No. 38570-1-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

EVARISTO JUNIOR SALAS,

Appellant.

On Appeal from the Yakima County Superior Court
Cause No. 96-1-01430-9
The Honorable David A. Elofson, Judge

OPENING BRIEF OF APPELLANT EVARISTO SALAS

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I. INTRODUCTION

In 1996, Evaristo "Junior" Salas was convicted of the first-degree murder of Jose Arreola. He was 14-years old. No physical evidence connected Junior to the homicide – the State's case hinged entirely on the eyewitness identification made by Ofelia Gonzalez six months after the homicide, and the testimony of a William Bruhn, a police informant.

Post-conviction investigation revealed the State suppressed evidence that before trial, Ms. Gonzalez was investigated for rendering criminal assistance for deceiving police in connection to Mr. Arreola's murder, and that she underwent hypnosis prior to identifying Junior as the shooter. Also withheld was the long collaborative relationship between lead Detective Jim Rivard, and Mr. Bruhn, who now admits to receiving financial and other incentives in exchange for testifying falsely against Junior.

When presented with this newly discovered evidence, the trial court issued a blanket denial of relief. All the newly discovered evidence of Junior's innocence necessitates that this Court reverse the trial court's decision and remand for a new trial, or at the very least, a proper evidentiary hearing in front of a different judge.

II. ASSIGNMENT OF ERROR

1. The trial court erred when it denied Junior's Motions for Post-Conviction Discovery and New Trial.

Issues Pertaining to the Assignment of Error

1. Whether appellant's conviction should be vacated because he established the newly discovered evidence (1) would probably change the outcome of the trial; (2) was discovered after the trial; (3) could not have been discovered prior to trial through the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching?
2. Whether appellant's conviction should be vacated the State violated its discovery obligations pursuant to *Brady v. Maryland*?
3. Whether the trial court held a meaningful show cause hearing when it denied appellant's request to depose witnesses and/or present live testimony and denied the CrR 7.8 motion prior to the hearing and prior to the State filing its responsive briefing?

III. STATEMENT OF THE CASE

A. Overview

On January 14, 2020, Evaristo "Junior" Salas filed a CrR 7.8 Motion to Vacate Judgment and Order a New Trial for his 1996 first-degree murder conviction. CP 9-47. The motion was based on newly

discovered evidence. There was no physical evidence connecting Junior to Jose Arreola's murder, which occurred on November 14, 1995. The State's case centered on the testimony of two witnesses: (1) Ofelia Gonzalez[1] who was the victim's girlfriend at the time of his death and stood near the victim when he was shot; and (2) William Bruhn who worked as police informant on Junior's case.

Junior's motion presented four pieces of newly discovered evidence. First, Mr. Bruhn came forward and recanted his trial testimony, which included the damning evidence that he overheard Junior confess to Mr. Arreola's murder and his identification of Junior from three polaroids seen on Detective Rivard's desk. CP 423-25. Mr. Bruhn also admitted that he was paid to testify against Junior, contrary to his trial testimony that he was testifying for the good of the community. CP 424. Supporting this piece of newly discovered evidence was Mr. Bruhn's sworn declaration, corroborating evidence of various factual assertions therein, and a sworn declaration from Junior's trial attorney, George Trejo. CP 423-25, 433-36.

Second, newly discovered evidence that Detective Rivard and/or Sunnyside Police Department had Ms. Gonzalez undergo hypnosis prior to her identification of Junior. In support of this evidence was a sworn

[1] Ofelia Cortez is her current name, however she will be referred to by her former name, Gonzalez, because that is the name used in the exhibits and case file. No disrespect is intended.

declaration from Reyna Arreola, the victim's mother. CP 428-30. Junior also presented a handwritten note documenting Detective Rivard's conversation with Ms. Gonzalez about whether she would be amenable to hypnosis to assist her in identifying the suspects. CP 1081.

Third, while Sunnyside Police investigated Mr. Arreola's homicide, Detective Rivard investigated Ms. Gonzalez for tampering with and destroying physical evidence related to Mr. Arreola's homicide. CP 435-36, 487-90. At the conclusion of his investigation into Ms. Gonzalez, Detective Rivard referred a criminal charge to the State recommending Ms. Gonzalez be charged with rendering criminal assistance to Mr. Arreola's homicide. CP 490. In support of this piece of newly discovered evidence were police reports describing Ms. Gonzalez's criminal acts relating and Sunnyside Police Department's investigation thereof. CP 488-92, 530-31.

Fourth, Junior submitted reports from two expert witnesses presenting new research relevant to his case: Dr. Geoffrey Loftus, an Emeritus Professor of Psychology with expertise in human perception and memory; and Professor Robert Bloom, an expert as to the use of informants in the criminal system. CP 439-85.

On July 9, 2021, the trial court advised the parties of its intention to retain Junior's CrR 7.8 motion. RP 7/9/21, Pg. 32. In preparation for the

hearing on Junior's CrR 7.8 motion, he filed motions for post-conviction discovery. CP 2143-58. On September 27, 2021, the trial court denied Junior's discovery motions. In so doing, the trial court denied Junior's CrR 7.8 motion.

A hearing was scheduled for October 27, 2021, to hear Junior's CrR 7.8 motion. However, the trial court agreed that it ruled on the merits of Junior's CrR 7.8 motion when it ruled on Junior's discovery motions. RP 10/27/21, Pg. 27. No findings of fact and conclusions of law were entered. This appeal follows.

B. The Homicide

On November 14, 1995, Mr. Arreola, Ms. Gonzalez, and their infant son returned to their apartment on Saul Road in Sunnyside around 6:15pm. CP 94.[2] Upon parking at their building, they sat talking in their Mazda pickup truck for a few minutes. CP 95-95. Ms. Gonzalez testified that she looked in the rear-view mirror and saw two boys approaching. CP 97. She described one boy as looking approximately 15 years-old and the other as appearing to be 7 or 8 years-old. CP 106. Ms. Gonzalez got out of the truck and nodded to Mr. Arreola, who was still sitting in the passenger

[2] The complete trial transcripts were submitted as exhibits to Junior's CrR 7.8 motion and are included in the Clerk's Papers. Relevant citations to the report of proceedings from Junior's trial can be found in the Defendant's Motion for Discovery in Post-Conviction Proceedings, CP 2143-58.

seat, with the door closed and the window rolled up. CP 100-01. Ms. Gonzalez testified that she saw the older boy approach the passenger side window and heard two gunshots before both boys ran off. CP 102-03.

Benito Martinez, a neighbor, testified he was inside his neighboring apartment on the second story drinking beer and watching television when he heard an argument and gunshots outside. CP 598-99. He stepped onto his balcony overlooking the parking lot where he saw a black car parked behind a Mazda pickup truck. CP 599. He testified that he saw a large man who appeared to be about 25 years-old get into the black car and drive away. CP 599-600.

Three children, Robert and Albert Perales and Michelle Cisneros, were outside playing in a nearby backyard when the shooting occurred. CP 571, 582-83. Robert, who was 12 years-old at the time of trial, testified that he was standing near the fence and heard an argument in a parking lot on the other side. CP 586. Robert testified that he heard people yelling and someone shouted, "Ricardo, leave them alone," immediately before he heard 4 to 5 gunshots. CP 586-87. Michelle testified that she was able to see into the parking lot from where she stood in the yard and believed there were approximately seven people arguing before she heard gunshots. CP 575-76.

Jeffery Erehart lived in a single-family home across the street from where the shooting occurred. CP 559. He testified that he heard male voices arguing in the parking lot prior to hearing gunshots. CP 560.

C. Police Investigation

Shortly after the shooting, Sunnyside Police found Mr. Arreola inside the truck with extensive gunshot injuries to his head. CP 370-71. He was transported by ambulance to the local hospital, then airlifted to Harborview Medical Center in Seattle where he later succumbed to his injuries. CP 116-17.

