MONTGOMERY COUNTY COURT OF COMMON PLEAS
MONTGOMERY COUNTY, OHIO

STATE OF OHIO,	:	Case No. 2019-CR-1088
Plaintiff,	:	Judge Huffman
v.	:	
TEAVEN CURTISS,	:	
Defendant.	:	

MOTION TO DISMISS FOR JUDICIAL DUE PROCESS VIOLATIONS

Now comes the Defendant, Teaven Curtiss, and moves this Court to dismiss the indictment with prejudice or, alternatively, to defer ruling until an evidentiary hearing has been held and additional briefing has been submitted.

Respectfully submitted,

/s/Eric G. Eckes
ERIC G. ECKES (0091840)
STEPHANIE F. KESSLER (0092338)
MARTIN S. PINALES (0024570)
MOLLY T. TOLBERT (0101162)
Pinales, Stachler, Young & Burrell Co., LPA
455 Delta Ave., Suite 105
Cincinnati, Ohio 45226
(513) 252-2732
Attorneys for Teaven Curtiss
skessler@pinalesstachler.com
eeckes@pinalesstachler.com
mpinales@pinalesstachler.com
mtolbert@pinalesstachler.com

MEMORANDUM IN SUPPORT

I. RELEVANT BACKGROUND

Serious *Brady* violations occurred in this case by both the trial court itself and the state. Each will be addressed in separate motions to dismiss. The due process violations perpetrated by this Court stem from the review of records from Montgomery County Child Services ("MCCS"[1]). This is not a situation where the trial court failed to protect Curtiss' due process rights during his trial. Rather, the trial court actively violated Curtiss' due process rights. For this, as argued below, Curtiss' case must be dismissed with prejudice.

Curtiss' original trial counsel recognized the significance of the MCCS records and, on July 27, 2020, filed a motion requesting the trial court conduct an in-camera review of the children's services records of K.J. and Kh.J. Motion Requesting Order For In-Camera Review of Children's Services Records, Docket ID: 34778661. In the motion, trial counsel asserted the records "contain potentially exculpatory evidence and evidence that is necessary to prepare a full and fair defense, including preparation of direct and cross examination of witnesses." *Id.* On August 31, 2020, the trial court released to the parties, sealed Court's Exhibit II - seven pages of documents from the MCCS records. The trial court determined only these seven pages were relevant and discoverable. Entry Filing Exhibits Under Seal, Docket ID: 34857981. At the same time, the trial court also filed under seal Court's Exhibit I, which is a CD of the complete copy of the MCCS records that the trial court reviewed. *Id.* This CD was not released to the parties. *Id.*

---

[1] By MCCS, counsel is referring to both Montgomery County Child Services and Montgomery County Jobs and Family Services as the Child Services is a division of the bigger Jobs and Family Services entity.

After the initial release of the seven pages of MCCS records, on November 23, 2020, the state filed a motion for the trial court to take another in-camera look at the MCCS records. *See* Motion for Court to Review In Camera Children's Services Records, Docket ID: 35059677. In the motion, the state articulated that the trial court had only released records "directly dealing with the circumstances of the victim's disclosure of sexual abuse and the caseworker's response to that disclosure." *Id.* The state indicated to the trial judge that the records released were too narrow. *Id.* "In light of some of the testimony at the recently held 807 hearing, the State now believes other portions of the record may be relevant and asks this Court to consider releasing additional sections of the record." *Id.* After a pretrial hearing, the state argued that the circumstances leading to Mother's loss of temporary custody of her children was at issue and "may be relevant at trial." *Id.* In response to the state's motion, the trial court released redacted additional pages of the MCCS records. Tr. of Proc., p. 124. "The second Court's Ex. I, filed on December 17, 2020, contains an MCCS activity log from May 11, 2017, to August 2, 2017. The second Court's Ex. II contains redacted records from this Ex. I, and was filed under seal on December 17, 2020." *State v. Curtiss*, 2nd Dist. Mont. No. 29006, 2022-Ohio-146, ¶ 13.

