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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

RESPONDENT

v.

JULIO J. DAVILA,

APPELLANT

SUPPLEMENTAL BRIEF OF RESPONDENT

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ORIGINAL

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I. INTRODUCTION

Respondent, State of Washington, respectfully submits this supplemental brief as permitted by RAP 13.7(d) to address the issue presented by the petition for review.

II. ISSUES PRESENTED

1. What is the standard of review regarding the trial court's findings of fact with respect to a *Brady* claim where the trial court allowed a full post-trial evidentiary hearing?

2. Was the undisclosed information regarding the former DNA analyst material or prejudicial in the sense that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial?

3. Should the defendant have known of the expert witness's employment history where the defendant subpoenaed the expert as his own witness, listed the expert as his own witness, and had conversations with the witness prior to going forward with his case?

4. Is a new trial warranted under *Brady* when the motion for a new trial is based upon speculation?

III. STATEMENT OF THE CASE

PROCEDURAL HISTORY.

Petitioner/defendant, Julio Davila, was convicted by a jury in Spokane County Superior Court of murder in the second degree.

Thereafter, the defendant filed a motion for a new trial, alleging the State withheld unfavorable evidence regarding Ms. Olson, a former WSP crime lab analyst, who conducted the initial DNA testing of evidence collected at the crime scene. This claim was made irrespective of the fact that Ms. Olson had been listed and subpoenaed by the defendant as his own witness for trial and Ms. Olson had several pretrial discussions with the defense attorney. RP 398-99; RP 575-76. The Honorable Kathleen O'Connor denied the motion. CP 90.

The defendant appealed to the Court of Appeals which affirmed the conviction. *State v. Davila*, 183 Wn. App. 154, 333 P.3d 459 (2014). As to the *Brady* claim, the Court of Appeals found the undisclosed evidence of the former crime lab DNA analyst's overall job performance was not material, even though "the DNA evidence was the crux of the State's case, and ... Ms. Olson was the critical link in the chain that handled the DNA swabs and performed the initial testing." *Davila*, 183 Wn. App. at 171. The suppression of her "undisputed incompetence" as an analysis in other cases presented no reasonable probability of a different outcome because the record showed "little likelihood that her handling of the evidence could have contaminated the evidence at issue." *Davila*, 183 Wn. App. at 171.

Review was granted solely on the issue of the *Brady* disclosure of favorable evidence.

SUBSTANTIVE FACTS,

On June 18, 2007, around 2:00 am, officers of the Spokane Police Department were called to an adult bookstore. RP 116. The co-defendant, Jeramie Davis, was standing near the business when officers arrived. RP 118. Mr. Davis showed officers the body inside the business. RP 118. The victim, John Allen, was located near the office located inside the store. RP 121. He was showing little signs of life. RP 119. He had a large pool of blood located next to and around his head. RP 120.

1. Processing the Crime Scene.

The murder weapon, a baseball bat, was located under Mr. Allen's right leg. RP 129.¹ One of the initial responders, Detective Brian Cestnik put on rubber gloves, grabbed the bat, and placed it onto a shelf. RP 129-30. He did so because he was aware of the potential DNA and/or fingerprint evidence on the bat. RP 129. He grabbed the bat in the area least likely to contain potential evidence. RP 129.

¹After testing, it was determined the baseball bat contained the petitioner's DNA.

The bookstore and a pickup truck thought to be associated with the crime were processed for potential DNA and fingerprint evidence. The bookstore was processed first.

