No. 22-

IN THE

Supreme Court of the United States

WILLIAM MICHAEL CROTHERS,

Petitioner,

v.

THE STATE OF WYOMING,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WYOMING

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In a criminal case based on disputed eyewitness testimony, is the Constitutional rule set out in *Brady v. Maryland* and its progeny prejudicially violated when the prosecutor fails to disclose to the defense the undisputed fact that he promised the witnesses that they would not be prosecuted?

PARTIES TO THE PROCEEDING

Petitioner is William Michael Crothers.

Respondent is the State of Wyoming.

RELATED PROCEEDINGS

Docket CR-2019-280; State of Wyoming v. William Michael Crothers; Circuit Court of the Ninth Judicial District, Teton County, Wyoming; Order Denying Motion for a New Trial, April 21, 2021. (Decision not reported).

Docket No. 18307 & 18385; William Michael Crothers v. State of Wyoming; District Court for the Ninth Judicial District, Teton County, Wyoming; Affirmed Conviction on October 18, 2022. (Decision not reported).

Docket S-22-0261; William Michael Crothers v. State of Wyoming; Supreme Court, State of Wyoming; Declined to Review Case on November 22, 2022. (Decision not reported).

22-CV-00268-SWS; William Michael Crothers v. Bridget Hill and Matt Carr, U.S. District Court for The District of Wyoming. (No decision yet).

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES:

Page

STATUTES AND OTHER AUTHORITIES:

Page

OPINIONS BELOW

The Ninth Judicial Circuit Court's opinion for Teton County, Wyoming denying a motion for a new trial. (April 21, 2021), (Pet. App. 51a). (Decision not reported). The Ninth Circuit Court's opinion, denying a motion to reconsider a motion for a new trial. (May 27, 2001), (Pet. App. 37a). (Decision not reported). The District Court's opinion, Ninth Judicial Circuit, affirming the conviction and denying the motion for a new trial. (October 18, 2022), (Pet. App. 3a). (Decision not reported).

JURISDICTION

The Supreme Court of Wyoming entered its decision on November 22, 2022 (Pet. App. 1a). This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when it actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or taken property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., amend. XIV (Sec 1):

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Factual Background and Procedural History

Factual Background

In May 2019, Petitioner's teenage son invited several friends over to the Petitioner's home in Teton County, Wyoming for a party. The teenagers brought and consumed alcohol and marijuana. (Trial Transcript at 73-78, Feb. 27, 2021).

Petitioner was inebriated upon his return home from a charity event with no pre-existing awareness of the on-going party. (Trial Transcript at 30-32, Feb. 27, 2021). There were twenty teenagers present when Petitioner arrived home. (Trial Transcript at 99, Feb. 27, 2021).

The charges and trial testimony included encounters between Petitioner and two teenage females at the party. D.K. testified that Petitioner approached her while she was in his garage, where much of the party had congregated, and asked her if she was having a good time. He then leaned down to kiss her. D.K. quickly moved her head to

dodge his kiss as Petitioner then planted a kiss on her cheek. (Trial Transcript at 150-53, Feb. 27, 2021).

K.H. also testified about her encounters with Petitioner. She testified that she had been "chugging" vodka from a bottle throughout the night. Petitioner approached her in the garage, hugged her, and grabbed the lower part of her buttocks. K.H. left the garage and went into the main house to get away from Petitioner. She was again approached by Petitioner while walking in the hallway when he grabbed her by the waist and kissed her on the lips. Later that evening, K.H. started crying while telling others at the party that Petitioner had kissed her and grabbed her buttocks. (Trial Transcript at 218-227, Feb. 27, 2021).

None of the partygoers witnessed Petitioner grab K.H.'s buttocks. K.H.'s boyfriend, Riggs Turner, did not see the alleged kiss, even though K.H. was sitting on his lap when the alleged kiss occurred. (Trial Transcript at 187, Feb. 27, 2021). K.H. was upset and crying but did not seek a ride home, made no attempt to leave the party, asked no one for help, and stayed overnight at the Petitioner's home.

School Resource Officer Andrew Roundy ("SRO Roundy")

School Resource Officer Andrew Roundy ("SRO Roundy") learned of the party the following week and began questioning some of the students. Over the ensuing days, Roundy surreptitiously recorded the interviews with the students without advising their parents of his on-going investigation (Trial Transcript at 466, Feb. 27, 2021).

Nine out of the ten witnesses who testified for the State at trial were the students who had been interviewed by Roundy.

As to the charges outlined below, Petitioner was found guilty of Counts 3, 4 and 5; and not guilty of Counts l, 2 and 6. He was sentenced to serve sixty (60) days in the Teton County Jail, with all but thirty (30) days suspended.

- Count 1, Sexual Battery, a misdemeanor in violation of Wyo. Stat. §6-2-313(a).
- Count 2, Unlawful Contact, a misdemeanor" in violation of Wyo. Stat. §6-2-501(g)(i).
- Count 3, Unlawful Contact, a misdemeanor in violation of Wyo. Stat, §6-2-501(g)(i).
- Count 4, Unlawful Contact, a misdemeanor in violation of Wyo. Stat. §6-2-501(g)(i).
- Count 5, Permitting House Party Where Minors Present, in violation of Wyo. Stat. §6-4-406(a).
- Count 6, Breach of Peace, a misdemeanor in violation of Wyo. Stat. §6-6-102(a).

The State's Failure to Disclose Brady Material

There can be no dispute that the credibility of the teenage witnesses was a paramount issue argued by the defense at trial. There also was no dispute at trial that those witnesses were drinking alcohol and smoking marijuana at the party. With that, the following assertions were not in dispute at the trial.

1) There is no factual dispute that at the outset of each interview with the teenagers, Deputy Roundy informed them that they were not going to be in trouble for anything that they may disclose to him about drinking alcohol or using marijuana at the house party.

2) There is no dispute that many of the teenagers had committed misdemeanor crimes pursuant to Wyoming Law by consuming alcohol and marijuana. Indeed, the offenses committed by the teenagers coincide with the same level of offenses charged against Petitioner.

3) There is no dispute that the Roundy interviews, including the promise not to charge the teenagers with any offenses, was known to defense counsel through discovery.

4) There is no dispute that prior to trial one of the parents sent the following email to the prosecutor in this case. The email and the prosecutor's response were as follows:

> "[I]t seems that several parents are concerned that their kids will get in trouble about drinking or illegal behavior during the party in question. Is there some sort of statement that could be made either in writing or otherwise, assuring these families that their kids will not be held accountable for underage drinking, etc. while on the stand for this case?"
>
> The prosecutor's response stated, in relevant part, 'We'll reassure them about drinking etc."

(See Attachment A to Defendant's Motion for New Trial).

The e-mail is from the mother of one of the State's witnesses, namely, a 16-year-old female high school student who is the subject of the Unlawful Touching count. The e-mail leaves no doubt that the sender wants assurances from the ***prosecutor*** (emphasis added) in addition to or opposed to Officer Roundy's statements made to only the students directly at their interviews. Moreover, that the extraction of a promise not to prosecute was the very reason for the e-mail. The communication also reflects the fact that the parent was expressing the collective mentality of other parents regarding the exposure to criminal charges associated with their children admitting under oath that they had committed criminal offenses.

5) There is no dispute in the record, including the numerous post-trial motions and filings (along with the accompanying affidavits of the trial prosecutor and defense attorney), that the prosecutor never disclosed the existence of the e-mail to the defense; never disclosed the sum and substance of the underlying communication itself; never disclosed that he had promised the witnesses that he (the **prosecutor)** would not bring charges; that the e-mail communications were not otherwise provided to the defense in discovery; and finally, that there is no dispute that the state never disclosed this communication, but rather, that it was only discovered post-trial by the defense through a public records request. The record clearly establishes, therefore, that the prosecutor failed to disclose to the defense the key fact that the prosecutor made a legally binding commitment to the witnesses and their parents that they would not be prosecuted if they testified.

Post-Trial Litigation Regarding the Brady Material

In a post-conviction motion, Petitioner moved, among other issues raised, for a new trial arguing that the State had violated Brady based on the newly discovered evidence that Deputy Allan promised that the witnesses would not be subject to prosecution.

As opposed to addressing the e-mail from the parent and the related Brady issues attendant thereto, both the prosecutor and the Courts below, cast aside any effort to directly address the same by engaging in a series of misapplied legal analysis grounded in two central, faulty conclusions. First, that statements made by a law enforcement officer to various witnesses during the investigate phase have the same legal effect as promises and assurances not to prosecute made by a prosecutor to the same witnesses during the pretrial preparation phase. Second, that a prosecutor's uncommunicated, subjective intent not to prosecute witnesses has the same legal effect as when a prosecutor communicates his subjective intent to the various witnesses to garner their further cooperation. In the first instance, the lower courts wrongly equated a law enforcement officers' promise to that of a prosecutor. In the second instance, the lower courts conflated a prosecutor disclosing his subjective intent not to prosecute various witnesses with his duty to disclose the promises he made to the various witnesses not to prosecute them.

As evinced by the motions, decisions and appeals below, specifically as to the Brady violation assertion, both the State and more importantly the courts below,

all conclude that Roundy's statements to the minors was one in the same as to the prosecutor's promises to the witnesses. Further, that for what constitutes "disclosure" pursuant to Brady, knowledge of the Roundy statement sufficed to "cover" any lack of disclosure as to the e-mail communication between the prosecutor and the parents not to prosecute the witnesses for their crimes. The defense herein concedes that if in fact they are one in the same, then no Brady violation exist. However, if the contrary is true, which it undoubtedly is, then a significant Brady violation occurred that deprived defendant of his right to a fair trial, right to confront the witnesses against him and violated the notions and underpinnings upon that which the principles in Brady are founded.

As further apparent from an analysis of the relevant decisions below, both the Court and the State misapply the relevant Brady analysis by conflating the prosecutor's subjective intent with what promises the prosecutor made to the witnesses. Simply put, the lower courts held that the prosecutor's decision not to prosecute his witnesses, that was arguably disclosed to defense counsel, satisfied the prosecution's duty under *Brady*. The *Brady* rule was violated, however, when the prosecution did not disclose the promise made to the witnesses that they would not be prosecuted.

Procedural History

The Petitioner was convicted after trial in the Ninth Judicial Circuit Court for Teton County, Wyoming of three misdemeanors: two counts of unlawful contact and one count of permitting a house party where minors were present. On April 11, 2020, the defendant was sentenced

to 30 days in jail, 30 days suspended sentence, six months' probation, and a fine of $2,250.00.

Petitioner filed a motion for a new trial alleging, *inter alia* that a *Brady* violation had occurred, i.e., that the prosecutor had failed to disclose to defense counsel that the prosecutor had promised the State's minor witness and their parents that the witness would not be prosecuted.

In opposing the motion, the prosecutor submitted an affidavit. In the affidavit, the prosecutor stated that: (1) he talked to Deputy Roundy, a school resource officer who had promised the minor witnesses that they would not be prosecuted; (2) the prosecutor agreed to honor the deputy's commitment to the minors; (3) he told defense counsel that he agreed with the deputy's representation that the minor witnesses would not be charged with any crime; and (4) the prosecutor told the minor witnesses and their parents that no one would be prosecuted.

Defense counsel submitted two affidavits. In the first affidavit he stated that the prosecutor never informed him that the prosecutor had "immunized the State's witnesses" (para. 9). In the second affidavit, he stated that the prosecutor never disclosed to him that: (1) the prosecutor "had promised the witnesses that they would not be prosecuted"; (2) any benefit had been provided to any witness; or (3) any benefit had been communicated to any witness (para. 2). (Pet. App. 61a).

The Circuit Court held that the State had not suppressed favorable evidence. It held that the prosecutor's obligation under *Brady* had been met when the prosecutor informed defense counsel that the State would not be

charging any of the minor witnesses for any offenses regardless of whether the minor witnesses cooperated or testified.

The motion was denied on April 21, 2021. (Pet. App. 51a).

The Petitioner appealed his conviction and the denial of a motion for a new trial to the District Court, Ninth Judicial District, Teton County, Wyoming. The Petitioner alleged, *inter alia* that a *Brady* violation had occurred when the State failed to disclose to defense counsel a communication the prosecution had with key witnesses regarding their criminal liability.

In the Respondent's brief in opposition to the appeal, Respondent argued that the State had satisfied its *Brady* obligation because defense knew about the prosecution's unilateral promise of non-prosecution of witnesses regardless of whether or not they testified.

The District Court held that the promise made to the minor witnesses by the prosecutor was a promise of immunity and that the prosecutor's obligation under *Brady* had been satisfied when the prosecutor informed defense counsel of the "immunity agreement."

On October 18, 2022, the District Court affirmed the Petitioner's conviction and affirmed the decision to deny the motion for a new trial. (Pet. App. 3a).

On November 22, 2022, the Supreme Court, State of Wyoming denied a petition for a writ of review. (Pet. App. 51a).

Compliance With Supreme Court Rule 14.1(g)(i)

The federal question raised, is whether this Court's decision in *Brady v. Maryland* was violated. The federal question was raised in the trial court when, on October 9, 2020, a motion for a new trial was made in the Circuit Court in the Ninth Judicial District, Teton County, Wyoming. The Court ruled against the Petitioner on the federal question in its Order Denying the Motion (April 21, 2021, pages 7-13). The federal question was raised again to the District Court for the Ninth Judicial District, Teton County, Wyoming. The Court ruled against Petitioner on the Federal Question in Affirming the Conviction (October 18, 2022, pages 14-15).

The Federal Question was raised again in Petitioner's Petition for Writ of Review filed in the Wyoming Supreme Court. The Court declined to hear the case and denied the Petition on November 22, 2022.