Curtiss appealed his conviction. On appeal, he successfully argued that the trial court violated his due process rights by withholding exculpatory information, material to his defense, when it reviewed the MCCS records. The Court of Appeals described the existence of significant exculpatory material that was not disclosed to the defense.

Pertaining to evidence related to the mother of the alleged child victim ("Mother's credibility evidence"), the Court of Appeals found:

> If the evidence had been disclosed, Mother's testimony may have been disbelieved and material evidence relevant to the defense presented. There is a reasonable probability that the result would

have been different.

Id. at ¶ 64.

With respect to the lead detective ("Detective pressure evidence"), the Court of Appeals found:

> Furthermore, it is noteworthy that records were not disclosed concerning Detective Spears's comments to Mother about the fact that the children were not disclosing enough and needed to be brought to CARE House to build his case. Either Mother was being truthful about these statements or she was not. If she was not being truthful, that reflects on her credibility. If Mother's statements were true, they could have been used to attack the detective's credibility. In either event, these were material records.

Id. at ¶ 65.

With respect to evidence regarding the level of violence and abuse the children were exposed to ("violence and abuse evidence"), the Court of Appeals found:

> As an additional matter, we agree with the defense that other evidence relating to the level of violence in the home and [K.J.]'s prior behavioral issues was both relevant and material. For example, during closing, the State pointed out that [K.J.] had regressed in potty training, was acting out sexually, and was in counseling – all of which would have been caused by Curtiss's abuse. Tr. at p. 924-925. However, if other reasons existed for this behavior, they could have cast doubt on what was another important aspect of the State's case.

Id. at ¶ 67.

In addition to the Mother's credibility evidence, the detective pressure evidence, and the violence and abuse evidence, the Court of Appeals also noted several other instances of exculpatory and impeachment evidence not disclosed to the defense:

- In 2019, when asked if he had ever lied to MCCS, Kh.J. "hid his face in his shirt and then stated 'only about the stuff with [K.J.].'" *Id.* at fn. 9.

- In an October 30, 2018 Care Clinic Consultation, the same day of K.J.'s CARE house interview played during trial, K.J. reported that Kh.J had touched her "coco." *Id.* at fn. 12.

- "[T]he records here indicated that Mother (the primary witness) had a history of making inconsistent statements, making apparently false accusations, accusing MCCS caseworkers and hospital employees of lying, threatening lawsuits against both MCCS and hospital personnel, manipulating staff and law enforcement, and triggering others to obtain negative responses that worked on her behalf." *Id.* at ¶ 59.

- K.J. and Kh.J were well coached not to talk to MCCS. *Id.*

- There were substantiated emotional maltreatment findings against Mother. *Id.* at fn. 3.

- "[D]uring the pendency of the criminal case, i.e., *before Mother testified*, Mother's physical abuse against [Kh.J] was substantiated for the dates of April 16 and 26, 2019." (Emphasis sic.) *Id.*

- Mother reported behavior issues with K.J. prior to 2017 in direct contrast to her trial testimony that she did not have behavior problems with K.J. prior to the alleged sexual abuse. *Id.* at fn. 5.

In summary, significant and obvious exculpatory and impeachment evidence was withheld from Curtiss by the trial judge.

II. ARGUMENT

A. A trial judge assumes *Brady* obligations when reviewing child services records.

In *Pennsylvania v. Ritchie*, the United States Supreme Court addressed how to balance a defendant's right to relevant, material, and exculpatory information with the confidentiality concerns of sensitive child protective services' records. *Pennsylvania v. Ritchie*, 480 U.S. 39, 57-58, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987). The Supreme Court fashioned a compromise, whereby a procedure was to be followed by trial courts. Rather than requiring the full records be turned over to the parties, the full records must be turned over to a trial court for *in camera* review. *Id.* The trial court is then tasked with review of the records where all material and exculpatory information is to be turned over to the parties. Ever since 1987 (the year *Ritchie* was decided), trial

courts throughout the country have followed the *Ritchie* compromise, generally without significant issues.

