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IN THE COURT OF APPEALS OF INDIANA

State of Indiana,
Appellant-Respondent,

v.

Andrew M. Royer,
Appellee-Petitioner

April 8, 2021

Court of Appeals Case No. 20A-PC-955

Appeal from the Elkhart Superior Court

The Honorable Special Judge Joe V. Sutton, Judge

Trial Court Cause No. 20D03-0309-MR-155

May, Judge.

[1] The State appeals following the trial court's decision to grant Andrew M. Royer's successive petition for post-conviction relief based on newly discovered

evidence. The State argues the trial court erred in granting Royer's petition for post-conviction relief and ordering a new trial. We affirm.

Facts and Procedural History[1]

[2] We summarized the facts of the offense in our opinion on Royer's first petition for post-conviction relief as follows:

> In November 2002, ninety-four year-old Helen Sailor lived in [Waterfall Highrise,] an apartment complex for elderly, disabled, and handicapped persons eligible for public assistance. On November 28, 2002, Sailor spent the day with relatives who drove her back to her apartment that evening. The following day, November 29, 2002, Sailor's home healthcare provider and two relatives entered her apartment and found her body. The contents of Sailor's dresser drawers had been emptied out, a lock box was partially pulled out from under the bed, and Sailor's keys and the money she usually kept tucked inside a Bible were missing. An autopsy revealed significant injuries to Sailor's neck, face, and hands, and a forensic pathologist concluded that the cause of Sailor's death was strangulation and the manner of death was homicide.

Royer v. State, 20A04-1106-PC-325, 2011 WL 6595351 at *1 (Ind. Ct. App. Dec. 20, 2011), *trans. denied*.

[1] We held oral argument on this matter remotely via Zoom on February 10, 2021. We appreciate counsel's flexibility in participating in an oral argument in this novel manner and commend counsel on their thorough presentation of the issues. We also thank the University of Southern Indiana for incorporating this oral argument into its 2021 Law Day, and we look forward to holding traveling oral arguments on campus in the future.

[3] The initial investigation yielded no suspects. The Elkhart Police Department formed a homicide unit in August 2003, and the Sailor murder was the first case assigned to the newly-formed homicide unit. At the time, the unit consisted of Lieutenant Paul Converse, Sergeant William Wargo, Lieutenant Peggy Snider, Detective Carl Conway, and Detective Mark Daggy. Detective Conway was the unit's lead detective on the Sailor murder.

[4] On September 2, 2003, Elkhart Police Officer Kruzynski pulled over a vehicle in which Lana Canen and Nina Porter were traveling. Officer Kruzynski arrested Canen on an outstanding warrant. He gave Porter a traffic ticket and allowed her to leave the scene. Detective Conway learned about the traffic stop,[2] and he learned that Porter was Canen's neighbor. Detective Conway then questioned Porter about the Sailor murder, and during the interview, Porter stated that Canen made incriminating statements to her while they were spending time together on July 3, 2003. Porter also indicated that Canen and Royer would consume drugs together, and she described an incident in which Canen and Royer acted as if they were going to rob her. Sergeant Wargo and Lieutenant Snider also interviewed Canen on September 2, 2003. Canen denied murdering Sailor or ever visiting her apartment.

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[2] Detective Conway testified at the successive post-conviction hearing that as of September 2, 2003, there was no evidence directly implicating Lana Canen in the Sailor murder. He testified that Porter told Officer Kruzynski information about the Sailor homicide and that Officer Krruzynski relayed that information to the Elkhart Police Department homicide unit. However, Detective Conway did not document receiving information from Officer Kruzynski in his police report, and Porter testified that she did not tell Officer Kruzynski any information about the Sailor homicide.

[5] On September 3, 2003, Detective Conway visited Royer's apartment at the Waterfall Highrise and asked Royer to come with him to a nearby police station for questioning. Royer agreed, and Detective Conway drove Royer two blocks to the police station. Detective Conway advised Royer of his *Miranda*[3] rights at 9:34 a.m., and Royer signed a written waiver of his *Miranda* rights at 9:35 a.m. Detective Conway then began questioning him. Detective Conway did not audio or video record his initial questioning of Royer because he considered the initial stages of questioning to be a "pre-interview." (Tr.[4] Vol. III at 4.)

[6] In the course of this interrogation, Royer gave two different stories implicating himself in Sailor's murder. In the first version, Royer stated that he and Canen went to Sailor's apartment to ask Sailor for money and that they killed Sailor when she refused. In the second version, Royer said that he and Canen went to Sailor's apartment and Sailor gave Canen some money, but then Royer returned to Sailor's apartment alone later in the evening to ask for more money and he killed Sailor when she refused.

[7] In Detective Conway's supplemental case report, he noted "it was obvious that [Royer] was becoming very confused and fatigued[,]" so Detective Conway

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[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966), *reh'g denied*.

[4] Citations to "Tr." refer to the transcript from the evidentiary hearing on Royer's successive petition for post-conviction relief. Citations to "Sup. P-C. R. Ex." refer to exhibits submitted at the hearing on the successive petition for post-conviction relief. Citations to "DA Tr." and "DA App." refer to the direct appeal transcript and the direct appeal appendix, respectively.

decided to take a break. (Sup. P-C. R. Ex. 3; Tr. Vol. VI at 117.) Detective Conway then wrote in his supplemental case report:

> After taking a break, it was obvious that Royer was becoming very mentally fatigued and was having a very hard time maintaining his concentration. Due to this reason, I decided to take a preliminary statement from Royer because of the admissions he had made that included several details about the crime scene that were not public knowledge.

(Tr. Vol. VI at 117-18.) Detective Conway began recording Royer's confession at approximately 1:30 p.m. Detective Conway asked Royer questions throughout the recorded statement. For instance, when Royer denied going anywhere else after visiting Canen on Thanksgiving night 2002, Detective Conway asked, "No? Okay. In our interview, you talked about how you went to visit somebody else. That you went to visit Helen Sailor. Is that true?" (Pet. Ex. 18; Tr. Vol. VIII at 34.) Detective Conway asked Royer further leading questions regarding the decision to go to Sailor's apartment:

> [Conway]: And was it Lana's suggestion that that you guys go to Helen's?
>
> [Royer]: Yes.
>
> [Conway]: Okay. Did you know Helen before this night?
>
> [Royer]: Uh . . . (silence) . . . um yes.
>
> [Conway]: And how did you know Helen before this night?

[Royer]: I've seen her in the hallway before.

[Conway]: Okay. But you never really actually went and visited Helen before?

[Royer]: No.

[Conway]: Okay. So you and Lana went to Helen's, did you guys see Helen?

[Royer]: Yes we seen her.

[Conway]: And did you guys go inside the apartment?

[Royer]: Yes we went int . . into the apartment.

[Conway]: Did Lana ask Helen for money?

[Royer]: (silence) uh. . Lana. . ya. Lana asked Helen for money.

(Tr. Vol. VIII at 34-35.) The interrogation continued, and after recording Royer's confession, Detective Conway arrested Royer.

[8] Detective Conway interrogated Royer again on September 4, 2003, at which time Royer relayed a third rendition of events wherein he visited Sailor alone and killed her because she started "preaching at him." (Sup. P-C. R. Ex. 3; Tr. Vol. VI at 118.) Royer changed certain details over the course of the September 4, 2003, interrogation, and he gave a second recorded statement at the conclusion of the interrogation. While Royer said that he sold Sailor's jewelry

at a local pawn shop, the pawn shop did not have a record confirming a sale from Royer. Detective Conway's unrecorded pre-interview of Royer on September 4 began at 8:25 a.m., and Detective Conway began taking Royer's second recorded statement at 11:56 a.m.

[9] The Elkhart Police Department asked Dennis Chapman, an Elkhart County forensic specialist,[5] to examine latent fingerprints recovered from the Sailor murder scene and determine their owner. Prior to his employment for Elkhart County, Chapman had worked for the Federal Bureau of Investigation ("FBI") as a fingerprint examiner. In his role with the FBI, Chapman had compared inked prints[6] to other inked prints on file in order to determine if they matched. He had not compared latent prints[7] to inked prints for the FBI, and he had not received any latent print comparison training before reviewing the latent prints from the Sailor murder scene. Chapman had the latent prints for 189 days before he returned the prints to the Elkhart Police Department. Chapman submitted a report indicating one latent print found on a pill container in Sailor's apartment belonged to Canen.

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[5] Chapman retired in 2013.

