STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

C'QUAN MICHAEL HINTON,

Defendant-Appellant.

Supreme Court Case No. 162374

Court of Appeals Case No. 349585

Genessee Co. Cir. Ct. No. 08-02218-FC

AMICUS BRIEF OF THE INNOCENCE NETWORK IN SUPPORT OF DEFENDANT-APPELLANT

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The Innocence Network[1] is an association of independent organizations dedicated to providing pro bono legal and/or investigative services to imprisoned people for whom evidence discovered post-conviction can provide conclusive proof of innocence. The 68 current members of the Network represent hundreds of incarcerated people with innocence claims in 49 states, the District of Columbia, and Puerto Rico, as well as Australia, Argentina, Brazil, Canada, Ireland, Israel, Italy, the Netherlands, the United Kingdom, and Taiwan.[2] The Innocence Network and its

[1] Counsel for a party was not involved in authoring this brief. Neither counsel nor a party made a monetary contribution intended to fund the preparation or submission of the brief. No other person made a monetary contribution for such purpose.

[2] The member organizations for amicus brief purposes include the Actual Innocence Clinic at the University of Texas School of Law, After Innocence, Alaska Innocence Project, Arizona Justice Project, Boston College Innocence Program, California Innocence Project, Center on Wrongful Convictions, Committee for Public Counsel Services Innocence Program, Connecticut Innocence Project, Duke Law Center for Criminal Justice and Professional Responsibility, Exoneration Project, George C. Cochran Innocence Project at the University of Mississippi School of Law, Georgia Innocence Project, Great North Innocence Project, Hawai'i Innocence Project, Idaho Innocence Project, Illinois Innocence Project, Indiana University McKinney Wrongful Conviction Clinic, Innocence Delaware, Inc., Innocence Project, Innocence Project Argentina, Innocence Project at the University of Virginia School of Law, Innocence Project Brasil, Innocence Project London, Innocence Project New Orleans, Innocence Project of Florida, Innocence Project of Texas, Italy Innocence Project, Justicia Reinvindicada Puerto Rico Innocence Project, Korey Wise Innocence Project, Loyola Law School Project for the Innocent, Manchester Innocence Project, Michigan Innocence Clinic, Mid-Atlantic Innocence Project, Midwest Innocence Project, Montana Innocence Project, New England Innocence Project, New York Law School Post-Conviction Innocence Clinic, North Carolina Center on Actual Innocence, Northern California Innocence Project, Office of the Ohio Public Defender Wrongful Conviction Project, Ohio Innocence Project, Oklahoma Innocence Project, Oregon Innocence Project, Osgoode Hall Innocence Project, Rocky Mountain Innocence Center, Taiwan Innocence Project, Thurgood Marshall School of Law Innocence Project, University of Arizona Innocence Project, University of Baltimore Innocence Project Clinic, University of Baltimore Innocence Project Clinic, University of British Columbia Innocence Project at the Allard School of Law, University of Miami Law Innocence Clinic, Wake Forest University School of Law Innocence and Justice Clinic, Washington Innocence Project, West Virginia Innocence Project, Wisconsin Innocence Project, and Witness to Innocence.

members are also dedicated to improving the accuracy and reliability of the criminal justice system. Drawing on the lessons from cases in which the system convicted innocent persons, the Network advocates for reform designed to enhance the truth-seeking functions of the criminal justice system to prevent against future wrongful convictions. Amicus supports the application of Defendant-Appellant C'Quan Miller Hinton for leave to appeal, urges the Court to grant Hinton's application, and, on appeal, reverse the decision of the Court of Appeals.

INTRODUCTION

Appellant C'Quan Miller Hinton is currently serving a sentence of 32 to 60 years of imprisonment based primarily on the testimony of a single, juvenile eyewitness who—as previously suppressed records now reveal—admittedly could not clearly see the faces of the perpetrators of the crime in question. Nearly a decade into Hinton's sentence, a relative of one of Hinton's co-defendants filed a Freedom of Information Act request that revealed a previously undisclosed transcript of the eyewitness's first interview with the police. As detailed below, that transcript revealed that this eyewitness initially told police that he was unable to see the perpetrators clearly and that he made numerous statements that were inconsistent with his trial testimony regarding essential details about the crime. If these facts had been known and presented to the jury at Hinton's trial, the lynchpin of the State's case – the reliability of the only eyewitness who identified Hinton – would have been destroyed.

This sort of belated, post-conviction disclosure of critical impeachment evidence by the State is, unfortunately, not an anomaly. Rather, as discussed below, the unlawful withholding of evidence that impeaches a critical witness's testimony has contributed to many wrongful convictions, including the unjust convictions of several of The Innocence Project's clients.

Despite the risk posed to innocent people, courts throughout Michigan, such as the Court of Appeals here, have misinterpreted the dictates of the United States Supreme Court and failed to provide adequate remedies when the State fails to disclose impeachment evidence. *See generally Brady v Maryland*, 373 US 83, 86; 83 S Ct 1194; 10 L Ed 2d 215 (1963); *Kyles v Whitley*, 514 US 419, 434; 115 S Ct 1555; 131 L Ed 2d 490 (1995) (requiring the vacatur of a conviction if "the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'").

In this case, the Court of Appeals made at least two fundamental errors in its analysis: concluding that the withheld impeachment evidence was immaterial merely because other impeachment evidence was available at the time of trial, and erroneously applying a sufficiency-of-the-evidence standard rather than the *Brady* materiality standard. The result here is particularly troubling because the prosecution's case hinged on the testimony of a juvenile witness, who, as a consequence of his youth, was categorically more susceptible to suggestion and police coercion than an adult. If upheld or sanctioned by this Court, the Court of Appeals' failure to apply the correct analysis and failure to appreciate the critical significance of the impeachment evidence at issue threatens to insulate wrongful convictions from meaningful scrutiny.

For the reasons discussed below, The Innocence Project urges this Court to provide clear guidance that impeachment evidence is not immaterial merely because other manners of impeachment were available at the time of trial, or because other evidence existed that supported the conviction. The Court should reiterate that the proper "touchstone of materiality" under *Brady* is whether, in the "absence [of the suppressed material,] [the defendant] received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 US at 434. Without due adherence to this fundamental principle of *Brady* law, innocent people who have been wrongfully convicted based upon unreliable testimony will be without meaningful recourse.

STATEMENT OF FACTS

On October 9, 2007, at about 8:00pm, Robert Person was shot and killed on a street corner in Flint, Michigan. 25a-29a. Fifteen-year-old Jarylle Murphy purportedly was present at the scene. 148a. At Hinton's trial, Murphy was the State's primary eyewitness, as he was the only witness who identified Hinton as one of the shooters. 196a-99a; 369a-71a.

Despite being a critical eyewitness, the police did not interview Murphy until October 16, 2007—a full week after the shooting—when Sergeant Lee Ann Gaspar first questioned him at the Flint Police Department. 148a. Police officers created a written transcript of this October 16th interview, but did not provide the transcript to Hinton's defense counsel in advance of trial. *Id.* Rather, Hinton received only a one-paragraph "summary" of the interview—a summary that did not include statements by Murphy that significantly undermined the reliability of his account and his identification of Hinton. 157a.

The suppressed transcript contains materially different information than the one-paragraph summary that was provided to defense at the time of trial. *Compare* 155a-57a, *with* 148a. Most critically, the transcript revealed that Murphy initially said that he could not clearly see the faces of the perpetrators because it was dark outside. 148a. Additionally, the transcript reveals the presence of another eyewitness and inconsistencies with Murphy's later trial testimony about, *inter alia*: whether either the shooter or Person was riding a bicycle at the time of the shooting; whether the first altercation Murphy and Person had with two of the suspects involved gang affiliations and marijuana; and where Murphy and Person were immediately prior to the shooting. *Id.*; 325a-28a; 208a; 167a; 213a. Moreover, the transcript demonstrates that Sgt. Gaspar—who conceded to using

coercive tactics with another witness[3]—asked Murphy leading, suggestive questions which, in light of Murphy's young age, raises further reliability concerns about Murphy's testimony. 148a.

During the October 16th interview, Murphy was shown two photo line-ups and identified Hinton and another suspect, both in placement #2 of the six-person photographic array. The identification procedures were not recorded or transcribed.[4] 221a-22a.

At trial, Murphy testified to the facts contained in the *summary* of his police interviews, much of which—unbeknownst to the defense at the time—directly contradicted his statements in the suppressed October 16th transcript. 325a-32a; 149a-157a. No other witness corroborated Murphy's account or positively identified Hinton, and some of the State's evidence contradicted Murphy's testimony.[5] 196a-99a; 369a-71a. Despite the defense's efforts to impeach Murphy's testimony with the available evidence demonstrating some inconsistencies in his account, and despite the lack of physical evidence connecting Hinton to the murder, the jury accepted Murphy's testimony and convicted Hinton of first-degree murder.

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[3] Sergeant Gaspar admittedly told witness/suspect, Will Harris, that he "either would be a defendant or would be a witness," prior to Harris implicating co-defendant Joshun Edwards in the murder. 290a-94a.

[4] On November 8, 2017, nearly a month later, Murphy gave a second police interview with Sgt. Gaspar and the prosecuting attorney. 159a. During this interview, Murphy was shown additional photographic arrays and asked to identify the shooters. Murphy testified that prior to being shown the photographic lineups, he was told the names of the people Sgt. Gaspar thought were involved. 171a–75a. Murphy picked out one suspect from each of the three photo arrays, all of whom were again in place #2 in the six-person photographic arrays. 171a–75a. The suspects identified were Joshun Edwards, Kino Christian, and Dartonian Edwards—the very people that Sgt. Gaspar suggested were involved. 224a-26a.

[5] For example, Murphy testified that the shooting happened at 9 pm at the earliest, but evidence of the Flint 911 calls show that Person was shot around 8 pm. 154a; 84a, Flint 911 Calls. Also, Murphy testified that he saw the perpetrators walking behind him, and he told Person to run, while another witness saw a boy alone on a bike. 213a; 47a–49a.

Hinton unsuccessfully appealed his conviction in 2009. Nearly a decade later, after the discovery of the suppressed October 16th transcript, Hinton and the other defendants sought relief from the judgment in the trial court. 305a. The trial court denied Hinton's motion. *Id.*

Hinton appealed, and the Court of Appeals affirmed, holding that the prosecution's suppression of the October 16th transcript did not undermine confidence in the verdict because the transcript was not "material" under *Brady*, as the defense was able to impeach Murphy on other grounds with the impeachment material that was timely produced. 1a, *People v Edwards*, unpublished opinion of Court of Appeals, issued Oct. 22, 2020 (Case Nos. 348753, 348807, 349585) (the "Court of Appeals Opinion").

In reaching that conclusion, the Court of Appeals acknowledged that the October 16th transcript evidenced inconsistencies in Murphy's testimony that the other impeachment material did not; still, the court decided that the impeachment presented at trial rendered the October 16th transcript cumulative. *Id.* at 8-9. In a materiality analysis that reads more like a sufficiency-of-the-evidence review, the court parsed through the evidence individually, listing pieces of evidence that supported the conviction. *Id.* at 8-10. The court rejected Hinton's *Brady* claim. Defendant has now filed an application for leave to appeal with this Court.

ARGUMENT

I. The Nondisclosure of Impeachment Evidence Places Innocent People at Risk of Wrongful Conviction; This Court Must Make Clear That Withheld Impeachment Evidence Is Not Immaterial Merely Because Other Impeachment Evidence Was Introduced or Other Evidence Supported the Conviction.

Brady's "touchstone of materiality is a 'reasonable probability' of a different result, and the adjective,"—reasonable—"is important." *Kyles v Whitley*, 514 US 419, 434; 115 S Ct 1555; 131 L Ed 2d 490 (1995). "The question is not whether the defendant would more likely than not have received a different verdict with the availability of the suppressed evidence, but whether, in

its absence, he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* "[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." *Id.* Rather, "[a] 'reasonable probability' of a different result is . . . shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Id.*

In this case, the Court of Appeals failed to apply this well-established standard and, instead, erroneously held that impeachment evidence is immaterial once a witness has already been impeached by other evidence, seemingly applying a sufficiency-of-the-evidence standard of review instead of the *Brady* materiality standard. *See* Court of Appeals Opinion, p. 10 ("The record establishes that the prosecution presented direct and circumstantial evidence from which the jury *could* find each defendant guilty beyond a reasonable doubt of the charged offenses independent of Murphy's testimony") (emphasis added). Not only does the ruling below contravene United States Supreme Court precedent, it also misapprehends the importance of impeachment evidence, ignoring this Court's recognition that "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *People v Grissom*, 492 Mich 296, 317; 821 NW2d 50, 61 (2012) (citing *Napue v Illinois*, 360 US 264, 269; 79 S Ct 1173; 3 L Ed 2d 1217 (1959)). To help protect innocent people from wrongful conviction—an injustice often caused by the suppression of impeachment evidence—it is imperative that the errors below be corrected.

A. Withheld Impeachment Evidence Is Not Immaterial Just Because a Witness Was Already Impeached.

The Court of Appeals' decision discounted the import of the suppressed evidence that Hinton could have used to undermine Murphy's testimony, improperly relying on the fact that

Murphy had been impeached in other manners, with other evidence, at the time of trial. Consistent with relevant U.S. Supreme Court precedent, this Court should make a clear statement that non-cumulative impeachment evidence is not categorically immaterial just because a witness's credibility or reliability has already been challenged at trial.

The United States Supreme Court addressed just this issue in *Banks v Dretke*, 540 US 668; 124 S Ct 1256; 157 L Ed 2d 1166 (2004). In *Banks*, the prosecution's star witness was impeached at trial by the defense on his past drug use and his history of providing false information as a police informant in another state. *Id.* at 680. When the defendant discovered that the prosecution had not disclosed that this witness was a paid informant in that very case, however, the defendant sought postconviction relief under *Brady*. *Id.* at 682. The state argued that the fact of the witness's informant status was merely cumulative, because the witness had been impeached on other grounds. *Id.* at 702. The Supreme Court rejected the State's argument and held that the witness's informant status was not cumulative of the other impeachment evidence already in the defense's possession because the nature of the trial impeachment, as in Hinton's case, was meaningfully distinct from the impeachment evidence that was uncovered after conviction. *Id.* The Court reasoned that, had the jury learned that the witness was actually an informant in this case—and not just that he had a history as an informant in other matters—there was a reasonable probability of a different result sufficient to undermine confidence in the verdict. *Id.*; *see also Kyles*, 514 US at 454 (reversing a federal Court of Appeals opinion that categorized impeachment evidence as cumulative when the relevant witness had already been impeached in another manner).

The Court of Appeals here is not the first court to ignore Supreme Court precedent and erroneously find no *Brady* materiality where the suppressed evidence implicated the credibility or accuracy of a witness who had already been impeached in other ways. For example, the Third

Circuit granted relief under *Brady* after the Pennsylvania Supreme Court improperly ruled that suppressed impeachment evidence was not material because there was other evidence by which the prosecution witness in question had been impeached at trial. *Lambert v Beard*, 537 F Appx 78, 80 (CA 3, 2013). In holding that the state committed a *Brady* violation, the Third Circuit reasoned that the withheld evidence "would have opened an entirely new line of impeachment" at trial had it been disclosed. *Id.* at 86. Indeed, the evidence was not cumulative because it "provided a *unique* basis on which to impeach." *Id.* (emphasis in original).

Other federal appellate courts have likewise echoed the conclusion that additional, non-cumulative impeachment material implicates *Brady*. *See United States v Torres*, 569 F3d 1277, 1284 (CA 10, 2009) ("Merely because other impeachment evidence was presented does not mean that additional impeachment evidence is cumulative . . . ."); *Horton v Mayle*, 408 F3d 570, 580 (CA 9, 2005) (reasoning that just because "the jury had other reasons to disbelieve [the witness in question,] does not render the suppressed evidence . . . that the prosecution promised immunity to induce [the witness] to testify as its star witness" as immaterial, in that the suppressed evidence "is a wholly different kind of impeachment evidence . . . ."); *Reutter v Solem*, 888 F2d 578, 581 (CA 8, 1989) (rejecting the state's argument that "because [the witness] was a convicted felon his credibility already was suspect and the additional [suppressed] information regarding his petition for commutation and pending hearing thereon would not have affected the jury's judgment as to his truthfulness[,]" and finding that "logic of this kind has been dismissed by the Supreme Court.") (citing *Napue*, 360 US at 270).

