No. _____

IN THE

Supreme Court of the United States

DEANGELO HORN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Florida First District Court of Appeals

PETITIONER'S APPENDIX

SETH E. MILLER, ESQ.
Florida Bar No. 806471
Innocence Project of Florida, Inc.
1100 E. Park Ave.
Tallahassee, FL 32301
(850) 561-6767
smiller@floridainnocence.org

MARTIN J. MCCLAIN
Counsel of Record
Florida Bar No. 754773
Law Office of Martin J. McClain
141 NE 30th Street
Wilton Manors, FL 33334
(305) 984-8344
martymcclain@comcast.net

Counsel for Petitioner

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FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-4659

DEANGELO HORN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Leon County.
Robert E. Long, Jr., Judge.

October 21, 2020

B.L. THOMAS, J.

Appellant challenges the trial court's summary denial of his motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. We affirm the trial court's ruling.

The jury convicted Appellant of sexual battery on a child under twelve years of age by a defendant eighteen years of age or older (count I) and attempted lewd or lascivious molestation (count II). The trial court sentenced Appellant to life in prison on count I and fifteen years in prison on count II. On appeal, this Court affirmed Appellant's sexual battery conviction and sentence, but reversed the attempted lewd or lascivious molestation conviction and sentence due to a jury instruction issue. *See Horn v. State*, 120

So. 3d 1 (Fla. 1st DCA 2012). Following this, the State dismissed count II.

Appellant argues that the State violated its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose records from the Department of Children and Families and a Tallahassee Police Department report that contained information that could have been used to impeach the credibility of the State's two key witnesses, D.M. (the victim) and M.M. Appellant claims that the State suppressed four pieces of evidence: two investigators' opinion reports on the instant case, historical reports showing the victim's family had a history of making dubious reports, a report noting that the victim had previously witnessed a sexual assault similar to what she alleged here, and a Tallahassee Police Department report that Appellant claims impeached the credibility of one of his accusers.

Appellant argues that the reports of the Department's investigators show that the investigators did not find the victim's allegations "particularly credible." These records allegedly show that the victim's claims did not seem to be substantiated because she had difficulty remembering details and information not provided to her by other parties. Appellant also argues that the prior reporting history and the police report could have been used to impeach the victim's credibility as well as M.M.'s credibility by demonstrating a history of filing false reports and allegations. He contends that these reports were material because his defense at trial was that the criminal allegations were fabricated by M.M.

The trial court found that the opinions of the caseworkers would not have been admissible at trial. The court ruled that the caseworkers did not participate in the interview and merely gave their opinion of the victim's statements and claims after watching a video recording of the interview. This same video was played for the jury at trial, and it was the jury's decision to determine the victim's credibility. The trial court further found that a Child Protection Team report included a summary of prior reports from the victim's family and noted that two prior investigations had been closed for lack of substantiation and that this report had been provided to defense counsel. The disclosed documents also mentioned that the victim had been involved in another case in

which the victim had observed the sexual assault of another minor. Thus, the trial court found that the State had not suppressed the prior Department reports or the report noting the incident the victim allegedly witnessed. Finally, the trial court ruled that the police report could not have been used to impeach the witness(es) because it concerned an unrelated matter and was inadmissible.

Appellant's claim that the State violated its obligations under *Brady* when it failed to disclose favorable information to the defense is meritless. 373 U.S. 83 (requiring the State to disclose material information within its possession or control that is favorable to the defense). To establish a *Brady* violation, a defendant must show that: "(1) the evidence was either exculpatory or impeaching; (2) the evidence was willfully or inadvertently suppressed by the State; and (3) because the evidence was material, the defendant was prejudiced." *Davis v. State*, 136 So. 3d 1169, 1184–85 (Fla. 2014) (citing *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999)). The materiality prong requires that the defendant to demonstrate "a reasonable probability that had the suppressed evidence been disclosed, the jury would have reached a different verdict." *Id.*

As to the Department investigators' reports, the trial court correctly ruled that these reports would not have been admissible. As a general rule, "it is not proper to allow an expert to vouch for the truthfulness or credibility of a witness." *Frances v. State*, 970 So. 2d 806, 814 (Fla. 2007) (citing *Feller v. State*, 637 So. 2d 911, 915 (Fla. 1994); *State v. Townsend*, 635 So. 2d 949, 958 (Fla. 1994)). The general rule applies to prohibit an expert witness from testifying concerning the truthfulness or credibility of the victim in child sexual abuse cases. *Weatherford v. State*, 561 So. 2d 629, 634 (Fla. 1st DCA 1990). These reports would not have been admissible to impeach the testimony of the victim or M.M. where the opinion testimony regarding previous behavior was to be used to undermine the credibility of the victim's new and distinct accusations. *See Tingle v. State*, 536 So. 2d 202, 205 (Fla. 1988) (holding that it was error for the state's witnesses to directly testify as to the victim's credibility). This case is distinguishable from other cases in which an expert expressed an opinion on whether a child was sexually abused. *See Glendening v. State*, 536 So. 2d 212, 221 (Fla. 1988) (holding that "it was proper for an expert to express

an opinion as to whether a child has been the victim of sexual abuse, but "improper for the expert witness to testify that it was her opinion that the child's father was the person who committed the sexual offense.").

In the instant case, Appellant intended to use these reports not to show whether the victim had been sexually abused, but, instead, to discredit the victim's testimony based on past behavior unrelated to the instant case. *See Roebuck v. State*, 953 So. 2d 40, 42 (Fla. 1st DCA 2007) ("[C]redibility may not be attacked by proof that a witness committed *specific acts of misconduct* which did not end in a criminal conviction."). Neither report would have been admissible under those circumstances, and, thus, Appellant's argument fails the *Brady* test.

