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 STATE 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
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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 the state are two-fold. First, evidence was withheld that the lead detective had to put pressure on critical witnesses Kh.J. and K.J. because they were not disclosing enough information about the alleged abuse. Second, it has recently come to light that the state possessed a significant body of MCCS records and failed to disclose, not only the records themselves, but that they had them in the first instance.

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.*

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 Erica Jones' 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 ("Erica Jones' 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 Erica Jones' 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 Erica Jones. *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.*

- Jones 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.

Prior to a recent bond hearing, defense counsel had assumed the trial court was the only entity in possession of the exculpatory evidence in the MCCS records, However, it has come to light that the state possessed some, all, or perhaps even more, of the records reviewed by the trial judge. On February 1, 2022, during a bond hearing, Detective Spears testified "I have a lot of a lot of records from children's services. Like a lot." *See* video of hearing at 10:37 AM.[1] Further, he was given a disc with "hundreds if not thousands of pages." *Id.* at 10:38 AM. Significantly, Detective Spears testified that he turned over the thousands of child services records he had to the prosecutor's office. *Id.* In contrast, Curtiss received only the records disclosed to both parties by the trial court.

[1] Counsel has ordered and paid for a transcript of this hearing but the transcript has not yet been completed.

II. ARGUMENT

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 v. Maryland*, 373 U.S. at 87, 83 S.Ct. at 1196–1197, 10 L.Ed.2d at 218. 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. *Aldridge,* 120 Ohio App. 2d at 145, 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 (1988), syllabus. Further, a "reasonable probability" is "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,* 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

Furthermore, law enforcement officers are bound by *Brady*. "[p]rosecutors are not the only state actors bound by *Brady*, and 'police can commit a constitutional deprivation analogous to that recognized in *Brady* by withholding or suppressing exculpatory material.'" *White v. City of Cleveland*, N.D. Ohio No. 1:17-CV-01165, 2020 WL 7640932, at *22 (Dec. 23, 2020), citing *Jackson v. City of Cleveland*, 925 F.3d 793, 814 (6th Cir.2019), quoting *Moldowan v. City of Warren*, 578 F.3d 351, 379 (6th Cir.2009). As the Sixth Circuit has reasoned, "Because prosecutors rely so heavily on the police and other law enforcement authorities, the obligations imposed under *Brady* would be largely ineffective if those other members of the prosecution team had no responsibility to inform the prosecutor about evidence that undermined the state's preferred theory of the crime." *Moldowan,* 578 F.3d at 378. Further,

> As a practical matter then, *Brady*'s ultimate concern for ensuring that criminal defendants receive a "fundamentally fair" trial, *see United States v. Bagley*, 473 U.S. 667, 675, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (explaining that the "purpose" of the *Brady* rule is "to ensure that a miscarriage of justice does not occur"), demands that "*Brady*'s protections also extend to actions of other law enforcement officers such as investigating officers," *White v. McKinley*, 519 F.3d 806, 814 (8th Cir.2008).

Id.

A. State actors violated due process by failing to disclose that the detective put pressure on Kh.J and K.J. because they were not disclosing enough information about the alleged abuse.

The case at hand is similar to *State v. Aldridge* and warrants the same result. In *State v. Aldridge*, the Second District Court of Appeals upheld a trial court's finding the state failed to disclose exculpatory material to the defendants. *Aldridge*, 120 Ohio App. 3d at 134. Dale Aldridge was charged with two counts of forcible rape of a child under thirteen years of age and three counts of gross sexual imposition of a child under thirteen years of age. *Id.* at 132. The lead up to the

charges is particularly relevant to the case at hand.

First, a resident of an apartment complex reported to the police that she heard that several neighborhood children had become sexually active with one another. *Id.* at 128. "Huber Heights Police Detective Jennifer Bazell was the primary investigator in the case. Det. Bazell interviewed children, parents, and neighbors in the area and recorded her observations in an ongoing police report." *Id.* at 128. Initially, her investigation indicated that all suspects and alleged victims were children. However, as the Second District Court of Appeals described it, "the case took an important turn." *Id.* at 129. "Det. Bazell reported receiving phone calls from parents of the children involved, informing her that their children were implicating adults in the alleged sexual encounters." *Id.* The parents were reporting that adults were involved in encouraging older children to have sex with younger children. *Id.* Further, the children reported that the implicated adults were taking photos of the sexual activities. *Id.* Consequently, "Det. Bazell obtained a search warrant to look for child pornography in the Glenburn Green apartment where Jenny Wilcox and Dale Aldridge lived.