Here, the Court of Appeals improperly held that the transcript was immaterial because the defense was able to challenge Jarylle Murphy's credibility with *other* available impeachment evidence. As noted, at the time of trial, the defense had only a single paragraph summarizing

Murphy's October 16th statement, and that summary omitted significant details that were contained in the transcript and could have been used to impeach Murphy in ways he was not impeached at trial, on critical issues in the case, including Murphy's statements that:

- It was too dark out to see the perpetrators' faces at the time of the shooting.
- There was another witness to the shooting—a girl with long black hair—who Murphy mentioned during the October 16th interview, but not at trial, and whose testimony was not presented to the jury.
- Person did not ride a bicycle leading up to the shooting, even though Murphy had consistently claimed that Person had ridden a bicycle in subsequent statements.
- The first altercation between Murphy and Person and the initial perpetrators was a dispute over gang affiliations, which he did not mention at trial.
- The dispute involved marijuana, which Murphy did not mention at trial.
- Murphy and Person had been sitting on the sidewalk, instead of walking, when the perpetrators approached them.

Court of Appeals Opinion, pp. 7-8. Any one of these details could have opened up an entirely new line of impeachment questions that would have been reasonably likely to send the jury's deliberations in a different direction.

Moreover, the summary of the October 16th interview failed to reflect the suggestiveness of the questions and the coercive nature of the police interview of Murphy, who was just fifteen years old at the time. For example, the transcript reflects that, when asked about his ability to observe and identify the perpetrators, Murphy's first response was only that he could "possibly" recognize the perpetrators. 148a. After prompting from Sgt. Gaspar, then Murphy changed his answer to affirmatively indicate that "yes" he could identify at least some of the perpetrators. *Id.* Only later, after hours spent with Sgt. Gaspar at the police precinct, did Murphy affirmatively identify Hinton and the other codefendants. 221a-24a. This sort of suggestiveness is especially

important where, as here, the witness is a juvenile because, as discussed in detail in Section II below, young people are highly susceptible to police coercion and suggestion.

Further, a close examination of a transcript of a witness's interactions with police often, as here, can lay bare not only the witness's own credibility, but also the quality of the police investigation. The United States Supreme Court has made clear that the defense is entitled not only to question the reliability of a witness, but "the thoroughness and even the good faith of the investigation." *Kyles*, 514 US at 445. In *Kyles*, undisclosed statements made by the state's star witness reflected "a remarkably uncritical attitude on the part of the police," and with the statements, "the defense could have examined the police to good effect on their knowledge of [the witness]'s statements and so have attacked the reliability of the investigation." *Id.* at 445-46.

The October 16th interview transcript therefore provided several unique bases to impeach the State's primary witness, and was not cumulative merely because Murphy's testimony had already been attacked on other grounds. If the defense had access to the suppressed evidence and had impeached Murphy and the officers accordingly, the jury would have been entitled to find that Murphy could not actually see the perpetrators' faces, that the police neglected to investigate all the available eyewitnesses at the scene, that Murphy was pressured by Sgt. Gaspar to identify Hinton and his co-defendants, and that Murphy had an inaccurate memory of the events that occurred, in light of his inconsistent accounts. 155a; 22a; 227a; 155a-75a. Accordingly, "[s]ince all of these possible findings were precluded by the prosecution's failure to disclose the evidence that would have supported them, 'fairness' cannot be stretched to the point of calling this a fair trial." *Kyles*, 514 US at 454.

The Court of Appeals improperly dismissed the multi-faceted significance of the transcript in concluding that it was immaterial. Amicus thus urges this Court to make clear the crucial

significance of evidence documenting police interactions with an essential eyewitness, especially a juvenile witness, and that such evidence is not immaterial merely because the defense had access to other evidence upon which to impeach the witness.

B. The Court of Appeals Erroneously Applied a Sufficiency-of-the-Evidence Standard in Analyzing *Brady* Materiality—Should This Idea Take Root, It Would Immunize *Brady* Violations Involving Impeachment Evidence.

In evaluating materiality, the lower court additionally erred in effectively applying a sufficiency-of-the-evidence standard. This Court should, consistent with United States Supreme Court precedent, reiterate that materiality review is not sufficiency review. *See Kyles*, 514 US at 434 (explaining that the *Brady* materiality test "is not a sufficiency of evidence test").

As discussed above, in holding that the October 16th interview transcript was not material, the Court of Appeals said, "[t]he record establishes that the prosecution presented direct and circumstantial evidence from which the jury *could find* each defendant guilty beyond a reasonable doubt of the charged offenses independent of Murphy's testimony." Court of Appeals Opinion, p. 10 (emphasis added). That reasoning is nearly identical to the sufficiency-of-the-evidence standard announced in *Jackson v Virginia*. *See Jackson v Virginia*, 443 US 307, 319; 99 S Ct 2781; 61 L Ed 2d 560 (1979) ("[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact *could have found* the essential elements of the crime beyond a reasonable doubt." (emphasis added)).

This analysis is in direct contradiction to the Supreme Court's *Brady* jurisprudence. The Supreme Court has held that a "defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict." *Kyles*, 514 US at 434–35. "Rather, the question is whether the

favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Strickler v Greene*, 527 US 263, 290; 119 S Ct 1936; 144 L Ed 2d 286 (1999); *Kyles*, 514 US at 453 ("[T]he question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same").

The conflation of the *Brady* and *Jackson* standards is not only wrong but is particularly problematic in the case of impeachment evidence. Impeachment evidence, by its nature, will almost *never* pass the muster of a *Jackson*-style sufficiency review, even when it is otherwise material under *Brady*. A sufficiency standard views the evidence in the light most favorable to the prosecution and presumes the truthfulness of the prosecution's evidence. Thus, evidence that goes only to impeach a prosecution witness logically could never alter the outcome of a sufficiency analysis, because in such an analysis prosecution witness testimony would necessarily be taken as true. The Court of Appeals' use of a *Jackson*-type sufficiency review would thus effectively remove impeachment evidence from the *Brady* calculus, in contravention of well-established Supreme Court precedent, and at risk of wrongfully convicting innocent citizens of Michigan.

To prevent the injustice of wrongful conviction, impeachment evidence cannot and should not be carved out of the *Brady* analysis. This Court needs to clarify the important distinction between *Brady* materiality and *Jackson* insufficiency and reverse the Court of Appeals' erroneous reliance on the *Jackson* sufficiency standard to evaluate the materiality of previously-undisclosed impeachment evidence.

C. Wrongful Conviction Cases Demonstrate That Withheld Impeachment Evidence Is Often Material and Therefore Should Require New Trials.

Impeachment evidence is often pivotal for a defendant's case. By way of example, let us look to two recent cases in which the discovery of wrongfully withheld impeachment evidence

was the turning point that led to a new, more fair trial for a defendant. In neither case was the impeachment evidence, alone, enough to overcome a sufficiency-of-the-evidence test.

First, in *Commonwealth v Roberts*, the defendant was convicted of murder based upon the testimony of a two eyewitnesses who claimed to see him at the scene of the crime. *Commonwealth v Roberts*, memorandum opinion of Common Pleas Court of Dauphin County, PA, issued June 30, 2017 (Case No. 1127-CR-2006) (attached as Ex. 1). At trial, Roberts presented evidence that, around the time of the murder, his cell phone pinged a cell tower far away from the location of the murder. *Id.* The Commonwealth conceded that if Roberts had the phone on his person, it would have been impossible for him to have committed the murder, but argued that the phone was not on his person the night of the murder. *Id.* at *10, *29. The jury convicted the defendant despite the cell-tower evidence. *Id.* at *1.

When Roberts later sought post-conviction relief, several emails withheld by the prosecution came to light. *Id.* at *20. In one pre-trial email exchange between the lead investigator on the case and a prosecuting attorney, the investigator expressed concern regarding the cell-phone evidence, suggesting the prosecutor "give serious consideration that [the defendant] might not be the killer in this case." *Id.* at *20-21. A separate set of emails reflected communication between the prosecuting attorney and the attorney for a prosecution witness, discussing a previously-undisclosed plea deal arrangement for that witness, and revealing an intent to delay the witness's own sentencing hearing so that the witness could represent that there was no deal when he testified in the murder trial. *Id.* at *22

As a result of this newly disclosed evidence, Robert's conviction was vacated because the court found that the withheld impeachment evidence had "a reasonable probability of changing the outcome of the proceedings." *Id.* at *27, *29, *39. On retrial, with the benefit of the previously

suppressed evidence, the jury found Roberts not guilty. *Trent's Story*, The Pennsylvania Innocence Project, https://painnocence.org/Larry-Trent-Roberts?locale=en (last visited February 11, 2022). He was released after thirteen years of wrongful imprisonment. *Id.*

In another recent case, in Michigan's Oakland County Circuit Court, newly discovered impeachment evidence led the prosecution to move jointly with the defense to vacate a defendant's conviction and move for a new trial. *See* Joint Mot. to Vacate Defendant's Convictions and Sentences, pg. 1, *People v Deering*, Oakland Co. Cir. Ct. Case No. 2006-207873-FC (motion and order attached as Exhibit 2). There, the defendant, Mr. Deering, had been convicted of arson and felony murder and sentenced to life in prison without the possibility of parole after a fire destroyed a house and killed five children. *Id.* at 1–2. The conviction rested largely upon the testimony of three jailhouse informants. *Id.* at 1. Years later, the University of Michigan Innocence Clinic—an organization within Amicus's network—agreed to take Mr. Deering on as a client. *Id.* at 2. As part of discovery proceedings, the Innocence Clinic requested, and the prosecutor's office turned over, dozens of newly discovered documents establishing that the jailhouse informants who testified against Deering had all received plea bargains, sentence reductions, or outright dismissal of charges in exchange for their testimony. *Id.* at 7. The disclosure additionally uncovered that the defense had only been given access to half of the interview of a child who survived the housefire; the missing half contained statements by the child identifying someone other than the defendant as being outside of the house prior to the fire, and that the child had affirmatively told a case detective that the defendant, a person known to the child, was not the person whose voice he had heard outside of the house prior to the fire. *Id.* at 5–7.

The information regarding the incentives awarded to the jailhouse informants could have been used to impeach their credibility. *Id.* at 5. Moreover, the child's interview transcript could

have been used to impeach not only the informants' testimony, but also the reliability of the government's investigation as a whole, because a detective on the case heard the child exculpate the defendant and identify another man, yet the prosecution continued to focus their investigation on the defendant. *See Kyles*, 514 US at 445.

Upon the discovery of this withheld evidence, the State agreed that it constituted *Brady* material that should have been turned over to the defense at trial so that it could have been used to impeach the prosecution witnesses. Joint Motion to Vacate, pp. 18–19. The court ultimately vacated Deering's conviction and dismissed all charges against him. (Order, Ex. 2.)

It is doubtful that the impeachment evidence in either of these two cases would have risen to the level of "materiality" the Court of Appeals required in this case. For example, in *Roberts*, a sufficiency review of all of the evidence would have credited the testimony of two eyewitnesses that purported to place Roberts at the crime scene. The impeachment evidence identifying the lead investigator's doubt as to Robert's guilt and the impeachment evidence proving the prosecution's deal with a material witness still would have left sufficient evidence to establish the elements of the crime and support the conviction. *See Jackson*, 443 US at 319 ("[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.").

The same is true of the impeachment evidence belatedly discovered in *Deering*. Deering's conviction hinged on the testimony of three jailhouse informants. Under the Court of Appeals' test, the stacks of new impeachment evidence likely would not have been considered "material" because a rational finder of fact still could have credited the witnesses' testimony and that testimony, taken as true, would have been enough to convict. When considered under the proper

Brady materiality review, the impeachment evidence severely undercuts the informants' testimony and undermines confidence in the verdicts, as correctly recognized by both parties in that case.

As these two cases demonstrate, the Court of Appeals' approach to materiality would produce the wrong results in many cases where a wrongful conviction of an innocent person may have occurred.

II. Impeachment Evidence Is Especially Critical in Cases Involving Adolescent Witnesses Due to Their Increased Vulnerability to Police Influence.

Impeachment evidence is especially essential when the witness being impeached, like Murphy, is susceptible to police influence and made inculpatory statements in a police-controlled environment.

As discussed below, numerous studies have shown the particular susceptibility of adolescent witnesses to persuasion, particularly in police interviews. This Court should consider this body of well-documented research in evaluating the materiality of impeachment evidence particularly where, as here, the young person is interviewed by a police authority who asks leading questions and suggests relevant facts to the child.[6] As applied in this case, it is clear that the transcripts were necessary not only for impeaching Murphy, but also for effective cross-examination and argument regarding the circumstances of the interview, which increased the risk of eliciting false statements from a susceptible adolescent witness.

[6] For example, Murphy was asked during the November interview to draw a picture of the van he says he and Person approached prior to the shooting. As Murphy drew the van, the interviewer suggested it was a Dodge, and Murphy agrees, stating "That is what I am thinking." 170a, "Transcript 11/08/07 Statement to Police by Jarylle Murphy" at 11. (Date: 11/08/07).

A. The Increased Susceptibility of Adolescents to Outside Influences Makes Them More Likely Than Adults to Give False Information.

Due to a multitude of neurological and psychosocial factors, young people are far more susceptible to outside influences than adults are, especially when interviewed or interrogated by police officers or other authoritative figures. *See* Steinberg, *Risk Taking in Adolescence: New Perspectives from Brain and Behavioral Science*, 16 Current Directions in Psych Science 55-99 (2007); Thomas, *Reckless Juveniles*, 52 UC Davis L Rev 1665, 1675 (2019). The United States Supreme Court has repeatedly acknowledged that there is a meaningful, cognitive difference between adults and adolescents, and that this difference makes adolescents more vulnerable to coercion from authority figures such as police. *See, e.g.*, *Miller v Alabama*, 567 US 460, 477; 132 S Ct 2455; 183 L Ed 2d 407 (2012) (discussing the psychological "incompetencies associated with youth—for example, his inability to deal with police officers"); *Roper v Simmons*, 543 US 551, 593; 125 S Ct 1183; 161 L Ed 2d 1 (2005) (refusing to apply the death sentence to juveniles, because "juveniles are categorically less mature, less able to weigh risks and long-term consequences, more vulnerable to external pressures, and more compliant with authority figures than are adults"); *JDB v North Carolina*, 564 US 261, 281; 131 S Ct 2394; 180 L Ed 2d 310 (2011) (children are more likely than adults to feel pressured to waive *Miranda* rights); *In re Gault*, 387 US 1, 45; 87 S Ct 1428; 18 L Ed 2d 527 (1967) (noting that the "admissions and confessions of juveniles require special caution"); *Haley v State of Ohio*, 332 US 596, 599; 68 S Ct 302; 92 L Ed 224 (1948) ("That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.").

A young person's heightened suggestibility can impact various aspects of an adolescent's involvement with a case, from confessions, to plea offers,[7] to the information they give the police as witnesses. Significantly, there is a disproportionate number of innocent young people who falsely "confessed" to crimes they did not commit, only to be wrongfully convicted and later exonerated by DNA testing. Indeed, of all known DNA exoneration cases that involved a false confession, nearly one-third of those cases involved false "confessions" elicited from suspects aged 18 or younger at the time of arrest, and nearly one-half from those aged 21 or younger. *See* Innocence Project, *DNA Exonerations in the United States* <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> (accessed December 13, 2021); Tepfer, Noroder, & Tricarico, *Arresting Development: Convictions of Innocent Youth*, 62 Rutgers L Rev 887, 904-05 (2010).[8] Neuroscience offers an explanation for the disproportionately high number of young people in the population of exonerees who falsely confessed. Specifically, neuroimaging has revealed that the prefrontal cortex and other regions that make up the "cognitive-control networks"—the areas and systems of the brain that are responsible for future planning, judgment, and decision making—are not fully developed until a person's early to mid-twenties, resulting in adolescent and "emerging adult" (18–21-year olds)

[7] Adolescents are also susceptible to outside influence when accepting plea offers, which often come at the recommendation of a lawyer or legal authority figure. A case study found that while 70% to 74% of adolescents aged eleven to fifteen accepted plea offers, only 50% of adults did. Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 Rutgers L Rev 943, 946 (2010). This increased percentage of adolescents accepting plea offers shows their greater susceptibility to compliance with what the person with authority, often the police officer or prosecutor, wants. As age increases, the willingness a suspect has in pleading guilty, or adhering to what the authority figure wants, decreases. *Id.*; *Arresting Development*, 62 Rutgers L Rev at 893.

