

No. 24-

IN THE
Supreme Court of the United States

WILLIAM MICHAEL CROTHERS,

Petitioner,

v.

THE STATE OF WYOMING,

Respondent.

**On Petition for Writ of Certiorari to the
Supreme Court of the State of Wyoming**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Constitutional rule set out in *Brady v. Maryland* and its progeny requires prosecutors to disclose material, exculpatory evidence to the defense. In a criminal case involving disputed eyewitness testimony—and no other evidence—the prosecution failed to disclose its sole corroborating witness’s prior theft and enrollment in a diversion and probation program. The prosecution further failed to disclose its key witness’s changing recollection of events during pre-trial, prep meetings with the prosecution. Finally, the prosecution failed to disclose that it had promised its witnesses that they would not be prosecuted for their own misconduct. The jury rendered a split verdict with the defense conducting only a limited cross-examination on the prosecution’s key witness and its sole corroborating witness. Did Wyoming state courts misapply the Constitutional rule set out in *Brady v. Maryland* and its progeny in concluding that that the prosecution’s withholding of this evidence—even when considered cumulatively—did not constitute a *Brady* violation?

(i)

PARTIES TO THE PROCEEDING

William Michael Crothers is the Petitioner, and the State of Wyoming is the Respondent.

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 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 No. 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).

Docket No. 22-CV-00268-SWS; William Michael Crothers v. Bridget Hill, U.S. District Court for the District of Wyoming; Order Denying Petition for Writ of Habeas Corpus, August 1, 2023. (Decision not reported).

Docket No. 23-8061; William Michael Crothers v. Bridget Hill, U.S. Court of Appeals for the Tenth Circuit; Order Denying Certificate of Appealability, March 6, 2024. (Decision not reported).

Docket No. CR-2019-280; William Michael Crothers v. State of Wyoming; District Court for the Ninth Judicial District, Teton County, Wyoming; Order Denying Defendant's Motion to Dismiss or, in the Alternative, Motion for New Trial on July 1, 2023. (Decision not reported).

Docket No. 18926; William Michael Crothers v. State of Wyoming; District Court for the Ninth Judicial District, Teton County, Wyoming; Affirmed Denial of Defendant's Motion to Dismiss or, in the Alternative, Motion for New Trial on June 18, 2024. (Decision not reported).

Docket No. S-24-0165; William Michael Crothers v.
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OPINIONS BELOW

The opinion of Circuit Court of the Ninth Judicial District for Teton County, Wyoming denying a motion to dismiss or, in the alternative, for a new trial. (July 23, 2023), (Pet. App. C). (Decision not reported). The District Court's opinion, Ninth Judicial District, affirming the denial of the motion to dismiss or, in the alternative, for a new trial. (June 18, 2024), (Pet. App. B). (Decision not reported).

JURISDICTION

The Supreme Court of Wyoming entered its decision on July 30, 2024 (Pet. App. A). This Court has jurisdiction under 28 U.S.C. § 1257(a). (Decision not reported).

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 in 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 witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Factual Background and Procedural History

Factual Background

For over five years, Petitioner Michael Crothers has fought for justice in a place where prosecutors unabashedly violate Defendants' constitutional rights, emboldened by a complete lack of accountability for their actions. Indeed, rather than facing any discipline, the rogue prosecutors were promoted to the bench and elected president of the state bar association. Compare that to the devastating effects the prosecutors' actions have on the accused. Crothers' life—and his family's life—were uprooted by uncorroborated allegations that the Teton County prosecutors refused to accept as anything but unshakable truth, and a circus-like trial tainted by, then-undisclosed, *Brady* violations. Only after the trial did Crothers discover what the prosecution had kept from him. He discovered clear evidence of the prosecutor providing favorable treatment to its witnesses in exchange for testifying against Crothers. Crothers further discovered obvious *Giglio* evidence that was not disclosed and admissions from the prosecutor himself that the witnesses kept changing their "story" during pretrial interviews and that one of the witnesses had committed theft and had been admitted into a diversionary program – supervised by the prosecutor – immediately preceding his testifying against Crothers. None of this was disclosed to Crothers prior to trial.

