IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0539

GARY WAYNE TEMPLE,

Plaintiff and Appellee,

v.

STATE OF MONTANA,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, the Honorable Elizabeth Best, Presiding

APPEARANCES:

LAURA REED
P.O. Box 17437
Missoula, MT 59808
laurareedlawmt@gmail.com
(406) 493-2336

JOSHUA VAN DE WETERING
512 E. Broadway
Missoula, MT 59802
josh.vandewetering@bresnan.net

ATTORNEYS FOR PLAINTIFF
AND APPELLANT

AUSTIN KNUDSEN
Montana Attorney General
KATIE F. SCHULZ
Assistant Attorney General
Appellate Services Bureau
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

JOSHUA RACKI
Cascade County Attorney's Office
121 4th St N., STE. 2
Great Falls, MT 59401

ATTORNEYS FOR DEFENDANT
AND APPELLEE

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Appellant respectfully submits this *Reply* to Appellee's *Response*.

I. THE STATE PROSECUTOR VIOLATED *BRADY* BY FAILING TO DISCLOSE EVIDENCE OF FERGUSON'S MOTIVES FOR TESTIFYING AGAINST TEMPLE.

A. The district court used the wrong legal standard in evaluating Temple's *Brady* claim and the State's *Response* fails to refute this argument.

The district court erred in requiring evidence of a pretrial *quid pro quo* agreement between the State and Temple. "There is no evidence of a pretrial agreement and thus there was no *Brady* violation." App. A at 9.

In its *Response*, the State argues that the district court did use the correct legal standard. *Response* at 21. At the same time, the State admits that a "promise is not required" and that the "possibility of a reward" in exchange for testimony need not be "guaranteed through a promise or binding contract" to constitute a *Brady* violation. *Id*. at 27.

Nevertheless, the State argues that in this case, AUSA Betley's assurance to Ferguson's lawyer – that if Ferguson provided substantial assistance, she would file a Rule 35 motion – falls into the category of "some promises, agreements, or understandings [that did not need to be

disclosed, because they are too ambiguous, or too loose or are of too marginal a benefit to the witness to count." *Response* at 27-28.

But Temple's case is nothing like those cited by the State. Those cases involve, for example, "a police officer's promise to speak a word on behalf of the witness." *Id*. at 28.

By contrast, Temple presented testimony from a federal prosecutor that she communicated with the witness' attorney that she would file a Rule 35 motion if the witness offered substantial assistance. This is an "understanding with tangible benefits" of the kind required by *Gollehon v. State,* 1999 MT 210, 296 Mont. 6, 986 P.2d 395.

The State cites *United States v. Curtis* for the idea that failure to disclose post-trial Rule 35 benefits is not a *Brady* violation. *United States v. Curtis*, 380 F.3d 1311, 1315 (11th Cir. 2004).

But *Curtis* involved significantly different facts. The government witness did receive Rule 35 benefits after trial, but in that case, the defense attorney and the jury had been informed about the witness' Rule 35 expectations and about the possibility that the government would consider filing a recommendation for substantial assistance. *U.S. v. Curtis,* 380 F.3d at 1313-15.

In Temple's case, Ferguson did not mention the possibility of a Rule 35 sentence reduction to the jury, nor the fact that she knew all about Rule 35 sentence reductions and had received one before. Moreover, unlike the defense attorney in *Curtis*, Temple's attorney was never informed about Betley's understanding with Ferguson's attorney that she would file a Rule 35 motion if Ferguson provided substantial assistance.

Despite acknowledging that a "promise is not required," the *Response* drifts back into asserting that Temple never proved that there was a promise made prior to trial. *Response* at 31. The *Response* does not present a coherent legal standard for evaluation of *Brady* claims.

B. The correct legal standard for determining a *Brady* violation is whether or not the State withheld "evidence favorable to the defense," including evidence of a witness' motivation for testifying.

"A prosecutor has a duty to provide a defendant with all evidence in the state's possession materially favorable to the defendant's defense." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). "When the defendant's guilt or innocence may turn on the reliability of a witness, the prosecutor's nondisclosure of the evidence affecting the credibility of

this witness falls within this general rule." *Napue v. Illinois*, 360 U.S. 254, 269 (1959).

