

SUPREME COURT OF NEW JERSEY
DOCKET NO. 090853

STATE OF NEW JERSEY,
Plaintiff-Respondent,
v.
YUSEF B. ALLEN,
Defendant-Petitioner.

: CRIMINAL ACTION
: On Certification Granted from a
: Judgment of the Superior Court of
: New Jersey, Appellate Division.
: Sat Below:
: Hon. Ronald Susswein, J.A.D.;
: Hon. Lisa Perez Friscia, J.A.D.;
: Hon. Stanley L. Bergman, Jr., J.A.D.

**BRIEF ON BEHALF OF DEFENDANT-APPELLANT IN RESPONSE TO
AMICUS CURIAE BRIEFS FROM THE ATTORNEY GENERAL AND
THE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

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TRANSCRIPT KEY

ACDLb – Association of Criminal Defense Lawyers Amicus Curiae Brief

AGb – Attorney General’s Amicus Curiae Brief

AGa – Attorney General’s Amicus Curiae Appendix

Dsb – Defendant’s Supreme Court Supplemental Brief

Dsa — Defendant’s Supreme Court Supplemental Appendix

Db — Defendant’s Appellate Division Brief

Da — Defendant’s Appellate Division Appendix

Dp — Defendant’s Petition for Certification

Pa — Defendant’s Petition Appendix

Sb — State’s Appellate Division Brief

Sr — State’s Response to Petition for Certification

1T — January 11, 1999 — Trial

2T — January 12, 1999 — Trial

3T — January 13, 1999— Trial

4T — January 14, 1999— Trial

5T — January 19, 1999 — Trial

6T — January 20, 1999 — Trial

7T — January 21, 1999 — Trial

8T — January 22, 1999 — Trial

9T — May 28, 1999 — Sentencing

10T — September 20, 2005 — Hearing

11T — July 14, 2008 — Hearing

12T — August 4, 2008— Hearing

13T — August 5, 2008— Hearing

14T — August 6, 2008 — Hearing

15T — September 3, 2008 — Hearing

16T — July 12, 2011 — Hearing

17T — August 4, 2022— Motion for New Trial

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PROCEDURAL HISTORY & STATEMENT OF FACTS¹

Defendant-Appellant Yusef Allen relies on the procedural history and statement of facts as set forth in his Appellate Division brief (Db1-14), and his supplemental brief previously submitted in this matter. (Dsb3-4)

LEGAL ARGUMENT

POINT I

THE BRADY AND CARTER MATERIALITY STANDARDS ARE DISTINCT: BRADY MATERIALITY IS LESS STRINGENT THAN CARTER MATERIALITY, AND BRADY MATERIALITY ALONE CAN BE SATISFIED BY A SHOWING THAT THE UNDISCLOSED EVIDENCE “UNDERMINES CONFIDENCE” IN THE OUTCOME OF THE TRIAL.

Prior to the submission of the Association of Criminal Defense Lawyer’s (“ACDL”) amicus curiae brief, no party to this matter had argued that the Brady and Carter materiality standards are equivalent. As the Attorney General (“AG”) rightly acknowledges, notwithstanding the ACDL’s submission, “all parties agree that the Carter and Brady materiality standards are different[.]” (AGb14-15) (citing Db18; Sb18-20; Dp5-8).² The reason that there is near-unanimous

¹ For purposes of ease and clarity, the procedural history is included alongside the statement of facts.

² At the time of this writing, the State has not yet submitted their supplemental response brief. In its brief before the Appellate Division, however, the State did not argue that the two materiality standards are equivalent. (Sb18-20)

consensus amongst the parties is because the law on this question is long settled and patently clear. In short, in order to “succeed on a Brady claim, a defendant need only show that the new [undisclosed] evidence undermines faith in the verdict, a showing” which, unlike the newly discovered evidence test under Carter, “does not require demonstrating that defendant more likely than not would have been acquitted had the new evidence been before the jury.” (AGb1)

The rationale for this difference between the tests is well established. As discussed in Point I.A., unlike Carter movants whose trials were presumptively fair, Brady movants have been deprived of their due process right to a fair trial by virtue of the prosecutor’s failure to meet its discovery obligations, and are thus entitled to a new trial even if they cannot prove that the suppressed evidence would more likely than not have led to an acquittal. In reaching a contrary conclusion, the ACDL failed to include any mention whatsoever of this core distinction in the purpose and focus of the two tests. Instead, as discussed in Point I.B., in support of its claim that the two materiality standards are equivalent, the ACDL provides an incomplete overview of the relevant case history, and offers a mischaracterization of this Court’s opinions in Carter I³, Carter II⁴, and State v. Ways, 180 N.J. 171 (2004).

³ State v. Carter, (Carter I) 85 N.J. 300 (1981).

⁴ State v. Carter, (Carter II) 91 N.J. 86 (1982).

Importantly, the difference between Allen’s argument (that Brady materiality is a lower threshold than Carter materiality) and the ACDL’s argument (that Carter materiality has been the same as Brady materiality since this Court’s 2004 opinion in Ways) is not merely an academic or inconsequential distinction. Rather, as will be discussed in Point I.C., the position that the ACDL asks this Court to adopt would not only be a violation of *stare decisis* and the U.S. Constitution, but it would substantially prejudice Allen (as well as all other defendants alleging Brady violations) by subjecting him to the materiality test as defined and applied by this Court in Carter, Ways and their relevant progeny – a test which is more rigorous than the applicable test under Brady.

A. The Defense And The Attorney General Agree That Brady Materiality is Less Stringent than Carter Materiality.

The case histories and proper definitions of the Brady and Carter materiality tests are discussed at length in both Allen’s prior submission to this Court (Dsb4-22) as well as the AG’s amicus brief (AGb14-21). A comprehensive recap of those arguments is therefore unnecessary, but certain points of agreement between Allen and the AG are highlighted below insofar as they demonstrate why and how the ACDL’s argument on materiality is wrong. Ultimately, the fundamental distinction between Brady and Carter materiality is that, for Brady movants alone, the prosecutor has violated the defendant’s due process rights by failing to disclose favorable evidence. U.S. v. Agurs, 427 U.S.

97 , 111 (1976). All the reasons why, and the manners in which, the two tests differ flow from this central, fundamental distinction. In short, “new trials should more readily be available where newly discovered evidence was possessed by the prosecution, and not disclosed to defendant, than where it is simply that the defense did not discover it beforehand.” (AGb1)

To recap, when a prosecutor violates Brady, they have failed to meet their obligation of “assist[ing] the defense in making its case” by “disclos[ing] evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial[.]” U.S. v. Bagley, 473 U.S. 667, 675; 675, n.6 (1985). The consequence of the State’s failure is that it casts doubt on the overall fairness of the trial given that the defendant has been denied one of the “crucial assurances that the result of the proceeding is reliable[.]” Strickland v. Washington, 466 U.S. 668, 694 (1984). Because Brady violations “cas[t] the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice” such violations result in a “denial of due process” and an “unfair trial to the accused.” Brady v. Maryland, 373 U.S. 83, 87-88 (1963) (emphasis added). It is for this reason that the central focus of Brady is fairness: “The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he

received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” Kyles v. Whitley, 514 U.S. 419, 434 (1995) (emphasis added).

In contrast, Carter motions do not entail any failure by the State to provide one of the “crucial assurances” of a trial’s reliability, and thus the Carter inquiry is not focused on whether the trial was fair. Strickland, 466 U.S. at 694. Quite the opposite, in fact. Carter cases “presuppos[e] that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged.” Ibid. The challenged conviction in a Carter motion is not cast in doubt by any procedural failure, but rather, is “cast in doubt by evidence suggesting that a defendant may be innocent.” Ways, 180 N.J. at 188.

In sum, Carter and Brady motions serve two distinct purposes. Brady remedies the injustice of being denied a fair trial, whereas Carter remedies the injustice of being “unjustly convicted” as a defendant who “may be innocent.” Ibid. And these distinct purposes call for distinct inquiries. For Brady, where “government misconduct” is “assume[d],” (AGb19) “the result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if” the error “cannot be shown by a preponderance of the evidence to have determined the outcome.” Strickland, 466 U.S. at 694. Brady movants do not need to show “by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal” in order to get a new trial.