The search revealed both developed and undeveloped rolls of cartridge film and movie film, but none contained child pornography." *Id.* Nevertheless, "Det. Bazell concluded that Dale Aldridge and Jenny Wilcox were the leaders of a group of adults who had been repeatedly sexually molesting the children of Glenburn Green." Ultimately, the case proceeded to trial where "[a]ll three of the Chronopoulos brothers, Valerie Picklesimer, Angelina Rodriguez, and Chris Barnette testified that Wilcox and Aldridge had sexually abused them." *Id.* at 132. Aldridge was convicted at trial. *Id.*

However, the Chronopoulous brothers recanted their testimony seven years later. "The Chronopoulos boys, who are now in their early twenties, claim that they lied during the 1985 trial

because they were coerced by and frightened of the police and prosecutors." *Id.* at 132. The brothers gave testimony regarding the coercive interrogation techniques of the Det. Bazell. Further, "[m]uch of the brothers' testimony relating to the coercive interrogation techniques of Det. Bazell is easily corroborated by reference to the report that Det. Bazell prepared in 1985. However, the petitioners claimed that the state, in defiance of the duties imposed by the Montgomery County Criminal Court Management Plan and Crim.R. 16, withheld the report from the defense." *Id.* at 133. Ultimately, the trial court found the state failed to disclose exculpatory material to the defendants including the " . . . threats made by Detective Bazell to John and Jason in the face of their denials of any sexual conduct happening. *Id.* at 135. The state appealed the trial court's ruling finding a *Brady* violation. *Id.* On appeal, the Second District upheld the trial court's ruling. The court observed, among other things, "With respect to John Chronopoulos's statement at the original trial, we note that the police report reveals that John, a twelve-year-old at the time, was threatened and coached by Det. Bazell." *Id.* at

For the case at hand, evidence related to the detective pressuring the children is *Brady* material. According to the Court of Appeals,

> In records not disclosed after the in camera inspection, Mother said, during a home visit on March 21, 2019, that "the detective told her that she needs to take [K.J] to Carehouse so she will disclose what he needs for court." Activity Log, p. 60-61. In addition, during an investigation of Mother's physical abuse, Mother reported that "the children are 'not saying the right things to the therapist' and the detective wants them to be in counseling at Carehouse to help build his case." *Id.* at p. 71.

Curtiss, 2022-Ohio-146 at fn. 10. As already determined by the Court of Appeals, the prosecution failed to disclose this evidence. The records reviewed by the Court of Appeals are like the police reports in *Aldridge*. The records contain information about coaching and/or pressuring child witnesses by Detective Spears. Evidence of the lead detective applying pressure to child witnesses,

is favorable to the defense and material as set forth in *Aldridge*. Had the defense been able to question witnesses with the information, there is a reasonable probability that the jurors would have concluded that the children were pressured into making disclosures that were untrue or exaggerated. Furthermore, the pressure exerted on the children through Detective Spears likely contributed to the contamination of the memories of Kh.J and K.J.

Notably, this Brady violation could not be raised during Curtiss' appeal as the defense was not privy to the detective's pressure on the children until after the court's opinion alerted counsel to the existence of the exculpatory evidence. Moreover, this claim will be further developed upon 1.) receipt of the evidence in question by defense counsel, and 2.) an evidentiary hearing on the due process violations.

B. State actors violated due process by failing to disclose *Brady* material within the MCCS records in the state's possession.

It was not known to the defense or the Court of Appeals that the state possessed MCCS records beyond those records disclosed to the parties by the trial court. As the state noted in its Motion for Court to Review *In Camera* Children's Services Records, it was not entitled to the full body of MCCS records. Rather, it needed the Court to "review and release to the parties relevant Children's Services Records." Motion for Court to Review *In Camera* Children's Services Records, Docket ID: 35059677, filed Nov. 23, 2020. However, to the defense's surprise, during a bond hearing, Detective Spears testified "I have a lot of a lot of records from children's services. Like a lot." *See* video of hearing at 10:37 AM.[2] Further, he was given a disc with "hundreds if not thousands of pages." *Id.* at 10:38 AM. Significantly, Detective Spears testified that he turned over

[2] Counsel has ordered and paid for a transcript of this hearing but the transcript has not yet been completed.

the thousands of child services records he had to the prosecutor's office. Because the state had the records that contained the *Brady* material described by the appellate court, the state is likely to have simultaneously violated Curtiss' due process rights along with the trial court.