[8] Of the cases examined, 31.1% of cases involving the wrongful conviction of adolescents had false confessions, as opposed to only 17.8% of cases involving adults. Over half of children aged eleven to fourteen falsely confessed in interviews while children aged fifteen falsely confessed in 37.5% of the cases.

immaturity and relative cognitive impairments. *See Risk Taking in Adolescence: New Perspectives from Brain and Behavioral Science*, 16 Current Directions in Psych Science at 55-99; *Reckless Juveniles,* 52 UC Davis L Rev at 1675; Johnson, Blum, & Giedd, *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J Adolescent Health 216 (2009), available at https://tinyurl.com/rjr7etew (noting that the "adolescent brain continues to mature well into the 20s"). Due to these neurological impairments, as well as psychosocial factors, young people have, relative to adults, diminished cognitive control under stress, difficulty with "future orientation," and increased sensitivity to the power imbalance between themselves and law enforcement officers—collectively rendering children and adolescents underequipped to understand their options in the inherently stressful context of a police-dominated atmosphere, and at an increased risk of succumbing to police coercion or suggestion. *See e.g.*, Cleary, *Applying the Lessons of Developmental Psychology to the Study of Juvenile Interrogations: New Directions for Research, Policy, and Practice,* 23 Psych, Pub Policy, & L 118, 121 (2017).

Like adolescent subjects of custodial interrogation, teenaged witnesses, like Murphy, have been found more likely than adults to make false statements, wrongfully implicating others. Ceci & Bruck, *Suggestibility of the Child Witness: A Historical Review and Synthesis*, 113 Psychol Bull 403, 418 (1993). Indeed, in the Tepfer study, *supra*, over one-third of the cases examined involved an adolescent witness who provided an unreliable statement that contributed to the wrongful conviction of another adolescent. *Arresting Development*, 62 Rutgers L Rev at 909. As noted, the inherently stressful environment of being questioned in a police station or enclosed room with officers, prosecutors, or other investigators—as Murphy was during his October 16th interview—will heighten a young person's vulnerability to suggestion, given the cognitive deficits noted

above, as well as their lack of self-autonomy and inexperience with the world. Reppucci, Meyer, & Owen-Kostelnik, *Testimony and Interrogation of Minors: Assumptions About Maturity and Morality*, 61 American Psychologist 286, 295 (2006). Stress works to impede the judgment of the adolescent within the investigator's presence and weakens their ability to calmly and rationally think through decisions. *Id.*

Further, adolescents are more likely than adults to feel pressure to conform to the requests and instructions of the interviewer. While adults typically feel control over their daily choices, adolescents are accustomed to receiving instruction from a plethora of authority and disciplinary figures. This causes the adolescent to be more sensitive to negative feedback and more susceptible to complying with the external pressure from authoritative figures, such as investigators, police officers, or parents. *Arresting Development*, 62 Rutgers L Rev at 907; *Testimony and Interrogation of Minors*, 61 American Psychologist at 292. Adolescents may also feel a need to self-preserve their innocent status. If the adolescent believes information they give may lead to discipline, they will likely change facts about what happened, who was present, or where the incident occurred in order to avoid any type of trouble. *Suggestibility of the Child Witness*, 113 Psychol Bull at 418; Redlich & Goodman, *Taking Responsibility for an Act Not Committed*, 27 Law and Hum Behav 141, 152, (2003). The adolescent will also be more likely to anticipate, whether correctly or not, what the interviewer wants from them, and give an answer accordingly. *Suggestibility of the Child Witness*, 113 Psychol Bull at 418; *Arresting Development*, 62 Rutgers L Rev at 910; *Testimony and Interrogation of Minors*, 61 American Psychologist at 291.

Suggestive questions that give adolescents the answer the interviewer is looking for allow the young witness to provide an account that appears to be their own, when in reality it has been fed or supplemented by those interviewing the witness. Garrett, *The Substance of False*

Confessions, 62 Stanford L Rev 1051, 1053 (2010). The way that questions are asked and the tone used will affect the likelihood that the account the adolescent is giving is true, accurate, and without embellishment. *Testimony and Interrogation of Minors*, 61 American Psychologist at 294-95.

B. The Undisclosed Transcript Reflects Suggestive Police Questioning and Murphy's Susceptibility to Influence.

The law enforcement community is well aware that adolescents perceive police interactions differently than adults. International Association of Chiefs of Police, *Juvenile Interview and Interrogation*, https://www.theiacp.org/resources/document/juvenile-interview-and-interrogation (last visited February 14, 2021) (detailing the police training given over 39 times to over 2,100 law enforcement professionals from 28 states on model policies and procedures for interviewing juveniles). Due to their susceptibility to police suggestion, organizations like The National Children's Advocacy Center have published recommendations on how to properly question adolescents, which, for example, includes guidance that police not use leading or manipulative questions. *Arresting Development*, 62 Rutgers L Rev at 917.

As is seen in the transcript of the October 16th interview, Sgt. Gaspar suggested critical facts to Murphy, to which he simply acquiesced. For example, Murphy was asked during the October 16th interview if an additional witness, who they refer to as an "Indian girl," was present for the shooting. 148a, "Transcript 10/16/07 Statement to Police by Jarylle Murphy" at 7. Murphy responds that he thinks so, and the response from Sgt. Gaspar is "She was there for the shooting." *Id.* Murphy does not clarify this answer for Sgt. Gaspar, and the questioning moves on. *Id.* This puts far more certainty into the account that Murphy gave. The officer's suggestive questioning is also evident when Sgt. Gaspar asks Murphy if he saw the faces of the perpetrators clearly. Murphy first responds "[n]ot really it was kinda dark." *Id.* When Sgt. Gaspar presses Murphy, asking if he would know the faces again if he saw them, Murphy first answers "possibly," and only

after more pressure, answers "yes" as to the original two suspects (though "[p]robably not the other two suspects"). *Id.* at 8. Murphy was only fifteen years old at the time of this interview and the following photo identification, and only saw the perpetrator briefly and in a group of several young men in the evening. *Id.* at 7. The undisclosed transcript thus would have provided invaluable evidence for the defense in properly undermining confidence in Murphy's identification and therefore the outcome at trial.

C. The Limited Information Available About the Photo Lineup Identification Suggests Further Reliability Issues with Murphy's Testimony and Identification of Hinton.

Eyewitness identification, due to the variety of factors that can influence a witness's memory and recall of an event, is known to be "*among the least reliable* forms of evidence." *See United States v Brownlee*, 454 F3d 131, 142 (CA 3, 2006) (emphasis in original) (citation omitted); *see also* Boyce et al., *Belief of Eyewitness Identification Evidence,* Handbook of Eyewitness Psychology: Memory for People, 508-09 (Jan. 1, 2007) ("Research indicates that people overestimate the abilities of eyewitnesses."). Indeed, eyewitness misidentification is one of the most "pervasive factor[s] in the conviction of the innocent." Medwed, *Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 Vill L Rev 337, 358 (2006). At the date of filing, the National Registry of Exonerations lists 2,870 exonerations nationwide. The National Registry of Exonerations, *% Exonerations by Factor*, https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.asp x (accessed Sep. 24, 2021). Of those, just under one-third (805) list mistaken eyewitness identification as a contributing cause. *Id.* Further, the Innocence Project has found that 69% of convictions that were later reversed by DNA evidence were caused, at least in part, by eyewitness misidentification. *See* Innocence Project, *DNA Exonerations in the United States* <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> (accessed December

13, 2021). Of those cases, 34% of them involved misidentifications in an in-person lineup and 52% of them involved misidentifications in a photo array. *Id.*

All witnesses viewing photographic lineups are susceptible to influence from cues—even inadvertent cues—from investigators conducting the lineup. *See* Innocence Project, *Traditional Eyewitness Identification Practices—And Problems* <https://innocenceproject.org/eyewitness-identification-reform/> (accessed December 13, 2021); Gary Wells, et. al., *Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence*, Law & Hum Behav, 9 (Feb. 2020) (noting that several variables, including the "manner in which a witness is interviewed by an investigator[,] can undermine the accuracy of a witness's [description] statement."); *see also* Steblay et al., *The Eyewitness Identification Feedback Effect 15 Years Later: Theoretical and Policy Implications*, 20 Psychology, Public Policy & Law 1, 11 (2014) ("Confirming feedback significantly inflates eyewitness reports on an array of testimony-relevant measures, including attention to and view of the crime event, ease and speed of identification, and certainty of the identification decision.").

For this reason, many modern science-based recommendations direct law enforcement officers to advise witnesses before identification procedures that the culprit might not be in the lineup at all. Such instructions discourage witnesses, who are predisposed toward making positive identifications, from assuming the presence of a suspect, and thereby reducing the risk that a witness will simply choose a subject who is merely a "reasonable match to their memory." *See Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence*, Law & Hum Behav at 20. Furthermore, law enforcement officers coordinating lineup or photo array identification procedures should ensure they are double-blind—where neither the administrator nor the witness knows which person is the suspect—to prevent the

administrator from giving intentional or unintentional cues about a suspect's identity to the witness. *Id*. at 14-17. Research has demonstrated that when administrators are aware of the identity of the suspect, they may unknowingly send cues to the witness, who is, in turn, more likely to select the suspect from the lineup, whether the suspect is indeed the culprit or not. *See* Kovera & Evelo, *The Case for Double-Blind Lineup Administration*, Psychology, Public Policy, and Law, 421-437 (2017).

Just as adolescents are categorically more susceptible to police coercion during an interview or interrogation, adolescents are likewise more vulnerable to influence during an identification procedure than adults, and they may be less likely to properly identify a perpetrator or less likely to speak up if they do not think the perpetrator is actually in the lineup. *Arresting Development*, 62 Rutgers L Rev at 894. Here, rather than conduct a blinded procedure with proper witness instructions to Murphy, Sgt. Gaspar, the lead detective in the case, informed fifteen-year-old Murphy who the suspects were, and then placed them all in the same lineup position. Because the procedure was not recorded, it is unclear what else Murphy was told before or after identifying Hinton. This reliability issue with the photographic lineup procedure, in conjunction with the critical inconsistences revealed by the disclosure of Murphy's October 16th interview transcript, should cause this Court grave concern that an injustice has occurred.

CONCLUSION

The Court of Appeals' holding fails to apply the proper *Brady* materiality standard and, if upheld, threatens to render *Brady* effectively inapplicable to cases involving suppressed impeachment evidence. Impeachment evidence is critical defense evidence and all the more important where the suppressed evidence reflects suggestive police conduct during a police interview of an adolescent witness. For all of the reasons discussed above, this Court should reverse the ruling below and, in so doing, clarify that impeachment evidence cannot be deemed "immaterial" merely because other impeachment evidence was introduced at trial or other evidence was legally sufficient to support a conviction. Amicus urges the Court to grant Hinton's application for leave to appeal, and, on appeal, reverse the decision of the Court of Appeals.

Dated: February 16, 2022

Respectfully submitted,

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Commonwealth v. Roberts

Common Pleas Court of Dauphin County, Pennsylvania

June 30, 2017, Decided

1127-CR-2006

Reporter

2017 Pa. Dist. & Cnty. Dec. LEXIS 10616 *

COMMONWEALTH OF PENNSYLVANIA v. LARRY TRENT ROBERTS

Subsequent History: Affirmed by *Commonwealth v. Roberts, 2018 Pa. Super. Unpub. LEXIS 3781 (Oct. 10, 2018)*

Prior History: *Commonwealth v. Roberts, 69 A.3d 1298, 2013 Pa. Super. LEXIS 1493 (Pa. Super. Ct., Mar. 20, 2013)*

Judges: **[*1]** Scott Arthur Evans, Judge.

Opinion by: Scott Arthur Evans

Opinion

MEMORANDUM OPINION

On November 14, 2007, Defendant Larry Trent Roberts was convicted by a jury of Murder in the First Degree. On the game date, the Honorable Todd A. Hoover imposed the mandatory sentence of life imprisonment. Defendant filed a notice of appeal on December 14, 2007, and the Superior Court affirmed Defendant's judgment of sentence on March 31, 2009. Defendant filed a petition under the Post-Conviction Relief Act (PCRA) on January 27, 2011, which was dismissed by Judge Hoover on June 28, 2012. Defendant filed a notice of appeal from such dismissal on July 16, 2012.

On March 20, 2013, having determined that there appeared to be a genuine issue of material fact regarding Defendant's location during the offense and of trial counsel's ineffectiveness as it related to not having called a Ms. Tyisha Williams as a potential alibi witness, the Superior Court affirmed in part and vacated and remanded in part for a PCRA hearing,

Defendant amended his PCRA petition twice following the March 20th Superior Court decision. On December 15, 2015, this case was reassigned to die Honorable Scott Arthur Evans. This Court granted Defendant a third amendment of his **[*2]** PCRA petition, and a hearing was held on March 29, April 1, and April 4 of 2016.

By way of background, the following facts were elicited at Defendant's jury trial:

> In late 2005, Defendant spoke to Layton Potter, an alleged drug dealer, about a Duwan ("Wubb") Stern, the victim in this ease. Potter knew Stern, and Stern had been supplied crack by Defendant and his brother. [Notes of Testimony, Trial, November 5-15, 2007, pp. 192-194]. Defendant was angry because he had not been paid by Stern for cocaine, which Defendant felt could be sold on the street for about $10,000. [N.T. Trial, pp. 198-99]. Defendant wanted Potter to "shake him down" to get whatever Stem had in his possession. Potter told Defendant that he "wasn't going into that anymore." [N.T. Trial, p. 201]. In one conversation, Defendant told Potter he was going to "go B.C. on

Wubb" referring to Brian Charles, who Potter knew from prison to be serving a life sentence for murder [N.T. Trial, p. 202].

On December 21, 2005, a Thomas Mullen and an acquaintance. Ebersole, were in Harrisburg in the vicinity of 20th and Swatara Streets with the intention of buying drugs. [N.T. Trial, p. 598]. Mullen knew Stern, having bought drugs from **[*3]** him in the past. [N.T. Trial, pp. 598-99]. At approximately 9:10 p.m., Ebersole dropped Mullen off, and Mullen waited about one half block away from 20th and Swatara Streets while Ebersole went to meet his dealer. [N.T. Trial p. 602].

At approximately 10:00 p.m., the victim. Stern, drove to where Mullen was standing. He had a passenger in the car [N.T. Trial, 604-605]. Stem made an offer to sell Mullen drugs. However, because Ebersole had the money, it was necessary for Stern to go around the corner to talk to Ebersole. [N.T. Trial, p. 606]. Ebersole rejected the idea of buying drugs from someone else, so Mullen walked back toward the location of Stern's car [N.T. Trial, p. 606], As he did so, he heard the motor of Stern's car 'revving' as if the tires Were spinning on a patch of ice. [N.T., Trial, pp. 607-08]. At about the same time, Mullen heard 2-3 gunshots in quick succession. [N.T. Trial, 60.8-09]. As he arrived at the car, the left front tire was slowly spinning and a person was standing at the driver's side of the car. [N.T. Trial p. 609]. Mullen asked the person if Stern was stuck on the ice; the person pulled a gun but and said, "Yeah, he's stuck." [N.T. Trial, p. 610]. Mullen **[*4]** looked at Stern and saw that he was sitting in the driver's seat, staring straight ahead, not moving, with blood on his lips and neck. [N.T. Trial, p. 612], The person standing by the driver's door said he needed help getting Stern out of the car. [N.T. Trial, p. 613]. Mullen did not want to argue since the person had a gun. Since Stern was a large person, Mullen did not know how he was going to get the body out of the car. [N.T. Trial, p. 613]. He walked to the passenger side with the man, and got into the car, crouching on the seat. [N.T. Trial, pp. 614-16]. After pushing the body out of the car, Mullen backed out of the car, got onto the sidewalk, and left quickly, hoping he would riot get shot. [N.T. Trial, p. 614]. He got into Ebersole's car and left to find a dealer from whom they could buy drugs. [N.T. Trial, pp. 619-20]. Mullen did not initially contact police because he was in violation of parole by being out past curfew, and feared that he would be charged widi a crime. [N.T. Trial, p. 620]. He and Ebersole contacted police at around 12-12:30 that night. [N.T. Trial, p. 622]. Mullen told police what had occurred, but initially did not say that he moved the hody. [N.T. Trial, **[*5]** p. 625]. He was charged with Hindering Apprehension and Tampering with Evidence. [N.T. Trial, p. 625]. While in a holding cell at the police station, Mullen was asked to look at a photo array. lie looked, but refused to cooperate because he was angry that he was charged with a crime, having cooperated. [N.T. Trial, pp. 627-628]. Mullen saw a photograph of Defendant in the array. [N.T. Trial, pp. 627=28:; 690]. Eventually, he gave a statement in February 2006, in which he told police everything. He identified the person with the gun as Defendant. [N.T. Trial, p. 632].