Kyles, 514 U.S. at 434 (emphasis added). This means that a court could find that a new trial is warranted under Brady even if the court believes that the undisclosed evidence “does not... prove [Defendant’s] innocence, and [that] the jury might” still have found the remaining evidence “sufficient to convict” even with the additional disclosure. Id. at 453 (emphasis added).

To properly focus the test on fairness, courts must apply the inquiry unique to Brady (and Strickland)⁵ wherein the “touchstone of the enquiry [is] whether the evidentiary suppression ‘undermines our confidence’ that the factfinder would have reached the same result.” Strickler v. Greene, 527 U.S. 263, 300 (1999) (Souter, J. concurring in part and dissenting in part) (emphasis added). This requirement of the Brady inquiry – wherein the court is unconcerned with the likelihood of acquittal and instead must be attuned to the possibility that the trial was not fair – is captured by the holdings which recognize that the Brady materiality test is not “outcome-determinative,” Strickland, 466 U.S. at 693, and is not a “sufficiency of the evidence test.” Kyles, 514 U.S. at 419. Ultimately, given this focus on fairness, and given the presumption that “assumes

⁵ As noted in Allen’s prior submission, the Strickland prejudice analysis implicates the same possibility of unfairness as Brady, wherein a “crucial assurance” of the trial’s reliability was denied to defendant, albeit via defense counsel’s failing instead of the State’s failing. (Dsb20) (quoting Strickland, 466 U.S. at 694). That is why the Brady materiality and Strickland prejudice inquiries are equivalent.

government misconduct” (AGb19), the Brady “materiality standard is not difficult to achieve.” State v. Nelson, 155 N.J. 487, 500 (1998).

By contrast, under Carter, without any such concern for fairness, and with the attention instead directed on the possibility of unjustly convicting someone who “may be innocent,” the inquiry, does, in fact, center on the likelihood of acquittal, requiring a showing that the new evidence “would probably lead to an acquittal[.]” Ways, 180 N.J. at 188-190. Accordingly, in contrast to this Court’s characterization of Brady materiality as not “difficult to achieve” Nelson, 155 N.J. at 500, the presumption of fairness under Carter led this Court to explicitly characterize the test as rigorous, cautioning that “[a] jury verdict rendered after a fair trial should not be disturbed except for the clearest of reasons.” Ways, 180 N.J. at 187-88 (emphasis added). Namely, “[n]ewly discovered evidence must be reviewed with a certain degree of circumspection to ensure that it is not the product of fabrication, and, if credible and material, is of sufficient weight that it would probably alter the outcome of the verdict in a new trial.” Ibid.

The fatal flaw in the ACDL’s argument is that it omits any discussion of this fundamental distinction between Brady and Carter. The ACDL routinely alleges, without reference to any authority, that Carter movants have suffered the same type of procedural deficiency that Brady movants have suffered, thereby requiring a focus on fairness in both inquiries. As shown above, that is

simply not the case. And while the affirmative argument that the ACDL puts forward – based upon cherry picked language from this Court’s decisions in Carter I, Carter II, and Ways – is also unavailing for reasons that will be discussed, it is ultimately the failure to reckon with this indelible distinction between Carter and Brady litigants that makes their argument flawed.

B. The ACDL’s Claim That Brady And Carter Materiality Are Equivalent Is Based Upon A Misreading Of The Law.

The ACDL argues that while Strickland, Brady, and Carter claims all carry different requirements, the “through line” of each test is ensuring that the “defendant received a fair trial.” (ACDLb5) The “materiality/prejudice prong” of each test, according to the ACDL, asks, “[w]as there an error at trial that undermines our confidence in the jury’s verdict?” (ACDLb5) The ACDL offers three arguments in support of this claim. First, they argue that this Court’s opinions in Carter I and Carter II can be read as treating Brady and Carter materiality standards as equivalent. (ACDLb6-7) Second, they provide a case overview tracing the evolution of the Brady and Carter materiality tests as they relate to the Strickland prejudice prong to allege that there is a “connective tissue” between the three standards which “long pre-dates” the Appellate Division’s equating of Brady and Carter in Allen’s case. (ACDLb5; ACDLb7-11) Third, they argue that this Court’s opinion in Ways definitively established that the Brady and Carter materiality standards are equivalent. (ACDLb11-14)

All of these arguments are unavailing. The interpretations of Carter and Ways are both contradicted by the plain text of the opinions, as well as the subsequent opinions of this Court and the U.S. Supreme Court. And the discussion of how the tests relate to Strickland is woefully incomplete in that it omits the central distinction drawn by the U.S. Supreme Court in Strickland between the Carter and Brady standards; a distinction which is the very reason why both standards were assigned their current, and distinct, thresholds of rigor.

Beginning with the interpretation of the Carter opinions, the ACDL points to two passages to support its argument. First, the ACDL argues that “the newly discovered evidence test” was characterized in Carter I as “‘more stringent’ than merely meeting the Brady materiality standard because a defendant [under Carter] must meet all ‘three tests’ of the newly discovered evidence standard.” (ACDLb6) The relevant interpretive question here is why this Court in Carter I characterized the Carter materiality test as “more stringent” than the Brady materiality test. In claiming that the difference lies simply in the fact that the tests have different prongs, the ACDL adopts the Appellate Division’s rationale that “the Carter test is more ‘stringent,’ not because it uses a more rigorous formulation of [materiality]⁶ but rather because it requires a threshold finding

⁶ The Appellate Division here used the language of “harmless error principle” in place of materiality. Allen, 482 N.J. Super. at 164. The language of harmless

that the defense could not have discovered the evidence before trial through the exercise of due diligence.” State v. Allen, 482 N.J. Super. 142, 164 (App. Div. 2025). This is mistaken for several reasons.

First, the actual reason why the Carter test is “more stringent” is the one explained at length above: Brady movants have been denied due process by a failure of the State, and Carter movants have not. As the ACDL notes, the Brady standard applied by this Court in Carter I was the one established by the Supreme Court in Agurs, 427 U.S. at 104. (ACDLb6) As discussed at length in Allen’s prior submission (Dsb18), Agurs held that it is the prosecutor’s failure to meet its obligation in Brady which “places it in a different category” than Carter and is the core reason why Brady movants do not have to satisfy the “severe burden” applicable in Carter cases. Agurs, 427 U.S. at 111. There is no reason to think that in characterizing Carter as “more stringent” than “the test of materiality for the granting of a new trial under a Brady analysis” this Court was choosing to tacitly depart from the holding of Agurs and opine upon the rigor of the as-yet discussed second prong of Carter – a prong which has no bearing on the question of materiality. Carter I, 85 N.J. at 314 (emphasis added).

error comes from a now-outdated articulation of Brady materiality. Bagley, 473 U.S. at 680-682. The phrase “materiality” is thus used above to avoid confusion.

The ACDL next argues that in Carter II “this Court expressly relied on its Brady analysis to complete the materiality analysis for the newly discovered evidence test as if the two standards for materiality were identical.” (ACDLb7) (citing Carter II, 91 N.J. at 121). This is an erroneous interpretation of Carter II. There, this Court first found that the defendant failed to meet the materiality standard for Brady. Carter II, 91 N.J. at 120. The Court then turned to its consideration of whether the defendant had met the criteria for granting a new trial based on newly discovered evidence. To prevail on that inquiry, the defendant had to meet a “more stringent” standard. Carter I, 85 N.J. at 314. Because the defendant had not met the lower Brady materiality standard, he necessarily could not have met the “more stringent” materiality standard for newly discovered evidence. Ibid. That was all that was meant by the finding in Carter II that the defendant failed Carter materiality “for the reasons outlined in our discussion of the Brady violation[.]” Carter II, 91 N.J. at 121. That finding in no way supports the proposition that the two materiality standards are equal.