Appellant's argument that the State committed *Brady* violations by failing to disclose the historical reports is also meritless. "[A] *Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant." *Geralds v. State*, 111 So. 3d 778, 787 (Fla. 2010) (quoting *Occhicone v. State*, 768 So. 2d 1037, 1042 (Fla. 2000)). For example, where a defendant had prior knowledge of who was with him in the hours before a murder, his *Brady* claim regarding the State's failure to disclose interview notes containing certain witnesses' statements about being in his company and noticing that he was intoxicated, was defeated. *Occhicone*, 768 So. 2d at 1041. Similarly, where a defendant was present when he made statements during his polygraph, he could not raise a *Brady* claim based upon withheld evidence of a polygraph report. *Farr v. State*, 124 So. 3d 766, 780 (Fla. 2012).

In the instant matter, the State disclosed to the defense a report that was specifically denoted to be "a brief summary" of the forensic interview with the victim and the circumstances surrounding the situation. The summary stated that further information was available via court order, subpoena, or a property slip from law enforcement. The summary noted that the Department had been previously involved with the victim's family with similar cases that had been closed with "no indicators" of sexual abuse, as well as a statement that a Child Protection Team

had been involved with the family in 2009 after claims that the victim and another member of the family were abused. This information was known to Appellant and trial counsel. The record shows that trial counsel stated that he had received the report and incorporated elements of it into his trial strategy. Appellant was, therefore, on notice as to the existence of these prior reports and could have investigated further. *See Pagan v. State*, 29 So. 3d 938, 947–48 (Fla. 2009) ("If the evidence in question was known to the defense, it cannot constitute *Brady* material."). Thus, the claim fails prong two of the *Brady* test.

Finally, Appellant's claim that the State committed a *Brady* violation by failing to disclose the police report is meritless because it would not have been admissible at trial. "A witness' credibility may only be impeached by convictions of crimes involving dishonesty or false statements." *Washington v. State*, 985 So. 2d 51 (Fla. 4th DCA 2008) (quoting *Jackson v. State*, 545 So. 2d 260, 264 (Fla. 1989)). "[C]redibility may not be attacked by proof that a witness committed *specific acts of misconduct* which did not end in a criminal conviction." *Roebuck,* 953 So. 2d at 42. Appellant admits in his motion that none of the accusers faced criminal consequences for this allegedly false report. Furthermore, this Court's examination of the report indicates that the report itself does not accuse M.M. of a false allegation, but merely that the officer was unable to find signs of injury or "any obvious signs of a battery" upon the alleged victim in the prior unrelated matter. Thus, this report would not have been admissible to impeach M.M. in this case, and as a result, no *Brady* violation occurred.

AFFIRMED.

OSTERHAUS and BILBREY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Seth E. Miller and Krista A. Dolan of the Innocence Project of Florida, Inc., Tallahassee, for Appellant.

Ashley Moody, Attorney General, and Robert "Charlie" Lee, Assistant Attorney General, Tallahassee, for Appellee.

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

STATE OF FLORIDA,

CASE NO.: 2010 CF 0688

v.

DEANGELO HORN,

Defendant.

_____/

ORDER DENYING DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF

THIS CAUSE comes before the Court on Defendant's Successive Motion for Postconviction Relief filed on November 29, 2018. The State responded to the motion in opposition on March 15, 2019, and Defendant filed a Reply on July 5, 2019. After careful consideration, the Court summarily denies the motion.

Procedural History: In 2010, Monika Moore accused Mr. Horn of sexually assaulting her child sister, D.M. The incident occurred in a hotel room were Mr. Horn was staying with D.M., Moore, and two others. Investigators found Mr. Horn's semen in D.M.'s underwear. He was subsequently charged by information with Sexual Battery on a Child Under 12 Years-of-Age by a Defendant 18 Years-of-Age or Older, Attempted Lewd or Lascivious Molestation, and three other related counts. He was ultimately convicted of only the two named crimes. The Court imposed a life sentence for the sexual battery conviction and a 15-year sentence for the attempted molestation conviction.

On appeal, his conviction for Attempted Lewd and Lascivious Molestation was reversed based on a jury instruction issue. *Horn v. State*, 120 So. 3d 1 (Fla. 1st DCA 2012). The State opted not to pursue the charge further, meaning Mr. Horn's only conviction and sentence is for the sexual battery of D.M.

Mr. Horn has filed four previous postconviction motions. First, he submitted a motion for postconviction DNA testing that was denied and the denial was affirmed on appeal (case no. 1D13-4551). His second was a postconviction motion under rule 3.850, Fla. R. Crim. P., which was denied without a hearing and the denial affirmed on appeal (case no. 1D13-6190). In his third motion he argued his sentence was illegal because his social security number does not appear on his written sentence. That motion was denied and the denial was affirmed on appeal (case no. 1D14-4163). Fourth, Mr. Horn again sought postconviction DNA testing and the motion was denied. Mr. Horn did not seek an appeal of this denial.

Current Motion: Mr. Horn argues the State violated *Brady*[1] by failing to disclose several exculpatory documents containing information consistent with his trial defense. He claimed at trial, and continues to claim, that Moore framed him by planting his semen in D.M.'s underwear. To motive and execution, he claimed Moore was upset with him because he was not having penetrative sex with her and she wanted to get pregnant. She allegedly started saving his semen in plastic water bottles when she performed oral sex on him.

There are four types of evidence that Mr. Horn claims were suppressed: **(A)** a Department of Children and Families (DCF) report in this case where two investigators believed D.M.'s sexual assault claim against Mr. Horn was not substantiated, **(B)** historical DCF reports showing the Moore family had a history of making dubious DCF reports, **(C)** a DCF report

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

noting D.M. had relatively recently witnessed a sexual assault that occurred similarly to what she alleged Mr. Horn did to her, and **(D)** a Tallahassee Police Department (TPD) report from a few years before the assault involving Moore that Mr. Horn believes impeaches her credibility.

