

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.

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**SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT-APPELLANT**

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<sup>1</sup> Ruby Waller’s 1991 plea agreement, which was the basis for Yusef Allen’s motion for a new trial based on a Brady violation, was submitted to the Union County trial court as part of the appendix to the State’s March 25, 2022 brief in opposition to Allen’s motion for a new trial. As the State noted in its submission to the trial court, “the plea form is difficult to read; however, the condition of Ms. Waller’s plea to testify truthfully in the trial of Ricardo Bradley is decipherable.” Undersigned counsel for Allen was not able to obtain a version of the plea that was easier to read, but agrees with the State that the plea condition requiring Ms. Waller to provide testimony is decipherable.

**TRANSCRIPT KEY**

Dsa — Defendant’s 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  
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## PRELIMINARY STATEMENT

Yusef Allen had a constitutional right to receive evidence from the State which he could have used to impeach the credibility of the State's lead witness, Ruby Waller. The State, however, failed to disclose Waller's plea agreement which demonstrated that she had previously given testimony in a different case in exchange for leniency. Proper disclosure of this plea would have drastically changed the contours of Allen's case because the State's entire case against him boiled down to Ruby Waller's credibility – the State offered no physical evidence implicating Allen; no established motive; and no eyewitnesses to the shooting. Waller, however, gave two very different versions of what she saw on the morning of the shooting. In one version, Waller merely identified Allen as one of two men standing near the scene; in the other, she claimed to have seen Allen actually holding a gun. The dispositive question in Allen's case was therefore which of Waller's statements to believe. In deciding this question, the State urged the jury to consider Waller's motive, arguing vigorously that she had no motive to lie when she testified that she saw Allen holding a gun, and that her statement to the contrary should be discredited because it was motivated by her self-interest. Allen, on the other hand, could not put forward a compelling argument as to Waller's motive – thus marking a crucial gap in his defense on the most important issue in the case. If the State had disclosed Waller's 1991

plea agreement, Allen could have filled this gap by arguing that Waller knew how beneficial it can be to provide testimony, and was thus testifying in Allen's case out of her self-interested motivation to curry favor with the State. Because Allen's conviction hinged entirely upon Waller's credibility, and because, as the State itself acknowledged, the question of Waller's motivation was key to deciding her credibility, the improper suppression of Waller's plea is enough to "undermine confidence" in the outcome of the trial, thereby satisfying Brady.

In reaching a contrary conclusion, the Appellate Division failed to apply the correct standard. The threshold for Brady materiality is whether there is a "reasonable probability" that the undisclosed evidence would have led to a different outcome. This standard is lower than a preponderance, and the core inquiry is whether the undisclosed evidence "undermines confidence" in the outcome of the trial. The threshold for Carter materiality is "more stringent" and asks whether the newly discovered evidence "probably" would lead to a different verdict if a new trial was granted. This showing is equivalent to a preponderance, and does not entail the same "undermines confidence" inquiry. When the correct standard is applied, it is clear that Waller's 1991 plea agreement was material to Allen's case. Because it is undisputed that the Brady framework applies and that the first two prongs of the test were satisfied, this Court should reverse the trial court's denial of his motion, and grant a new trial.

## **PROCEDURAL HISTORY & STATEMENT OF FACTS**<sup>2</sup>

Defendant-Appellant Yusef Allen relies on the procedural history and statement of facts from his Appellate Division brief (Db1-14), and adds the following. On June 12, 2025, in a published opinion, the Appellate Division affirmed the motion court’s denial of Allen’s motion for a new trial, but remanded to the motion court for additional fact finding as to the court’s failure to enforce subpoenas against Crime Stoppers and the Union County Prosecutor’s Office. State v. Allen, 482 N.J. Super. 142, 168-169 (App. Div. 2025).<sup>3</sup>

As for the motion for a new trial, the Appellate Division held that “we do not believe that the Carter test is more stringent than the one prescribed in Brady with respect to the question of materiality and whether the trial outcome would have been different[.]” Id. at 164. 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 [Ruby] Waller’s 1991 plea deal had been disclosed to the defense[.]” Id. at 165. Because the Appellate Division was “satisfied that

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<sup>2</sup> For purposes of ease and clarity, the procedural history is included alongside the statement of facts.

<sup>3</sup> As of this writing, no hearing notices or motions have been filed on the Union County Superior Court eCourts page (State v. Yusef Allen, Union County Ind. No. 98-08-01208-I).

the newly discovered information would not have led to a different result,” the court affirmed the denial of the motion for new trial. Ibid.

On June 25, 2025, Allen filed a petition for certification arguing that the Appellate Division had erred in deciding that “the materiality standards under Carter and Brady are the same,” and in finding that the nondisclosed evidence in Allen’s case was not material. (Dp5) That same day, the State filed a letter opposing Allen’s petition for certification and relying upon its Appellate Division briefing for its response. (Sr1) On September 16, 2025, this Court granted certification “limited to the proper measure of ‘materiality’ for a claim that the State failed to turn over evidence under [Brady] including whether the materiality standard articulated in [Carter] applies, and whether the record in this case meets that standard[.]” (Dsa1) This supplemental brief follows.

## LEGAL ARGUMENT

### POINT I

**THE BRADY MATERIALITY STANDARD OF “REASONABLE PROBABILITY” IS LOWER THAN THE PREPONDERANCE STANDARD, AND THE APPELLATE DIVISION ERRED BY IMPROPERLY EQUATING CARTER AND BRADY MATERIALITY AND THEN APPLYING THE WRONG INQUIRY TO DENY DEFENDANT’S MOTION FOR A NEW TRIAL.**

Allen brought his motion for a new trial based on a Brady violation wherein the prosecution failed to disclose a plea agreement for their lead

witness, Ruby Waller, indicating that she had previously provided testimony for the State in exchange for leniency. State v. Allen, 482 N.J. Super. 142, 151-52, 158 (App. Div. 2025) (citing Brady v. Maryland, 373 U.S. 83 (1963)). (17T10-21 to 25) As the Appellate Division correctly held, the motion court should have applied the three-prong Brady test to rule on his motion. Id. at 165, 165 n.8. Notwithstanding the motion court's error, the Appellate Division affirmed the denial of Allen's motion by erroneously concluding that the Brady materiality standard is equivalent to materiality under Carter. Id. at 164. Our case law is clear that the Brady standard is less demanding and was satisfied in this case.

In ruling on a motion for a new trial based on a Brady violation, courts use the following three-prong test: "(1) the evidence at issue must be favorable to the accused, either as exculpatory or impeachment evidence; (2) the State must have suppressed the evidence, either purposely or inadvertently; and (3) the evidence must be material to the defendant's case." State v. Brown, 236 N.J. 497, 518 (2019). Although the language of the Brady test does not explicitly articulate the materiality standard, this Court has consistently held, since its 1997 opinion in State v. Marshall (Marshall II), that evidence is material under Brady if there is a "reasonable probability" that the outcome of the trial would have been different had the undisclosed evidence been provided. 148 N.J. 89, 156 (1997) (quoting U.S. v. Bagley, 473 U.S. 667, 682 (1985)) (emphasis

added). Notably, “[e]stablishing materiality does not require demonstration by a preponderance that the disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal.” Brown, 236 N.J. at 520 (emphasis added). The central inquiry in a Brady motion is thus whether the undisclosed evidence “undermines confidence in the outcome of the trial.” Kyles v. Whitley, 514 U.S. 419, 434 (1995) (quoting Bagley, 473 U.S. at 678).