Next, the ACDL provides an overview of the Supreme Court decision in Strickland v. Washington to argue that “[t]his Court has often relied on the prejudice prong of ineffective assistance of counsel in assessing the materiality of newly discovered evidence.” (ACDLb5; ACDL7-11) The ACDL first notes that the Strickland prejudice prong “was adopted from the Brady materiality

standard....for exculpatory information withheld from the defense by the prosecution” and quotes to the Strickland Court’s decision to define the prejudice prong with the same language as the test for Brady materiality: “[t]he defendant must show that there is a reasonable probability that...the result of the proceeding would have been different.” (ACDLb8) (quoting Strickland, 466 U.S. at 694). This summary is correct. The thresholds for Strickland prejudice and Brady materiality are, in fact, equivalent. Ibid. It is what the ACDL’s overview of this “historical development” omits, however, that reveals the flaw in their argument. (ACDLb5)

Namely, the ACDL conveniently overlooks the immediately preceding paragraph from Strickland which explains how and why the Brady and Carter materiality standards are distinct. Strickland explains, in no uncertain terms, that the “newly discovered evidence standard is not an apt source from which to draw a prejudice standard for ineffectiveness claims.” Ibid. The reason the two standards must be distinct is the same as discussed above: newly discovered evidence claims “presuppos[e] that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged” whereas Brady and Strickland claims “asser[t] the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should

be somewhat lower.” Ibid. Given this distinction, for Brady and Strickland claims only, “[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.” Ibid.

It is unsurprising that the ACDL omitted this passage given that its entire position hinges on the repeated assertion that Carter, Brady, and Strickland movants have all suffered a deficiency in their trial proceedings, thereby rendering the trial unfair, and resulting in a due process violation. They argue that the “through line” in each test is ensuring that “defendant received a fair trial”; that each test is rooted in the “constitutional principles of due process and fundamental fairness”; that each test focuses on whether the court is “confident in the verdict given this deficiency”; and that each test asks whether “there [was] an error at trial that undermines our confidence in the jury’s verdict?” (ACDLb5) (emphasis added) In sum, they claim that “the fundamental core” of each test is the same: “a determination of whether the defendant received a fair trial and if there is confidence in the verdict. When an error ‘undermines our confidence in the verdict,’ it is material for Brady purposes, just as it is material for Carter purposes and prejudicial for Strickland/Fritz purposes.” (ACDLb14-15) The law, however, is clear: the newly discovered evidence test “presupposes that all the essential elements of a presumptively

accurate and fair proceeding were present” and thus the undermines confidence inquiry does not apply to Carter. Strickland, 466 U.S. at 694.

This rule – which was absent from the ACDL’s case overview – was later confirmed by this Court’s holding in State v. Ways, when this Court recognized that Carter movants have had a “fair trial” and cautioned that “[a] jury verdict rendered after a fair trial should not be disturbed except for the clearest of reasons.” Ways, 180 N.J. at 187. Carter motions must therefore be “reviewed with a certain degree of circumspection” and should only result in a reversal if the new evidence “is of sufficient weight that it would probably alter the outcome off the verdict in a new trial.” 180 N.J. at 187-88 (emphasis added).

This holding from Ways undermines the ACDL’s third and final argument in support of its claim that Brady and Carter materiality are equivalent. Namely, the ACDL claims that while “there may have [previously] been some doubt about the interchangeability of the standards,” “after Ways, there should be no dispute that materiality is the same” for Brady, Carter, and Strickland. (ACDLb12-13) (citing Ways, 180 N.J. at 188). The ACDL’s reliance upon Ways is twofold: the opinion’s opening paragraph uses the phrase “undermines confidence,” and the opinion twice uses the phrase “probability” when considering materiality, ultimately concluding that “there is a probability – not a certainty – that a new jury” would acquit. (ACDLb12-13) (quoting Ways, 180

N.J. at 173; 197). The principal reason this interpretation is mistaken is because Ways did not consider both a Carter motion and a Brady motion, and the opinion does not purport to compare the two tests. The Ways Court thus had no reason to be particularly attuned to the risk of conflating the operative language for Carter and Brady. And, as previously noted, the U.S. Supreme Court has recognized that the language of the tests is ripe for confusion: “[T]he term ‘probability,’ is naturally read as the cognate of ‘probably’ and thus confused with more likely than not[.]” Strickler, 527 U.S. at 300. (Dsb15)

As for the use of the term “undermines confidence” in Ways, that language was included only in the introductory paragraph which merely summarized the case, and did not provide citations or thorough analysis. 180 N.J. at 173. When the Ways Court later defined materiality in the substantive body of the opinion, it did not define the test as requiring a showing of a “reasonable probability” or as applying the inquiry of “undermines confidence” – instead, the Court defined the test as whether the evidence “would probably change the jury’s verdict if a new trial were granted.” Id. at 178 (internal citation omitted). Moreover, the subsequent discussion in the Ways decision included the passage quoted above, clarifying that Carter movants have undergone a “fair trial” and such motions must therefore be “reviewed with a certain degree of circumspection” which demands a showing of a preponderance. Id. at 188. Notably, in a subsequent

opinion analyzing the Carter test, State v. Nash, this Court characterized the Ways decision as a “further refine[ment] of the newly discovered evidence standard” and did not use “undermines confidence” or “reasonable probability” to define materiality, but defined the test as whether the evidence would “probably” change the outcome. 212 N.J. 518, 549-50 (2013).

In sum, the ACDL’s interpretation of Ways is reaching. Contrary to their position, this Court in Ways did not jettison the long-standing rule – based upon thorough, well-reasoned U.S. Supreme Court opinions – that Brady movants, who have been denied a fair trial, are entitled to a lower threshold of materiality than Carter movants, who have not been denied a fair trial. Nor is this rule in any way undermined by the fact that the Ways Court was less than precise in the terminology it used in its introductory paragraph, and then substituted the word “probability” in place of its cognate “probably.” This Court should adopt the argument upon which the AG and Allen are in agreement, not only because it is consistent with the law, but because doing otherwise would prejudice Allen.

C. The ACDL’s Position Would Prejudice Allen.

The prejudice to Allen from the ACDL’s position stems from the manner in which the ACDL advances its argument. Namely, the ACDL does not argue that the threshold for Carter materiality ought to be lowered, for the first time, to the threshold for Brady materiality for reasons based in New Jersey’s

enhanced protections for criminal defendants. Rather, the ACDL argues that, ever since this Court’s 2004 opinion in Ways, the threshold for “materiality is the same whether the claim” is under Brady, Carter, or Strickland, and thus asks this Court to adopt the Appellate Division’s finding that there is “no practical difference between the materiality/harmless error elements set forth in the Brady and Carter formulations.” (ACDLb13-14) (citing Allen, 482 N.J. Super. at 164).

The problem with this holding is that, if it were in fact the case that there is “no practical difference” between Brady and Carter, then a court could use the language and inquiry from the Carter context – as set forth in Ways, for example – to rule on Allen’s motion for a new trial. In that scenario, the court would be permitted to: presume that Allen had undergone a fair trial, review the evidence with a certain degree of circumspection, and then grant a new trial only if it were convinced that the new evidence more likely than not would have resulted in an acquittal. When, under the properly applicable law, the Court is actually supposed to: recognize that Allen was deprived of a crucial assurance of reliability by virtue of the State’s failing, operate under the assumption that successfully establishing materiality is not a difficult task, focus the inquiry on whether Allen ultimately had a fair trial, and grant a new trial so long as the court’s confidence in the verdict is undermined – even if the court thinks Allen may still have been convicted.