Detective Tim Madsen arrived at the business and he was assigned the lead. He collected the bat inside the store. RP 271. Detective Madsen wore gloves and a mask to prevent contamination when collecting the evidence in the business, including the swabs collected at the scene. RP 282.² He was present when the forensic staff swabbed the bat for DNA evidence. RP 278. Forensic Specialist Lori Preuninger, with 13 years of experience, swabbed the bat. RP 367. To protect the integrity the bat and other evidence, she used sterile swabs and changed gloves before and after swabbing evidence. RP 373; RP 376. Three areas of the bat were swabbed—the tip, the middle, and the bottom (the handle). RP 375. The handle was labeled swab “d.” RP 376. The swabs were individually placed into separate containers and then into an evidence bag which was sealed

²Forensic Specialist Carrie Johnson arrived at the crime scene. She has almost 35 years' experience in fingerprint processing. RP 325. She processed several countertops at the business adjacent to where the victim was located. RP 328; RP 337. Six prints of value were collected from a glass countertop. RP 337; RP 348. Two of the prints were identified to the victim. RP 338. Three of the prints were unidentified in 2008. RP 338. In 2011, the three separate prints were identified belonging to the petitioner. RP 338. One additional print, lifted from the cash register countertop at the business was identified in 2011 as belonging to the defendant. RP 341.

with evidence tape. RP 373. That bag was placed into another evidence bag and again resealed with evidence tape. RP 373.³

2. After the Collection of Evidence at the Store.

Once the swabs were taken at the crime scene, the detective placed them individually into sealed evidence boxes and transported the property to the law enforcement evidence/property unit for safekeeping. RP 281. The evidence storage unit has limited access. RP 283. Once logged into the property unit, law enforcement has to sign an evidence log before the property is taken for analysis. RP 283. If a particular piece of property is analyzed by a crime laboratory, the evidence is cut open and the evidence bag is removed. RP 284. When the task is completed, the evidence is returned to the evidence bag and evidence tape is affixed and initialed by _____ the analyst to maintain the chain of custody. RP 284.

3. DNA testing and analysis of the bat and other evidence.

Former Washington State Patrol Crime Laboratory DNA analyst Denise Olson originally tested the DNA evidence to include the swabs from the bat.

Specifically, on or before November 5, 2007, she tested a bloodstain card collected from the victim, John Allen (Item 35); a _____

³After examination, no usable prints were located on the bat. RP 354; RP 378. In addition, the petitioner's prints were not located inside the pickup. RP 352-53.

reference DNA sample from suspect and co-defendant Jeramie Davis (Item 81) and swabs “a” through “d” (Items’ 87 through 90) - swabs previously taken from the bat by Ms. Preuninger at the crime scene. CP 61 (crime lab report of Denise Olson-11/5/2007); RP 453-455.

Swab “a” was identified as belonging to the victim. CP 61; RP 453-54. Co-defendant Jeramie Davis was excluded as a contributor. CP 61. No DNA was detected from swabs “b” and “c.” CP 61.

A DNA profile⁴ was developed for swab “d” from the handle of the baseball bat and it was a mixture of two people. CP 61. The victim could not be excluded as one of the contributors. CP 61. The major contributor of swab “d” was designated “unknown individual ‘A.’” During this time period, there were never any reference swabs or other items that contained the DNA of the petitioner in the crime laboratory. CP 73.

Approximately one month later, on or before December 4, 2007, Ms. Olson only tested and analyzed items taken from the pickup. CP 61 (crime lab report of Denise Olson-12/4/2007). Both co-defendant Davis and the petitioner were excluded as sources of the DNA on these items

⁴A DNA profile is a small amount of genetic material from a blood or cellular sample, which is unique to the individual similar to a fingerprint.

except the petitioner could not be included or excluded from a swab of DNA taken from the steering wheel of the pickup. CP 61. RP 448.

After the original testing and analysis of swab “d,” the DNA profile developed from swab “d” was entered into the CODIS DNA database⁵. RP 434. The petitioner was not in the CODIS system at that time.

In 2011, the crime lab received a hit between the profile of swab “d” and the petitioner’s DNA profile that was entered from another case. RP 435. The lab requested law enforcement obtain a new reference DNA sample from the petitioner. RP 435.