At the crime scene on Saul Road, Sunnyside Police made efforts to secure and preserve the truck Mr. Arreola sat in when he was shot. CP 522. Specifically, efforts were made to preserve the window, which was being held together by the tinting materials. CP 372. Officers noted that Mr. Arreola was sitting in the passenger seat with the door closed and window rolled up when he was shot twice in the head. CP 370. The bullets went through the window. CP 499. The truck was towed from the crime scene and impounded at Denny Morrow Towing with instructions that it was to be held as evidence. CP 375-76.

On November 17, 1995, Sunnyside Police showed Ms. Gonzalez two six-pack photo arrays of potential suspects, however she did not make an identification. CP 159-60. She was also given a book of police

mugshots and a yearbook, which she sifted through without any direction. CP 160. In total, Ms. Gonzalez viewed thirteen six-pack photo arrays – 66 total photos. CP 160-63. On May 13, 1996, in her twelfth six-pack photo array, she identified Junior. CP 198-99.

On May 6, 1996, Junior was at Sunnyside Police Department giving a witness statement for an unrelated case. CP 492. According to Detective Rivard's trial testimony, after he learned that Junior was at the police station, and for no apparent reason, he took three polaroids of him. CP 194-95. Detective Rivard returned to his office where he threw the polaroids on top of his desk. CP 194-95. The informant sitting at Detective Rivard's desk saw the polaroids and identified Junior as the boy who, back in March 1996, confessed to Mr. Arreola's murder. CP 195, 277-83.

The informant was William Bruhn. It was Mr. Bruhn's identification of Junior that inserted him into the investigation, ultimately causing his photo to be included in the May 13, 1996, six-pack photo array shown to Ms. Gonzalez. CP 492. The polaroids were also shown to Ms. Gonzalez that day. CP 198.

Junior was arrested on May 22, 1996. CP 980. He was questioned about Mr. Arreola's murder, and he repeatedly denied any involvement. CP 982-89.

D. Jury Trial

At trial, the State did not present any physical evidence connecting Junior to Mr. Arreola's murder. Instead, it relied on what the prosecutor described as the "unbroken chain" of events: Mr. Bruhn's chance encounter with Junior in March 1996, at which time he confessed; Mr. Bruhn's accidental viewing of Detective Rivard's polaroids of Junior and subsequent identification of Junior as the boy he overheard confess; and Ms. Gonzalez's identification of Junior. CP 745.

The first link in the State's "chain" was Mr. Bruhn, who testified that in March 1996, he saw Junior and another boy while he was drinking beers in the common area of an apartment building. CP 278-79. Mr. Bruhn testified that he overheard Junior telling his companion that he "wished he still had the pistol" and he "would have hated to have to clean up the truck" after what happened. CP 280. Mr. Bruhn went on to describe how he came to see the three polaroids of Junior and his subsequent identification of Junior as the boy he overheard confessing. CP 283.

Mr. Bruhn admitted that he regularly worked as a paid informant for Detective Rivard, but insisted he was not being compensated for his work on Junior's' case. CP 284. The State also insisted Mr. Bruhn was not being compensated. CP 637.

The second link in the State's chain was Detective Rivard, who confirmed Mr. Bruhn's account of the circumstances surrounding his identification of Junior. CP 194. When describing Ms. Gonzalez's identification of Junior, he testified that she was hysterical and certain that Junior was the shooter. CP 196.

Concluding the State's "chain" of events was Ms. Gonzalez. She testified that on the night of Mr. Arreola's murder, she "got an extremely good look" at the boy who fired the gun while she stood on the other side of the pickup truck. CP 101. She said she looked at the shooter for two to three seconds from about five feet away and she would never forget his face. CP 152.

The defense called two of the three children, Mr. Martinez, and Sylvia Siller. CP 571, 582-83; CP 598-600; CP 624. Just prior to Ms. Siller taking the witness stand, Detective Rivard attempted to intimidate her and was admonished by the trial court. CP 617. Ms. Siller testified that Junior frequented the convenience store where she worked and on the night of November 14, 1995, he came in around 7pm. CP 624. She asked if he heard about the shooting on Saul Road and Junior seemed surprised and asked a few questions about what happened. CP 626.

In closing argument, Mr. Trejo questioned the reliability of Ms. Gonzalez's identification of Junior. CP 712-17. The State's closing

argument focused on the "unbreakable chain" of events. CP 694-95. The State emphasized it "had nothing to hide" when it came to Mr. Bruhn, assuring the jury that he was not being paid for his work on Junior's' case. CP 739. The State further asserted "there [was] no more credible witness in this case than Ofelia Gonzalez." CP 742.

On December 19, 1996, two days after Junior's 16th birthday, the jury found him guilty, and he was sentenced to 393 months in prison. CP 4-5.

E. Direct Appeal and PRPs

Junior appealed to Division Three on the grounds that the trial court erred in declining juvenile jurisdiction. *See State v. Salas*, 94 Wn.App. 1001 (Div. 3 1999).[3] Division Three rejected his argument and affirmed his convictions in all respects. *Id.* The mandate was issued on May 14, 1999.

Junior filed a PRP in 2006, arguing the trial court failed to set a definite term of Community Supervision. *See PRP of Evaristo Salas*, COA No. 257100. The State conceded, and the error was correct. In 2010, Junior filed a second PRP arguing his due process rights were violated because his trial occurred in the jail basement courtroom, which the

[3] This is an unpublished opinion with no precedential value and is being cited for reference purposes, not as legal authority.

Washington Supreme Court had just held was inherently prejudicial and eroded the presumption of innocence. *See State v. Jaime*, 168 Wn.2d 857, 233 P.3d 554 (2010). This Petition as denied. *See Personal Restraint Petition of Evaristo Salas*, COA No. 293882.

F. Post-Conviction Investigation

In the early 2000s, Junior wrote a letter to film director, Joe Berlinger, asking for help. Def.'s Mot. New Trial, Ex. B. Over a decade later, Mr. Berlinger found Junior's letter and included his case in a documentary series being developed with Starz television network. *Id.* The docu-series, Wrong Man, investigated the criminal cases of three people asserting innocence. *Id.* Season One included Junior, Curtis Flowers in Mississippi, and Christopher Tapp in Idaho. *Id.*

Mr. Berlinger's team began its investigation in 2017. *Id.* When speaking with Mr. Bruhn, he recanted his trial testimony, stating he never heard Junior confess to killing Mr. Arreola and Detective Rivard paid and pressured him to provide false testimony against Junior. *Id.* Investigators learned Detective Rivard and Mr. Bruhn lived very close to each other, however when asked, Detective Rivard denied having any contact or knowledge about Mr. Bruhn's whereabouts. *Id.* Later, Detective Rivard was seen in his pajamas, knocking on the door of Mr. Bruhn's residence.

In May 2019, Mr. Bruhn provided a sworn declaration detailing how Detective Rivard instructed him to obtain incriminating statements from Junior. CP 424-25. When that plan failed, Detective Rivard directed him to provide a false account of Junior's confession and subsequent viewing of Detective Rivard's payment process to avoid the appearance of impropriety. CP 424. Mr. Bruhn explained that Detective Rivard threatened him with jail if he did not cooperate, and did in fact, jail him at one point during Junior's case. CP 424.

Mr. Berlinger's team uncovered Sunnyside Police Department's investigation of Ms. Gonzalez for rendering criminal assistance in connection with Mr. Arreola's murder. The police reports described that on November 21, 1995, Detective Rivard sought to process the truck Mr. Arreola sat in when he was shot and killed. CP 487. When Detective Rivard called the lot where the truck was being held, he learned the truck was gone. CP 487-88. The lot owner relayed that on November 18, 1995, Ms. Gonzalez told him that police had given permission for the truck to be released to her. CP 488. The owner allowed Ms. Gonzalez to take the truck, at which time she had it professionally cleaned, the window was repaired, and it was sold. CP 530.

Detectives followed up with Ms. Gonzalez about who gave her permission to remove the truck from impound. Initially, Ms. Gonzalez

said that someone from the police department told her to pick up the truck. CP 531. Detective Rivard spoke with every officer and personnel on duty and no one authorized the truck's release. CP 488-89. When questioned about the truck on two other occasions, Ms. Gonzalez said someone from the impound lot called her sister directing them to pick up the truck, and next, that her parents received a letter from the tow company instructing them to pick up the truck. CP 490-91.