The Carter test is different. In order to be granted a new trial based on newly discovered evidence, that evidence must be: “(1) material to the issue and not merely cumulative or impeaching or contradictory; (2) discovered since the trial and not discoverable by reasonable diligence beforehand; and (3) of the sort that would probably change the jury’s verdict if a new trial were granted.” State v. Carter (Carter I)<sup>4</sup>, 85 N.J. 300, 314 (1981). “[U]nder the Carter analysis, prongs one and three are inextricably intertwined,” because “[d]etermining whether evidence is ‘merely cumulative, or impeaching, or contradictory’” under prong one “necessarily implicates prong three, whether the evidence is ‘of the sort that would probably change the jury’s verdict if a new trial were granted.’” State v. Nash, 212 N.J. 518, 549 (2013) (quoting State v. Ways, 180 N.J. 171, 188-89 (2004)). Taken together, prongs one and three require that the

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<sup>4</sup> In Carter, this Court first remanded for consideration of the Brady issue in Carter I, 85 N.J. 300, and then subsequently affirmed the court’s denial of the Brady motion in Carter II, 91 N.J. 76 (1982).

evidence be material, where materiality is defined as evidence “of the sort that would probably change the jury’s verdict if a new trial were granted.” Ibid. New Jersey law has long treated this standard – “probably” change the jury’s verdict – as equivalent to a preponderance standard, requiring a showing that the newly discovered evidence would more likely than not have changed the jury’s verdict. Model Jury Charges (Civil), Charge 1.12H General Provisions for Standard Charge – Preponderance of the Evidence (*short version*) (app. Nov. 1998). Because satisfaction under this test requires a preponderance, Carter materiality cannot be satisfied by a showing that the new evidence would “undermine confidence” in the verdict, and thus, unlike in Brady, that inquiry does not apply.

Even though both tests require defendants to prove that the evidence in question is material, under settled law, the standards are plainly not equivalent. In short, Carter materiality requires a showing that the new evidence “probably” would have changed the outcome, which is equivalent to a preponderance; Brady materiality requires a showing of a “reasonable probability” that the evidence would have changed the outcome, which is less than a preponderance. Because Brady alone calls for less than a preponderance, evidence that is sufficient to “undermine confidence” in the outcome of the case will satisfy Brady materiality but not Carter materiality. The standards are thus distinct, with Carter as “more stringent” than Brady. Carter I, 85 N.J. at 314.

There are two core reasons supporting this outcome. First, as discussed in Point I.A., the case history of both standards demonstrates that New Jersey and federal courts have been consistent in using the above language to define the standards, and neither court has treated “probably” and “reasonable probability” as interchangeable or synonymous. Accordingly, *stare decisis* militates against adopting the Appellate Division’s holding that Brady and Carter materiality are equivalent. Second, as discussed in Point I.B., this distinction between the standards serves two important purposes: it incentivizes prosecutors to liberally disclose evidence, and ensures that courts properly account for the fact that Brady movants have suffered an unfair trial whereas Carter movants have not.

**A. Longstanding Precedent Establishes That The Brady Materiality Standard Is A Lower Threshold Than The Carter Materiality Standard.**

The current standard for Brady materiality in New Jersey was announced by this Court in State v. Marshall (Marshall II): “In all instances, evidence is material for Brady purposes ‘if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.’” 148 N.J. at 156 (quoting Bagley, 473 U.S. at 682). In Marshall II, this Court adopted the federal iteration of Brady materiality as articulated by the U.S. Supreme Court in U.S. v. Bagley. *Ibid.* (finding there was no “state-law basis on which to depart from the use of [the Bagley] standard in Brady cases”).

U.S. v. Bagley marked the first time that the United States Supreme Court used the materiality standard of “reasonable probability,” as the Court in Bagley chose to depart from an earlier iteration of materiality that had been used in the years following the publication of Brady. 473 U.S. at 682.

The Court in Bagley defined the Brady standard by explicitly adopting the prejudice prong of the Strickland v. Washington test used to rule on claims of constitutionally ineffective assistance of counsel. 473 U.S. at 682. In Strickland, the test for prejudice is whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Ibid. (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)). “The Strickland Court defined a ‘reasonable probability’ as a ‘probability sufficient to undermine confidence in the outcome.’” Ibid. Drawing on these rules, the Court in Bagley announced the current iteration of Brady materiality: “The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” Ibid.

The Strickland decision which Bagley expressly drew from made clear that the newly-announced prejudice standard was less stringent than the standard for newly discovered evidence: “[T]he newly discovered evidence standard is

not an apt source from which to draw a prejudice standard for ineffectiveness claims” because prejudice can be found “even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.” Strickland, 466 U.S. at 694. See U.S. v. Kelly, 663 Fed.App’x. 222, 226 (3d Cir. 2016) (“To establish an ineffective assistance of counsel claim, unlike with a motion for a new trial based on newly discovered evidence, a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.”) (quoting Strickland, 466 U.S. at 693) (emphasis added). This holding from Strickland – that a showing of “reasonable probability” is less than a preponderance – has been incorporated into and applied to motions for a new trial based on Brady under New Jersey law: “a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal.” State v. Nelson, 155 N.J. 487, 500 (1998) (quoting Kyles, 514 U.S. at 434).

Unlike a motion for newly discovered evidence, where the core of the inquiry is whether the outcome of the trial probably would have been different, “the question [for Brady materiality] is not whether the defendant would more likely than not have received a different verdict with the suppressed evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” Kyles, 514 U.S. at 434; Brown, 236 N.J. at

520 (quoting from Kyles, 514 U.S. at 434, to define Brady rules). In light of the Brady standard's origin from Strickland, this Court has defined the rigor of Brady materiality as lower than the preponderance standard of "more likely than not," where the dispositive question on materiality is whether the undisclosed evidence "undermines confidence" in the outcome of the trial. Ibid. In contrast, this Court's decisions on motions for newly discovered evidence make clear that Carter materiality cannot be satisfied by a showing that is lower than a preponderance, and courts ruling on Carter motions should not apply the inquiry of whether the newly discovered evidence "undermines confidence" in the outcome of the original trial.

The Carter materiality standard has been the same in New Jersey since the early 1900s. In State v. Bunk, this Court explained that the threshold for Carter materiality – evidence of the sort that would "probably change the result if a new trial was granted" – is a rule that is "amply supported by the authorities." 4 N.J. 482, 486 (1950) (citing Christie v. Petrullo, 101 N.J.L. 492 (Sup.Ct.1925); Paradise v. Great Eastern Stages, Inc., 114 N.J.L. 365 (E. & A.1934); Albrecht v. Raab, 127 N.J.L. 292 (E. & A.1941); Rooney v. Herrmann, 27 A.2d 650 (Cir.Ct.1942); Wilkotz v. Ziss, 137 N.J.L. 3 (Sup.Ct.1948)). These cases establish that the Carter materiality threshold of "probably" is both longstanding and equivalent to a standard of "more than likely[.]" Paradise, 114 N.J.L. at 367

(“New trials are not to be favored...unless the court feels that the evidence, newly discovered, more than likely would change the result.”).

While this Court has not explicitly equated Carter materiality with the preponderance standard, under Federal and State law, the standard of proof requiring a showing that an outcome will “probably” occur has consistently been understood as requiring a showing by a preponderance of the evidence. In our State, the general model jury charge for civil trials, for example, provides two definitions of the preponderance standard: that the “allegation is probably true” or that the allegation is “more likely true than not true.” Model Jury Charges (Civil), Charge 1.12H General Provisions for Standard Charge – Preponderance of the Evidence (*short version*) (app. Nov. 1998). Criminal jury instructions also treat the preponderance standard as a showing that something is probably true: “[a] belief that property has probably been stolen is a belief that it is more likely than not that the property had been stolen.” Model Jury Charges (Criminal), Receiving Stolen Property (N.J.S.A. 2C:20-7(a)) (rev. Mar. 21, 2005).

Relatedly, the Appellate Division and this Court have both characterized the preponderance standard as requiring a showing that an outcome would “probably” occur. Sharpe v. Bestop, Inc. 314 N.J. Super. 54, 70 (App. Div. 1998), aff’d, 158 N.J. 329 (1999); Campo v. Tama, 133 N.J. 123, 130 (1993). Federal case law likewise equates “probably” with the preponderance standard.