Ms. Olson was terminated from her employment with the state patrol around February 25, 2011, for incompetence in other areas related to her employment. Her termination was not based on any testing or analysis conducted in this case. See, WSP report dated February 25, 2011. CP 60 (Attachment 4 to defendant’s post-trial motion brief).

4. Collection of the DNA swab from petitioner Davila.

When collecting DNA from the petitioner, Detective Madsen wore gloves. RP 292. He handed the sterile swabs to the suspect. RP 292. After the suspect scrubbed the inside of his mouth, the suspect handed the swab

⁵This database contains a large variety of profiles from many different individuals where comparisons can be made between DNA profiles entered into the system. RP 435.

to the detective. RP 293. The detective placed the swab into a prepared evidence box. The evidence box was designed to suspend the swab so that it does not touch the box. RP 293. The detective sealed the box with evidence tape and transported it to the property storage unit where it was placed into another envelope and again sealed with evidence tape. RP 293.

5. Retesting of swab “d” by WSP forensic scientist Lorraine Heath.

Prior to trial and on December 12, 2011, Lorraine Heath, supervising forensic scientist at the Washington State Patrol Crime lab, independently retested and reanalyzed certain evidence items in the case. Specifically, she retested and analyzed Item 24 (steering wheel swab); Item 90 (swab “d” from the handle of the baseball bat); and the reference buccal swab taken from the petitioner. CP 73; RP 313; RP 434-37. Ms. Heath matched swab “d” to the petitioner. CP 73; RP 436-37. The matching profile was 1 in 2.7 trillion. RP 437. Ms. Heath confirmed Ms. Olson’s previous DNA profile developed from swab “d.” CP 73. Ms. Heath also independently confirmed Ms. Olson’s determination that petitioner could not be included or excluded from the steering wheel swab taken from the pickup. CP 73.

Ms. Heath also described the various procedures and protocols that were in place to guard against contamination in the lab. RP 439-443. She

also described the protocols in place for chain of custody for evidence submitted by law enforcement. RP 440.

Ms. Heath testified that potential secondary transfer of DNA found on the bat was extremely unlikely. RP 465. She also confirmed that the only DNA found on the bat was the victim and the petitioner. RP 466.

Importantly, when the petitioner was interviewed by law enforcement concerning the crime, he adamantly denied knowing the co-defendant and the victim, and claimed he had never entered the store. RP 296-97; RP 299-300; RP 314-15; RP 470-71. Petitioner made this claim notwithstanding the fact that his DNA was found on the handle of the bat and *his fingerprints were found on the glass counter* near the body at the crime scene. CP 73; RP 341

6. Post-trial motion for a new trial based, in part, on *Brady*.

After conviction, the Honorable Kathleen O'Connor, Spokane County Superior Court, set sentencing for August 1, 2012. CP 57; RP 569. On that date, in response to the defendant's motion for a new trial, the court allowed the defense an opportunity to explore "[w]hether the sample tested by Ms. Olson ... was tested with sufficient safeguards and that it was not contaminated with any other DNA." RP 596. The court granted six weeks to the defense to gather information on Ms. Olson and based its

decision on fairness to the defendant. RP 598. The court reset sentencing and argument on the *Brady* issue for September 14, 2012. RP 601.

It is not clear as to why the hearing did not take place on September 14, 2012, but the next hearing date was October 19, 2012. CP 66; RP 604. In the intervening eleven weeks the defendant was unable to offer a report from a DNA expert regarding Ms. Olson's testing in this case. RP 604-08. At the hearing, the court stated: "There has been no offer of proof to me, that, on a more likely than not basis, at least Mr. Davila's DNA was on something that was in the lab at the relevant time. I think we at least have to have that before I continue the matter." RP 612-13. The trial court continued the matter to October 25, 2012, for the *Brady* motion and sentencing. RP 613-15. In total, the trial court gave defense counsel approximately twelve weeks to gather and present materials related to the *Brady* issue.