After Junior secured post-conviction counsel, an undated, handwritten note authored by Detective Rivard was found. The note documented Ms. Gonzalez's willingness to undergo hypnosis if it would help her identify the suspects. CP 1081. Law enforcement's use of hypnosis was later corroborated with a sworn declaration from Mr. Arreola's mother, Reyna Arreola. CP 428.

In her sworn declaration, Reyna[4] explained that Ms. Gonzalez had undergone hypnosis just before selecting Junior's picture out of a six-pack photo array on May 13, 1996. CP 429. According to Reyna, the first time she accompanied Ms. Gonzalez to the police station, hypnosis was described as an investigation tool used to assist in making identifications. CP 428. When she accompanied Ms. Gonzalez on May 13, 1996, Reyna

[4] Reyna Arreola is referred to by her first name to avoid confusion as the decedent's last name is also Arreola. No disrespect is intended.

described waiting in one room while Ms. Gonzalez and an officer went to a separate room. CP 429. When Reyna rejoined Ms. Gonzalez she was looking at pictures, identifying Junior as the shooter. CP 429. Driving home, Ms. Gonzalez told Reyna she underwent hypnosis while she was in the other room, separated from Reyna. CP 429.

After Wrong Man aired and Junior secured counsel, attempts were made to interview Detective Rivard but, through the State, he declined. CP 1137-38. When Ms. Gonzalez agreed to an interview, she conditioned it upon an agreement that she would not be asked any about the truck. Post-conviction discovery motions addressed both witnesses.

G. Junior's CrR 7.8 and Discovery Motions

On January 14, 2020, Junior filed a CrR 7.8 motion in the Yakima County Superior Court. CP 9. In it, he outlined the newly discovered evidence and alleged the State violated its obligations under *Brady v. Maryland*.

In response to Junior's CrR 7.8 motion, the State requested Washington State Patrol (WSP) investigate his claims. CP 1125, 2135. In 2021, WSP provided recorded, unsworn interviews with Detective Rivard and Ms. Gonzalez. CP 2106, 2117. Detective Rivard denied all wrongdoing. Specifically, he stated that Ms. Gonzalez was not hypnotized and no one at Sunnyside Police Department ever used hypnosis. CP 2121.

WSP did not ask Detective Rivard about his documented conversation with Ms. Gonzalez about hypnosis, nor was he asked whether Mr. Bruhn was paid for his work on Junior's case.

Junior's motions for post-conviction discovery were argued over several hearings. CP 2143. Depositions and/or live testimony of Detective Rivard and Ms. Gonzalez were sought. CP 1126-27.

On July 9, 2021, the trial court retained Junior's CrR 7.8 motion. RP 7/9/21, Pg. 32. On September 27, 2021, the trial court denied Junior's discovery motions, which included requests to depose, issue subpoenas and permit testimony at Junior's CrR 7.8 motion. RP 9/27/21, Pg. 36-42.

On October 11, 2021, the State filed its response to Junior's CrR 7.8 Motion, arguing that Mr. Bruhn's recantation was unreliable, and the remainder of Junior's claims were time barred because none of the evidence was newly discovered. CP 2159-73. The State did not argue, nor did it provide evidence that the newly discovered evidence outlined in Junior's motions was ever disclosed.

The trial court scheduled Junior's CrR 7.8 hearing for October 27, 2021. As a preliminary matter, defense counsel sought clarification on the trial court's findings and rulings pertaining to Junior's discovery motions. The trial court affirmed those findings and rulings and agreed they effectively denied Junior's CrR 7.8 motion. RP 10/27/22, Pgs. 19-20.

A Notice of Appeal was filed on November 8, 2021, however it was deemed immature because the trial court failed to sign orders. Consistent with its belief that the Court of Appeals wouldn't be "as interested" in Junior's case "as [we] might think they are," the trial court failed to enter findings and conclusions. RP 10/27/21, Pg. 28.

This appeal follows.

V. ARGUMENT

A. DESPITE NEWLY DISCOVERED EVIDENCE UNDERCUTTING THE STATE'S CASE, THE TRIAL COURT FAILED TO HOLD A SHOW CAUSE HEARING AND UNTENABLY REJECTED JUNIOR'S CrR 7.8 MOTION

A CrR 7.8 motion provides a trial court the opportunity to correct errors that occurred during trial. The legislature adopted a one-year limit on most motions for post-conviction relief. RCW 10.73.090. However, it created exceptions to that one-year time limit – importantly, the discovery of new evidence which is material to the determination of guilt or innocence. CR 7.8(b)(2).

In Washington, newly discovered evidence can constitute both a claim for relief and an exception to the time bar. RCW 10.73.100(1). Evidence is "newly discovered if it: (1) would probably change the result of the trial; (2) was discovered since trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material;

and (5) is not merely cumulative or impeaching. The absence of any one of the five factors is grounds for the denial of a new proceeding." *In re Brown*, 143 Wn.2d 431, 453, 21 P.3d 687 (2001) (quoting *State v. Williams*, 96 Wn.2d 215, 222–23, 634 P.2d 868 (1981) (citations omitted)).

This Court reviews a trial court's CrR 7.8 ruling for an abuse of discretion. *State v. Zavala-Reynoso,* 127 Wn.App. 119, 122, 110 P.3d 827 (2005). A trial court abuses its discretion when it bases its decision on untenable grounds or misapplies the law *State v. Powell,* 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

1. Mr. Bruhn's Recantation is Reliable and Newly Discovered

A recantation is generally considered to be "newly discovered evidence," and here, the State conceded this issue. *State v. Macon,* 128 Wn.2d 784, 799-801, 911 P.2d 1004 (1996); RP 10/27/21, Pg. 21. When determining if a defendant is entitled to a new trial based on a witness' recantation, a court must "first determine whether the recantation is reliable before considering a defendant's motion for a new trial based upon the recantation." *State v. Wynn*, 178 Wn. 287, 288, 34 P.2d 900 (1934). Reliability is the overriding concern and encompasses all relevant circumstances surrounding the recantation, including possible undue influence, coercion, and any other improper motive or influence. *See*

Macon, 128 Wn.2d at 802; *State v. Landon*, 69 Wn.App. 83, 93, 848 P.2d 724 (1993). When determining reliability, the trial court also considers the credibility of the recanting witness. *In re Clements*, 125 Wn.App. 634, 644 n3, 106 P.3d 244 (2005). A credibility determination includes an assessment of evidence considering its rationality, internal consistency, consistency with other evidence, and common experience. *See Carbo v. United States,* 314 F.2d 718, 749 (9th Cir. 1963).

Here, the trial court failed to determine the reliability of Mr. Bruhn's recantation prior to denying Junior's CrR 7.8 motion. In an attempt to obviate this error, the State reminded the trial court of its obligation to determine whether the recantation is credible, material, and provides a basis for granting a new trial. RP 10/27/21, Pg. 32. However, the trial court made clear that it ruled on the merits of Junior's CrR 7.8 motion one month prior, at Junior's motion for post-conviction discovery. RP 10/27/21, Pg. 20. The trial court's failure in this regard is reversible error.

The circumstances surrounding Mr. Bruhn's recantation do not suggest improper influence or coercion. He had nothing to gain by exposing himself on national television as a paid informant who falsely implicated a teenage boy in a homicide that resulted in a prison sentence twice the boy's age. To the contrary, he had everything to lose by

recanting. Mr. Bruhn further exposed himself to harm by publicly accusing a career police officer of egregious misconduct. In contrast, Mr. Bruhn had a financial incentive to provide false evidence against Junior in 1996. Besides picking up the occasional odd job, Mr. Bruhn had no other source of income outside of his informant work. CP 298-302.