REASONS FOR GRANTING THE WRIT

Although *Brady v. Maryland* Has Been Settled Law for Sixty Years, Many Prosecutors and Courts Below Still Do Not Understand the Prosecution's Obligations to Disclose Exculpatory Information and Impeachment Material

a) *Brady* Violations Remain Pervasive Despite This Court's Clear Guidance

Despite the fact that the *Brady* rule has reached its sixtieth anniversary, *See Brady v. Maryland*, 373 U.S. 83 (1963), "judging by the number of cases overturned

because of *Brady* violations, misconduct continues at an alarming rate." *See* Jason Kreag, *The Jury's Brady Right*, 98 B.U. L. Rev. 345, 355 (2018).

The *Brady* rule and its elements have been well established by the Court. Prosecutors have an obligation to disclose evidence that is favorable, either because it is exculpatory or because it constitutes impeachment evidence. Prosecutors violate the rule when they fail to disclose this evidence, either intentionally or inadvertently. Finally, the undisclosed evidence must be material, i.e., there must be a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.

Over the last six decades following *Brady*, this Court has expanded its holding, increasing the burden on prosecutors to ensure a fair trial. In *Giglio v. United States*, 405 U.S. 150 (1972), the Court held that *Brady* extended to impeachment evidence, not just exculpatory evidence. In *United States v. Bagley*, 473 U.S. 664 (1985), the Court clarified the standard for "materiality": regardless of the nature of the defense request or whether a request is made at all, exculpatory evidence is material only if there is a "reasonable probability" that it "would" affect the outcome of the trial. *Id.* at 682.

Finally, this Court expanded *Brady* by extending it beyond what is known to prosecutors; prosecutors have a duty to learn of any favorable evidence known to others acting on behalf of the government, including the police. *See Kyles v. Whitley*, 514 U.S. 419 (1995).

While the basic elements of the *Brady* rule are well established, "the *Brady* disclosure duty has become one

of the most unenforced constitutional mandates in the criminal justice system." Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Interference of Innocence*, 100 J. Crim. L. & Criminology 415, 434 (2010).

Ten years ago, Ninth Circuit Judge Alex Kozinski warned that we had reached an "epidemic" of *Brady* violations, *United States v. Olsen*, 737 F.3d 625, 631 (9th Cir. 2013). Several national studies support the conclusion that *Brady* violations are pervasive, continuous and persistent. Jones, Supra, at 434. One academic who has opined extensively on this subject has reached the same conclusion: "Nondisclosure of exculpatory evidence by prosecutors … account[s] for more miscarriages of justice than any other type of prosecutorial infraction." Bennett L. Gershman, *Prosecutorial Misconduct* §5:1, 5:3 (2d ed. 2002).

Unfortunately, this seems only to be the tip of the iceberg. As *Brady* is a rule requiring an affirmative duty to disclose, violations of that rule may never be revealed. The extent of the problem, therefore, has been understated. As one commentator has noted, "The failure to discover prosecutorial misconduct is especially likely in cases of *Brady* violations." Margaret Z. Johns, *Unsupported and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 Fordham L. Review 509, 513 (2011). Judge Kozinski has also concluded that assessing the prevalence of *Brady* violations is difficult: "Prosecutorial misconduct is a particularly difficult problem to deal with because so much of what prosecutors do is secret," Hon. Alex Kozinski, *Criminal Law 2.0*, 44 Geo. L.J. Ann. Rev. Crim. Proc. iii, xxiii (2015).

One commentator has reviewed the "scars from *Brady* misconduct" and notes that it can result in the wrongful conviction of innocent defendants, as well as harm to others in the criminal justice system. This harm can extend to jurors and witnesses who realize they were unknowingly participating in the prosecutor's misconduct. And, the harm can extend, of course, to the public which will question the "very integrity of the criminal justice system," Jason Kreag, *Disclosing Prosecutorial Misconduct*, 72 Vand. L. Rev. 297 (2019).

Legal scholars have proposed an array of reforms to address the problem. Some academics have proposed increased training for prosecutors on the *Brady* rule. See, e.g., Bennett L. Gershman, *Educating Prosecutors and Supreme Court Justices About Brady v. Maryland*, 13 Loy. J. Pub. Int. L. 517 (2012). This Court, on more than one occasion, has suggested the use of the attorney disciplinary process to respond to the increase in *Brady* violations. *See, e.g.*, *Bank of N.S. v. United States*, 487 U.S. 250, 263 (1988); *Imbler v. Pachtman*, 424 U.S. 409, 428-429 (1976). Despite any attempts at reform, however, violations of the *Brady* rule continue to be violated despite six decades of settled law from the Court.

This case presents this Court with an opportunity to reaffirm the core principles of *Brady* and to reaffirm this Court's commitment to ensuring that defendants in criminal cases have sufficient access to exculpatory and impeachment material and, as a result, receive a fair trial.

(b) This Case Provides the Court with the Opportunity to Correct a Significant Misunderstanding of the *Brady* Rule by Prosecutors

The prosecutor's obligation in this case was stunningly simple: he was obligated to disclose to defense counsel that he had promised the underaged witnesses and their parents that the witness would not be charged with any crimes. The fact that he failed to do so, that he does not deny that fact, and yet continues to argue that he complied with his *Brady* obligations, underscores the lack of understanding apparently still held by many prosecutors.

The facts are relatively simple. After the Petitioner's trial, Petitioner discovered communications from the prosecutor (Deputy Allan) in which the prosecutor had reassured the underaged witnesses and their families that they would not be prosecuted for crimes if they testified at the Petitioner's trial. Petitioner moved for a new trial based on a *Brady* violation. Both the prosecutor and defense counsel (Fleener) submitted affidavits.

In his affidavit, the prosecutor made two assertions which he believed satisfied his obligations under *Brady*. First, he stated that he told defense counsel Fleener that he agreed with a deputy school resource officer (Roundy) who had made representations to the witnesses that none of them would be charged with any crimes (para. 6, affidavit). Second, he stated that he had assured the witnesses and their parents that no one would be prosecuted (para. 9, affidavit). (Pet. App. 12a).

In defense counsel's affidavit, he stated that the prosecutor never disclosed to him that he (the prosecutor)

had "promised the witnesses that they would not be prosecuted" (para. 2, second affidavit of Thomas Fleener).

What is clear from the prosecutor's affidavit is that he believed he had satisfied his *Brady* obligations by only informing defense counsel prior to trial that none of the witnesses would be prosecuted. That was entirely irrelevant to his responsibility under *Brady* and, most significantly, he did not, and could not claim in his affidavit that he disclosed to defense counsel that he had promised the witness that they would not be prosecuted.

The significance of the prosecutor's promise is self-evident. Prior to trial, one of the parents sent an email to the prosecutor asking for a legally binding assurance that their daughter would not be prosecuted: "Is there some sort of statement that could be made either in writing or otherwise, assuring these families that their kids will not be held accountable for underage drinking, etc. while on the stand for the case." (Attachment, A to Petitioner's Motion for a new trial). The prosecutor gave them that assurance. Thus, this assurance gave the witness a motive to testify favorably for the prosecution, something which could never be explored by the defense at trial without the defense knowing of the promise.

The materiality of the undisclosed information is also self-evident. As defense counsel states in his affidavit, had he known of the prosecutor's promise, his strategy in defending the Petitioner would have changed completely. His cross-examination of the State's witness would have focused on their bias, after having received favorable treatment. His *voir dire* would also have concentrated on the fact that the State had provided favorable treatment.

Finally, his request for jury instructions would have asked for a jury charge on bias. Thus, had the promise been disclosed, there is a reasonable probability that the result of the proceeding would have been different, especially because the innocence or guilt of the defendant turned on the credibility of young witnesses whose testimony may well have been influenced by the undisclosed prosecutorial promises.

The Court also has the opportunity to create a new standard of materiality in cases such as this, where the prosecutor is obviously aware of impeachment material, since he is the one who made the promise. In these cases, the prosecutor should be held to a higher standard under *Brady*. The Court has the opportunity to create a presumption of materiality where it is clear that the prosecutor knew of the *Brady* material but withheld it.

The prosecutor obviously realized the withheld promise would be highly material to an effective cross examination of the eyewitnesses. That is why he withheld it. Now to credit his claim of lack of materiality would allow prosecutors to improperly have it both ways: they can withhold crucial impeachment material of which they are aware; and then after winning at trial, deny the defendant relief by claiming that it was immaterial. The court should not allow prosecutors to be so cavalier with defendant's constitutional rights.

There is no dispute in this case about what was not disclosed to defense counsel, i.e., a promise by the prosecutor to a witness not to prosecute. The fact that the prosecutor, as well as the courts in Wyoming, did not understand that what was not disclosed was a clear

violation of *Brady*, speaks volumes about the continued misunderstanding of the *Brady* rule itself.

The prosecutor's misunderstanding is difficult to fathom in light of this Court's ruling almost fifty years ago in *Giglio v. United States*, 405 U.S. 150 (1972). In that case, the prosecution failed to disclose a promise made to a witness that he would not be prosecuted if he testified for the Government. In reversing the defendant's conviction, this Court held that "evidence of any understanding or agreement as to a future prosecution would be relevant to [the witness'] credibility and the jury was entitled to know of it." *Id*. at 155.

Following *Giglio*, courts have routinely reversed for similar *Brady* violations: *United States v. Obagi*, 965 F.3d 993 (9th Cir. 2020) (witness received immunity); *Mahler v. Kaylo*, 537 F.3d 494 (5th Cir. 2008) (witness pre-trial statements that were inconsistent); *Silva v. Brown*, 416 F.3d 980 (9th Cir. 2005) (witness had entered into a plea agreement); *Wilson v. Beard*, 589 F.3d 651 (3d Cir. 2009) (witness had mental history); *Lewis v. United States*, 408 A.2d 303 (D.C. Cir. 1979) (witness' prior criminal history).

It has been six years since this Court has had occasion to opine on the *Brady* rule. *See Turner v. United States*, 137 S. Ct. 1885 (2017). This case would give the Court an opportunity to reaffirm its commitment to ensuring that defendants in criminal cases have access to exculpatory evidence and impeachment evidence prior to trial. At the same time, the Court would have the opportunity to clarify a misunderstanding still held by some prosecutors six decades since *Brady* was decided. The passage of time has not diminished the Court's commitment to a fair trial

when it said, "Society wins not only when the guilty are convicted but when criminal trials are fair." *Brady*, 373 U.S. at 87.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

Page

APPENDIX A — DENIAL OF REVIEW OF THE SUPREME COURT OF THE STATE OF WYOMING, FILED NOVEMBER 22, 2022

IN THE SUPREME COURT, STATE OF WYOMING

October Term, A.D. 2022

S-22-0261

WILLIAM MICHAEL CROTHERS,

Petitioner,

v.

THE STATE OF WYOMING,

Respondent.

ORDER DENYING PETITION FOR WRIT OF REVIEW

This matter came before the Court upon a Petition for Writ of Review, filed herein November 1, 2022. After a careful review of the petition, the materials attached thereto, the Response to Petition for Writ of Review, Petitioner's Reply to State's Response to Petition for Writ of Review, and the file, this Court finds that the petition should be denied. It is, therefore,

ORDERED that the Petition for Writ of Review, filed herein November 1, 2022, be, and hereby is, denied; and it is further

Appendix A

ORDERED that the Motion for Admission of Attorney Alan M. Dershowitz *Pro Hac Vice*, filed herein November 1, 2022, be, and hereby is, denied as moot.

DATED this 22nd day of November, 2022.

BY THE COURT:

/s/

KATE M. FOX
Chief Justice

APPENDIX B — ORDER OF THE NINTH JUDICIAL DISTRICT, COUNTY OF TETON, STATE OF WYOMING, FILED OCTOBER 18, 2022

IN THE DISTRICT COURT OF THE
NINTH JUDICIAL DISTRICT WITHIN
AND FOR THE COUNTY OF TETON,
STATE OF WYOMING

Civil Action Nos. 18307; 18485

WILLIAM MICHAEL CROTHERS,

Appellant (Defendant),

v.

THE STATE OF WYOMING,

Appellee (Plaintiff).

ORDER AFFIRMING CRIMINAL CONVICTION AND AFFIRMING DENIAL ON MOTION FOR NEW TRIAL

The above-entitled matter is before the Court on two appeals—an appeal from Appellant's criminal convictions and from the denial of Appellant's motion for a new trial. Appellant appeals the judgment and sentence entered against him on April 16, 2020. On October 9, 2020, he filed a motion for a new trial, which the circuit court denied on April 21, 2021. Both appeals were consolidated by this Court on July 20, 2021.

Appendix B

Oral arguments were heard on August 3, 2022. Devon Peterson and Alan Dershowitz represented Appellant, with argument by Mr. Dershowitz. Clayton Kainer represented and argued on behalf of the State. Having heard arguments, having considered the record, and being otherwise fully advised in the premises, the Court affirms the criminal conviction and the denial on motion for a new trial for the following reasons:

I. ISSUES

There are five dispositive issues for the Court's consideration:

1. Did the court properly deny Appellant's motion for a new trial based upon the allegation that the State committed a *Brady* violation when it failed to disclose communications with key witnesses regarding their criminal liability?

2. Did the State commit prosecutorial misconduct, and thus deprive Appellant of his constitutional right to a fair trial, by amending the Information with a sexual battery charge prior to trial, by orchestrating a negative press campaign against Appellant, or by failing to disclose communications with witnesses about their criminal liability?

3. Did the court violate Appellant's right to effective cross-examination when it prevented him from cross-examining witnesses about a video that would undermine their credibility and reliability?

4. Did the court err in denying Appellant's motion for change of judge?

5. Is the unlawful contact statute unconstitutionally vague as applied to Appellant, or, in the alternative, was the evidence insufficient to convict him?