Stern's body was found by Harrishurg Police who responded to a call of shots fired at 20th and Swatara Streets. [N.T. Trial, p. 277]. Wayne Ross, M.D. of the Dauphin County Coroner's Office, testified that an autopsy revealed that Stern died of a gunshot wound about the right ear which came from the right side. [N.T. Trial, pp. 589-590; 594].

Commonwealth witness Lisa Starr, who lived in an

apartment at 20th and Swatara Streets in Harrisburg, testified that at approximately 10:00 p.m., she heard two gunshots in quick succession. [N.T. Trial, p. 402; 416]. Upon hearing squealing of tires, Ms. Starr looked out of the window **[*6]** and saw an African American man with his head in an older car, with his other hand braced on the car. [N.T. Trial, p. 405]. The man then walked around the front of the car. She observed the person in front of the headlights for a minute or two. [N.T. Trial, p. 412]. The person crossed the street, and walked up the street, in Ms. Starr's direction. [N.T. Trial p. 414]. She saw him from her window approximately 3-4 feet away. [N.T. Trial, p. 415]. By the time Ms. Starr was able to call police, officers were arriving at the scene. [N.T. Trial, p. 418]. She gave a statement to police very early in the morning of December 22, 2005, [N.T. Trial, p. 420]. Ms. Stan" identified Defendant as the person she saw that night. [N.T. Trial, p. 433].

Jacqueline Wright also lived on Swatara Street and looked out her window upon hearing gunshots and the squeal Of tires.... Approximately three weeks later she identified Appellant.

Attorney Bryan S. Walk represented Defendant at trial and on direct appeal. Attorney Cheryl Sturm filed Defendant's first PCRA petition.[1] Attorney Jennifer Tobias was then appointed to represent Defendant in his appeal from the denial of that petition. After the case was remanded, **[*7]** the Pennsylvania Innocence Project began representing Defendant in the PCRA proceedings in 2013, and Pepper Hamilton began representing Defendant as co-counsel in 2014.

In his initial PCRA petition, Defendant argued that trial counsel was ineffective for failing to present an alibi defense. At trial, the parties jointly called Don Strickland, a Sprint engineer, as an expert witness. Before Mr. Strickland's testimony began, the prosecutor read to the jury the fallowing stipulation of the facts Mr. Stickland used to form his conclusions:

> "December 21st, 2005, at 9:57:37 seconds p.m. time, the Defendant's cell phone received an inbound call lasting approximately 8 seconds from area code 717-233-3603. That phone call — and this fact will be relevant in a moment — bounced off the Devonshire tower, Devonshire Road cellular Nextel tower is the first half of the stipulation. Second, at approximately 10:08:54 seconds, December 21st, 2005 in the p.m., the Defendant's cellular phone received a 19 second inbound call from the same number that 1 mentioned a moment ago. That call also bounced off the Devonshire Road Nextel cellular tower."

[N.T. Trial, pp. 500-01]. Mr. Strickland testified that an **[*8]** area called Sector 3 was the coverage area for the Devonshire tower. *Id.* He then testified about a diagram or "footprint" (Trial Exhibit C-30, PGRA Exhibit D-15) that showed an area outlined in red and an area outlined in blue. *Id.* at 504. The red area was the "basic serving area" for the Devonshire tower Sector 3, and mere was a potential that it could also serve in the blue area. *Id.* Mr. Strickland testified that a call hitting off Sector 3 would be "any where within that red area...." *Id.* at 506, There was a "lower probability" that it could be in the larger blue area. *Id.* at 508, At the time of the calls that were the subject of the stipulation, the towers in the area were functioning, *Id.* at 507. Mr. Stickland further testified that, at the time of those calls, there was a "high probability" the phone was in the red area, a "lower probability" the phone was in the blue area, and "an impossibility" the phpne would be outside the blue area. *Id.* at 508. Mr. Strickland also testified that he was not

[1] Defendant tiled a First Amended PCRA petition on December 20, 2013.

able to pinpoint precisely where the phone was with the data he had, and had no way of knowing who possessed the phone at any particular time. *Id.* at 508-09.

In light of Mr. Strickland's testimony and based oh Defendant's cellular phone records, there was a high probability **[*9]** that Defendant's phone was being used several minutes before 10:00 p.m. and several minutes alter 10:00 p.m. on the 21st of December, The location of the murder, 20th and Swatara Streets, falls well outside of those circles. If the phone was in Defendant's pocket/on his person, he could not have been within a three-mile radius of the crime scene at 20th and Swatara Streets during the time Mr. Stem was shot. Evidence that Defendant was not at the crime scene and did have his phone on him is bolstered by the alibi testimony of Defendant's then-girlfriend Tyisha Williams and Bernard Lyn (as set forth in Defendant's second-amended PCRA petition).

At the outset of the PCRA hearing held before the undersigned on March 29, April 1, and April 4 of 2016, Nilam Sanghvi, Esq. of the Pennsylvania Innocence Project representing Defendant, noted that three amendments had been filed to Defendant's PCRA petition since the remand, and clarified the claims being addressed at the hearing.

> The first group of claims are [Defendant's] due process and *Brady* claim based on the Commonwealth's failure to disclose certain emails before trial. There is an email from Detective Lau that was not disclosed, and there **[*10]** are also emails related to witness Thomas Mullen.
>
> Then there is the ineffective assistance of counsel claim based on defense counsel's failure to present alibi testimony from [Defendant's] daughter's mother, Tyisha Williams, regarding [Defendant's] whereabouts oh the night of December 21st, 2005, and whether bebad his phone with him that night.
>
> And then we have a newly discovered evidence claim based on the recantation of witness Layton Potter who was the only eye witness at trial who provided motive evidence.
>
> And we have a claim of actual innocence.

[PCRA hearing, March 29, 2016, Vol. I, Notes of Testimony, pp. 8-9].[2]

Referencing the testimony by Mr. Strickland at trial, along with the diagram/exhibit offered by both parties. Attorney Sanghyi highlighted that fact that the critical issue was whether been at the crime scene. The Commonwealth has conceded that if Defendant had his phone with him on the night of the murder. Defendant could not have committed the murder. To this end, Tyisha Williams was Defendant's first witness at the PCRA hearing.

Ms. Williams testified to being the mother of Defendant's 21 -year-old daughter, and to having known Defendant for 25 years. At the time of the **[*11]** murder, Ms. Williams testified that she and Defendant had been dating off and on, and that Defendant was seeing other people as well. [N.T., Vol. 1, pp. 11-13]. When asked about what she was doing on December 21st, 2005, Ms. William's testified that every year for the past 19 years, she has always taken off from work to get the house organized for Christmas. On December 21st, she was cleaning her daughter's room and washed her comforter. The lace on the comforter melted in the dryer, so she went looking to purchase another one to match at area stores. The comforter she purchased did

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[2] Attorney Sanghvi went on to state that the claims that would MOT be pursued at the hearing were as follows: claims based on the recantations of Witnesses Quinta Samuel and Sohya Anderson, and the ineffective assistance claim based on trial counsel failing to seek DNA testing of the victim's hands before trial. *Id.* at p. 9.

not match, so Ms. Williams called Defendant on his cell phone at around 10:25 or 10:30 p.m. and asked him to run her to Target to return it. [N.T., Vol. 1, pp, 15-16]. Defendant told her that he was either at his father's house or on his way to his father's house, Which was a 10 minute drive from Ms. William's house. Defendant told her he would pick her up. Defendant picked up Ms. Williams, drove her to Target, and then the two of them went to Media Play afterwards. [N.T.. Vol. 1, pp. 16-17].

Ms. Williams was then shown an exhibit which was a fax cover sheet from Ms. Williams to Attorney Walk, showing the **[*12]** Target receipt for the comforter return. The receipt indicated the return was made at 10:46 p.m. on December 21st, [N.T., Vol. 1, pp. 18-19]. When asked if Ms. Williams recalled if Defendant received any phone calls that evening on his cell phone, she said that he had. While they were at Media Play he received a call from a man by the nickname of "Bobbie." When he hung up with Bobbie, Defendant told Ms. Williams that Bbobie told him that he heard from Ms sister that Duwan Stern was killed. [N.T., Vol. 1, pp. 19-21]. Defendant then took Ms. Williams home.

Ms. Williams was then asked if she recalled giving a statement to anyone about being at Red Lobster on the evening of December 21st. Ms. Williams testified that she and Defendant used to go there all the time. While sitting at work one day, Ms. Williams got a call from a detective saying that Defendant had been arrested. When asked where she was the day in question, Ms. Williams said she thought she and Defendant were at Red Lobster. Her reason for being confused was the fact that on an evening when the two of them had been at Red Lobster, they received a phone call that a young man had been killed, and she believed his name was Soto. **[*13]** As the days went on, Ms. Williams realized that it was not December 21st that they were at Red Lobster, but a different night close to the date of the 21st. [N.T., Vol. 1, pp. 22-24]. Ms. Williams testified that she communicated the same timeline, phone records, and Target receipt to Attorney Walk prior to Defendant's trial. She was subpoenaed to testify but was not called as a Witness. [N.T., Vol, 1, pp. 24-26].

The next witness to testify for Defendant was Bernard Lyd. Mr. Lyd was a mechanic who did some work for Defendant when Defendant owned a used car lot. On the morning of December 21st, Defendant called Mr. Lyd and asked him to attend an auction with him, and also to help him to tow a vehicle belonging to Bilal Watts. [N.T., Vol. 1, pp. 34-35]. Mr. Lyd got the, call at around 10:00 a.m. Defendant picked up Mr. Lyd and the two of them got the tow truck and went over to Mr. Watts' apartment complex to pick up his Chrysler. They took Mr. Watts' car to the used ear lot, which was located-on Cameron Street in Steelton. At that point they were supposed to go to the auction, but Defendant and Mr. Watts stepped out and were gone far a long period of time. Mr. Lyd estimated that he was **[*14]** in the car lot for about 6 or 7 hours, until about 7:00 or 8:00 p.m. [N.T., Vol. 1, pp. 36-38]. At that point Defendant, Mr. Lyd, and Mr. Watts left the lot and stopped to get something to eat at a Vietnamese restaurant on 29th Street. They were there until close to 9:00 p.m. Defendant was tired, so Mr. Watt's drove. Once at Mr. Watts' house in Steelton, Mr. Watts exited the vehicle and Mr. Lyd drove back to the Colonial Park area, where Mr. Lyd lived. When they arrived there, he woke up Defendant. It was around 9:30 or 9:35 p.m. Defendant told Mr. Watts that he was going to his father's house, which was at 322-5 Willow Lane in Susquehanna Township. Mr. Lyd spoke to Attorney Walk about the timeline. Mr. Lyd was subpoenaed to testify but was never called. [N.T., Vol. 1, pp. 39-41].

Defendant testified on his awn behalf at the PCRA hearing. Defendant's testimony regarding the day of December 21st is consistent with Mr. Lyd's timeline. After eating at the Vietnamese restaurant and dropping

off Mr. Watts, Defendant placed and received some phone calls on his cell phone. This is while Defendant was a passenger, on the way to Mr. Lyd's house, while Mr. Lyd was driving. [N.T., Vol. 1, pp, **[*15]** 47-51]. Defendant was shown his cell phone records for the evening of December 21st. He testified as having seen them before, as he was given a copy of them by Attorney Walk. At 7;16 p.m. there was an outbound call to Ms. Williams, then several calls to a Danielle McCollum. Defendant testified that he was "trying to hook up with" Ms. McCollum. [N.T., Vol. 1, p. 55]. At 9:14 p.m. there was an outbound call lasting for approximately 20 minutes. Defendant testified that call was to Ms. McCollum. [N.T., Vol. 1, p. 66]. At 9:53 p.m. there was an inbound call. While Defendant could not recall who made that call, he testified that he had his phone with him then and would have received that call. [N.T., Vol. 1, p. 66]. Defendant also testified that he had his phone at 10:08 p.m., when another call was received. [N.T., Vol. 1 p. 66-67]. At 10:10 p.m., there was an outbound call made, and Defendant testified the recipient of that call was his friend Liz Britton. [N.T., Vol. 1, p. 66]. At 10:26 p.m. the phone records reflect a call from Ms. Williams, which was the phone call where she asked Defendant to take her to Target. Defendant testified that he was at his father's house when he received **[*16]** that call. He picked up Ms. Williams, took her to Target, then went to Media Play and purchased two DVDs. It was around that time that Defendant received a call from "Boobie" (Earnest Fry) which was reflected in the phone records. Defendant testified that Boobie and Robert Cook were at 20th and Swatara Streets, and that the police had the scene taped off around a car that looked like Suwan Stern's. [N.T., Vol. 1, pp. 52-59].

On the day Defendant was arrested, Detective Lau asked several questions such as how did Defendant know Mr. Stern, and where was Defendant on the evening in question. Defendant said he thought he was at Red Lobster but was not sure. He asked to call Ms. Williams to see if she could remember. Defendant dialed Ms. Williams' number and handed the phone to Detective Lau, who questioned her. Defendant confirmed that there was a night when the two of them were at Red Lobster when he received a call from someone letting him know that a Melvin Soto had been killed. [N.T., Vol. 1, pp. 60-61].

Defendant's trial counsel, Bryan S. Walk, Esq., was next to testify at the PCRA hearing. Attorney Walk agreed that at trial, his best argument was what he had stated in his closing at **[*17]** trial: "The thing that proves the best to you that they got the wrong guy is from those phone records. There was a 9:53:57 call in the red area [referring to trial exhibit C-30] and a 10:09 call back in the red area." [N.T., Vol. 1, p. 105]. Attorney Walk testified that it was true that the purpose in gathering the information about the phone records was to show point-by-point where phone calls were either incoming or outgoing from Defendant's phone on the evening of December 21st. [N.T., Vol. 1, p, 106]. Attorney Walk agreed that if it could be shown that Defendant and his phone were together at around 10:00 p.m. on the night of December 21st, that Defendant was physically unable to be where Mr. Stern was murdered. [N.T., Vol. 1, pp. 124-25].

When asked about Danielle McCollum, Attorney Walk could not recall if she had testified at trial, and he was given trial transcripts to refresh his memory that she did, in fact, testify. [N.T., Vol. 1, p. 127-28]. The trial testimony revealed, and Attorney Walk agreed, that Mr. Walk had not spoken to Ms. McCollum prior to trial. Attorney Walk established at trial that she knew and was a friend of Defendant, and knew what his phone number was. **[*18]** [N.T., Vol. 1, p. 128]. Attorney Walk did not ask Ms. McCollum if she had spoken to Defendant on the evening of December 21st. [N.T., Vol.