Mr. Horn claims, had all of it been disclosed, this evidence would have impeached Moore and D.M. enough to establish a reasonable probability of a different trial outcome.

Legal Standard: "To establish a *Brady* violation, a defendant must show: (1) the evidence is favorable to the accused because it is either exculpatory or impeaching; (2) that the evidence was suppressed by the State, either willfully or inadvertently; and (3) that prejudice ensued." *Guzman v. State*, 868 So. 2d 498, 508 (Fla. 2003). A defendant is prejudiced if there is "a reasonable probability that the result of the trial would have been different if the suppressed documents had been disclosed to the defense." *Polk v. State*, 906 So. 2d 1212, 1215 (Fla. 1st DCA 2005). Evidence is not suppressed by the State once they put the defendant on notice that it exists. *See Ward v. State*, 984 So. 2d 650, 654 (Fla. 1st DCA 2008) ("Appellant had no duty to exercise due diligence to review *Brady* material until the State disclosed its existence.").

(**A) The Department Report in This Case**: These are notes created by DCF employees who interviewed D.M. and other family members about this incident. They closed their investigation with "[no] substantiated finding of [Sexual] Abuse." Def. Mot. Exh. A at 170. Part of this investigation was the Child Protection Team (CPT) interview of D.M. by Kendra Walker which one DCF investigator described as follows:[2]

> CPI R[i]chardson arrived at CPT with [Stephanie] and [D.M.]. The purpose of visit [] [was] [D.M.] had a Forensic Interview with Kendra. [D.M.] alleged that she was raped [] by her sister's paramour. It remains unclear exactly what happen[ed] that night[;] [D.M.] was unable to recall the day it happen[ed], and she wasn't sure if he actually touched other parts of her body,[] but she stated that he was inside of her and he was also on top of her humping her legs. [D.M.] was able to recall of lot of

[2] There are numerous bracket corrections in these quotes because of spelling and grammar mistakes. These reports were probably written hastily.

> things that [were] told to her but she was unable to say directly what happen[ed]. [D.M.] did appear nervous [when] she spoke of the incident. The mother and the child appeared very close.

Id. at 176. Another note describing the interview said this:

> CPI Richardson along with Stephanie Moore and [D.M.] arrived at CPT to see Kendra for a Forensic Interview. Kendra explained the purpose of the [interview] with [D.M.], and she asked [D.M.] what happen[ed] and [she] stated that she had been raped. [D.M.] was unsure about what really happen[ed], she stated that she was asleep at times,[] but she could feel him on [top] of her humping her legs and at times she was saying he was inside her,[] Kendra [asked] [if she was] hurting anywhere and she stated no.[] [D.M.] was able to recall a lot [of] things [that] were told to her by other people, and she was unsure what exactly happen[ed] that night,[] and she is not sure what day,[] but she think[s] it happen[ed] [around] six in the morning. [D.M.] stated that her sister and Deangelo were drinking but no other [drugs] were used that she could see. The[re] were no recommendations made by CPT at this time, Kendra stated that she would forward a copy to TPD.

Id. at 177.

Analysis: This evidence fails prongs (1) and (3) of the *Brady* test because none of this evidence is admissible in any form. The report reflects CPT employees' opinions on the credibility of D.M.'s recorded interview – they did not participate in the interview, but only watched the video in the same way the jury or anyone else can. It is irrelevant whether DCF employees thought D.M.'s story was credible or not because the jury was shown the entire taped interview and D.M. testified at trial. It was the jury's job, not any witness's, to determine the credibility of D.M.'s story. "[I]t is an invasion of the jury's exclusive province for one witness to offer his personal view on the credibility of a fellow witness." *Boatwright v. State*, 452 So. 2d 666, 668 (Fla. 4th DCA 1984). Nor can an expert witness, like a CPT child development expert, comment on "the truthfulness or credibility of a witness's statements in general." *State v. Townsend*, 635 So. 2d 949, 958 (Fla. 1994). For this reason, it cannot be that these notes are exculpatory or impeaching because they could not have been used at trial. No prejudice resulted

from the failure to disclose these notes for the same reason. This portion of Mr. Horn's *Brady* claim is denied.

(B) The Historical Department Reports: These are several DCF reports going back several years involving the Moore family. It appears, and Mr. Horn alleges, that family members reported abuse on each other and people around them with relative frequency. Several of the claims were found by investigators to be unsubstantiated. Def. Mot. Exh. A at 1-147, 149-169. Mr. Horn claims he could have used this to impeach Moore and D.M.

Analysis: These DCF reports were not suppressed because Mr. Horn was on notice of their existence at the time of trial. In a CPT report disclosed during discovery, there was a summary of prior DCF reports involving the Moore family noting two investigations closed for lack of substantiation:

> **This family has been involved in several prior abuse investigations.** During a 2001 investigation, a child was removed from Ms. Moore's[3] home due to neglect and was place in long term relative care with Shirley Peterson. Ms. Moore was also listed in a case in 1999 as a significant other and [D.M.] was listed as a child. In 2000, [D.M.]'s brother, Jacoby, was listed in a child on child case with some indicators. Also in 2000, Jacoby was listed as a victim of sexual molestation, but was **closed with no indicators**. There is also a prior abuse report from 2004 that was **closed with no indicators** of environmental hazards, inadequate supervision, sexual abuse other [sic] child, and substance exposed child [sic]. It was alleged that [D.M.]'s mother, Stephanie Moore was allowing the children in the home to have sex with young boys. The children were allegedly drinking, smoking, and staying up all night. It was also alleged that Stephanie Moore's paramour, Reggie Turner, had sex with a child in the home that was 13 years old and the mother was aware of it. It was also alleged that Stephanie was using cocaine powder and crack cocaine in the home. The house was also alleged to be dirty and filthy. CPT was involved with this family in 2009 regarding the sexual abuse of [D.M.] and a family member by a cousin, Alphonso. CPT found positive indicators for sexual abuse. CPT also found positive indicators for physical abuse by [D.M.]'s guardian, Shirley.