To prevail on a habeas petition alleging actual innocence, for example, a petitioner must show that a violation “has probably resulted in the conviction of one who is actually innocent” which, as the Court explains, requires a showing of “more likely than not[.]” Schlup v. Delo, 513 U.S. 298, 327 (1995)<sup>5</sup>; Sawyer v. Whitley, 505 U.S. 333, 366 (1992) (Blackmun, J. concurring) (“The defendant must show that he is probably– that is, more likely than not, – innocent of the death sentence.”). Federal case law is relevant here because Carter materiality in New Jersey is equivalent to the federal standard. The rule of criminal procedure governing motions for a new trial following conviction, R. 3:20-1, “was taken from Rule 33 of the Federal Rules of Criminal Procedure[.]” Bunk, 4 N.J. at 487. Both rules call for a new trial when doing so would be “required in the interest of justice.” R. 3:20-1; Fed. Rule Crim. Proc. 33. And satisfaction of “Fed. Rule Crim. Proc. 33 based on newly discovered evidence” requires “demonstrating that newly discovered evidence probably would have resulted in acquittal” – the same standard employed in New Jersey. U.S. v. Agurs, 427 U.S.

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<sup>5</sup> The Court then goes on to explain that a showing of “more likely than not” imposes a lower burden of proof than the ‘clear and convincing’ standard[.]” Ibid. This distinction is worth noting to emphasize that, while Allen asks this Court to find that Brady materiality calls for less than Carter materiality, he does not argue that Carter materiality is a particularly high burden. Rather, as this distinction from the Supreme Court highlights, Carter materiality is simply equivalent to the preponderance standard, which is higher than the “reasonable probability” of Brady but lower than “clear and convincing,” and certainly lower than the “beyond a reasonable doubt” standard. Schlup, 513 U.S. at 327.

97, 111, 111, n. 19 (1976). Before the adoption of that Federal rule, “the practice in the federal courts with respect to new trials for newly discovered evidence was precisely the same as in this state.” Bunk, 4 N.J. at 487.

Following the comprehensive articulation of the Carter standard in Bunk, this Court has remained consistent in applying the rules articulated above wherein the materiality standard is defined as a showing that the new evidence would “probably” lead to a different result. State v. Artis, 36 N.J. 538, 541 (1962) (“To entitle a party to a new trial on the ground of newly discovered evidence, the new evidence must be...(3) of the sort that would probably change the jury’s verdict if a new trial were granted.”); State v. Bey, 161 N.J. 233, 287 (1999) (same); State v. Ways, 180 N.J. 171, 189 (2004) (same); State v. Nash, 212 N.J. 518, 532 (2013) (same); State v. Smith, 224 N.J. 36, 49 (2016) (same); State v. Hannah, 248 N.J. 148, 171 (2021) (same). None of these opinions applied the standard of “reasonable probability,” none indicated that a showing of less than a preponderance would be sufficient, and none asked whether the newly discovered evidence would “undermine confidence” in the outcome. Adopting the Appellate Division’s finding that Brady and Carter materiality are equivalent would thus be a departure from longstanding precedent. The principle of *stare decisis* thus demands that this Court reaffirm the existing materiality standards wherein materiality is easier to satisfy under Brady than under Carter.

Moreover, the standards remain distinct even though the language of each – “probably” and “reasonable probability” – makes the tests ripe for confusion. Justice Souter acknowledged this potential for confusion and warned courts against the risk of conflating the standards, cautioning that “it is misleading in Brady cases to use the term ‘probability,’ which is naturally read as the cognate of ‘probably’ and thus confused with more likely than not[.]” Strickler v. Greene, 527 U.S. 263, 300 (1999) (Souter, J. concurring in part and dissenting in part). To avoid confusion, Justice Souter suggested that “[w]e would be better of speaking of a ‘significant possibility’ of a different result to characterize the Brady materiality standard.” Ibid. See State v. Hypolite, 236 N.J. 154, 169, n.3 (2018) (citing favorably to Justice Souter’s discussion of the two standards).

This Court need not change the language defining Brady materiality in order to protect against further confusion between the two standards, and could instead simply emphasize that the required inquiries for each test are distinct. As noted, for Brady motions only, in which the preponderance threshold does not need to be met, courts must ask whether the improperly suppressed evidence “undermines [the court’s] confidence” in the outcome of the trial. Brown, 236 N.J. at 527 (citing Kyles, 514 U.S. at 434). This emphasis would ensure that courts applying Brady do not ask “whether the defendant would more likely than not have received a different verdict with the suppressed evidence” and will

instead address the “touchstone” inquiry of “whether in [the] absence [of the undisclosed evidence] he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” Kyles, 514 U.S. at 434 (emphasis added); Strickler, 527 U.S. at 300 (characterizing above as the “touchstone” of the Brady inquiry). Moreover, this emphasis on the question of fairness in Brady motions is consistent with the reason why the two standards are distinct in the first place – in short, because only Brady motions concern an unfair trial.

**B. Because Brady Movants Have Suffered a Due Process Violation That Rendered Their Trial Unfair Whereas Carter Movants Have Not, The Brady Materiality Standard Must Be Set Lower Than the Carter Materiality Standard.**

The “Brady rule is based on the requirement of due process” and “[i]ts purpose is....to ensure that a miscarriage of justice does not occur.” Bagley, 473 U.S. at 675. Due process places a responsibility on the prosecutor “to assist the defense in making its case[.]” Id. at 675, n.6. This obligation stems from the unique duty of the prosecutor as “the representative not of an ordinary party to a controversy, but of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done.” Ibid. The prosecutor is thus the “servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.” Agurs, 427 U.S. at 111.

The core of the prosecutor’s duty under Brady is to “disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a

fair trial[.]” Bagley, 473 U.S. at 675. The State’s failure to do so “casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice,” and constitutes a “denial of due process” which results in an “unfair trial to the accused.” Brady, 373 U.S. at 87-88. A Brady violation thus means that: (1) the State has failed to meet their constitutional duty to the defendant, and (2) the defendant’s due process right to a fair trial has been violated. Neither of these findings can be said for a grant of a new trial under Carter. Unlike in Brady, “newly discovered evidence claims presuppos[e] that all the essential elements of a presumptively accurate and fair proceeding were present[.]” Strickland, 466 U.S. at 694. By the same token, claims under Carter do not involve a failure by the State to meet its obligation to the defendant. Ibid.

There are thus the two key differences between defendants raising a Brady motion as opposed to a Carter motion: (1) Brady movants have suffered from the State’s failure to meet its constitutional obligation, whereas Carter movants have not; and (2) Brady movants have suffered a due process violation rendering their trial unfair, whereas Carter movants have had a presumptively fair proceeding. Accordingly, by setting the Brady materiality standard lower than Carter, two important purposes are served: (1) prosecutors are incentivized to liberally disclose evidence, and (2) the injustice that Brady movants have suffered by virtue of their unfair trial is appropriately remedied. The U.S.

Supreme Court – and later this Court – have acknowledged that the two standards need to be different in order to further these purposes. In short, “the law makes it easier for defendants to obtain a new trial where the government has engineered an unfair trial by withholding material exculpatory evidence.” U.S. v. Joleyn, 206 F.3d 144, 153 (1st Cir. 2000).

As to the first purpose, because only Brady motions implicate the duty of the prosecutor, the U.S. Supreme Court held that its materiality standard must be lower than Carter to incentivize liberal disclosure of exculpatory evidence:

[The] description of the prosecutor's duty illuminates the standard of materiality that governs his obligation to disclose exculpatory evidence...[T]he fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal.<sup>[6]</sup> If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice.

[Agurs, 427 U.S. at 111 (emphasis added).]

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<sup>6</sup> The Court includes a footnote explaining that the “severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal” is “the standard generally applied by lower courts in evaluating motions for new trial under Fed. Rule Crim. Proc. 33 based on newly discovered evidence.” Id. at 111, n. 19. As discussed above, the Carter standard in New Jersey is based upon, and equivalent to, this federal rule.