II. FACTS

On May 11, 2019, Appellant, William Michael Crothers, arrived home after a charity event to unexpectantly find a high school party, hosted by his teenaged son, underway at his house. Appellant mingled with the teenaged partygoers, drinking and smoking marijuana with them. At one point, he looked at L.K., one of the girls at the party, and, loud enough for her to hear, exclaimed that he "needed some pussy." Appellant also exclaimed to another girl, E.H., that she was a "hot piece of ass."

Trial testimony revealed Appellant's physical encounters with two of the girls. D.K. testified that Crothers approached her while she was in his garage, where much of the party had congregated, and asked her if she was having a good time. He then leaned down to kiss her. D.K. quickly moved her head to dodge his kiss, and Appellant planted a kiss on her cheek. W.O., one of the boys nearby, testified that he witnessed this encounter and explained to the jury that D.K. turned her head to avoid the kiss.

K.H, also testified about her encounters with Appellant. She testified that she had been "chugging"

vodka from the bottle throughout the night. Appellant approached her in the garage, hugged her, and grabbed the lower part of her buttocks. K.H. left the garage and went into the main house to get away from Appellant. After a while, she was walking in the hallway when he approached her again, grabbed her by the waist, and kissed her on the lips. K.H, ran from the house crying, but eventually returned to the party in the garage.

Later that night, K.H. had another encounter with Appellant, but she could not remember it. W.O., one of the boys at the party, testified that Appellant approached K.H. while she was sitting on her boyfriend's lap in the garage. Appellant leaned down and kissed K.H. on the lips. K.H. leaned back as far as she could to avoid the kiss. Appellant forced the kiss on her and had to be pulled off her by another kid.

Deputy Andrew Roundy of the Teton County Sheriff's Office, a school resource officer, caught wind of the house party at the high school the following day. He learned about Appellant allegedly kissing and grabbing the girls, and Deputy Roundy interviewed the minor partygoers individually. He recorded the interviews and verbally assured each minor that they would not be in trouble for drinking or drug use at the party. The focus of the interviews was Appellant's culpability.

After interviewing the teenaged partygoers, Deputy Roundy recorded an interview with Appellant. During the interview, Appellant was contrite and repentant. On May 17, 2019, Deputy Roundy issued Appellant three citations:

One citation fox unlawful contact, one for permitting a house party with minors present, and one for breach of peace. The State amended the charges by filing an information on September 11, 2019, which included one count of sexual battery, two counts of unlawful contact, one count of breach of peace, and one count of permitting a house party where minors are present. The State filed a First Amended Information on January 31, 2020, which added a charge for unlawful contact. The First Amended Information charged Crothers with sexual battery in violation of W.S. § 6-2-313(a), three counts of unlawful contact in violation of W.S. § 6-2-501(g)(i), one count of permitting a house party where minors were present in violation of W.S. § 6-4-406(a), and one count of breach of peace in violation of W.S, § 6-6-102(a). A jury trial was held on February 26-28, 2020.

The jury convicted Appellant of the three unlawful contact charges and the charge for permitting a house party. On April 11, 2020, the court sentenced him to thirty (30) days in jail for each conviction to be served concurrently, The court stayed the sentences pending appeal.

On October 9, 2020, Appellant filed a motion for a new trial alleging newly discovered evidence. He claimed that he had learned that the State had entered into immunity agreements with the minor witnesses but had failed to disclose those immunity agreements to the Defense. The State responded with an affidavit by the lead prosecutor, Clark Allan, in which Mr. Allan outlined that he had agreed to honor Deputy Roundy's assurances to the

minors that they would not be in trouble. The affidavit states that Mr. Allan had pre-trial conversations with Defense counsel Thomas Fleener. In one conversation, Mr. Allan remembered telling Mr. Fleener that he had made a commitment to not prosecute the teenaged partygoers regardless of whether they would be testifying.

The court held that the promise not to prosecute the minor witnesses was favorable evidence and subject to *Brady* analysis. However, the court determined there was no *Brady* violation because the favorable evidence was known by the defense and had not been suppressed by the State. The court held that even if the evidence had been suppressed, there was no reasonable probability that, had it been disclosed, the result of the trial would have been different. Because the jury knew that the minors would not be prosecuted, any further reference to that evidence would have been cumulative. The court denied the motion for a new trial. Appellant filed a motion for reconsideration, which the court denied without a hearing.

While the decision on the motion for a new trial was pending, Appellant moved to disqualify the trial judge from deciding the motion for a new trial. Appellant claimed that the trial judge could not impartially assess the credibility of the prosecutor because of the judge's long-standing professional relationship with the prosecutor, which had culminated with the judge recommending the prosecutor to the Judicial Nominating Commission for an appointment The proceedings to disqualify the trial judge were referred to the Honorable Matthew F.G. Castano for consideration.

While the motion to disqualify the trial judge was pending, Appellant served a subpoena duces tecum on Chief Justice Michael K. Davis of the Wyoming Supreme Court seeking confidential judicial nominating records relating to Mr. Allan's nomination. The Wyoming Attorney General's Office intervened and moved to quash the subpoena duces tecum, which the court granted. Appellant also issued a subpoena for the circuit court judge, Judge Radda, to testify. The attorney general's office intervened and moved to quash that subpoena, which the court also granted. The Parties had a hearing on the motion for a change of judge on February 12, 2021, and the court denied the motion, Judge Castano entered an order explaining the decision to deny the motion for change of judge.

Appellant asserts a timely appeal on his criminal convictions and on the denial of the motion for a new trial. The appeals were consolidated on July 20, 2021.

III. STANDARDS OF REVIEW

The issues before the Court have differing standards of review. On the issue of whether the State committed a *Brady* violation, a constitutional issue, the Court applies *de novo* review. *Lawson v. State,* 2010 WY 145, ¶ 19, 242 P.3d 993, 1000 (Wyo. 2010). The Court also reviews *de novo* the circuit court's denial of Appellant's motion for a new trial on the ground that the State improperly suppressed impeachment evidence. *Id.* Similarly, on the issue of whether W.S. § § 6-2-501(g)(i) is unconstitutionally vague as to Appellant's conduct, the Court applies *de novo* review. *Giles v. State,* 2004 WY 101, ¶ 10, 96 P.3d 1027, 1030 (Wyo. 2004).

Appendix B

On the issue of prosecutorial misconduct, the court applies the plain error standard to the those matters to which Appellant did not object and the court applies the harmless error standard to those statement to which Appellant objected. *Bogard v. State,* 2019 WY 96, ¶ 18, 449 P.3d 315, 321 (Wyo. 2019). To demonstrate plain error, Appellant "must show 1) the record clearly reflects the incident urged as error; 2) a violation of a clear and unequivocal rule of law; and 3) that he was materially prejudiced by the denial of a substantial right," *Id.* ¶ 21, 449 P.3d at 321 (citation & quotations omitted). To demonstrate harmless error, Appellant must show "a violation of a clear and unequivocal rule of law in a clear and obvious, not merely arguable, way." *Id.* (citations, quotations & alteration omitted). Under either standard, the focus is upon whether the alleged error affected Appellant's substantial right to a fair trial. *Id.* ¶ 21, 449 P.3d at 321. The Court will review Appellant's arguments for harmless error.

The Court uses the abuse of discretion standard when reviewing the denial of a motion for disqualification of a judge for cause. *Royball v. State,* 2009 WY 79, ¶ 12, 210 P.3d 1073, 1076 (Wyo. 2009). "An abuse of discretion occurs when the deciding court could not have reasonably concluded as it did." *Id.* The Court reviews the decision "to quash a subpoena for abuse of discretion." *Hathaway,* ¶ 43, 399 P.3d at 636.

Appendix B

IV. DISCUSSION

Appellant's arguments focus upon the five main issues, as listed above,

1. ls Appellant entitled to a new trial because of the State's *Brady* violation?

Appellant argues that he is entitled to a new trial because the State failed to disclose favorable impeachment evidence in violation of *Brady.* In *Brady v. Maryland,* 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215 (1963), the Court held, "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." "[D]ue process also requires the prosecution to disclose impeachment evidence, including plea agreements made with witnesses." *Worley v. State,* 2017 WY 3, ¶ 14, 386 P.3d 765, 770 (Wyo. 2017) (citing *Giglio v. United States,* 405 U.S. 150, 154, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972)). "

"In order to establish a *Brady* violation, a defendant must demonstrate that the prosecution suppressed evidence, the evidence was favorable to the defendant, and the evidence was material. Favorable evidence includes impeachment evidence." *Lawson,* 121, 242 P.3d at 1000. The prosecutor bears the "affirmative duty" to learn of favorable evidence and to divulge that evidence to the defense. *Id.* "However, *Brady* does not 'automatically require a new trial whenever a combing of the prosecutor's

files after the trial discloses evidence possibly useful to the defense but not likely to have changed the verdict.'" *Id.* (quoting *Giglio,* 405 U.S. at 154, 92 S.Ct. at 766). The law requires there be a new trial only if the undisclosed evidence is material. *Id.*

Under *Brady,* evidence is material when there is a reasonable probability the result of the trial would have been different if the evidence had been disclosed. *Id.* ¶ 22, 242 P.3d at 1000. A reasonable probability is a probability that undermines confidence in the outcome of the trial. *Id.* This Court focuses upon "the cumulative effect of the withheld evidence, rather than on the impact of each piece of evidence in isolation." *Id.* ¶ 22, 242 P.3d at 1001.

During Deputy Roundy's interviews with each teenaged partygoer, he made assurances that the child would not be "in trouble." After trial, the Defense learned that some of the parents had approached the prosecutor's office before trial about immunity for their children. This led to Appellant's motion for a new trial based upon the alleged *Brady* violation.

In response to Appellant's motion for a new trial, the State filed an affidavit by Mr. Allan. In the State's affidavit, Mr. Allan attested to the fact that he had not made an agreement with any of the teenaged witnesses, that he was committed to honoring Deputy Roundy's promises to not prosecute the teenagers, and that he had discussed these things with Mr. Fleenor on the phone before trial. The affidavit states as follows:

> 4. I agreed with Deputy Roundy's assessment and concluded I would honor his representations to the young witnesses in their interviews, and that none of the high school aged witnesses would be prosecuted for misdemeanor alcohol or controlled substance violations. This was a unilateral commitment and would be true regardless of whether they cooperated or testified in the case.
>
> 5. During the time I was preparing for trial, I had many discussions about the case and the trial with the defendant's attorney, Tom Fleener, These were both in person and on the telephone. In at least one of these conversations, the topic of charges against the State's witnesses came up.
>
> 6. To the best of my recollection, Mr. Fleener brought it up by complaining about Deputy Roundy's representations in the interviews, and the fact that none of the kids had been charged with anything. X told Mr. Fleener that I agreed with Deputy Roundy's representations and that, in fact[,] none of the youthful participants at the party would be charged with misdemeanor crimes.

(R. at 682.) It is noteworthy that neither Mr. Allan nor any other prosecutor in the Teton County and Prosecuting Attorney's Office prosecuted any of the teenaged partygoers, even those who did not testify on behalf of the State.

Appellant argued that the promise to not prosecute was an immunity agreement that was not disclosed to him before trial. Devon Petersen, one of Crothers' defense attorneys, filed an affidavit in support of the motion for a new trial. Mr. Peterson stated that he learned from a parent that there had been a meeting of the parents in which the State promised witness immunity in exchange for witness testimony.

> 3) Having learned of the immunity, I contacted a parent of one of the State's witnesses at trial. This parent confirmed that he had attended a meeting at which the State granted the witness immunity for the witness's testimony at trial.
>
> 4) The parent did not want to become publicly involved in the Motion for New Trial by signing an affidavit for fear of retaliation by Teton County authorities.

(R. at 464.) Because the parent refused to testify, this evidence was simply hearsay, which the court found inadmissible. However, Mr. Fleener filed an affidavit in which he categorically denied that the State had disclosed the evidence.

> 9. I categorically deny knowing prior to trial that the State of Wyoming immunized its witnesses. Referring to paragraphs five and six of Mr. Allan's affidavit, I do not deny that he and I had discussions about this case. However, Mr. Allan never informed me that he had immunized the State's witnesses. The first

> I learned of immunity agreements came when we received responses to our Wyoming Public Records Act Requests. When we read an email between one of the witnesses' parents and Mr. Allan it was fairly clear to us that the State had immunized its witnesses. This belief was furthered when we interviewed one of the other parents and they confirmed that Mr. Allan had told them and their child that their child would not be prosecuted. Mr. Allan's affidavit attached to the State's Response to our Motion for a New Trial confirmed what, by then, we certainly suspected that the State had immunized its witnesses.

(R. 844-845.) Upon considering the evidence and arguments at the hearing on the motion for a new trial, the circuit court agreed that the State's promise that none of the underaged witnesses would be prosecuted was impeachment evidence regarding favorable treatment. It held it was *Brady* evidence, even though it was not a promise made in return for truthful testimony or another *quid pro quo.*

The trial court held the State did not suppress the evidence about the promise not to prosecute. It held that Mr. Allan informed Mr. Fleener that the State was not charging the witnesses regardless of whether they testified. That court held, based upon Allan's affidavit, that Mr. Allan told Mr. Fleener prior to trial that the State was not charging any of the witnesses regardless of whether the witnesses testified. (R. 932.)

The trial court also held that Mr. Fleener's affidavit did not directly address Mr. Allan's statement that the State unilaterally had decided not to prosecute. The trial court reasoned that the affidavit did not specifically deny that Mr. Allan told Mr. Fleener about not charging the witnesses. Therefore, nothing in Mr. Fleener's statement contradicted Mr. Allan's statement. That court held the Defense failed to prove there was an immunity agreement. It also held that the Defense's reliance upon statements made by the parents, claiming that Mr. Allan had told them that their children would not be prosecuted, were inadmissible hearsay. Those statements would not be admitted at a retrial.