Independent evidence corroborating Mr. Bruhn's recantation lends credence to its reliability. The case ledger and payment receipts detailing Mr. Bruhn's informant work with Detective Rivard support Mr. Bruhn's recanting statements that he was paid for his informant work on Junior's case and payment was sometimes withheld for a day or two to avoid the appearance of impropriety. CP 1058. Of the 49 total documented payments, 13 exceeded $50 – all of which were during Mr. Arreola's homicide investigation. CP 1007-56.

Notably, Mr. Bruhn's first large payment of $150 occurred in March 1996, when Detective Rivard noted in that he asked a "reliable informant" to gather information "on the street" about Mr. Arreola's homicide. CP 491. In "April/May 96," Detective Rivard documented Mr. Bruhn's work as "Jr. Salas – 1 homicide trial." CP 1058. On May 6, 1996 – the same day Mr. Bruhn saw the polaroids of Junior on Detective Rivard's desk, Mr. Bruhn was paid $180. RP 12/12/96, Pg. 41; CP 1026. On May 13, 1996, Ms. Gonzalez identified Junior as the boy who shot Mr.

Arreola, and Mr. Bruhn received $50 that day and the next day. CP 1046-47. Mr. Bruhn received a $100 payment on May 20, 1996, Junior was arrested on May 22, 1996, and Mr. Bruhn received a $150 payment on May 23, 1996. CP 1048-49. On May 27, 1996, Detective Rivard documented another statement from Mr. Bruhn relating to Junior's case and paid him $120. CP 1054-55.

Independent evidence supported Mr. Bruhn's statement that he was threatened with jail. Three weeks after Junior's arrest, the juvenile court issued a material witness warrant for Mr. Bruhn. CP 1692. The same day Detective Rivard booked him into jail and the next day asked that he be transferred to Sunnyside jail. CP 1694, 1699. No substantive hearings occurred until Junior's declination hearing where the State did not call Mr. Bruhn as a witness and Detective Rivard testified that he had been cooperative from the beginning, denying that he ever expressed an unwillingness to testify against Junior. RP 8/13/96, Pgs. 84, 98, 99. This testimony appeared to confuse the prosecutor given the earlier request for a warrant.

Incredibly, during Junior's trial, Detective Rivard displayed the threatening tactics described by Mr. Bruhn in his recantation. Defense witness Silvia Siller was called to testify on the final day of trial and just prior to her testimony, Detective Rivard "remind[ed]" her that he was

responsible for the pseudo sting operation during which Ms. Siller was videotaped stealing a hot dog. CP 617. In response, the trial court advised that witnesses are not to be subjected to intimidation. CP 620.

The only evidence advanced by the State to rebut Mr. Bruhn's recantation was his criminal history and WSP's unsworn interview with Detective Rivard 2020. CP 2118, 2171-72.

After determining credibility of the recantation, the trial court must determine whether the recantation is newly discovered evidence such that it is requires a new trial. *Macon*, 128 Wn.2d at 805. Here, the trial court found that payments made to Mr. Bruhn and his status as a confidential information were not newly discovered evidence because both were discussed at trial. RP 10/27/21, Pg. 25; RP 9/27/21, Pgs. 39, 41. These facts were never in dispute. What *is* newly discovered evidence is Mr. Bruhn's recantation that those payments made by Detective Rivard were not payments for unrelated, generalized informant work, as insisted at trial, but were to provide false evidence against Junior, specifically. This evidence was not provided prior to trial and was, in fact, denied repeatedly during trial. The trial court acknowledged that "each and every detail" was not available prior to trial while failing to understand the significant distinction between being a paid informant in general and being a paid informant on Junior's case, specifically. RP 10/27/21, Pg. 26.

The mountain of independent evidence demonstrating the reliability of Mr. Bruhn's recantation was meaningless because the trial court did not assess the reliability of Mr. Bruhn's recantation, instead it found that the recantation had no merit because it was cumulative. RP 10/27/21, Pg. 26.

After ruling on Junior's CrR 7.8 motion, the trial court commented that the material witness warrant was a procedural process resulting from Mr. Bruhn's decision not to cooperate is irreconcilable with the record. RP 10/27/21, Pg. 33. Similarly, the trial court's belief that a material witness warrant issued for Mr. Bruhn during Junior's trial is factually inaccurate, not supported by the record. RP 10/27/21, Pg. 33.

2. The Newly Discovered Evidence Satisfies the *Williams'* Factors

In addition to Mr. Bruhn's recantation, Junior's motion for new trial presented several pieces of newly discovered evidence establishing the following:

Ms. Gonzalez underwent hypnosis before identifying Junior.

Reyna submitted a sworn declaration that she accompanied Ms. Gonzalez to the Sunnyside Police Department on at least three occasions during the investigation. CP 428-430. Reyna was present for a conversation Ms. Gonzalez had with police about hypnosis. C9 429. On one of those occasions, believed to be May 13, 1996, Reyna observed

police take Ms. Gonzalez to another room and a short while later when they reunited, Ms. Gonzalez identified Junior. CP 429. Driving home, Ms. Gonzalez told Ms. Arreola that she was hypnotized when taken to another room. CP 429.

During the post-conviction investigation, among Detective Rivard's case file was a note documenting a conversation he had with Ms. Gonzalez about hypnosis. The note said: "Ofelia would undergo hypnosis if it would help." CP 1081.

Ms. Gonzalez was investigated for rendering criminal assistance to Mr. Arreola's murder.

On November 18, 1996, Ms. Gonzalez provided false information to Denny Morrow Towing to repossess the truck Mr. Arreola sat in when he was shot and killed. CP 488. Once the truck was in her possession, she had the window repaired, the interior cleaned, and it was sold. CP 530. Her actions eliminated law enforcement's ability to make use of critical evidence and destroyed any exculpatory evidence the truck could have provided, such as measurements of the bullet holes in the windows and angles at which they traveled. Those measurements could have been compared to Junior's small frame – 5'0, 110 lbs. CP 494.

Ms. Gonzalez's removal of the truck came as a surprise to Detective Rivard and after an investigation into the circumstances of its

removal, a criminal referral was sent to the State recommending she be charged with rendering criminal assistance. CP 487-90.

Expert testimony based on new research establishes the unreliability of Ms. Gonzalez's and Mr. Bruhn's trial testimony.

Geoffrey Loftus has been a pioneer in the study of eyewitness identification and while there have been material advances or changes in the science of eyewitness identification, it is also the evolution of the law that makes eyewitness identification expert testimony newly discovered evidence. The same can be said for Professor Robert Bloom who studies incentivized witness testimony – also a field of study that has seen profound advances in its science and methods. This case does not involve new opinions that could have been discovered and presented at trial with the exercise of due diligence, but advances in the science that put the previously known facts in a new and different light. *See State v. Harper*, 64 Wn.App. 283, 293, 823 P.2d 1137 (1992).

The foregoing newly discovered evidence satisfies the five-factor test articulated in *State v. Williams,* and this Court should find the trial court abused its discretion when denying Junior's motion for a new trial. 96 Wn.2d 215, 223, 634 P.2d 868 (1981).

i. *The newly discovered evidence would probably change the result at trial.*

To determine whether the newly discovered evidence will probably result in a different outcome upon retrial, the trial court must determine the credibility, significance, and cogency of the proffered evidence. *State v. Barry,* 25 Wn.App. 751, 758, 611 P.2d 1262 (1980). Additionally, the trial court considers the strength of the State's evidence. *State v. Castro,* 32 Wn.App. 559, 565-66, 648 P.2d 485 (1982). The court may assess whether the jury would have believed the new testimony. *Id.*

First, Mr. Bruhn's recantation would have changed the results of Junior's trial because his testimony was central to the State's "unbreakable chain." Without Mr. Bruhn's initial identification of Junior, his picture would not have been included in the six-pack photo array shown to Ms. Gonzalez. It was Mr. Bruhn who inserted Junior into the investigation. It was Mr. Bruhn who gave the State its only other piece of evidence it used against Junior at trial, Ms. Gonzalez – evidence the State referred to as "the most credible." CP 742. In contrast, in *State v. Swan,* where the newly discovered evidence would not have affected outcome of trial because it challenged "only one relatively minor detail" in a witness' testimony and other witnesses also implicated the defendant. 114 Wn.2d 613, 643, 114

Wn.2d 613 (1990). Mr. Bruhn's testimony was not a minor detail in Junior's trial.