[6] Chapman testified that an "inked" fingerprint is a print made after dipping a finger in ink and placing the finger on a card to record the print. (Tr. Vol. II at 33.)

[7] A latent fingerprint is a print lifted from a surface, such as at a crime scene. (Tr. Vol. II at 34.)

[10] Then-Elkhart County Chief Deputy Prosecutor Vicki Becker[8] was primarily responsible for initiating charges against Royer and Canen in connection with Sailor's murder. Then-Elkhart County Prosecutor Curtis T. Hill, Jr.,[9] made the final decision and approved initiation of the charges. The State charged Royer with murder[10] on September 9, 2003. The State did not charge Canen with murder until September 2, 2004.[11]

[11] In June 2004, after being charged but before trial, Royer agreed to an interview with Detective Daggy. Royer's attorney was present during the interview, and Royer waived his *Miranda* rights. Royer denied any involvement in Sailor's murder. He told Detective Daggy that on the day of Sailor's murder, he had attended a Thanksgiving meal and then returned to his apartment. He said he took a nap and then went to Martin's Super Market to buy beer. Royer indicated he then returned to his apartment and drank the beer. Detective Daggy subsequently learned that Martin's Super Market was closed on Thanksgiving.

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[8] Becker is currently Elkhart County Prosecutor.

[9] Curtis T. Hill, Jr., was subsequently elected Indiana Attorney General and served in that capacity when the State initiated this appeal. His term of office expired in January 2021, and Theodore E. Rokita replaced him as the Attorney General on this appeal.

[10] Ind. Code § 35-42-1-1 (2001).

[11] Becker waited until Chapman identified the latent fingerprint as belonging to Canen before initiating charges against her. The parties stipulated, based on Becker's deposition testimony, that she would not have recommended initiating charges against Canen without Chapman's latent fingerprint identification.

[12] The court tried Canen and Royer together before a jury from August 8 to August 10, 2005. At trial, Porter testified that she and Canen were visiting each other and drinking together on July 3, 2003. During the course of the evening, Canen stated "no one was supposed to get hurt." (DA Tr. Vol. III at 704.) Porter also testified that Canen said, "Thanksgiving, thanks for giving death." (*Id*. at 707.) Porter explained that she met Royer through Canen and that Royer was easily influenced by Canen. For instance, Porter reported that when Canen asked Royer to stand outside in the rain without an umbrella for a half-hour, Royer followed her instructions without questioning her.

[13] Detective Conway testified at trial that the information he learned from Porter led him to interrogate Royer. Detective Conway testified that Royer "willingly" agreed to be interviewed on September 3, 2003, and that Royer "seemed pretty relaxed about the whole situation." (DA Tr. Vol. II at 482-83.) Detective Conway relayed that Royer demonstrated strangling Sailor and "openly admitted that he committed the homicide." (*Id*. at 489.) According to Detective Conway, Royer said during the pre-interview, '"I know if I tell you what I did I'm going to get in a lot of trouble.'" (DA Tr. Vol. III at 520.) Detective Conway also testified that Royer knew details about Sailor's murder that had not been released to the public.

[14] During the State's closing argument, the State emphasized Porter's testimony, and the State argued her testimony "corroborate[d] virtually every piece of evidence that came from that stand." (*Id*. at 720.) The State referred to Canen's fingerprint found in Sailor's apartment as the "most important piece of

evidence in this case." (*Id*. at 730.) The State recalled Detective Chapman's testimony that he "took the fingerprint card of Lana Canen, and he compared it to the print from the tub, and he said, yep, that print is Lana Canen's. Her left pinky – left little finger." (*Id*. at 732.) The State then used the fingerprint to place Canen inside Sailor's apartment at the time of the murder, and the State additionally argued Royer "did whatever Lana told him to do." (*Id*. at 734.) The State referred to Porter's testimony to demonstrate the influence Canen had over Royer and characterized Royer as the "brawn" in Canen's plan to rob Sailor. (*Id*. at 764.) The State also referenced Detective Conway's testimony during its closing to argue that Royer knew information about the homicide that had not been disclosed to the public. The jury returned guilty verdicts as to both Canen and Royer, and the trial court sentenced Canen and Royer to fifty-five-year terms in the Indiana Department of Correction.

[15] On direct appeal, Royer argued there was insufficient evidence to support the jury's verdict because "[t]here was no direct evidence linking Mr. Royer to the murder and Mr. Royer's alleged confessions were insufficiently reliable to support a conviction," and he asserted the trial court did not consider a proffered mitigating factor at sentencing. (Tr. Vol. XIV at 186; Petitioner's Ex. 63.) We affirmed Royer's conviction and sentence on direct appeal. *Royer v. State*, 20A03-0601-CR-14, slip. op. at *1 (Ind. Ct. App. May 31, 2006). In holding that there was sufficient evidence to support Royer's conviction, we stated that:

> in addition to evidence that Canen and Royer were friends, that Canen's fingerprints were found inside Sailor's apartment, and that others had heard Canen talk about the crime, Royer also confessed to murdering Sailor. He described in detail the manner in which he strangled her, cleaned her apartment, and took money and jewelry from her home.

Id. at *4. Royer subsequently filed a petition for post-conviction relief, arguing his trial counsel was ineffective for failing to consult a false confession expert, which the trial court denied. We affirmed the denial on appeal, and our Indiana Supreme Court refused to accept transfer of the case. *Royer*, 20A04-1106-PC-325, slip op. at *1.

[16] Canen also filed a petition for post-conviction relief and, during the course of that proceeding, an Indiana State Police latent print examiner determined the latent print Chapman identified at trial as belonging to Canen did not match Canen. Rather, the latent fingerprint belonged to one of Sailor's home health aides. The State joined Canen's motion to set aside her murder conviction, and the trial court vacated the conviction. Royer sought leave to file a successive petition for post-conviction relief based on his claim of newly discovered evidence, and we granted his request. He filed his successive petition on June 4, 2019.

[17] The successive post-conviction court held an evidentiary hearing in October 2019. Chapman testified at the evidentiary hearing that he was aware of the Elkhart Police Department's theory that Canen was involved in the murder prior to identifying the latent print as belonging to Canen. While Chapman had

the latent fingerprints for over 180 days before identifying it as Canan's, he spent only about a week of that time analyzing the latent prints. Sergeant Wargo testified at the successive post-conviction hearing that the Elkhart Police Department had the ability to videorecord interviews in 2003 and that the Police Chief removed Detective Conway from the homicide unit before Royer's trial because Detective Conway gave false information to an attorney in another homicide investigation. The State did not disclose Detective Conway's removal from the homicide unit to Royer's defense team prior to his trial for Sailor's murder in 2005.

[18] Porter also testified at the post-conviction hearing. She stated that she did not volunteer any information about the Sailor case during the traffic stop. She explained that officers contacted her soon after the traffic stop and told her that they were taking her into custody because of an outstanding warrant,[12] and that Detective Conway interrogated her at the police station. Porter testified that she implicated Canen in the Sailor murder only because Detective Conway threatened her with prison time and the removal of her children if she did not cooperate. She also testified that Detective Conway fed her information about the Sailor homicide during the unrecorded portions of the interview. Shortly after Sailor's murder, Pam Fahlbeck, the owner of the home healthcare company Sailor utilized, offered a $2,000 reward for information about the

[12] This was apparently a rouse to get Porter to agree to questioning. She did not have an active outstanding warrant at the time.

murder. Porter revealed that the detectives notified her about the reward before she testified and that Detective Daggy delivered the reward money to Porter following her testimony. The State also had not disclosed the reward payment to Royer's defense team prior to his trial for Sailor's murder.

[19] Detective Conway testified at the successive post-conviction relief hearing that he suggested during his interrogation of Royer that Royer struck Sailor, that a substance had been poured on Sailor, and that towels had been thrown away. Detective Conway also admitted that, during his interrogation of Royer, he was aware that some of the details Royer provided did not match the physical evidence. Detective Daggy had watched portions of Detective Conway's September 3, 2003, interrogation of Royer though a closed-circuit video monitoring system as it was happening. Detective Daggy testified at the successive post-conviction relief hearing that Detective Conway's interrogation of Royer was "super leading" and "[p]robably one of the most difficult" interrogations Detective Daggy had ever watched. (Tr. Vol. IV at 149-50.) Detective Daggy also recounted that during a covertly recorded phone conversation in 2018, he discussed the Sailor murder with Larry Towns, a former Elkhart Police Department detective.[13]

[13] In Royer's verified motion for permission to file a successive petition for post-conviction relief, Royer alleged that Detective Daggy said during this covertly recorded phone conversation that Detective Conway's September 3, 2003, interrogation of Royer was "one of the worst interrogations he had ever seen" and that the interrogation was "[s]o leading, in fact, that Detective Daggy was concerned that others would view the interrogation as coercive." (Appellant's App. Vol. II at 35.)