The trial court held that even though the evidence did not support the claim that the State had not disclosed the promise not to prosecute, it would consider whether the results would have been different if that evidence had been disclosed. Evidence is material when there is a reasonable probability that the result of the proceedings would have been different if the evidence had been disclosed. *Lawson*, ¶ 22, 242 P.3d at 1000-01. The trial court held there was not a reasonable probability the result would have been different. The Defense was aware that Deputy Roundy had promised the teenagers would not be in trouble. The Defense took advantage of Deputy Roundy's offer by attacking the students' credibility in opening statements. The Defense also cross-examined Deputy Roundy about that decision. The court held the jury was aware the students would not be prosecuted. Any further evidence about the promise to not prosecute would have been cumulative in the minds of the jury. (R. at 934.) Even if the

Defense had challenged the testifying minors' credibility based upon the immunity agreements, the court held Mr. Crothers would still have been convicted on the count of permitting a house party where minors were present.

Now on appeal before this Court, Appellant claims the State violated *Brady* when the State failed to disclose Mr. Allan's promise of immunity to the Defense while there was a reasonable probability that if the immunity agreements had been disclosed, Appellant would not have been convicted. Appellant claims that even though the Defense knew about the school resource officer's promise of immunity, it did not know about Mr. Allan's promise of immunity. Appellant points to an email from one of the parents of the teenaged party-goes who had concerns about the prosecution of her child. Appellant claims, "[Ms. Kirkpatrick] requests that Deputy Allan provide a 'statement' or other assurance that the witnesses and their families would not be prosecuted. In other words, promise use immunity and we will agree to testify." (Br. Of Appellant., p. 19.) Appellant argues that the promise of immunity was not unilateral. (Br. Of App. at 20.)

The State counters that *Brady* did not apply to the prosecutor's promise not to prosecute. The State claims the promise was unilateral because it did not matter whether the teenager was going to testify. The State counters that there was no immunity agreement, per se, and the State had simply assured the parents that their children would not be prosecuted. The State claims that there was no promise in exchange for testimonies and therefore, no immunity agreement. Finally, the State

claims that even if this Court finds that the State's decision to not prosecute any of the juveniles was an immunity agreement, State's Counsel disclosed it when the State discussed with the Defense during trial preparation its decision not to prosecute.

There has been much ado about whether there was an immunity agreement. The State claims it was not an official immunity agreement, so *Brady* does not apply. An immunity agreement, whether formal or informal, is a contract and is made in exchange for cooperation. 22 C.J.S. Criminal Law: Substantive Principles §§ 107 & 108. Although the students were granted immunity regardless of whether they testified, the promise not to prosecute should be taken seriously. Out of an abundance of caution, giving all benefit to the Appellant, this Court views the promises not to prosecute as immunity agreements.

Under *Brady,* the decision not to prosecute the teenaged partygoers was favorable impeachment evidence. However, the evidence shows that the State disclosed the immunity agreements to the Defense, and nothing in the evidence undermined the truthfulness of Mr. Allan's affidavit to that effect. The State points out that at the hearing on the motion for: a new trial, Appellant never challenged the veracity or accuracy of Mr. Allan's recollection of the events. At the hearing, the Defense introduced an expert witness who testified about the standards for a reasonable attorney. The expert did not testify about the subjective understanding of the witnesses and did not demonstrate that Mr. Allan's affidavit lacked veracity. Although Mr. Fleener stated he did not learn of

the immunity agreement from the telephone conversation with Mr. Allan, he was not persuasive to the trial court that Mr. Allan did not disclose the evidence to him. Likewise, Mr. Fleener's argument is not persuasive to this Court in its de novo review.

Even if this Court is incorrect in its holding and if the State did not disclose the immunity agreements to the Defense, the Defense knew about Deputy Roundy's promises that the children would not be, in trouble. The Defense revealed that evidence during his opening statements. The Defense was able to call into question the credibility of the witnesses.

> And the first thing [Deputy Roundy) tells them is, I understand you were at a party, and there was drinking going on and there was marijuana being smoked, but I'm not worried about that. You're not—I'm not going to get you in trouble for that. Just tell me what happened.
>
> So right away, these kids are hearing—they're being promised something. They're being given favorable treatment in exchange for what they'll say about our client. Immunity. And I think we have parents here on the jury, or just in your common experience, what better way to shift the focus off of you than to talk about what somebody else did, what somebody else did wrong. That's one of the types of things you can consider as this trial goes on.

(Jury Trial Tr. Feb. 27, 2020, p.7, 11. 5-20.) Even if the jury had heard additional evidence of the State's commitment not to prosecute, it would have been cumulative. The Court holds that the circuit court properly denied the motion for a new trial based upon the *Brady* violation.

2. Did Prosecutorial Misconduct Deprive Appellant of His Right to a Fair Trial?

Appellant argues the prosecution engaged in misconduct when it charged Appellant with sexual battery without supporting evidence, when it orchestrated a negative press campaign, and when it did not disclose the offer of immunity, Appellant claims he was deprived of his constitutional right to a fair trial. Appellant bears the burden of establishing prosecutorial misconduct. *Bogard,* ¶ 16, 449 P.3d at 321.

Prosecutorial misconduct occurs when a prosecutor acts improperly to persuade the jury to wrongly convict a defendant. *Id.* Appellant argues that the State engaged in prosecutorial misconduct when it amended the information to include the sexual battery charge in retaliation for Appellant's refusal to plead. Appellant argues the decision to bring the sexual battery charge was prosecutorial misconduct because there was nothing in the evidence to justify the charge, The allegations were that he had grabbed K.H.'s buttocks but, Appellant claims, the area of the buttocks does not fit the elements of sexual battery. To convict on sexual battery, there must be a demonstration, beyond a reasonable doubt, that the defendant touched "intimate parts," which are "external genitalia, perineum,

anus or pubes of any person or the breast of a female person." W.S. § 6-2-301(a)(ii) and (vi). On closing, the Defense pointed out that there was "no testimony that the butt cheek is anywhere near the anus." (Feb 28. Trial Tr. P. 215.)

In raising the claim that the sexual battery charge was retaliatory, Defense has pointed to nothing demonstrating that the State violated a clear and unequivocal rule of law, Appellant claims the State's case was weak, and the State had no legal basis for the sexual battery charge. However, there was a question of fact whether, in touching K.H.'s buttocks, Appellant had also touched her intimate parts.

Wyoming Rule of Criminal Procedure 3(e)(2)(A) permits the State to amend an information, regardless of whether the defendant consents, at any time before trial as long as the substantial rights of the defendant are not prejudiced. Furthermore, as noted by the State, Appellant never filed a motion relating to the additional charge and never requested a Bill of Particulars. The Defense failed to move for a judgment of acquittal, under W.R.Cr.P. 29(a), on the charge, If there had been no evidence to support the claim that Appellant had touched K.H.'s "intimate parts," even the court could have moved for a sua sponte judgment of acquittal under Rule 29(a). There was no motion for judgment of acquittal on that charge. Ultimately, the jury was not persuaded that the State presented sufficient evidence that proved beyond a reasonable doubt that Appellant had touched K.H.'s "intimate parts," It refused to convict and, in fact, acquitted Appellant on the sexual battery charge. Appellant has not shown that the sexual

battery charge was retaliatory. Appellant failed to object to the amended charge at trial and has failed to show on appeal that the State violated a substantial right. *Rogers v. State,* 2021 WY 123, 498 P.3d 66 (Wyo. 2021).

Second, Appellant argues that State committed prosecutorial misconduct when it orchestrated a salacious press campaign against him before and during trial. He argues that the most egregious comment came when the State suggested to the press that had his victim been a few months younger, Appellant would be looking at a lengthy prison sentence, He argues the State's comments to the press served no legitimate legal purpose.

The prosecutor has an obligation to "refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused." W.R.P.C. 3.8(e). The State claims Rule 3.8 is not applicable because none of the statements were made by the State to the press. Rather, they were made during adversarial proceedings or responsive pleadings filed within the docket. While Appellant may have been bewildered and enraged by the media coverage, the State had no control over the media coverage. Appellant has not demonstrated that the negative press coverage of his case was driven by the prosecution.

Finally, Appellant argues that these errors, along with the failure to disclose the favorable impeachment evidence, cumulatively prejudiced his case. "In conducting a cumulative error evaluation, we consider only matters that we have determined to be errors." *Bogard,* ¶ 69, 449

P.3d at 332 (citations & quotations omitted). There has not been a persuasive showing of errors. "To warrant reversal, there must be a reasonable possibility that [Appellant] would have received a more favorable verdict if the evidence had not been admitted." *Hathaway v. State,* 2017 WY 92, ¶ 33, 399 P.3d 625, 634 (Wyo. 2017). Appellant has not been convincing that had the sexual battery charge not been brought, had the media coverage played out more favorably, and had the State disclosed the immunity agreements, the verdict would have been different.

The evidence presented supported the guilty verdicts convicting Appellant of unlawful contact and permitting a house party where minors were present. Although the State's witnesses were not particularly credible, the jury believed their testimonies about the events of May 11. The testimonies of the partygoers were corroborative, and a photograph taken on the night of May 11 showed Appellant exhaling smoke in his kitchen while surrounded by teenagers. Any errors were not harmful, and the, State's case against Appellant was quite strong. *Hathaway,* ¶ 33, 399 P.3d at 635.

3. Did the Court Deprive Appellant of His Right to Effective Cross Examination When It Excluded Video Evidence of Witnesses Partying the Night Before Their Testimonies?

Appellant argues he was denied the right to effective cross-examination and the right to a meaningful opportunity to present a complete defense. Appellant argues the court violated his right to effective cross

examination when it prevented him from cross examining the State's witnesses on video evidence that would have shown bias and would have undermined the credibility of the witnesses' testimony. During trial the Defense obtained video showing K.H. and D.K. and other witnesses laughing, screaming, drinking, celebrating, and carousing after the first day of trial and before their testimonies. The video had been posted on the internet (Feb 28, Trial Tr. at 219). Appellant claims the video showed the witnesses' bias against him, and it undermined their credibility. He claims the court did not allow the jury to see the video on cross examination.

The State counters that on cross examination, the Defense was allowed to question K.H. about partying the night before her testimony. On closing, the Defense raised the point that both D.K. and K.H. were out partying the night before their court appearances. (Feb 28, Trial Tr. at 219). The Defense was able to connect for the jury that witnesses' credibility had been undermined with their carousing during such a serious time.

The record also reveals that the Defense had no intention of using the videos. In a sidebar on February 27, 2020, the Defense admitted that it had no intention of introducing the videos. Mr. Fleener stated:

> I wasn't even going to use the videos. I was going to use the substance of the videos to impeach the witness for bias and other things. I was never going to offer then substantively and still I'm not.

(Feb. 27 Trial Tr. 270.) The record does not support the claim that the Defense was prevented from relying upon the videos or impeaching the witnesses based upon the images in the videos. Appellant's argument that he was deprived of the right to effective cross examination is not convincing because, simply stated, he was never prevented from presenting the evidence. There was no error.

4. Did the Circuit Court Abuse Its Discretion in Denying Appellant's Motion for a Change of Judge?

During the time the circuit court was considering Appellant's motion for a new trial, Mr. Allan applied for and received a judgeship appointment. The Defense hypothesized that the trial court judge, Judge Radda, may have written a favorable letter of recommendation on behalf of Mr. Allan. The Defense began to think that even if Judge Radda had not written a favorable letter of recommendation, it was likely that Judge Radda had fanned a personal and favorable relationship with Mr. Allan that had so influenced Judge Radda that he would be unable to objectively decide the motion for a new trial. The Defense moved for a new judge to hear arguments on the motion for a new trial. The Defense argued that because both Mr. Fleener and Mr. Allan had filed affidavits that would be considered on the motion for a new trial and because Judge Radda, more likely than not, had a more favorable opinion of Mr. Allan, Judge Radda should be disqualified from hearing the motion for a new trial.

To establish a case demonstrating bias, the Defense served a subpoena duces tecum on Chief Justice

Michael Davis of the Wyoming Supreme Court to access confidential judicial nominating records relating to Mr. Allan's nomination. The Wyoming Attorney General's Office intervened and moved to quash the subpoena duces tecum, which the court granted. Appellant issued a subpoena for Judge Radda to testify. The attorney general's office intervened and moved to quash the subpoena, which the court granted. Appellant now seeks a remand on the motion for new trial to be heard by a different judge or a remand for a new trial.

The Defense can "move for a change of judge on the ground that the presiding judge is biased or prejudiced against the ... defendant." W.R.Cr.P. 21.1(b). "A ruling on a motion for a change of judge is not an appealable order, but the ruling shall be made a part of the record and may be assigned as error in an appeal of the case or on a bill of exceptions." *Id.* To demonstrate judicial bias, Appellant must show more than the fact that the trial court ruled against him—correctly or incorrectly. *DeLoge v. State,* 2007 WY 71, ¶ 12, 156 P.3d 1004, 1008 (Wyo. 2007). The Appellant must show bias—a personal "inclination toward one person over another." *Id.* (citation omitted). "Judicial prejudice involves a prejudgment or the forming of an opinion without sufficient knowledge or examination." *Id.*

In the Order Denying Motion to Disqualify, decided by circuit court judge Matthew Castano, the court said there was no evidence to demonstrate bias that would justify a change of judge. Judge Castano said:

> In this matter even if we assume Judge Radda has a very favorable professional opinion of now

> Judge Allen [sic], it cannot be said that there is any evidence to show that Judge Radda's mind is closed to the possibility that now Judge Allen [sic] mis-recalls the events underlying the Motion for New trial or for some other reason misapprehends those circumstances. Judges in Wyoming often have the same attorneys appear before them regularly and often develop opinions of those attorneys' professional skill and ethics. Holding such an impression does not translate to that judge being unable to accept that an attorney about whom they hold a favorable opinion fell below their usual standard in a particular case or in some other manner failed to meet what is expect [sic] of counsel.