Since Crothers' trial, Wyoming courts have played a game of legal whack-a-mole, in an effort to keep Crothers convictions in place. One court would make purported factual findings, without any basis for such findings in the evidentiary record. Another court

would then find a separate basis to affirm, that neither party had raised or even contemplated. And when Crothers presented the courts with additional, newly discovered *Brady* violations, the Wyoming courts repeated the same pattern as before, refusing to protect Crothers' constitutional rights. Because Wyoming state courts have repeatedly failed to uphold Crothers' constitutional protections—and incorrectly decided important questions relating to the application of *Brady* and *Giglio*—Crothers now petitions this Court for a writ of certiorari, so he may finally obtain the justice he seeks.

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

Crothers was at a charity event that evening and had no idea his son had invited friends over to his home. Because Crothers consumed several alcoholic beverages at the charity event, he took a taxi home. (Trial Transcript at 30-32, Feb. 27, 2021). When Crothers arrived at his house, there were twenty teenagers present. (Trial Transcript at 99, Feb. 27, 2021). Many of the teenagers were longstanding family friends, whom Crothers had known since their youth. See, e.g., (Trial Transcript at 144-45, Feb. 27, 2021).

The charges and trial testimony included encounters between Crothers and two teenage women at the party, D.K. and K.H. At trial, 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. D.K. testified that Crothers then kissed her on her cheek. But, according to D.K., she had to quickly move her

head to dodge—what she claimed—would have been a kiss on the lips. (Trial Transcript at 150-53, Feb. 27, 2021).

K.H. also testified about her encounters with Crothers. While K.H. admitted that she was “chugging” vodka all night before Crothers arrived, she nonetheless claimed to have a clear recollection of the events of that evening. According to K.H., Crothers approached her in the garage, hugged her, and grabbed the lower part of her backside. She was sitting on her boyfriend’s lap when this supposedly occurred. (Trial Transcript at 187, Feb. 27, 2021). K.H. testified that Crothers approached her again while she was walking in the hallway, grabbed her by the waist, and then kissed her.

While K.H. said that she told others at the party about the interactions, none of the partygoers witnessed Crothers grab K.H.’s backside. (Trial Transcript at 218-227, Feb. 27, 2021). Even K.H.’s boyfriend testified that he did not see Crothers hug and grab K.H.’s backside, despite K.H. sitting on his lap when the altercation allegedly occurred. (Trial Transcript at 187, Feb. 27, 2021). K.H. was purportedly upset and crying that evening. But she did not make any attempt to find a ride home. She told no one she wanted to leave the party or needed help. In fact, she decided to stay at the party, stay the night at Crothers’ home, and then go brunching with her friends the next day.

School Resource Officer Andrew Roundy (“SRO Roundy”)

News spread quickly at the local high school, and the School Resource Officer Andrew Roundy (“Roundy”) immediately inserted himself into the fray. He started questioning the students, surreptitiously recording the interviews without advising the students—or, more importantly, their parents—of the recording or

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, Crothers was found guilty of Counts 3, 4 and 5; and not guilty of Counts 1, 2 and 6. He was sentenced to 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

At trial, Crothers' defense centered on the credibility of the teenage witnesses who had admitted to drinking (and for some, chugging) alcohol and smoking marijuana. None of this is disputed or was disputed at Crothers' trial. And none of the following assertions were disputed at trial, either:

- 1) At the outset of each interview with the teenagers, 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 party.

2) Many of the teenagers had committed misdemeanor crimes pursuant to Wyoming Law by consuming alcohol and marijuana. Indeed, the offenses committed by the teenagers coincides to the same level of offenses charged against Crothers.

3) Roundy's interviews, including Roundy's promise not to charge the teenagers with any offenses, were known to defense counsel through discovery and used at trial for purposes of challenging the credibility of the witnesses.

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:

Q: [Parent] 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?"

A: [Prosecutor] "We'll reassure them about drinking[,] etc."