[20] Following the evidentiary hearing, the post-conviction court entered a fifty-five -page order with extensive findings of fact and conclusions of law, including:

> **I. Detective Chapman's Lack of Training and Experience as Latent Print Examiner**
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> * * * * *
>
> 21. It is undisputed that Mr. Chapman's lack of qualifications to conduct latent print comparisons was not disclosed to the defense prior to trial. (EH[14] at 15-16).
>
> 22. Prior to trial, Ms. Becker and Mr. Williams divided witnesses to prepare and put on the stand. (EH at 15:14-16). Ms. Becker was the prosecutor responsible for meeting with Mr. Chapman and preparing him to testify. (Id. at 15:18-20). During those meetings, Mr. Chapman misled Ms. Becker into believing that he was qualified to conduct the type of latent print comparisons that exist here. (EH at 15:22-25). During her conversations with Mr. Chapman, Ms. Becker was never provided with his resume and it was never represented to her that he was not qualified to conduct comparisons of latent prints. (EH at 16:12-16). Pursuant to Rule 3.8, *Brady v. Maryland*, 383 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972), Ms. Becker should have disclosed such exculpatory and impeachment evidence to the defense. (EH at 16:18-17:3).
>
> 23. The Court finds that Mr. Chapman's lack of qualifications to compare latent prints was not disclosed to Mr. Royer or his

[14] For purposes of the post-conviction court's findings of fact and conclusions of law, "EH" refers to the transcript of the evidentiary hearing on Royer's successive petition for post-conviction relief and "R." refers to the transcript of Royer's criminal trial.

defense counsel at the time of his criminal trial and could not have been discovered by him or his counsel in the exercise of reasonable diligence in 2005.

24. The Court finds that the evidence presented satisfies the newly discovered evidence standard set forth in *Carter v. State*, 738 N.E.2d 665, 671 (Ind. 2000). On this score, the Court finds that this is newly discovered evidence that has been discovered since trial which is material and relevant. The Court finds that this evidence is not cumulative nor merely impeaching. This Court further finds that the evidence is competent, worthy of credit, and can be produced upon retrial. The Court finds that Chapman's testimony that he was qualified to compare latent prints and that the latent left at the scene matched Ms. Canen was material to the State's case at trial. This new evidence demonstrates that Chapman's testimony and the State's argument to the jury were false and materially misleading. The Court finds that this new evidence undermines the credibility of the State's case and there is a reasonable probability that this new evidence will produce a different result on retrial.

25. This Court also finds that the evidence presented satisfies the requirements of *Brady v. Maryland* and *Giglio v. United States*. It is undisputed between the parties that the evidence was not disclosed to the defense. The Court finds that the evidence is favorable to the defense as it would have constituted critical impeachment evidence of the State's main forensic witness. Finally, the Court finds that the withheld evidence was material to an issue at trial and the failure to disclose such evidence deprived Mr. Royer of this right to due process and a fair trial.

II. Latent Print Exclusions

26. This Court finds that the record and pleadings submitted by the parties along with the testimony and evidence presented,

including the documentary exhibits submitted to the Court, establish the following facts relating to the latent print exclusions:

27. Mr. Chapman received a request from the Elkhart Police Department to conduct a comparison of latent prints to known standards in the Sailor homicide. (EH at 60:18-23). Mr. Chapman had the evidence for approximately 189 days prior to forming his opinions in a written report. (EH at 79:10-13). Mr. Chapman estimates that he only worked on the comparison for approximately a week during the 189 days. (EH at 79). According to Chapman, he did not find a match to Ms. Canen until "just before" he returned the print back to the Elkhart Police Department. (EH at 80:17-18).

28. Mr. Chapman documented his opinion in this case in a report. (EH at 76; Petitioner's Ex. 12). Having reviewed the report, Mr. Chapman revealed that he first received the evidence in this case on August 29, 2003. (EH at 77). On that date, he received fingerprint standards and lifts that he needed to compare the standards to. (EH at 77-78). Mr. Chapman compared the standards of caregivers to the latent at issue. (EH at 86:1-9). In doing so, Chapman determined that "it didn't come from none of the caregivers." (EH at 86:8-9).

29. At trial, Mr. Chapman informed the jury that the print was a match to Lana Canen.

30. Mr. Chapman reviewed a latent print expert's power-point presentation prior to Ms. Canen's 2011 evidentiary hearing. (EH at 94:1-9). After his review, Chapman came to the realization that he "made a mistake in [his] original analysis." (EH at 94:12).

31. Mr. Chapman testified at the evidentiary hearing that the latent print left at the crime-scene on the victim's medicine bottle

was not Ms. Canen's. (EH at 94:13-14). Mr. Chapman recalled that "the ridge count was way off. It wouldn't have been hers, well without you not knowing it (inaudible) sense. The distance from the delta to the core was a lot longer in the latent print then what her print was." (EH at 95:5-9).

32. Mr. Chapman also admits that he did not even look for dissimilarities when he conducted his original comparison. (EH at 95:21-22). This is critical, as even Chapman explains, "all I needed was that one error [dissimilarity], because it wasn't similar so I knew it wasn't hers then." (EH at 95:12-13).

33. The Court finds that the exclusion of Ms. Canen from the latent prints found at Ms. Sailor's residence was not disclosed to Mr. Royer or his defense counsel at the time of his criminal trial and could not have been discovered by him or his counsel in the exercise of reasonable diligence in 2005.

34. The Court finds that evidence presented satisfies the newly discovered evidence standard set forth in *Carter v. State*, 738 N.E.2d 665, 671 (Ind. 2000). On this score, the Court finds that this is newly discovered evidence that has been discovered since trial which is material and relevant. The Court finds that this evidence is not cumulative nor merely impeaching. This Court further finds that the evidence is competent, worthy of credit, and can be produced upon retrial. The Court finds that Chapman's false testimony that the latent left at the scene matched Ms. Canen was material to the State's case against Mr. Royer at trial. As noted above, the State repeatedly argued to the jury that the latent print match to Canen corroborated the statements obtained from Mr. Royer. This new evidence demonstrates that Mr. Chapman's testimony and the State's argument to the jury were inaccurate and materially misleading. The Court finds that this new evidence undermines the credibility of the State's case and there is a reasonable probability that this new evidence will produce a different result on retrial.

* * * * *

IV. Detective Conway's Removal from the Homicide Unit

* * * * *

64. In 2003, Detective Conway was assigned to the Gwen Hunt homicide investigation. (EH at 129:19-130:1). Beginning in August 2003, Detective Conway was also assigned as the lead investigator in the Sailor homicide investigation. (EH at 185:10-16; 2014:8-13).

65. During the investigation into the Hunt homicide, Sergeant Wargo was informed that Detective Conway spoke to an attorney representing Stacy Orue around February 2004. (EH at 130:7-10). In this conversation, Sergeant Wargo was presented with complaints surrounding Detective Conway's questioning of Ms. Orue. (EH at 130:17-131:2). Specifically, Detective Conway made a request . . . to her attorney to interview Orue without counsel's presence. In doing so, Detective Conway falsely represented that Orue was a witness and not a suspect in a criminal investigation.

66. After conducting interviews with Conway, Sergeant Wargo and Lieutenant Converse requested that "Detective Conway . . . be removed from the homicide unit." (EH at 135:2-3).

67. Detective Conway was removed from the homicide unit because his supervisors had concerns about the impact that his misrepresentations would have on future homicide investigations and his credibility at trials if called to testify. (EH at 137:12-21). For these reasons, Lieutenant Converse and Sergeant Wargo requested Detective Conway's removal, a request that was

ultimately accepted by the Chief of Police at the Elkhart Police Department. (EH at 142:5-19).

68. Detective Conway admits that he was removed from the homicide unit of the Elkhart Police Department prior to Mr. Royer's trial. (EH at 517:11-13). Detective Conway testified that he was informed at the time of his removal that it stemmed from the "possibility [of] misrepresentation to an attorney." (EH at 519:23-25).