The bottom line is "Was the jury offered information about the witness' motives for testifying?" This is the standard established in *Giglio*. As the *Alderman* court explains, "this Circuit has emphasized that 'the thrust of *Giglio* and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony.'" *Alderman v. Zant*, 22 F.3d 1541, 1554 (11th Cir. 1994), citing *McCleskey v. Kemp*, 753 F.2d 877, 844 (11th Cir. 1985).

All of these cases demonstrate that *Brady* requires disclosure of a far broader category of credibility evidence than merely "quid pro quo, pretrial agreements."

Here, the jury was not informed about Ferguson's motives for testifying. The jury had no idea that Ferguson was engaging in the federal Rule 35 process and that her attorney had been told that a Rule 35 motion would be filed if she provided substantial assistance. The jury had no idea that Ferguson had a powerful motive to exaggerate the amount of drugs in order to show that she was providing "substantial assistance."

The evidence withheld from the jury and the defense attorney included far more than Betley's communications with Ferguson's attorney. Temple's attorney was deprived of knowledge of the cooperation context in which Ferguson was offering information on Temple, because he was given only a redacted copy of the debrief meeting. The jury was also kept in the dark about Ferguson's prior knowledge of Rule 35 benefits and her handwritten letter explaining that knowledge. The jury was kept ignorant of Ferguson's 5K benefits that she had only recently received as a reward for cooperating with the government.

The jury was not told that Ferguson had been eligible for 20-year mandatory minimum sentence, then cooperated and received a 128-month sentence, and was hoping for still further reductions. The jury did not hear that Ferguson was hoping to receive these benefits from the same AUSA and the same judge who had already given her a large 5K reduction. The jury did not hear that the AUSA had held off filing the Rule 35 motion until after Ferguson testified against Temple. Instead, the jury was told by the State prosecutor that Ferguson had

already been sentenced, and was simply testifying because she wanted others to be held accountable as she had been.

The Ninth Circuit has held that restricting cross-examination of a witness about the witness' expectation of a Rule 35 deal created constitutional error. *United States v. Schoneberg*, 396 F. 3d 1036, 1043 (9th Cir. 2005) (drug conviction reversed because defense counsel was not permitted to cross-examine witness regarding his incentive to satisfy the government with his testimony in order to receive a Rule 35 sentencing break). A Montana U.S. district court judge agreed that an AUSA violated *Brady* when he withheld information that his witnesses had received 5K sentencing breaks and that they were in a position to obtain potential Rule 35 sentencing breaks at the time they testified. *See United States v. Anderson*, 2018 U.S. Dist. LEXIS 173659 at *7-9 (D. Mont., October 9, 2018) (granting habeas petition to dismiss drug conviction counts because AUSA Seykora withheld information about 5K and Rule 35 benefits given to and expected by government's witnesses).

II. THE AUSA'S KNOWLEDGE OF FERGUSON'S EXPECTATION OF A RULE 35 MOTION SHOULD BE IMPUTED TO THE CASCADE COUNTY PROSECUTOR AND STATE LAW ENFORCEMENT.

The district court concluded that no *Brady* violation occurred because the State prosecutor did not know about Ferguson's expectation Rule 35 sentence reduction. App. A. at 3. The district court erred in using an incorrect legal standard. *Cf. United States v. Price*, 566 F.3d 900, 908 (9th Cir. 2009) (U.S. district court erred in dismissing *Brady* claim when it reasoned that prosecutor did not have personal knowledge of *Brady* material).

In its *Response* brief, the State argues that AUSA Betley's knowledge of Ferguson's motivations for testifying may not be imputed to prosecutor Fuller and to Cascade County. *Response* at 33. In support, the State cites several cases in which courts held that prosecutors were not required to disclose to the defense information held by other agencies. *Id.* at 34. These cases are not on point. They involve facts in which the other agency had no involvement in the criminal case and did not assist the prosecution.

A. Temple does not have to show that the prosecutor had personal knowledge or possession of exculpatory evidence in order to prove a *Brady* claim.

The Ninth Circuit has explained this standard: "[A]ctual awareness (or lack thereof) of exculpatory evidence in the government's hands, . . . is not determinative of the prosecution's disclosure obligations. Because the prosecution is in a unique position to obtain information known to other agents of the government, it may not be excused from disclosing what it does not know but could have learned." *Carriger v. Stewart*, 132 F.3d 463, 480 (9th Cir. 1997). This Court similarly recognized that prosecutors have a duty to seek out exculpatory evidence in *State v. Chavis,* 2019 MT 108, ¶6 n.1, 395 Mont. 413, 440 P.3d 640 (reversing district court that had denied *Brady* claim when it had reasoned that the prosecution was unaware of exculpatory photos prior to trial).