In other words, if the State's constitutional duty to disclose favorable evidence is to mean anything, then Brady must be easier to satisfy than Carter.

This Court has reached the same conclusion, holding that “[t]he [Brady] materiality standard is specifically designed to encourage prosecutors to disclose information to the defense in close cases.” Nelson, 155 N.J. at 519 (citing Kyles, 514 U.S. at 439-40). This incentive is consistent with New Jersey's discovery rules which “represent a modern embracement of broad pretrial disclosure as an aid to advancing truth and justice” under which, “in effect, [the] prosecutor's entire file [is made] available to the defendant as a matter of right upon a general demand.” State v. Engel, 249 N.J. Super. 336, 393 (App. Div. 1991), cert. denied 130 N.J. 393 (1991). To incentivize liberal disclosure, Brady materiality must remain lower than Carter materiality. Ibid.

The second difference between Brady and Carter movants is that Brady movants assert a denial of due process and a fair trial, whereas Carter movants do not. As noted above, the Brady materiality standard derived from the Strickland prejudice standard. In Strickland, the Court differentiated between claims based on newly discovered evidence – where the defendant does not allege that he was deprived of a fair trial – and claims like Strickland and Brady where the defendant claims to have been deprived of a fair trial. The Court explained that this difference in posture requires Strickland prejudice be lower

than the threshold for newly discovered evidence, and found that the same rationale demands Brady materiality be lower than newly discovered evidence:

...[T]he newly discovered evidence standard is not an apt source from which to draw a prejudice standard for ineffectiveness claims. The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged. An ineffective assistance claim asserts 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. The 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.

Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution[.] [Agurs, 427 U.S., at 104.] The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

[Strickland, 466 U.S. at 694.]

In both Brady and Strickland motions, the defendant asserts that he has been denied one of the “crucial assurances that the result of the proceeding is reliable” thereby calling the overall fairness of his trial into doubt. Ibid. In ruling on a Brady motion, then, courts start from a position of skepticism in which they

are “concerned with whether ... the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.” Marshall II, 148 N.J. at 248. In light of the State’s failure asserted by a Brady motion, “the result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if” the Brady error “cannot be shown by a preponderance of the evidence to have determined the outcome.” Strickland, 466 U.S. at 694. What this means in practical terms is that in ruling on a Brady motion, a court can be 51% certain (or more) that the defendant would still be convicted if the suppressed evidence had been properly disclosed and can, nonetheless, find that a new trial is warranted. That is what is meant by the rule in Strickland that the “reasonable probability” standard is not “outcome-determinative[.]” Id. at 693. The question for Brady is not whether courts can say with confidence that defendant would have “received a different verdict” if the evidence was disclosed, but whether the defendant “received a fair trial” in the absence of the suppressed evidence. Kyles, 514 U.S. at 434.

That is why the “undermines confidence” inquiry must be employed for Brady motions, instead of an “outcome determinative” test. Only the former inquiry – whether the evidence undermines confidence –starts from the proper position of skepticism as to the overall fairness and reliability of the proceeding, and asks if the Brady violation provides further reason to doubt the fairness of

the trial. Given this perspective – without the presumption of reliability and fairness that applies for Carter – and given that the core of the Brady inquiry is whether defendant received a fair trial, any error that further undermines the already-doubtful fairness of the proceeding is sufficient for a new trial. That is why this Court has said, in no uncertain terms, that “[f]or an appellant, the materiality standard is not difficult to achieve.” Nelson, 155 N.J. at 500.

While the other iteration of Brady materiality – whether there is a “reasonable probability” that the outcome of the trial would have been different – is undoubtedly applicable, that inquiry carries a high risk of misapplication. First, that framing runs the risk of conflating “reasonable probability” with “probably” and thereby unwittingly importing a preponderance standard into the inquiry. Second, that framing shifts attention away from the issue of fairness, thereby failing to account for the due process violation that Brady movants alone by virtue of a failing by the State. This misapplication is precisely what happened in Allen’s case where the Appellate Division did not ask whether the undisclosed evidence undermines confidence in the outcome of Allen’s trial. Allen, 482 N.J. Super. at 152. In so doing, the Appellate Division conflated the materiality standards, improperly applied an outcome-determinative inquiry, and failed to focus on the question of fairness. When the proper standard is applied, it is clear that Waller’s 1991 plea was material evidence under Brady.

## POINT II

### **THE TRIAL COURT’S DENIAL OF ALLEN’S MOTION FOR A NEW TRIAL MUST BE REVERSED BECAUSE ALLEN SUCCESSFULLY ESTABLISHED ALL THREE PRONGS OF BRADY, INCLUDING THE MATERIALITY TEST.**

The State’s case rested entirely upon the credibility of Ruby Waller – the State’s lead witness who gave two very different versions of her story. In her anonymous 911 call, and in speaking with defense investigators, Waller never mentioned Allen holding a gun. Whenever she spoke with the prosecutor, however, Waller claimed that she had, in fact, seen Allen holding a gun. Because the State had no other affirmative proof of guilt beyond Waller’s circumstantial testimony, Allen’s conviction ultimately boiled down to the question of whether, in the State’s own words, “Ruby Waller [was] telling the truth to the defense investigators” when she said that she never saw a gun, “or [whether] she [was] telling the truth on the witness stand” when she did mention a gun. (7T55-8 to 16) The key to determining which of her statements was more believable, according to the State, was to “understand[d] her motivation” in giving each statement. (7T55-17 to 18) The State argued, on the one hand, that the jury should discredit Waller’s statement to defense investigators as a self-motivated attempt to “serve her end[.]” (7T59-7 to 12)

Allen, on the other hand, was not able to put forward a compelling argument to the contrary by suggesting that it was Waller's trial testimony that should be discredited as motivated by self-interest. Allen thus had a missing gap on the single most important issue in the case. This gap would have been filled if the State had properly disclosed Waller's 1991 plea agreement. Had they done so, Allen could have argued that Waller's testimony should be discredited as self-serving in light of the fact that she had previously received leniency from the State in exchange for testifying against a codefendant, and thus knew how beneficial it can be to provide testimony helpful to the State's case. Allen must therefore be granted a new trial because the State failed to disclose favorable evidence in its possession that would have provided Allen with a compelling argument on the dispositive question in the case, thereby satisfying all three prongs of Brady.

As noted, a motion for a new trial must be granted if a defendant satisfies all three prongs of the Brady test: "(1) the evidence at issue must be favorable to the accused, either as exculpatory or impeachment evidence; (2) the State must have suppressed the evidence, either purposely or inadvertently; and (3) the evidence must be material to the defendant's case." Brown, 236 N.J. at 518. A court ruling on a Brady violation is a "mixed question of law and fact." Marshall II, 148 N.J. at 185 (citing, *inter alia*, U.S. v. Pelullo, 14 F.3d 881, 886

(3d Cir. 1994)). Reviewing courts thus “conduct a de novo review of the [lower] court’s conclusions of law and a review based on the ‘clearly erroneous’ standard of its findings of fact.” Pelullo, 14 F.3d at 886 (citation omitted). Where, as here, the facts are undisputed, appellate review is de novo: “Because the materiality of Brady evidence is a question of law, and the Brady facts are undisputed, our review is de novo.” U.S. v. Cuffie, 80 F. 3d 514, 518 (D.C. Cir. 1996); see also Marshall II, 148 N.J. at 185 (holding that only the “court’s factual determination” is owed deference); Allen, 482 N.J. Super. at 163 (“[W]e review the legal effect of the motion judge’s findings de novo.”). Once a reviewing court has found a Brady violation, “there is no need for further harmless-error review.” Kyles, 514 U.S. at 435. In fact, a Brady violation “could not be treated as harmless,” because it “necessarily entails the conclusion that the suppression must have had substantial and injurious effect or influence in determining the jury’s verdict[.]” Ibid. (citations omitted). If all three Brady prongs are satisfied, the inquiry is over, and the conviction must be reversed, and a new trial granted. Brown, 236 N.J. at 528 (“Because we conclude that the State’s Brady violation...undermines our confidence in the jury’s verdict of guilt against the defendants....a new trial is required.”).