Thus, this section of the motion is the direct result of counsel recently learning that the lead detective and prosecutor's office had access to the MCCS records. Counsel recognizes that more facts need to be ascertained to fully litigate this specific part of the motion. Counsel understands there is a distinction between the lead detective and/or the prosecutor possessing confidential exculpatory records (but not looking them) and a scenario where the state reviewed the confidential records and suppressed knowledge that the records contained exculpatory information. Having said that, it is now clear the state was in possession of serious *Brady* material prior to the first jury trial. What they knew about the *Brady* material, and what the state did about it, must be determined considering the serious due process violation that occurred when certain parts of the records were not disclosed to the defense.

C. Soliciting of false testimony must also be addressed.

The fact the state possessed a large body of MCCS records gives rise to the potential for additional due process violations. Again, the factual record for this issue needs to be complete before a full analysis can be conducted. In particular, the defense needs full access to the *Brady* evidence in question.

It is worth noting, however, that the Supreme Court of the United States has held "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. (Citations omitted.) *Napue v. People of State of Ill.*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). Further, "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears."

(Citations omitted.) *Id.*

Further, "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness." *Id.* "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Id.*

> 'It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. * * * That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.'

Id. at 269-70, citing *People v. Savvides*, 136 N.E.2d 853, 854—855, 1 N.Y.2d 554, 154 N.Y.S.2d 885 (1956).

Once the defense is provided with the *Brady* material from the MCCS records, an analysis must be conducted of whether the state used false testimony to obtain a tainted conviction. In other words, if the forthcoming *Brady* material, which the state had in its possession during the trial, contains proof that the state elicited false testimony, this Court will need to preside over litigation regarding the potential *Napue* violation.

D. Dismissal with prejudice is the appropriate remedy for the state's *Brady* violation.

When the state commits a *Brady* violation, trial courts are tasked with fashioning an appropriate remedy. The analysis of the *Brady* violation and its remedy implicates both the discovery rules and the defendant's due process rights. 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).

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

Curtiss has above argued two lines of reasoning for the *Brady* violations by the state in his case and each will be addressed in turn.

1. Lead Detective Pressuring K.J. and Kh.J

The state's failure to disclose the fact its lead detective pressured K.J. and Kh.J. was a willful violation of Crim.R. 16. This is not a situation where someone could have overlooked a bit of information in a document. This is a situation where the detective framed his investigation around pressuring the children to tell a story that confirmed what he believed happened, likely based on information from Mother. Without confirming evidence from the kids, he would not have been able to build a case. Consequently, the first *Parson* factor is met.

The second *Parson* factor is met because the undisclosed fact that Detective Spears

pressured the kids to say K.J. was abused would have led to an investigation of the detective's interview techniques, the results of which go to K.J. and the detective's credibility. Interview techniques used with children are paramount to cases where a child is the alleged abuse victim. The Second District Court of Appeals issued a decision that provides a description of how the investigation and the child's credibility are intertwined. "In *State v. Gersin* (1996), 76 Ohio St.3d 491, 668 N.E.2d 486, the Supreme Court stated that evidence concerning the interview techniques that police used to obtain statements from alleged child sex abuse victims are relevant to the issue of their credibility." *State v. Leak*, 2nd Dist. Montgomery No. 16424, 1998 WL 184646, at *3 (Mar. 27, 1998). As to an investigation of interview techniques, the Ohio Supreme Court held "A defendant in a child sexual abuse case may present testimony as to the proper protocol for interviewing child victims regarding their abuse." *Id.*, quoting *Gersin* at 491. "Presumably, variances between the techniques used and those that are proper may create an inference that the victims' statements are unreliable and, therefore, not worthy of belief." *Id.* Further,

> The rule announced in *Gersin* may be applied in any case to impeach the credibility of a witness who may have been exposed to undue influence by agents of the state or partisans of its case against a defendant. It has particular application to child witnesses who, though competent, may nevertheless have been so shocked or perplexed by the events involved in alleged criminal conduct that they are rendered particularly susceptible to suggestion.