Documents held by another executive branch agency are deemed to be "in the possession of the government" if the prosecutor has "knowledge of and access to" the documents. *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1989). Knowledge and access are presumed if the agency participates in the investigation of the defendant. *Id.*

In particular, courts have determined that joint task forces should be responsible for disclosing information belonging to another agency that is a member of the joint task force. Where the prosecution "conducts a 'joint investigation' with another state or federal agency, courts in the Second Circuit have held that the prosecutor's duty extends to reviewing the materials in the possession of that other agency for *Brady* evidence." *United States v. Gupta*, 848 F. Supp. 2d 491, 493 (S.D.N.Y. 2012). Several factors are relevant in determining whether the prosecution conducted a "joint investigation." These factors are set out in *United States v. Middendorf*, and include whether the other agency "participated in the prosecution's witness interviews." 2018 U.S. Dist. LEXIS 139980, 2018 WL 3956494 at *4 (S.D.N.Y. Aug. 17, 2018).

The Seventh Circuit has stated that "joint state-federal drug investigations are quite common, and prosecutors should give some thought to these potential problems of coordination." *Carey v. Duckworth*, 738 F. 2d 875, 878 (7th Cir. 1984). Prosecutors may not bury their heads in the sand and remain ignorant of information that may be helpful to the defense. *See United States v. Morris*, 80 F.3d 1151, 1169

(7th Cir. 1996) (finding it "improper for a prosecutor's office to remain ignorant about certain aspects of a case or to compartmentalize information so that only investigating officers, and not the prosecutors themselves, would be aware of it").

B. Because AUSA Betley participated in the investigation of Temple and helped the Cascade County prosecutor, her knowledge may be imputed to Cascade County.

Here, AUSA Betley participated in the investigation and evaluation of Temple's case. She was present for the March 29, 2019 debrief of Ferguson, along with Detective Hinchman and prosecutor Fuller.[1] Betley testified that she had arranged the interview, and would have provided recordings and transcripts to Ferguson's attorney, Mr. Holden. Postconviction Hrg. Tr. at 58. She facilitated Ferguson's testimony by approving a writ which directed the U.S. Marshal's Office to transfer Ferguson from federal prison to the local jail. *Id*. at 50, 62. She also helped the Cascade County team by holding off on filing the

[1] Betley was not present at the debrief because she was prosecuting Ferguson, contrary to the State's assertion. *Response* at 5. Ferguson had already been convicted and sentenced. Betley's purpose for being there was to evaluate Ferguson's information for Rule 35 purposes.

Rule 35 motion for nearly eight months, so that Ferguson would still be motivated to testify at Temple's trial.

Cascade County law enforcement also worked with Betley in confirming that Ferguson had in fact testified at trial, so that Betley could then file her Rule 35 motion knowing that Ferguson's cooperation had taken place. Postconviction Hrg. Tr. at 63.

At the same time, because Detectives Hinchman and Lynch and prosecutor Fuller were members of joint federal/state task forces, the federal prosecutor's and investigators' knowledge of the Rule 35 process and Ferguson's benefits may be imputed to them. Hinchman and Fuller were members of the Russell County Drug Task Force. Hinchman investigated both federal and state suspects and participated in discussions about whether they should be charged federally or in state court. Lynch worked for the High Intensity Drug Trafficking Area (HIDTA) joint task force. *See* Trial Tr. at 280, 286; Postconviction Hrg. Tr. at 30, 42.

III. THE PROSECUTOR'S FAILURE TO DISCLOSE IMPEACHMENT EVIDENCE CREATED MATERIAL PREJUDICE TO TEMPLE.

The district court did not analyze the issue of materiality in its order denying Temple's petition. The court mentioned that, in the context of sentencing, Temple failed to prove that Ferguson's testimony was false. This is not the correct legal standard for assessing materiality. App. A at 11.

In its *Response*, the State argues that the prosecutor's failure to disclose evidence of Ferguson's bias was not material because it would not have made any difference in the outcome of trial. The State contends that Ferguson was not a key witness for the prosecution. *Response* at 38.

A. Temple only need show that, had the evidence been disclosed, there is a reasonable probability the outcome of the proceeding would have been different.

