

NO. 33314

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

DAVID FARRIS,

Appellant,

v.

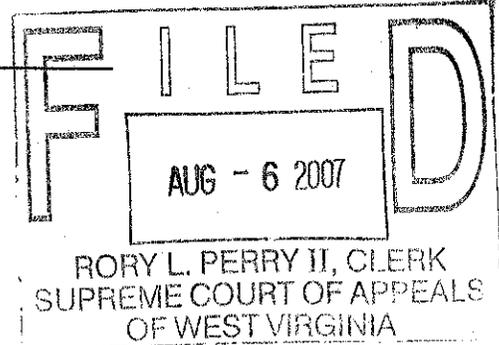
STATE OF WEST VIRGINIA,

Appellee.

APPELLANT'S REPLY BRIEF

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

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APPELLANT'S REPLY BRIEF
DAVID FARRIS
MINGO COUNTY, WV

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ARGUMENT

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

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).

At issue here is whether the report by Dr. Brozowski, a Kentucky psychologist employed by Big Sandy Area Child Advocacy Center, Inc., in Pikeville, Kentucky, who

interviewed a third alleged victim, Barbara R., in Kentucky during the investigation of the allegations against Appellant, constitutes newly discovered evidence. As discussed more fully in Appellant's Brief, the report of the interview of Barbara R. by Dr. Brozowski stated that Joyce Spradlin, the mother of Autumn B. and Shannon B., coerced her daughters into falsely accusing Appellant and threatened Barbara R. if she did not go along with the fabrication. Barbara R.'s statements also discredit Autumn's and Shannon's testimony in other ways and indicate that Shannon "stuck a toothbrush inside her (Shannon)," thus providing an innocent explanation for the physical evidence of probable penetration of Shannon. The report would thus support Appellant's defense that the children's story was fabricated at the direction of the mother.

The state contends that the report does not constitute newly discovered evidence because it could have been obtained by Appellant with due diligence and that it is "dubious" that the report would have produced an opposite result in the case but, rather, would have been useful merely for impeachment purposes. Contrary to the state's contention, Appellant did everything she could to determine if there was a report and if it contained exculpatory material but was thwarted by the state and the fact that she could not obtain materials from the Kentucky authorities. Prior to the first trial, Appellant's then 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). The state filed its disclosure which included, 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 it did not include any material concerning Barbara R.

Moreover, while Dr. Brozowski was a witness at both trials and defense counsel planned on calling Barbara R. as a witness, this does not establish that defense counsel was aware of the report or that the interview contained exculpatory material. Although defense counsel may have been aware of the interview with Barbara R. in general, defense counsel could not have known about the report or its contents. At the first trial, Dr. Brozowski did not indicate that there was a report or that anything exculpatory was disclosed during the interview. At the second trial, defense counsel cross-examined Dr. Brozowski but was not permitted to pursue a line of questioning concerning Barbara R. The foregoing facts and circumstances demonstrate that defense counsel discovered the report only after the second trial and was diligent in ascertaining and securing all exculpatory evidence and that despite exercising due diligence she could not secure the report before the verdict. Of course, the circuit court failed to hold an evidentiary hearing on the motion for a new trial. Thus, should this Court doubt defense counsel's diligence, it should remand the matter for an evidentiary hearing.

Furthermore, contrary to the state's contention, the report was such as ought to produce a different result at another trial and was more than mere impeachment evidence. On this latter point, the circuit court agreed, finding that the fifth requirement for grant of a new trial based on newly discovered evidence had been met. The report was crucial to the Appellant's defense. As discussed more fully in Appellant's Brief, the report would have

directly contradicted the testimony of the key state witnesses and directly supported Appellant's defense that the alleged victims fabricated their story at the direction of their mother. The report would also have innocently explained the physical evidence concerning the probable penetration of Shannon B.

The state cites no cases to support its contention concerning the effect of the report while, as discussed in Appellant's Brief, *O'Donnell* and *State v. Stewart*, 161 W. Va. 127, 239 S.E.2d 777 (1977), present analogous situations in which the newly discovered evidence was held to require a new trial. In addition, the recent case of *State v. Youngblood*, 2007 WL 1388186 (W. Va. 2007), also supports Appellant's position, although decided in the context of a *Brady* claim. *Youngblood* is fully discussed in Argument II.