Thus, the *Ritchie* compromise effectively requires trial courts to assume *Brady* obligations. *Id.* Because the state cannot legally access the records to review them, but the judge can and is, in fact, legally required to do so, a judge assumes *Brady* obligations in this serious context. *See also State ex rel. Lorenzetti v. Sanders*, 238 W. Va. 157, 163, 792 S.E.2d 656, 662 (2016) ("Therefore, we hold that, before allowing a defendant to review records concerning a child that are confidential under West Virginia Code Section 49–5–101 [2015] but may contain exculpatory or impeachment evidence which is material to the defense, the circuit court should conduct an *in camera* review of the records to determine whether and to what extent they will be disclosed to the Defendant under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).").

Finding no authority to the contrary, *Brady* violation claims against a trial court should be initially assessed using the same standards that apply to *Brady* violation claims against prosecutors. Notably, the appellate court in this case began its discussion of the trial court's due process violations by describing the framework set forth in *Brady*. *Curtiss* at ¶ 51. Brady's central holding is well-known: when the prosecution fails to disclose evidence favorable to an accused upon request, the prosecution violates a defendant's due process rights where the evidence is material either to guilty or to punishment. *State v. Aldridge*, 120 Ohio App. 3d 122, 145, 697 N.E.2d 228, 242 (2nd Dist.1997), citing *Brady*, 373 U.S. at 87. In order to establish a due process violation pursuant to *Brady*, a defendant must demonstrate three elements:

(1) the prosecution failed to disclose evidence upon request;

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

(3) the evidence was material.

Id. at 145, citing *Moore v. Illinois* 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972).

For the second *Brady* factor, "evidence favorable to the defense" includes exculpatory *and impeachment* evidence. *Id.* at 242-43, citing *United States v. Bagley,* 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). For the third *Brady* factor, the Supreme Court of Ohio explained that evidence is material when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.*, citing *State v. Johnston,* 39 Ohio St.3d 48, 529 N.E.2d 898, syllabus at ¶ 5. Further, a "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." (Citation omitted.) *Id.* Lastly, "The success of a *Brady* claim turns not on an item-by-item analysis of the withheld evidence, but rather on whether the 'likely net effect' of such evidence yields a 'reasonable probability' of a different result." *Id.*, citing *Kyles v. Whitley* (1995), 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

B. In this case, the trial judge violated Curtiss' due process rights when she suppressed *Brady* material.

This motion will not spend significant time detailing the *Brady* violations perpetrated by the trial court for two reasons. First, the fact that the trial court committed *Brady* violations is now well-established by the Second District Court of Appeals' opinion. Second, defense counsel is still not privy to the scope and details of the *Brady* violations because the actual *Brady* evidence has not been turned over to the defense at this point in the proceedings. Thus, the full scope of the *Brady* violations will be detailed in further briefing. For now, the following brief summary is offered.

The Court of Appeals' descriptions of the Mother's credibility evidence, the detective pressure evidence, and the violence and abuse evidence have been quoted above. In other

instances, the Court of Appeals noted the existence of additional *Brady* materials but did not provide a full analysis of how the evidence was favorable. The chart below includes additional *Brady* materials noted by the court of appeals and a brief description of its favorability to the defense:

Court of Appeals note	**Brief description of favorability**
In 2019, when asked if he had ever lied to MCCS, Kh.J. "hid his face in his shirt and then stated 'only about the stuff with [K.J].'" *Id.* at fn. 9.	Goes to whether the sexual abuse occurred and whether the K.J. and Kh.J were coached to lie about the abuse (exculpatory)
In an October 30, 2018 Care Clinic Consultation, the same day of K.J.'s CARE house interview played during trial, K.J. reported that Kh.J had touched her "coco." *Id.* at fn. 12.	Goes to whether the sexual abuse occurred and whether the K.J. and Kh.J were coached to lie about the abuse (exculpatory) and goes to whether K.J.'s sexual knowledge and abuse occurred at the hands of Kh.J. rather than Curtiss (exculpatory).
"The records here indicated that Mother (the primary witness) had a history of making inconsistent statements, making apparently false accusations, accusing MCCS caseworkers and hospital employees of lying, threatening lawsuits against both MCCS and hospital personnel, manipulating staff and law enforcement, and triggering others to obtain negative responses that worked on her behalf." *Id.* at ¶ 59.	Goes to whether Mother fabricated the abuse (exculpatory) and Mother's credibility (impeachment)
K.J. and Kh.J were well coached not to talk to MCCS. *Id.*	Goes to whether the sexual abuse occurred and whether the K.J. and Kh.J were coached to lie about the abuse (exculpatory)
There were substantiated emotional maltreatment findings against Mother. *Id.* at fn. 3.	Goes to Mother's credibility (impeachment) and whether K.J.'s problematic behaviors[2] were a result of