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

Importantly, this e-mail is from the mother of one of the State's key witnesses. The e-mail leaves no doubt that the sender wants assurances from the **prosecutor** (emphasis added) about her daughter's and her daughter's friend's liability. The statement from the school resource officer about the witnesses not getting in trouble was—understandably—not sufficient. Roundy's

authority was limited, and the mother knew that. Otherwise, she would not have reached out to the prosecutor to try to obtain a written promise of non-prosecution directly from the prosecutor. And the mother was not just reaching out for herself and her daughter. Indeed, she 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 that the prosecutor never disclosed the existence of the above e-mail to the defense; never disclosed the sum and substance of the underlying communication itself; and never disclosed that he had promised the parent(s) that he (**the prosecutor**) would not bring charges.

6) There is no dispute that the sole witness to corroborate the two Unlawful Contact charges against Crothers was on probation for theft at the time he testified. Further, he was enrolled in a diversion program that was supervised by the same prosecutor who directed his testimony. To be sure, shortly after Crothers' trial, the deputy prosecutor who directed the witness's testimony appeared for a status conference before the trial court to discuss the witness's criminal case and diversionary status.

7) There is no dispute that the prosecution never disclosed any of the negative facts related to its sole corroborating witness's theft offense and his probationary and diversionary status. Crothers only discovered these facts after his trial through a public records request.

8) There is no dispute that K.H. changed her version of the events during pretrial interviews with the State. And there is no dispute that the prosecution failed to inform Crothers prior to his trial that the

same witness who was chugging vodka throughout the night was waffling on her recollection of events.

Post-Trial Litigation Regarding the Brady Material

Crothers has twice sought a new trial at the trial court.

The First Motion for a New Trial

In a post-conviction motion, Crothers moved for a new trial arguing, among other things, that the State had violated *Brady* based on the newly discovered evidence that the prosecutor 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 these issues and instead engaged in distorted legal analyses grounded in two central faulty conclusions. First, the courts wrongly concluded that statements made by a law enforcement officer to various witnesses during the investigation 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, the courts wrongly concluded that a prosecutor's uncommunicated, subjective intent not to prosecute witnesses has the same legal effect as when a prosecutor directly communicates his intent to the various witnesses to garner their further cooperation. In the first instance, the lower courts wrongly equated a law enforcement officer's 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

In the proceedings below, the lower courts have consistently equated Roundy's statements to the minors to the prosecutor's promise to the parent. And they have concluded that Crothers' counsel's knowledge of Roundy's statement to the students is sufficient to "cover" the prosecution's failure to disclose the e-mail communication between the prosecutor and the parents not to prosecute the witnesses for their crimes. Crothers asserted in his first motion for new trial (and continues to assert) that the prosecution's failure to disclose the promise of non-prosecution constituted a *Brady* violation that deprived him 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. Both the lower courts and the State misapplied the relevant *Brady* analysis by conflating the prosecutor's subjective intent with what promises the promises the prosecutor made to the witnesses. And this misapplication of the bedrock principals of *Brady* and its progeny alone justifies this Court's issuance of a writ of certiorari.

The Second Motion for a New Trial

After Crothers exhausted his appeals relating to the first *Brady* violation, Crothers discovered new evidence supporting two additional *Brady* claims. First, Crothers discovered that the sole corroborating witness had pled guilty to theft immediately prior to testifying for the State against Crothers. Not only had this witness pled guilty to theft, but he was also on probation and in diversion program at the time of his trial testimony, which—shockingly—was supervised by the same prosecutor who directed his testimony. Crothers knew nothing of this prior to his trial. Second, Crothers

discovered that K.H. had changed her version of the events during her pretrial interviews. But again, the prosecutors kept Crothers in the dark, keeping this information from him while at the same time trying him for offenses founded upon this witness's testimony.

After discovering this new evidence, Crothers filed a Second Motion for New Trial. Crothers argued that this new evidence, along with the prior evidence presented with his first Motion for a New Trial, demonstrated a pattern of disregard for the fundamental tenants of *Brady*, which require the prosecution to turn over all material exculpatory evidence. Crothers further argued that, when taken together, the three violations clearly established a reasonable probability of a different jury verdict at trial.