"A showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles v. Whitley*, 514 U.S. 419, 434-435 (1994). Temple was materially prejudiced at trial by the prosecutor's failure to disclose Ferguson's motivations for testifying.

1. Because Ferguson's testimony was critical to the prosecution's case, the failure to disclose evidence for impeaching her was material.

"Impeachment evidence is especially likely to be material when it impugns the testimony of a witness who is critical to the prosecution's case." *Silva v. Brown*, 416 F.3d 980, 987 (9th Cir. 2005).

At Temple's trial, the prosecutor treated Ferguson's testimony as her most compelling evidence. She opened her closing argument by referring to Ferguson's testimony, and ended her argument by referring once again to Donny's testimony. In between, she referred to "Donny" 26 times throughout closing. Trial Tr. at 382, 385-86, 388-389, 396-97, 399 401-403. Ferguson was the prosecutor's pièce de résistance. She was the only source of the most damaging evidence offered against Temple, including the allegation that he distributed over ten pounds of meth and that he wrote a self-incriminating note to her while he was in jail. She countered the defense argument that Temple only possessed drugs in personal use amounts. She was the only witness supporting the prosecution's theory of the case – that Temple had engaged in a continuous course of conduct of dealing drugs from July of 2017 until February 5, 2018. Trial Tr. at 290.

Ferguson was the State's best witness precisely because the defense had no way of impeaching her. For Ferguson, the only impeachment evidence offered was that she had received immunity from the State, a fact of minor importance in the context of her federal conviction. This is not a case in which the witness had already been successfully impeached at trial and additional impeachment evidence emerged later. *Cf. Benn v. Lambert,* 283 F.3d 1040, 1056 (9th Cir. 2002) (holding that *Brady* material is especially likely to be prejudicial if it "would have provided the defense with a new and different ground of impeachment").

While Temple's attorney did attack the motives of all the other drug witnesses, he had no ammunition for challenging Ferguson. Mr. Neal testified that Ferguson was the most damaging witness to his client and that he had no way of impeaching her at trial. Postconviction Hrg. Tr. at 16.

The State argues that the "tentative" nature of Ferguson's Rule 35 expectation made it an "insignificant" incentive for Ferguson that was not material. *Response* at 38. But that is not what U.S. Supreme Court and other federal decisions say about "understandings" that motivate

witnesses to testify against a defendant. Instead, these cases state that the uncertainty about the exact benefits or reward is a more powerful incentive to lie and please the government than that provided by an agreement that has already been signed by the government. *See U.S. v. Bagley*, 473 U.S. 667, 683 (1985), *U.S. v. Curtis*, 380 F.3d at 1316.

2. Viewed in the context of the trial as a whole, the State's failure to disclose impeachment evidence for Ferguson was materially prejudicial to Temple.

Courts must evaluate the significance of withheld/suppressed information in light of all the evidence presented at the trial. *Kyles*, 514 U.S. at 435. When Ferguson's testimony is evaluated in the context of the trial as a whole, it is apparent that she was a critical witness for the State. The prosecution's case relied entirely on the testimony of drug-dealing witnesses whose credibility was low, thus making Ferguson's unimpeached testimony crucial. Two of the witnesses were drug dealers who were required to admit that they had been rewarded with lenient plea deals for their testimony and that they hoped for further leniency in pending cases. Osborn also admitted that he had pending charges and that he had testified for the State multiple times before.

Ferguson's unimpeached testimony was also critical in the context of the trial as a whole because the State offered no physical evidence such as drugs, cash, recordings, cell phone records, or forensic evidence at trial. No law enforcement witnesses testified that they had personally witnessed the defendant selling drugs and receiving money.

The jury recognized that the evidence was not overwhelming. For this reason, during deliberations, the jury sent questions to the court about sufficiency of the evidence. The jury asked, "Does someone from law enforcement have to see the drugs and money being transferred?" and "Does it have to be one of the four acts they described in the case on the board?" (referring to the transactions described by Wilson, Lohmeyer and Osborn). Trial Tr. at 407, 387-88. These questions reveal that the jury wasn't buying the testimony of Wilson and Lohmeyer and Osborn. The jury recognized the weaknesses of the State's case – specifically, the reliance on the testimony of drug criminals rather than objective, physical evidence or law enforcement testimony.