[2] Given the lack of physical evidence of abuse, the state argued that certain behaviors demonstrated by K.J. indicated she had been sexually abused. Dr. Parks, K.J.'s physician, described regression of potty-training skills. Tr. of Proc., p. 479. Sarah Lipps, K.J.'s school therapist, testified she observed

	abuse by Mother rather than Teaven Curtiss (exculpatory)
"[D]uring the pendency of the criminal case, i.e., *before Mother testified*, Mother's physical abuse against [Kh.J.] was substantiated for the dates of April 16 and 26, 2019." *Id.*	Goes to Mother's credibility (impeachment)
Mother reported behavior issues with K.J. prior to 2017 in direct contrast to her trial testimony that she did not have behavior problems with K.J. prior to the alleged sexual abuse. *Id.* at fn. 5.	Goes to Mother's credibility (impeachment)

The *Brady* violations by the trial judge go beyond failing to disclose records. The trial judge took an affirmative step in *redacting Brady evidence*. "We also note that in a document that was released to the defense, the trial court redacted a statement that [K.J.] made during an October 30, 2018 Care Clinic Consultation. Specifically, [K.J.] said that [Kh.J.] had touched her by her "coco." *Id*. This evidence was favorable to the defense because it disclosed Kh.J as a possible alternative suspect, or, alternatively, it went to the veracity of the sexual abuse claims. October 30, 2018 was the day that K.J. did the forensic CARE interview that was played during trial. Thus, the fact that she disclosed that someone else had touched her coco on the same day she did the interview is highly material.

Here, the trial judge affirmatively redacted evidence, purposefully hiding it from the defense, that the appellate court later found to be exculpatory. This conduct was an egregious violation of the defendant's rights; the trial court woefully failed in its obligation to be a non-biased reviewer of the evidence by actively hiding exculpatory evidence. With actions of this

---

temper tantrums and inattentiveness from K.J. which can indicate trauma. Tr. of Proc., p. 361-62. This motion will refer to the inappropriate sexual knowledge, bed-wetting, temper tantrums, and inattentiveness as "problematic behaviors."

nature, the *Ritchie* compromise is turned on its head.

C. The appropriate remedy is a dismissal with prejudice.

Generally, the remedy for violations of law, argued successfully on appeal, is a new trial. However, in certain circumstances, a dismissal is warranted. As explained below, and as will be elaborated upon further once counsel has full access to the *Brady* information, the remedy for the serious due process violations committed by the trial court in this case is a dismissal with prejudice.

A trial court has discretion to dismiss this case with prejudice. "[A] trial judge is allowed great flexibility in determining when the judicial process is no longer useful in a given case such that a dismissal under Crim.R. 48(B) is warranted." (Citations omitted.) *State v. Lewis*, 2020-Ohio-5294, 162 N.E.3d 113, ¶ 10.

> The Ohio Supreme Court explained the effect of Crim.R. 48(B) in the *Busch* decision: "Crim.R. 48(B) recognizes by implication that trial judges may *sua sponte* dismiss a criminal action over the objection of the prosecution, since the rule sets forth the trial court's procedure for doing so. *The rule does not limit the reasons for which a trial judge might dismiss a case,* and we are convinced that a judge may dismiss a case pursuant to Crim.R. 48(B) if a dismissal serves the interests of justice.