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* 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); *Ward*. As explained in the recent case of *Youngblood*, there are three components of a constitutional due process violation under *Brady* and *Hatfield*:

(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.

2007 WL 1388186, at *6.

The state contends that the failure of the prosecution to disclose the Brozowski report was not a *Brady* violation because the report was not material as defined for purposes of *Brady*. (The state also observes that "the State did not have access to this report conducted by an agent of the Commonwealth of Kentucky, but does not argue that *Brady* was not violated due to this alleged lack of access. As Appellant's Brief and the following argument demonstrate, the alleged lack of knowledge of the report by the prosecutor does not exonerate his failure to disclose the report, as knowledge by someone acting on the state's behalf in the investigation is imputed to the prosecutor.)

Evidence is material for purposes of *Brady* only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Youngblood*, 2007 WL 1388186, at *8. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Additionally,

it has been said that "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles*, 514 U.S. at 434, 115 S.Ct. at 1565. All that is required is a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435, 115 S.Ct. at 1566. Finally, the suppressed evidence "must be evaluated in the context of the entire record." *Agurs*, 427 U.S. at 112, 96 S.Ct. at 2402.

Id. The report at issue in this case was certainly material under this standard.

As discussed in Appellant's Brief, in *Youngblood v. West Virginia*, 126 S. Ct. 2188 (2006), 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).

On remand to the Supreme Court of Appeals of West Virginia, *see* 2007 WL 1388186, the court recently reversed the defendant's conviction finding that *Brady* was violated based on the state's suppression of the letter. The court stated that, in view of the opinion of the United States Supreme Court, three issues had to be resolved:

(1) whether the prosecution's disclosure duty under *Brady* includes evidence that is known only to police investigators, (2) whether the disclosure requirement under *Brady* includes disclosure of favorable impeachment evidence, and (3) whether the suppressed evidence violated the disclosure requirement of *Brady*.

Id. at *3. The court addressed these issues under *Brady* and also on independent state constitutional grounds under *Hatfield*.

As to the first issue, the court held that a police investigator's knowledge of evidence in a criminal case is imputed to the prosecutor, and, therefore, a prosecutor's disclosure duty under *Brady* and *Hatfield* includes disclosure of evidence that is known only to a police investigator and not to the prosecutor. As the court explained:

It is not relevant under *Brady* and *Hatfield* that the police, rather than a prosecutor, had knowledge of material evidence that was favorable to a defendant. The United States Supreme Court addressed this point in *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995):

[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation, the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

The State of Louisiana [in this case] would prefer . . . [a] more lenient rule. It pleads that some of the favorable evidence in issue here was not disclosed even to the prosecutor until after trial, and it suggested . . . that it should not be held accountable

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

Kyles, 514 U.S. 419 at 437-38, 115 S.Ct. 1555, at 1567-68, 131 L.Ed.2d 490 (internal quotations and citations omitted).

Id. at *4-*5. The court continued:

The decision in *Kyles* stands for the proposition that "it is proper to impute to the prosecutor's office facts that are known to the police and *other members of the investigation team.*" *United States v. Wilson*, 237 F.3d 827, 832 (7th Cir.2001). *See also Powell v. United States*, 880 A.2d 248, 254 (D.C.2005) ("The government also concedes that the prosecutor's lack of actual knowledge, and therefore any bad faith, is not relevant to the *Brady* analysis. As the government points out in its brief, the MPD and the FBI were part of the government team and their knowledge is imputed to the prosecutors."). *Archer v. State*, 934 So.2d 1187, 1203 (Fla.2006) ("To comply with *Brady*, the individual prosecutor has a duty to learn of any favorable evidence known to *others acting on the government's behalf* in the case and to disclose that evidence if it is material."); *Harrington v. State*, 659 N.W.2d 509, 522 (Iowa 2003) ("This test does not mean, however, that evidence unknown to the individual prosecutor is not considered suppressed. . . . Regardless of whether the prosecutor actually learns of the favorable evidence, the prosecution bears the responsibility for its disclosure."); *State v. Jones*, 891 So.2d 760, 775 (La.Ct.App.2004) ("[T]he State is not necessarily absolved of its responsibilities under *Brady* simply because the prosecution does not possess or have knowledge of evidence, because the individual prosecutor has a duty to learn of any favorable evidence known to the *others acting on the*

government's behalf in the case, including the police."); *Thomas v. State*, 131 P.3d 348, 353 (Wyo.2006) ("We have applied Brady to hold that the duty to disclose exculpatory evidence . . . encompasses evidence known only to police investigators and not to the prosecution."). In the final analysis, "[t]he prosecutor cannot get around Brady by keeping [him]/herself in ignorance." *United States v. Hamilton*, 107 F.3d 499, 509 (7th Cir.1997).

