impeached by his assistant, Ketchum, who indicated that the reports from which Caldwell derived his testimony were routinely altered and falsified. Coupling these newly-discovered revelations with the defense based upon an alibi, this Court is convinced that there is a substantial likelihood that this newly-discovered evidence "ought to produce an opposite result" on retrial. Here the newly-discovered evidence impeaches the state's principal witness and lends support to the alibi defense of the accused. Since this fourth rule of newly-discovered evidence is met, the trial court erred in denying the defendant's motion for a new trial.

239 S.E.2d at 785.

As in *O'Donnell* and *Stewart*, the new evidence at issue here satisfies element (4) of the test for a new trial.

Finally, the circuit court found that while Barbara R.'s denial of abuse would be admissible at trial, her other statements would be inadmissible hearsay. Initially, this overlooks the fact that had the report been known about before trial, Barbara R. most likely would have been found competent to testify, in light of the report's conclusion that she was competent and Dr. Saar's conclusion, based, in part, on the report, that she was competent to testify. Thus, Barbara R. could have testified as to her statements. Moreover, Joyce Spradlin and her daughters could have been cross-examined more effectively had Appellant known of the report. Furthermore, Barbara R.'s statement that Shannon stuck a toothbrush inside her (Shannon) apparently was based on Barbara R.'s observations and thus would not have been hearsay had she testified.

Furthermore, even if Barbara R. had been ruled incompetent to testify and, therefore, was unavailable as a witness, her statements would have been admissible pursuant to W. Va. R. Evid. 804(b)(5), the residual exception. Rule 804(b)(5) provides:

**(b) Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

....

(5) *Other Exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point

for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Clearly, all of the factors necessary for admissibility under this Rule are met here. Most importantly, the trustworthiness of the statement is equivalent to the trustworthiness underlying the specific exceptions to the hearsay rule, particularly since the statement was audiotaped. *See State v. Johnson*, 210 W. Va. 404, 557 S.E.2d 811 (2001); *State v. Dillon*, 191 W. Va. 648, 447 S.E.2d 583 (1994) (informant's tape-recorded statement admissible under Rule 804(b)(5)). Accordingly, the report would have been admissible under Rule 804(b)(5).

In light of the foregoing, all of the requirements for a new trial based on newly discovered evidence have been met in this case. Therefore, the circuit court erred in denying Appellant's motion for a new trial based on newly discovered evidence.

**II. THE FAILURE OF THE PROSECUTOR TO DISCLOSE DR. BROZOWSKI'S REPORT VIOLATED *BRADY v. MARYLAND* AND CONSTITUTES REVERSIBLE ERROR.**

The prosecution's suppression of material evidence favorable to an accused violates due process of law under *Brady v. Maryland* as well as Article III, § 14 of the West Virginia

Constitution. *State v. Kearns*, 210 W. Va. 167, 556 S.E.2d 812 (2001); *see State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982); *State v. Ward*. As explained in *State v. Cooper*, there are three components of a *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.

619 S.E.2d at 131 (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). In *Youngblood v. West Virginia*, 126 S. Ct. 2188, 2190 (2006), the Supreme Court explained the principles applicable to a *Brady* violation as follows:

A *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused. *See* 373 U.S., at 87, 83 S. Ct. 1194. This Court has held that the *Brady* duty extends to impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed.2d 481 (1985), and *Brady* suppression occurs when the government fails to turn over even evidence that is "known only to police investigators and not to the prosecutor," *Kyles*, 514 U.S., at 438, 115 S. Ct. 1555. *See id.*, at 437, 115 S. Ct. 1555 ("[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"). "Such 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,'" *Strickler v. Greene*, 527 U.S. 263, 280, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999) (quoting *Bagley*, *supra*, at 682, 105 S. Ct. 3375 (opinion of Blackmun, J.)), although 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. 1555. The reversal of a conviction is required upon 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. 1555.

As stated in *Youngblood*, the *Brady* rule applies even if the prosecutor was unaware of the exculpatory evidence in question, as the rule extends to any police or state agency

officials whose knowledge is imputed to the prosecution. *See State v. Hall*, 174 W. Va. 787, 329 S.E.2d 860 (1985); *see Monroe v. Angelone*, 323 F.3d 286 (4<sup>th</sup> Cir. 2003) (prosecutor's *Brady* disclosure duty encompasses both impeachment material and exculpatory evidence, and includes material that is known only to police investigators and others acting on government's behalf); *Mathis v. Berghuis*, 90 F. App'x 101 (6<sup>th</sup> Cir. 2004) (not published) (*Brady*'s disclosure requirement encompassed evidence, including prior unrelated police reports of alleged victim's past false accusation of rape, that was known only to police investigators and not to prosecutor).