State v. Sanders, 2013-Ohio-5220, 3 N.E.3d 749, 752, ¶ 13 (7th Dist.).

The appellate court has established the trial court violated Curtiss' due process rights. As described above, defendants have a due process right to exculpatory information that is both material and relevant to the defense. In Ohio, the discovery rules also require disclosure of exculpatory information. Crim.R.16(B)(5). Thus, questions regarding the withholding of exculpatory information invoke both the discovery rules and a defendant's due process rights. *See also Ritchie*, 107 S.Ct. at 1001 (Supreme Court acknowledges claims regarding access to information, particularly regarding child services records, "are considered by reference to due process.") Likewise, **the remedy** for failures to turn over exculpatory information requires analysis

into both the due process clause and the discovery rules.

Upon remand, the Court is faced with an unusual circumstance where the appellate court has confirmed that the discovery rules and Curtiss' due process rights were violated by the trial court itself when exculpatory information was withheld. Thus, the question of whether such violations occurred was answered, and the remedy for the violations must now be addressed.[3] In other words, it was not ripe to conduct an analysis of the remedy at the appellate level (when defense counsel still did not have or fully know the contents of the withheld information), but it will soon become ripe once the full scope of the due process and discovery violations are determined.

Counsel anticipates the state will argue that the remedy for the violations of Curtiss' due process rights was already provided to him by means of the vacating of his conviction. However, as recognized by the Ohio Supreme Court, *Brady* violations do not work this way. *Brady* violations can serve as both the reason overturning a conviction on appeal and the basis for a dismissal with prejudice upon remand. *State v. Keenan*, 143 Ohio St. 3d 397, 2015-Ohio-2484, 38 N.E.3d 870, ¶ 12. According to the Supreme Court of Ohio,

> In so holding, we reject the state's argument that because the *Brady* violations led to the granting of the writ of habeas corpus, they cannot also serve as the basis of a dismissal with prejudice. It is possible for a *Brady* violation (or other type of discovery abuse) to be so severe, so detrimental to the interests of justice that it can be the basis for the granting of a great writ and for the subsequent granting of a motion for dismissal.

Id.

---

[3] The appellate court was only asked to consider the question of whether due process was violated. It would have been putting the cart before the horse for the defense to argue the remedy for the violations, particularly in this type of case where the defense was not (and still is not) privy to the *Brady* information.

Curtiss requests the Court consider the remedy of dismissal in two ways. First, under the framework of due process implicating discovery violations, which Ohio courts routinely do pursuant to *Parson* and *Papadelis*.[4] Unlike the normal situation of a prosecutor or law enforcement committing the *Brady* violation (and we have that here as well, which will be addressed in a separate motion), the discovery/due process violations at issue were perpetuated by the trial court. Second, Curtiss requests this Court consider the remedy of dismissal because permitting the continuation of this prosecution in the face of the trial court's egregious withholding of exculpatory information during the first trial would violate due process and fundamental fairness.

1. A dismissal with prejudice is appropriate pursuant to *Parson*.

Before considering the sanction for a discovery violation, "[a] trial court must inquire into the circumstances surrounding [the] violation . . ." *City of Lakewood v. Papadelis*, 32 Ohio St. 3d 1, 1, 511 N.E.2d 1138 (1987). Because this initial inquiry must be conducted, counsel is requesting by separate motion that the current trial judge recuse because, without recusal, the court would effectively be investigating itself. This investigative stage will likely require an evidentiary hearing.

Once the investigation is completed, the Court then must determine the appropriate sanction for the violation. The Ohio Supreme Court in *Parson* "established three factors that should

[4] Criminal Rule 16 contemplates sanctions as severe as dismissal with prejudice. As the Ohio Supreme Court noted, "Crim.R. 16 governs discovery matters in a criminal proceeding." *State v. Carabello*, 2017-Ohio-4449, 93 N.E.3d 322, ¶ 18. Further, "The purpose of this rule is "to provide the parties in a criminal case with the information necessary for a full and fair adjudication of the facts, **to protect the integrity of the justice system**, the rights of defendants, and the well-being of witnesses, victims, and society at large." (Emphasis added.) *Id.*, citing Crim.R. 16(A) (emphasis added).