[3] "Ms. Moore" refers to Monika Moore's mother, Stephanie, not the 'Moore' otherwise referred to in this order.

Def. Mot. Exh. E at 12 (emphasis added). The report explicitly describes itself as a summary, *Id.* at 10, and the Court finds it was enough to put Mr. Horn on notice at the time of trial that historical DCF documents of this type were available to him. This portion of Mr. Horn's Brady claim is denied.

(C) The Department Report with D.M. as a Witness: Less than a year before the assault, a DCF report states D.M. witnessed what Mr. Horn claims to be two sexual assaults that happened in a similar way to how she claimed Mr. Horn assaulted her. The first time, she walked into a room to find two individuals apparently engaged in a sexual act. When the male saw D.M., he jumped up and pulled his pants up. Def. Mot. Exh. A at 148. The second time, she saw the two people "humping." *Id.*

Analysis: This report was also not suppressed. In the same summary cited in the previous section, this report is mentioned: "CPT was involved with this family in 2009 regarding the sexual abuse of D.M. and a family member by a cousin, Alphonso. CPT found positive indicators for sexual abuse. CPT also found positive indicators for physical abuse by D.M.'s guardian, Shirley." Def. Mot. Exh. E at 12. Had Mr. Horn or his counsel requested the 2009 report at the time of trial, he would have found what he now claims was suppressed:

> FV to CPT for forensic interview w/ [D.M.]. Interview conducted by Case Specialist, Kendra Walker. Mx and victim transported by office support staff, Glenda Shaw. [D.M.] disclosed sexual abuse by Alphonso and physical abuse by Shirley. She further disclosed seeing Brittany and Willie engaging in inappropriate interaction on two occasions. Disclosed seeing Brittany and Willie in bed. Stated Brittany was in the front and Willie was behind her. Stated they were under the covers and Willie's pants were down. Stated she knew Willie's pants were down, because when she entered the room he jumped and pulled his pants up. Stated the second time, she witnessed Willie on top of Brittany and "they were humping on his bed". Stated their pants were down and they were over the covers.

Def. Mot. Exh. A at 148. In order to put a defendant on notice of the existence of evidence, the State is not obligated to provide a detailed explanation of its contents. The notice must be

sufficient to explain the nature and identity of the materials disclosed. The State's disclosure was more than adequate to meet this obligation. In addition, there is record evidence indicating Mr. Horn's counsel had read this very report and attempted to use it as a part of his trial strategy. *Attachment A*. This attempt was denied by the trial judge, *Id.*, and any disagreement with the correctness of that ruling needed to be addressed on direct appeal. Fla. R. Crim. P. 3.850(c). For these reasons, this portion of Mr. Horn's Brady claim is denied.

(D) The Police Report: Three years before the incident, Moore called the police on a former boyfriend. He had become angry after hearing her talking to another man and she became afraid. She and her friend locked themselves in her bedroom and blocked the door. She then claimed her boyfriend kicked the door open, breaking the lock off but causing no damage to the actual door. Once he was in, she claimed that he "thumped" her face. The responding officer could not find a lock and found no damage to the door. He also found no physical injuries. Def. Mot. Exh. B.

Analysis: The Court cannot find, and Mr. Horn has not offered, any conceivable way this police report could have been used at trial to impeach Moore. Any conclusion reached by a police officer regarding whether Moore was truthful would be inadmissible. The police report, or testimony relating to it, would also be inadmissible because it is entirely unrelated to the underlying sexual battery. Further, there is no indication in the report that the allegations made by Moore were actually false. Because this report was not material for the purposes of *Brady*, this portion of Mr. Horn's *Brady* claim is denied, resolving the motion.

WHEREFORE IT IS

ORDERED AND ADJUDGED that Defendant's Successive Motion for Postconviction Relief is hereby **DENIED**. Defendant has **30 days from the date of this order** to file a notice of appeal. The State's Motion to Place Case on Case Management Docket is **DENIED as moot**.

DONE AND ORDERED this 21st day of November, 2019.

ROBERT E. LONG, JR.
CIRCUIT JUDGE

Copies to:
Defendant;
Defendant's Counsel;
State Attorney's Office

PROCEEDINGS

THE COURT: Good morning, gentlemen.

MR. MARSEY: Good morning, your Honor.

THE COURT: I noted that you were busy getting your --

MR. MARSEY: Yes, I'm sorry.

THE COURT: -- exhibits in order.

MR. MARSEY: We've got all our exhibits in order. And I believe my witness is here, Judge, if I could just have a moment to step outside the courtroom.

THE COURT: Uh-huh. And we are proceeding with the -- go ahead and talk to your witness.

(Pause)

MR. MARSEY: Thank you, your Honor. All the State's witnesses are here, Judge, and we're ready to proceed.

THE COURT: Okay. And for the record, we are here on the State of Florida versus Deangelo S. Horn. And I believe that you have a notice of intent to rely on child hearsay statements that has been filed by the State. In fact, we are on the second -- is that the only second amended notice, Mr. Marsey?

MR. MARSEY: Yes, your Honor, it is. And of course that, as we discussed, supercedes everything else.

THE COURT: Correct.

MR. MARSEY: All the statements the State intends to

introduce are contained in the second amended notice.

THE COURT: Okay. And I note that, for the record, it was received on or at least filed on March 24th, which meets the procedural ten-day requirement under 90.802 -- 803.22.

So, Mr. Remland, are you ready to proceed, sir?

MR. REMLAND: Yes, your Honor.

THE COURT: Okay. All right. Does any side wish to have the rule invoked at this time prior to the testimony?

MR. REMLAND: Yes, defense does.

THE COURT: Ladies and gentlemen, if you are a witness for purposes of this hearing, we do ask you to step outside until it's necessary for your testimony to begin. Thank you very much.