These are obviously different inquiries. Permitting courts to apply the first inquiry to Allen by holding that there is no actual difference between the two tests would undoubtedly result in prejudice and would deprive Allen of his due process right to a fair trial.⁷ Moreover, this risk is not a matter of mere speculation. In ruling against Allen, the Appellate Division made this precise mistake, first deeming the two standards equivalent, and then denying Allen's motion by not correctly applying Brady. The outcome of Allen's motion, according to the Appellate Division, "turns on" the question of "whether the trial outcome would have been different if Waller's 1991 plea deal had been disclosed to the defense[.]" In denying his motion, the Court explained:

We acknowledge there is no forensic evidence placing defendant at the crime scene. Nor did the victim make a deathbed identification of his assailant. But the State's case did not rely solely on Waller's testimony, which another witness, Whitfield, corroborated. Considering all relevant circumstances, we conclude there is not a reasonable probability that had the 1991 plea agreement

⁷ The ACDL's position also asks this Court to deprive Allen of basic protections afforded to him under the U.S. Constitution. As explained above, the ACDL's position would subject Allen and other Brady movants to the higher standard under Carter. The Brady threshold of materiality represents the federal "floor of minimum constitutional protection." State v. Eckle, 185 N.J. 523, 538 (2006) (internal citation omitted). Raising the Brady materiality threshold would deny Allen that minimum protection, and would thus violate the U.S. Constitution. State v. Landano, 271 N.J. Super. 1, 32 (App. Div.), cert. denied, 137 N.J. 164 (1994); ("Obviously, New Jersey's standard for determining whether a reversal is required where the prosecutor has withheld exculpatory evidence may not be more stringent than that required by the federal constitution.").

been disclosed to the defense, the trial result would have been different.

[Allen, 482 N.J. Super. at 177].

Here, the Appellate Division did not ask the required inquiry of whether Waller’s plea “undermines confidence” in the verdict. Nor did it ask whether the trial was ultimately fair. Instead, the court weighed the evidence that would have remained intact even with the disclosure of Waller’s plea and concluded, in light of that remaining evidence, that the outcome would not have been different. Ibid. In other words, the Appellate Division applied a “sufficiency of the evidence” test – which is precisely the wrong inquiry. Kyles, 514 U.S. at 419 (“Bagley materiality is not a sufficiency of the evidence test.”). In order to satisfy Brady, a “defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict.” Ibid. That is, however, the standard that the Appellate Division demanded of Allen. Because the Appellate Division believed that there was other evidence left that could have sufficed for a conviction, it concluded that Allen failed to meet Brady materiality. Allen, 482 N.J. Super. at 166.

The relevance here is that the sufficiency of the evidence inquiry would have been proper in ruling on Carter materiality, but is not proper when ruling on Brady. Therein lies the prejudice Allen would suffer from the ACDL’s position. Allen thus asks this Court not to adopt the ACDL’s argument and to

find that Brady materiality is a lower threshold than Carter materiality for all the reasons previously discussed.

Nor should this Court interpret the ACDL's argument as to the cumulative nature of the Brady inquiry as cause for a remand. To be sure, the ACDL is correct in noting that "where multiple items of evidence have been suppressed, the prosecution's Brady obligation 'turns on the cumulative effect of such evidence' and thus courts must consider "the State's non-disclosures 'collectively, not item-by-item.'" (ACDLb15) (quoting State v. Knight, 145 N.J. 233, 246 (1996)) In Allen's case, however, the motion court was presented with one item of evidence that had been suppressed: Waller's 1991 plea agreement. Defense counsel's discussion of the possibility of a monetary reward given to Waller in exchange for her testimony was limited to the fact that attempts to "obtain documentation of said reward" were frustrated by the failures to comply with relevant subpoenas, and thus "[t]o date, that information [as to any such reward] has not been confirmed or denied." (Da41-42) It is certainly true that "if and when evidence Waller received a cash reward is revealed," any future consideration of that evidence's impact should be considered cumulatively. Allen, 482 N.J. Super. at 169 (emphasis added). But the unconfirmed possibility of additional undisclosed evidence has no bearing on the propriety of the motion

court's denial of Allen's motion for a new trial based on the actual undisclosed evidence brought before the court: Waller's 1991 plea.

Instead, this Court should consider the rule requiring cumulative analysis of Brady violations by recognizing that – beyond the failure to disclose Waller's 1991 plea – there were numerous other instances of belated disclosures and outright Brady violations that occurred during Allen's trial. As noted in Allen's previous submission, because Brady materiality “turns on the cumulative effect of all suppressed evidence favorable to the defense,” Kyles, 514 U.S. at 420, and the “ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged,” Strickland, 466 U.S. at 670, this Court should consider that the State tried Allen's case in a manner that the trial court on several occasions found to be underhanded and unfair, describing the State's approach as litigating by “ambush[,] surprise,” and “game playing.” (2T126-6 to 127-9) Ultimately though, the failure to disclose Waller's 1991 plea agreement is sufficient on its own to satisfy the materiality standard of Brady for the reasons that follow.

POINT II

ALLEN SUCCESSFULLY ESTABLISHED ALL THREE PRONGS OF BRADY, INCLUDING THE MATERIALITY TEST.

The AG’s argument as to why Waller’s 1991 plea agreement does not meet the Brady materiality standard can be boiled down to its claim that the plea “agreement was minimally probative of bias and cumulative, given defense counsel’s thorough exploration of Waller’s potential biases at trial.” (AGb22) The AG here makes one significant legal concession, and one significant factual error. First, the AG’s acknowledgment that the plea is “probative of bias” should lay to rest any dispute as to Allen’s satisfaction of the first two Brady prongs, particularly where the State has waived any argument to the contrary by failing to dispute the establishment of those prongs in its Appellate Division briefing. (Sb21-26) As discussed in Point II.A., the undisputed fact that the plea was probative of bias at all – even if minimally so – means that it was favorable evidence which should have been, but never was, disclosed by the State, satisfying prongs one and two of Brady.

Second, the AG is mistaken to claim that Allen’s defense counsel thoroughly explored “Waller’s potential biases at trial.” (AGb22) To the contrary, as discussed in Allen’s prior submission to this Court, in the absence of Waller’s plea, defense counsel did not, at any point, explore Waller’s self-

interested bias beyond the rhetorical question posed during opening argument asking, “who knows what [Waller’s] interest is in this case.” (Dsb42) The crucial takeaway of the AG’s concession and factual error is that Waller’s plea agreement could have been used by Allen to advance an argument on an issue that he otherwise could not make. And, as discussed in Point II.B., because that issue – Waller’s motivation in providing competing statements – was characterized by the State in its closing argument as centrally important to the jury’s consideration of Waller’s testimony, the fact that Allen was deprived of the opportunity to make any argument on that central issue by virtue of the State’s Brady violation is undoubtedly enough to undermine confidence in the verdict, thereby satisfying materiality.

A. Allen Successfully Established Brady Prongs 1 and 2.

To satisfy the first two prongs of Brady, “(1) the evidence at issue must be favorable to the accused, either as exculpatory or impeachment evidence; [and] (2) the State must have suppressed the evidence, either purposely or inadvertently[.]” State v. Brown, 236 N.J. 497, 518 (2019). The AG now calls into doubt whether Allen can satisfy the first two prongs, arguing that “it is far from clear that the State was obligated ‘to disclose to defendant the plea deal it had made with Waller eight years earlier in an unrelated matter’ as Brady material.” (AGb22-23) (quoting Allen, 482 N.J. Super. at 165). As an initial

matter, because the State has not argued – either at the trial level or the Appellate Division – that Allen failed to satisfy the first two prongs, that argument is waived. (Dsb30-31)

It is well settled that an argument not briefed in the Appellate Division is waived for purposes of that appeal. State v. Vincenty, 237 N.J. 122, 135 (2019) (“On appeal, the State opposed [defendant’s] legal arguments on the merits and did not argue harmless error. We find that the State has waived the harmless error argument -- and we decline to exercise our discretion to reach an issue not raised before the Appellate Division.”); State v. Legette, 227 N.J. 460, 467 n.1 (2017) (declining to consider State’s argument raised “for the first time on appeal”); see also Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2023) (“It is, of course, clear that an issue not briefed is deemed waived.”). And even if those arguments had not been waived, the AG’s arguments as to Allen’s “potential inability to satisfy the first two Brady elements” fail on the merits. (AGb24)

As to the first prong – whether the evidence is “favorable to the accused, either as exculpatory or impeachment evidence” – the AG concedes that Waller’s plea agreement would have been “probative of bias[.]” (AGb22) The AG here makes the same concession that the State made when it argued that “a requirement in [Waller’s] 1991 plea agreement to testify against her then-codefendant could potentially impact the credibility of Waller in defendant’s

trial[.]” (Sb21). Taken together, the AG and the State acknowledge that the 1991 plea could impact Waller’s credibility (Sb21) because it was probative of bias. (AGb22) Based on these acknowledgements, there is no doubt that Waller’s plea was favorable impeachment evidence. State v. Sugar, 100 N.J. 214, 230 (1985) (“The right to cross-examine and test for bias at a plenary trial of criminal charges is indispensable...It is a right of constitutional dimensions.”).