govern a trial court's exercise of discretion in imposing a sanction for a discovery violation. The *Parson* factors are: (1) whether the failure to disclose was a willful violation of Crim.R. 16, (2) whether foreknowledge of the undisclosed material would have benefited the accused in the preparation of a defense, and (3) whether the accused was prejudiced. *State v. Darmond*, 135 Ohio St. 3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 35, citing *State v. Parson*, 6 Ohio St.3d 442, 445, 453 N.E.2d 689 (1983), at syllabus. *See also State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 115. All three factors are met in this case.

Candidly, the assessment of the *Parson* factors should likely occur after an evidentiary hearing. To that end, the following brief description of the *Parson* factors should be seen as roadmap for future articulation of how the factors will apply to the case at hand.

First, the trial court's failure to disclose the material was willful. During a hearing on September 1, 2020, the trial judge stated: "I personally went through each and every page of the [MCCS] records that were provided to me." Tr. of Proc., p. 43. Thus, the trial court reviewed the clearly exculpatory information and suppressed it. The willfulness is evident based on the obvious nature of the exculpatory evidence withheld.

Second, as outlined earlier in this memorandum, the suppressed material would have benefited Curtiss in his preparation of a defense.

Third, Curtiss was prejudiced. Although the full scope of the prejudice cannot be determined until the defense has had the opportunity to review the full body of relevant MCCS records, some prejudice is already apparent.

In short, the defense is prejudiced because the optimal time to challenge by K.J. and Kh.J's contaminated memories has passed. Moreover, they have now spent years in the presence of the contaminating influence, Mother. As the Sixth Circuit has noted:

> C]hilden can be influenced by adults to produce false allegations—either through an adult's misinterpretation of what a child has said, hysteria about the possibility of abuse, or through maliciousness on the part of the adult. Some of the studies examining children's suggestibility have found children to be prone to conforming their stories to the beliefs of the questioning adult.

United States v. LeBlanc, 45 F. App'x 393, 399 (6th Cir. 2002), citing Diana Younts, *Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions*, 41 DUKE L.J. 691, 697 (1991). The issue of contamination of K.J.'s memories is an issue that Curtiss needed to explore close in time to K.J.'s disclosures about what she remembered.

Curtiss is prejudiced because the damage cannot be undone. The children's memories have been contaminated by the lead detective (as described more fully in the Motion to Dismiss for State Due Process Violations) and Mother. The damage caused by the defense's inability to investigate and challenge the lead detective's interview techniques pressuring the children to disclose cannot be overstated. Obviously, the goal of an interview is to encourage the interviewee to retrieve stored information in their memory. To do that, interviewers may use cues designed to induce "emotional or cognitive state at retrieval that match those present at the time of encoding." Stephen J. Ceci and Maggie Bruck, *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*, American Psychological Association, p.43 (1995). Of concern for this case is "Although these techniques may facilitate the recall of actually experienced events, they may promote false recall if an event was never experienced." *Id.* "Young children may think the interviewer has the correct answers which may lead to suggestibility." Kamala London, Lucy A. Henry, Travis Conradt, and Ryan Corser, *Suggestibility and Individual Difference in Typically Developing and Intellectually Disabled Children*, Suggestibility in Legal Contexts; Psychological Research and Forensic Implications (2013). K.J.'s memory was contaminated by the "answers"

the detective wanted her to give. The false memories were further solidified by the repeated interviewing and the time that has now passed.

> Unfortunately, for several reasons, repeated interviewing is also associated with baleful effects. First, as interviews are repeated, so is the length of time between the original event and the interview; **this allows for weaking of the original memory trace, and as a result of this weakening, more intrusions are able to infiltrate the memory system.** In fact . . when asked for free recall, both children and adults remember more with additional interviews, it is also true **their reports become more inaccurate overtime** (i.ie., they recall both more accurate and more inaccurate details over repeated trials). Some recent data by Poole and White (1993) suggest that this decline in accuracy over a long delay may be most apparent in children.