On October 25, 2012, the trial court denied the petitioner's motion for a new trial based on the *Brady* claim. The trial court, in its oral finding of facts, found, in part:

[T]he question is, is it likely that contamination occurred.

We do know that Mr. Davila's DNA was not in the lab directly from any prior conviction or prior matter, so the test sample for him came in later. Ms. Heath has provided not only her certificate of where she tested the materials,

but also the reports that these materials were not tested together. They were tested on separate days.

The first thing that was tested was the bat, and it is the bat that has the DNA. The steering wheel ended up being inconclusive as to whether or not Mr. Davila's DNA was even on it. So that was inconclusive; it has never been identified specifically as an item that had his DNA. The only thing that has been identified is an item that had his DNA was the bat. That was tested first.

While I can appreciate counsel's concern in this matter about not having known about it, the reality is that the information provided to the jury came from Ms. Heath. She did the testing on it and essentially supported Ms. Olson's testing. I appreciate the argument that once it is contaminated, it is contaminated and the testing is going to come up the same. Which is one of the reasons that I allowed counsel to go forward on this matter, but I have not seen anything that is anything other than speculation. The facts, as best I can see them, are that these items were tested on different dates. The bat was tested first and the steering wheel was inconclusive and the bat was not inconclusive.

RP 622-24.

IV. ARGUMENT

The United States Supreme Court held in *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194 (1963), that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.” *Id.*

STANDARD OF REVIEW.

This court reviews alleged *Brady* violations de novo. *State v. Mullen*, 171 Wn.2d 881, 893-94, 259 P.3d 158 (2011). Although it has not been settled as to the applicable standard of review on direct appeal⁶ with respect to the trial court's findings of fact, the First, Second, Third, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits and the United States Court of Appeals for the District of Columbia all afford some level of deference to a district court's factual findings bearing on *Brady* materiality, especially when the lower court conducted a hearing on the alleged violation.⁷ The rationale for this standard of review is best expressed by

⁶This court has found in the context of a PRP that the first two *Brady* factors (materiality and suppression of evidence) are factual questions and the standard of review is whether there was "substantial evidence" in the lower court record. *In re Stenson*, 174 Wn.2d 474, 488, 276 P.3d 286 (2012) ("We defer to the trial court and will not "disturb findings of fact supported by substantial evidence even if there is conflicting evidence." *Id.*, citations omitted). The third *Brady* factor (prejudice) is a mixed question of law and fact in a PRP analysis. *Stenson*, 174 Wn.2d at 488.

⁷*United States v. Sanchez*, 917 F.2d 607, 618 (1st Cir. 1990) (Deferential standard in prosecutorial non-disclosure cases); *United States v. Madori*, 419 F.3d 159, 169 (2d Cir. 2005) (Materiality a mixed question of law and fact. Trial judge's factual conclusions as to the effect of non-disclosure entitled to great weight, record examined *de novo* to determine whether the evidence in question is material as a matter of law."); *United States v. Thornton*, 1 F.3d 149, 158 (3rd Cir. 1993) (De novo review of conclusions of law as well as a 'clearly erroneous' review of any findings of fact where appropriate. "Where the district court applies the correct legal standard, its weighing of the evidence merits deference from the Court of Appeals, especially given the difficulty inherent in measuring the effect of a non-disclosure on the course of a lengthy trial covering many witnesses and exhibits."); *United States v. Sipe*, 388 F.3d 471, 479 (5th Cir. 2004) (Deference to the factual findings underlying the district court's decision.); *United States v. Ryan*, 153 F.3d 708, 711 (8th Cir. 1998) ("[Abuse of discretion] standard also applies where, as here, a defendant seeks a new trial premised upon a *Brady* claim."); *United States v. Reese*, 745 F.3d 1075, 1083 (10th Cir.) *cert. denied*, 135 S. Ct. 235, 190 L. Ed. 2d 177 (2014) ("In a long line of cases, we have held that in the new-trial context we