MR. MARSEY: And, your Honor, the witnesses that are not present in the courtroom, I have already instructed them on the rule.

THE COURT: Thank you very much.

MR. MARSEY: And I have a brief motion in limine, Judge. I haven't conferred with Mr. Remland, but it's straight out of the statute, if the Court would like to address it first or after.

THE COURT: No, we can address it now.

MR. MARSEY: It's just the -- under Florida statute

794.022, commonly referred to as Florida's rape shield statute, it prevents admission of any evidence under these circumstances about the victim's prior sexual conduct with people other than the defendant. And I just ask that any such evidence be excluded.

THE COURT: Mr. Remland?

MR. REMLAND: I believe, your Honor, that in a case where the credibility of the victim is an issue, I can have a limited right to get into that area in terms of her credibility such as her -- if she has had experiences and has observed sexual activity or has some knowledge of that or something, that goes to her credibility in terms of whether she is making things up, whether she's fabricating, whether she's lying.

THE COURT: Well, the character of the -- let me just say this. There's a case on point called the Pantoja v State case, it's a Supreme Court case, which holds for the position that the character of the victim in a sexual battery case is not something that can be gone into. I have a cite for you if you need it.

MR. REMLAND: Can you give me the --

THE COURT: The character -- if you're talking about the character of the witness, it is not a necessary element of the offense. It's called Pantoja v State. It's a Supreme Court case.

MR. REMLAND: What's the cite?

THE COURT: And it is, in fact, it is found at 36 Fla. L. Weekly S91.

MR. REMLAND: 36.

THE COURT: Florida Law Weekly. Which claims that the character of the victim is not a necessary element. So you cannot attack the character of the witness -- of the victim in this case. I believe the rape shield law is very clear that as to prior sexual encounters, that the law prohibits that from coming in, so.

MR. REMLAND: Well, let me just say that in general I think that might be correct if you're just going to go up there and, you know, without any defense theory, you know, attack the character of the victim.

In this particular case, it's the defense's theory that the victim in the case, along with her older sister, lied and made up a story about the defendant raping the little sister when, in fact, the older sister planted the semen on either the clothing or the body of the little sister. So if the sister has been exposed to sexual --

THE COURT: We're --

MR. REMLAND: Can I finish talking, please?

THE COURT: Yes, sir. I was just talking about the victim you were going into, but go ahead.

MR. REMLAND: Well, you know, the victim and the

sister, being related, since they're sisters, and since the defendant was in a relationship with the older sister and the older sister's motive and everything else is going to be brought out during the trial, but our theory here, our defense theory here is based upon sexual activity existing in an inappropriate way in the family and therefore -- and the attitudes and all the rest of it is not just character. It's the defense's theory that because of what this child was exposed to in the family, that she was led into this lie. And so I think it's relevant to the defense's theory to, in a limited way -- I'm not saying attacking her character. That's not what I'm talking about. I'm talking about asking her what she's been exposed to and if she's ever been the victim of an assault before and what she's been exposed to and what she's seen and what she's been through.

In fact, she was removed from the household, from what I understand -- and I get all this information in the discovery provided to me by the State in the Child Protection Team report, where they indicate, your Honor, that the family of this victim unfortunately was involved in alcohol consumption, the mother was allowing sexual activity in the home, that she was, you know, overly exposed to this influence. And that could have, I think in this particular case, played a very big part in what

she is saying.

And I think you've seen the Child Protection Team video, which was provided to you for the hearing that we're going to do on the hearsay. And I think in looking at that, you'd like to make that Child Protection Team video part of the record in this case for appeal on my objection to the State's motion right now.

(Someone enters the courtroom)

THE COURT: Just a minute.

THE BAILIFF: He's good.

THE COURT: I'm sorry. That was a witness that walked in.

MR. REMLAND: Should I wait?

THE BAILIFF: He's with us.

THE COURT: No, he's not a witness.

MR. REMLAND: So the videotape the, Child Protection Team video, I think, shows the, you know, it shows the victim talking about how kids at school called her a tramp. Perhaps you recall that, your Honor. Do you recall that?

THE COURT: Yes, I recall.

MR. REMLAND: And she said that she doesn't like school because she's called a hoar, which I think is rather odd for an 11-year-old, to be called a hoar and a tramp. And I think that sort of plays into our theory

here. And so the reason I think we should -- I'm not going to get into, you know, attacking her character, but what am I saying is for purposes of cross examination of the victim, that I be allowed a certain latitude to bring out what she's been exposed to in the family so the jury understands, you know, this isn't just some angel who's never been exposed to negative influences. And it affects her head. If affects her judgment. It affects her perception of the world, her reality.

And I think no case is tried in a vacuum. And that's why I object to the State's -- I could see in a general case I just can't get up here and attack a victim in a rape case. That's what the rape shield law is for. But I think when I have a theory, which I have in this case, which Mr. Marsey pointed out to you in voir dire, that we've had multiple discussions about the theory.

And it was provided to me in discovery where my client was interviewed by the police and he told the police about the fact that he was worried or concerned that maybe this semen was planted by the sister, because she would save it when they'd have oral sex. You know, it's scientifically possible.

Maybe to some extent people might say, oh, my goodness, I can't believe that there's something like that. Now they're getting into credibility, Judge. And

if credibility of the opposing stories or the opposing points of view is an issue in this case, which I think it is, credibility is a big factor in this case because when the jury hears this, they're going to go, oh, my God, he's saying that was planted. Oh, my goodness. And that's why I think the influences of the home and everything else are relevant to the theory and credibility of our entire defense in this case. Thank you.