(Emphasis added.) Stephen J. Ceci and Maggie Bruck, *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*, American Psychological Association, p.108 (1995).

The contamination has been made permanent by 1.) time and 2.) the nature of how memory works. Now, the contaminated memories are solidified beyond remediation. Although K.J. likely remembers talking to the detective, she is not likely to recall specific statements that were made to her or that she made more than one year later. *See* Monica Lawson, Kamala London, *Children's Memory for Conversations After a 1-Year Delay*, Journal of Applied Research in Memory and Cognition 6 (2017) ("Our results suggest that after 1 year, children may remember the topic of seminal conversations, but memory for conversational statements may be sparse and unreliable." Thus, cross-examination, at any future trial, would be greatly hindered by the nature of how a child's memory works.

2. Pursuant to Pennsylvania v. Ritchie, and the Due Process clause, a dismissal with prejudice is appropriate.

Ohio law acknowledges circumstances where a trial court can dismiss a case with prejudice in the interests of justice. Generally, "[a] court had the 'inherent power to regulate the practice

before it and protect the ***integrity of its proceedings***." (Emphasis added.) *State v. Busch,* 76 Ohio St.3d 613, 615, 669 N.E.2d 1125 (1996), quoting *Royal Indemn. Co. v. J.C. Penney Co.*, 27 Ohio St.3d 31, 33–34, 501 N.E.2d 617 (1986). In *State v. Busch*, the Ohio Supreme Court explained that Crim.R. 48(B) "does not limit the reasons for which a trial judge might dismiss a case, and we are convinced that a judge may dismiss a case pursuant to Crim.R. 48(B) if a dismissal serves the interests of justice." *Id.* at 615.

In addition, the United States Supreme Court has recognized the remedy of dismissals for serious due process violations. In doing so, the Supreme Court noted the need for flexibility in applying the Due Process Clause to the dismissal of State criminal procedures:

> The Court's function in the observance of this settled conception of the Due Process Clause does not leave us without adequate guides in subjecting State criminal procedures to constitutional judgment. In dealing not with the machinery of government but with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions. Words being symbols do not speak without a gloss. On the one hand the gloss may be the deposit of history, whereby a term gains technical content. Thus the requirements of the Sixth and Seventh Amendments for trial by jury in the federal courts have a rigid meaning. No changes or chances can alter the content of the verbal symbol of 'jury'—a body of twelve men who must reach a unanimous conclusion if the verdict is to go against the defendant. On the other hand, the gloss of some of the verbal symbols of the Constitution does not give them a fixed technical content. It exacts a continuing process of application.

Rochin v. California, 342 U.S. 165, 169–70, 72 S. Ct. 205, 96 L. Ed. 183 (1952).

The Supreme Court further noted the need for a "disinterested inquiry" when balancing various considerations.

> In each case 'due process of law' requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not ad hoc and episodic but

> duly mindful of reconciling the needs both of continuity and of change in a progressive society.

(Citations omitted.) *Id.* at 172. Finally, the Court noted the role of "fair play and decency" when assessing the validity of state practices: "We are further admonished to measure the validity of state practices, not by our reason, or by the traditions of the legal profession, but by 'the community's sense of fair play and decency'; by the 'traditions and conscience of our people'; or by 'those canons of decency and fairness." *Id.* at 176.

When accessing whether a serious due process violation warrants a dismissal, there is a critical threshold question: must the defendant show prejudice? As often is the case, the answer is sometimes. The Supreme Court has recognized there to be a "class of cases" where errors are "deemed fundamental," such that the court need not conduct "a particular assessment of the prejudicial impact of the errors." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256–57, 108 S. Ct. 2369, 101 L. Ed. 2d 228 (1988). For instance, the Supreme Court has recognized certain cases must be dismissed when "**the structural protections** of the grand jury have been so compromised as **to render the proceedings fundamentally unfair**, allowing the presumption of prejudice." (Emphasis added.) *Id.*, citing *Rose v. Clark,* 478 U.S. 570, 577–578, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986).