(R. at 823.) Appellant has not shown that the deciding court could not have reasonably concluded as it did, Appellant has not demonstrated that either Judge Castano's decision denying a change of judge or Judge Radda's decision to quash the subpoenas was not reasonable under the circumstances. The circuit court did not abuse its discretion in denying the motion for a change of judge.

5. Is the Unlawful Contact Statute Unconstitutionally Vague as Applied to Appellant, or was the Evidence Insufficient to Support the Jury's Verdict?

Appellant argues that W.S. § 6-2-501(g)(i) is unconstitutionally vague as applied to his conduct. Appellant was convicted of three counts of W.S. § 6-2-

501(g)(i) which states, "A person is guilty of unlawful contact if he [t]ouches another person in a rude, insolent or angry manner ...." Appellant claims that the statute does not provide sufficient notice that kissing or touching D.K. and K.H. could be criminalized as a "rude" touch.

The question of a statute's constitutionality is a question of law, over which the court has *de novo* review. *Martin v. Bd. Of Cnty. Commissioners of Laramie Cnty.,* 2022 WY 21, ¶ 6, 503 P.3d 68, 71 (Wyo. 2022). "At the outset, we note that our legislature may not promulgate vague or uncertain statutes under the constitutions of Wyoming and the United States." *Teniente v. State of Wyoming,* 2007 WY 165, ¶ 84, 169 P.3d 512, 536 (Wyo. 2007). "Statutes are presumed constitutional, and we resolve any doubt in favor of constitutionality." *Martin,* 16, 503 P.3d at 71 (citations & quotations omitted).

A defendant can challenge a statute as facially vague or vague as-applied-to-the-facts. *Moe v. State,* 2005 WY 58, ¶ 9, 110 P.3d 1206, 1210 (Wyo.), *on reh'g,* 2005 WY 149, ¶ 9, 123 P.3d 148 (Wyo. 2005). "To establish that a statute is facially vague, [the defendant] must show that it reaches a substantial amount of constitutionally protected conduct, or that it specifies no standard of conduct at all." *Jones v. State,* 2016 WY 110, ¶ 24, 384 P.3d 260, 266 (Wyo. 2016).

> To succeed on a facial vagueness challenge to a legislative measure that does not threaten constitutionally protected conduct … a party must do more than identify some instances in which the application of the statute may be

> uncertain or ambiguous; he must demonstrate that the law is impermissibly vague *in all of its applications,*

Teniente, ¶ 86, 169 P.3d at 536 (citations omitted) (emphasis and alteration in original). "[S]uccessful challenges to statutes for facial vagueness are rare." *Id.* As such, Appellant has not made a claim that W.S. § 6-2-501(g)(i) is facially vague.

Appellant argues that W.S, § 6-2-501(g)(i) is vague as applied.

> A statute violates due process under the Fifth and Fourteenth Amendments of the United States Constitution on vagueness grounds and is void if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute, *Giles v. State,* 2004 WY 101, ¶ 11, 96 P.3d 1027, ¶ 11 (Wyo.2004); *Meisenheimer v. State,* 2001 WY 65, ¶ 6, 27 P.3d 273, ¶ 6 (Wyo.2001), and violates equal protection if it encourages arbitrary and erratic arrests and convictions. *Meisenheimer,* ¶ 6; *Scadden v. State,* 732 P.2d 1036, 1041 (Wyo.1987).

Moe ¶ 9, 110 P.3d at 1210. The court "will not find a statute vague as applied if [the court] can reasonably conclude that its language would sufficiently apprise a person that the conduct proven at trial was prohibited by law." *Jones,* ¶ 24, 384 P.3d at 266.

Appendix B

Appellant argues "men of common intelligence must necessarily guess" at what a "rude" touch would be, *Britt v. State,* 752 P.2d 426, 428 (Wyo. 1988) Appellant argues that rudeness is a vague term when it comes to criminalizing a kiss on the cheek especially in this case where the victims were members of families that were known friends with Appellant. Appellant claims:

> [K]issing someone on the cheek is an acceptable salutation in many cultures and could easily be interpreted by members of the community as not rude and therefore not criminal. Even in cultures where kissing on the cheek is not the norm, an unexpected kiss on the cheek is considered an etiquette faux pas, not criminal behavior. For these reasons, the Wyoming unlawful contact state is unconstitutionally vague as applied to Mr. Crothers in Count IV. An ordinary person would not be on notice that kissing a longtime family friend on the cheek could be considered a criminal act.

(Br. of Appellant, p, 40.) Appellant claims that a kiss, in many cultures, including our own, is a socially acceptable greeting, particularly where one encounters a close family friend. However, the Court need not offer an advisory opinion on such hypotheticals. *Kelley v. Commonwealth,* 69 Va. App. 617, 630, 822 S.E.2d 375, 381 (2019). The law requires that the Court review whether W.S. § 6-2-501(g)(i) gave sufficient notice to a person of ordinary intelligence that the conduct for which Appellant was charged is illegal and whether the facts of this case demonstrate arbitrary

and discriminatory enforcement. *Tentente,* ¶ 91, 169 P.3d at 537.

When evaluating a statute to determine whether it provides sufficient notice, the court considers not only the statutory language but al.so prior court decisions that have applied that language to specific conduct. *Griego v. State,* 761 P.2d 973, 976 (Wyo. 1988). "If the statute has been previously applied to conduct identical to that of appellant, he cannot complain that notice was lacking." *Id,*

Wyoming Statute § W.S. § 6-2-501(g)(i) gives sufficient notice to a person of ordinary intelligence that the conduct for which Appellant was charged is illegal. Under the statute, "[a] person is guilty of unlawful contact if he [t]ouches another person in a rude, insolent or angry manner ...." "The first prong of the Wyoming statute, forbidding 'rude, insolent or angry' touching, follows the common-law rule." *United States v. Hays,* 526 F.3d 674, 678 (10th Cir. 2008), The common law approach is that "any contact, however slight, may constitute battery." *ld.* (citation & quotations omitted).

> To constitute battery there must be some touching of the person of another, but not every such touching will amount to the offense. Whether it does or not will depend, not upon the amount of force applied, but upon the intent of the actor.
>
> > "A battery is the unlawful touching of the person of another by the aggressor

> himself, or by some substance set in motion by him. * * * The intended injury may be to the feelings or mind as well as to the corporeal person. * * * The law cannot draw the line between different degrees of force, and therefore totally prohibits the first and lowest stage of it."

Lynch v. Commonwealth, 131 Va. 762, 764-65, 109 S.E. 427, 427-28 (1921) (quoting 2 Am. & Eng. Ency. L. pp, 953, 955, 959). The types of offenses that may fall under the ambit of common law battery include, at one end of the spectrum, examples such as "kissing another without consent, touching or tapping another, jostling another out of the way, throwing water upon another, rudely seizing a person's clothes, cutting off a person's hair, throwing food at another," *United States v. Proctor,* 28 F.4th 538, 546 (4th Cir. 2022) (citations & quotations omitted), and, at the other end of the spectrum, "a fatal shooting or stabbing of the victim," *Hays,* 526 F.3d at 679 (citation & quotations omitted). The common law approach to "battery" includes a sense of rudeness resulting from a touch without consent.

Courts have found a kiss to be a rude touch for purposes of convicting on a charge of common law battery. For example, in *Moreland v. State,* 125 Ark. 24, 188 S.W. l, 2 (1916), the court held it was unlawful for the defendant to kiss the victim without her consent even through the defendant had been familiar with the victim, as he had been her family's physician, and even though he had kissed her on previous occasions. The court held there was no

justification for him to lay "his hands upon her before he knew whether or not she would consent to these advances." *Id.* The undisputed evidence showed that she did not consent, and the defendant "had no right to presume from his past conduct and his professional relations with her that she would consent." *Id.*

In another example, *Kelley,* 69 Va. App. 617, 822 S.E.2d 375, the court held the appellant's attempt to kiss the victim was done with the requisite intent of rudeness.

> [T]he appellant has provided no legal basis upon which his holding of the victim's face against her will, while trying to kiss her, was justified or excused. After considering the evidence, the trial court rejected both of these theories. The court found that the victim expressly rebuffed the appellant's action of grabbing her chin by trying to pull away while saying "no, no, no," but that he continued to touch her and advance. It specifically credited the victim's testimony that she did not consent to the touching and communicated the lack of permission to the appellant by pulling away from him and saying no before he touched her. In addition, the court rejected the appellant's theory that he touched Hester in a congenial manner in order to convey his gratitude.

Id. 69 Va. App. at 631, 822 S.E.2d at 381-82. In this case, even Appellant initially admitted that kissing a person without her consent would be rude behavior. He admitted

during his interview with Deputy Roundy that it would be totally inappropriate to kiss an underaged girl. Any person of average intelligence would know that an adult kissing a high school teenager without her consent at a social gathering in a private home where alcohol and marijuana are being consumed is touching another in a rude manner.

Appellant has not demonstrated that W.S. § 6-2-501(g)(i) "does not give sufficient notice to a person of ordinary intelligence that the conduct for which he was charged is illegal, and that the facts of the case demonstrate arbitrary and discriminatory enforcement." *Teniente,* 191, 169 P.3d at 537. Wyoming Statute § 6-2-501(g)(i) is not vague as applied to the facts of this case.

Appellant argues there was insufficient evidence to convict him of touching in a rude manner. However, the evidence showed that both K.H. and D.K. tried to avoid Appellant's advances. The evidence showed that K.H. was 17 years old on May 11, 2019, when she attended the party at Appellant's house. Appellant, who was 53 years old on May 11, 2019, was also intoxicated, and had been smoking marijuana at the house party. He approached K.H. and bent down to kiss her, but K.H. leaned back to avoid being kissed. Appellant succeeded in kissing her on the lips, another teenager pulled Appellant off her, and K.H. appeared shocked. W.O. testified that he witnessed Appellant kiss K.H., but she tried to move away from him and there was no place for her to go, (Jury Trial Tr. Feb. 27, 2020, p. 199-200.) K.H. also testified that after Appellant hugged her and grabbed her buttocks, she tried

to get away from him. Appellant found her again, grabbed her and kissed her. She testified that she "freaked out and ran outside." (Jury Trial Tr. Feb. 27, 2020, p. 225.)

The evidence also showed that D.K., who was 16 years old at the time of the party, walked past Appellant as he was asking her if she was having a good time. He leaned in and kissed her cheek because she moved her head to one side to avoid the kiss. She testified that she did not want to kiss Appellant, and if she had not turned, he would have kissed her on the lips. Appellant's persistence in kissing and grabbing the girls, despite their physical efforts to avoid contact, shows an intent to touch them in a rude manner. There is no similarity between the facts in this case, where teenaged girls tried to escape Appellant's advances, and the cultural greeting in some foreign counties where a kiss on the cheek is an acceptable touch.

The evidence of the girls' lack of consent and the evidence of Appellant's derogatory comments about other girls at the party show his rude intent. L.K. testified that Appellant looked at her and exclaimed that "he needed some pussy." (Jury Trial Tr. Feb. 27, 2020, p. 79, ll. 8-19.) E.H. testified that she heard Appellant call her "a hot piece of ass." (Jury Trial Tr. Feb. 27, 2020, p. 139.) Other party goers corroborated testimony of those statements. (Jury Trial Tr. Feb. 27, 2020, p. 115.) The evidence was sufficient to support the convictions for unlawful contact.

Appendix B

IV. DECISION

This Court affirms Appellant's convictions and affirms the decision to deny the motion for a new trial. The trial court properly denied the motion for a new trial based upon the *Brady* violation. Even if the jury had heard cross examination based upon the immunity agreements, the jury would have, more likely than not, convicted Appellant for permitting a house party with minors present. The prosecution did not deprive Appellant of his right to a fair trial, and the trial court did not deprive Appellant of his right to effective cross examination based upon video evidence of witnesses partying the night before their testimonies. The circuit court did not abuse its discretion in denying the motion for a change of judge. Finally, this Court holds that W.S, § 6-2-501(g)(i) is not unconstitutionally vague as applied and the evidence supports Appellant's conviction for unlawful touch.

It Is So Held.

Dated this 18th day of October 2022.

/s/ Joseph B. Bluemel
JOSEPH B. BLUEMEL
District Court Judge

APPENDIX C — OPINION OF THE CIRCUIT COURT OF THE NINTH JUDICIAL DISTRICT TETON COUNTY, DATED MAY 27, 2021

CIRCUIT COURT OF THE NINTH
JUDICIAL DISTRICT, TETON COUNTY,
STATE OF WYOMING

Case No. CR-2019-280

THE STATE OF WYOMING,

Plaintiff,

v.

WILLIAM CROTHERS,

Defendant.

ORDER DENYING MOTION TO RECONSIDER ORDER DENYING MOTION FOR NEW TRIAL

The court issued its *Order Denying Motion for New Trial* on April 21, 2021. On May 6, 2021, the defendant filed *Defendant's Motion to Reconsider Order Denying Motion for New Trial* ("Motion to Reconsider"). The motion does not request a hearing, but the defendant submitted a proposed Order Setting Hearing on Motion for Reconsideration. The State has not responded.

For the following reasons, the court shall deny the motion without a hearing.

Appendix C

1. The *Defendant's Motion for New Trial*, filed October 9, 2020, is based upon newly discovered evidence.

2. Wyo.R.Crim.Pro. 33(c) governs motions for new trial based upon newly discovered evidence. Rule 33(c) states:

> A motion for a new trial based on the grounds of newly discovered evidence may be made only before or within two years after final judgment but if an appeal is pending, the court may grant the motion only on remand of the case. A motion for new trial based on the ground of newly discovered evidence shall be heard and determined and a dispositive order entered within 30 days after the motion is filed unless, within that time, the determination is continued by order of the court, but no continuance shall extend the time to a day more than 60 days from the date that the original motion was filed. When disposition of a motion for new trial based on newly discovered evidence is made without hearing, the order shall include a statement of the reason for determination without hearing.