And while both the State and AG argue that the significance of the 1991 plea was minimal, arguments as to the impact that the favorable evidence will have on the outcome of the case go only to the materiality of the evidence under prong three. Brown, 236 N.J. at 518 (“In deciding materiality, we examine the circumstances under which the nondisclosure arose and [t]he significance of a nondisclosure in the context of the entire record.”) (cleaned up and internal quotation omitted) (emphasis added). The dispositive question under prong one, on the other hand, is simply whether the evidence is favorable to the defense as “exculpatory or impeachment evidence.” Ibid. Satisfying prong one is a “straightforward analysis” which does not require a showing of materiality. Ibid. R. 3:13-3(b)(1)(A)-(K) (requiring disclosure of all “relevant material,” including exculpatory and impeachment evidence, without any requirement that the evidence be material); Knight, 145 N.J. at 245-46 (“Brady encompasses evidence that the defendant might have used to impeach government

witnesses.”). Because it is undisputed that Waller’s plea was probative of bias and could have been used to impeach her, it was undoubtedly favorable impeachment evidence satisfying prong one.

As to prong two – whether the State suppressed the evidence in question – the AG does not dispute that Waller’s plea agreement was “never disclosed by the prosecution[.]” (AGb28, n. 14) To the contrary, the AG concedes that the State’s failure to disclose Waller’s plea “weigh[s] in favor of materiality.” (AGb28, n. 14) Prong two is clearly satisfied. See State v. Spano, 69 N.J. 231, 235 (1976) (finding Brady violation because State had a “responsibility to be aware” of the “favorable treatment” their witness had received, and a responsibility to “to disclose [that information] to the court and to defense counsel”).

Despite these concessions as to the probative value of Waller’s plea and the State’s failure to disclose, the AG nonetheless argues that Allen had a “potential inability to satisfy the first two Brady elements” by citing five federal cases. (AGb22 to 24) All these cases, however, are inapposite and non-binding. In the first, U.S. v. Ramos-Cartagena, the District Court of Puerto Rico held that the prosecutor did not have a duty to disclose because of a narrow exception that has no bearing on Allen’s case. 9 F. Supp. 2d 88, 90-92 (D.P.R. 1998). There, the defendant argued that the U.S. Attorney’s Office was required to produce

Brady material which was in actual “possession of the Puerto Rico Department of Justice or its state prosecutors[.]” 9 F. Supp. at 91. The case turned on the outcome of the “joint investigation test” – a test specific to inter-jurisdictional cases – where the court had to determine whether the federal prosecutor’s office could be imputed with knowledge of a file possessed by a non-federal (i.e. Puerto Rican) agency. Ibid. Ramos-Cartagena thus has no bearing on this case where no federal law enforcement is involved. (AGb28 n. 14)

The AG next offers four cases in support of the proposition that the State lacked a “duty to disclose” because there was no allegation that the State had offered leniency to Waller on her shoplifting case – which was pending at the time of Allen’s trial – in exchange for her testimony in Allen’s case. (AGb23-24) Each case cited by the AG turned on the finding that the State had not violated Brady because it was not clear that there was, in fact, any agreement or promise of leniency between the State and the State’s witness such that disclosure was necessary – or even possible. People v. Sibadan, 671 N.Y.S. 2d 1, 3-5 (N.Y. App. Div.), leave to appeal denied, 699 N.E.2d 451 (N.Y. 1998) (finding no Brady violation because “there is no evidence that [the witness] was promised anything for his previous cooperation”); People v. Giuca, 128 N.E.3d 655, 661-64 (N.Y. 2019) (same, where there was “no evidence of any understanding or agreement between the prosecution and the witness”); Collier

v. Davis, 301 F.3d 843, 849-50 (7th Cir. 2002) (same, where defendant “has not proved that an understanding [between State and witness] actually existed”); White v. Steele, 853 F.3d 486, 491 (8th Cir. 2017) (“[T]he State did not violate Brady...by failing to disclose an agreement that did not exist.”).

The outcome in each of the above cases thus hinged on the finding that there was no actual agreement between the prosecution and witness guaranteeing leniency. In other words, there was no evidence for the prosecution to either turn over or suppress, and thus no Brady violation. The same clearly cannot be said for the State’s obligation to disclose to Allen the existence of an explicit promise of leniency which was previously made to the State’s lead witness. Accordingly, the rule cited by the AG in the cases above – that there must be sufficient proof of an agreement to trigger Brady obligations – does nothing to undermine the State’s requirement in this case to disclose the plea which undoubtedly existed. Allen thus successfully satisfied Brady prongs one and two.

B. Allen Successfully Established Materiality Under Brady Prong 3.

Although the AG correctly defines the applicable standard and inquiry for ruling on Brady materiality (AGb14-21), the AG is wrong to conclude that Allen failed to meet that threshold. (AGb24) The AG rightly notes that, when ruling on materiality, courts consider “the strength of the State’s case, the timing of the disclosure of the withheld evidence, the relevance of the suppressed evidence,

and the withheld evidence's admissibility." Brown, 236 N.J. at 519. And while the AG concedes that "the timing of disclosure of the withheld evidenc[e] does weigh in favor of materiality," (AGb28) they are mistaken to argue that the remaining factors weigh against a finding of materiality. To the contrary, the State's case was weak (Point II.B.1), and the undisclosed evidence was not only admissible (Point II.B.2), but was relevant to a centrally important issue in the case: Waller's bias in favor of the State. (Point II.B.3).

1. The State's Case Was Weak.

Beginning with the weakness of the State's case, far from bolstering its claim that the State had a strong case, the AG's summary of the prosecution's proofs belies its weakness. The AG encapsulates the State's proofs in two sentences, noting that both Waller and Whitfield saw Allen and the victim on the scene before the shooting, and that they both saw him holding something and yelling, but that "only Waller testified to seeing defendant holding a gun[.]" (AGb25) The AG then notes a crucial deficiency in the State's case, that "Waller told a defense investigator, one year after the incident, that she did not recall seeing anyone holding a gun that day," but argues that this fact should be discounted because "the jury was entitled to credit Waller's explanation that she only said this to get the investigator, who confronted her at home, to leave."

(AGb25) That this summary is the extent of the State's core evidence of Allen's guilt is demonstrative of the case's weakness.

First, as the above summary demonstrates, there was no physical evidence implicating Allen as the shooter, no motive for the shooting, and no eyewitness observation of the shooting itself. In other words, the State offered no direct evidence of Allen's guilt; all the evidence was circumstantial, including Waller's eyewitness testimony. Second, Waller's testimony was clearly indispensable to the State's case. While the AG suggests that much of her testimony was corroborated by other witnesses, there is no dispute that the most essential detail of Waller's testimony was not corroborated by anyone. As the AG now notes: "only Waller testified to seeing defendant holding a gun[.]" (AGb25) This further validates the characterization of the State's proofs provided by both the trial judge and the State itself. Namely, that Rhonda Whitfield's testimony was relevant only insofar as it "corroborate[d]" certain details of Waller's testimony, and thus "[w]ithout [Waller]...there is no case." (Dsb37) (7T45-22 to 46-7) (16T21-23 to 22-5)