Here, the denial of Allen’s motion for a new trial must be reversed because Allen satisfied all three Brady prongs. As to the first two prongs, “[d]etermining

whether the first two Brady elements have been satisfied is a straightforward analysis,” and the State has not disputed that Allen successfully met both prongs: Ruby Waller’s 1991 plea was clearly favorable impeachment evidence that was in the possession of the State but was not disclosed to Allen. Ibid. Those prongs are discussed briefly in Point II.A (Brady prong 1) and Point II.B (Brady prong 2). The core question is whether Waller’s plea agreement was material under Brady’s lower materiality standard. As discussed in Point II.C., a review of the State’s proofs makes clear that the suppressed evidence satisfies Brady materiality because Waller’s 1991 plea agreement would have filled a missing gap in Allen’s case as to Waller’s self-interested motivation for testifying.

**A. Brady Prong 1: The Undisclosed Evidence Was Favorable Impeachment Evidence.**

Ruby Waller’s 1991 plea agreement was favorable impeachment evidence that satisfied the first prong of Brady. In Giglio v. United States, the Supreme Court extended Brady protections to incorporate evidence that impeaches the credibility of a State witness “[w]hen the reliability of [that] witness may well be determinative of guilt or innocence.” 405 U.S. 150, 154 (1972). This Court has thus long recognized that “Brady encompasses evidence that the defendant might have used to impeach government witnesses.” State v. Knight, 145 N.J. 233, 245-46 (1996) (citing Giglio, 4005 U.S. at 154).

One clear means of impeaching credibility is by confronting a witness with evidence of possible bias or motivation for their testimony. “The Confrontation Clause protects a defendant's right to cross-examine a witness on the possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand.” State v. Higgs, 253 N.J. 333, 361 (2023) (internal citation omitted). “[T]here can be no question that a defendant must be afforded the opportunity through effective cross-examination to show bias on the part of adverse state witnesses.” State v. Bass, 224 N.J. 285, 302 (2016). This Court has broadly interpreted what type of evidence is permissible grounds for cross-examining on potential bias: “Every fact or circumstance tending to show the jury the witness’s relation to the case or the parties is admissible to the end of determining the weight to be given to his evidence.” State v. Spruill, 16 N.J. 73, 78 (1954); see also State v. Holmes, 290 N.J. Super. 302, 313 (App. Div. 1996) (“The law in New Jersey concerning the constitutional right of the defendant to explore potential bias on the part of a prosecution witness is even broader than that which exists in federal court.”).

The scope of permissible questions as to a witness’s criminal involvement, and its potential for establishing bias in favor of the State, is likewise broad. Inferences of witness bias towards the State are “particularly compelling when the witness is under investigation, or charges are pending against the witness, at

the time that he or she testifies.” Bass, 224 N.J. at 303. When a witness has some form of criminal involvement, the defense “may explore the possibility” that they are only providing testimony favorable to the State because they “had received a promise of lenient treatment,” ibid, and thus had a motive that went beyond a simple “duty to recount the facts as best he could remember them.” Gordon v. United States, 344 U.S. 414, 422 (1953). Even if there is no “[e]xpress agreement at all that the witness will benefit from testifying favorably for the State,” cross-examination as to potential bias is nonetheless admissible if it tends 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.” Holmes, 290 N.J. Super. at 313 (emphasis in original) (internal citation omitted); see State v. Vaccarro, 142 N.J. Super. 167, 176 (App. Div.), cert. denied 71 N.J. 518 (1976) (“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.”); State v. Parsons, 341 N.J. Super. 448, 458 (App. Div. 2001) (holding that questioning as to bias is permissible so long as it “tend[s] to show that the State may have a ‘hold’ of some kind over a witness, the mere existence of which might prompt the individual to color his testimony in favor of the prosecution”).

In other words, defendants can rely upon evidence for impeachment purposes to suggest that a witness simply believes – or even just hopes – that their testimony will result in favorable treatment from the State. State v. Taylor, 49 N.J. 440, 449 (1967) (finding impeachment questioning admissible as it related to whether the witness was “influenced in giving [his testimony] by the strong motive of hope of favor”) (emphasis added); see also U.S. v. Campbell, 426 F.2d 547, 549 (2d Cir. 1970) (“[A] defendant may not only elicit evidence showing that the government made explicit promises of leniency in return for cooperation, but may also show conduct which might have led a witness to believe that his prospects for lenient treatment by the government depended on the degree of his cooperation.”) (emphasis added).

Questioning as to bias in favor of the State is also permitted: even if the witness denies any expectation of leniency, State v. Knight, 283 N.J. Super. 98, 121 (App. Div. 1995), aff’d 145 N.J. 233 (1996) (“The fact that the witness denies holding any expectancy of leniency is not a proper basis for barring [questioning] on the subject.”); even if the witness’s criminal involvement is unrelated to the trial in which they are testifying, State v. Baker, 133 N.J. Super. 394, 397 (App. Div. 1975) (“[I]t is immaterial for purposes of admissibility whether the pending indictments relate to the same cause in which the witness is testifying.”); and even if there is already evidence in the record demonstrating

that the witness may be “bias[ed] to some degree” so long as the questioning can establish that there are “other factors which might” show the witness “to be biased towards the State[.]” State v. Mazur, 158 N.J. Super. 89, 105 (App. Div. 1978), cert. denied 78 N.J. 399 (1978).

In Allen’s case, Ruby Waller’s undisclosed plea agreement was favorable evidence that could have been used by Allen to impeach her credibility by suggesting that she had a self-interested motivation to provide testimony favorable to the State in the hopes of getting leniency. At the time of Allen’s trial, Waller had an unresolved shoplifting charge. Allen, 482 N.J. Super. at 166. With that charge pending, Allen could have used her plea agreement to suggest that her testimony was “influenced...by the strong motive of hope” that she would receive leniency on that charge in light of the fact that that she had previously received leniency for doing just that. Taylor, 49 N.J. at 449.

Moreover, the State conceded in its Appellate Division brief that the 1991 plea agreement could have been used to impeach Waller’s credibility: “[A] requirement in [Ruby Waller’s] 1991 plea agreement to testify against her then-codefendant could potentially impact the credibility of Waller in defendant’s trial[.]” (Sb21) Allen, 482 N.J. Super. at 165 (relying upon State’s above “acknowledge[ment]” in analysis of prong one). Allen thus satisfies prong one.

**B. Brady Prong 2: The Undisclosed Evidence Was In The State's Possession And Was Not Disclosed.**

The prosecution possessed Waller's plea agreement and did not turn it over, satisfying Brady prong two. "The Brady rule is invoked where information is discovered after trial 'which had been known to the prosecution but unknown to the defense.'" State v. Carter, (Carter II) 91 N.J. 86, 111 (1982) (citing Agurs, 427 U.S. at 103). The "prosecutor is charged with knowledge of evidence in his file, even if he has actually overlooked it" ibid, including documents "that are in the possession of the prosecutor, law enforcement officials, and other agents of the State." State v. Robinson, 229 N.J. 44, 71 (2017).

Waller's plea agreement was within the State's possession: it was a document that the State itself negotiated and signed. (Dsa7) Despite being in possession of the plea, the State did not turn over the document as required under Brady. Notably, the State has not disputed this. Allen, 482 N.J. Super. at 165 ("[A]s to the second prong, the State does not argue that it did not have knowledge of the plea deal offered to Waller in the 1991 prosecution.") (quoting, *inter alia*, Kyles, 514 U.S. at 437-38) (holding that a prosecutor is responsible to learn of evidence favorable to the defendant that is known to others acting on the government's behalf and vacating a conviction for failure to provide impeachment evidence of a government witness). Allen satisfied prong two.