(Emphasis added).

3. Rule 33(c) does not expressly permit a motion to reconsider the denial of a motion for new trial based upon newly discovered evidence.

4. The Wyoming Rules of Criminal Procedure do not expressly permit a motion to reconsider, either

generally or relating to the denial of a motion for new trial based upon newly discovered evidence.

5. However, the federal courts do permit motions to reconsider, and specifically, motions to reconsider prior denials of motions for a new trial:

> "Motions to reconsider in criminal cases are judicial creations not derived from any statute or rule." *U.S. v. Salinas,* 665 F.Supp.2d 717, 720 (W.D. Tex. 2009), citing *U.S. v. Brewer,* 60 F.3d 1142, 1143 (5th Cir. 1995). Generally, district courts are free to reconsider their own earlier decisions, but motions for reconsideration are meant to serve the narrow purpose of correcting manifest errors of law or fact or presenting newly discovered evidence. *See Salinas,* 665 F.Supp.2d at 720, citing *U.S. v. Scott,* 524 F.2d 465, 467 (5th Cir. 1975). "There is a high burden of proof on the party seeking reconsideration in order to discourage litigants from making repetitive arguments on issues already considered." *Salinas,* 665 F.Supp.2d at 720.

U.S. v. Dumas, CR 17-00215-01, 2020 WL 5260947, at* 1 (W.D. La. Sept. 3, 2020) (denial of motion to reconsider prior denial of motion for new trial).

6. In criminal cases, the First Circuit Court of Appeals uses the same standard applied under Rule 59(e) of the Federal Rules of Civil Procedure in determining whether to reconsider a prior ruling:

Unlike the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure do not explicitly provide for motions for reconsideration. *See United States v. Ortiz,* 741 F.3d 288, 292 n. 2 (1st Cir.2014) ("[M]otions for reconsideration in criminal cases are not specifically authorized either by statute or by rule.") (internal citation omitted). The First Circuit Court of Appeals has considered motions for reconsideration in criminal cases, however, and applied the same standard to them that is applied to motion [sic] for reconsideration pursuant to Federal Rule of Civil Procedure 59(e). *United States v. Allen,* 573 F.3d 42, 53 (1st Cir.2009). The Court follows the First Circuit's approach.

Motions for reconsideration do "not provide a vehicle for a party to undo its own procedural failures [or] allow a party [to] advance arguments that could and should have been presented to the district court prior to judgment."

Iverson v. City of Boston, 452 F.3d 94, 104 (1st Cir.2006) (internal quotation marks and citation omitted). Rather, motions for reconsideration are appropriate in a limited number of circumstances, such as (1) where the movant presents newly discovered evidence; (2) where there has been an intervening change in the law; or (3) where the movant can demonstrate that the original decision was

> based on a manifest error of law or was clearly unjust. *Allen,* 573 F.3d at 53 (citing *Marie v. Allied Home Mortg. Corp.* 402 F.3d 1, 7 n. 2 (1st Cir.2005)).

U.S. v. Camacho-Santiago, 52 F. Supp. 3d 442 (D.P.R. 2014) (denial of motion to reconsider prior denials of motion for judgment of acquittal and for a new trial).[1]

7. The court therefore shall address the *Defendant's Motion to Reconsider Order Denying Motion for New Trial.*

8. As stated above, the State filed the *State's Response to Defendant's Motion for New Trial* (State's response) on December 3, 2020. The State's response included, as Exhibit 12, the *Affidavit of Clark C. Allan.*

9. Clark Allan was the State's lead prosecutor at the trial. In his *Affidavit,* Mr. Allan states that after reading the transcripts of the interviews with the nine minors, he talked to Deputy Roundy about it. Deputy Roundy defended his promises to the minors because, in his opinion, it was not right to pursue charges against high school witnesses, whether they cooperated with the prosecution or not, because "we had a more important crime to prosecute against Mr. Crothers." *(See Affidavit of Clark C. Allan,* ¶ 3).

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1. *See* page 5 of the *Defendant's Motion to Reconsider Order Denying Motion for New Trial,* which advocates that the court permit the defendant's motion to reconsider under the standards of either Rules 59(e) or 60(b) of the Federal Rules of Civil Procedure.

10. Clark Allan agreed to honor Deputy Roundy's commitment to the minors. Mr. Allan agreed, "none of the high school aged witnesses would be prosecuted for misdemeanor alcohol or controlled substance violations." Mr. Allan characterized this commitment as a unilateral commitment regardless of whether the minor witnesses cooperated or testified. *(See Affidavit of Clark* C. *Allan,* ¶ 4).

11. In ¶ 5 of his *Affidavit,* Mr. Allan states that during at least one of his many conversations with Mr. Fleener about this case, "the topic of charges against the State's witnesses came up." ¶¶ 6 – 9 of the Affidavit state:

> To the best of my knowledge, Mr. Fleener brought it up by complaining about Deputy Roundy's representations in the interviews and the fact that none of the kids had been charged with anything. I told Mr. Fleener that I agreed with Deputy Roundy's representations and that, in fact none of the youthful participants at the party would be charged with misdemeanor crimes.
>
> I did not make any notes about this conversation simply because it did not seem noteworthy. The commitment to not prosecute was obvious and apparent in Deputy Roundy's interviews and all I was doing was confirming it.
>
> Throughout the trial preparation process none of the State's witnesses were ever threatened

> with prosecution for any crime arising from their actions at the party. Furthermore, no charges were threatened of filed against any party participant who failed to cooperate with the State.
>
> On occasion some of the witnesses and their parents asked about the possibility of either themselves or others getting into trouble. They were immediately reassured that no one would be prosecuted for using alcohol or drugs at the party.

12. Context matters. The basis of the *Defendant's Motion for New Trial* is an alleged "immunity agreement." The State countered this argument in the *State's Response to Defendant's Motion for New Trial*, filed December 3, 2020:

> * * * the defendant's entire argument hinges on the allegation that the child witnesses were given immunity "deals" where they were promised that they would not be prosecuted for misdemeanor alcohol and drug offenses ***in exchange for*** their agreement to testify against the defendant.

(Emphasis in original). The State argued that the prosecution did not suppress "immunity agreements" because they never existed in the first place. *(See* pages 13 – 15 of *State's Response to Defendant's Motion for New Trial).*

13. The defendant never presented evidence of an immunity "agreement." Instead, the defendant offered speculation and conjecture that an immunity "agreement" existed. However, the defendant did recognize the State's position, namely, that the prosecution could not have suppressed something (an "immunity agreement") that never existed. The State's position went hand-in-hand with Clark Allan's affidavit, which candidly admitted that the State had informed defense counsel that the prosecution had made a unilateral and unconditional decision not to prosecute the minors for using alcohol or drugs at the house party and the prosecution had communicated that decision to one or more of the minors and their parents.

14. The defendant directly, and, in the court's opinion, successfully rebutted the State's position by arguing that it did not matter that there was no quid pro quo.

15. In this context, it was incumbent upon the defendant to rebut the statements, in Clark Allan's affidavit, that the State had informed defense counsel that the prosecution had made a unilateral and unconditional decision not to prosecute the minors for using alcohol or drugs at the house party and the prosecution had communicated that decision to one or more of the minors and their parents.

16. The defendant did not rebut Clark Allan's statements. Instead, in ¶ 9 of the *Affidavit of Thomas Fleener*, attached as Attachment A to the *Defendant's Brief*

in Support of Motion for New Trial, Mr. Fleener denied knowing, prior to trial, that the State had "immunized" its witnesses:

> I categorically deny knowing prior to trial that the State of Wyoming immunized its witnesses. * * * Mr. Mr. Allan never informed me that he had immunized the State's witnesses. The first I learned of the immunity agreements came when we received responses to our Wyoming Public Records Act Requests. When we read an email between one of the witnesses' parents and Mr. Allan it was fairly clear to us that the State had immunized its witnesses. This belief was confirmed when we interviewed one of the other parents and they confirmed that Mr. Allan had told them and their child that their child would not be prosecuted. *Mr. Allan's Affidavit* attached to the State's response to our Motion for a New Trial *confirmed* what, by then, we certainly suspected—*that the State had immunized its witnesses.*

(Emphasis added).

17. The issue whether Clark Allan informed defense counsel that the prosecution had made a unilateral and unconditional decision not to prosecute the minors for using alcohol or drugs at the house party and the prosecution had communicated that decision to one or more of the minors and their parents. ¶ 9 of Mr. Fleener's affidavit does not rebut Clark Allan's affidavit on that issue.

18. Therefore, as stated in ¶ 33 of the *Order Denying Motion for New Trial,* the court "ha[d] no difficulty finding, based upon Mr. Allan's affidavit, that Mr. Allan told Mr. Fleener, prior to the trial, that the State was not charging any of the minor witnesses for misdemeanor alcohol or controlled substance violations related to the house party, regardless of whether the minor witnesses cooperated or testified."

19. In his motion to reconsider, the defendant argues that, at the hearing on March 24, 2021, neither the court nor the State ever suggested that Mr. Allan and Mr. Fleener's affidavits could be read consistently. At the hearing, the court certainly did not make this suggestion. As far as the court recalls, neither did the State. The court did not realize the two affidavits were not materially inconsistent on the relevant issue until the court quietly reviewed and compared the two affidavits. At that point, the absence, in Mr. Fleener's affidavit, of a rebuttal to Clark Allan's statements was conspicuous.

20. However, the point here is not whether the court was quick enough in its analysis of the two affidavits to realize that the two affidavits were not materially inconsistent. Instead, the point is that the defendant failed to timely refute the essential allegations of Clark Allan's affidavit. The defendant filed Mr. Fleener's affidavit as part of *Defendant's Brief in Support of Motion for New Trial,* filed March 10, 2021. That is more than three months after the State filed the *State's Response to Defendant's Motion for New*

Trial, which included Clark Allan's affidavit. Three months is more than sufficient time for the defendant to rebut the essential allegations of Clark Allan's affidavit. The defendant was obligated to provide a sufficient counter affidavit prior to the hearing on the motion for new trial and the defendant failed to do so.

21. The defendant has filed the *Second Affidavit of Thomas Fleener*, dated May 6, 2021, in an attempt to cure the deficiencies in Mr. Fleener's first affidavit.

22. The court shall not reconsider the *Defendant's Motion for New Trial* by reconsidering the motion in light of the *Second Affidavit of Thomas Fleener*. Doing so would be permitting the defendant to cure his own procedural failures, which the court is not willing to do. The arguments the defendant now wishes to advance—based upon the *Second Affidavit of Thomas Fleener*—could and should have been presented during the proceedings on the *Defendant's Motion for New Trial* that ended with the hearing on March 24, 2021. There has not been an intervening change in controlling law; the "new evidence" in the *Second Affidavit of Thomas Fleener* could and should have been presented earlier; and the defendant has not shown that the *Order Denying Motion for New Trial* was based on a manifest error of law or was clearly unjust.

23. In his motion to reconsider, the defendant also argues that Mr. Fleener uses the words like "immunity" loosely to refer to immunity agreements as well as

informal immunity, pocket immunity, or merely a promise by a prosecutor to not prosecute, whether unilateral or otherwise. The court has no control over Mr. Fleener's choice of words. However, words matter. Mr. Fleener is an expert trial attorney and the court is unwilling to provide him a second opportunity to do what clearly he should have done prior to the hearing on March 24, 2021—provide an affidavit that squarely addressed whether the State informed defense counsel that the prosecution had made a unilateral and unconditional decision not to prosecute the minors for using alcohol or drugs at the house party and communicated that decision to one or more of the minors and their parents. *U.S. v. Camacho-Santiago,* 52 F. Supp. 3d at 442.

24. There is another, perhaps more compelling reason, that the court is denying the *Defendant's Motion to Reconsider Order Denying Motion for New Trial* without a hearing: as stated in ¶¶ 34 – 42 of the *Order Denying Motion for New Trial,* the court assumed, purely for the sake of argument, that the State suppressed evidence and ruled there is no reasonable probability that, had the evidence been disclosed, the result of the proceedings would have been different; for which reason the evidence is not "material" under *Brady.*

25. In *Defendant's Motion to Reconsider Order Denying Motion for New Trial,* the defendant notes this ruling. However, the defendant's motion is devoid of any argument or analysis as to why the court should

reconsider the court's ruling on whether evidence was suppressed, in light of the fact that the court has already ruled that the evidence is not "material" under *Brady.*

26. To be clear, in *Byerly v. State,* 2019 WY 130, 455 P.3d 232 (Wyo. 2019), the Court stated that in order to demonstrate a *Brady* violation, a defendant has the burden of showing: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the defense; and (3) the evidence was material because there is a reasonable probability that, had the evidence been disclosed, the result of the proceedings would have been different. ¶ 32, 455 P.3d at 244.

27. The defendant proved the second prong—the evidence was favorable to the defense. However, the court ruled the prosecution did not suppress evidence. The court also ruled there is no reasonable probability that, had the evidence been disclosed, the result of the proceedings would have been different. Even if the court were to reconsider its ruling on whether the State suppressed evidence—which, to be clear, the court is not doing—the defendant's *Brady* argument still fails because the court has ruled there is no reasonable probability that, had the evidence been disclosed, the result of the proceedings would have been different. These circumstances provide further support for the court declining to order a hearing on the *Defendant's Motion to Reconsider Order Denying Motion for New Trial.*

IT IS THEREFORE ORDERED:

1. The court shall not reconsider its *Order Denying Motion for New Trial* and therefore denies the *Defendant's Motion to Reconsider Order Denying Motion for New Trial.*

DATED May 27, 2021.