This case should fall into the class of cases described in *Bank of Nova Scotia* where the due process violations have rendered the proceeding fundamentally unfair. This argument is not made lightly. Certainly, courts have addressed countless *Brady* violations by prosecutors, and counsel is not aware of a court classifying those prosecutor's violations as requiring dismissal without a showing a prejudice. The difference here is in **who** perpetrated the *Brady*/due process violations. The *Ritchie* compromise can only constitutionally function upon the assumption that trial judges

will not operate as advocates helping the state obtain tainted convictions by hiding evidence that only the court is allowed to review.

The *Ritchie* compromise requires judges to be neutral reviewers of a critical type of evidence in a procedure that is very common in criminal trial courts throughout the country. If judges are found to be biased when applying the structural protections ensured by *Ritchie*, the compromise itself falls apart. Moreover, the overall neutrality of the judicial process is implicated by a proven example of a judge willfully withholding exculpatory information to help ensure a conviction and help the state present an entirely false narrative to the jury.[5] The community's "sense of fair play and decency" is upended. The "integrity of the proceedings" is left unprotected, not only in the public's eye, but also in the reality of the courtroom experience for defendants. In sum, a judge willfully withholding evidence of the innocence of the accused must be deemed fundamentally unfair.

Upon such a finding, a specific showing of prejudice should be presumed as this case falls into the special class of cases where dismissal is the appropriate remedy to serve the interests of justice, to preserve the constitutionality of the *Ritchie* compromise, and to uphold "those canons of decency and fairness" cited above. With a dismissal, and its deterrent effect realized, the integrity of proceedings in future cases will remain intact.

If this Court were to find this case does not fall into the special class of cases described in *Rochin*, a prejudice analysis would then need to be conducted before this case could be dismissed

---

[5] As set forth more fully in Curtiss' appellant brief, the withholding of the MCCS records allowed the state to present an entirely false narrative to the jury.

for the trial court's egregious due process violations.[6] To that end, a prejudice discussion was offered above under the *Parson* framework. As stated above, this prejudice argument will be fully fleshed out with additional briefing after 1.) the full scope of the *Brady* violation is understood and the evidence turned over, and 2.) an evidentiary hearing is held.

III. CONCLUSION

For the reasons set forth above, Curtiss respectfully requests this Court either grant a dismissal with prejudice or defer ruling until an evidentiary hearing has been held and additional briefing has been submitted.

Alternatively, if this Court does not find the reasons set forth in this memorandum or the reasons set forth the separate motion to dismiss are sufficient, independently, for a dismissal with prejudice, Curtiss respectfully requests this Court consider the cumulative effect of the due process violations caused by both the state and the trial judge. When analyzed collectively, it is apparent that, by deliberate conduct, the truth was kept from the jury in an effort to obtain a conviction.

Respectfully submitted,

/s/Eric G. Eckes
ERIC G. ECKES (0091840)
STEPHANIE F. KESSLER (0092338)
MARTIN S. PINALES (0024570)
MOLLY T. TOLBERT (0101162)
Pinales, Stachler, Young & Burrell Co., LPA
455 Delta Ave., Suite 105

[6] The Sixth Circuit Court of Appeals has also discussed the sanction of dismissal for egregious due process violations. In a context where the Sixth Circuit was not discussing the special "class of cases" described in *Richin*, the Sixth Circuit stated, "Even under circumstances where a constitutional right of the defendant has been violated, deliberately or otherwise, the defendant is entitled to the extreme sanction of dismissal of the indictment only where he can prove that he was demonstrably prejudiced by the violation." *United States v. Talbot*, 825 F.2d 991, 998 (6th Cir. 1987).

Cincinnati, Ohio 45226
(513) 252-2732
Attorneys for Teaven Curtiss
skessler@pinalesstachler.com
eeckes@pinalesstachler.com
mpinales@pinalesstachler.com
mtolbert@pinalesstachler.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via this Court's electronic filing system on all counsel of record on this 28th day of February 2022.

/s/Eric G. Eckes
ERIC G. ECKES (0091840)