Contrary to the AG's characterization of the State's proofs as strong, courts have routinely found material Brady violations in cases, like Allen's, where the proofs rested principally or entirely upon the testimony of a single eyewitness, and the State offered no physical evidence implicating guilt. Wearry

v. Cain, 577 U.S. 385, 392-93 (2016) (finding material Brady violation where State’s proofs were characterized as a “house of cards” because there was “no physical evidence” and the conviction required jury to credit the testimony of a single witness whose credibility had been challenged); Kyles, 514 U.S. at 421 (same, where State’s case rested on eyewitness identification testimony and “the physical evidence remaining unscathed [if suppressed evidence had been disclosed] would...hardly have amounted to overwhelming proof that Kyles was the murderer”); State v. Knight, 283 N.J. Super. 98, 102-105 (App. Div. 1995), aff’d 145 N.J. 233 (1996) (same, where State “produced one eyewitness to the incident,” the “case against defendant relied heavily on [that] testimony,” and the State introduced no physical evidence). Allen’s case thus bears the hallmark features of the type of case that consistently results in a material Brady violation.⁸

⁸ The AG goes on to argue that Waller was “generally accurate because “no evidence presented by the defense meaningfully undermined Waller’s account,” and Waller’s observations were corroborated. (AGb28) Both of these claims, however, mischaracterize the facts established at trial. As discussed at length in Allen’s prior submission (Dsb38-39), the defense offered substantial evidence from numerous witnesses demonstrating that Waller’s recall of the incident was inaccurate and contradicted by other witnesses on the scene, ultimately leading the State to concede in closing that, “Yes, Ruby Waller did not remember seeing Rhonda Whitfield out there. Rhonda Whitfield did not remember seeing Ruby Waller out there. There were people out there. Certain witnesses could not remember certain people, other witnesses could. There are inconsistencies.” (7T67-6 to 11)

The reason that cases such as this are so ripe for Brady violations is clear: when the State's case rests entirely upon the credibility of one witness, any evidence that could have impeached that witness's credibility bears substantial importance. In fact, the AG's summary of the facts demonstrates how centrally important Waller's plea would have been to Allen's defense. In acknowledging that Waller's claim to have seen Allen holding a gun was contradicted by the fact that she had "told a defense investigator, one year after the incident, that she did not recall seeing anyone holding a gun that day," the AG discounts the importance of Waller's contradicting herself on this key issue by pointing out that "the jury was entitled to credit Waller's explanation that she only said this to get the investigator, who confronted her at home, to leave." (AGb25)

By the AG's own admission, to credit Waller's statement in which she claimed to have seen a gun over her statement where she said she did not see a gun, the jury had to conclude that Waller had lied to the defense investigator to further her own self-interest. (Dsb40-41) Or, to use the words of the State in closing argument, that Waller "was foolish because she gave untruthful information" to the defense investigator that she thought "would serve her end[.]" (7T54-21 to 55-8) (7T59-7 to 12) The relevant takeaway is that, per the State's closing and the AG's summary, the case was only strong insofar as the jury credited Waller's trial testimony as motivated by a desire to tell the truth,

while crediting her statement to defense investigators as motivated by self-interest. Seen in this light, the AG’s argument strains credulity by claiming that Waller’s plea – that was admittedly “probative of bias” – was “minimally, if at all, relevant.” (AGb22; 28) To the contrary, it would have given Allen an argument on the dispositive question in the case. In sum, contrary to the AG’s characterization, the case against Allen was far from strong, and resembled the prototypical case resulting in a material Brady violation.

2. Waller’s 1991 Plea Agreement Was Admissible Impeachment Evidence.

As to the admissibility of Waller’s plea, the AG now “cast[s] doubt” on the plea’s admissibility, not by alleging a specific evidentiary ground upon which the plea would be inadmissible, but by simply claiming that the plea is “minimally, if at all relevant[.]” (AGb28) This claim – that the plea is not at all relevant – is undermined by the undisputed fact, discussed above, that the plea is probative of bias and could have been used to impeach Waller’s credibility. It is axiomatic that “[t]he partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony.” Davis v. Alaska, 415 U.S. 308, 316 (1974) (internal citations omitted). See Sugar, 100 N.J. at 230 (“The right to cross-examine and test for bias at a plenary trial of criminal charges is indispensable.”).

Moreover, as discussed at length in Allen’s prior submission to this Court, the scope of permissible questions to establish potential bias is extremely broad, particularly when the witness has a pending criminal charge at the time of their testimony. (Dsb27-30) The case of State v. Vaccaro is particularly apt in establishing the admissibility of Waller’s plea as impeachment evidence. 142 N.J. Super. 167 (App. Div. 1976), cert. denied, 71 N.J. 518 (1976). There, defendant was prohibited from impeaching the State’s witness by suggesting that their prior criminal charge which had been dismissed was indicative of bias in favor of the State. Id. at 175. Such impeachment was precluded because the trial court had found that “favorable treatment of a witness by the State could be shown only...by an express or implied agreement between the witness and the State.” Id. at 176 (emphasis added). In rejecting this finding and granting a new trial, the court held that:

Whether a witness actually received favorable treatment is not a Sine qua non to appropriate cross-examination relating to colorable bias of the witness toward the State because of possible favorable treatment in connection with criminal charges. The test of propriety of questions addressed to credibility is not necessarily whether there was an arrangement to grant the witness concessions. It is as relevant and significant for a defendant to demonstrate the state of mind of the witness based on his subjective reactions to the favorable treatment he may have received or may hope to receive in connection with his own criminal involvement.

[Ibid.]

The same applies to Allen: he was entitled to suggest that Waller's plea demonstrated that she knew how beneficial testifying for the State can be and was only testifying in Allen's case in the hope of currying favor with the State on her shoplifting charge. Impeachment of Waller via her 1991 plea was admissible as demonstrating potential bias even though there was no explicit agreement between the State and Waller promising leniency in exchange for her testimony in Allen's case.

3. Waller's 1991 Plea Agreement Was Highly Relevant: The Plea Would Have Provided Allen With An Argument He Did Not Otherwise Have On The Central Issue Of Waller's Motivation To Testify.

The AG next argues that even if the plea was admissible, its impact on the case would have been minimal, thus rendering it immaterial. There are two components to the AG's argument on relevance: first, that Waller had already been impeached, thereby making any additional impeachment cumulative; and second, that the jury was unlikely to have interpreted Waller's plea as establishing bias. Both these claims are unavailing because they mischaracterize both the relevant law and the facts of the case.

As to Waller's prior impeachment, per the AG, the plea was only "minimally probative of bias and cumulative, given the defense counsel's thorough exploration of Waller's potential biases at trial." (AGb22) (emphasis

added) This argument is premised upon a substantial mischaracterization of the facts. Contrary to the AG's claim, defense counsel did not explore Waller's potential bias at any point during the trial. In fact, Allen's inability to provide an argument as to Waller's bias in favor of the State was the central gap in Allen's defense. See Bagley, 473 U.S. at 683 (finding material Brady violation where State's failure to disclose "induced defense counsel to believe" that witnesses could not be "impeached on the basis of bias or interest").

As discussed at length in Allen's prior submission to this Court, there were numerous instances where exploration of Waller's self-motivated bias in favor of the State was missing from his defense. (Dsb42-44) Moreover, while the jury was made aware of Waller's pending criminal charge for shoplifting, the court's mistaken jury charge had the effect of instructing the jury to not consider her pending criminal case as potentially indicative of bias. (Dsb45-47) Following the court's instruction, there was, in effect, no evidence upon which the jury was permitted to rely on to infer Waller's bias, and the AG's characterization to the contrary is mistaken. Brown, 236 N.J. at 521-22; Banks v. Dretke, 540 U.S. 668, 701-02 (2004) (noting lack of jury instruction as to credibility concerns of informants as part of its finding of material Brady violation).

When viewed in light of this factual correction, the AG's argument that Waller's plea would have been only minimally relevant is significantly

undermined. Namely, because Allen did not, in fact, advance any argument on Waller's bias, the fact that the 1991 plea was "probative of bias" makes it highly impactful on the outcome of the case. The plea agreement was, simply, probative on the single issue which was missing from Allen's defense: an issue which the State explicitly urged the jury to consider when considering how much weight to give to their lead witness's testimony. (Dsb40-41)

Aside from the inaccurate argument that Waller's plea agreement would have been cumulative because her bias in particular had been explored by defense counsel, the AG also argues that the plea would have been cumulative because Waller's credibility was otherwise impeached, even if not specifically on the question of bias. Per the AG, the plea "was cumulative given other avenues of impeachment defense counsel was able to pursue" concerning her "ability to observe and recall accurately, due to her drug use on the night before, and morning of, the murder, plus her flight from the scene at its most critical stage." (AGb31) Contrary to the AG's argument – which relies exclusively upon non-binding authorities – this Court and the Supreme Court have held that suppressed evidence which could have been used to impeach a State's witness can be material even if that witness had already been thoroughly impeached.