MR. MARSEY: Your Honor, first of all, the defense can come up with any theory that would make the credibility of a witness or a victim in a sexual battery case relevant. In fact, that's why the Florida legislature has enacted statute 794.022. And I'm sure the Court is familiar with it. But for record purposes, paragraph two says: Specific instances of prior consensual sexual activity between the victim and any other person other than the offender shall not be admitted into the prosecution under 794. It doesn't say unless the defense has a theory that makes it relevant. Relevance is not an issue, Judge. This child's prior sexual activity is absolutely inadmissible. Case law establishes it, as your Honor has noted.

The defense's theory does not supercede the intent of the legislature to protect victims of sexual battery.

If she's been a prior victim of sexual battery, it is still not admissible under any circumstance present in this case. The statute does set forth a couple other circumstances where it may, after an in camera review, be permitted, but I submit to the Court that those are not present here. One is that to prove that the defendant was not the source of the semen, pregnancy, injury, or disease, and that's not an issue here, or when consent by the victim is an issue. As the Court is familiar, this is an 11-year-old child. Consent is not an issue in this case. Therefore, there is no exception as argued by -- excuse me. There's no statutory exemption that fits within the parameters argued by the defense.

And as I noted, Judge, that type of defense and that type of questioning of a victim of a sexual battery is exactly the reason why the State has chosen to exclude such information. Now, that being said, Judge, if the defense would like to cross-examine the mother and the sister as to things consistent with their theory, then they are certainly entitled to. However, the child should not be required to undergo any questioning regarding any prior sexual conduct, any sexual activity, nor should the witnesses be required to testify about the child's prior sexual conduct or activity, if there even is any. And at this point, for record purposes, I'm not

saying there is, but the existence of such, if any, is protected by statute, Judge.

THE COURT: Mr. Remland, I'm going to grant the State's motion in limine on that issue. You're free to, depending on the nature of the question at the point in time, to ask other witnesses, subject to my ruling, as to whether it is relevant or not, but as to the victim, the motion in limine is granted.

MR. REMLAND: Judge, you cited a case. I was trying to write it down while you were saying it, but I couldn't get the whole cite down. I just got 36 Florida Law Weekly, but I didn't get the rest of it.

THE COURT: It's 36 Fla. L. Weekly S91, which dealt specifically with the defendant in that case.

MR. REMLAND: S9 --

THE COURT: S91.

MR. REMLAND: 91.

THE COURT: A.

MR. REMLAND: 91A?

THE COURT: Yes, sir.

MR. REMLAND: And what's the name of that case, Judge?

THE COURT: Pantoja v State.

MR. REMLAND: Pantoja.

THE COURT: S91A. Came out March 3rd, 2011. And it

deals very much on similar issues such as this where the defendant tried to bring in evidence of issues or character of the victim or prior indications or accusations or false accusations or made-up accusations. And the Supreme Court ruled that that would be improper impeachment.

And, first of all, it's improper impeachment and, too, was not deemed relevant, because then that would mean that the character of a victim in every sexual battery case would then be subject to attack. So I'm going to grant the State's motion on that issue.

MR. MARSEY: Thank you, your Honor. The State has no further motions in limine and are ready to proceed on the child hearsay issue.

THE COURT: All right.

MR. REMLAND: Judge, in the Court's ruling, I noticed that Mr. Marsey did not object and noted that those areas can be gone through with the mother and the sister so --

THE COURT: Yes, depending on the nature of the question and how it is relevant as the case folds out in chief. I think you may question a witness' bias or motive as long as it's conducted within the proper parameters of impeachment. And we'll proceed with the notice of hearsay at this time.

MR. MARSEY: Judge, so the record is clear, if I misspoke, when I said that he could progress against the other witnesses --

THE COURT: But not about the --

MR. MARSEY: About what they did. Not about what the child's prior sexual activity was.

THE COURT: Correct, correct. That is correct. The victim's prior history is subject to the requirements of 794.022 and will not, under Florida law, you may not get into that. That's the order of the Court. All right. You may proceed.

MR. MARSEY: May I call my first witness, your Honor?

THE COURT: Yes, sir, you may.

MR. MARSEY: State calls Stephanie Moore.

THE COURT: Ms. Moore, if you'll have a seat, ma'am, please. And move the microphone towards you and speak clearly. And we will begin.

MR. MARSEY: Your Honor, can the witness be sworn?

THE COURT: Yes. I'll swear you in. Ms. Moore, raise your right hand, ma'am.

Whereupon,

STEPHANIE MOORE

was called as a witness, having been first duly sworn, was examined and testified as follows:

Table 1: State Jurisdictions Imposing the Defense Diligence Requirement

Alabama

Mashburn v. State, 148 So. 3d 1094, 1120 (Ct. Crim. Ala. 2013) ("Prosecutors have no duty under *Brady v. Maryland* to disclose evidence available to the defense from another source.") (internal citation omitted)

Arkansas

Henington v. State, 556 S.W.3d 518, 522 (Ark. 2018) (no *Brady* violation where the undisclosed report "could have been sought out by the defense")

California

People v. Superior Court (Johnson), 377 P.3d 847, 858-59 (Cal. 2015) (no *Brady* violation where "information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence") (quoting *United States v. Brown*, 628 F.2d 471, 473 (5th Cir. 1980)

District of Columbia

Walker v. United States, 167 A.3d 1191, 1208 (D.C. Ct. App. 2017) ("the government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself.")

Illinois

People v. Burton, No. 1-14-1796, 2016 WL 7638173, at *12 (Ill. App. Ct. Dec. 30, 2916) ("The State does not offer any explanation why it did not disclose the medical records during discovery. However, defendant offers no explanation as to why he was unable to discover his medical records until 2013 . . . . He avers in the petition that the records were 'readily available by subpoena.' Therefore, this information was not dependent on the State, and there is no evidence that the State knowingly or inadvertently withheld the information from defendant.")

Indiana

Conner v. State, 712 N.E. 2d 1238, 1246 (Ind. 1999) ("the State will not be found to have suppressed material information if that information was available to a defendant through the exercise of reasonable diligence.")