69. Detective Conway's removal from the homicide unit was not by choice. (EH at 532:18-22). In fact, Detective Conway attempted to appeal his removal to the Chief of Police, which was summarily denied. (EH at 533:2-6). To this day, Detective Conway has never been placed back in the homicide unit of the Elkhart Police Department. (EH at 533:7-9).

70. Pursuant to a stipulation between the parties, "it is undisputed that any discipline against or demotion of Detective Conway from the homicide unit was not disclosed by the Elkhart Police Department to Mr. Royer's defense prior to his 2005 trial." (EH at 19:20-25).

71. As the lead investigator in the Sailor homicide, responsible for obtaining statements from Mr. Royer, Detective Conway's credibility was a critical factor in the case. Detective Conway's testimony regarding his interrogations of Mr. Royer and his claims that Royer confessed to the murder subsequent are matters clearly material to Royer's innocence or guilt. The decision made by leadership in the Elkhart Police Department to remove Detective Conway from the homicide unit is material impeachment evidence. The new evidence significantly undermines Detective Conway's credibility and testimony at trial.

72. This Court finds that the State introduced no evidence contradicting Sergeant Wargo's findings or the supporting documentary evidence submitted by Mr. Royer.

73. The Court finds that this new evidence would have been material to the jury's determination of Detective Conway's credibility as a witness at trial. This new evidence would have been material to the jury's ultimate determination of Mr. Royer's innocence if known and if available at the time of trial.

74. The Court finds that this new evidence would have been relevant to Detective Conway's testimony and credibility at trial about his interrogation of Mr. Royer.

75. The Court finds that Detective Conway's removal from the homicide unit was not disclosed to Mr. Royer or his defense at the time of his criminal trial and could not have been discovered by him or his counsel in the exercise of reasonable diligence in 2005.

76. The Court finds that evidence presented satisfies the newly discovered evidence standard set forth in *Carter v. State*, 738 N.E.2d 665, 671 (Ind. 2000). On this score, the Court finds that this is newly discovered evidence that has been discovered since trial which is material and relevant. The Court finds that this evidence is not cumulative nor merely impeaching. This Court further finds that the evidence is competent, worthy of credit, and can be produced upon retrial. The Court finds that Mr. Conway's removal from the homicide unit because his supervisors had concerns about the impact that his misrepresentations would have on homicide investigations and his credibility at trials if called to testify is material to the State's case at trial. This new evidence demonstrates that Conway's testimony and the State's argument to the jury were inaccurate and materially misleading. The Court finds that this new

evidence undermines the credibility of the State's case and there is a reasonable probability that this new evidence will produce a different result on retrial.

77. The Court finds that the evidence presented satisfies the requirements of *Brady v. Maryland* and *Giglio v. United States* as well. *Brady v. Maryland*, 373 U.S. 84, 87 (1963). It is undisputed between the parties that the evidence was not disclosed to the defense. The Court finds that the evidence is favorable to the defense as it would have constituted critical impeachment evidence of the State's main law-enforcement witness. Finally, the Court finds that the withheld evidence was material to an issue at trial.

V. Monetary Consideration Promised and Paid to Nina Porter

78. Petitioner has presented this Court with newly discovered evidence establishing that the State's critical third-party witness, Nina Porter, was paid $2,000 for her cooperation in this case.

* * * * *

85. It is undisputed that the payment of $2,000 to Nina Porter was not disclosed to Mr. Royer's defense prior to trial. (EH at 20:1-4).

86. This Court finds that the undisclosed payment to Ms. Porter is material impeachment evidence. The Court also finds that the undisclosed payment casts doubt on the credibility of Ms. Porter's 2005 trial testimony.

87. Additionally, this Court finds Ms. Porter's testimony that she was promised consideration prior to giving a statement and testifying at trial to be credible. Furthermore, neither the promise

nor the actual payment to Porter were disclosed prior to trial, which is a classic *Giglio* violation.

88. Consistent with the parties' stipulation, the Court finds that the promise and payment to Ms. Porter was not disclosed to Mr. Royer or his defense at the time of his criminal trial and could not have been discovered by him or his counsel in the exercise of reasonable diligence in 2005.

89. The Court finds that the evidence presented satisfies the newly discovered evidence standard set forth in *Carter v. State*, 738 N.E.2d 665, 671 (Ind. 2000). On this score, the Court finds that this is newly discovered evidence that has been discovered since trial which is material and relevant. This Court finds that this evidence is not cumulative nor merely impeaching. This Court further finds that the evidence is competent, worthy of credit, and can be produced upon retrial. The Court finds that payment is material to the State's case at trial. This new evidence demonstrates that the State's argument to the jury were inaccurate and materially misleading. The Court finds that this new evidence undermines the credibility of the State's case and there is a reasonable probability that this new evidence will produce a different result on retrial.

90. The Court finds that the evidence presented satisfies the *Brady v. Maryland* standard as well. *Brady v. Maryland*, 373 U.S. 84, 87 (1963). It is undisputed between the parties that the evidence was not disclosed to the defense. The Court finds that the evidence is favorable to the defense as it would have constituted critical impeachment evidence of the State's star third-party witness. Finally, the Court also finds that the withheld evidence is material to an issue at trial.

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VI. Nina Porter's Recantation of Her Statement and Attendant Trial Testimony

* * * * *

110. The Court finds Ms. Porter's testimony that she was threatened by Detective Conway and promised monetary consideration to testify falsely against Ms. Canen and Mr. Royer to be credible.

111. The Court finds that Ms. Porter's recantation is credible.

112. The Court finds that Ms. Porter's explanation for how her statement was created is credible.

113. It is undisputed that the coercion and fabrication of Nina Porter's statements and false trial testimony were not disclosed to Mr. Royer's defense lawyer. (EH at 20:4-8). The Court finds that this could not have been discovered by Mr. Royer or his counsel in the exercise of reasonable diligence in 2005.

114. This Court finds that the circumstances leading to the creation of Ms. Porter's statement and subsequent trial testimony are material, relevant, and exculpatory.

115. The Court finds that the evidence presented satisfies the newly discovered evidence standard set forth in *Carter v. State*, 738 N.E.2d 665, 671 (Ind. 2000). On this score, the Court finds that this is newly discovered evidence that has been discovered since trial which is material and relevant. The Court finds that this evidence is not cumulative nor merely impeaching. This Court further finds that the evidence is competent, worthy of credit, and can be produced upon retrial. The Court finds that new evidence is material to the State's case at trial. This new

evidence demonstrates that the State's argument to the jury were inaccurate and materially misleading. The Court finds that this new evidence undermines the credibility of the State's case and there is a reasonable probability that this new evidence will produce a different result on retrial.

116. The Court finds that the evidence presented satisfies the *Brady v. Maryland* standard as well. *Brady v. Maryland*, 373 U.S. 84, 87 (1963). It is undisputed between the parties that the evidence was not disclosed to the defense. The Court finds that the evidence is favorable to the defense as it would have constituted critical exculpatory and impeachment evidence relating to the State's star third-party witness. Finally, the Court also finds that the withheld evidence is material to an issue at trial.

VII. Interrogation Issues

117. The Court next addresses the two statements obtained by Detective Conway from Mr. Royer on September 3, 2003 and September 4, 2003. What remains of the State's case is based almost exclusively on two audio-recorded statements from September 3, 2003 and September 4, 2003. Those audio-recorded statements total approximately 61 minutes. This Court heard substantial evidence and testimony regarding those statements and what occurred during the approximate seven and a half hours of Detective Conway's unrecorded interrogations of Mr. Royer. Given the newly discovered evidence, the Court concludes that the statements obtained from Mr. Royer are unreliable. The Court also finds that the statements are involuntary. Given the newly discovered evidence discussed *infra*, Mr. Royer's unreliable statements would not result in a conviction upon retrial.

* * * * *

C. Detective Conway's Awareness and Dismissal of Royer's Vulnerabilities

121. Petitioner has likewise developed newly discovered evidence indicating that Detective Conway was aware of Mr. Royer's vulnerabilities during the interrogation process. Knowing these vulnerabilities, Petitioner has demonstrated that Detective Conway did not use any protections to safeguard against the possibility of Mr. Royer giving false and unreliable statements. The Court summarizes the most salient facts in turn.