During the hearing on the Second Motion for New Trial, the State conceded that its sole corroborating witness was in a diversionary program at the time of Crothers' trial. The State further conceded that K.H. had changed her testimony in pretrial interviews, and that the prosecutor chose not to disclose this critical evidence to Crothers prior to his trial. But the trial court brushed all of this evidence off, concluding that none of the evidence Crothers presented—even considered cumulatively—prejudiced Crothers at his trial. Crothers timely appealed. The appellate court thereafter affirmed the trial court's conclusion, agreeing with the trial court's finding of no prejudice.

Procedural History

Crothers 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, Crothers was

sentenced to thirty days in jail, an additional thirty day suspended jail sentence, six months probation and a fine of \$2,250.00.

Crothers filed a motion for 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 witnesses and their parents that the witnesses would not be prosecuted.

In opposing the motion, the prosecutor submitted an affidavit. In the affidavit, the prosecutor stated that (1) he talked to Roundy, who had promised the minor witnesses that they would not be prosecuted; (2) the prosecutor agreed to honor the deputy's commitment to the witnesses; (3) he told defense counsel that he agreed with the Roundy's representation and that the witnesses would not be prosecuted for their crimes; and (4) that he told the 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. In the second affidavit, he stated that the prosecutor never disclosed to him that the prosecutor had promised the witnesses that they would not be prosecuted and, more importantly, that the prosecutor never disclosed that the prosecutor had, in fact, told him that those promises were conveyed to the witnesses and their parents.

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

Crothers appealed his conviction and denial of the motion for a new trial to the District Court, Ninth Judicial District, Teton County, Wyoming. Crothers alleged, *inter alia*, that a Brady violation had occurred when the State failed to disclose to counsel that the prosecutor had told its witnesses that they would not be prosecuted.

On October 18, 2022, the District Court held that the promise made to the minor witnesses by the prosecutor was a promise of immunity but held that the prosecutor had met its obligation by disclosing said promise. This was a clear abuse of discretion, as even the State never asserted that the prosecutor had informed Crothers that the promise of favorable treatment was conveyed to the individual witnesses and their parents.

On November 22, 2022, the Wyoming Supreme Court denied a petition for a writ of review.

On February 21, 2023, Crothers sought a Petition for a Writ of Certiorari before this Honorable Court. This court denied the Petition.

While the first motion for a new trial was working its way through the appellate process, Crothers uncovered the other two *Brady* violations. First, the sole corroborating witness's mother approached Crothers to inform him that at the time her son had testified, her son was in a juvenile diversionary program for theft. Crothers sent an investigator to the courthouse to try and locate the casefile. Because the case ended up as a juvenile matter, records were scarce. However, the records that were available confirmed what the young man's mother had told Crothers.

Second, Crothers deposed the prosecutor in a civil deposition. During the deposition, the prosecutor stated that at least one witness, K.H. told varying versions of what she recalled happening on the night in question during preparation for her trial testimony. He also admitted that he did not disclose this information to Crothers. Finally, contrary to the finding of the District Court on appeal that the promises he made to his witnesses were conveyed to Crothers, he confirmed that he did not, in fact, tell Crothers about the promises he made to the witnesses and their parents of favorable treatment.

All of this led Crothers to file a Second Motion for New Trial. The Circuit Court heard and denied the Second Motion on July 12, 2023. Crothers appealed.

On June 18, 2024, the District Court for the Ninth Judicial District, Teton County, Wyoming denied Crothers' Second Motion.

Crothers again sought a writ of review from the Wyoming Supreme Court. On July 30, 2024, the Wyoming Supreme Court denied the petition.

Compliance with Supreme Court Rule 14.1(g)

The federal question raised is whether the Wyoming courts misapplied the legal principles and framework articulated by this Court in *Brady v. Maryland* and *Giglio v. United States*. The federal question was first raised in the trial court when, on October 9, 2020, Crothers moved for a new trial in the Circuit Court in the Ninth Judicial District, Teton County, Wyoming. The court ruled against Crothers in its Order Denying the Motion (April 21, 2021, pages 7-13). The federal question was raised again on appeal to the District Court for the Ninth Judicial District, Teton County, Wyoming. The District Court ruled against Crothers

by affirming the conviction (October 18, 2022, pages 14-15). The federal question was raised a third time in Crothers' Petition for Writ of Review filed in the Wyoming Supreme Court. The Wyoming Supreme Court declined to hear the case and denied the petition on November 22, 2022. Crothers then sought relief from this Court. On March 20, 2023, this court declined to issue a writ of certiorari.