1, p. 129-130]. Attorney Walk also recalled meeting with Tyisha Williams, mother of Defendant's daughter. Attorney Walk did not call Ms. Williams as an alibi witness or present her Target receipt at trial. Also, Attorney Walk did not call Bernard Lyd, Defendant's mechanic friend who testified to spending the day with Defendant on December 21st. [N.T., Vol. 1, pp. 130-33]. Attorney Walk testified that he did not call Ms. Williams or Mr. Lyd because he wanted corroboration closer co the time of the murder. [N.T., Vol. 1, pp. 134.35]

> MR. SCHMIDT:[3] You had Danielle [McCollum] between 9:00 and 10:00, starting around 9:15, with a series of phone calls. You established from phone records who the two numbers belonged to, but you didn't ask her whether she was talking to Trent [Defendant] on those particular times or for that length of time, correct?
>
> MR. WALK: Correct.
>
> MR. SCHMIDT: And then you had Tyisha Williams who could testify about Trent possessing the phone and using the phone starting around 10:26 after the murder, and you didn't present her as a witness **[*19]** at all, correct?
>
> MR. WALK: Correct.
>
> MR. SCHMIDT: And what was your strategic reason for not presenting Tyisha Williams to corroborate Trent's possession of the phone immediately after the murder?
>
> MR. WALK: Because it was after the murder. It was almost a half an hour after the murder occurred, which wouldn't prove, in my mind, where the phone was at 10:00. She is talking to him at 10:26. In theory, my concern was the DA could still argue he shot Wub and went back to wherever he was and got his phone or had his phone with him when he called her. So, after the time of the murder, where she was or where Trent was, wasn't EtS important to me as putting the time of the murder into question.

[N.T., Vol. 1, pp. 135-36]: Attorney Walk went on to testify that he also did not with to open the door to the Red Lobster memory mistake. He further did not wish to give the Commonwealth the ability to cross-examine Ms. McCollum any more than be wanted, that the phone records spoke better than witness testimony, and that the dots were connected sufficiently for what he was trying to show. [N.T., Vol. 1, 138].

Attorney: Walk Was also questioned about emails that Miss Nilam Sanghvl, Esq., of the Pennsylvania **[*20]** Innocence Project presented to Attorney Walk. The documents had been found in the district attorney's file for the prosecution of Defendant. [N.T., Vol. 1, p. 109]. Attorney Walk confirmed that when he was provided discovery from the-district attorney's file, he was not provided with a copy of the emails. Attorney Walk was first questioned about Exhibit 2, a copy of an email from Senior Deputy District Attorney Michael Rozman to Assistant District Attorney John Baer dated October 2nd, 2007. It is an email that was forwarded from Detective David Lau dated September 11th, 2007 to Michael Rozman. (N.T., Vol. 1, p. 110]. Detective Lau was the lead investigator in the case. Attorney Schmidt read part of the email from Detective Lau to Attorney Walk: "I know We can never be absolutely certain, but if Hopper is right...about the closest tower thing, this causes me to hesitate. With that, I'd rather see Trent get over on us than to carry with me the possibility that the witnesses could be wrong rend an innocent man is incarcerated." [N.T., p. 111). Attorney Walk testified that "Hopper" is Jonna Hopper with Nextel, Attorney Schmidt went on to read more of the email: "This girl told me she is **[*21]** one of the ones trained in this stuff ... and knoWs this for sure. And this being true, if we agree to give the benefit of the doubt to Tram that he was on is

[3] Thomas B. Schmidt, III, Esq., of Pepper Hamilton LLP.

phone at the time of the calls in question we need to give serious consideration that Trent might not be the killer in this ease because it appears that Trent's phone was likely closest to a Devonshire tower at 9:53 hours and 10:08 hours." [N.T., Vol. 1, p. 112]. When asked if he had had this email in his possession when cross-examining Detective Lau at trial, as the chief investigator had expressed serious doubts about the case against Defendant, would Mr. Walk have used the email? Mr. Walk replied, "Absolutely." [N.T., Vol. 1, p. 113],

In another set of documents (exhibits 32, 33 and 34), Attorney Walk was presented with emails regarding Thomas Mullen, a witness in the case that Attorney Walk contended was the actual person who committed the murder. According to his own testimony, Mr. Mullen was present at the scene of the murder and eyewitness fur the Commonwealth. [N.T., Vol. 1, pp. 114-116]. In Mr. Mullen's own statement, he puts himself in the font passenger seal adjacent to the deceased's right side of the head where The **[*22]** fatal gunshot wound had entered. Mr. Mullen had some pending charges related to Mr. Stern's death, including-tampering with evidence and hindering apprehension. According to the emails in question, Mr. Mullen had entered into a proffer letter with the Commonwealth sometime during the pendency of Defendant's case and the case against Mr. Mullen. [N.T., Vol. 1, pp. 116-117]. One of the emails, from Michael Rozman to Justin McShane (Mr. Mullen's attorney) stated: "As we discussed, I expect Mullen to testify at some point on Tuesday. If you and Ed [Marsico, Dauphin County District Attorney] do not have his case agreed on before he testifies, we are just going to have to tell the jury and Walk that there is not any type of deal. Whether there is a deal or not, Walk is going to make a big production out of it, so I am not even sure that it matters. I would like for him to Be taken to another courtroom right after he testifies so his case can be resolved[.]" [K.T., Vol. 1, pp. 120-121]. When Attorney Walk was asked whether had been in possession of this email thread when he was cross-examining Mr. Mullen about whether or not he had a deal in exchange for testimony, would he have used that **[*23]** on cross-examination? "Absolutely," was Attorney Walk's response. He would have found it helpful and powerful. [NX, Vol. 1, p. 121].[4]

Detective David Lau provided testimony on the emails in question as well. As far as what prompted Detective Lau to send an email to Mike Rozman, Detective Lau testified that in any investigation he is working on, he wants to make sure that he has factual information before casting any opinions on any of the issues. Specifically, he testified:

> One of the issues involved in this case was a cell phone, that belonged to the Defendant in this case and that cell phone according to the records company from Sprint indicated that the cell phone itself which was determined to belong to the Defendant was not in the area of this incident when it occurred. It was in a radius of a couple miles but it was not in the exact area where this incident occurred at the: time that it Occurred and I wanted to make sure that we had very thorough discussions concerning this matter before we

[4] This Court notes the testimony of Nicholas Kato, a staff investigator with the Pennsylvania Innocence Project [N.T., Vol. 2, p. 10]. As part of his work at the Project, Mr. Kato familiarized himself with Defendant's case and case file. Mr. Kato reviewed Attorney Walk's file to determine whether certain documents from the District Attorney's Office file were in Attorney Walk's file. [N-T., Vol. 2, p. 11]. Mr. Kato testified that the emails from Detective Lau to Mr. Rozman, and the email exchange between Attorney McShane and Mr. Rozman were not in Attorney Walk's file. [N.T., Vol. 2, pp. 11-12]. Additionally, Mr. Kato did not find a notice of alibi defense in Attorney Walk's file. [NT., Vol. 2, pp. 13-14].

> moved forward with any type of prosecution. That is why 1 forwarded the email to Mr. Rozmam.

[N.T., April 1, 2016, Vol. 2, pp. 17-18]. Detective Lau went on to express that if Defendant was proven **[*24]** to be on the other end of his phone at the time in question, then the eye-witnesses in the case were wrong and that needed to be dealt with appropriately. [N.T., Vol. 2, p. 21].

John Baer, Esq. of the Dauphin County District Attorney's office and lead prosecutor in Defendant's case, also testified at the PCRA hearing. Layton Potter, a witness at Defendant's trial and also at the PCRA hearing, gave a statement to the Innocence Project investigators in 2013, claiming that Attorney Baer coerced him to testify regarding Defendant's motive to kill Mr. Stern. Mr. Potter was under the impression that if he helped out Attorney Baer, it would help him with the gun charges he was facing. After testifying against Defendant, Mr. Potter was sentenced on his gun charges. Mr. Potter later testified that the motivation for providing the 2013 statement was because he was upset with Attorney Baer. Mr. Potter felt as if Attorney Baer did not fulfill his end of their "agreement." He was upset at the district attorney's office for being sentenced to extra time for his gun charges.

When Mr. Potter was asked about his trial testimony concerning his statement that he knew Defendant and bought drugs from him, **[*25]** Mr. Potter stated that that "was exaggerated testimony." [N.T., April 4, 2016, Vol. 3, p. 10]. Regarding his trial testimony, Mr. Potter stated: "Honestly, sir, the only thing I really remember was me trying my darndest to be a part of it so I could make my situation a little better. That is, anything else I think I would be guessing as for as validity or not." [N.T., Vol. 3, p. 14]. Potter also admitted that he did not know the extent of Defendant's and Mr. Stern's relationship outside of rumors he had heard. (N.T., Vol. 3, p. 21]. Me claimed to have gotten to know Defendant in the early 1990s, as he was "dating his little sister." Mr. Potter was ten years old in 1990. [N.T., Vol. 3, pp. 10, 19]. Defendant testified he did not know Mr. Potter until he was made aware of him via Mr. Potter's testimony. [N.T., Vol. 2, p. 62].

In order to be eligible for PCRA relief, a petitioner must plead and prove by a preponderance of the evidence that his conviction or sentence arose from one or more of the errors listed at *42 Pa.C.S.A. § 9543(a)(2)*. These issues must be neither previously litigated nor waived. *42 Pa.C.S.A. § 9543(a)(3)*. The appellate court applies a *de novo* standard of review to the PCRA court's legal conclusions." *Commonwealth v. Spotz, 610 Pa. 17, 18 A.3d 244, 259 (Pa. 2011)* (citation omitted). **[*26]** [5]

In his first claim of eligibility for relief under the PCRA, Defendant claims that the Commonwealth's failure to disclose exculpatory information violated his due process rights pursuant to *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*. *Brady* and

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[5] Pursuant to *42 Pa.C.S. §§ 9545(b)(1)*, *(3)*, any petition seeking relief under the PCRA "shall be filed within one year of the dale the judgment became final," which is "at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania." Defendant's conviction became final with the exhaustion of his direct appellate rights on February 7, 2010. His PCRA petition was timely filed on January 27, 2010, and this Court has jurisdiction over it, as well as over all of the claims contained in the amendments to Defendant's petition. Defendant's first PCRA petition was denied, and such denial was remanded in part and, after remand, Defendant filed three amendments to his claims. This Court granted Defendant leave to file all three of his amendments. *See **Pa. R.Crim. P, 905(A)*** (the judge may grant leave to amend or withdraws petition for post-conviction collateral relief at any time. Amendment shall be freely allowed to achieve substantial justice).

its progeny make it clear that the due process rights of the accused are violated if the government fails to disclose before trial, either intentionally or inadvertently, the existence of material evidence favorable to the defense. *Brady, 373 U.S. at 87*; *see Commonwealth v. Gibson, 597 Pa. 402, 951 A.2d 1110, 1126 (Pa. 2008)* (requiring a defendant "to demonstrate that exculpatory or impeaching evidence, favorable to the defense, was suppressed by the prosecution, to the prejudice of the defendant."). The duty to disclose favorable evidence is an affirmative one that extends beyond the evidence in the prosecutor's actual possession to anything in the possession of the prosecution team, including law enforcement. *See Commonwealth v. Lambert, 584 Pa. 461, 884 A.2d 848, 854 (Pa. 2005)*.

There are three necessary components that demonstrate a violation of the *Brady* parameters: the evidence was favorable to the accused, either because it is exculpatory or because it impeaches; the evidence was suppressed by the prosecution, either willfully or inadvertently; and prejudice ensued. *Commonwealth v. Burke, 566 Pa. 402, 781 A.2d 1136, 1141 (Pa. 2001)*. The United States Supreme Court has recently clarified that **[*27]** to prevail on a *Brady* claim, a petitioner "need not show that he more likely than hot would have been acquitted had the new evidence been admitted. He must show only that the new evidence is sufficient to; undermine confidence in the verdict." *Wearry v. Cain, 577 U.S. , 136 S.Ct. 1002, 1006, 194 L. Ed. 2d 78 (2016)*.

Defendant asserts that the Commonwealth violated his due process rights under *Brady* ant its progeny by failing to disclose to him before trial two categories of emails: Detective Lau's September 11, 2007 email regarding the cell tower information, and emails regarding the circumstances surrounding the withdrawal of Mr. Mullen's charges. As was reflected in the PCRA testimony, Detective Lau sent Mr. Rozman, who was then the lead prosecutor in the case, an email that posed questions about Defendant's guilt based on information from Sprint/Nextel regarding the cell phone towers. The failure to disclose this email is a *Brady* violation.

First, this evidence is favorable to Defendant. This email could have undoubtedly been used to impeach Detective Lau during cross-examination about his investigation in the case. Attorney Walk testified that the email would have absolutely been used in his cross-examination. This Court does not agree with the Commonwealth's **[*28]** characterization that this is not impeachment evidence, but rather a mere opinion. The United States Supreme Court has consistently held that evidence is favorable where it would tend to exculpate a defendant or impeach evidence against him, where the defense might have used it to impeach the government's witnesses, or where it might have been helpful in conducting the cross-examination. *See Brady, supra; United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)*. An email by the lead investigator expressing doubts about whether the investigation resulted in prosecuting the correct person is impeachment evidence that "absolutely" would have been used on cross-examination.

Second, the evidence was suppressed by the prosecution. While there is no evidence of the Commonwealth's intentional non-disclosure of the email, Mr. Walk's credible testimony reflected that he had not received the email, before, trial and that he had provided his full file to the Pennsylvania Innocence Project. Mr. Kato, the Project's investigator, testified that he had reviewed Mr. Walk's entire file and that it did not contain the email in question. The Commonwealth did not present any evidence of pre-trial, disclosure. The evidence was in the Commonwealth's possession but

not disclosed. **[*29]** Inadvertent suppression is sufficient to satisfy this prong; *See* Burke, supra, 781 A.2d at 1141.

Third, the evidence is material and prejudice resulted from its non-disclosure. Here, the focus of the trial was the issue of where Defendant's phone was at the time of the murder and the question of who was in possession of the phone. The Commonwealth acknowledged as much in its closing argument: "The bottom line is that we don't know who had that phone. Was it in the footprint that Donald Strickland presented to you? Absolutely. No doubt about it. We don't know who had the phone. That is the bottom line." [N.T., Trial, Vol, 2 at 978]. Detective Lau's view of the cell, tower evidence could have put the case, in an entirely different light for the jury.

In addition to Detective Lau's. email, Attorney Rozman and Attorney McShane exchanged emails in September, 2007, about, the resolution of charges against Mr. Mullen related to Mr. Stern's death. Emails were also ex changed bet ween the two about the decision to *nolle prosse* Mr. Mullen's charges. The Commonwealth's failure to disclose these emails to Defendant before trial establishes the three prongs of a *Brady*, violation. We find this failure to be extremely egregious. **[*30]** It infers an attempt by Attorney Rozman to shield from Defendant the extent of the benefits being provided to Mr. Mullen for his testimony.

First, this evidence is favorable to Defendant. As previously set forth, exculpatory evidence includes impeachment, evidence. There is no doubt that such emails could have been used by Attorney Walk on cross-examination to impeach the credibility of Mr. Mullen's testimony on direct examination that he was not testifying in exchange for any type of promise or consideration and that the withdrawal of the charges against him was not promised to him at any point, Again, Attorney Walk testified that he "absolutely" Would have used these emails in cross-examining Mr. Mullen.

Second, the evidence as suppressed by the prosecution. Again, while there is no evidence of the Commonwealth's intentional non-disclosure of these emails. Attorney Walk credibly testified that he had not received them before trial and he had provided his full file to the Pennsylvania Innocence Project when it began representing Defendant. Mr. Kato, the Project's investigator, testified that he reviewed the entire file provided by Attorney Walk and that it did not contain these emails. **[*31]** The Commonwealth did not present any evidence of pre-trial disclosure. The evidence was in the Commonwealth's possession but not disclosed. Inadvertent suppression is sufficient to satisfy this prong. *See* Burke, supra, 781 A.2d at 1141.

Third, the evidence is material and prejudice resulted from its non-disclosure. Mr. Mullen was a key witness identifying Defendant as Mr. Stern's shooter; he was the only witness who actually interacted with the shooter. The Commonwealth emphasized the importance of his testimony in both its opening and closing arguments. Thus. Mr. Mullen's credibility was critical to the trial. The undisclosed emails would have cast the case in a different light by giving support to the defense's theory that Mr. Mullen was not being truthful when he said he had not been promised anything in exchange for his testimony. The appearance of "a wink and a nod" is clearly at issue here and its non-disclosure cannot be condoned or ignored. Even the thought that "a wait and see" approach to assessing the witness's testimony must be disclosed. The negotiations of counsel should have been released or, at the very least, the Commonwealth at trial had an obligation to clarify the witness's assertion of no consideration. **[*32]** *See* Commonwealth v. Strong, 563 Pa. 455, 761 A.2d 1167 (Pa. 2000) (conviction vacated where evidence showing that a key witness had a motive to testify favorably for

the Commonwealth was not disclosed).[6] The cumulative effect of the Commonwealth's failure to disclose the Detective Lau email and the emails related to Mr. Mullen's *nolle prosse* violated Defendant's due process rights.