Judge Posner in *United States v. Boyd*, 55 F.3d 239, 242 (7th Cir. 1995):

But the other judgments that the district judge makes, signally here the judgment whether some piece (or pieces) of evidence wrongfully withheld by the government might if disclosed have changed the outcome of the trial, are to be reviewed deferentially. This is not only the rule; it is the dictate of common sense, especially in a case such as this. Forget the 29 witnesses at the evidentiary hearing; forget there *was* an evidentiary hearing on the motion for a new trial. Before then, during the trial, Judge Aspen had for months on end listened to witnesses-had heard, had not merely read, their testimony, and had watched them as they gave it. And he had observed the jurors as they listened to the witnesses. A trial judge of long experience, he would have developed a feel for the impact of the witnesses on the jury-and how that impact might have been different had the government played by the rules-that an appellate court, confined to reading the transcript, cannot duplicate. Judge Aspen may have been mistaken; we might suspect that he *was* mistaken; but unless we are *convinced* that he was mistaken, we have no warrant to reverse. That is what it means to say that appellate review is deferential. It is not abject, *Carr v. Allison Gas Turbine Division*, 32 F.3d 1007, 1008 (7th Cir. 1994), but it is deferential.

Respondent requests this court adopt the generally accepted standard of review by the federal courts of appeal and find the record in the lower court supports the trial court's findings of fact.

review de novo a district court's ruling on a *Brady* claim, with any factual findings reviewed for clear error." *United States v. Vallejo*, 297 F.3d 1154, 1163 (11th Cir. 2002) ("Similarly, a district court's denial of a motion for new trial based on a *Brady* violation is reviewed for abuse of discretion."); *United States v. Oruche*, 484 F.3d 590, 595-96 (D.C.Cir. 2007) (As to findings of fact made by the district court, including determinations of credibility made both at trial and in post-trial proceedings, appellate court would defer under an abuse of discretion standard).

BRADY FACTORS.

Three factors must be considered to evaluate an alleged *Brady* violation: (1) the evidence at issue must be material, which is favorable to the accused either because it is exculpatory or because it is impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued. *Banks v. Dretke*, 540 U.S. 668, 691, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)); *Mullen*, 171 Wn.2d at 895.

Evidence is material under *Brady* “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). “[A] reasonable probability does not mean that the defendant ‘would more likely than not have received a different verdict with the evidence,’ only that the likelihood of a different result is great enough to ‘undermine[] confidence in the outcome of the trial.’” *Smith v. Cain*, — U.S. —, 132 S.Ct. 627, 630 (2012), quoting *Kyles*, 514 U.S. at 434. Materiality requires evaluating the State's nondisclosure “in the context of the entire record.” *United States v. Agurs*, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Thus, impeachment evidence “may not be material if the ... other

evidence is strong enough to sustain confidence in the verdict.” *Smith v. Cain*, 132 S.Ct. at 630.

A. THE UNDISCLOSED WSP EMPLOYMENT HISTORY OF MS. OLSON WAS NOT MATERIAL AND/OR PREJUDICIAL IN THE SENSE THAT THE LIKELIHOOD OF A DIFFERENT RESULT WOULD NOT BE GREAT ENOUGH TO UNDERMINE CONFIDENCE IN THE OUTCOME OF THE TRIAL.

The trial court found the petitioner’s DNA was not in the lab prior to the testing by Ms. Olson. There was no evidence produced that the petitioner’s DNA evidence, located on the handle of the bat, was ever commingled with any other evidence, or that it was not his DNA on the bat. Certainly, the jury heard testimony regarding the collection efforts of law enforcement and forensic personnel and the steps each took in the collection of that evidence; evidence regarding the chain of custody of the forensic evidence; and, the testing of the evidence. The bat and the swabs from the bat were collected in such a manner as to foreclose any contamination or commingling up to and including Ms. Olson’s initial testing.