The federal question involving the second and third Brady/Giglio violations were raised (incorporating the initial allegation) when on April 25, 2023, Crothers filed a Second Motion for New Trial in the Circuit Court in the Ninth Judicial District, Teton County, Wyoming. The Circuit Court again ruled against Crothers on July 12, 2023. This same federal question was raised on appeal to the District Court for the Ninth Judicial District, Teton County, Wyoming. The District Court denied the appeal on June 18, 2024. Crothers subsequently sought review from the Wyoming Supreme Court on the federal issue. The Wyoming Supreme Court declined to hear the case on July 30, 2024.

REASONS FOR GRANTING THE WRIT

I. **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, “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) (discussing *Brady v. Maryland*, 373 U.S. 83 (1963)).

The *Brady* rule and its elements have been well established by the Court. Prosecutors are obligated to disclose favorable evidence, 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. But 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. Then, in *United States v. Bagley*, 473 U.S. 664 (1985), the Court clarified the standard for “materiality.” As the Court explained in *Bagley*, regardless of the nature of the defense request or whether a request is

made at all, exculpatory evidence is material if there is a “reasonable probability” that it “would” affect the outcome of the trial. *Id.* at 682.

Extremely pertinent to this case, this Court held that the prosecution must disclose a witness’s criminal history and probationary status following an adjudication of juvenile delinquency because to withhold such information violates a defendant’s constitutional rights to confront witnesses. *See Davis v. Alaska*, 415 U.S. 308 (1974).

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). Indeed, just 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). And numerous national studies support Judge Kozinski’s conclusion, finding that *Brady* violations remain pervasive throughout the country. *See Jones, supra*, at 434; Bennett L. Gershman, *Prosecutorial Misconduct* §5:1, 5:3 (2d ed. 2002) (“Nondisclosure of exculpatory evidence by prosecutors … account[s] for more miscarriages of justice than any other type of prosecutorial infraction.”).

Unfortunately, this seems only to be the tip of the iceberg. *Brady* imposes an affirmative duty to disclose

on prosecutors and thus, many violations of that rule remain concealed. 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). That is because, as Judge Kozinski has explained, “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 sixty years of consistent jurisprudence from this Court, *Brady* violations remain persistent, wide-spread, and most certainly, underreported.

This second petition again 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 Again Provides the Court with the Opportunity to Correct a Significant Misunderstanding of the *Brady* Rule by Prosecutors

The prosecutor’s obligations in this case were stunningly simple: First, the prosecutor 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. Second, he needed to disclose the circumstances surrounding his sole corroborating witness pleading guilty to a theft charge and being placed in a juvenile diversionary program supervised by the prosecutor’s office. And third, he needed to disclose to the defense when, during pretrial preparation, at least one of his witnesses changed their story from when they initially reported to law enforcement. The fact that he failed to do so, admitted that he failed to do so, and yet continues to argue that he complied with his *Brady* obligations, underscores the lack of understanding apparently still held by prosecutors and courts—or at least those in Wyoming.

The facts are relatively simple. After Crothers’ trial, Crothers discovered communications from the prosecutor in which the prosecutor had reassured the underaged witnesses and their families that they would not be prosecuted for crimes if they testified against Crothers. Additionally, Crothers later discovered that the sole corroborating witness had pled guilty to a theft charge and was placed in a juvenile diversionary program

immediately prior to him testifying for the State. Crothers then discovered one of the State's key witnesses, K.H., changed her story during trial preparation.

The Wyoming courts first found that the prosecutor cannot provide immunity and therefore the fact that it was promised did not need to be disclosed. That obviously incorrect analysis was rejected by the appellate court. But in correcting one mistake the appellate court committed a separate mistake of its own. Specifically, the appellate court incorrectly interpreted the prosecutor's subjective intent not to prosecute—that arguably was relayed to Crothers—as equating to the prosecutor relaying that promise to his witnesses. The prosecutor has finally admitted, contrary to the District Court's finding, that he did promise favorable treatment to the witnesses, and parents and that he did not inform Crothers of those promises.