Defendant next argues that his trial counsel, Attorney Walk, was ineffective for failing to present alibi testimony.[7] A PCRA petitioner is eligible for relief if he pleads and proves "by a preponderance of the evidence" that his conviction or sentence resulted from "[i]neffective assistance of counsel which, in the

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[6] It is further noted that Mr. Mullen said "no" when asked at trial, on direct examination, "Are you here testifying today in exchange for any type of promise or Consideration?" [N.T., Trial, Vol. 2 at 596]. The prosecutor elicited testimony from Mr. Mullen regarding his arrangements with the Commonwealth. Thus, the Commonwealth knew or should have known that such testimony was false, or at the very least, should have corrected the testimony after it was given.

[7] In the unpublished memorandum opinion filed March 20, 2015, the Superior Court set forth the following reasons for remanding for a PCRA hearing:

As to [Tyisha] Williams, Appellant's proffer to the PCRA court was that Williams would testify that she called Appellant at roughly 10:20 p.m. on the night of the incident and that Appellant answered his phone... Appellant does not dispute the court's finding that the time of the offense was roughly 10:00 p.m. However, while his brief is not particularly clear, the brief seems to suggest grounds for relief as follows. Although Williams cannot specifically indicate Appellant had his phone at exactly 10:00 p.m., her testimony that Appellant had his phone at roughly 10:20 p.m. could reasonably lead to an inference that Appellant may have had his phone at or very near the time of the killing — a time which, itself, was approximated to be roughly 10:00 p.m. Both times were approximated. Thus, if Appellant had his phone at approximately 10:20 p.m. and the killing occurred at approximately 10:00 p.m., an arguably reasonable inference could be that Appellant had his phone during or close to the approximated time of the killing.

Appellant then points to trial testimony from Donald Strictland, an employee of Sprint/Nextel, that indicated Appellant's phone received incoming calls at 9:57 p.m. and 10:08 p.m. on the night of the incident. The calls bounced off a particular Newel tower. Apparently based on the location of the tower, Strickland seemed to testify it was impossible for Appellant's phone to have been at the murder scene at those times.

In light of the foregoing, Appellant appears to take the following position. When Strictland's testimony that Appellant's phone could not have been at the shooting scene at 9:57 p.m. or 10:08 p.m. is linked with Williams' proffered testimony that arguably suggests that Appellant had his phone at or very near the time of the offense (at approximately 10:00 p.m.), the link could arguably create the combined inference that Appellant was in possession of his phone and that he and his phone were not at the scene when the victim was killed.

....

In light of the approximate nature of the evidence, both adduced and proffered, we find it was erroneous to conclude that there were no genuine issues of material fact and that no purpose would have been served by further PCRA proceedings.... [I]t is at least arguable that Appellant may not have been present at the crime. We are persuaded that testimony front Williams at a PCRA hearing may serve not only to explicate and focus her contentions but also to elucidate what significance those contentions have, if any, in light of all the other trial evidence and/or in light of trial counsel's basis, whatever it might now be shown to have been, for not calling Williams to testify.

....

We are only finding that there appears to be some genuine issue of material fact, at this point, on the questions of Appellant's location during the offense and of counsel's ineffectiveness as it relates to counsel hot having called Williams as a trial witness.

*Commonwealth v. Larry Trent Roberts, No. 1401 MDA 2012, 2013 Pa. Super. Unpub. LEXIS 2633, *13-17 filed March 20, 2013*.

circumstances of the particular case, so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place." *42 Pa.C.S. § 9543(a)(2)(ii)*. Pursuant to the PCRA, a defendant claiming ineffective assistance must plead and prove that (1) the issue underlying a claim of ineffectiveness must be of arguable merit; (2) trial counsel did not have a reasonable basis for the act or omission in question; and (3) trial counsel's act or omission had an adverse effect on the outcome of the proceedings, **[*33]** in other words, but for the errors and omissions of trial counsel there is a reasonable probability that the outcome of the proceedings would have been different. *Commonwealth v. Kimball, 555 Pa. 299, 724 A.2d 326, 333 (Pa. 1999)*. Where an ineffectiveness claim is based on trial counsel's failure to call a witness, a petitioner must demonstrate: "(1) the witness existed; (2) the witness was available; (3) counsel knew of, or should have known of the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony was so prejudicial to petitioner to have denied him or her a fair trial." *Commonwealth v. Dennis, 609 Pa. 442, 17 A.3d 297, 302 (Pa. 2011)*.

Our review of the record and the testimony at the PCRA hearing reveals that Defendant has met his burden of establishing that Attorney Walk's decision not to call Tyisha Williams as a witness at trial and his corresponding failure to present the Target receipt rises to the level of ineffective assistance of counsel. The evidence establishes that Ms. Williams existed, that she was available at the time of trial, that Attorney Walk knew of Ms. Williams' existence, that Ms. Williams was willing to testify at trial, and the absence of her testimony was so prejudicial so as to deny **[*34]** Defendant a fair trial. *Dennis, supra.*

In light of the testimony presented, Attorney Walk had no objectively reasonable basis for not calling Ms. Williams as a defense witness. As set forth previously, the Commonwealth conceded at Defendant's trial that if he had his cell phone with him during the time period of the murder, he "absolutely" could not have been at the crime scene when his phone received an eight-second call at 9:53:57 p.m. and a nineteen-second call at 10:08:54 p.m. on December 21, 2005. The prosecutor iterated during closing argument, "The bottom line is we don't know who had that phone."

As crucial as it was to present testimony during trial that Defendant was in possession of his phone during the time period in question, trial counsel did not call Ms. Williams or present any other evidence to establish that information. When questioning Danielle McCollum, trial counsel asked her whether Defendant ever called her from his cell phone, but did not inquire as to whether she spoke with him on the evening of December 21, 2005. Again, given the importance of whether Defendant was in possession of his phone on the night of Mr. Stern's murder, the stipulation there were calls received on **[*35]** his phone just prior to and just after Mr. Stern's death (the time of which was approximate), placed his phone outside the crime scene. Thus, counsel could have no objectively reasonable strategy for failing to call a witness who could place Defendant's phone with Defendant very close to the critical time of Mr. Stern's death.

Specifically, Ms. Williams placed a phone call to Defendant at 10:26 p.m., and he answered that call. At 10:34 p.m, he called to tell her he was outside her apartment. They went to Target and Media Play together until around 11:30 p.m., when Defendant left Ms. Williams to go to 20th and Swartara Streets to find out if Mr. Stern had been shot, Ms. Williams testified that Defendant was in possession of his phone while she was with him, and her testimony about the balls is corroborated by Defendant's phone records. Ms. Williams' testimony is also corroborated by the Target receipt showing a return transaction at 10:46 p.m. on

December 21, 2005, which lends credence to her account of the trip to Target, with Defendant to return a comforter.

Attorney Walk expressed concern about the potential cross-examination of Ms. Williams regarding her statement to Detective Lau **[*36]** that she and Defendant had been at Red Lobster on the night Mr. Stern died. However, such trepidation for not calling Ms. Williams was unfounded. Ms. Williams' testimony is independently corroborated by Defendant's phone records and by the Target receipt. Her account of why she was initially confused between the night they went to Target and the night they went to Red Lobster is also corroborated by the Commonwealth's stipulation that Melvin Soto was shot in Harrisburg on January 1, 2006, not long after Mr. Stern's shooting,

Actual prejudice resulted from Attorney Walk's failure to call Ms. Williams and failure to present the Target receipt. As stated by the Superior Court in remanding this ease: "When Strickland's testimony that Appellant's phone could not have been at the shooting scene at 9:57 p.m. or 10:08 p.m., is linked with Williams' proffered testimony that arguably suggests Appellant had his phone at or very near to the time of the offense (at approximately 10:00 p.m.), the link could arguably create the combined inference that Appellant was in possession Of his phone and that he and his phone were not at the scene when the victim was killed." *Commonwealth v. Larry Trent Roberts* **[*37]** , *No. 1401 MDA 2012, 2013 Pa. Super. Unpub. LEXIS 2633, *16 filed March 20, 2013*. Ms. Williams' credible testimony confirms this very inference. Had the jury been presented with her testimony and Target receipt, there is a very reasonable probability that it would have inferred that Defendant had his phone with him on the evening of December 21st, 2005, including at the time Mr. Stern was killed, and therefore would have reached a different verdict. The evidence has a reasonable probability of changing the outcome of the proceedings. *Kimball, supra.* The ineffective assistance of counsel "in the circumstances of the particular case, so undermined the truth-determining: process that ho reliable adjudication of guilt or innocence could have taken place." *42 Pa.C.S. § 9543(a)(2)(ii)*. Based on the foregoing, a new trial is warranted.

Finally, this Court addresses Layton Potter's recantation as a newly discovered evidence claim. A PCRA petitioner is eligible for relief if he pleads and proves "by a preponderance of the evidence" that his "conviction or sentence resulted from....[t]he unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced." *42 Pa.C.S. § 9543(a)(2)(vi)*. To be **[*38]** granted a new trial on the basis of after-discovered evidence, a petitioner "must demonstrate that the evidence: (1) could, not have been Obtained prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach the credibility of a witness; and (4) would likely result in a different verdict if a new trial were granted." *Commonwealth v. Cox, 636 Pa. 603, 146 A.3d 221, 228 (2016)*; *Commonwealth v. Padillas, 2010 PA Super 108, 997 A.2d 356, 363 (Pa. Super. 2010)*.

Certain portions of Mr. Potter's recantation and PCRA testimony are credible: His PCRA testimony that he exaggerated aspects of his trial testimony; his: PCRA testimony that in regards to his trial testimony, he was "trying his darndest to be a part of it so I could make my situation a little better."; his post-trial statements that he did not buy drugs from Defendant and did not have personal knowledge of the transactions between Defendant and Mr. Stern.

Mr. Patter's recantations meet all four prongs of the newly-discovered evidence test. Clearly his recantation

could not have been obtained prior to the conclusion of Defendant's jury trial. Moreover, Mr. Potter's recantation is no: merely corroborative or cumulative, nor does it serve to impeach other witness's **[*39]** credibility. Rather, it was the only evidence presented at trial regarding Defendant's alleged motive for shooting Mr. Stern. Mr. Potter claimed at trial that Defendant killed Mr. Stern because Defendant was angry that Mr. Stem "burnt him out of some drugs and he wanted paid back." [N.T., Trial, Vol. 1, p. 196]. Mr. Potter now claims he has no knowledge of any drug transactions between Defendant and Mr. Stern, It is likely that the jury would reach a different verdict if a new trial were granted.

In light of Mr. Potter's post-trial statements, Attorney Walk's ineffectiveness in failing to call Ms. Williams and present her Target receipt, along with Defendant's due process rights being violated pursuant to *Brady*, it is hereby ordered that Defendant's PCRA relief is granted in the form of a new trial.

BY THE COURT:

/s/ Scott Arthur Evans

Scott Arthur Evans, Judge

End of Document

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

v

JUWAN DEERING,
Defendant.

Case No.: 06207873-FC

Hon. Jeffery S. Matis

Karen D. McDonald (P59083)
Oakland County Prosecutor
OAKLAND COUNTY PROSECUTOR'S OFFICE
1200 N. Telegraph Rd.
West Wing, Building 14-E
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(248) 858-0656

Imran J. Syed (P75415)
David A. Moran (P45353)
Megan B. Richardson (P85230)
MICHIGAN INNOCENCE CLINIC
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701 S. State St.
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(734) 763-9353

ORDER VACATING CONVICTIONS

At a session of said Court, held in the County of Oakland, State of Michigan, on this 21 day of Sept, 2021

HON. JEFFERY S. MATIS PRESIDING:

This matter having been presented through a joint motion of the parties, and the parties having agreed that newly discovered evidence warrants the relief herein:

IT IS ORDERED that Defendant Juwan Deering's convictions and sentences in the above-captioned matter are hereby vacated.

Dated: 9/21/21.

Hon. Jeffery S. Matis, *Circuit Judge*

We stipulate to the entry of the above Order:

s/Karen D. McDonald (P59083)
Oakland County Prosecutor

s/ Imran J. Syed (P75415)
Attorney for Defendant

Approved. SCAO

Original - Court
1st copy - Prosecutor
2nd copy - Defendant/Juvenile

3rd copy - Police agency
4th copy - Arresting agency
PROBATE JIS CODE: NOL

STATE OF MICHIGAN 6TH JUDICIAL DISTRICT JUDICIAL CIRCUIT	MOTION/ORDER OF NOLLE PROSEQUI	CASE NO. 2006-207873-FC

ORI
MI-
Police Report No.

Court address
1200 N. Telegraph Road, Pontiac, MI 48341

Court telephone no.
248-858-0368

THE PEOPLE OF
☑ The State of Michigan
☐ _____

v

Defendant's name, address, and telephone no.
JUWAN KNUMAR DEERING

CTN/TCN	SID	DOB
63-00-042989-01	1490418X	02/19/1971

☐ Juvenile In the matter of _____

Count	CRIME	CHARGE CODE(S) MCL citation/PACC Code
I	ARSON-DWELLING HOUSE CURTILAGE	750.72B / 769.12
II-VI	HOMICIDE - FELONY MURDER	750.316B / 769.12

MOTION

KAREN D. MCDONALD
Name (type or print)
, prosecuting official, moves for a nolle prosequi in this case for the following reason(s):

9-30-2021
Date

Karen D. McDonald P59083
Prosecuting official Bar no.

ORDER

IT IS ORDERED:

☒ 1. Motion for nolle prosequi is granted and the case is dismissed without prejudice.
☐ 2. Motion for nolle prosequi is granted as to the following charge(s), which are dismissed without prejudice:

_____

_____

☐ 3. Motion for nolle prosequi is denied.
☒ 4. Defendant/Juvenile shall be immediately discharged from confinement in this case.
☐ 5. Bond is canceled and shall be returned after costs are deducted.
☐ 6. Bond is continued on the remaining charge(s).
☒ 7. The Michigan State Police and arresting agency shall destroy the arrest record, biometric data, and, as applicable, DNA profile for the dismissed charge(s). The Michigan State Police shall also remove any LEIN entry concerning ~~any~~ dismissed charge(s).

9-30-21
Date

P51284
Judge/~~Magistrate~~ Bar no.

If item 1 or 2 is checked, the clerk of the court shall provide a copy of this order to the Michigan State Police.

MCL 28.243, MCL 764.26a, MCL 767.29, MCL 769.16a, MCR 3.936(D)

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

v

JUWAN DEERING,
Defendant.

Case No.: 2006-207873-FC

Hon. Jeffery S. Matis

Karen D. McDonald (P59083)
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JOINT MOTION TO VACATE DEFENDANT'S CONVICTIONS AND SENTENCES

The parties jointly move to vacate defendant Juwan Deering's convictions and sentences in the above captioned manner. A proposed stipulated order is attached as Exhibit 1 to this Motion. As explained below and in the attached Report and Recommendation of the Special Prosecutor, there is newly discovered evidence establishing that Mr. Deering's right to a fair trial was violated. Because there were multiple, significant constitutional violations, relief from judgment is required under the law. Therefore, the parties jointly request that the Court vacate Mr. Deering's convictions and sentences pursuant to MCR 6.501, *et seq.,* and order a new trial.

I. Introduction and Background

1. Mr. Deering was convicted on August 1, 2006, of arson and felony murder, MCL 750.72(b); MCL 750.316(b), after a jury trial before the Honorable Wendy Potts. The evidence against Mr. Deering consisted primarily of: the testimony of three jailhouse informants (Raymond Jeffries, Ralph McMorris, and Philip Turner), who testified that Mr. Deering had made

inculpatory statements while he was housed in jail; and the testimony of fire investigator James Lehtola who testified that the fire had been intentionally set with an accelerant and that it had started on the porch.

2. On August 23, 2006, Mr. Deering was sentenced to life in prison without the possibility of parole, as required by statute. Mr. Deering is currently serving that sentence at the Kinross Correctional Facility in Kincheloe, Michigan.