The State relied on the connection between Mr. Bruhn's false account of overhearing Junior confess, seeing Junior's picture on Detective Rivard's desk, and Ms. Gonzalez's identification of Junior to bolster their otherwise-weak case. *See e.g. State v. Slanaker,* 58 Wn.App. 161, 791 P.2d 575 (1990) (considering the cumulative effect of four new witnesses corroborating defendant's alibi).

Without this connection, Ms. Gonzalez's testimony would have been less persuasive to the jury because by the time she saw Junior's photo, she viewed eleven prior six-pack photo arrays (66 photos), an entire mugbook, and a yearbook without making an identification. CP 160-63. Mr. Bruhn's testimony was thus not only important to the case on its own, but also because it reinforced the otherwise-weak identification made by Ms. Gonzalez.

Second, evidence that Ms. Gonzalez underwent hypnosis before identifying Junior would have changed the outcome of his trial because her identification would have been excluded as evidence. Washington courts have consistently held that hypnotized witnesses may not testify to any facts which became available following hypnosis. *See State v. Martin,* 101 Wn.2d 713, 684 P.2d 713 (1984); *State v. Laureano*, 101 Wn.2d 745,

682 P.2d 745 (1984); *State v. Coe,* 109 Wn.2d 832, 750 P.2d 208 (1998). Had Mr. Trejo been able to show that Ms. Gonzalez's identification of Junior occurred after she was hypnotized, the trial court would have been required to exclude it.

The neighbors who testified were witnesses to hearing an argument just prior to hearing gunshots and some observed an adult man fleeing the scene in the aftermath of the shooting, however only Ms. Gonzalez stood within feet of the shooter. CP 571-76, 582-87, 598-600. As such, her identification testimony was central to the State's case.

Third, evidence that Ms. Gonzalez used deception to obtain and destroy the only piece of physical evidence, which led police to conclude that she rendered criminal assistance in Mr. Arreola's homicide, would have discredited her testimony to an insurmountable degree. Much in the way that Mr. Bruhn's testimony was used to bolster Ms. Gonzalez's identification of Junior, her testimony provided corroboration for Mr. Bruhn's story that he overheard Junior confess. Taken on its own, Mr. Bruhn's testimony may have failed to persuade a jury because of his history as a paid informant and his admission of substance abuse. CP 269-70, 306-08. However, his account likely appeared much more plausible when paired with testimony that the boy he overheard confessing to the shooting was later identified by the only eyewitness to the murder.

Fourth, expert testimony pertaining to the eyewitness identification would have changed the results at trial because jurors would have been able to contextualize Ms. Gonzalez's identification. As Mr. Loftus explained, most experts on human perception and memory now reject ostensibly "commonsense" beliefs about the reliability of eyewitness identifications that used to pervade criminal courtrooms. CP 439-442. The State relied upon many of these common misconceptions when arguing the reliability of Ms. Gonzalez's identification. CP 741. Moreover, experts now agree that viewing several photo arrays renders an identification *less* likely to be correct, not more. CP 446-47. Modern scientific consensus regarding eyewitness identification directly contradicts the common assumptions invoked by the State, it likely would have changed the outcome at trial. In contrast, in *In re Fero,* declarations from expert witness would not have changed the outcome at trial where experts at trial testified that State's theory of victim's injuries was only "possible." 190 Wn.2d 1, 21-23, 409 P.3d 214 (2018).

Expert testimony as to the unreliability of incentivized witnesses likely would have changed the result at trial because now there is research demonstrating the prevalence of perjury and false accusations in the testimony of incentivized witnesses. CP 469. Here, the State relied upon the testimony of Mr. Bruhn, a professional informant, to present Junior's

confession and bolster Ms. Gonzalez's identification. Because jurors may not have been familiar with all that goes into the decision-making of incentivized witnesses, particularly when considered together with repeated misrepresentations by Detective Rivard and Mr. Bruhn about compensation, expert testimony on this issue likely would have changed the outcome of the trial.

Each piece of newly discovered evidence would likely have changed the result of Junior's trial and taken cumulatively his motion satisfies the first factor.

ii. The evidence was discovered after Junior's trial.

All the newly discovered evidence presented was discovered after Junior's 1996 trial. Mr. Bruhn did not recant his trial testimony until 2017. CP 4-8, 423. *State v. Scott,* 150 Wn.App. 281, 294, 207 P.3d 495 (2009) ("a witness or victim's recantation of earlier statements is generally considered newly discovered evidence").

The evidence pertaining to Ms. Gonzalez undergoing hypnosis was uncovered during the post-conviction investigation and not available prior to trial because the State withheld this evidence. The State argued this evidence was available to Junior because it was known prior to trial that Reyna accompanied Ms. Gonzalez the day she identified Junior. CP 2161-63. In other words, Mr. Trejo would have discovered this evidence if he

interviewed Reyna back in 1995. This conclusion puts the onerous on the defense to presume the State is not meeting its discovery obligations, which is contrary to CrR 4.7 and *Brady v. Maryland*, and its progeny.

The same can be said about the evidence pertaining to the investigation into Ms. Gonzalez's unlawful removal of the truck from impound and subsequent criminal referral for her to be criminally charged. The State asserted in its response that Ms. Gonzalez testified at the declination hearing that she sold the truck, and this statement should have compelled Mr. Trejo to investigate further. CP 2166-67. Again, the State asserted Mr. Trejo should have assumed the State was not meeting its discovery obligations. CP 2166-67. It is unreasonable to assert that Mr. Trejo found have jumped to the illogical line of questioning with a crime victim about whether she used deceit or committed a crime to repossess her property.

Finally, in 1996, experts were studying the reliability of eyewitness identification, however the bulk of the research was not available until well after Junior's trial, and thus could not have been discovered at the time of trial. CP 438-48. Similarly, today it is widely known that incentivized witness testimony is inherently unreliable and one of the leading causes of wrongful convictions. However, the systematic study of exoneration cases did not provide that insight until after Junior's trial.

Moreover, trial courts have only recently allowed expert witness testimony on this issue. See *Williams v. Davis*, No. CV 00-10637 DOC, 2016 WL 1254149, at 20 (C.D. Cal. Mar. 29, 2016) (vacating conviction and death sentence after evidentiary hearing which included expert testimony on informants); *Larson v. State*, 194 Wn.App. 722, 731, 375 P.3d 1096 (2016) (expert witness on criminal informants testified in wrongful conviction compensation trial); *State v. Sun,* Snohomish County Superior Court Case No. 17-1-00704-31 (trial court ruled expert witness on incentivized witnesses allowed at trial).

iii. The evidence could not have been discovered before trial by the exercise of due diligence.

Mr. Bruhn did not recant his trial testimony until 2017, and thus his statement could not have been discovered before trial by the exercise of due diligence. Evidence of Ms. Gonzalez's hypnosis and destruction of evidence could not have been discovered at the time of trial because it was suppressed by the State and defense counsel had no reason to suspect the evidence existed. This issue was only explored because, by chance, Detective Rivard's handwritten note documenting a conversation he had with Ms. Gonzalez about hypnosis was discovered. CP 1081. After discovering this note, confirmation was made through Reyna, who by all accounts, had no reason to assist in Junior's efforts to obtain a new trial.

CP 428. Last, it was confirmed by Mr. Trejo that the discovery he received from the State did not include any of the above-described evidence. CP 434. Due diligence does not require trial counsel to explore investigative leads that were not known at the time of trial, and thus the evidence could not have been discovered. *See State v. Gassman,* 160 Wn.App. 600, 611, 248 P.3d 155 (2011); *State v. Swan,* 114 Wn.2d 613, 643, 790 P.2d 610 (1990). As such, the third factor is satisfied. The trial court disregarded this claim based on an unsworn interview done by WSP during which Ms. Gonzalez denied being hypnotized. RP 9/27/21, Pg. 39.