It is factually impossible for the petitioner’s DNA to have been commingled or contaminated with any other evidence linking him to the crime. There was no evidence that Petitioner’s DNA had been in the lab prior to or at the time of the initial testing by Ms. Olson other than the

DNA specifically and eventually located on swab “d.” It is of no consequence that additional evidence in the case was tested a month later by Ms. Olson. Swab “d” contained petitioner’s DNA. It was tested first. The later DNA testing of the steering wheel swabs and other pickup truck evidence could not contaminate the earlier finished testing. It is also important to note that no other DNA evidence was developed from any other collected piece of evidence linking the petitioner and the co-defendant to the crime.

The petitioner was given twelve weeks to cull through the WSP records and to consult with an independent DNA expert to determine and demonstrate how Ms. Olson’s prior job performance on other cases and her testing in the present case would have cast doubt on the results of that testing both by Ms. Olson, and, again, by Ms. Heath. Ultimately, the defense was unable to identify any evidence to that effect.

Even though the defense presented Ms. Olson’s WSP work history⁸ to Judge O’Connor at the post-trial hearing, the defense could not develop, after weeks and weeks of diligent searching, any specific information that would have cast doubt on the DNA testing and analysis in the present case. In fact, swab “d” was retested and reanalyzed anew by

⁸The document provided to Judge O’Connor was developed by the Washington State Patrol in preparation for the termination of Ms. Olson.

Ms. Heath in 2011 and Ms. Olson's work and analysis from 2007 was reviewed and confirmed.

Moreover, the defense failed to provide the trial court with any authority on how Ms. Olson's employment history and termination would be admissible at the time of trial. "An important aspect of materiality under *Brady* is admissibility." *Mullen*, 171 Wn.2d at 897. *See, also, Wood v. Bartholomew*, 516 U.S. 1, 6, 116 S.Ct. 133 L.Ed.2d 1 (1995) (holding that undisclosed polygraph results were not material because they were inadmissible under the evidence rules in Washington and thus "could not have had no direct effect on the outcome of the trial"); *State v. Gregory*, 158 Wn.2d 759, 797, 147 P.3d 1201 (2006) ("[I]f evidence is neither admissible nor likely to lead to admissible evidence[,] it is unlikely that disclosure of the evidence could affect the outcome of a proceeding").

Accordingly, and as this court found in *Mullen*, 171 Wn.2d at 900, ER 608(b)⁹ generally prohibits evidence of impeachment of a witness's credibility based upon specific instances of conduct. The petitioner fails to explain or cite any authority as to how Ms. Olson's employment history

⁹ER 608(b) states: "**(b) Specific Instances of Conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."

would be admissible in the present case. It is important to note that no other DNA evidence was developed linking the petitioner and the co-defendant to the crime.

Accordingly, the confidence in the outcome of the trial could not be undermined because the subsequent DNA tests and analysis remains static notwithstanding any impeachment of Ms. Olson regarding her WSP employment history.

B. THE STATE DID NOT SUPPRESS ANY EVIDIENCE BECAUSE THE PETITIONER, WITH DUE DILIGENCE, SHOULD HAVE OBTAINED THE EMPLOYMENT HISTORY OF HIS OWN EXPERT WITNESS.

Evidence is not “suppressed” if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence. *Mullen*, 171 Wn.2d at 896; *see also State v. Gregory*, 158 Wn.2d at 798; *State v. Thomas*, 150 Wn.2d 821, 851, 83 P.3d 970 (2004); *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 396, 972 P.2d 1250 (1999); *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 916, 952 P.2d 116 (1998).

Accordingly, if the defense reasonably could have discovered the evidence through due diligence, the State's failure to disclose it does not constitute “suppression” which is necessary for a *Brady* violation. *Mullen*,

171 Wn.2d at 896, citing *State v. Lord*, 161 Wn.2d 276, 293, 165 P.3d 1251 (2007).¹⁰

Here, Petitioner subpoenaed Ms. Olson on June 28, 2012; listed her as an expert witness; and spoke with her several times prior to trial. In fact, defense counsel Thomas Krzyminski acknowledged the same during trial, *informing the court he was ready to call* Ms. Olson, in his case-in-chief, as his expert for the next day's testimony.