In this case, while it appears from the record of the first trial that the prosecutor was unaware of the interview of Barbara R. and the report of the intervention by Dr. Brozowski, she was put on notice of such interview during the first trial. The prosecutor, however, apparently made no effort to obtain or review the report before the record trial. The case law makes clear, however, that knowledge of the report must be imputed to the prosecutor because someone (Dr. Brozowski) on the prosecution team knew of the exculpatory evidence. Clearly, in light of the joint investigation in this case, the exchange of information between the prosecutor and Kentucky authorities and the fact that Dr. Brozowski testified for the prosecution, Dr. Brozowski and the participating Kentucky authorities must be considered a part of the prosecution team. Thus, their knowledge of the report must be imputed to the prosecutor for purposes of determining whether *Brady* was violated.

In this case, the report concerning Barbara R. and her statements to Dr. Brozowski were clearly exculpatory and material. The report and the child's statements directly

contradict and impeach the testimony of the State's main witnesses, the two children, as well as their mother, and they support and corroborate the Appellant's testimony that he did nothing wrong and that the mother must have told the children to lie and falsely accuse the Appellant to get back at him. Moreover, the evidence provides an explanation for the physical evidence and expert opinion that one of the girls had been penetrated.

In *State v. Kearns*, the court held that the failure of the prosecution to disclose a prior inconsistent statement of the defendant's estranged wife, whom the defendant was charged with sexually assaulting, constituted a *Brady* violation. As the court explained:

In the case presently before the Court, the principal charge against the appellant was that he had sexually assaulted his estranged wife. A critical issue in the case was whether the estranged wife had been forced to engage in sexual acts against her will. The principal evidence adduced by the State to support the claim that the estranged wife had been forced to engage in sexual acts against her will was the testimony of the estranged wife herself. In this Court's view, the credibility of the estranged wife's testimony potentially affected the jury's conclusion as to whether she was or was not forced to act against her will. The credibility of her testimony was obviously very material, and impeachment of her testimony could potentially have affected the outcome of the case, particularly in view of the fact that the thrust of the defense's questioning suggested that the appellant might have been at his estranged wife's trailer at her invitation.

In view of the clear contradictory nature of the non-disclosed statement and its potential impact of its revelation to the jury might have had on the assessment of the credibility of the estranged wife's testimony, this Court believes that the State's withholding of the statement did violate the appellant's constitutional rights, and, as the Court indicated in *State v. Hall, id.*, the Court believes that in light of this, the appellant should be granted a new trial.

556 S.E.2d at 814; see *State v. Hall* (reversed on same grounds); *State ex rel. Yeager v. Trent*, 203 W. Va. 716, 510 S.E.2d 790 (1998) (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).

In *Youngblood v. West Virginia*, the Supreme Court recently granted certiorari and vacated a West Virginia state court decision in a sexual assault prosecution based on a *Brady* violation. See *State v. Youngblood*, 217 W. Va. 535, 618 S.E.2d 544 (2005). In *Youngblood*, a police officer became aware of a letter written by two of three women allegedly abducted by the defendant which indicated that the defendant had consensual sex with the third woman as he claimed at trial. The police officer told the person who showed him the note to destroy it and did not tell the prosecutor about it and it was not disclosed to the defendant. The West Virginia Supreme Court of Appeals, with little discussion, affirmed the denial of a new trial. A dissenting opinion, however, concluded that the note had been suppressed and was material, both because it was at odds with the testimony provided by the State's three chief witnesses and because it was entirely consistent with the defendant's defense at trial that his sexual encounters with the woman were consensual. 618 S.E.2d at 550-52 (Davis, J., dissenting). The Supreme Court vacated the state court judgment, stating:

*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.

126 S. Ct. at 2190 (citations to record omitted).

So, too, in this case, the failure of the prosecution to disclose Dr. Brozowski's report of her interview with Barbara R. constitutes a *Brady* violation and requires a new trial.

**III. THE CIRCUIT COURT'S FAILURE TO HOLD AN EVIDENTIARY HEARING ON APPELLANT'S MOTION FOR NEW TRIAL WAS AN ABUSE OF DISCRETION.**

On March 20, 2006, a hearing was conducted on the motion for new trial at which the court heard argument but did not hear evidence. At the hearing, Appellant informed the court that he wished to present evidence, including the testimony of his expert witness, Dr. Timothy Saar.

The court, however, stated that it had to decide as a threshold matter whether the motion was "well taken" and had "to see what threshold argument you make first" before determining whether to hold an evidentiary hearing. (Trial Tr. 3.) Following argument by counsel, the court stated it would publish a written order on the matter and would "proceed accordingly." (Trial Tr. 15.) Therefor, on April 21, 2006, the court issued a written order denying the motion without conducting an evidentiary hearing.

W. Va. R. Crim. P. 33 provides as follows:

**RULE 33. NEW TRIAL**

The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony, and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within ten days after

verdict or finding of guilty or within such further time as the court may fix during the ten-day period.

The decision whether to hold an evidentiary hearing on a motion for a new trial is within the discretion of the circuit court. *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 465 S.E.2d 416 (1995).