Finally, the scientific research of human memory perception and the unreliability of incentivized witness testimony was not conducted until after trial. *See generally State v. Derri,* 511 P.3d 1267, 1282-85 (2022) (discussing developments in scientific research of the reliability of eyewitness identification).

iv. The newly discovered evidence is material

Evidence is material for purposes of the fourth factor if it "strongly indicates that the defendant did not commit the crime." *Gassman,* 160 Wn.App at 611. At Junior's trial, only two pieces of evidence connected him to Mr. Arreola's murder: Mr. Bruhn's testimony that he overheard Junior confess and Ms. Gonzalez's identification testimony of Junior – she could "never forget his face." CP 152. Mr. Bruhn's recantation goes right

to the heart of this evidence because he was the first person to identify Junior to the police, and this identification subsequently corroborated Ms. Gonzalez's otherwise-unreliable identification.

Alongside Mr. Bruhn's recantation, expert evidence regarding the unreliability of incentivized witness testimony also strongly supports Junior's assertion of innocence. This new research establishes that paid informants are under great psychological pressure to perjure themselves, which lends credence to Mr. Bruhn's explanation as to why he cooperated to falsify evidence.

The evidence that Ms. Gonzalez was hypnotized just prior to her identification of Junior similarly supports his assertion of innocence. Her identification was essential to establishing Junior's guilt at trial. Had trial counsel been aware that she was hypnotized her identification would have been excluded. Assuming arguendo, the trial court would have allowed Ms. Gonzalez's identification, finding the hypnosis went to weight not admissibility – it would have been gutted by the evidence of her criminal behavior in what could be only characterized as a cover-up.

Similarly, the recent scientific consensus regarding the unreliability of eyewitness identification testimony is material because it presents serious doubts about Ms. Gonzalez's ability to identify Mr. Arreola's killer. As stated previously, the validity of her identification was

central to the State's theory of the case as evidenced by its closing arguments. The evidence is thus material for purposes of the fourth factor.

v. The newly discovered evidence is not merely cumulative or impeaching

Cumulative evidence is "additional evidence of the same kind to the same point." *State v. Williams,* 96 Wn.2d 215, 223-24, 634 P.2d 868 (1981). Evidence is "merely impeaching" when a similar piece of evidence or theory was already presented to the jury at trial. *State v. Swan,* 114 Wn.2d 613 at 643. Under these definitions, the newly discovered evidence presented in Junior's motion is not merely cumulative or impeaching.

First, the notion that Mr. Bruhn lied on the stand in response to Detective Rivard's coercive tactics was never presented to the jury. It goes beyond the scope of being impeachment because it explains why Mr. Bruhn falsely testified that he overheard Junior confess, and why he was reluctant to disavow this story at trial. However, it does explain his lack of cooperation when Mr. Trejo attempted a pre-trial interview when Mr. Bruhn claimed to have "CRS[5]" syndrome. CP 293-294.

Second, evidence that Ms. Gonzalez underwent hypnosis before identifying Junior was not presented to the jury. The defense's critique of

[5] "CRS" means "can't remember shit." CP 294.

Ms. Gonzalez's identification at trial centered largely on whether she was able to get a good view of the shooter in the darkness of the apartment building parking lot. CP 712-17. The reliability of her identification was the heart of the State's case and would have been excluded entirely. *See State v. Savaria*, 82 Wn.App 832, 838, 919 P.2d 1263 (1996) (impeaching evidence can warrant a new trial if it devastates a witness' uncorroborated testimony establishing an element of the offense. In such cases the new evidence is not merely impeaching, but critical).

Third, evidence impeaching Ms. Gonzalez for lying to investigators and destroying physical evidence in the case similarly would have not been cumulative or impeaching because it would have allowed for an entirely different defense theory – she was an alternate suspect.

Fourth, expert testimony regarding the reliability of eyewitness identifications and incentivized witness testimony is not merely cumulative or impeaching because it provides data for the jury to consider when evaluating the evidence, which was not presented at Junior's trial. As such, the fifth factor is satisfied.

3. Junior is entitled to a new trial.

Junior presented newly discovered evidence that was reliable, material, and undermines his conviction, and the trial court abused its discretion denying his motion for new trial on the merits. This Court

should reverse the trial court's denial of Junior's CrR 7.8 motion, or in the alternative remand the matter for proper show cause hearing.

B. JUNIOR'S CONVICTION MUST BE VACATED BECAUSE THE STATE WITHHELD MATERIAL, EXCULPATORY EVIDENCE BEFORE TRIAL IN VIOLATION OF BRADY V. MARYLAND

The United States Supreme Court acknowledged in *Brady v. Maryland* that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The United States Supreme Court has since held that there is a duty to disclose such evidence even when there has been no request by the accused. *United States v. Agurs*, 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). The duty to disclose encompasses impeachment evidence as well as exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). The individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf, including the police. *In re Stenson*, 174 Wn.2d 474, 487, 276 P.3d 286 (2012).

Accordingly, a person asserting a *Brady* violation must establish three things: (1) The evidence is favorable to the accused because it is

exculpatory, or impeaching; (2) it was suppressed; and (3) it is material. *Strickler v. Greene,* 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). In analyzing these factors, "we are mindful that the fundamental purpose of *Brady* is the preservation of a fair trial." *State v. Davila*, 183 Wn.App. 154, 167, 333 P.3d 459 (2014) (quoting *Morris v. Ylst,* 447 F.3d 735, 742 (9th Cir. 2006)).

The court reviews the first and second prongs for abuse of discretion as they are factual inquiries. *See In re Stenson*, 174 Wn.2d at 488. 276 P.3d 286, 293 (2012). The issue of materiality is purely legal and thus reviewed *de novo*. *State v. Davila*, 184 Wn.2d 55, 75, 357 P.3d 636, 646 (2015).

Junior argued the State withheld several pieces of material evidence before trial. Specifically: (1) the money paid to Mr. Bruhn for cooperating in his case; (2) Ms. Gonzalez's false statements to the impound lot, destruction of evidence, and the subsequent investigation and referral to the State for the filing of criminal charges; (3) Ms. Gonzalez's hypnosis; and (4) Detective Rivard's coercion of Mr. Bruhn to provide false evidence against Junior.

1. The Suppressed Evidence was Favorable

Favorable evidence includes evidence that tends to exculpate the accused and evidence that is useful to impeach the credibility of a

government witness. *Davila*, 183 Wn.App. at 167 (citations omitted). The failure to disclose evidence affecting the overall credibility of witnesses corrupts the process. *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). When the government's case depend[s] almost entirely on the testimony of a certain witness, evidence of that witness' possible bias simply may not be said to be irrelevant, or its omission harmless. *Id*. at 154. In *Giglio,* the Court ordered a new trial when the prosecutor made an affirmative misrepresentation to the jury that no promises were made to a key witness:

> "[W]ithout [Taliento's testimony] there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.
>
> "For these reasons, the due process requirements enunciated in Napue and other cases cited earlier require a new trial."

Id. at 154–155.

Here, Mr. Bruhn and Ms. Gonzalez were crucial to the State's case. Their credibility was dispositive to the investigation and trial. The evidence revealed in Mr. Bruhn's could have been used to impeach him,

Ms. Gonzalez, and Detective Rivard. Specific to Mr. Bruhn, the financial incentives given to him in exchange for his testimony, and the circumstances relating to Junior's confession and Mr. Bruhn's subsequent identification of Junior as the boy he overheard confessing would have changed the trajectory of the investigation. Afterall, it was Mr. Bruhn's identification of Junior that inserted him into the investigation. This evidence also would have changed the outcome of the trial because without this evidence the State could not have used Mr. Bruhn's testimony to bolster Ms. Gonzalez testimony and visa versa.