**C. Brady Prong 3: The Undisclosed Evidence Was Material.**

Waller's 1991 plea agreement was material because it would have filled a missing gap in Allen's defense by giving him the opportunity to suggest that Waller's testimony was motivated by her interest in currying favor with the State in exchange for her testimony. "[E]vidence is material if there is a reasonable probability that timely production of the withheld evidence would have led to a different result at trial." Brown, 236 N.J. at 520 (citations omitted). Establishing materiality "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." Ibid. Instead, the question is "whether in the absence of the undisclosed evidence the defendant received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Ibid. The key inquiry in determining materiality is whether the undisclosed evidence in question "undermine[s] confidence in the outcome" of the trial. Nelson, 155 N.J. at 521.

In ruling on materiality, "the court must consider the quantum and quality of evidence," Marshall II, 148 N.J. at 157, and the "analysis depends primarily on the importance of the witness's testimony and the strength of the State's case against defendant as a whole." State v. Marshall, (Marshall I), 123 N.J. 1, 200 (1991). Thus if "the verdict is already of questionable validity," then even "additional evidence of relatively minor importance might be sufficient" for a

Brady violation. Agurs, 427 U.S. at 113; see also Marshal II, 148 N.J. at 157 (“[A] verdict that is only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.”).

Given the importance of the strength of the State’s proofs, materiality is easier to prove in cases where the State offers little to no physical evidence demonstrating guilt. Kyles, 514 U.S. at 421 (reversing based on Brady violation and noting that “[i]t is significant...that the physical evidence remaining unscathed would, by the State’s own admission, hardly have amounted to overwhelming proof that [Defendant] was the murderer”). Likewise, when the evidence that was improperly suppressed by the State would have been used for impeachment purposes, defendants are more likely to satisfy materiality if the witness in question was central to the State’s case. Carter v. Rafferty, 826 F.2d 1299, 1309 (3d. Cir. 1987) (favorably cited by Marshall I, 123 N.J. at 200). In such cases, if the “outcome of the case depended on who the jury believed,” then “anything which could have tipped the credibility scale had the potential to affect the outcome and, to the extent that the credibility scale was wrongly tipped, a fundamental injustice was the result.” Holmes, 290 N.J. Super. at 312.

In Carter v. Rafferty, for example, the Third Circuit found that the “testimony [of the State’s witness] was critical to the prosecution’[s] case...[and] [h]is credibility was a crucial issue for the jury.” 826 F.2d at 1309.

Because the jury needed to find the witness credible in order to convict, the Third Circuit concluded that “it must necessarily follow that there is a reasonable probability that the result of the trial would have been different had the prosecution properly disclosed” the evidence which could have been used for impeachment. Ibid. (emphasis added). In so finding, the Third Circuit treated the centrality of the witness’s credibility to the State’s case as dispositive on the question of materiality: because the verdict hinged on the jury finding the witness credible, any impeachment evidence that would have undermined their credibility was sufficient to undermine confidence in the verdict. See Marshal I, 123 N.J. at 200 (citing to Rafferty to hold that materiality depends “primarily” on the “importance of witness’s testimony and strength of the State’s case”).

Moreover, undisclosed impeachment evidence is more significant to the materiality analysis if, as is the case here, it could have been used to establish a motive for the witness to testify favorably for the State. In State v. Landano, the Appellate Division held that a Brady violation had occurred where the State’s failure to disclose impeachment evidence for their lead witness deprived the defense of the opportunity to argue that “there was a motive or interest that affected [that witness’s] credibility.” 271 N.J. Super. 1, 40-41 (App. Div.), cert. denied, 137 N.J. 164 (1994). Even though the jury was aware that the lead witness had contradicted himself in general, the defense’s inability to

persuasively argue that his testimony was motivated by self-interest or bias “deprived Landano of an important weapon for his defense,” thus requiring a new trial. Ibid. See also Napue v. Illinois, 360 U.S. 264, 270 (1959) (reversing conviction based on a Brady violation where undisclosed evidence “might well have” led jury to conclude that witness “had fabricated testimony in order to curry the favor of the prosecutor”).

Ultimately, “[f]or an appellant, the materiality standard is not difficult to achieve.” Nelson, 155 N.J. at 500. While this is true for all Brady movants, the threshold for materiality is even easier to meet for Allen where all of the above scenarios weigh in his favor: the State’s proofs were weak; the undisclosed evidence would have impeached the State’s key witness whose credibility was essential to the conviction; the undisclosed evidence provided a motive to explain why Waller’s statements were inconsistent; and, as will be discussed, the trial court committed a substantial error in instructing the jury on the all-important question of Waller’s motive, which compounded the injury Allen suffered from the Brady violation.

A review of the evidence makes clear that, not only was the State’s case weak in general, but Ruby Waller’s testimony was, undoubtedly, essential to the State’s case, and the jury needed to find her credible in order to convict. As the judge overseeing trial later found as part of its summary of the State’s proofs:

“[Waller] puts the gun in [Allen’s] hand, [and] she talks about the confrontation. Without her...there is no case.” (16T21-23 to 22-5) More specifically, there was no direct evidence implicating Allen as the shooter. The State introduced no gun, no fingerprints, no DNA, and no shell casings. Allen, 482 N.J. Super. at 166 (“We acknowledge there is no forensic evidence placing defendant at the crime scene.”). Nor did the victim “make a deathbed identification of his assailant.” Ibid. Nor did the State prove any motive for the shooting, as they conceded: “We can’t prove what the motive was, why Yusef Allen committed this crime. As I said, it’s not an element and we don’t have to prove it.” (7T72-8 to 10)

The State’s case thus rested on the testimony of two witnesses, Rhonda Whitfield and Ruby Waller, both of whom provided only circumstantial evidence. Allen, 482 N.J. Super. at 154-56. Neither Whitfield nor Waller, however, saw the shooting itself. Ibid. Whitfield, moreover, did not even see Allen holding a gun, and explained only that she saw him holding “something” in his hand and then later heard what she described as “firecracker[s].” (4T28-2 to 29-25; 4T31-3) Thus even if the jury found Whitfield and Waller to be credible, their testimony was circumstantial at best and would not have made for overwhelming proof of guilt. And, crucially, Whitfield’s testimony served the limited purpose of corroborating Waller, and did not offer independent, affirmative evidence of guilt that would have been sufficient for a conviction.

The State conceded this point, explaining at a side bar that the “main reason I called [Whitmer] was simply because she supported Ruby Waller’s testimony in that she saw Status,” which was as a nickname for Allen, come out of the Mack house. (4T97-14 to 16) This was confirmed in summation, when the State, after discussing Waller’s testimony at length, made limited comments on Whitfield, explaining only that she “corroborates” certain facts of Waller’s testimony, namely that “Status” came out of the house, that there was a confrontation, and that he was holding something. (7T45-22 to 46-7). See Kyles, 514 U.S. at 444 (“The likely damage is best understood by taking the word of the prosecutor, who contended during closing arguments that [certain witnesses] were the State’s two best witnesses.”). The Appellate Division likewise held that Whitfield’s testimony “corroborated” Waller. Allen, 482 N.J. Super. at 166. In other words, Whitfield’s testimony was not, on its own, sufficient for a conviction.

This is particularly true given Whitfield’s credibility issues as a witness who: was addicted to drugs and admitted using heroin before the shooting; had a criminal record, including the filing of false police reports and obstruction of justice; had a pending shoplifting charge at the time of her testimony; had asked the State for leniency; and had suffered a traumatic brain injury that left her with memory problems. (4T56-6 to 64-11; 4T90-3 to 91-23; 4T103-3 to 8) Because

Whitfield's testimony was limited to corroboration and was plagued by credibility issues, in order to convict Allen, the jury needed to find that the State's lead witness, Ruby Waller, was credible. And because Waller's 1991 plea agreement would have substantially undermined her credibility, it was material evidence, the improper suppression of which constituted a Brady violation.