Kansas

State v. Walker, 559 P.2d 381, 384 (Kan. 1977) ("Other states have held the Brady rule does not apply when the defendant or his counsel knew of the exculpatory evidence either before or during trial;" question left open here, but court observes "the

rule seems to have support in this jurisdiction."); *see also State v. Belone*, 343 P.3d 128, 150 (Kan. 2015) ("Additionally, a *Brady* violation does not occur when a defendant or counsel knew about the evidence and could have obtained it prior to or during trial.") (citing to *Walker*)

Louisiana

State v. Green, 225 So. 3d 1033, 1037 (La. 2017) ("However, a defendant shows no entitlement to relief if the information was available to him through other means by the exercise of reasonable diligence.")

Minnesota

Zornes v. State, 903 N.W. 2d 411, 418 (Minn. 2017) (no *Brady* violation where the evidence was "readily available in other documents", so there was no reasonable probability that the result of the trial would have been different); *see also Vera v. State*, No. C1-99-330, 1999 WL 809731, at *2 (Minn. Ct. App. Oct. 12, 1999) ("Evidence is not considered to have been suppressed within the meaning of the *Brady* doctrine if the defendant or his attorney either knew, or should have known, of the essential facts permitting him to take advantage of [that] evidence.") (internal citation omitted) (alteration in original)

Mississippi

Lofton v. State, 248 So. 3d 798, 810 (Miss. 2018) ("And the State has no obligation to furnish a defendant with exculpatory evidence that is fully available to the defendant or that could be obtained through reasonable diligence.").

Missouri

State v. Moore, 411 S.W.3d 848, 855 (Mo. Ct. App. 2013) ("there can be no *Brady* violation where the defendant knew or should have known of the material or where the information was available to the defendant from another source")

Montana

State v. Weisbarth, 378 P.3d 1195, 1203 (Mont. 2016) (finding *Brady* violation because the defendant exercised due diligence in seeking records and was thwarted by the State)

Nevada

Slaughter v. State, No. 78760, 474 P.3d 332, at *2 (Nev. Oct. 15, 2020) (Table) ("And this court has recognized, "'a *Brady* violation does not result if the defendant, exercising reasonable diligence, could have obtained the information.'") (citing *Rippo v. State*, 946 P.2d 1017, 1028 (Nev. 1997)

New Mexico

State v. Stevenson, No. A-1-CA-36451, 2017 WL 6997257, at *1 (N.M. Ct. App. Dec. 18, 2017) ("Defendant discusses federal law and contends that the United States Supreme Court as well as several federal circuits have rejected a 'duty of due diligence by the defendant with regards to *Brady* violations[.]' Defendant then acknowledges that several federal circuits do still recognize a due diligence exception to *Brady*. Importantly, Defendant also acknowledges that New Mexico is in line with the latter group of courts recognizing the exception.") (internal citations omitted)

New York

People v. LaValle, 817 N.E.2d 341, 352 (NY Ct. App. 2004) ("Evidence is not suppressed where the defendant "knew of, or should reasonably have known of, the evidence and its exculpatory nature") (internal citation omitted)

North Carolina

State v. Allen, 731 S.E.2d 510, 524 (N.C. Ct. App. 2012) (relying on numerous federal court decisions to impose a diligence requirement)

Ohio

State v. McFeeture, No. 108434, 2020 WL 1062137, at *3 (Ohio Ct. App. Mar. 5, 2020) (slip op.) ("Further, the prosecution is not required under *Brady* to furnish a defendant evidence which, with any reasonable diligence, he can obtain for himself.") (internal quotation omitted)

Tennessee

State v. Marshall, 845 S.W. 228, 233 (Tenn. Crim. App. 1992) ("The prosecution is not required to disclose information that the accused already possesses or is able to obtain")

Texas

Pena v. State, 353 S.W.3d 797, 810 (Tex. Crim. App. 2011) ("Similarly, the State does not have such a duty if the defendant was actually aware of the exculpatory evidence or could have accessed it from other sources.")

Utah

State v. Pinder, 114 P.3d 551, 557 (Utah 2005) ("courts universally refuse to overturn convictions where the evidence at issue is known to the defense prior to or during trial, where the defendant reasonably should have known of the evidence, or where the defense had the opportunity to use the evidence to its advantage during trial but failed to do so") (internal citation omitted)

Vermont

State v. Rooney, 19 A.3d 92, 97 (Vt. 2011) (" A defendant who is aware of essential facts that would allow him to request the exculpatory evidence at issue, yet fails to act on that knowledge, cannot fault the State for failing to produce it.")

Virginia

Porter v. Warden of Sussex I State Prison, 722 S.E.2d 534, 541 (Va. 2012) ("Furthermore, pursuant to *Brady*, there is no obligation to produce information available to the defendant from other sources, including diligent investigation by the defense.")

Washington

State v. Mullen, 259 P.3d 158, 166 (Wash. 2011) ("where a defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression by the government") (internal citation omitted)

West Virginia

State v. Peterson, 799 S.E.2d 98, 106 (W.Va. 2017) (as part of West Virginia's suppression test, a defendant must show evidence was "not available . . . through the exercise of reasonable diligence")

Table 2: Jurisdictions Allowing Inadmissible Evidence as *Brady* Material if it leads to Admissible Evidence

First Circuit

Ellsworth v. Warden, 333 F.3d 1, 9 (1st Cir. 2003) (Lipez, J., concurring) ("Today the en banc court has ruled, in conformity with a majority of the circuits, that the petitioner can also establish a viable Brady claim by demonstrating that withheld evidence, though itself inadmissible, would have led directly to the discovery of material admissible evidence.")

Sixth Circuit

Henness v. Bagley, 644 F.3d 308, 325 (6th Cir. 2011) ("Because this statement is hearsay and therefore inadmissible, Henness must demonstrate that the statement would lead to the discovery of additional, admissible evidence that could have resulted in a different result at trial.")