TRIAL.

THE COURT: Mr. Krzyminski, do you have witnesses available for tomorrow if we need them?

MR. KRZYMINKSI: The witness I would anticipate is Denise Olson, your Honor. In my conversations with Mr. Nagy, I believe the testimony that I can elicit from Denise Olson I can get from Lorraine Heath. If that worked

¹⁰“[W]hen information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no *Brady* claim.” *United States v. Brown*, 628 F.2d 471, 473 (5th Cir.1980); *Kutzner v. Cockrell*, 303 F.3d 333, 336 (5th Cir.2002) (holding that *Brady* does not require prosecutors to furnish a defendant with exculpatory evidence if that evidence is fully available to the defendant through an exercise of reasonable diligence); *Rector v. Johnson*, 120 F.3d 551, 558–59 (5th Cir.1997) (holding that the State has no duty to lead the defense toward potentially exculpatory evidence if the defendant possesses the evidence or can discover it through due diligence); *Raley v. Ylst*, 470 F.3d 792, 804 (9th Cir. 2006) (“where the defendant is aware of the essential facts enabling him to take advantage of any exculpatory evidence, the Government does not commit a *Brady* violation by not bringing the evidence to the attention of the defense); *United States v. Grossman*, 843 F.2d 78, 85 (2d Cir.1988) (stating that prosecution's failure to disclose potentially exculpatory evidence does not violate due process “where a defendant knew of or should have known the essential facts permitting him to take advantage of any exculpatory information, or where the evidence is available to defendant from another source”); *United States v. Gaggi*, 811 F.2d 47, 59 (2d Cir.1987) (“[N]o *Brady* violation occurs if the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence.”)

out all fine, I would not be calling Denise Olson. But again that's subject to Ms. Heath. I'm anticipating that she can answer the questions I would have because it has to do with previous tests. And she didn't work there in 2007, 2008, when these items were being tested but she does have the reports available.

RP 398-99.

However, after trial and conviction, the defense advised the court of the following:

POST TRIAL MOTION.

THE COURT: And I'm sorry, Mr. Krzyminski, I did not catch when you actually interviewed Ms. Olson.

MR. KRZYMINKSI: Ms. Olson was never -- I would say never really interviewed. I put her on the witness list very late because I started to think there might be some issues in regard to the findings that she had. I was not aware or --...

...

And Ms. Heath, as the supervisor, never mentioned this to me when I was asking about testing procedures, and just sort of the safeguards that are in place at the Washington State Patrol Crime Lab. So no mention of Ms. Olson at that time. Right before trial, your Honor, I got to thinking; well maybe there might be some areas where I need to question Ms. Olson again, not thinking that she had any issues with the crime lab or why she was not working there any longer. I had no idea at that point.

THE COURT: I take it you did not ask Ms. Heath why Ms. Olson was not available.

MR. KRZYMINKSI: I did not, you Honor.

THE COURT: Sure.

MR. KRZYMINKSI: I sure didn't think that was something I needed to pursue at that point...

RP 575-76.

MR. KRZYMINKSI: My conversations with Ms. Olson, and briefly putting her on the witness list, that had nothing to do with her past issues with the Washington State Patrol and her performance problems at her place of employment. That was not the intent. The intent was more along the lanes of the chain of custody issue, possibly, and testimony about testing inside the pickup truck, which I was not sure at that point if Ms. Heath was going to testify to because she really didn't look closely at that evidence, she was looking more at the baseball bat. So that was the purpose of putting her on the witness list as far as the defense was concerned.

RP 577-78.