122. Prior to interrogating Mr. Royer, Detective Conway was informed by Detective Snider, a member of the homicide unit, that the Elkhart Housing Authority had documentation illustrating that Mr. Royer was severely disabled and had the mind of a child. (EH at 211:1-10). Detective Conway admits that he was aware of such information prior to engaging in a two-day interrogation of Mr. Royer. (EH at 284:17-285:1). Mr. Conway admitted on the stand that he considered this evidence to be just an opinion. (Id.) Although Detective Conway testified that he disagreed with this opinion (EH at 285:2-5), he did not take any investigative steps to determine whether Mr. Royer was mentally disabled or the extent of his mental disability prior to interrogating him. (EH at 286:20-287:3).

123. Conversely, Detective Daggy testified that he did not disagree with the information obtained by Detective Snider that Mr. Royer was severely mentally disabled and had the mind of a child. (EH at 858:14:20). In his words, "I know there are some issues with him mentally." (EH at 858:19-20).

124. Although Detective Conway testified that he did not contact Oaklawn prior to questioning Mr. Royer, had he done so, he would have learned that Mr. Royer was diagnosed with schizoaffective disorder while receiving treatment at Oaklawn.

(EH at 166:17-22). Mr. Royer was also on multiple psychiatric medications. (EH at 169:14-15).

125. Geneva West was a property manager for the Elkhart Housing Authority in 2002. (EH at 653:12-14). At the time of the underlying events, Ms. West was the manager of the Waterfall High-Rise. (EH at 653:21-654:1). Ms. West was familiar with Andrew Royer in November of 2002, as he was a resident in the Waterfall High-Rise. (EH at 654:22-655:6). As Ms. West revealed, Mr. Royer qualified to be a resident of the High-Rise because he had a "mental disability." (EH at 655:21-25). Ms. West recalled speaking to an Elkhart police officer on August 28, 2003 regarding the investigation into Helen Sailor's death. (EH at 657:7-24). In that meeting, Ms. West informed the officers that the file pertaining to Mr. Royer documented that he was severely disabled, had the mind of a child, and was being treated at Oaklawn. (EH at 658:17-22; 660:14-16).

126. In spite of this, Mr. Royer was not permitted to have a lawyer, counselor, nor family member present for his interrogations on September 3, 2003 and September 4, 2003. (EH at 295:8-20). The Court finds that this newly discovered evidence, too, would impact a future trier of fact's consideration of the veracity and reliability of the statements obtained from Mr. Royer.

* * * * *

E. Detective Conway Fed Information to Mr. Royer During the Unrecorded Interrogations

131. Petitioner has presented additional newly discovered evidence establishing that the statements obtained from Mr. Royer are unreliable. Detective Conway made critical

admissions that would impact a future trier of fact's consideration of the statements obtained from Mr. Royer.

132. Mr. Conway spoke to Mr. Royer "quite extensively" before obtaining his recorded statement. (EH at 349:14-350:1). Given that Detective Conway obtained Mr. Royer's September 3, 2003 recorded statement at 1:32 p.m. and the waiver was signed at 9:35 a.m., this Court finds that Detective Conway interrogated Royer for nearly four hours prior to taking his recorded statement. (Petitioner's Ex. 18; EH at 359:10-13). During this unrecorded interrogation, Mr. Royer maintained his innocence for the first two to three hours. (EH at 363:13-16).

133. Although Detective Conway admits that it's inappropriate to feed someone information about the details of the crime during an interrogation, "so that way they are not repeating back just what they're told," Mr. Conway admits engaging in this tactic with Mr. Royer. (EH at 500:4-7; 365:3-5). Detective Conway repeatedly provided intimate details of the crime to Mr. Royer during the unrecorded interrogation process. (EH at 388:5-10).

-Detective Conway admits he was the first person to accuse Mr. Royer of striking the victim. (EH at 399:22-200:7).

-Detective Conway was also the first to bring up towels being thrown away. (EH at 401:18-402:12). After Mr. Royer did not respond in a satisfactory manner, Detective Conway then confronted Mr. Royer with the towels being thrown in the dumpster. (EH at 402:20-403:25).

-Detective Conway admits he was the first person to bring up that a substance was poured on the victim. (EH at 419:21-23).

134. This Court finds that Detective Conway's admissions regarding the nature and method of the Royer interrogations are significant newly discovered evidence, most especially when compared to his testimony at Mr. Royer's 2005 trial. There, Detective Conway testified that:

> Q: Okay when you were interviewing the defendant, Andrew Royer, for the first time on September 3, 2003, did you give him any details about Helen Sailor's murder?
>
> A: No. As a matter of fact in Mr. Royer's case I made a point not to.
>
> Q: Why not?
>
> A: I mean, we were well aware of Mr. Royer and, and of, we have limited knowledge about his mental background. So I definitely wanted to make a point not to give Mr. Royer, just for the sheer fact that he might go ahead and dispose of the concept that we might have been spoon feeding him information.

R. at 490

135. This Court finds that Detective Conway did not have a credible explanation for why his admissions to feeding Mr. Royer information about the homicide during the interrogation were directly contrary to the testimony he provided at the 2005 trial. (EH at 423:1-16).

136. Given his admissions, this Court finds that Detective Conway repeatedly provided information about the homicide to Mr. Royer throughout the unrecorded two-day interrogation sessions.

137. The Court finds that this newly discovered evidence, too, would impact a future trier of fact's consideration of the veracity and reliability of the statements obtained from Mr. Royer.

* * * * *

I. Detective Daggy's Observations Support the Unreliability of Mr. Royer's Statements

162. Petitioner has presented this Court with newly discovered evidence derived from Detective Daggy's testimony. This Court summarizes some of Detective Daggy's admissions below.

163. From witnessing the September 3, 2003 interrogation of Mr. Royer, Detective Daggy came to form his belief that the manner of questioning was not only leading, but in fact, "super-leading." (EH at 870:7-10; 878:2-6; 886:25-887:3).

164. In fact, Detective Daggy informed the Court that this was one of the worst interrogations that he witnessed in his career. (EH at 875:3-5). For Mr. Daggy, "it was one of the most difficult ones to watch." (EH at 875:20-23).

165. Detective Daggy formed the same opinions regarding the recorded statements obtained from Mr. Royer on September 3, 2003 and September 4, 2003. (EH at 2-15).

166. From Detective Daggy's view, the interrogation was so taxing that when Detective Conway exited the room, "he would appear like he was . . . struggling, he appeared fatigued or tired." (EH at 870:18-23). According to Detective Daggy, Detective Conway was also frustrated and having a hard time due to Mr. Royer's mental disability. (EH at 870:10-14; 872:9-21).

167. Detective Daggy testified that the corroboration of details in a confession is an important process to determine whether the statement is reliable. (EH at 894:2-7). Here, Detective Daggy agreed that Mr. Royer's statements conflicted with one another and the physical evidence. (EH at 894:12-895:21). In fact, Detective Daggy testified that he believed that portions of Mr. Royer's statements "were lies." (EH at 895:22-25).

168. Detective Daggy further revealed to this Court that although Mr. Royer implicated Lana Canen in the Sailor homicide in two recorded statements—September 3, 2003 and September 4, 2003—Ms. Canen was released from jail in September of 2003. (EH at 913:3-11).

169. According to Detective Daggy, probable cause did not exist to initiate charges against Lana Canen based on Mr. Royer's statements on September 4, 2003. (EH at 913:15-20).

170. This is a critical admission from the Court's perspective, as is discussed above, by the time the State possessed two audio-recorded statements from Mr. Royer admitting his involvement in the Sailor homicide and an additional statement from Ms. Porter implicating Ms. Canen and Mr. Royer in the crime.

171. Detective Daggy clarified that he did not take any action to initiate charges against Ms. Canen until September 2, 2004, after Mr. Chapman issued his opinion positively matching Lanen's inked prints to the latent print found at the scene of the homicide. (EH at 961:1-18).

172. This Court finds that this newly discovered evidence, too, would impact a future trier of fact's consideration of the veracity and reliability of the statements obtained from Mr. Royer. The statements are unreliable and given the newly discovered

> evidence, there is a reasonable probability of a different result on retrial.

(App. Vol. VI at 82-88; 96-104; 109-10; 112-17; & 124-25) (emphases in original) (internal footnotes omitted) (errors in original). The post-conviction court granted Royer's successive petition for post-conviction relief and vacated his murder conviction. The post-conviction court also ordered a new trial. By separate order, the post-conviction court ordered Royer released on his own recognizance pending retrial.