3. At the conclusion of Mr. Deering's direct appeal, his case was referred to the Michigan Innocence Clinic, a non-DNA innocence clinic based at the University of Michigan Law School. After an investigation spanning several years, the Michigan Innocence Clinic took Mr. Deering on as a client in 2016.

4. The Innocence Clinic's investigation led to a conclusion by two leading independent fire investigators (David Smith and Robert Trenkle) that: 1) the State's initial fire investigators relied on outdated science in their investigation, and 2) credible scientific analysis indicates that the fire most likely started inside the house and not on the porch.[1] Without Mr. Lehtola's testimony, the prosecution could not establish the corpus delecti for arson, and a determination that the fire started inside the home would have derailed the prosecution's case because it would have contradicted the informant testimony.

    a. Expert David Smith, who is among the world's foremost experts in the field of fire science and investigation and has investigated over 7,000 fire scenes in his over 40-year career, noted that "there is no credible evidence that ignitable liquid was sprayed on the porch," and the State's original investigator, Mr. Lehtola, deemed the fire to be arson based on "outdated myths about fire behavior." Smith Report ¶ Further, Mr.

[1] Mr. Smith and Mr. Trenkle's reports are already part of the record of this case; they were submitted to the Court as part of Mr. Deering's 2017 Motion for Relief from Judgment.

Smith noted:

> "**In light of [current scientific standards for fire investigation], there is simply no physical evidence that the fire at 8038 Pasadena St. was arson.** No investigator could credibly conclude this fire was arson based on the evidence available to the State's investigator at trial." *Id.* ¶ 14 (emphasis in original).
>
> While Lehtola "may have believed that he was testifying truthfully based on traditional 'rules of thumb,' **the fact is that the jury was misled by objectively false, unscientific testimony.**" *Id.* ¶ 31 (emphasis in original).

b. Expert Robert Trenkle is also a leading fire investigator with over 35 years of experience, and he previously served as president of the Oakland County Association of Arson & Fire Investigators. Mr. Trenkle agreed that the State's original investigator failed to follow the accepted standards for fire investigation and ultimately, "[n]o competent scientific analysis could deem this fire an arson." Trenkle Report at 10 (emphasis added).

5. The new experts' determination that the fire cannot be credibly deemed to be arson is important because there can be no prosecution if the fire is not arson (i.e. intentionally set) in the first place. *See People v Lindsey*, 83 Mich App 354, 355 (1978) (requiring a showing that "the fire was willfully or maliciously set.").

6. The new defense experts also noted that multiple eyewitnesses had testified that the fire began inside the home, as opposed to on the porch. Indeed, one witness said he ran onto the porch to bang on the front door because he saw smoke and flames coming from the inside of the house, and he was absolutely certain that the porch itself was not on fire at that time. As described in a prior filing:

> Several neighbors noted seeing the fire **inside** the house before it spread to the porch.
>
> **Norman Fitzpatrick** lived two houses away. Tr. Vol. VI at 149. He was taking out his trash when he went to talk to a neighbor, Major Hatcher. *Id.* at 157-58; *See also* Tr. Vol. VII at 47-48. Walking back to his house after chatting with Hatcher, Fitzpatrick noticed a fire at the Dean house. Tr. Vol. VI at 160. He said that the fire caught his attention because

he looked at a window where a carpet normally hung and saw that there was a flickering and smoke. *Id.* at 160-61. This window with the carpet was inside the living room, not on the enclosed front porch. *Id.* Upon noticing the fire, Fitzpatrick immediately ran to his wife and told her to call 911, before running to the Dean home to raise the alarm. *Id.* at 162-63.

When Fitzpatrick arrived at the Dean home, he saw the fire in the house through a window on the north side. *Id.* at 164. This window was on the other side of the house, past the porch. Tr. Vol. VII at 17. The window was **not** on the front porch. *Id.* **Fitzpatrick then actually ran onto the front porch itself**, and began to bang on the door (which he found to be hot) to try to rouse the occupants. *Id.* at 18, 19. As Fitzpatrick banged on the door, the front windows started popping, causing flames to erupt out onto the porch. *Id.* at 19. At this point, Fitzpatrick ran off the porch and started banging on the side of the house instead. *Id.* At about that time, Al Wesson, another neighbor, arrived and said he heard someone inside the house. *Id.* at 22. The two neighbors then went to the rear porch, and with the help of an arriving policeman, they managed to remove the back door and pull Marie Dean out of the house. *Id.* at 22-23. Fitzpatrick also helped rescue a baby from one of the windows. *Id.* at 24.

Major Hatcher lived across the street from Fitzpatrick. Tr. Vol. VI at 156. He was walking home at around 11:45 p.m. when he stopped to talk to Fitzpatrick. Tr. Vol. VII at 47-48. Continuing to his own house, Hatcher noticed that the Dean house was on fire. *Id.* at 50-52. He told his wife to call 911, and then ran over to the Dean house to help. *Id.* at 50. Upon arriving, Hatcher first saw the fire **inside** the living room through the front window, and **not on the porch**. *Id.* at 54. He noticed that Fitzpatrick was distraught because Fitzpatrick thought the electrical work he had recently done may have caused the fire. *Id.* at 64-65.

Alvin Wesson was the next door neighbor to the south of the Dean house. Tr. Vol. VI at 118. Some time between 11:15 and 11:30 p.m., he heard the sound of windows breaking at the Dean home. *Id.* at 126. He went outside and saw the fire. *Id*. Wesson made clear that the fire was "coming from the middle windows. **It was not coming from the porch**." *Id.* (emphasis added).

Wesson saw Fitzpatrick banging on the side of the house and joined him and a police officer at the back door. *Id.* at 131-32. After helping kick in the door, Wesson crawled into the house and pulled out Marie Dean, then ran around to the side of the house, broke a window, and pulled a child out of the window to safety. *Id.* at 135.[2]

Collectively, Fitzpatrick, Hatcher, Wesson, Pullen, and Craig viewed the area surrounding the Dean house at various times between 11:00 p.m. and the start of the fire; **no one saw**

[2] Two other witnesses testified about witnessing the fire scene. **Dorothea Pullen** testified that the fire "looked as though it was on the porch." Tr. Vol. III at 47. But Pullen did not see the fire until after the windows popped, which would have been after Fitzpatrick had already entered and exited the enclosed porch. *Id.* at 56, Tr. Vol. VII at 19. When **Marvin Craig** saw the fire, it was at "the front of the Dean house, on the porch." Tr. Vol. VII at 85. But Craig did not see the fire until after he heard Pullen's screams, Tr. Vol. III at 54, meaning he also did not see the fire until after Fitzpatrick had run onto and off the porch. *Id.* at 56, Tr. Vol. VII at 19.

Mr. Deering or his car at any point during that timeframe. Tr. Vol. VII at 16, Tr. Vol. VI at 161 (Fitzpatrick); Tr. Vol VI at 47-48 (Hatcher); Tr. Vol. VI at 124 (Wesson); Tr. Vol. III at 51-52 (Pullen); Tr. Vol. VII at 85 (Craig).

II. 2021 Review By Prosecutor's Office And Newly Discovered Evidence

7. As part of its advocacy on behalf of Mr. Deering, the Innocence Clinic initially reached out to the Oakland County Prosecutor's Office and asked that office to review the validity of Mr. Deering's conviction based on arson science, and Prosecuting Attorney Karen McDonald agreed to review the case.

8. While the arson science review was still pending, the prosecutor's office located and quickly turned over dozens of newly discovered documents relevant to the credibility of the jailhouse informants—documents that had previously not been disclosed to the defense. The documents spanned decades. Some predated the Deering trial and some were created subsequent to the trial. These documents are summarized in Exhibit 3 to this Motion (and they are attached as Appendices to Exhibit 3, which are lettered Appendix A through Appendix HH).

9. Upon the discovery of these documents, Prosecutor McDonald assigned an independent special prosecutor, Beth Greenberg Morrow, to conduct a full review of the case.

10. As part of her review, Ms. Morrow went through the entire prosecutor's office file, including the trial file, police reports, transcripts and videotaped interviews. One of those videotaped interviews was of Timmothy Dean shortly after the fire.

11. Timmothy Dean was the oldest child to survive the fire, and the only child who could provide investigators with information. He was also the person who discovered the fire. Because he was sleeping in the front room of the house, and because he was the one who discovered the fire, he was in the best position to provide information about how the fire started, where it started and who, if anyone, started it.

12. Timm Dean was interviewed by a forensic interviewer, Mary Kaye Neumann, on April 19, 2000, less than two weeks after the fire. The interview was conducted at the Oakland County Sheriff's Department in an interrogation room with a hidden camera. The entire interview was recorded.

13. The April 19, 2000 interview of Timmothy Dean is not referenced during the trial. The interview was first referenced in pleadings on appeal, when the prosecutor attached a transcript to an appellate filing.

14. During her review, Ms. Morrow reviewed the videotape of the April 19, 2000 interview in the prosecutor's file. That tape was consistent and coextensive with the existing transcript.

15. As noted in her report and recommendation, Ms. Morrow discovered that both the videotape in the prosecution file and the existing transcript did not reflect the entire interview. **In fact, the existing tape and transcript only reflected the first half of the April 19, 2000 interview.** A tape in the Sheriff's Department investigative file contained the entire interview. The full video of the interview can be viewed at this link: www.tinyurl.com/fulldeaninterview. (The relevant second half of the interview starts around the 49:30 mark.) A transcript of the previously unknown, second half of the interview is attached as Exhibit 4.

16. In the interview, Timmothy Dean describes hearing a voice he recognized on the front porch shortly before the fire.

17. In the newly-discovered recording, Timmothy Dean makes a number of statements exculpatory to Mr. Deering. At one point, an investigator shows Timmothy Dean a photo lineup containing six photos. Timmothy Dean identifies the photo in the lower left corner as "Juwan" who lives on his street. **Timmothy Dean specifically states that the "Juwan" in the photo is not the voice he heard that night, and that "I'm sure it's not him."** Exhibit 5 at 13. Timmothy describes a different person, "Little Juwan", who is not in the photo lineup, as the person he

heard on the night of the fire. Timmothy makes clear that "Juwan" who lives on his street and "Little Juwan" who lives in Detroit are not the same person. *Id.* at 12-14.

18. There was no reference to a photo lineup at trial or in any police report. Special Prosecutor Morrow states that no such photo lineup was found anywhere in the prosecution files.

19. During their investigation, the Michigan State Police did find one photo lineup, "randomly" in the Sheriff's Department investigative file. Juwan Deering's photograph is in the lower left corner of that lineup.

20. The second half of the Timmothy Dean interview and the photo lineup both constitute *Brady* evidence (as explained below) that was not disclosed to the defense in violation of Mr. Deering's constitutional rights.

21. Special Prosecutor Morrow completed her investigation and submitted her report and recommendation to Prosecutor McDonald on August 27, 2021. Prosecutor McDonald disclosed the report/recommendation to defense counsel that day, and it is attached here as Exhibit 2.

22. Special Prosecutor Morrow's report made several critical findings that establish that Mr. Deering's rights were violated and that he did not receive a fair trial. These include:

    a. That Timmothy Dean, a key eyewitness, made exculpatory statements in a police interview, and, when shown a photo lineup **he explicitly made clear that the "Juwan" in the lower left photo was not the person he heard on the night of the fire**, but this was not disclosed to the defense. *See* Special Prosecutor's Report, Exhibit 2 at 3-5.

    b. There is new evidence that each of the three jailhouse informants who testified against Mr. Deering received plea bargains, sentence reductions or outright dismissal of charges in exchange for their testimony. None of that was disclosed to the defense or presented to the jury. "The prosecution's case hinged on the jury hearing and believing

the inculpatory statements by the jail informants. **The jury was materially misled about all three jail informant's relationships with the [sheriff's department] and [prosecutor's office], their motives and their credibility."** *Id.* at 12 (emphasis added).

c. "[C]ritical exculpatory and impeachment evidence was not disclosed to the defense, **and that failure constitutes prosecutorial misconduct. Deering's conviction was in violation of his due process rights under the federal and state constitutions**, *Brady*, *Napue* and *Cress*." *Id.* at 13-14 (emphasis added).

III. Relevant Background Case Law

23. Several legal standards mandate that Mr. Deering's convictions and sentences be vacated.

a. ***Brady v Maryland***, 373 US 83 (1963) makes clear that, under the 14th Amendment Due Process Clause, the State must turn over to the defense any evidence it possesses that is material and favorable to the defense.

i. *Brady* includes both exculpatory evidence and evidence that impeaches the prosecution's case. *Kyles v Whitley*, 514 US 419, 433 (1995).

ii. There is no bad faith requirement in *Brady*: even an accidental failure to disclose qualifies. And *Brady* applies to the full prosecution team (including all prosecutors in the office as well as the police). So even if certain evidence was only in the hands of the police and never turned over the prosecutor, the State's disclosure duty still applies. *Id.* at 437-38.

iii. A new trial is required under *Brady* where the undisclosed evidence creates a reasonable probability of a different outcome. When evaluating the materiality prong of a *Brady* claim, the suppressed evidence must be "considered collectively, not item by item." *Kyles*, 514 US at 436.

iv. Courts have found that *Brady* requires relief on far less evidence than is present in this case. For example, in *People v Swain*, 499 Mich 920 (2016), the Michigan Supreme Court unanimously reversed the Court of Appeals, and reinstated the trial court's decision granting relief on the basis of *Brady*, where the *Brady* claim was based on the uncorroborated account of a single witness.

v. The U.S. Supreme Court has made clear that, when analyzing the materiality standard under *Brady*—that the undisclosed evidence must establish a reasonable

probability of a different outcome—"the adjective ["reasonable"] is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, ***but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence***." *Kyles*, 514 US at 434 (emphasis added).

vi. Indeed, the U.S. Supreme Court's most famous *Brady* relief cases featured suppressed evidence that was far less substantial than the suppressed evidence at issue in this case. *See Giglio v United States*, 405 US 150 (1972) (failure to disclose impeachment evidence of consideration given in exchange for prosecution witness's testimony); *Banks v Dretke*, 540 US 668 (2004) (failure to disclose impeachment evidence indicating that witness was a government informant); *Smith v Cain*, 565 US 73 (2012) (failure to disclose prior statements by eyewitness indicating he was uncertain on the facts he testified to at trial); *Wearry v Cain*, 136 S Ct 1002 (2016) (failure to disclose three lines of impeachment evidence undermining State's two key witnesses).

vii. Finally, the Sixth Circuit has granted relief based on *Brady* in cases that are categorically very similar to this case. *See Thomas v Westbrooks*, 849 F 3d 659 (2017) (*Brady* relief granted because State failed to disclose consideration given to one witness for her testimony); *Robinson v Mills*, 592 F 3d 730 (2010) (*Brady* relief granted due to failure by State to reveal informant status of its key witness); *Harris v Lafler*, 553, F 3d 1028 (2009) (*Brady* relief granted where State failed to disclose consideration given to key witness); *Mathis v Berghuis*, 90 Fed Appx 101 (2004) (Relief granted under *Brady* for failure to disclose key impeachment evidence); *Schledwitz v United States*, 169 F 3d 1003 (1999) (same).

b. ***Napue v Illinois***, 360 US 264 (1959) established that a defendant's Due Process right to a fair trial is violated if a prosecution witness gives false testimony and the prosecutor, knowing the testimony is false, fails to correct it. 360 US at 269. If a *Napue* violation occurs, the defendant is entitled to a new trial unless the prosecution can show the error was harmless beyond a reasonable doubt.

i. *Napue* itself involved a government witness who was getting a deal in exchange for his testimony; he denied that on the stand, and the prosecutor, who knew this testimony was false, failed to correct the record. *Id.* at 265. Thus, the facts of *Napue* make it especially relevant here.

ii. Relief has been granted under *Napue* in many cases where a prosecution witness misrepresented the consideration he received in exchange for his testimony, and the prosecutor failed to correct the misrepresentation. *See Shortt v Roe*, 342 Fed Appx 331, (2009); *Jackson v Brown*, 513 F 3d 1057 (2008); *Hayes v Brown*, 399 F 3d 972 (2005); *Goldstein v Harris*, 82 Fed Appx 592 (2003); *Adams v Commissioner of Correction*, 71 A 3d 512 (Conn 2013); *People v Diaz*, 696 NE 2d 819 (Ill App 1998).

c. ***People v Cress***, 468 Mich 678 (2003) articulates Michigan's standard for obtaining

relief based on new evidence that emerges after trial (i.e. the evidence could not have been suppressed by the State at trial because it did not exist at the time of trial). *Cress* requires relief where the new evidence creates a reasonable probability of a different outcome upon retrial. *Id.* at 692. *Cress* is relevant here because, in addition to the evidence that the informants had been offered or were expecting benefits before trial, some of the new evidence relates to post-trial benefits and credibility issues.

i. Importantly, the Michigan Supreme Court clarified in a case called *People v Grissom*, 492 Mich 296 (2012) that *Cress* applies to impeachment evidence in addition to direct/exculpatory evidence. And *Grissom* centered on impeachment evidence that emerged after trial, which makes it very relevant to this case.

ii. Moreover, the Michigan Supreme Court recently also made clear that a materiality review under *Cress*, much like materiality under *Brady*, should be weighed holistically, adding up the materiality of all the new evidence to decide if there is a reasonable probability that it would make a difference upon retrial. *People v Johnson*, 502 Mich 541, 570-72, 576-77 (2018).