Due diligence is defined as “[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation.” *Black's Law Dictionary* 523 (9th Ed. 2009). Defense counsel has an obligation to determine the qualifications of a defense expert witness. In *Thomas, supra*, the trial court found the proposed defense expert witness was not qualified. *Thomas*, 109 Wn.2d at 231. This court held that counsel was deficient, regarding an ineffective assistance of counsel claim, for failing to investigate his proposed expert. *Thomas*, 109 Wn.2d at 231.

Likewise, the defense attorneys in the present case had an elementary and fundamental obligation to at least question their listed expert witness, Ms. Olson, before trial about her qualifications and work history with the Washington State Patrol. The defense had Ms. Olson subpoenaed as their witness, and, Mr. Krzyminski advised the court he spoke with her several times prior to trial.

Certainly, if the defense attorney had asked Ms. Olson the most basic questions during his pretrial conversations with her, he would have obtained the information about her employment history and departure from the state patrol. It is every lawyer's obligation when an expert is anticipated and listed as a potential witness for trial, at a minimum, to ask that witness basic questions so there are no surprises at trial, or, so the lawyer can determine whether to call the witness at trial.

Equally important, the petitioner had equal access to Ms. Olson. Both the State and the petitioner had the ability to question Ms. Olson before trial and during trial, if called. The petitioner elected not to call Ms. Olson at the time of trial. As the court found in *Mullen*, 171 Wn.2d at 899, there is no suppression of favorable evidence where the defense fails to ask questions that could have elicited favorable responses.

Consequently, the petitioner fails to explain why his claims against his expert witness, Ms. Olson, could not have been discovered through a

reasonable investigation prior to his trial or why the method that eventually uncovered his new evidence post-trial could not have been used before trial.

Judge O'Connor did not error when she denied the defendant's motion for a new trial based upon an alleged *Brady* violation.

C. THE PETITIONER'S UNSUPPORTED ALLEGATION THAT EXCULPATORY INFORMATION POTENTIALLY EXISTS, WHICH THEORETICALLY WAS NOT DISCLOSED TO THE DEFENSE, IS INSUFFICIENT TO SUSTAIN A *BRADY* CLAIM.

Here, Petitioner's *Brady* claim fails because there was no showing by the petitioner during the post-trial evidentiary hearing that the DNA sample of Petitioner was commingled or mixed with other evidentiary items at the time of testing which may or may not have had his DNA; notwithstanding any of the personnel issues surrounding Ms. Olson's termination from the WSP.

The superior court found defense trial counsel's allegation that Ms. Olson could have contaminated or mislabeled the samples was mere speculation. CP 103.

As noted previously, Judge O'Connor allowed defense counsel twelve weeks to meticulously review the Ms. Olson's WSP records and to potentially consult an expert to provide evidence to the court discrediting Ms. Olson's work in the lab on this case. At the motion for a new trial, and

when considering the *Brady* claim, the trial court found she had “[n]ot seen anything that is anything other than speculation.” RP 622-24.

“The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish ‘materiality’ in the constitutional sense.” *United States v. Michaels*, 796 F.2d 1112, 1116 (9th Cir. 1986), *cert. denied*, 479 U.S. 1038 (1987) (observing that “mere speculation” about materials in the government's files does not trigger a disclosure obligation under *Brady*); *U.S. v. Georgiou*, 777 F.3d 125, 141 (3rd Cir. 2015); *United States v. Andrus*, 775 F.2d 825, 843 (7th Cir. 1985).

The defendant was given the ample opportunity post-trial as he would have had pretrial for impeachment of Ms. Olson’s testing an analysis, and he failed to produce any evidence discrediting the resulting DNA testing and evidence. He neither established ‘materiality’ under *Brady* nor did he establish any prejudice.

V. CONCLUSION

For the reasons stated above the decision of the court of appeals should be affirmed

Dated this 25 day of March, 2015.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'LDS', is written over a horizontal line.

Larry D. Steinmetz #20635
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