The failure of the circuit court to hold an evidentiary hearing in this case was an abuse of discretion. The court made findings of fact to the Appellant's detriment without the benefit of an evidentiary hearing and thus, Appellant was not permitted to present facts which would have supported his contentions. As the foregoing arguments indicate, the trial came down to a question of credibility and had Appellant been aware of Dr. Brozowski's report concerning Barbara R., his defense would have been much stronger and the State's case would have been seriously undermined. The circuit court, therefore, should not have ruled on Appellant's motion for new trial without allowing him to fully present the facts in support of his claims. Therefore, this case should be remanded in order for the circuit court to conduct an evidentiary hearing on the motion for new trial.

**IV. THE ADMISSION OF THE TESTIMONY OF CHIEF ROBY POPE IMPROPERLY VOUCHING FOR THE VICTIMS' CREDIBILITY CONSTITUTES PLAIN ERROR.**

During direct examination of Roby Pope Jr., the Chief of Police in Williamson, West Virginia, who investigated the allegations of abuse in this case, the following exchange occurred:

Q While the girls were participating in their interview with Robin Brownsoski, did you have an opportunity to observe their demeanor?

A Yes, I did.

Q Based upon your experience in this area—First, let me ask you—Can you describe their demeanor.

A Uh—The first child, Autumn, actually was very open with Ms. Brownsoski, from what I saw and open with her on what she was saying and she was—the things she was saying I felt was credible. I don't think any young child could make it up.

(Trial Tr. 9.) Chief Pope's testimony constituted improper bolstering and was plain error.

Bolstering is improper and occurs when a party seeks to enhance witness's credibility before it has been attacked. *State v. Wood*, 194 W. Va. 525, 460 S.E.2d 771 (1995); see W. Va. R. Evid. 608(a)(2). In *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990), the court held that expert psychological testimony is permissible in cases involving incidents of child sexual abuse and an expert may state an opinion as to whether the child comports with the psychological and behavioral profile of a child sexual abuse victim, and may offer an opinion based on objective findings that the child has been sexually abused. Such expert, however, may not give an opinion as to whether he personally believes the child, nor give an opinion as to whether the sexual abuse was committed by the defendant, as these would improperly and prejudicially invade the province of the jury.

Chief Pope was not an expert witness and, in any case, was not permitted to testify as to the credibility of the victims. See *State v. Wood*; *State v. Edward Charles L.*; W. Va. R. Evid. 608(a). Indeed, the State's expert witnesses were permitted to testify as to their opinion that the victims were credible as to their allegations of abuse. (Trial Tr. 74, 93-94, 111-12,

136). Such testimony indicated that they believed the victims and went beyond the type of expert testimony allowed by *Edward Charles L. See State v. Wood*, 460 S.E.2d at 782; W. Va. R. Evid. 608(a).

Defense counsel did not object to the testimony of Chief Pope, thus the plain error standard applies. *See State v. Wood*. To trigger the plain error doctrine,

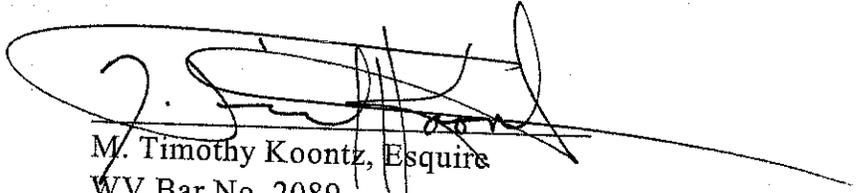
there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.

460 S.E.2d at 776 (quoting *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995)). This standard is met here. Moreover, it is noted that defense counsel objected to this same testimony by Chief Pope in the first trial, but her objection was overruled. (Trial Tr. 13.) Thus, defense counsel's failure to object at the second trial was understandable. In any case, in light of the facts and circumstances presented, Chief Pope's testimony concerning the credibility of the victims constitutes plain error and requires a new trial.

## CONCLUSION

For all the foregoing reasons, the Appellant requests this Court to vacate his conviction and enter an order requiring a new trial. In the alternative, Appellant requests that the case be remanded for an evidentiary hearing on Appellant's motion for new trial.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'M. Timothy Koontz', is written over a horizontal line. The signature is highly cursive and extends across the width of the text block below it.

M. Timothy Koontz, Esquire  
WV Bar No. 2089

186 East Second Avenue

Post Office Box 2180

Williamson, WV 25661

Telephone: (304) 235-2227

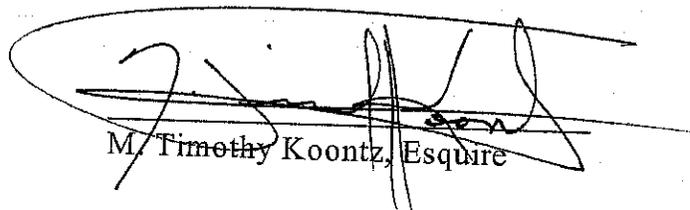
Attorney for Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that I have mailed a copy of this Appellant's Brief, first-class postage prepaid, to

Teresa Maynard, Esquire  
Assistant Prosecuting Attorney of Mingo County  
Post Office Box 2236  
Williamson, WV 25661

this 24<sup>th</sup> day of March 2007.

  
M. Timothy Koontz, Esquire