The State argued that "there was no more credible witness in this case" than Ms. Gonzalez, yet it never disclosed she was investigated her for rendering criminal assistance in destroying evidence in Mr. Arreola's murder. CP 742. Any evidence diminishing her credibility would have been helpful to Junior. Part of the defense theory was that Ms. Gonzalez was not credible and the jury should not convict Junior based on her identification, so evidence of her malfeasance in Mr. Arreola's homicide investigation would have given the jury reason to question her credibility. Instead, they had no evidence calling her credibility into question and being that it was undisputed that she was the eyewitness closest to Mr. Arreola when he was shot, she was the most important witness.

Evidence that Ms. Gonzalez underwent hypnosis before identifying Junior was favorable because it undermined her credibility, and her identification would have been excluded. Without her identification, the State's only link between Junior and Mr. Areola's murder would have been Mr. Bruhn's account of a conversation between Junior and another child, which has now been recanted.

Detective Rivard's intimidation, coercion, directives to provide false evidence, and influencing witness testimony through payments of cash was also favorable to Junior. Detective Rivard formed the connective link between Mr. Bruhn and Ms. Gonzalez's identifications of Junior. The information regarding Detective Rivard's misconduct would have thrown the entire police investigation and therefore the prosecution into question. *See e.g. State v. Davila,* 184 Wn.2d 55, 70-71, (2015)(undisclosed evidence of investigator incompetence would have been favorable to the defense).

2. The State Suppressed Evidence

Junior's trial counsel, George Trejo, confirmed in a sworn declaration that the evidence outlined herein was not disclosed prior to trial. CP 433-36. The State did not present any evidence to the trial court contradicting Mr. Trejo's declaration – other than its assertion that Mr.

Trejo's declaration was a "CYA."[6] RP 9/25/21, Pg. 35. Importantly, the State never advanced evidence that it did disclose any of the evidence Junior argued was newly discovered and suppressed in violation of *Brady.*

None of the evidence at issue in Junior's *Brady* claims could have been discovered at the time of trial had defense counsel acted with due diligence because Mr. Trejo had no reason, based on the evidence before him, to pursue any of these investigative avenues. Mr. Trejo could not have learned about Mr. Bruhn's false account of overhearing Junior confess, or his subsequent identification of Junior until Mr. Bruhn chose to come forward and recant. He similarly could not have known Mr. Bruhn was being paid for his work on Junior's case.

Mr. Trejo had no reason to believe that Ms. Gonzalez used deceptive tactics to tamper with and destroy evidence, and that Detective Rivard requested she be criminally charged for those acts. Ms. Gonzalez testified that, by the time of Junior's decline hearing in August 1996, she sold the truck, and she did not elaborate on the circumstances of how she came to repossess the truck. CP 95. While it may be common for people to repossess property seized by law enforcement, usually that repossession

[6] "CYA" can mean "cover your ass."

occurs after law enforcement has processed it for evidence. There was no reason to believe this same procedure was not followed in this case.

Mr. Trejo's had no reason to question Reyna accompanying Ms. Gonzalez to Sunnyside Police Department. *See Davila*, 183 Wn.App. At 167-68 (evidence could not have been discovered at trial where defense had no reason to believe the significance of a particular witness at the time of trial). Moreover, at the time of Junior's trial, hypnosis was disavowed as an investigation tool.

There is no requirement that a defense attorney be as imaginative in his investigative efforts as the typical television sleuth, but only that a good faith effort be made to pursue obvious leads. Mr. Trejo followed logical leads and did not assume the State was failing to comply with its ethical and legal obligations.

3. The Evidence Suppressed was Material

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." *Stenson,* 174 Wn.2d. at 487. When evaluating whether withheld evidence was material for purposes of *Brady,* reviewing courts "consider evidence collectively, not item by item." *State v. Mullen*, 171 Wn.2d 881, 897, 259 P.3d 158 (2011). The question of prejudice is thus not whether the defendant has proven his or

her innocence, or even whether the State would still have a case to go to the jury if it had disclosed the favorable evidence, but whether the suppression of the evidence undermines confidence in the outcome of the trial. *Id*. If a reviewing court determines that it is possible that even one juror would have had reasonable doubt that the defendant was guilty had the suppressed evidence been disclosed to the defendant, then prejudice has been established. *Matter of Mulamba,* 199 Wn.2d 488, 504, 508 P.3d 645 (2022) (citations omitted).

The undisclosed evidence relating to Mr. Bruhn is material because it would have discredited the State's claim that his testimony should be trusted because he was not receiving any benefits for his work on Junior's case. CP 739. The State's bolstering of Mr. Bruhn's testimony added value to its case, in that it simultaneously bolstered Ms. Gonzalez's identification of Junior. The new evidence in Mr. Bruhn's recantation isn't merely impeaching, it eliminates the most damning piece of evidence against Junior – his alleged confession. It further eliminates Mr. Bruhn's initial identification of Junior, which led Junior to be included in the six-pack photo array shown to Ms. Gonzalez. The financial incentives Mr. Bruhn received would have impeached his credibility, and Detective Rivard's.

Evidence of Ms. Gonzalez's false statements regarding the truck and the criminal charge culminating from her conduct would have damaged her credibility to an overwhelming degree. This evidence also would have created an entirely new defense theory – she was an alternate suspect. The alternate suspect theory would have devastated her identification of Junior because there would have been evidence of her motive to identify someone other than herself, or someone she knew. The State argued that Ms. Gonzalez "had the temerity to ask for her car back, get it, clean it up and sell it because she needed transportation and didn't want to drive around in a car where her baby daddy[7] was murdered." RP 9/27/21, Pg. 44. If her actions were as innocent as the State would like to make it seem, why was this evidence not disclosed?

The hypnosis of Ms. Gonzalez is material because testimony about her identification of Junior would have been excluded. This evidence is not impeaching, it is case-changing. If her identification of Junior was excluded, the jury would not have been left with the most powerful evidence at trial – her testimony that she was 100% certain Junior shot Mr. Arreola. CP 152.

[7] "Baby daddy" is a derogatory term for an absent father. The term is disparaging to men of color as it plays into the stereotype that men of color are deadbeats, drug addicts, uneducated, among other things.

Evidence of Detective Rivard's misconduct is material because it undermines the entire case against Junior. The case started with Detective Rivard's misconduct relating to Mr. Bruhn and ended with his misconduct in using hypnosis as an investigation tool. Calling his entire investigation into question and demonstrating the coercive tactics he used to solve cases would have undermined his investigation and his testimony. The jury would have had access to evidence to weigh "the sloppiness of the investigation against the probative force of the State's evidence." *In re Stenson,* 174 Wn.2d at 492 (citing *Kyles v. Whitley,* 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995))("indications of conscientious police work will enhance probative force and slovenly police work will diminish it").

While the suppressed impeachment evidence is powerful on its own, its materiality is reinforced by considering the evidence together. The State's unbroken chain of events was a farce. If Junior had the benefit of all the evidence, the State's chain of evidence would have led the jury to conclude that Junior was not merely not guilty, but that he was innocent.

4. Conclusion

Junior presented the trial court with evidence that the State suppressed several pieces of favorable evidence, which prejudiced him at

trial. The trial court's understanding of *Brady* is alarming, in that it believed it had less to do with proper disclosure of discovery to the defense and more to do with whether a "fraud [was] committed on the court." RP 9/27/21, Pg. 48. Because the trial court found that there wasn't "fraud on the court," it found no *Brady* violations. *Id*. This Court should reverse the trial court's order denying Junior's CrR 7.8 motion. In the alternative, remand the matter for a proper evidentiary hearing in front of a different judge.

C. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO FOLLOW THE PROCEDURES MANDATED IN CrR 7.8(c)

Upon receipt of a CrR 7.8 motion, the trial court has two options: 1) transfer the motion to the Court of Appeals for consideration as a PRP; or 2) the trial court maintains jurisdiction so long as "…[it] determines the motion is not time barred and either (i) the defendant has made a substantial showing of merit or (ii) resolution of the motion will require a factual hearing…". CR 7.8(c)(2), *State v. Robinson,* 193 Wn.App. 215, 218, 374 P.3d 175 (2016). The trial court is prohibited from ruling on the merits of the motion if these conditions are not met. *Id.* If these conditions are met, then it must hold a show cause hearing. CR 7.8(c)(3). This is mandatory, not discretionary. CrR 7.8(c)(2); *Id.*

Where a trial court fails to follow the mandatory procedures outlined in CrR 7.8(c), it abuses its discretion. *State v. Flaherty,* 177 Wn.2d 90, 92-93, 296 P.3d 904 (2013); *State v. Smith*, 144 Wn.App. 860, 864, 184 P.3d 666 (2008).