Additionally, it is uncontested that K.H. changed her version of events during trial preparation. It is also uncontested that the State's main witness committed theft and was in a diversionary status at the time of the trial.

The facts involving what was known and what and was not disclosed are finally clear. But the problem remains: the state courts in Wyoming continue to misapply *Brady* in analyzing these facts. Throughout the posttrial litigation, the various lower courts found facts that didn't exist, conflated various legal principles, and evaluated prejudice in a manner which suggests no amount of undisclosed evidence could rise to the level of a reasonable probability of a different jury verdict.

Take the prosecutor's promises of non-prosecution, for instance. The significance of these promises 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 promise gave the witnesses a motive to testify favorably for the prosecution, **something which could never be explored by the defense at trial.**

The same logic applies to the undisclosed evidence relating to the prosecution's sole corroborating witness. As the witness had committed arguably a crime of moral turpitude (theft) and his ability to divert the crime and keep his record clean was placed in the prosecutor's hands, he clearly had a motive to testify favorably for the State.

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 (and now the juvenile diversionary status of the other witness), his strategy in defending the Crothers would have changed completely. His cross-examination of the State's witnesses 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. (Defense counsel affidavit attached to Response to Motion for New Trial). Thus, had the promise and diversionary status been disclosed, there is a reasonable probability that the result of the proceeding would have been different.

The Court also has the opportunity to create a new standard of materiality in cases such as this,

where the prosecutor has obvious impeachment material solely in his possession. 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 knew the withheld promise would be highly material to an effective cross examination of the eyewitnesses. That is why he withheld it. The same applies with the other two violations. To now 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. 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 seven years since this Court has had occasion to opine on *Brady*. 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

The Court should grant the petition.

Respectfully submitted,

Of Counsel:

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October 28, 2024

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APPENDIX

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APPENDIX A

IN THE SUPREME COURT, STATE OF WYOMING

S-24-0165

WILLIAM MICHAEL CROTHERS,
Petitioner,

v.

THE STATE OF WYOMING,
Respondent.

April Term, A.D. 2024

ORDER DENYING PETITION FOR WRIT OF REVIEW

This matter came before the Court upon a Petition for Writ of Review, filed herein July 3, 2024. After a careful review of the petition, that material attached thereto, the 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 July 3, 2024, be, and hereby is, denied.

DATED this 30th day of July, 2024.

BY THE COURT:

/s/

KATE M. FOX
Chief Justice

APPENDIX B

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

Civil Action No. 2023-CV-18926

WILLIAM MICHAEL CROTHERS,

Appellant,

v.

THE STATE OF WYOMING,

Appellee.

ORDER AFFIRMING CIRCUIT COURT DENIAL OF APPELLANT'S MOTION FOR DISMISSAL OF THE INFORMATION OR NEW TRIAL BASED UPON *BRADY* VIOLATIONS

The above-entitled matter is before the Court on a second appeal with nearly indistinguishable issues argued in the first appeal. This appeal is, again, from the Teton County Circuit Court and brought on a decision denying Appellant, William Crothers', motion to dismiss or, in the alternative, second motion for a new trial.

Having reviewed the record *de novo*, and being otherwise fully advised in the premises, the Court holds there was no violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The suppressed evidence of a corroborating witness's shoplifting ticket being deferred through the Teton County juvenile diversion program was not material. Even if

the evidence had not been suppressed, the Court holds that the witness's testimony was consistent with his statement to law enforcement. Moreover, even if the jury were persuaded that the juvenile witness held an unfair State bias because of his favorable treatment by the State, the Court is persuaded there was other credible evidence supporting a conviction. The jury verdict would not have been different. This appeal is nothing more than Appellant's redundant attempt to outmaneuver his conviction. The Court affirms the criminal conviction and the circuit court's denial of Appellant's motion for a new trial.

I. ISSUE

Did the circuit court properly deny Appellant's motion for dismissal of information or, in the alternative, motion for a new trial based upon an alleged *Brady* violation?