Discussion and Decision

I. Standard of Review

[21] When the State appeals from the grant of a petition for post-conviction relief, we review the post-conviction court's decision pursuant to Indiana Trial Rule 52(A), which provides:

> On appeal of claims tried by the court without a jury or with an advisory jury, at law or in equity, the court on appeal shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses.

Therefore, we do not reweigh the evidence or judge the credibility of the witnesses. *State v. Oney,* 993 N.E.2d 157, 161 (Ind. 2013). We draw all reasonable inferences in favor of the post-conviction court's decision, and we will reverse only upon a finding of clear error. *Id.* "Clear error is 'that which

leaves us with a definite and firm conviction that a mistake has been made.'" *Id*. (quoting *Spranger v. State*, 650 N.E.2d 1117, 1119 (Ind. 1995)). We will accept as true factual findings not challenged by the parties. *Madlem v. Arko*, 592 N.E.2d 686, 687 (Ind. 1992). Nonetheless, we review the post-conviction court's conclusions of law de novo. *State v. Stidham*, 157 N.E.3d 1185, 1190 (Ind. 2020), *reh'g denied*.

[22] Indiana Post-Conviction Rule 1(1)(a)(4) states, in relevant part:

> Any person who has been convicted of, or sentenced for, a crime by a court of this state, and who claims:
>
> * * * * *
>
> (4) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
>
> * * * * *
>
> may institute at any time a proceeding under this Rule to secure relief.

A petitioner for post-conviction relief based on a claim of new evidence bears the burden of proof and must meet nine requirements to obtain relief:

> (1) the evidence has been discovered since trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) it is worthy

> of credit; (8) it can be produced upon a retrial of the case; and (9) it will probably produce a different result at trial.

Whedon v. State, 900 N.E.2d 498, 504 (Ind. Ct. App. 2009), *summarily aff'd*, 905 N.E.2d 408 (Ind. 2009). Courts review petitions for post-conviction relief based on claims of new evidence "with great caution" and carefully scrutinize the alleged new evidence. *Taylor v. State*, 840 N.E.2d 324, 330 (Ind. 2006).

[23] As our Indiana Supreme Court has explained: "By definition, a claim for relief based on newly discovered evidence must not be based on evidence or information of which the claimant had knowledge prior to trial." *Wisehart v. State*, 693 N.E.2d 23, 36 (Ind. 1998), *reh'g denied*, *cert. denied*, 526 U.S. 1040 (1999). A defendant may not fail to present evidence at trial only to later argue the evidence entitles him to a new trial. *Id*. Rather, it is the post-conviction relief petitioner's burden to put forth "a particularized showing that all methods of discovery reasonably available to counsel were used and could not uncover the newly found information." *Bunch v. State*, 964 N.E.2d 274, 292 (Ind. Ct. App. 2012), *reh'g denied*, *trans. denied*. However, due diligence does not require counsel to undertake extraordinary efforts, such as interviewing everyone in town. *Rhymer v. State*, 627 N.E.2d 822, 824 (Ind. Ct. App. 1994), *reh'g denied*.

II. Chapman's Misidentification of Crime Scene Fingerprint and Nina Porter's Recantation of her Testimony

[24] By his own admission, Chapman lacked the training necessary to compare latent prints with inked prints. Yet, the Elkhart Police Department asked him

to make such a comparison in the Sailor murder case, and Chapman felt pressured by the police department to make the comparison. Chapman identified a latent fingerprint as belonging to Canen. However, years later, he realized his opinion was incorrect because the "ridge count was way off" and the "distance from the delta[15] to the core was a lot longer in the latent print th[a]n what [Canen's] print was." (Tr. Vol. II at 64.) Marcus Montooth, the technical supervisor of the Indiana State Police latent print unit, testified at Royer's post-conviction hearing that the latent fingerprint Chapman had identified at trial as belonging to Canen actually belonged to one of Sailor's home health aides.

[25] Porter testified at the post-conviction hearing that she was questioned by three detectives about the Sailor murder. She described the primary interrogating officer as "[v]ery tall, very big shoulders, very loud[.]" (Tr. Vol. IV at 18.) She explained that she initially denied having any knowledge regarding the Sailor murder, but the officers threatened her with a return to prison and the loss of custody of her children. Porter eventually gave a false statement implicating Canen, and Porter incorporated information the officers wrote on the back of crime-scene pictures into her statement. Officers informed Porter prior to her testimony at Royer's criminal trial that she would receive a reward in exchange for giving information related to the Sailor murder. Detective Daggy delivered

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[15] A delta is a roughly triangular formation within a fingerprint. "Fingerprint Patterns: Identifying the Different Types Easily." https://sciencestruck.com/identifying-types-of-fingerprint-patterns [https://perma.cc/M44A-92MZ]

the $2,000 to Porter shortly after the conclusion of Royer's trial. The post-conviction court found that Porter's testimony at the evidentiary hearing was credible and that Porter's recantation of her testimony constituted new evidence.

[26] The State asserts:

> The repudiation of the evidence establishing that the latent fingerprint in Sailor's apartment matched Canen did not undermine Royer's confessed guilt. Likewise, the post-conviction court's findings relating to the monetary consideration given to Nina Porter after trial and Porter's recantation of her trial testimony did not weaken the evidence against Royer.

(Appellant's Br. at 26-27.) The State also contends "Royer spills much ink emphasizing the post-conviction court's discussion of the repudiated evidence that implicated Canen, but this evidence was immaterial to the jury's determination of Royer's admitted guilt." (Appellant's Reply Br. at 8.) However, in our opinion on Royer's direct appeal, we explicitly referenced this evidence – Royer and Canen were friends, Canen's fingerprint was found in Sailor's apartment, and Porter heard Canen talk about the crime – in holding that the State presented sufficient evidence to sustain Royer's conviction. *Royer*, 20A03-0601-CR-14, slip. op. at *4.

[27] The State's theory of the case was that Royer acted as the "brawn" in Canen's plot to rob Sailor and that Royer killed Sailor when the plan went awry. (DA Tr. Vol. III at 764.) The State referred to the misidentified latent fingerprint as the "most important piece of evidence in this case." (*Id*. at 730.) The State

used the fingerprint to place Canen inside Sailor's apartment, and it argued Royer was also in Sailor's apartment because Canen exerted substantial influence over him. The State used Porter's testimony to exemplify the influence Canen exerted over Royer, and the State used Porter's testimony to indicate that Canen had told others about her involvement in the crime. Consequently, we agree with the post-conviction court's determination that the misidentified latent fingerprint, Porter's recantation of her testimony, and Porter's receipt of a reward that was not disclosed during trial constitute newly discovered evidence that undermines the State's case against Royer and produces a reasonable probability of a different result on retrial. *See Bunch*, 964 N.E.2d at 297 (holding petitioner was entitled to post-conviction relief when her conviction rested on discredited evidence).

III. Detective Conway's Removal from Homicide Unit

[28] The State also challenges the post-conviction court's findings that Detective Conway's removal from the homicide unit was newly discovered evidence and that the State's failure to disclose it constituted a *Brady v. Maryland*[16] violation. "The State has the duty to disclose to the defense evidence which is material to either guilt or punishment of the accused. This duty extends to evidence which can be used for impeachment." *Marshall v. State*, 621 N.E.2d 308, 315 (Ind. 1993) (internal citation omitted). The requirement that new evidence not be

[16] 373 U.S. 83, 83 S. Ct. 1194 (1963).

"merely impeaching" does not bar impeaching evidence that "destroys or obliterates the testimony upon which a conviction was obtained[.]" *Bunch*, 964 N.E.2d at 291. "The failure of the prosecution to honor the requests of the defense for evidence, for which a substantial basis for claiming materiality exists, is seldom, if ever excusable." *Rowe v. State*, 704 N.E.2d 1104, 1108-09 (Ind. Ct. App. 1999), *reh'g denied*, *trans. denied*. "To prevail on a *Brady* claim, a defendant must establish: (1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that the evidence was material to an issue at trial." *See Bunch*, 964 N.E.2d at 297 (quoting *Minnick v. State*, 698 N.E.2d 745, 755 (Ind. 1998)). Evidence is considered material if "a reasonable probability" exists that if the evidence had been disclosed to the defense, the outcome of the trial would have been different. *Id*. "However, the State will not be found to have suppressed material evidence if it was available to a defendant through the exercise of reasonable diligence." *Id*.