Here, in considering Junior's CrR 7.8 motion, the trial court failed to comply with the directives of CrR 7.8(c)(2) and (3), and thus lacked the authority to dismiss the motion on the merits. *State v. Smith,* 144 Wn.App.860, 863, 184 P.3d 666 (2008).

On July 9, 2021, the trial court stated, "I am not kicking [the motion to vacate] up as a PRP." RP 7/9/21, Pg. 32. Later, in explaining its reasoning it said "I think just by default that we're not going to stop now" because "we had done a lot of work." RP 10/27/21, Pg. 17-18. The trial court's decision to retain Junior's CrR 7.8 motion was not based in law, but in its opinion that a lot of work had been done, and thus was based on untenable legal grounds. *See In re Ruiz-Sanabria,* 184 Wn.2d 632, 638-39, 362 P.3d 758 (2015).

After deciding to retain the motion, the trial court compounded its error by denying Junior's motion on the merits without conducting a meaningful show-cause hearing, as contemplated by CrR 7.8(c)(3).

State v. Frohs highlights the purpose of a show cause hearing when the trial court retains a defendant's CrR 7.8 motion. 511 P.3d 1288

(2022)[8]. In *Frohs,* the defendant timely filed a CrR 7.8 motion raising three claims. *Id*. at 1290. The trial court determined the defendant made a substantial showing of entitlement to relief on one of the three claims, so it retained the motion and ordered the State to show cause as to the meritorious claim. *Id.* at 1291. At a subsequent hearing, without oral argument, the trial court granted relief as to the one claim and rejected the two remaining claims. *Id*. On appeal, the defendant argued the trial court's failure to hold a fact-finding violated the directives of CrR 7.8(c). In holding the trial court did not error, the court noted this was due to the State's concessions on one claim, the procedural and legal nature of the two remaining claims, and the lack of disputed facts on all three claims. Id. at 1292, 1293.

Here, Junior filed a CrR 7.8 motion on January 14, 2020 – the facts of each claim therein were hotly contested. Hearings were delayed after the State requested WSP investigate Junior's claims and COVID-19 caused further delay. On July 9, 2021, the trial court advised of its intention to retain Junior's CrR 7.8 motion. RP 7/9/21, Pg. 32. The trial court's decision in this regard meant it determined the motion was not

[8] This decision was published pursuant to a non-party's Motion to Publish and has not been published in the Washington Appellate Reports. Pursuant to GR 14.1, it is cited as nonbinding authority.

time-barred and either Junior made a substantial showing of entitlement to relief, or the motion required a fact-finding hearing.

Junior filed two motions for post-conviction discovery seeking to compel depositions and/or live testimony from Detective Rivard and Ms. Gonzalez. CP 2143-58, CP 1130-38. The State filed its response to Junior's discovery motions on May 14, 2021, and the trial court scheduled a hearing for September 27, 2021, to issue its ruling on discovery. On September 27, 2021, the trial court denied Junior's discovery motions, including his request to present live testimony and issue subpoenas for his CrR 7.8 motion hearing. Disregarding the various rules outlining post-conviction discovery, the trial court denied the discovery motions because of "policy," in that Detective Rivard "would probably need to retain counsel." RP 9/27/21, Pg. 37. This argument was also advanced by the State. RP 9/27/21, Pg. 22.

The State filed its response to Junior's CrR 7.8 motion on October 11, 2021. The parties appeared for a hearing on October 27, 2021, the stated purpose of which was to litigate Junior's CrR 7.8 motion. However, defense counsel sought clarification of the trial court's earlier rulings and the trial court agreed that it denied Junior's CrR 7.8 motion one month prior, simultaneously with the discovery motions. Intemperately, the trial court asked: "aren't you in kind of a funny spot

right now where, [you] don't really want to say [you] think [you] lost, but the ruling of September 27 was kind of – took care of today's hearing?" Indeed, in finding the evidence outlined in Junior's CrR 7.8 motion was irrelevant, without merit, or not newly discovered, denying further discovery, and prohibiting live testimony the trial court eliminated the very purpose of a show cause hearing – to present evidence. The hearing on October 27, 2021, was meaningless, nothing more than a perfunctory hearing at which time the trial court formally denied Junior's CrR 7.8 motion.

Instead of following the procedure outlined in CrR 7.8 and affording Junior the benefits that flow from the trial court's decision to retain, the trial court did not base its retention on law and thereafter blocked Junior's ability to properly present evidence. As such, this Court should reverse the trial court's order and remand with instructions for the trial court to order the discovery requested and hold a meaningful show-cause hearing.

V. CONCLUSION

Our Supreme Court has formally recognized the racial bias that has and does exist in our criminal system.[9] It called upon the legal community

[9] June 4, 2020, Wa Supreme Court Open Letter to the Judiciary and Legal Community.

the judiciary to develop a greater awareness of our own conscious and unconscious bias. Our high court demanded that we have the courage and the will to administer justice in a way that brings greater racial justice to our criminal system.

Junior's case is a stark example of these injustices. His prosecution was born of the very bias and structural disadvantages that have historically plagued the justice system, and unsurprisingly produced inequitable results, in cases involving poor minorities. He was an unsophisticated adolescent charged with the most serious offense, easily scapegoated as a violent youth by prosecutors working hand in glove with the police who were targeting Hispanic minorities and he was convicted on evidence which on examination raises significant and troubling questions regarding its efficacy. These are facts, proven in the defense filings at the trial court and included herein. The range and reach of the consequence of these facts, and what other facts might come to light to further illuminate the injustice that can already be seen, could only be determined by a meaningful discovery process. But even in the absence of that, the defense has proven the existence of procedural and evidentiary flaws that call into question not only the legality of Junior's conviction, but trend toward establishing the truth of his actual innocence.

In these cases that are decades old, Courts and prosecutors have a

misguided but seemingly professional inertia to want to ignore these troubling facts for the sake of 'finality,' which is a meaningless term when one has been in prison for 26 years for a crime he did not commit. But this professional inertia is real, and the system gives weight and meaning to the rigid idea of finality by erecting procedural hurdles to suffocate review and insulate the conviction by concluding that the procedural hurdles erected to reach review have not been sufficiently or timely managed. This, ultimately, leads to the greatest injustice of all: the court denying due process under the pretense of procedural fairness, and in so doing, masking the wrongful conviction of an innocent man.

The Supreme Court has demanded more than that for people like Evaristo Junior Salas, and this Court should hear that calling and allow a meaningful substantive review of this case.

THIS BRIEF CONTAINS 11279 WORDS (exclusive of title sheet, table of contents, table of authorities, certificate of service, and signature block)

Respectfully submitted on August 3, 2022.

Laura Shaver, WSBA 44087
Attorney for Evaristo Junior Salas

COURT OF APPEALS, DIVISION III
STATE OF WASHIGNTON

STATE OF WASHINGTON	)	**Case No. 38570-1-III**
	)	
Respondent,	)	DECLARATION OF FILING
	)	AND SERVICE
vs.	)	
	)	
EVARISTO JUNIOR SALAS,	)	
	)	
Appellant.	)	
	)	

I, Laura Shaver, state that on the 3rd of August, 2022, I caused the original Opening Brief of Appellant to be filed in the Court of Appeals – Division Three and a true copy of the same to be served in the following manner indicated below:

[x] Bret Roberts, Deputy Prosecuting Attorney: bret.roberts@co.yakima.wa.us (via e-service portal)
[x] WA Innocence Project (via e-service portal)

Signed in Everett, WA on this 3rd Day of August, 2022

Laura Shaver, WSBA 44087
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