/s/_____
James L. Radda
Circuit Court Judge

APPENDIX D — ORDER OF THE CIRCUIT COURT OF THE NINTH JUDICIAL DISTRICT, TETON COUNTY, STATE OF WYOMING, FILED APRIL 21, 2021

CIRCUIT COURT OF THE
NINTH JUDICIAL DISTRICT
TETON COUNTY, STATE OF WYOMING

Case No. CR-2019-280

THE STATE OF WYOMING,

Plaintiff,

vs.

WILLIAM CROTHERS,

Defendant.

ORDER DENYING MOTION FOR NEW TRIAL

This case was tried to a jury on February 26, 27 and 28, 2020. Clark C. Allan and Carly K. Anderson, Deputy Prosecuting Attorneys, represented the State; and Thomas A. Fleener and Devon Peterson represented the defendant.

The State charged the defendant with the following offenses that were alleged to have occurred on or about May 11, 2019:

- Count 1, Sexual Battery, a misdemeanor in violation of Wyo. Stat. §6-2-313(a).

- Count 2, Unlawful Contact, a misdemeanor in violation of Wyo. Stat. §6-2-501(g)(i).

- Count 3, Unlawful Contact, a misdemeanor in violation of Wyo. Stat, §6-2-501(g)(i).

- Count 4, Unlawful Contact, a misdemeanor in violation of Wyo. Stat. §6-2-501(g)(i).

- Count 5, Permitting House Party Where Minors Present, in violation of Wyo. Stat.§ 6-4-406(a).

- Count 6, Breach of Peace, a misdemeanor in violation of Wyo. Stat. §6-6-102(a).

In the early morning hours of February 29, 2020, the jury found the defendant guilty of Counts 3, 4 and 5; and not guilty of Counts 1, 2 and 6.

Sentencing occurred on April 11, 2020.

On October 9, 2020, the defendant filed *Defendant's Motion for New Trial* based upon newly discovered evidence (motion for new trial).

On October 12, 2020, the State filed State's Request for Response Deadline to Defendant's Motion for New Trial, asking that the State's deadline to respond be extended 45 days, because the defendant's motion was 20

pages in length and the exhibits accompanying the motion consisted of 38 pages.

The court extended the deadline for the State to respond to December 3, 2020, but also issued an order on October 12, 2020, ordering the defendant to object by October 20, 2021, if the defendant intended to object. The defendant did not file an objection.

Wyo.R.Crim.Pro. 33(c) governs motions for new trial based upon newly discovered evidence. Rule 33(c) states:

> A motion for a new trial based on the grounds of newly discovered evidence may be made only before or within two years after final judgment but if an appeal is pending, the court may grant the motion only on remand of the case. *A motion for new trial based on the ground of newly discovered evidence shall be heard and determined and a dispositive order entered within 30 days after the motion is filed unless, within that time, the determination is continued by order of the court, but no continuance shall extend the time to a day more than 60 days from the date that the original motion was filed.* When disposition of a motion for new trial based on newly discovered evidence is made without hearing, the order shall include a statement of the reason for determination without hearing.

(Emphasis added).

Regretfully, the court did not enter a dispositive order within 30 days, The court's order permitting the State to respond by December 3, 2020 made a dispositive order due by December 8, 2020. That left five days for a hearing and the filing of a dispositive order.

On December 3, 2020, the State filed *State's Response to Defendant's Motion for New Trial* (State's response).

The State's reply was lengthier than the defendant's motion. So were the State's exhibits to its reply. Not surprisingly, on December 8, 2020 the defendant filed *Defendant's Motion for Extension of Time to File Reply.* The defendant requested an extension from December 18, 2020 to January 17, 2021. The defendant stated that the State did not object to the extension and the parties were "waiving" the 60-day requirement in Rule 33(c).

On December 9, 2020, the court issued an *Order Denying Motion for Extension of Time to File Reply and Order Setting Hearing.* The court opined that it was not confident that the stipulation was effective and did not want "to compound its error by extending the. time for the defendant to file a reply." The Order set a hearing on December 22, 2020.

On December 11, 2020, the State filed a *Motion to Continue Hearing on Defendant's Motion for New Trial.*

On December 11, 2020, the court issued an *Order Continuing Hearing on Defendant's Motion for New Trial* which set the hearing on December 29, 2020.

Appendix D

On December 23, 2020, the defendant filed *Defendant's Motion for Change of Judge* and *Defendant's Motion to Stay Hearing on Motion for New Trial*. On December 28, 2020, the court entered an *Order Staying Hearing on Motion for New Trial* and an *Order Referring Motion for Change of Judge*, which referred the *Defendant's Motion for Change of Judge* to Circuit Court Judge Matthew F. G. Castano.

On February 23, 2021, Judge Castano denied *Defendant's Motion for Change of Judge in an Order Denying Motion to Disqualify.*

On February 24, 2021, the court issued an *Order Setting Hearing*, setting the motion for new trial for a hearing on March 9, 2021.

On March 1, 2021, the defendant filed an *Unopposed Motion to Continue Hearing on Motion for New Trial*. The motion stated that defense counsel was on trial on March 9, 2021, and was on trial the following week, and asked for a setting on March 24 or 25, 2021.

On March 1, 2021, in an *Order Vacating and Resetting Hearing*, the court vacated the March 9, 2021 hearing and rescheduled the hearing on March 24, 2021.

On March 10, 2021, the defendant filed a reply to the *State's Response to Defendant's Motion for New Trial*, entitled, *Defendant's Brief in Support of Motion for New Trial* (defendant's reply). The reply included the Affidavit of Thomas Fleener, dated March 9, 2021.

On March 10, 2021, the defendant also filed a *Notice of Intent to Call Expert Witness*.

On March 12, 2021, the State filed *State's Motion in Limine to Restrict Testimony from Expert Witness*.

On March 16, 2021, the defendant filed *Defendant's Response to State's Motion in Limine to Restrict Testimony from Expert Witness*.

On March 22, 2021, two days prior to the scheduled hearing on March 24, 2021, the defendant filed *Defense Supplement for Motion for New Trial*. Attached to the *Supplement* was the *Affidavit of Richard Mulligan*. Mr. Mulligan is an attorney with an office in Jackson, Wyoming. Mr. Mulligan's affidavit states that he represented an unnamed minor witness who testified for the State in this case. The affidavit states that Mr. Allan contacted Mr. Mulligan stating, in return for the client's cooperation and testimony, Mr. Allan "would see to it that the client was not prosecuted for his conduct on the night of May 11, 2019." According to the affidavit, after receiving this promise, Ms. Carly Anderson went to Mr. Mulligan's office and interviewed the unnamed client and the unnamed client later testified at the trial.

On March 23, 2021; the State filed *State's Motion to Strike the Affidavit of Richard Mulligan.*

The court held the hearing on March 24, 2021. At the hearing the court struck Mr. Mulligan's affidavit because it was untimely filed. Mr. Mulligan and Mr. Fleener have

served as co-counsel together and there was no reasonable explanation for the filing of the affidavit some 5½ months after the filing of the motion for new trial and only two days prior to the hearing.

Only the defendant's expert witness, Eric Klein, testified at the hearing on March 24, 2021. Counsel informed the court that counsel expected the court to determine the factual issue based upon the affidavits in support of, and in opposition to, the motion for new trial.

For the following reasons, and based upon the following findings of fact and conclusions of law, the court denies the *Defendant's Motion for New Trial*:

1. The State called ten witnesses at trial, namely, Deputy Drew Roundy of the Teton County Sheriff's Office and nine minors. The minors were all high school students at the time of the house party on May 11, 2019. One of the minors was a high school senior, six of them were juniors, and two were sophomores.

2. According to the defendant, his counsel's receipt of an email led him to seek a new trial, The email, which is one of two emails attached the motion as Attachment C,[1] was from the mother of one of the State's witnesses, namely, a 16-year-old female high school student who

1. The second email was an email directly to the court, from a concerned citizen and acquaintance of the court. The citizen expressed gratitude that the court had sentenced the defendant "to some jail time, however minimal." The court does not know why the defendant included this email as well in Attachment C.

was the victim of one the defendant's two convictions relating the Unlawful Touching. The email was directed to the "Circuit Court Team" and addressed to the lead prosecuting attorney, the Teton County Attorney, a victim advocate, the lead investigator, the Circuit Court Chief Clerk and the undersigned Circuit Court Judge. The email thanked the "team" for their advocacy. Not surprisingly, coming from the mother of a 16-year-old daughter whom the defendant had unlawfully kissed, and therefore victimized, at the house party, the email complained that the punishment imposed by the court did not adequately address the harm caused by the defendant's criminal acts.

3. Rule 2.10(B) of the Wyoming Judicial Code of Conduct required the court to notify both parties about this unsolicited ex parte communication; and the court did so.[2]

4. The defendant claims this email caused him to become "suspicious of potential illegal actively," which, in turn, caused him to make various public records requests.

5. One such request uncovered an email from a parent of one of the State's witnesses to the prosecuting attorney, and the prosecuting attorney's response. The parent's email stated several of the parents were concerned their kids would get in trouble for "drinking or illegal behavior" at the house party that led to the defendant's arrest. In the email, the parent asks, "Is there some sort of statement that could be made either in writing or otherwise, assuring

2. The court also notified both parties about the email referred to in footnote 1.

these families that their kids will not be held accountable for underage drinking, etc. while on the stand for this case?" (*See* Attachment A to *Defendant's Motion for New Trial*).

6. The prosecutor's response stated, in part, "We'll reassure them about drinking etc." (*See* Attachment B to *Defendant's Motion for New Trial*).

7. Based upon this email exchange, the defendant concludes, "it appeared the State's various fact witnesses had been offered immunity in exchange for their testimony against Mr. Crothers at trial." (*See Affidavit of Devon Petersen attached to Defendant's Motion for New Trial*).

8. In the weeks that followed the May 11, 2019 house party, Deputy Roundy, a School Resource Officer at the Jackson Hole High School attempted to interview eighteen minors about the house. party. He was successful in interviewing nine minors. Deputy Roundy conducted the recorded interviews of the nine minors at the High School. The State transcribed the nine interviews and provided them to the defendant as part of discovery. Exhibits 1 – 9 to the State's response are transcripts of the nine interviews. Those nine minors testified at the trial.

9. At the outset of each interview, Deputy Roundy informed the nine minors, clearly and unmistakably, that they were not going to be in trouble for anything that they may disclose to him about drinking alcohol or using marijuana at the house party. *See* pages 3 – 8 and of State's response and Exhibits 1 – 9 to that response.

10. Deputy Roundy's statements to the minors, and their discovery to the defendant, give context to the *Affidavit of Clark C. Allan*, attached as Exhibit 12 to the State's response.

11. Clark Allan was the State's lead prosecutor at the trial. In his Affidavit, Mr. Allan states that after reading the transcripts of the interviews with the nine minors, he talked to Deputy Roundy about it. Deputy Roundy defended his promises to the minors because, in his opinion, it was not right to pursue charges against high school witnesses, whether they cooperated with the prosecution or not because "we had a more important crime to prosecute against Mr. Crothers." (*See Affidavit of Clark C. Allan*, ¶ 3).

12. Mr. Allan agreed to honor Deputy Roundy's commitment to the minors. Mr. Allan agreed, "none of the high school aged witnesses would be prosecuted for misdemeanor alcohol or controlled substance violations." Mr. Allan characterized this commitment as a unilateral commitment regardless of whether the minor witnesses cooperated or testified. (*See Affidavit of Clark C. Allan*, ¶ 4).

13. In his Affidavit, Mr. Allan further states that during at least one of his many conversations with Mr. Fleener about this case, Mr. Fleener complained to Mr. Allan about Deputy Roundy's commitment not to cite or charge the minors. Mr. Fleener complained that the minors were not being charged with any offenses related to the house party. In his affidavit, Mr. Allan informed Mr. Fleener that he agreed with Deputy Roundy "and that, in

fact none of the youthful participants at the party would be charged with misdemeanor crimes." (*See Affidavit of Clark C. Allan*, ¶ 6).

14. ¶ 7 of the Affidavit states: "I did not make any notes about this conversation simply because it did not seem noteworthy. The commitment to not prosecute was obvious and apparent in Deputy Roundy's interviews and all I was doing was confirming it."

15. The defendant's reply attaches the *Affidavit of Thomas Fleener*. ¶ 9 of the *Affidavit* states, in pertinent part:

> I categorically deny knowing prior to trial that the State of Wyoming immunized its witnesses. * * * Mr. Mr. Allan never informed me that he had immunized the State's witnesses. The first I learned of the immunity agreements came when we received responses to our Wyoming Public Records Act Requests. When we read an email between one of the witnesses' parents and Mr. Allan it was fairly clear to us that the State had immunized its witnesses. This belief was confirmed when we interviewed one of the other parents and they confirmed that Mr. Allan had told them and their child that their child would not be prosecuted. *Mr. Allan's Affidavit* attached to the State's response to our Motion for a New Trial *confirmed* what, by then, we certainly suspected—*that the State had immunized its witnesses.*

(Emphasis added).

16. The defendant's motion for new trial claims a *Brady* violation. In *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the Court held "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S.Ct. at 1196-97.

17. In *Byerly v.* State, 2019 WY 130, 455 P.3d 232 (Wyo. 2019), the Court stated:

> "[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith or the prosecution." *Worley v. State*, 2017 WY 3, ¶ 14, 386 P.3d 765, 770 (Wyo. 2017) (citing *Wilkening v. State*, 2007 WY 187, ¶ 7, 172 P.3d 385, 386-87 (Wyo. 2007)). To demonstrate a *Brady* violation, Mr. Byerly has the burden of showing: "(1) the prosecution suppressed evidence; (2) the evidence was favorable to the defense; and (3) the evidence was material because there is a reasonable probability that, had the evidence been disclosed, the result of the proceedings would have been different." *Id.*

¶ 32, 455 P .3d at 244.