[29] Royer filed a motion for discovery and a request for evidence pursuant to Indiana Evidence Rules 404 and 405 on September 9, 2003. In that motion, Royer requested:

> Any and all evidence in the possession or control of the State of Indiana or its agents which may be favorable to the Defendant and material to the issue of guilt or punishment or could reasonably weaken or affect any evidence proposed to be introduced against the Defendant or is relevant to the subject matter or the charge filed herein or which in any manner may aid the Defendant in the ascertainment of the truth.

(DA App. Vol. I at 12.) At the evidentiary hearing on Royer's successive petition for post-conviction relief, the parties stipulated, "It is undisputed that any discipline or demotion of Detective Conway from the homicide unit by the Elkhart Police Department was not disclosed to Mr. Royer's defense prior to his 2005 trial." (Tr. Vol. II at 12.)

A. State's Suppression of Evidence

[30] For *Brady* purposes, the prosecutor is charged with knowledge of information known by the police even if the prosecutor herself is unaware of the information. *Turner v. State*, 684 N.E.2d 564, 568 (Ind. Ct. App. 1997) ("The prosecutor in this case was unaware of the existence of the blood test results. However, because Lieutenant Councellor was aware of their existence, the prosecutor is charged with knowledge of them as well."), *trans. denied*. Here, the prosecutor knew by the time of Royer's trial that Detective Conway had been removed from the homicide unit.

[31] Detective Conway's removal was based on his behavior during the case involving the murder of Gwen Hunt, which was unrelated to the Sailor case. On October 11, 2003, Detective Conway learned from an informant that Stacy Orue and two others were involved in the murder of Hunt. Detective Conway decided to interview Orue, who was already in custody, and he communicated with Orue's counsel, Cliff Williams, prior to interrogating Orue. After Williams and Orue consulted, Detective Conway interviewed Orue outside the presence of her counsel. Williams subsequently contacted Sergeant Wargo and complained "that when Conway contacted him that Cliff Williams asked

Detective Conway if Stacy Oreu was a suspect or was not a suspect in the case," and Detective Conway inaccurately stated that Oreu was not a suspect. (Tr. Vol. II at 91.) Sergeant Wargo explained the consequences of this misrepresentation, "I would imagine that Mr. Williams would want to be present if she was being questioned as a suspect, due to the fact that she was incarcerated already on a non-related investigation." (*Id.*)

[32] Sergeant Wargo and Lieutenant Converse thus determined Detective Conway should be removed from the homicide unit. They were concerned that Detective Conway's misrepresentation to Williams could impact Detective Conway's credibility in future homicide trials if called to testify. Lieutenant Converse requested that Detective Conway be removed from the homicide unit, and the Police Chief transferred Detective Conway to a different unit. Royer's trial occurred in 2005, over a year later, and the prosecutor did not communicate this information to Royer at any time in the interim.

[33] The State argues that Detective Conway's removal from the homicide unit does not qualify as newly discovered evidence "because Royer knew or should have known the essential facts giving rise to Detective Conway's lateral move from the homicide unit." (Appellant's Br. at 54.) The State notes that Williams was the chief public defender in Elkhart County at the time and an attorney from the public defender's office represented Royer at trial. However, the State does not cite to any authority for imputing the knowledge of one public defender to

an entire public defender's office.[17] Therefore, we decline to hold Royer knew or should have known about Detective Conway's removal from the homicide unit due to the public defender's office role in the events which led to Detective Conway's removal. *See In re V.A.*, 632 N.E.2d 752, 757 (Ind. Ct. App. 1994) (declining to impose a change in Indiana law).

B. Materiality and Favorability of Evidence to Defense

[34] The State also argues that Detective Conway's removal from the homicide unit "did not seriously undermine Detective Conway's credibility or make Royer's confessions to the crime inadmissible or less believable." (Appellant's Br. at 56.) However, Detective Conway's credibility was integral to the State's case. No physical evidence linked Royer to the crime, and his confessions were the most damaging pieces of evidence against him. Detective Conway testified regarding Royer's demeanor both before and after Detective Conway started recording Royer's statement on September 3, 2003. Detective Conway also testified that Royer made several incriminating statements during the unrecorded portions of his interrogations. The jury was required to rely on Detective Conway's account of what occurred during the interrogations. Detective Conway chose not to video record any portion of either interrogation even though the Elkhart Police Department possessed video recording

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[17] The State's argument also assumes that Williams learned about Detective Conway's removal after Williams lodged his complaint. Williams passed away prior to the evidentiary hearing on Royer's successive petition for post-conviction relief, and therefore, the record does not reflect what Williams knew about the Elkhart Police Department's actions following his complaint.

capabilities at the time. Also, Detective Conway chose not to audio record hours worth of questioning which preceded Royer's recorded statements. Consequently, we hold that the State's failure to disclose Detective Conway's removal from the homicide unit calls into question the integrity of Royer's conviction and requires a new trial. *See Bunch*, 964 N.E.2d at 304 (holding petitioner entitled to new trial because State did not disclose information in Bureau of Alcohol, Tobacco, and Firearms file that contradicted State witness's testimony).

IV. Detective Conway's Interrogations of Royer

A. Detective Daggy's Observations of Interrogation

[35] Detective Daggy testified during the evidentiary hearing on Royer's petition for post-conviction relief that he observed through a closed-circuit monitoring system a portion of Detective Conway's first interrogation of Royer. He stated that the interrogation was hard to watch and that he found Detective Conway's interview style to be "super-leading." (Tr. Vol. IV at 155.) The State argues that these opinions of Detective Daggy "could have been discovered with the exercise of due diligence, [were] not admissible, [are] immaterial, and [are] not worthy of credit." (Appellant's Br. at 51.) However, Detective Daggy intentionally concealed his observations and they came to light only as the result of a covertly recorded conversation. Therefore, Royer could not have discovered them with the exercise of due diligence. *See Boss v. Pierce*, 263 F.3d 734, 741 (7th Cir. 2001) ("Because mind-reading is beyond the abilities of even the most diligent attorney, such material simply cannot be considered available

in the same way as a document."), *reh'g denied*, *reh'g en banc denied*, *cert. denied*, 535 U.S. 1078 (2002).

[36] The State argues that Detective Daggy's opinion of Detective Conway's interview style would invade the province of the jury.[18] We disagree. Rather than invading the province of the jury, Detective Daggy's observations regarding how the September 3, 2003, interrogation was conducted would have given the jury additional information about what occurred during the interrogation, and as a result, the jury would have been better positioned to evaluate Detective Conway's testimony. *See Henson v. State*, 535 N.E.2d 1189, 1192-93 (Ind. 1989) (holding testimony was admissible because while it tended to show another witness' testimony was not credible, it was not direct testimony regarding the other witness' credibility). Therefore, we affirm the post-conviction court's conclusion that Detective Daggy's observations constitute newly discovered evidence that raises a reasonable probability of a different verdict.

[18] The State also argues that Detective Daggy's testimony that he did not believe the Elkhart Police Department possessed probable cause to arrest Canen after Royer's confessions is inadmissible. However, it is not necessary for us to address this issue to resolve the current appeal, and we decline to do so. *See J.D.M. v. State*, 68 N.E.3d 1073, 1079 n.4 (Ind. 2017) (declining to address additional claim made by appellant after determining first issue was dispositive).

B. Detective Conway's Contradictory Testimony

1. Detective Conway's Feeding Information to Royer

[37] At Royer's criminal trial, Detective Conway denied giving Royer details about Sailor's murder during his interrogations of Royer:

> [State:] When you were interviewing the defendant, Andrew Royer, for the first time on September 3, did you give him any details about Helen Sailor's murder?
>
> [Det. Conway:] No. As a matter of fact, in Mr. Royer's case I made a point not to do it.
>
> [State:] Why not?
>
> [Det. Conway:] I mean, I—we were well aware of Mr. Royer, and . . . we had limited knowledge about his mental background. So I definitely wanted to make a point not to give to Mr. Royer just for the sheer fact that he might go ahead and dispose of the concept that we might have been spoon feeding him information.

(DA Tr. Vol. II at 490-91.) The State even emphasized this testimony during its closing argument at Royer's criminal trial:

> Detective Conway said I didn't give any information because I knew he wasn't mentally sophisticated. I called and checked with Oaklawn[19] to see if I should go forward. They said fine, but he got on the stand and told you specifically, I didn't do those things because I didn't want to plant things in Andrew Royer's

[19] Oaklawn is a mental health facility that was providing outpatient treatment to Royer at the time of the interrogations.

> head. If you listen to the statement, he gives intimate details that would not have been disclosed to the public.