In State v. Knight, this Court held that the State violated Brady by suppressing evidence that could have been used to impeach "the State's only

eyewitness and the one person at trial who placed defendant at the scene of the crime.” 145 N.J. at 247. Even though defense counsel had already “vigorously attempted to impeach [witness], revealing the inconsistencies between her testimony and her prior statements, and the discrepancies between her testimony and that of other witnesses,” the State’s suppression of additional impeachment material nonetheless contributed to the material Brady violation because “counsel’s ability to impeach [the witness’s] credibility would have been significantly enhanced” if the material was properly disclosed. Id. at 248. See also, State v. Mazuir, 158 N.J. Super. 89, 105 (App. Div. 1978), cert. denied, 78 N.J. 399 (1978) (trial court erred by “precluding defendant from showing bias” even though cross-examination “demonstrate[ed] [the witness’s] bias to some degree” because “other factors which might have shown [the witness] to be biased toward the State” but were precluded “may have played a decisive role in the jury’s assessment of his credibility”).

Likewise, in Banks v. Dretke, the Supreme Court found improper suppression of evidence establishing that a State’s witness was a paid informant was material under Brady, and rejected the government’s argument that because the witness “was heavily impeached at trial” his status as an informant would have been “cumulative.” 540 U.S. at 702; see Napue v. Illinois, 360 U.S. 264, 270 (1959) (“[W]e do not believe that the fact that the jury was apprised of other

grounds for believing that the witness...may have had an interest in testifying against petitioner turned what was otherwise a tainted trial into a fair one.”).

Numerous federal circuit courts have reached the same outcome. Lambert v. Beard, 633 F.3d 126, 134 (3d Cir. 2011), judgment vacated on other grounds sub nom, Wetzel v. Lambert, 565 U.S. 520 (2012) (“[I]t is patently unreasonable to presume...that whenever a witness is impeached in one manner, any other impeachment becomes immaterial.”); United States v. Torres, 569 F.3d 1277, 1284 (10th Cir. 2009) (“Merely because other impeachment evidence was presented does not mean that additional impeachment evidence is cumulative....”); Reutter v. Solem, 888 F.2d 578, 581 (8th Cir. 1989) (“The state argues that because [witness] was a convicted felon his credibility already was suspect and the additional [impeachment] information...would not have affected the jury's judgment as to his truthfulness. Logic of this kind has been dismissed by the Supreme Court.”); U.S. v. Service Deli Inc., 151 F.3d 938, 944 (9th Cir. 1998) (“[I]t makes little sense to argue that because [the defendant] tried to impeach [the key witness] and failed, any further impeachment evidence would be useless. It is more likely that [the defendant] may have failed to impeach [the key witness] because the most damning impeachment evidence in fact was withheld by the government.”)

Moreover, in cases where the additional impeachment evidence would have been relevant to an issue or defense that was not at all explored by defense at trial, the prejudicial impact of that evidence's suppression is in no way undermined by the existence of prior impeachment efforts. Dennis v. Secretary, Pennsylvania DOC, 834 F.3d 263, 300-301 (3d Cir. 2016) (finding material Brady violation because “[t]here are significant, material differences between the type of cross-examination defense counsel engaged in and what he could have done had he known” of the improperly suppressed evidence); Horton v. Mayle, 408 F.3d 570, 580 (9th Cir. 2005) (“[T]hat the jury had other reasons to disbelieve [witness] does not render the suppressed evidence of the deal immaterial. Evidence that the prosecution promised immunity to induce [witness] to testify ... is a wholly different kind of impeachment evidence[.]”).

That is precisely the case here. Allen's defense counsel highlighted the fact that Waller's stories were inconsistent, but could not explain why they were so inconsistent. To reiterate, in her anonymous 911 call, Waller did not mention seeing a gun and did not implicate Allen as the shooter. (3T146-20 to 147-24) Likewise, Waller told defense investigators that she did not see a gun on the night of the shooting. (2T152-8 to 11) (3T176-14 to 19) By contrast, when speaking with police in person and when giving trial testimony, she changed her story and now claimed to have seen a gun in Allen's hand. (2T152-8 to 11)

(7T55-11 to 14) These inconsistencies were presented to the jury, but what was missing for Allen was an argument explaining what motivated Waller to change her story in this manner. Proper disclosure of Waller’s plea would have given him that missing argument.

Namely, the plea would have established Waller as someone with a history of obtaining leniency by giving testimony on behalf of the State. Armed with this knowledge, defense counsel could have argued that the jury should discount the statements Waller made at the police station and during trial testimony because those statements were nothing more than her attempt to garner the same kind of favorable treatment that she received from the prosecutor back in 1991 by giving a version of events most favorable to the State. The statements which should be credited as accurate, on the other hand, were those made by Waller when she had nothing to gain: her statements in the anonymous 911 call, and her statements to defense investigators. In those accounts, Waller described Allen as nothing more than a bystander. In light of this line of argument, the second aspect of the AG’s argument on materiality – that the “1991 plea agreement is minimally, if at all, relevant” – rings hollow. (AGb28) Defense counsel had successfully established Waller’s inconsistencies, but what he needed was an explanation as to why she was inconsistent. The plea which was “probative of bias” would have given him that missing explanation. (AGb22)

Faced with an analogous scenario in Carter v. Rafferty, the District Court of New Jersey chose to depart from this Court's finding in Carter II, and hold that the undisclosed evidence which could have been used to establish bias constituted material Brady evidence requiring a new trial. 621 F. Supp. 533 (D.N.J. 1985). There, the Court held that "to view the withholding of the [undisclosed evidence] as merely cumulative," would be to "gloss over the essential nature of th[e] inconsistency" between the prior impeachment and the impeachment made possible by the suppressed evidence. Id. at 554. The suppressed evidence would have created an avenue of impeachment otherwise unavailable to the defense as to why the State's witness changed his story over time. Id. at 553. The court thus held:

What distinguishes this situation from those in which attacks upon credibility are deemed merely cumulative is the fact that [witness] was permitted to urge his "final" version as being motivated by the truth rather than by circumstances having no relation to the truth whatsoever. The significance of this failure [to disclose impeachment evidence] is not that it denied the defendants just one more opportunity to challenge the credibility of [witness]. ...[Rather,] the petitioners were deprived of the opportunity to demonstrate why the witness settled on this particular version and to bring out the role of the prosecution in that choice....Absent the potent ammunition this knowledge would have afforded the defense, [witness] was free to say that he had selected this one of several versions because it was "true."

[Id. at 553 (emphasis added).]

The same is true for Allen. Waller was able to claim on direct examination that she was not “expecting any benefit with respect” to her shoplifting charge (3T124-25 to 125-9) thereby enabling the State to argue in closing that Waller was “telling the truth on the witness stand” when she claimed to see Allen holding a gun, and was not “telling the truth to the defense investigators” when she failed to mention any gun. (7T55-8 to 18) Disclosure of Waller’s plea would have enabled defense counsel to advance the opposite argument: that her statements on the witness stand were not motivated by her desire to accurately recount the facts, but rather to curry favor with the State. As was true in Carter v. Rafferty, the difference this would have made to Allen’s case was enough to undermine confidence in the verdict, requiring a new trial. See also Robinson v. Mills, 592 F.3d 730, 736-37 (6th Cir. 2010) (rejecting argument that “undisclosed impeachment information would have been merely cumulative” and finding material Brady violation because the undisclosed evidence “was different in kind” from the existing impeachment in that the “suppressed materials would have offered insight into why [the witness’s] testimony at trial differed” from her prior statement) (emphasis added).