IV. Application of Background Case Law to Evidence in This Case

24. This section summarizes (witness-by-witness) how the relevant legal standards are implicated and why they mandate relief in this case. Materiality (i.e. whether a new trial is required) must be evaluated collectively, as cited above. So all of the *Brady/Napue* and *Cress* claims are weighed together in determining whether Mr. Deering's conviction must be vacated.

a. Evidence pertaining to Timmothy Dean

25. As the Special Prosecutor noted:

> Marie Dean's 13-year-old son was present in the home during the fire. The prosecution's theory was that Timmothy Dean, called Timm, was on the couch in the living room, saw the fire on the porch, went to his mother's bedroom, tried to get some of his siblings out of the house, then escaped himself. He did not testify at trial.
>
> Timm was video interviewed on April 19, 2000 in the Oakland County Jail interrogation room. Initially, the Special Prosecutor's investigation found one VHS recording of this interview in the prosecutor's trial file. Further investigation revealed that only the first half of the interview was on this recording.
>
> The recording in the prosecutor's file shows Timm being interviewed by Mary Kaye Neumann, a forensic interviewer, and it ends when she says she needs to check her messages and they take a break. In the full recording, after the break, Neumann continues

> the interview and Detective David Wurtz joins her. **In the interview after the break, Timm gives information that is both impeachment evidence to the prosecution's theory of the case and exculpatory to Deering.**
>
> During the second half of the interview, Timm is shown a photo lineup. Timm says he recognizes the person in the lower left position on the photo lineup, that his name is Juwan, that Juwan lives in his neighborhood, **and that Juwan is not the person he heard outside before the fire.** He states that the person's voice he recognized was "little Juwan," who lives in Detroit, and he states that Juwan and "little Juwan" are two different people. **He says he doesn't think the Juwan in the photo lineup set the fire.**
>
> The photo lineup was not in the prosecution's trial, handwritten notes, or appellate files. It is not referred to in any police narrative report. Nor is there any reference to information from the second half of Timm's interview. Detective Wurtz is present in the second half of the video interview, therefore, he was aware it existed. Neither the second half of the interview nor the photo lineup were found in the prosecutor's file, and there is no mention of either anywhere in that file. There is no evidence that the Oakland County Prosecutor's Office or the trial prosecutor were aware of that evidence.
>
> Michigan State Police reported they discovered one unmarked photo lineup "randomly" in a case file from the property obtained from the OCSO. There is no indication if, how, or when that photo lineup was used. **However, the lineup is consistent with the one shown to Timm because Juwan Deering's photo appears in the bottom left corner.** This photo array was not part of the investigative record or disclosed to the defense. A copy of that photo lineup is attached to this report.
>
> <u>Conclusion</u>
> There is no record of Timm's interview in any police narrative report, yet Detective Wurtz was present and participated in the questioning. The full interview was not disclosed to trial counsel. The photo lineup was not in the Oakland County Prosecutor's trial file or any police narrative report. **In conjunction with the second half of the Timm interview, the photo lineup is substantive newly discovered impeachment and exculpatory evidence**.

Exhibit 2 at 4-5 (all emphasis added).

26. The failure to disclose the fact that Timm Dean affirmatively stated that the "Juwan" in the photograph was not the person he heard outside talking just before the fire constitutes a *Brady* violation for which relief is required. The U.S. Supreme Court has set forth the elements of a *Brady* claim as follows: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v Greene*,

527 US 263, 281–82 (1999).

27. All prongs of the *Brady* standard are met. The investigating police agency was clearly aware that Timm had exculpated Mr. Deering (as *Kyles* makes clear, the prosecutor's awareness is not required; it is sufficient that the police knew, 514 US at 437), yet this information was not disclosed to the defense (nor apparently to the prosecution). The evidence is both exculpatory and material.

28. Indeed, courts have repeatedly granted relief where the State failed to disclose such exculpatory information. *Hudson v Whitley*, 979 F 2d 1058 (1992) (relief granted where State failed to disclose that witness had originally identified an alternate suspect); *Felder v Florida*, 198 So 3d 951 (Fla App 2016) (same); *Ex Parte Miles*, 359 SW 3d 647 (Tex Crim App 2012) (same); *Ex Parte Williams*, 642 So 2d 391 (Ala 1993) (*Brady* relief granted where photo lineup from which victim had identified a person other than defendant was not disclosed to defense).

b. Evidence pertaining to Raymond Jeffries

29. Appendix HH to Exhibit 3 is a copy of the file jacket in a separate criminal case where Raymond Jeffries was the defendant. A note on that file jacket indicates that Jeffries is being given a favorable *Cobbs* deal "based on defendant's assistance in multiple homicide/arson-OCSD/Royal Oak Twp case." This reference to the Deering matter is dated "2/19/02," about two years after the fire, and more than four years before the Deering trial. The file jacket also includes the name and phone number of Detective Gary Miller, one of the officers in charge of the Deering case who was present with the prosecutor at the Deering trial. The benefit that Jeffries received in that case was not disclosed to the defense, and Jeffries denied receiving any benefits at Mr. Deering's 2006 trial.[3] If the prosecutor was aware that this prior benefit

[3] The following exchange occurred toward the end of Jeffries's re-direct exam:

existed, then a new trial would be required under *Napue*—this is in fact identical to the violation at issue in *Napue* itself. *See Napue* case law cited in Section III above. But even if the prosecutor was not aware, the same relief would be required under *Brady*, because *Brady* duties are the same regardless of whether the prosecutor was aware of the undisclosed evidence or not. *Kyles*, 514 US at 433. *See also Brady* case law cited in Section III above.

c. Evidence pertaining to Philip Turner

30. Philip Turner testified for the prosecution at the Deering trial on July 25, 2006.

31. Weeks later, on August 15, 2006, Turner, age 41, raped his 18 year-old neighbor. Turner was charged with six counts of Criminal Sexual Conduct. He was permitted to plead no contest to one significantly reduced count of Criminal Sexual Conduct. At sentencing, the Michigan Department of Corrections recommended a sentence of 19-40 years in prison. After the Deering prosecutor, Greg Townsend, approached the bench and spoke to the judge, Turner was sentenced to five years in prison. *See* Exhibit 2 at 9-10 and Exhibit 3 Appendices D and E.

32. The benefits Turner received came after the Deering trial. Even if there was no prior agreement between the State and Turner at the time of Mr. Deering's trial, relief would still be required under the *Cress* new evidence standard. *See Grissom*, 492 Mich 296 (impeachment evidence emerging after trial can be grounds for granting a new trial).

33. The defense discovered the benefits Turner received and argued that issue during prior appeals. Because that specific issue was previously litigated, it cannot make for a *Cress* claim on its

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Question: Have you received anything with regard from Detective Miller and Detective Wurtz?
Jeffries: No.
Question: On this case?
Jeffries: No.
Question: All right. Did you expect anything?
Jeffries: No. And I don't want anything. Tr. Vol. V at 174.

own (*Cress* requires that the evidence be new), but the issue is still relevant to establish the overall materiality of the *Cress* claims. *Johnson* 502 Mich at 571 (when evaluating if a new trial is required, the court must consider all of "the evidence that would be admitted at retrial.").

34. In other words, when the Turner issue was previously argued, the multiple breaks provided to the other two informants were not known to the defense or the court. Taken together, those repeated deals establish a pattern whereby the prosecution provided benefits to informants and failed to disclose them to the defense or jury, and then argued to the jury that the informants had not received any benefits and that their motivation for testifying was not to obtain any benefit.[4]

35. Appendix F establishes that Turner sought to use his prior testimony against Mr. Deering to obtain a favorable deal from the prosecution in 2019. He then pled no contest pursuant to a *Cobbs* agreement, which arguably shows that he continued to benefit from his testimony against Mr. Deering as late as 2019. This would be new impeachment evidence under *Cress*/*Grissom* at a potential retrial.

36. Turner was a key witness. The fact that he has benefitted in exchange for his testimony against Mr. Deering, but the jury that convicted Mr. Deering was left under the impression that Turner was not benefitting, is significant new evidence that warrants a new trial.

d. Evidence pertaining to Ralph McMorris

37. At Mr. Deering's Trial, Ralph McMorris testified that he had been in jail with Mr. Deering in 2003 and claimed that Mr. Deering confessed to him. He admitted he had specifically been placed in jail with Mr. Deering in order to elicit information. While cross examination from

[4] Notably, when he was arrested on the rape case, Turner informed the arresting officer that he "needed to contact Sergeant Gary Miller." Clearly, Turner believed he would benefit from his prior relationship with Detective Miller. *See* Exhibit 2 at 9.

trial counsel on any incentives McMorris might have received was quite weak, McMorris did state toward the end of his testimony that he received no favors. Tr. Vol. V at 144-45 (mentioning that he did not get a break on his prior prison sentence and that no police officers wrote letters in his favor to the parole board).

38. In his closing argument, trial prosecutor Greg Townsend stated: "Mr. McMorris never received anything for his assistance." Tr. Vol. VIII at 18. Mr. Townsend did not disclose that the Oakland County Sheriff and Prosecutor's Office both had a long-standing informant relationship with McMorris, even though, as the new materials in Exhibit 3 establish, Mr. Townsend himself was keenly aware of this relationship. Indeed, Mr. Townsend had used McMorris as a jailhouse informant at least as early as 1998, when McMorris testified for Townsend in another homicide trial. *See People v Robert Washington*, No. 215249, 2001 WL 682475 *2 (April 20, 2001) (unpublished).

39. **The new evidence pertaining to McMorris mandates that Mr. Deering's conviction be vacated.** The prosecution had a duty to disclose the longstanding mutually beneficial relationship that existed between the State and McMorris, and it also had a duty to disclose specific benefits he received, even if the defense did not explicitly ask. *See Brady* case law cited in Section III above.

    a. Appendix I to Exhibit 3 establishes that McMorris was receiving benefits from Oakland County as early as 1997.

    b. Appendix J establishes benefits received by McMorris in a separate case in 2003.

    c. Appendix K (March 2004) establishes familiarity between McMorris and the prosecutor's office far above and beyond what was disclosed at trial.

    d. Appendix L (April 2004) establishes a longstanding relationship between McMorris and the prosecutor's office and shows that a senior prosecutor was vouching for him

prior to Mr. Deering's trial.

e. Appendix M (April 2004) establishes that McMorris received a benefit from the prosecutor's office in part due to help he was providing in a case being handled by Greg Townsend, who apparently wrote a letter in support of McMorris. It is not made clear (because the Townsend letter is not included), but there is a strong presumption that this is in reference to the Deering case.

f. Appendix N (April 2004) is significant for multiple reasons. First, it again establishes a long history and mutually beneficial relationship between the prosecution and McMorris. **Second, it is crucial impeachment evidence because it includes a statement by McMorris regarding his own credibility in the Deering case.** McMorris writes, "With the exception of one time my credibility was unquestionable. And the one time I speak of is an attemp[t] to help put a guy away who killed five kids."

g. Appendix O (likely from 2004) pertains to a 2003 case against McMorris. It again establishes an ongoing relationship between McMorris and the prosecution, where he writes to them and asks for favors.

h. Appendix P is dated right after McMorris's testimony in the Deering preliminary examination. **This document shows that McMorris was seeking favors from the prosecution (and from Greg Townsend, the Deering prosecutor, specifically) in exchange for his ongoing testimony against Mr. Deering**. Such conversations between Townsend and McMorris and any benefits McMorris received were not disclosed to the defense. The letter attached as Exhibit P is crucial because, had it been disclosed to the defense, the defense would have been able to establish at trial that McMorris both asked for Townsend, Wurtz and Miller's assistance, and that his pending case in Genesee County had, in fact, been dismissed after McMorris wrote the

letter and before McMorris testified at the Deering trial. See Exhibit 2 pp 10-12.

40. The foregoing documents establish *Brady*/*Napue* violations because the documents were in the State's possession prior to trial, were not disclosed to the defense, and constitute material impeachment evidence. Relief would be required under *Brady* and *Napue* because the weight of these documents would be considered collectively, and, given the central role McMorris played at trial, these materials are far more than sufficient to establish a reasonable probability of a different outcome. *See Brady* and *Napue* case law cited in Section III above. Thus, a new trial is required under *Brady/Napue*.

41. Separately, the following documents were created after the trial, and thus they go toward a *Cress* claim. Even if the prosecutor does not have a *Brady* duty to disclose deals made after the trial (though an ethical duty would certainly apply), the fact that these deals were made is significant new *Cress* evidence undermining the credibility of McMorris's testimony—especially because he testified that he wasn't benefitting from testifying.

    a. Appendix Q (August 2006) to Exhibit 3 shows that McMorris received a favorable plea deal shortly after the Deering trial, specifically due to his testimony against Deering.

    b. Appendix R (March 2007) shows that an assistant prosecutor recommended in a letter to a supervisor that pending witness intimidation charges against McMorris should be dismissed. The letter specifically references McMorris's testimony for Greg Townsend "who has also used the Defendant as an informant on at least 3 murder cases, most recently Juwan Deering."

    c. Appendix S (likely from 2007) further shows that McMorris was getting favors from law enforcement and mentions his testimony in the Deering case specifically.

    d. Appendix T shows that the witness intimidation charge mentioned in Appendix R was in fact dismissed.

e. Appendix U is a 2009 letter from McMorris to an Oakland County assistant prosecutor in which McMorris thanks the prosecutor for the help that has been provided to him.

f. Appendix X establishes that McMorris's attorney wrote to the Oakland County prosecutor in 2012 and asked for a break on McMorris's pending charges, in part due to the testimony he gave in the Deering case.

g. Appendices Y-GG together establish that McMorris continued as an informant in Oakland County for over a decade after the Deering trial.

42. The Deering jury never heard about the close, decades-long, ongoing relationship between the Sheriff's Department and McMorris, the relationship between the Prosecutor's Office and McMorris, and the relationship between Greg Townsend and McMorris.

43. When read in light of all of the above, newly-discovered evidence, McMorris's testimony, and the prosecution's closing—"Mr. McMorris never received anything for his assistance." Tr. Vol. VIII at 18, it is patently obvious that the Deering jury was affirmatively misled about McMorris's motives and credibility. Indeed, that is precisely what the special prosecutor concluded. Exhibit 2 at 12.

V. Conclusion and Relief Requested

The law requires that Mr. Deering's convictions be vacated and a new trial be ordered. "Considering the evidence collectively it is painfully clear that the result of the trial would likely have been different had the suppressed evidence been disclosed to the defense." *Bies v Sheldon*, 775 F 3d 386 (2014). Here, it is "painfully clear" that Mr. Deering did not receive a fair trial, and that the verdict rendered by a jury that was deprived of critical exculpatory/impeachment evidence is no longer worthy of confidence. His conviction must be vacated and a new trial ordered. *Kyles v Whitley*, 514 US 419, 434 (1995).

Therefore, the parties respectfully move this Court to vacate Mr. Deering's convictions and sentences and order a new trial pursuant to MCR 6.501, *et seq*.

Respectfully Submitted Jointly By:

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