(DA Tr. Vol. III at 766.)

[38] However, Detective Conway's testimony during the evidentiary hearing on Royer's successive petition for post-conviction relief directly contradicted this aspect of his testimony at Royer's trial. As our Indiana Supreme Court has explained, the use of perjured testimony "invokes the highest level of appellate scrutiny," and we will set aside a conviction "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Gordy v. State*, 385 N.E.2d 1145, 1146 (Ind. 1979). Detective Conway acknowledged during Royer's successive petition for post-conviction relief that he was the first person to mention several details of the crime. He suggested Royer struck Sailor. He was the first person to mention that a substance had been poured on Sailor. He was the first person to mention that towels had been thrown away. Royer did not volunteer any of these pieces of information. Yet, at Royer's murder trial, Detective Conway testified:

> [State:] Did the defendant refer to items of—or cleaning up things that were details not released to the public?
>
> [Det. Conway:] Yes, ma'am.
>
> [State:] Were there other details that were not released to the public which the defendant seemed to have intimate knowledge of?

[Det. Conway:] Yes, ma'am.

[State:] What were those?

[Det. Conway:] Locations within the apartment that were rummaged through, where some of the evidence was disposed at.

[State:] Where was that?

[Det. Conway:] Waterfall Highrise has an internal garbage chute that goes to every floor where you can drop items down, and they will go down into a main hopper down—actually adjoined to the building outside the parking lot. Some of the items—some of the towels that were used to clean up the area of the scene were actually thrown in the garbage chute, and we found them in the hopper. He knew this. No one else—we did not ever disseminate that information to him.

[State:] Okay. So there were some details that you kept completely private.

[Det. Conway:] Yes, ma'am.

[State:] Yet he had intimate knowledge.

[Det. Conway:] Absolutely.

(DA Tr. Vol. II at 492-93.)

[39] The State argues these revelations do not amount to newly discovered evidence because Royer was personally present during the interrogations and could have challenged Conway's account of what occurred at trial. The State argues that

Royer's successive post-conviction counsel merely conducted an "improved cross-examination of the detective with old materials" and thus Detective Conway's admissions at the hearing do not constitute newly discovered evidence. (Appellant's Br. at 42.) The State's argument nonetheless misses the point. "Without some showing of intentional withholding by the witness, a person who testifies at trial can be assumed to have been available for whatever exploration is appropriate." *Stephenson v. State*, 864 N.E.2d 1022, 1052 (Ind. 2007), *reh'g denied*, *cert. denied*, 552 U.S. 1314 (2008). However, Detective Conway withheld the truth when he attempted to bolster the reliability of Royer's confessions by saying Royer knew details about the murder which were not known to the public. Thus, we hold that Royer was entitled to post-conviction relief due to Detective Conway's misrepresentation to the jury that he did not feed information about the crime to Royer and the State's reliance on Detective Conway's denial during its closing argument to implicate Royer.[20]

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[20] Detective Conway's false testimony at Royer's trial is particularly galling because he was an Elkhart Police Department detective at the time of Royer's trial and, as of the evidentiary hearing on Royer's successive petition for post-conviction relief, Detective Conway was still employed by the Elkhart Police Department overseeing the juvenile bureau and the special victims unit. As we have explained,

> when law enforcement officers lie under oath, they ignore their publicly funded training, betray their oath of office, and signal to the public at large that *perjury* is something not to be taken seriously. This type of conduct diminishes the public trust in law enforcement and is beneath the standard of conduct to be expected of any law enforcement officer.

Moore v. State, 143 N.E.3d 334, 343 (Ind. Ct. App. 2020) (emphasis in original), *trans. denied*; *see also Littler v. Martinez*, No. 2:16-cv-00472, 2020 WL 42776, at *24 (S.D. Ind. Jan. 3, 2020) (sanctioning Indiana Department of Correction officials for making false statements under oath in suit brought by prisoner pursuant to 42 U.S.C. §1983). Police officers are entrusted with the authority to arrest and in some cases use deadly force against private citizens. We must, therefore, have confidence that police officers are performing

See State v. Hicks, 519 N.E.2d 1276, 1280-81 (Ind. Ct. App. 1988) (holding petitioner entitled to post-conviction relief after post-conviction court determined that testimony implicating petitioner may have been perjurious), *summarily affirmed in relevant part*, 525 N.E.2d 316, 318 (Ind. 1988).

2. Detective Conway's Awareness of Royer's Mental Disabilities

[40] Detective Conway also testified at Royer's criminal trial that he spoke to someone at Oaklawn before interrogating Royer and that individual informed him that it was not necessary to have a counselor present during the interrogation. However, at the evidentiary hearing on Royer's successive petition for post-conviction relief, Detective Conway testified that an Elkhart Housing Authority employee relayed to the Elkhart Police Department that Royer "had a mind of a child," but Detective Conway dismissed this concern as simply "an opinion." (Tr. Vol. II at 202-03.) Royer went on to ask Detective Conway:

> [Royer:] Between the time Ms. Snider provided you with this information that she learned from the housing authority and the time that you questioned Andy Royer, so from August 28th to

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their duties with integrity, and when officers lie under oath that confidence is undermined. *See* Montré D. Carodine, "Street Cred", 46 U.C. Davis L. Rev. 1583, 1591 (2013) ("We should never underestimate the value of the public's trust to the legitimacy and effectiveness of the legal system. . . . 'Public distrust not only conflicts with democratic norms, but a public wary of the police is much less likely to be a legally compliant or cooperative one.'") (*quoting* Elizabeth E. Joh, Breaking the Law to Enforce It: Undercover Police Participation in Crime, 62 Stan. L. Rev. 155, 183 (2009)).

> September 3rd, 2003, what investigation did you do to determine whether Mr. Royer was mentally disabled?
>
> [Det. Conway:] At that point in time, I don't believe there was really any?
>
> [Royer:] You didn't make any phone call to Oaklawn, right?
>
> [Det. Conway:] We didn't have any information about any services that he was, that he was, he was, he was obtaining at the time.

(*Id*. at 204.) The State argues Detective Conway's awareness and dismissal of Royer's mental disabilities does not constitute newly discovered evidence because it was known at the time of trial that Royer was interrogated alone and that Royer became confused and fatigued over the course of the interrogation. However, Detective Conway's testimony at trial left the jury with the impression that he took Royer's mental disabilities into account and took protective measures before interrogating Royer; whereas, Detective Conway's testimony during the successive post-conviction evidentiary hearing reveals he cavalierly dismissed such concerns.[21] *See Hicks*, 519 N.E.2d at 1280-81 (holding

[21] We do not address the State's arguments that the post-conviction court erred in finding newly discovered evidence regarding Royer's waiver of rights, the department's practice of videotaping recorded statements, Detective Conway's lack of internal interrogation training, or Detective Conway's reputation for obtaining confessions because the post-conviction court's findings and conclusions discussed *supra* support granting Royer's petition for post-conviction relief, vacating his conviction, and ordering a new trial. *See Bunch*, 964 N.E.2d at 304 (declining to address additional issues raised by the parties after determining certain claims were dispositive).

petitioner entitled to post-conviction relief after post-conviction court determined that testimony implicating petitioner may have been perjurious).

Conclusion

[41] Simply put, Royer did not receive a fair criminal trial. The State largely concedes many of the post-conviction court's factual findings. The State does not challenge that it introduced evidence of a misidentified latent fingerprint at Royer's criminal trial or that Porter's testimony was false. While the State argues this evidence implicates only Royer's co-defendant, the State used the evidence at Royer's criminal trial to link both him and Canen to the crime. The State also concedes that it did not disclose Detective Conway's removal from the homicide unit prior to Royer's trial. While the State argues the revelations regarding Detective Conway's interrogations of Royer do not constitute new evidence, the State does not argue Detective Conway's testimony during the post-conviction evidentiary hearing was consistent with his testimony at Royer's trial.

[42] The post-conviction court's legal conclusions that the State relied on discredited evidence to secure Royer's conviction, that the State failed to disclose material impeachment evidence in violation of its duty under *Brady v. Maryland*, and that new evidence calls into question the voluntariness of Royer's confessions logically follow from these factual findings. Had this evidence been presented to the jury, there is a reasonable probability that the result of Royer's trial would have been different. Consequently, we affirm the post-conviction court's grant

of Royer's successive petition for post-conviction relief and the vacation of his murder conviction.

[43] Affirmed.

Brown, J., and Weissmann, J., concur.