Had the evidence of Ferguson's powerful incentives to please the government been disclosed, "there is a reasonable probability that the withheld evidence would have altered at least one juror's assessment"

regarding the evidence that Temple distributed drugs. *Cone v. Bell*, 129 S. Ct. 1769, 1773 (2009); *see also Duncan v. Ornoski*, 528 F.3d 122, 1245 (9th Cir. 2008).

B. Temple was also materially prejudiced at sentencing because Ferguson's unimpeached "ten pound" testimony was the primary basis for his 30-year sentence.

The State also argues that the failure to disclose impeachment evidence for Ferguson did not have a material impact on Temple's sentencing. *Response* at 36, 38. On the contrary, had the district court had been informed at Temple's sentencing about Ferguson's dishonesty at trial, she would have questioned whether Ferguson's "ten-pound claim" had any credibility at all. The State underestimates the impact that the news of Ferguson's dishonesty would have had on the district court.

The State argues that Ferguson's "ten pounds of meth" claim played only a minor role in the district court's decision to sentence Temple to 30 years in prison for a single count of drug distribution. It is true that Temple had been sentenced as a PFO before (though not twice before, as the State claims). (He was sentenced in two cases as a PFO during the same month in 2010 and received concurrent sentences.)

Temple's history of six prior felonies was also not the reason for his thirty-year sentence. His criminal history was no worse than that of Brian Osborn, who had seven lifetime felonies, and a history of repeated failures in treatment, at the time he was sentenced to an all-suspended sentence after testifying against Temple. D.C. Doc. 36. The district court also opined that Osborn's suspended sentence was typical and not "an exceptional deal." Postconviction Hrg. Tr. at 87.

The State's argument that Ferguson's testimony did not have a material impact at Temple's sentencing ignores the sentencing transcript. It ignores the fact that the prosecutor went out of her way to bring up Ferguson's testimony at sentencing. 2/24/20 Sentencing Tr. at 9. It ignores the district court's repeated statements that the reason why she was sentencing Temple to 30 years, was that he had introduced "such a large amount of drugs into the community." *Id*. at 15. The district court explained that she was sentencing Temple to a much longer sentence because "this was not just user amounts that were being distributed for private use." *Id*. Ferguson's "ten-pound" claim distinguished Temple from the other defendants. The prosecutor used Ferguson's testimony to justify a much harsher sentence for Temple

than for Lohmeyer, Wilson, and Osborn, all of whom received suspended sentences for drug dealing.

Because Ferguson was the sole witness who offered the "ten pound" allegation, the State's failure to disclose impeachment evidence was materially prejudicial to Temple.

IV. THE DISTRICT COURT ERRED IN DENYING TEMPLE'S *NAPUE* CLAIM.

Temple reasserts his arguments in his opening brief. Opening Br. at 42-44. The district court used the wrong standard in evaluating this claim, because the court required Temple to prove that the prosecutor knew that Ferguson was lying. App. A. at 2-3.

Instead, the correct legal standard is whether the prosecutor "should have known that Ferguson was lying." The arguments in section II above about the AUSA's knowledge being imputed to Cascade County apply to this *Napue* issue as well. The AUSA would have known that Ferguson was being misleading when she testified that her only motivations for testifying were altruistic. This knowledge should be imputed to the state prosecutor. The jury and the court were misled by Ferguson's testimony, and the prosecutor emphasized her false testimony in closing. Thus Temple was deprived of his right to Due

Process under the Fourteenth Amendment and Montana Constitution, Article II section 17.

CONCLUSION

For all of the above reasons, Mr. Temple's petition for post-conviction relief should be granted and the case remanded to district court for a new trial and/or new sentencing.

Respectfully submitted this 26th day of March, 2025.

Laura Reed
P.O. Box 17437
Missoula, MT 59808

By: /s/ Laura Reed
Laura Reed

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is less than 5000, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Laura Reed
Laura Reed

CERTIFICATE OF SERVICE

I, Laura Marie Reed, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 03-26-2025:

Joshua A. Racki (Govt Attorney)
121 4th Street North
Suite 2A
Great Falls MT 59401
Representing: State of Montana
Service Method: eService

Tammy Ann Hinderman (Attorney)
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena MT 59620
Representing: Gary Temple
Service Method: eService

Kathryn Fey Schulz (Govt Attorney)
215 North Sanders
P.O. Box 201401
Helena MT 59620-1401
Representing: State of Montana
Service Method: eService

Electronically Signed By: Laura Marie Reed
Dated: 03-26-2025