Finally, in addition to arguing that Waller’s plea was minimally relevant because she had already been impeached, the AG also argues that the jury was not likely to have interpreted the plea as establishing Waller’s bias. Here, the

AG attempts to limit the impact that the plea would have had on the jury by offering overly narrow and prescriptive conclusions as to how the jury would necessarily have reacted upon learning of the plea. Specifically, the AG argues that the plea “does no more than establish that Waller understood the potential for plea agreements and had once entered into one” and that “[i]f anything, Waller’s prior experience striking a plea deal would increase the odds that she understood how such deals work – namely, that a deal is struck before actually testifying, and that you lose leverage if you do not.” (AGb29) The AG, in other words, proposes alternative conclusions as to how the evidence could be interpreted in a manner that favors the State.

Primarily, it is not for this Court to decide what interpretation of the undisclosed evidence is most likely. Rather, the fact that it is possible for the jury to have interpreted the agreement as establishing bias is enough to establish a due process violation in Allen’s case. The law is clear that in weighing the significance that improperly suppressed evidence would have had on the jury, courts must ask how that evidence could have been interpreted, and they cannot minimize the prejudicial impact of the improper suppression by concluding that the jury would necessarily have reached an interpretation that would have been minimally prejudicial to the defense. In Gordon v. U.S., for example, when considering the impact that cross-examination of a State witness’s potential

motive would have had if it had not been improperly precluded by the trial court, the Supreme Court explained that the question is not how the reviewing court would “construe [the] meaning” of the suppressed impeachment evidence, but rather, “the question for the jury is what effect they think these words had on the mind and conduct of a prisoner [testifying for the State] whose plea of guilty put him in large measure in the hands of the speaker.” 344 U.S. 414, 422 (1953). The Court in Gordon granted a new trial because the jury “might have regarded [the suppressed impeachment evidence] as an incentive... to supply a motive for [the witness’s] testimony other than a duty to recount the facts as best he could remember them.” Ibid. (emphasis added). See also, U.S. v. Brown, 546 F.2d 166, 171 (5th Cir. 1977) (“We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them[.]”).

Likewise, in Wearry v. Cain, the Supreme Court found that the prosecution had committed a material Brady violation by improperly suppressing impeachment evidence which could have been used to suggest that a prosecution witness, Brown, provided testimony that was motivated by bias when they vouched for the credibility of the lead witness, Scott. 577 U.S. at 389-96. In assessing the impact that the impeachment evidence would have had, the Court

again focused on possible interpretations that the jury could have reached: “[A]ny juror who found Scott more credible in light of Brown’s testimony might have thought differently” in light of the suppressed impeachment evidence. Id. at 394. In so finding, the Wearry Court held that the state court being overruled had erred when it “emphasized reasons a juror might disregard new evidence while ignoring reasons she might not[.]” Id. at 394. See also, Banks, 540 U.S. at 701 (finding material Brady violation because if jurors had known of improperly suppressed evidence of State witness bias, “they might well have distrusted his testimony”) (emphasis added).

The same is true in New Jersey. In State v. Knight, the State suppressed evidence which could have been used to impeach a witness who “denied expecting or receiving any benefit” by suggesting that they had, in fact, received a benefit. 283 N.J. Super. at 121. In deeming the undisclosed evidence material under Brady, the Appellate Division did not need to find that the jury was necessarily going to conclude that the witness had, in fact, received a benefit; rather, it was enough that “the jury may well have so concluded had they had the benefit” of the undisclosed evidence. Ibid. (emphasis added). Likewise, when this Court affirmed that holding, the relevant factor was that “counsel’s ability to impeach [witness’s] credibility would have been significantly enhanced” if the State had properly disclosed. 145 N.J. at 248. This Court did

not opine on how the jury likely would have reacted to the enhanced impeachment — it was enough that there was an avenue of impeachment which had been foreclosed by the State’s improper suppression. Ibid. See also Sugar, 100 N.J. at 231 (reversing conviction where defendant was “denied the opportunity to suggest ... the possibility of... bias”) (emphasis added).

Here, by arguing that disclosure of the 1991 plea is immaterial simply because an alternative interpretation of the plea’s existence was possible, the AG asks this Court to do what the Court deemed improper in Wearry. That is, the AG “emphasize[s] reasons [why] a jury might disregard” Waller’s 1991 plea as establishing bias in favor of the State, and asks this Court to “discount entirely” the manner in which Waller’s plea could have established bias. 577 U.S. at 394. Ultimately, what matters is that Allen’s due process rights were denied when he was “deprived of the opportunity” to present an argument on the central issue in this case. Ibid. It is thus enough for Allen to show that the jury “may well have” concluded that Waller was biased had they had learned of her prior instance of receiving favorable treatment in exchange for testimony. Knight, 283 N.J. Super. at 121.

Finally, the AG’s arguments as to why the jury was not likely to interpret Waller’s plea as evidence of bias are simply unpersuasive. The AG offers two rationales: first, upon learning of the plea agreement the jury would have learned

“that a deal is struck before actually testifying, and that you lose that leverage if you do not”; and second, the jury would have been unlikely to believe that Waller was willing to perjure herself to avoid a shoplifting charge given the minimal sentencing exposure of shoplifting compared to perjury. (AGb29). The flaw with both arguments is that they improperly impute knowledge and experience of criminal law to the laypeople of the jury.

Without any presumed experience in trying criminal cases or negotiating pleas, there is no reason to believe that the jury was likely to conclude based on Waller’s plea that there is a standard practice of plea negotiation wherein any opportunity to obtain leniency from the State is forfeited once you testify without having first received a guarantee of leniency. In fact, there is no hard and fast rule to that effect. See State v. Rodriguez, 262 N.J. Super. 564, 571-72 (App. Div. 1993) (“There cannot be the slightest doubt of [defense] attorney's plan to have his client cooperate with the State in this manner and then use his evident cooperation for plea bargaining purposes later.”). And, prior to learning of Waller’s plea, the jury may not have even known that it is possible to obtain leniency from the State in exchange for testifying. Upon learning that prosecutors can, and do, treat criminal defendants with more leniency if they testify for the State, the jury likely would have been more receptive to an

argument that Waller’s testimony was motivated by an attempt to curry favor – an attempt that the jury now knew could genuinely have resulted in leniency.

The AG’s second rationale likewise improperly presupposes that the jury had knowledge of criminal law. It is highly unlikely that the jury would have known that “shoplifting was graded as a disorderly person offense, with the maximum punishment for a first offense being a five hundred dollar fine” whereas “perjury is a crime of the third degree.” (AGb30) The proper question is what the jury might have concluded based upon the evidence before them. What the jury had heard – and did know – was that Whitfield at the time of the trial was serving a 120-day jail sentence for a shoplifting charge. (4T103-24 to 104-7) The jury thus had every reason to believe that a shoplifting charge can carry serious consequences.

More importantly, Allen does not need to prove that the jury would have accepted defense counsel’s argument that the plea established bias, and thus would have acquitted. The question is whether this Court’s confidence in the fairness of the trial is undermined by the fact that the State violated its obligation to provide favorable evidence and that, as a result, Allen was deprived of the opportunity to put forward any argument on the dispositive issue in this case. The law on this question is well settled. Because having the opportunity to “test for bias....is a right of constitutional dimensions,” Sugar, 100 N.J. at 230, this

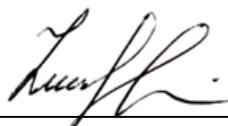
Court has held that “prosecutorial suppression of evidence relating to a witness’s possible interest constitutes a violation of the defendant’s right to due process.” State v. Parsons, 341 N.J. Super. 448, 457-59 (App. Div. 2001) (citing Spano, 69 N.J. at 235). In Allen’s case, where the question of bias was central to the conviction, ““fairness” cannot be stretched to the point of calling this a fair trial.” Kyles, 514 U.S. at 454. Allen is entitled to a new trial.

CONCLUSION

For the reasons set forth in this brief and Allen’s prior submission to this Court, as well as for the reasons set forth in defendant’s Appellate Division brief, the trial court’s denial of Allen’s motion for a new trial based on a Brady violation should be reversed, and this matter should be remanded for retrial.

Respectfully submitted,

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