II. FACTS

On May 11, 2019, Appellant, William Miachael Crothers, arrived home after a charity event to unexpectantly find a high school party, hosted by his teenaged son, underway at his house. Trial testimony revealed that Appellant did not end the illegal party, but, instead, encouraged the party by drinking and smoking marijuana with his teenaged guests. Then, during the evening, he grabbed and kissed two of the girls, D.K. and K.H. One of the boys at the party, W.O., testified that he witnessed Appellant's encounters with both girls. In February 2020, a jury convicted Appellant on three counts of unlawful contact and one count of permitting a house party.

After a series of post-trial motions and appeals, on April 25, 2023, Appellant filed with the Teton County Circuit Court a motion to dismiss or, alternatively, a

second motion for a new trial. The circuit court denied the motion, and this Court dismissed Appellant's appeal for lack of prosecution. Appellant appealed the dismissal to the Wyoming Supreme Court. In late 2023, the supreme court reinstated the appeal on the motion to dismiss the information or, in the alternative, second motion for a new trial.

III. STANDARDS OF REVIEW

On the issue of whether the State committed a *Brady* violation, 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. *Dockter v. State*, 2019 WY 31 ¶ 16, 436 P.3d 890, 895 (Wyo. 2019).

IV. DISCUSSION

Appellant argues that he is entitled to a new trial because the State failed to disclose favorable impeachment evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194. “[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.” *Id.*, 373 U.S. at 87, 83 S. Ct. at 1196-97. “The essence of *Brady* is the discovery of information *after the trial*, which was known to the prosecution but unknown to the defense during the trial.” *Thomas v. State*, 2006 WY 34 ¶ 16, 131 P.3d 348, 353 (Wyo. 2006). “In order to establish a *Brady* violation, a defendant must demonstrate the prosecution suppressed evidence, the evidence was favorable to the defendant, and the evidence was material.” *Id.* ¶ 15, 131 P.3d at 353. Under *Brady*, evidence is material when there is a

reasonable probability that, had the evidence been disclosed, the proceedings would have had a different result. *Id.* “A reasonable probability of a different result is shown when the suppression of evidence undermines confidence in the outcome of the trial.” *Id.*

The State did not disclose to Appellant that the corroborating witness W.O. had been placed on a juvenile diversion program in or around November 2019 following a shoplifting incident. W.O. was on diversionary status when he testified at Appellant’s trial in February 2020. The suppression of evidence of W.O.’s diversionary status, however, does not undermine confidence in the outcome of Appellant’s trial. W.O.’s testimony did not contradict his statement to law enforcement in May 2019, which was before the shoplifting incident occurred. In other words, even before W.O. might have been motivated to testify favorably for the State, he gave a statement that was consistent with his trial testimony. Second, the victims K.H. and D.K. testified credibly at trial. It is reasonable that their testimonies alone would have convinced the jury of Appellant’s guilt. There is no reasonable probability that there would have been a different outcome at trial if the evidence of W.O.’s diversionary status had not been suppressed. Therefore, the evidence was not material and there was no *Brady* violation.

Appellant argues that he is entitled to a new trial because he was not given the opportunity to cross-examine witnesses about their pro-State biases resulting from the State’s promise not to prosecute the witnesses. Appellant again argues that because the State did not notify him before the trial that it would not be prosecuting the witnesses for drug use and underaged drinking, he was not able to challenge their credibility. Appellant’s argument is the same argument that was

rejected by this Court's previous order denying Appellant's first motion for a new trial. The Wyoming Supreme Court also rejected the argument and denied Appellant's petition for review. Then, the United States Supreme Court rejected the argument and denied Appellant's petition for certiorari.

There is no reasonable probability that there would have been a different outcome at trial if Appellant had challenged the witnesses' credibility. The jury was informed that each of the witnesses had been at the house party and that each witness had been drinking or using marijuana. The witnesses admitted that they had been at the party where there was alcohol and marijuana and that they had partaken in those substances. Even if the Appellant did not cross-examine the witnesses about their immunity agreements, Defense Counsel's opening statement informed the jury that the witnesses had been at the party, there was drinking and marijuana use, and no one would be prosecuted for those offenses. Defense Counsel alerted the jury to the possibility that the witnesses were given favorable treatment through immunity. The defense opening statement even alleged that the witnesses might be motivated to shift the focus of their own criminal behavior onto another actor. Even with that information, the jury convicted. Any additional cross-examination attacking witness credibility or bias would have been cumulative. There is no reasonable probability that the trial would have resulted differently if the credibility of the witnesses had been challenged. The evidence was not material, and there was no *Brady* violation.