Waller's credibility was already questionable because her testimony contradicted the statements of several other witnesses on substantial details, and her recollection of the events changed over time. As to Waller's general lack of credibility, she had three prior convictions for cocaine possession, and at the time of the trial, she was facing prosecution for a shoplifting charge which had not yet been resolved. (3T123-17 to 124-16) She also testified that she was a drug addict at the time of the incident, who had been awake "doing crack cocaine" on the night before the shooting. (3T129-6 to 22; 3T186-10 to 19) Waller's testimony was also contradicted by several other witnesses, including Bobby Harris – the only witness without any credibility issues – who heard gunshots and saw the victim fall but did not see Allen on the scene. (6T 20-19 to 22-18) Notably, Waller and Whitfield contradicted each other on substantial details. They both testified that they were on or directly at the foot of the porch of the Mack house at the moment that the dispute broke out, but neither of them remembers seeing one another. (3T135-18 to 23) (7T67-6 to 8)

Beyond her general credibility, the most significant issue with Waller's testimony was that her recollection of the event changed numerous times, and it changed depending upon whom she was talking to. The first statement Waller gave to police was during her anonymous 911 call that she placed shortly after the incident. During the call, Waller did not mention anything about seeing a gun, and claimed to have been inside her home looking out the window when she heard the initial dispute. (3T146-20 to 147-24) When Waller next spoke with police, she identified herself rather than remaining anonymous. (3T118-18 to 119-14) Now she claimed, for the first time, to have seen a gun in Allen's hand. (2T152-8 to 11) (7T55-11 to 14) Her next statement changed again. This time, Waller was not speaking with the prosecutor but with defense investigators. Now, her story reverted back to her original version: that she never saw a gun. (3T176-14 to 19)<sup>7</sup> Finally, during her trial testimony, she changed her story yet again, explaining that she actually had seen a gun in Allen's hand. (3T52-4 to 8) Waller's testimony was undoubtedly inconsistent over time, and the defense was

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<sup>10</sup> During Allen's trial, Waller denied this, and said that she told defense investigators she could not remember whether she saw a gun. (3T170-16 to 18) Later, in a separate criminal matter that became the basis for one of Allen's PCR motions, Waller admitted under cross-examination that when she was speaking with Allen's defense investigators, she had, in fact, told them affirmatively that she never saw a gun, and not merely that she couldn't remember. State v. Allen, No. A-2532-08T3, 2011 WL 677252, \*6-\*7 (App Div. Unpub. Feb. 28, 2011). She admitted that her trial testimony to the contrary was false. Ibid.

able to use her inconsistency to undermine her credibility generally. What Allen could not do, however, was point to any motive that would explain why Waller's testimony was so contradictory. The State, however, was able to present numerous arguments concerning Waller's motive for testifying.

First, during Waller's direct examination, the State asked Waller if she was expecting leniency in exchange for her testimony, and she said that she was not. (3T124-3 to 16) Then, in closing, the State argued vigorously that Waller "has no motive to lie, no interest in the outcome of this case," and that her only motivation to give a statement to police was that she was saddened by the news that the victim died, and thus felt a need to come forward. (7T36-14 to 37-21) Finally, the State urged the jury to consider Waller's motive as part of its attempt to rehabilitate the fact that Waller had told defense investigators that she never saw a gun. The State urged the jury to reject Waller's statement to the defense investigator (wherein she said she did not see a gun) as untruthful because it was motivated by her self-interest in getting the investigators to leave her alone, whereas her trial testimony (where she said she did see a gun) should be considered truthful because there was no such motivation.

More specifically, the State argued that when Waller gave her statement to defense investigators, she was just "trying to get rid of these people" and was thus not "looking to answer questions truthfully." (7T53-10 to 14) Her statement

to defense investigators should thus be discredited, per the State, because at the time, she thought that lying about the case “would serve her end[.]” (7T59-7 to 12) The State thus conceded that Waller “was foolish because she gave untruthful information” but urged the jury to “dig deeper...[and] [g]o beyond the face value of what was said and recognize what is at work here.” (7T54-21 to 55-8) (emphasis added) The “bottom line,” according to the State:

is you have to ask yourselves, was Ruby Waller telling the truth to the defense investigators...or was she telling the truth on the witness stand and in her sworn statement [to police]? She can't be telling the truth on all occasions. Either she's telling the truth when she gave her sworn statement and she testified or she's telling the truth to the defense investigators. And you have to make that determination. And you have to understand her motivations. (7T55-8 to 18) (emphasis added)

By the State's own characterization, then, the case boiled down to a battle of credibility, not between two different witnesses, but between two different statements made by Waller herself. The core question for the jury was which statement was more believable: the statement Waller made to defense investigators that exonerated Allen, or the statement she made to police implicating him. The key to this credibility determination, per the State, was Waller's motive. And on this all-important – in fact, dispositive – question, the State was able to argue that Waller's statement to defense investigator should be discredited because she was simply lying to “serve her end[.]” (7T59-8 to 12)

Crucially, Allen was not able to make the opposite argument – that Waller was motivated by her hope of currying favor with the State, and was thus lying during her trial testimony in order to “serve her end.” This gap in Allen’s defense is where proper disclosure of Waller’s 1991 plea agreement would have drastically changed the contours of the case. Given the centrality of Waller’s credibility to the case, and given the explicit importance of motive to her credibility, there is undoubtedly a “reasonable probability” that the outcome of the case would have been different if Allen had been able to make this argument concerning Waller’s motive such that confidence in the outcome is undermined. There are numerous instances that “would have been different” on this key issue of motivation, if Allen was in possession of Waller’s 1991 plea agreement. Kyles, 514 U.S. at 435.

First, the question of Waller’s motive was missing from Allen’s opening argument. There, defense counsel was able to characterize Whitfield as having testimony motivated by self-interest, but could not argue the same for Waller:

You will hear what a witness’s interest is in the case... what their background, motive, interest is. Rhonda Whitfield wants the Prosecutor to get her out of jail. Ruby Waller, who knows what her interest is in this case.

[(2T152-1 to 7) (emphasis added)]

If Allen had been properly apprised of the fact that Waller previously received leniency in exchange for testimony, counsel could have easily made the same argument for Waller: that she is providing testimony helpful to the State because she “wants the Prosecutor to get her out of jail.” (2T152-5 to 6).

Second, Allen’s cross-examination of Waller would have been different. The State asked both Whitfield and Waller if they expected leniency in exchange for their testimony, and both said that they did not. (3T124-3 to 16) (4T60-13 to 15) Allen was able to impeach Whitmer on this fact, but without Waller’s prior agreement Allen was not able to do the same for Waller, and asked no questions about her prior convictions or the case hanging over her head. (4T90-3 to 22)

Finally, the gap in Allen’s defense was clear in summation, where defense counsel was not able to make all the arguments that should have been available to him with respect to motivated testimony. If Waller’s plea agreement had been properly disclosed, Allen could have urged the jury to discredit her trial testimony as self-serving in light of the fact that she had previously received leniency from the State in exchange for testifying against a codefendant, and thus knew how beneficial it can be to provide testimony helpful to the State’s case. Given this strong potential for bias, the more reliable statements, Allen could have argued, were those Waller gave when she could not have expected to gain anything from the State: the statement she made during her anonymous 911

call and her comments to defense investigators. In both those statements, she said she did not see a gun, and in her 911 call, she explained that she was not even on the scene but was instead watching from her window, unable to hear the details of the dispute or implicate Allen as anyone other than one of two men who happened to be standing outside at the time.