Id. at *5 (emphasis added).

In this case, as in *Youngblood*, even though the prosecutor may have been unaware of the interview of Barbara R. and the report of the intervention by Dr. Brozowski, Dr. Brozowski was part of the investigation team and her knowledge is imputed to the prosecutor.

As to the second issue, the court held that favorable impeachment evidence, such as the letter at issue, is a component of *Brady* and *Hatfield*, observing that it had reversed several convictions on the basis of the state's failure to disclose favorable impeachment evidence. *Id.* at *6.

Finally, with respect to whether the suppressed evidence violated the disclosure requirement of *Brady* and *Hatfield*, the court held in the affirmative. The court found that the letter was favorable impeachment evidence, that it was suppressed by the state, and that the evidence was material to *Youngblood's* defense. *Id.* at *7-*8. As the court explained:

For the purposes of this opinion, the note contains three critical pieces of evidence that the jury did not hear. First, the note clearly suggests that Katara informed either Wendy or Kimberly that she engaged in sexual conduct with Mr. *Youngblood*, which would be inconsistent with Wendy or Kimberly's testimony and the testimony of Katara. Second, contrary to Katara's testimony, the note suggests that Mr. *Youngblood* performed oral sex on her. Finally, the note suggests that Katara was pleased with the oral sex performed on her, i.e., that the sexual conduct was consensual. Insofar as the note was suppressed, the jury was never able to assess the credibility of each of the State's three key

witnesses, through effective questioning that would have naturally flowed from the introduction of the note through its author. This is particularly crucial because the State's case was weak, in light of evidence showing that Katara had an opportunity to flee and protect herself after the first alleged sexual assault when she went to a nearby house, and when two police officers stopped and spoke with her. In view of all the evidence in the case, we believe that there is a reasonable probability that, had the note been disclosed to the defense, the result of this proceeding would have been different. *See State v. Kearns*, 210 W.Va. 167, 169, 556 S.E.2d 812, 814 (2001) ("In view of the clear contradictory nature of the non-disclosed statement and [the] potential impact of its revelation to the jury . . . on the assessment of the credibility of the [victim's] testimony, this Court believes that the State's withholding of the statement did violate the appellant's constitutional rights[.]"); *State v. Hall*, 174 W.Va. 787, 791, 329 S.E.2d 860, 863 (1985) ("Viewing the record as a whole, we conclude that the jury's verdict might have been different had the jury been allowed to hear Green's prior inconsistent statement."). Therefore, we find that the State's failure to turn over the note violated *Brady* and *Hatfield*. Thus, the trial court erred in denying Mr. Youngblood's motion for a new trial.

Id. at *9 (footnotes omitted).

In this case, as in *Youngblood*, the suppressed evidence of the report concerning Barbara R. and her statements to Dr. Brozowski were exculpatory and material. As did the evidence at issue in *Youngblood*, the report of the child's statements in this case contradicts and impeaches the testimony of the state's main witnesses, the two children and their mother, and supports and corroborates 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 in order to get back at him. Moreover, the evidence at issue provides an explanation for the physical evidence and expert opinion that one of the girls had been penetrated. Thus, contrary to the state's assertion, the report does, indeed, exculpate Appellant. Moreover, as in *Youngblood*, because the report was suppressed, the jury was not able to assess the credibility of the state's key witnesses through effective questioning that would have naturally flowed from the

introduction of the report. Thus, as in *Youngblood*, in view of all the evidence in the case, there is a reasonable probability that, had the report been disclosed to the defense, the result of the proceeding would have been different.

Therefore, in addition to the cases cited in Appellant's Brief, the recent case of *Youngblood* further supports Appellant's *Brady* claim and undercuts the state's argument. Accordingly, Appellant's conviction should be reversed due to the state's *Brady* violation in failing to disclose the report to the defense.