V. DECISION

The Court holds there was no *Brady* violation when the State suppressed evidence of W.O.'s diversion status and of the immunity agreements with the witnesses. There was no cumulative error. The Court affirms the circuit court' decision to deny the motion to dismiss the information or, in the alternative, second motion for a new trial.

IT IS SO HELD.

Dated this 18th day of June 2024.

/s/ Joseph B. Bluemel
JOSEPH B. BLUEMEL
DISTRICT COURT JUDGE

T. Fleener/D. Petersen via fax
D. Erramouspe/A. Breckenridge via fax

CERTIFICATE OF SERVICE

I, _____, Deputy Clerk of Court, Teton County, Wyoming, hereby certify that I served true and correct copies of the foregoing on the _____ day of June 2024, to the following:

Thomas Fleener
Devon Petersen
Fleener Petersen, LLC
P.O. Box 1049
Laramie, WY 82073

Alex Breckenridge
Sweetwater County Attorney's Office
50140 C US Highway 191 South, Ste. 400
Rock Springs, WY 82901

Deputy Clerk of District Court

APPENDIX C

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

Curt A. Haws
Circuit Court Judge

Erin Munk
Clerk of Court

Teton County Courthouse
180 South King Street
P.O. Box 2906
Jackson, WY 83001
(307) 733-7713
(307) 733-8694 fax

Case No. CR-2019-0000280

STATE OF WYOMING,

Plaintiff,
vs.
WILLIAM MICHAEL CROTHERS,
Defendant.

ORDER DENYING DEFENDANT'S MOTION TO
DISMISS, OR, IN THE ALTERNATIVE, SECOND
MOTION FOR A NEW TRIAL

THIS MATTER came before the Court for a hearing
on the Defendant's Motion to Dismiss, or, in the
Alternative, Second Motion for New Trial on June 20,
2023. After receiving the evidence presented by the

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Defendant as well as the able argument of counsel for both parties, the Court ruled from the bench. The purpose of this Order is to memorialize that decision.

IT IS, THEREFORE, ORDERED ADJUGED AND DECREED that based on the findings announced in open court, and for the reasons set forth on the record of the June 20, 2023 hearing, the Defendant's Motion to Dismiss, or, in the Alternative, Second Motion for New Trial is denied.

July 12, 2023

/s/ Curt Haws

Curt Haws

Circuit Court Judge

Certificate of Service

x County Attorney x Defense Counsel

Defendant TSCO Jail TCSO Dispatch

/s/ [Illegible]

Clerk

APPENDIX D

IN THE SUPREME COURT, STATE OF WYOMING

S-22-0261

WILLIAM MICHAEL CROTHERS,

Petitioner,

v.

THE STATE OF WYOMING,

Respondent.

October Term, A.D. 2022

**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

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.

11a

DATED this 22nd day of November, 2022.

BY THE COURT:

/s/

KATE M. FOX
Chief Justice

APPENDIX E

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.

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 unexpectedly 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 for 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 longstanding 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).

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.

IV. DISCUSSION

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

1. Is 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 them 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 pre-judgment 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.

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 also 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.” *Id.* (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. 1, 2 (1916), the court held it was unlawful for the defendant to kiss the victim without her consent even though 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.

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.

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Dated this 18th day of October 2022.

/s/ Joseph B. Bluemel
JOSEPH B. BLUEMEL
DISTRICT COURT JUDGE

APPENDIX F

**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).

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- 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.

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 5 1/2 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 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

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.

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 activity,” 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 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

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

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, 1 14, 386 P.3d 765, 770 (Wyo. 2017) (citing *Wilkenning v. State*, 2007 WY 187, 1 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 turn 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); *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*.

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