In sum, the defense was never able to argue that Waller's trial testimony should be discredited because it was influenced by her motive to curry favor with the State as someone who has previously received leniency in exchange for testimony. Instead, because of the State's failure to provide the discovery that Allen was constitutionally entitled to receive, the best argument that Allen could make on the all-important question of Waller's motivation was mere speculation: "[W]ho knows what [Waller's] interest is in this case[?]" (2T152-1 to 7) Given all of the instances in which Allen was unable to make strong arguments concerning Waller's motive for testifying, the Appellate Division was mistaken to hold that "[i]n light of her pending charge, we are persuaded that any incentive Waller may have had to testify against defendant to curry favor with the prosecutor was revealed to the jury." Allen, 482 N.J. Super. at 166. The jury never learned that Waller was intimately familiar with how beneficial it can be to provide testimony favorable to the State as someone who had already received prosecutorial leniency for doing just that. That information would have cast

Waller in an entirely different light, and would have created the opportunity for Allen to argue that it was her trial testimony – and not her statement to defense investigators – that was tainted by her self-interested motive to testify in a manner that served her own end.

Moreover, in light of the Appellate Division’s emphasis on Waller’s pending charge, this Court must consider the fact that the jury was not, in fact, instructed that they could rely upon Waller’s pending shoplifting charge as impacting her motive in testifying. As previously noted, Waller had a pending shoplifting charge when she testified at trial. (3T124-7 to 16) When instructing the jury, the trial court initially gave the proper charge as to how the jury could consider her pending charge, explaining: “You may also consider Miss Waller’s pending shoplifting charges and any belief she may have had that the State would aid her in resolving these charges in a manner favorable to her in gauging her credibility.” (7T90-8 to 11) The State, however, then asked the judge to change this instruction, arguing that “when you were talking about the shoplifting charges you referred to Ruby Waller and not Rhonda Whitfield.” (7T115-4 to 6) The judge, believing that he had mistakenly “reverse[d] names,” told the parties that he would “correct it” and later instructed the jury that “I might have confused Miss Whitfield and Miss Waller, who had the pending shopliftings. I think I’ve been corrected to say Miss Whitfield. That’s the one

that had them. And vis-à-vis her testimony, you may consider that particular issue if she was motivated in her testimony in any way.” (7T115-7 to 116-14)

To reiterate, both Whitfield and Waller had pending shoplifting charges. The jury was permitted to consider their charges as impacting the motivation of both witnesses, and should have been instructed accordingly. By providing the follow-up instruction that explained, incorrectly, that only Whitfield had a pending shoplifting charge, the judge effectively instructed the jury that they were not permitted to consider Waller’s pending shoplifting charge as impacting her credibility. Given the importance of Waller’s motivation to the State’s case, this was an extremely prejudicial error that must be considered by this Court as part of its materiality analysis, even though the error was not a direct result of the State’s failure to disclose material evidence.

That is how this Court ruled in State v. Brown, where a new trial for a Brady violation was granted because the defendant had been prejudiced not only by improperly suppressed evidence, but also by erroneous evidentiary rulings made by the court. 236 N.J. at 521-522, 527 (noting that “our materiality inquiry is influenced by...two evidentiary rulings” and holding that “the State’s Brady violation, in the context of the trial court’s evidentiary rulings, undermines our confidence in the jury’s guilty verdict against the defendants”) (emphasis added). The reason why non-Brady specific errors must be considered is that the

Brady test is principally concerned with the fairness of the trial. As noted above, the core inquiry in ruling on Brady is whether, in the absence of the improperly suppressed evidence, the defendant “received a fair trial.” Kyles, 514 U.S. at 434.<sup>8</sup> As was the case in Brown, Allen’s trial was rendered unfair not only because of the Brady violation, but also because of the erroneous court finding that compounded the prejudice of the State’s failure to disclose material evidence. Brown, 236 N.J. at 527. Because the court’s erroneous finding “affected what the State and defense were able to rely on,” for both Allen and Brown, “no consideration of whether the trial could have ended differently [if] the exculpatory evidence been timely disclosed would be complete without consideration” of the court’s erroneous finding. Id. at 521.

In light of all of the above – the weakness of the State’s case; the centrality of Waller’s credibility; the explicitly recognized importance of Waller’s

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<sup>8</sup> In considering the fairness of Allen’s trial, it is worth noting that the State’s failure to disclose Waller’s plea was part of a broader “pattern” of failing to timely disclose Brady material, which the court characterized as litigating by “ambush[,] surprise,” and “game playing,” and which led defense counsel to explain, in a certified statement, that in his “32 years of practice, including 250 trials and [having] handled very close to 7,000 criminal matters, this single case stands out as a gross miscarriage of justice.” (2T126-6 to 127-1) (4T101-7 to 14) (10T18-5 to 16) See Kyles, 514 U.S. at 420, 437 (“[Brady] turns on the cumulative effect of all suppressed evidence favorable to the defense, not only the evidence considered item by item.”); Landano, 271 N.J. Super. at 32, 36, n.13 (“[T]he impact of each discrete item that was withheld by the State cannot be viewed in isolation...instances of prosecutorial suppression in this case must be viewed collectively.”).

motivation as impacting her credibility; and the erroneous instruction to the jury to not consider Waller's shoplifting charge as indicative of motive – Waller's 1991 plea agreement was material evidence under Brady because its improper suppression “undermines confidence in the outcome of the trial.” Kyles, 514 U.S. at 434. In fact, this Court previously found a material Brady violation in a case where the prejudice to defendant was less severe than it was for Allen.

In State v. Spano this Court reversed defendant's conviction and granted a new trial because the State committed a Brady violation for failing to disclose evidence that would have impeached one of their witnesses. 69 N.J. 231, 234 (1976). When the State's witness, D.L., was asked on cross-examination whether she had previously been arrested for drug possession, the trial court sustained the State's objection, and did not allow further questioning unless the defense produced an actual record of conviction for D.L. Ibid. Unbeknownst to the trial judge, defense counsel, and the assistant prosecutor trying the case, D.L. had, in fact, been previously arrested for a drug charge and was in a diversionary supervisory treatment program when she gave her testimony. Ibid. Even though the assistant prosecutor was himself unaware of the situation, this Court held that because the State had called “D.L. as a State's witness, [the prosecutor] had a responsibility to be aware of the fact and to disclose the conditional discharge to the court and to defense counsel when the inquiry was made.” Id. at 235.

Citing to Brady and Giglio, this Court concluded that “[d]ue process requires that the State disclose information it possesses which is material to the defense, even where it concerns only the credibility of a State’s witness.” Ibid.

As was true in Allen’s case, “the entire case” in Spano “turned on the question of credibility” and the improperly suppressed evidence would have impacted the testimony of the State’s witness. Id. at 234-35. Likewise, in both Allen and Spano, the improperly suppressed impeachment evidence “could have” shown a motive to testify in favor of the State, but was not an explicit arrangement guaranteeing leniency to the witness in exchange for testimony. Ibid. Notably, however, unlike in Allen’s case, the witness in Spano who was not properly impeached was not the State’s lead witness. The State’s case in Spano “was largely based on the testimony of an undercover narcotics officer” who had met with and bought drugs from the defendant. Id. at 233. The significance of D.L.’s testimony was thus merely corroboration: “[D.L.’s] testimony fully supported the undercover officer’s story[.]” Id. at 234. Moreover, unlike in Allen’s case, the State in Spano had direct, physical evidence of defendant’s guilt because the undercover officer had purchased marijuana and cocaine from the defendant himself. Ibid.

Nonetheless, this Court still found that the “Defendant did not receive a fair trial” and was entitled to a new trial “because the conditional dismissal of

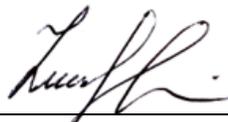
the criminal charge against [D.L.] could have motivated her to testify in support of the State’s case” and the defense was deprived of making that argument by virtue of the State’s Brady violation. If the Brady violation in Spano was enough for the grant of a new trial, then the Brady violation in Allen – where the State’s case was weaker and lacked physical evidence; where the undisclosed evidence would have actually impeached the State’s lead witness; and where motivation to testify untruthfully was an explicit theme of the case – is undoubtedly sufficient for a new trial.

**CONCLUSION**

For the reasons set forth in this brief, 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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