Id. Other courts have similarly recognized how investigatory interviews of young children can be problematic. *See State v. Michaels*, 136 N.J. 299, 309, 642 A.2d 1372, 1377 (1994) ("That an investigatory interview of a young child can be coercive or suggestive and thus shape the child's responses is generally accepted. If a child's recollection of events has been molded by an interrogation, that pressure undermines the reliability of the child's responses as an accurate recollection of actual events.")

> A variety of factors bear on the kinds of interrogation that can affect the reliability of a child's statements concerning sexual abuse. We note that a fairly wide consensus exists among experts, scholars, and practitioners concerning improper interrogation techniques. They argue that among the factors that can undermine the neutrality of an interview and create undue suggestiveness are a lack of investigatory independence, the pursuit by the interviewer of a preconceived notion of what has happened to the child, the use of leading questions, and a lack of control for outside influences on the child's statements, such as previous conversations with parents or peers.

Id. "Children often provide reports that coincide with the interviewer's pre-established beliefs." (Citation omitted.) Monica Lawson, Lillian Rodriguez-Steen, Kamala London, *A systematic review of the reliability of children's event reports after discussing experiences with a naïve, knowledgeable, or misled parent*, Developmental Review 49 (2018).

Pressure, particularly that children are not disclosing enough, is a critical contaminate of memories. Here, the detective improperly pressured the children to make additional disclosures. Because of their young age, they were susceptible to that pressure. "A large body of published research shows that young children are highly susceptible to the negative effects of suggestions, particularly when suggestions occur after a delay." Rachel Zajac, Maryanne Garry, Kamala London, Felicity Goodyear-Smith, Harlene Hayne, *Misconceptions about childhood sexual abuse and child witnesses: Implications for psychological experts in the courtroom*, Routledge, Department of Psychology, University of Otago, Dunedin, New Zealand (2013). The potential for negative effects of suggestions is exacerbated by how many people the child may have discussed the events with "including parents, friends, police officers social workers, forensic interviewers, and therapists." *Id.* Here, there was a delay between the alleged initial disclosure and the detective's application of pressure. In addition, K.J. had talked to quite a few people in that time frame. The detective's statement to Mother about the need for the children to go to CARE house

because they were not saying the right things to the therapist occurred in March of 2019. *Curtiss*, 2022-Ohio-146 at fn. 10. By March of 2019, K.J. had talked about events with, at minimum, her Mother, child services, and a therapist over the eight months from the time of the alleged abuse to March of 2019. The suggestive interview techniques that took K.J. from not disclosing sexual abuse by Curtiss to disclosing it may have resulted in contaminated memories. Autobiographical memory (the recall of past personally experienced events) is not like a video-taped records in our minds. Maggie Bruck, Kamala London, Rebecca Landa, and June Goodman, *Autobiographical memory and suggestibility in children with autism spectrum disorder*, Development and Psychopathology (2007). Rather, "memories often change or are formed as a function of internal factors (e.g., believes and motivations) and external factors (such as suggestive interviewing techniques.)" *Id.* 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). As a result of the pressure and the nature of how memory works in children, K.J. and Kh.J's memories were contaminated.

Lastly, Curtiss is prejudiced because the damage cannot be undone. The contamination has been made permanent by 1.) time and 2.) the nature of how memory works. 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 original memory was contaminated by the "answers" the detective wanted her to give. The false memories were further solidified by the repeated interviewing.

> 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).

Now, the false memories cannot be corrected. 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.")

2. Withholding of MCCS records that were in possession of lead detective and prosecutor's office prior to trial.

Upon remand, this Court is faced with confirmation from the appellate court that the discovery rules and Curtiss' due process rights were violated by the trial court when exculpatory information was withheld. It now appears the same violation may have occurred by the state as well. That said, the assessment of the *Parson* factors should likely occur after an evidentiary hearing and after the state is able to respond to what action it took, if any, regarding the MCCS records and the exculpatory material contained within. For example, unanswered questions remain and matter to the analysis of the willfulness of the state's withholding of exculpatory material. Thus, Curtiss withholds further argument on the *Parson* factors until 1.) the *Brady* material is disclosed to counsel, and 2.) further facts are developed regarding the prosecutor and lead detective's review of the MCCS records that were in their possession prior to trial.

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,

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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
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