Eleventh Circuit

Wright v. Hopper, 169 F.3d 695, 703 (11th Cir. 1999) ("Inadmissible evidence may be material if the evidence would have led to admissible evidence.")

D.C. Circuit

United States v. Derr, 990 F.2d 1330, 1335–36 (D.C. Cir. 1993) ("to be 'material' under Brady, undisclosed information or evidence acquired through that information must be admissible") (citing *United States v. Kennedy*, 890 F.2d 1056, 1059 (9th Cir.1989))

Colorado

People v. Bueno, 409 P.3d 320, 329 n.12 (Colo. 2018) ("But undisclosed evidence need not be admissible to satisfy Brady; it need merely lead to the possible discovery of other evidence.")

Connecticut

Lapointe v. Comm'r of Correction, 112 A.3d 1, 25 n.34 (Conn. 2015) ("The state's 'obligations under Brady to disclose such information [do] not depend on whether the information to be disclosed is admissible as evidence in its present form. The objectives of fairness to the defendant, as well as the legal system's objective of convicting the guilty rather than the innocent, require that the prosecution make the defense aware of material information potentially leading to admissible evidence favorable to the defense.'") (quoting *United States v. Rodriguez*, 496 F.3d 221, 226 (2d Cir.2007))

District of Columbia

Turner v. United States, 116 A.3d 894, 918 (D.C. 2015) ("Evidence that is inadmissible cannot be material for Brady purposes unless there is a reasonable

probability that its disclosure would have resulted in a different trial outcome because it is likely to have led to the discovery of other, admissible evidence favorable to the defense")

Georgia

Jones v. Medlin, 807 S.E.2d 849, 854 (Ga. 2017) ("Thus, 'inadmissible evidence may be material [under Brady] if it ... could have led to the discovery of [material] admissible evidence.'") (internal citation omitted)

Illinois

People v. Del Prete, 92 N.E.3d 435, 446 (Ill. App. Ct. 2017) ("even if the withheld evidence is itself inadmissible, it may still be material evidence under Brady if it would have led to the discovery of admissible evidence.")

Washington

State v. Mullen, 259 P.3d 158, 167 (Wash. 2011) (en banc) ("if evidence is neither admissible nor likely to lead to admissible evidence[,] it is unlikely that disclosure of the evidence could affect the outcome of a proceeding.") (internal citations omitted)

Table 3: State Jurisdictions that do not Distinguish between Admissible and Inadmissible Evidence

Alabama

State v. Ellis, 165 So. 3d 576, 588–89 (Ala. 2014) ("We have further held that exculpatory evidence, regardless of its trustworthiness or admissibility, should be disclosed, and, if it is not disclosed, that defendant's motion for a new trial should be granted.") (quoting *Ex parte Brown*, 548 So.2d 993, 994 (Ala.1989))

Arkansas

Berger v. State, 487 S.W.3d 815, 819 (Ark. 2016) ("Even if Berger's allegations had sufficiently demonstrated that evidence was withheld, he fails to establish that such evidence was favorable to him; that it would have been admissible at trial; or that its disclosure would have changed the trial's outcome.")

Kentucky

Taylor v. Com., 63 S.W.3d 151, 159 (Ky. 2001) ("While Wood does not hold that disclosure of inadmissible evidence is never required under the Brady rule, the opinion makes clear that there can only be a violation when there is a 'reasonable probability' that disclosure of the inadmissible evidence would have resulted in a different outcome at trial.") (internal citation omitted)

Mississippi

Underwood v. State, 37 So. 3d 10, 13–14 (Miss. 2010) (*Brady* claim failed because there was "no reasonable probability that the outcome of the proceedings was affected by the State's failure to disclose" the inadmissible evidence)

Montana

State v. Weisbarth, 378 P.3d 1195, 1201 (Mont. 2016) ("The focus of the inquiry should not be on whether the evidence is admissible or inadmissible, but rather whether the evidence is favorable to the defense and could have affected the outcome of the proceedings.")

Nevada

Jimenez v. State, 918 P.2d 687, 693 (Nev. 1996) ("the assumed inadmissibility of the overheard remarks is irrelevant to the issue of whether the State should have informed the defense of the evidence. Discovery in a criminal case is not limited to investigative leads or reports that are admissible in evidence. The issue is whether the State had a duty to inform the defense of this potentially exculpatory evidence, thereafter leaving to the defense problems concerning the extent to which the evidence could be used or expanded upon both before and during trial.")

Oregon

State v. Cockrell, 395 P.3d 612, 620 (Or. Ct. App. 2017) (information that "would not have been admissible at trial is, in most instances and for that reason, immaterial—its existence could not have had any effect on the outcome") (quoting *State v. Deloretto*, 189 P.3d 1243 (Or. Ct. App. 2008))

Pennsylvania

Commonwealth v. Willis, 46 A.3d 648, 670 (Pa. 2012) ("Accordingly, we hold that admissibility at trial is not a prerequisite to a determination of materiality under Brady.")

Tennessee

Nunley v. State, 552 S.W.3d 800, 818 (Tenn. 2018) ("The evidence need not be admissible: '[S]o long as the evidence qualifies as favorable to the accused, the Brady duty of disclosure applies, irrespective of the admissibility of the evidence at trial.'") (quoting *State v. Jackson*, 444 S.W.3d 554, 593-94 (Tenn. 2014))

Virginia

Workman v. Commonwealth, 636 S.E.2d 368, 376 (Va. 2006) ("When assessing the materiality of inadmissible evidence, we apply the general *Brady* test and 'ask only ... whether the disclosure of the evidence would have created a reasonable probability that the result of the proceeding would have been different.'") (quoting *United States v. Sipe*, 388 F.3d 471, 485 (5th Cir.2004))