18. Favorable evidence includes impeachment evidence. *Lawson v. State*, 2010 WY 145, ¶ 21, 242 P.3d 993,

1000 (Wyo. 2010), citing [*U.S. v.*] *Bagley*, 473 U.S. [667] at 676, 105 S.Ct. [3375] at 3380 [(1980)]; *Davis v. State*, 2002 WY 88, ¶ 18, 47 P.3d 981, 986 (Wyo.2002).

19. In order to prove a *Brady* violation, the defendant therefore must demonstrate:

(1) the prosecution suppressed evidence;

(2) the evidence was favorable to the defense; and

(3) the evidence was material because there is a reasonable probability that, had the evidence been disclosed, the result of the proceedings would have been different.

(1) WHETHER THE EVIDENCE WAS FAVORABLE TO THE DEFENSE

20. The court shall first address the second factor, namely, the defendant's burden of demonstrating the evidence was favorable to the defense.

21. The defendant argues that the unilateral act of Clark Allan informing the State's minor witnesses that he was not going to prosecute them for misdemeanor alcohol and drug offenses, was "favorable evidence" under *Brady*.

22. The State takes a different approach. The State argues that *Brady* does not apply to Mr. Allan's promise because his promise was unilateral, that is, it was made without regard to whether the minor's testified on behalf

of the State. The State concedes that *Brady* does apply to immunity agreements, but that in order for the State to immunize a witness, the prosecutor and the witness have to enter in an *agreement*; for example, an agreement by the State not to prosecute the witness as long as the witness testifies truthfully at trial. The State argues there was no immunity agreement between the State and any of the minor witnesses because there was no agreement, or a quid pro quo. Instead, according to the State, Mr. Allan made the unilateral and unconditional choice to not prosecute any of the minor witnesses. To bolster its argument, the State emphasizes that the State did not prosecute any of the minor Witnesses who did *not* interview with Deputy Roundy, or who did *not* cooperate in the prosecution against the defendant.

23. Complicating the issue is the fact that, under Wyoming law, a prosecuting attorney, solely by virtue of his office and in the absence of any statutory authorization, has no power to grant immunity to a witness. *Hall v. State*, 851 P.2d 1262, 1266 (Wyo. 1993).

24. Both explicit and tacit agreements between the prosecution and prosecution witnesses constitute exculpatory material subject to disclosure under *Brady*. *Douglas v. Workman*, 560 F.3d 1156, 1185 (10th Cir. 2009)

25. There was no agreement—explicit or tacit—between the State and the minor witnesses. Specifically, the State did not promise not to prosecute the minor witnesses in return for their truthful testimony at trial. Instead, Mr. Allan unilaterally promised, "none of the

high school aged witnesses would be prosecuted for misdemeanor alcohol or controlled substance violations." By stating this, the State simply confirmed what Deputy Roundy had promised the minor witnesses in their interviews, namely, that they would not be charged for offenses related to drinking alcohol or using illegal drugs at the house party.

26. However, Brady material is not limited to explicit and tacit agreements.

27. In *Harshman v. Superintendent, State Correctional Instn. at Rockview*, 368 F. Supp. 3d 776, 790 (M.D. Pa. 2019), the court explained that *Brady* material is not limited to "deals" or "agreements":

> Certainly, *Brady* is violated when the government fails to turn over evidence of an actual agreement between the prosecution and one of its witnesses regarding favorable treatment in exchange for testimony. *See Giglio*, 405 U.S. at 151-54, 92 S.Ct. 763. But *Brady* evidence is not limited to actual "deals" or "agreements" between witnesses and the government. Under firmly established Supreme Court precedent * * * the prosecution must tum over evidence that is "*favorable to the accused*." In the context of a government witness, this could mean *impeachment evidence regarding favorable treatment* or even the possibility or expectation of favorable treatment, *see Giglio*, 405 U.S. at 151-54, 92 S.Ct. 763; evidence

> that impugns the reliability of the witness's testimony, *see Kyles*, 514 U.S. at 441-45, 115 S.Ct 1555; and evidence of bias, prejudice, or ulterior motives affecting the witness's credibility, *cf. Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

368 F. Supp. 3d at 790 (emphasis added).

28. Clark Allan's unilateral promise, that "none of the high school aged witnesses would be prosecuted for misdemeanor alcohol or controlled substance violations[,]" is impeachment evidence regarding favorable treatment and is therefore subject to *Brady*, even though the promise was not made in return for the minors testifying truthfully at trial or other quid pro quo.

29. The court therefore concludes that promise, "none of the high school aged witnesses would be prosecuted for misdemeanor alcohol or controlled substance violations," was favorable to the defense and therefore subject to *Brady*.

(2) WHETHER THE STATE SUPPRESSED FAVORABLE EVIDENCE

30. Next, the court shall address the first factor, namely, whether the State suppressed the favorable evidence about the State's unilateral promise not to prosecute the minor witnesses.

31. The State did not suppress the evidence about the State's unilateral promise not to prosecute the minor witnesses. Instead, Mr. Allan informed Mr. Fleener that the State was not charging any of the minor witnesses for misdemeanor alcohol or controlled substance violations related to the house party, regardless of whether the minor witnesses cooperated or testified.

32. This conclusion is not inconsistent with Mr. Fleener's affidavit. The crux of Mr. Fleener's affidavit appears in ¶ 9, where Mr. Fleener makes the following six statements:

> (1) *Statement No. 1*. "I categorically deny knowing prior to trial that the State of Wyoming immunized its witnesses."
>
> Mr. Fleener's statement does not address Mr. Allan's statement that the State was not charging the minor witnesses. Instead, in this statement, Mr. Fleener denies that Mr. Allan told him the State was "immunizing" its witnesses. However, the State did not immunize its witnesses; and Mr. Allan's affidavit does not state that he told Mr. Fleener that the State was immunizing its witnesses.
>
> Significantly, Mr. Fleener's statement does not deny that Mr. Allan told Mr. Fleener the State was not charging the minor witnesses, which is the point in issue. Nothing in Mr. Fleener's statement contradicts Mr. Allan's affidavit.

(2) *Statement No. 2*. "Mr. Allan never informed me that he had immunized the State's witnesses."

Like the first statement above, Mr. Fleener's statement does not address Mr. Allan's statement that the State had decided unilaterally not to charge the minor witnesses. Instead, in this statement, Mr. Fleener denies that Mr. Allan told him the State was "immunizing" its witnesses. However, the State did not immunize its witnesses; and Mr. Allan's affidavit does not state that he told Mr. Fleener that the State was immunizing its witnesses.

Again and significantly, Mr. Fleener's statement does not deny that Mr. Allan told Mr. Fleener the State was not charging the minor witnesses, which is the point in issue. Nothing in Mr. Fleener's statement contradicts Mr. Allan's affidavit.

(3) *Statement No. 3*. "The first I learned of the immunity agreements came when we received responses to our Wyoming Public Records Act Requests."

The defendant has not proven there were any "immunity agreements." Instead, Mr. Allan's affidavit establishes the State decided not to charge any of the minor witnesses for misdemeanor alcohol or controlled substance violations related to the house party, regardless

of whether the minor witnesses cooperated or testified. Mr. Allan's affidavit also establishes that he provided this information to Mr. Fleener. Mr. Fleener's statement therefore does not contradict Mr. Allan's affidavit—it does not deny that Mr. Allan told Mr. Fleener that that the State was not charging the minor witnesses.

(4) *Statement No. 4*. "When we read an email between one of the witnesses' parents and Mr. Allan it was fairly clear to us that the State had immunized its witnesses."

The defendant has not proven the existence of any immunity agreements. Mr. Fleener's statement therefore does not contradict Mr. Allan's affidavit.

(5) *Statement No. 5*. "This belief [i.e., that the State had immunized its witnesses] was confirmed when we interviewed one of the other parents and they confirmed that Mr. Allan had told them and their child that their child would not be prosecuted."

A motion for new trial must be supported by admissible evidence. *U.S. v. Velarde*, 18- CR-00525-CMA, 2020 WL 758073, at *3 (D. Colo. Feb. 14, 2020); *U.S. v. Choudhry*, 330 F. Supp. 3d 815, 839 (E.D.N.Y. 2018), *aff'd*, 813 Fed. Appx. 4 (2d Cir. 2020) () (unpublished); *U.S. v. Wall*, 389 F.3d 457, 470-71 (5th Cir. 2004);

Appendix D

United States v. Parker, 903 F.2d 91, 102-03 (2d Cir. 1990); and *United States v. MacDonald*, 779 F.2d 962, 964 (4th Cir.1985). This statement is inadmissible hearsay and would not be admitted at a retrial.

More importantly, this statement does not refute that Mr. Allan told Mr. Fleener the State was not charging the minor witnesses.

(6) *Statement No. 6*. "Mr. Allan's Affidavit attached to the State's response to our Motion for a New Trial confirmed what, by then, we certainly suspected—that the State had immunized its witnesses."

This does not address Mr. Allan's statement that the State was not charging the minor witnesses. Instead, in this statement, Mr. Fleener denies that Mr. Allan told him the State was "immunizing" its witnesses. However, the State did not immunize its witnesses; and Mr. Allan's affidavit does not state that he told Mr. Fleener that the State was immunizing its witnesses.

Again and significantly, Mr. Fleener's statement does not deny that Mr. Allan told him the State was not charging the minor witnesses, which is the point in issue. Nothing in Mr. Fleener' s statement contradicts Mr. Allan's affidavit.

> 33. In short, Mr. Allan's affidavit states that he told Mr. Fleener that the State was not prosecuting the minor witnesses. Nothing in ¶ 9 of Mr. Fleener's affidavit contradicts the State's position. Instead, ¶ 9 of Mr. Fleener's affidavit discusses a different topic, namely, immunity agreements and immunization of the State's witnesses. The court therefore has no difficulty finding, based upon Mr. Allan's affidavit, that Mr. Allan told Mr. Fleener, prior to the trial, that the State was not charging any of the minor witnesses for misdemeanor alcohol or controlled substance violations related to the house party, regardless of whether the minor witnesses cooperated or testified.

(3) WHETHER THE EVIDENCE WAS MATERIAL BECAUSE THERE IS A REASONABLE PROBABILITY THAT, HAD THE EVIDENCE BEEN DISCLOSED, THE RESULT OF THE PROCEEDINGS WOULD HAVE BEEN DIFFERENT

34. Next, the court shall address the third factor, namely, whether the evidence was material because there is a reasonable probability that, had the evidence been disclosed, the result of the proceedings would have been different. The court does not have to address this factor, but will do so on the assumption, purely for the sake of argument, that the State suppressed evidence.

35. In *Lawson v. State*, 2010 WY 145, 242 P.3d 993, 1000-01 (Wyo. 2010), the Court explained:

> Evidence is material under *Brady* only when a reasonable probability exists that the result of the proceeding would have been different had the evidence been disclosed. *Bagley*, 473 U.S. at 682, 105 S.Ct. at 3383; *Thomas v. State*, 2006 WY 34, ¶ 15, 131 P.3d 348, 353 (Wyo.2006). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.* When the defense makes a specific request and the prosecution fails to respond fully, the reviewing court may consider directly any adverse effect the failure to respond might have had on the preparation or presentation of the defendant's case. *Bagley*, 473 U.S. at 683, 105 S.Ct. at 3384. "The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response." *Id.* In judging materiality, the focus is on the cumulative effect of the withheld evidence, rather than on the impact of each piece of evidence in isolation. *Id.*; *United States v. Nichols*, 2000 WL 1846225, 2000 U.S.App. Lexis 33183, 2000 Colo. J. C.A.R. 6735 (10th Cir.2000).

¶ 22, 242 P.3d at 1000-1001.

36. Even if the defendant had proven the suppression of favorable evidence—which the defendant did not prove—there is no reasonable probability that, had the evidence been disclosed, the result of the proceedings would have been different.

37. The court bases this conclusion, in large part, on the fact the defendant was very aware that Deputy Roundy, when interviewing the minor witnesses, stated he was not going to charge them for anything that they may disclose to him about drinking alcohol or using marijuana at the house party. (*See* pages 3 – 8 and of State's response and Exhibits 1 – 9 to that response).

38. In his opening statement, defense counsel took advantage of this fact by attacking the minor witnesses' credibility. Defense counsel stated,

> And the first thing he tells them is, I understand you were at a party, and there was drinking going on and there was marijuana being smoked, but I'm not worried about that. You're not—I'm not going to get you in trouble for that. Just tell me what happened.
>
> So right away, these kids are hearing—they're being promised something. They're being given favorable treatment in exchange for what they'll say about our client. Immunity. And I think we have parents here on the jury, or just in your common experience, what better way to shift the focus off of you than to talk about what somebody else did, what somebody else did

> wrong. That's one of the types of things you can consider as this trial goes on.

(*See* Exhibit 13 to State's response).

39. Defense counsel also cross examined Deputy Roundy at length about Deputy Roundy's promise not to charge the minor witnesses. *See* State's response, pp. 10 – 12).

40. Therefore the jury was made well aware that the minor witnesses who cooperated with the State—just like those who refused to cooperate with the State—were not being charged with alcohol or controlled substance violations related to the house party.

41. Any further information about the State deciding not to charge the minor witnesses for alcohol or drug offenses, would have been cumulative, at least in the minds of the jury.

42. There is no reasonable probability that, had the evidence been disclosed, the result of the proceedings would have been different Therefore the evidence is not "material" under *Brady.*

IT IS THEREFORE ORDERED:

1. The court respectfully denies the *Defendant's Motion for New Trial.*

Appendix D

DATED April 21, 2021.

/s/ James L. Radda
James L. Radda
Circuit Court Judge

CERTIFICATE OF SERVICE: This is to certify that a copy of the foregoing was delivered to counsel as follows on the 21st day of April, 2021.

- Carly Anderson by hand delivery to TCPA.
- Thomas Fleener by email: Tom@fleenerlaw.com
- Devon Petersen by email: devon@fleenerlaw.com