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

In light of the strength of Appellant's claims regarding the Brozowski report, as discussed above and in Appellant's Brief, the failure of the circuit court to hold an evidentiary hearing on Appellant's motion for a new trial must be deemed an abuse of discretion. Moreover, as discussed in Appellant's Brief, the report would have buttressed Dr. Saar's testimony that he was to give at the hearing concerning the competency of Barbara R. to testify and the credibility of statements made by Autumn B. and Shannon B. Without an evidentiary hearing, the circuit court did not have the facts it needed to intelligently rule on the motion for a new trial and render findings of fact. Appellant was prevented from presenting evidence to support his motion. Therefore, should this Court not reverse Appellant's conviction, it should remand the matter for the circuit court to conduct an evidentiary hearing on the motion for a new trial.

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

Chief Pope's testimony stating that he thought the victims were telling the truth clearly violated the rule against bolstering and vouching for the victims' credibility. *See State v. Wood*, 194 W. Va. 525, 460 S.E.3d 771 (1995); *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990); W. Va. R. Evid. 608(a).

The state attempts to characterize Chief Pope's testimony vouching for the victims' credibility as being presented for the purpose of background and to explain the reasoning for investigating Appellant. Such characterization is without merit. Chief Pope could have easily explained his investigation without vouching for the victims' credibility. The state's reasoning would render the rule against bolstering and giving an opinion as to the victims' credibility meaningless and allow the state to violate the rule simply by calling an investigator to "explain" why he pursued the investigation. Moreover, violation of the rule is particularly harmful when done by a police officer as opposed to nonpolice officer as in *Wood*.

In *Wood*, the witness's improper testimony occurred as he was explaining that he did not report the victim's allegations until after he had determined that they were true and how he had come to that conclusion. Thus, the witness in *Wood* was, indeed, merely giving an historical account as to how he learned of the victim's allegations and as to how he determined what actions he should take regarding those allegations. In such context, the court in *Wood* held that the erroneous admission of the testimony was not plain error. By

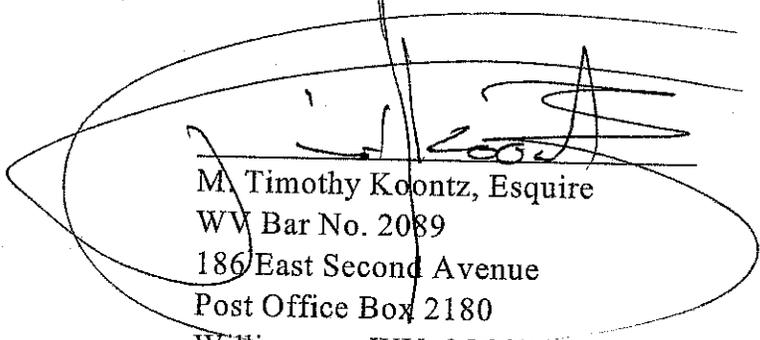
contrast, the context in which Chief Pope vouched for the victims' credibility was not so benign, and Chief Pope's improper testimony was totally unnecessary to explain his actions.

Therefore, in light of the facts and circumstances presented, Chief Pope's improper 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 a new trial.

Respectfully submitted,



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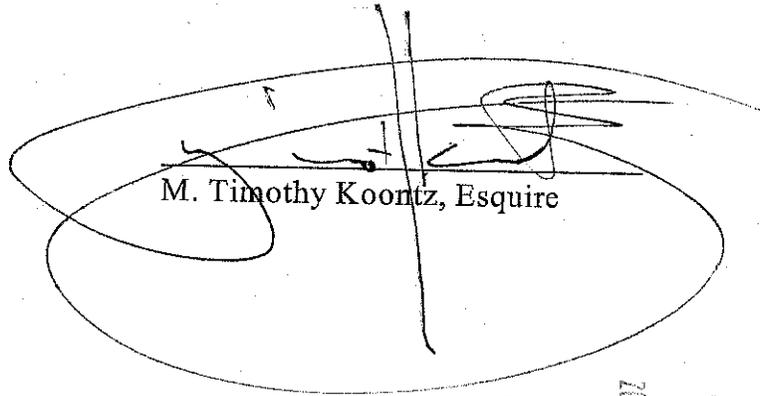
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CERTIFICATE OF SERVICE

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

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M. Timothy Koontz, Esquire

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