No. SC89846

IN THE

Supreme Court of Missouri

JASON MERRIWEATHER,

Respondent,

v.

STATE OF MISSOURI,

Appellant.

Appeal from the Newton County Circuit Court
Fortieth Judicial Circuit
The Honorable Timothy W. Perigo, Judge

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from a St. Louis County judgment granting relief on a claim contained in respondent's Rule 29.15 motion. Specifically, the motion court found that appellant had committed a *Brady* violation, and the court vacated respondent's conviction for forcible sodomy and ordered a new trial. After opinion by the Court of Appeals, Eastern District, this Court granted appellant's application for transfer. This Court has jurisdiction. MO. CONST., Art. V, § 10.

STATEMENT OF FACTS

Respondent, Jason Merriweather, was convicted of forcible sodomy. *State v. Merriweather*, 196 S.W.3d 636, 637 (Mo.App. E.D. 2006). The crime was committed as follows:

On March 31, 2002, T.B. was walking home in St. Louis City after having dropped her ten-year-old-daughter off at the Greyhound Bus Station (Vol. II Tr. 81-82). While T.B. was passing the 2600 block of North Florissant, respondent stopped his car in front of her on the street (Vol. II Tr. 83, 105). Respondent displayed a handgun and told T.B. to get in (Vol. II Tr. 83, 105). T.B. complied with respondent's demand, and respondent proceeded to drive to the area of North 13th Street and Wright, where he parked his car in an alley behind some apartment buildings (Vol. II Tr. 84, 105). Respondent asked T.B. if she was an undercover cop, and he patted her down, searching for a wire (Vol. II Tr. 84, 105).

After respondent parked the car, he said, "Bitch, give me what I want and you know what I want" (Vol. II Tr. 85). T.B. was scared, so she did what respondent told her to do and remained seated (Vol. II Tr. 85). Respondent reached over, put his hand up her skirt, pushed her panties aside and put his fingers inside her, fondling her genitals (Vol. II Tr. 85-86, 105). Respondent then unzipped his pants and started to climb on top of her (Vol. II Tr. 86, 106). T.B. pushed him off and screamed, and she was able to unlock the door and run away (Vol. II Tr. 86, 106). As respondent

drove away, T.B. obtained the license plate number (Vol. II Tr. 86, 106). A man at the end of the alley who heard her scream asked her if she needed help (Vol. II Tr. 86). T.B. borrowed his cell phone and called 911 (Vol. II Tr. 86-87).

Officer Kevin Ryan went to T.B.'s home, and she gave him the license plate number of the vehicle (Vol. II Tr. 106). Officer Ryan conducted a Department of Revenue check of the license plate, and discovered that the license plate was registered to a vehicle licensed to respondent (Vol. II Tr. 106-107). He obtained a photograph of respondent, and he showed the photograph, along with five other photographs, to T.B. (Vol. II Tr. 89-90, 108-109). T.B. identified respondent (Vol. II Tr. 90, 108-109). Two days after the attack, T.B. identified respondent in a live line-up (Vol. II Tr. 90-91, Vol. III Tr. 80-82).

After the lineup, Detective Craig Hebrank talked to respondent (Vol. III Tr. 83). Respondent said that he believed that T.B. was a prostitute, that T.B. willingly performed oral sex for drugs, and that T.B. argued with him when he would not pay her (Vol. III Tr. 83). The police ran a criminal history check on T.B., but T.B. had no criminal history whatsoever (Vol. III Tr. 84). The area where the attack occurred was not known for prostitution (Vol. III Tr. 89).

In April 2005, the jury found respondent guilty of forcible sodomy (L.F. 45; Vol. III Tr. 124-125). The jury found respondent not guilty of kidnapping, armed criminal action, and attempted forcible rape (L.F. 44-47; Vol. III Tr. 139). On May 27,

2005, respondent was sentenced to serve a term of ten years (51-52).

On June 6, 2006, the Court of Appeals affirmed respondent's conviction and sentence on direct appeal. *State v. Merriweather*, 196 S.W.3d at 637. On September 8, 2006, the court issued its mandate.

On December 6, 2006, respondent filed a motion for post-conviction relief (PCR L.F. 1). One of respondent's claims was that the state had "failed to abide by its discovery obligation and provide trial counsel with [T.B.'s] prior criminal history" (PCR L.F. 6). Respondent alleged that this failure deprived him of his "right to due process of law" as guaranteed by the United States Constitution (PCR L.F. 6). The motion further alleged that the state had failed to comply with Rule 25.03 (PCR L.F. 10). The motion did not specifically identify any prior convictions, but it alleged that T.B. had pled guilty "to misdemeanor and/or felonies" (PCR L.F. 6-7). The motion stated that "If an evidentiary hearing is granted counsel will request that The Court order The State to provide a REGIS, NCIC, MULES or equivalent record check of [T.B.] aka [T.D.'s] criminal history" (PCR L.F. 11).

On June 21, 2007, the court held an evidentiary hearing (PCR Tr. 1). At the evidentiary hearing, the prosecutor informed the court that – prior to trial – she had had her investigator run a criminal history check on the victim's name, but that the records check had not revealed any criminal history (PCR Tr. 74-80). The prosecutor also called her investigator to testify (PCR Tr. 80). He testified that he searched for a

criminal history, but that his search did not reveal any pending charges or criminal convictions (PCR Tr. 84).

At the time of respondent's trial, the St. Louis City Prosecutor's office was using an older system to search for criminal convictions (PCR Tr. 79-80). At the time of the evidentiary hearing, the office used a different system, L.E. Web (PCR Tr. 79-80). In anticipation of the evidentiary hearing, the prosecutor had her investigator run the victim's name through the new system (PCR Tr. 80). This search revealed three misdemeanor convictions in Illinois from 1990, 1993, and 1997 (PCR Tr. 80). It also revealed three pending misdemeanor charges in St. Louis County (PCR Tr. 80). The prosecutor had not been expecting any convictions to appear (PCR Tr. 80).[1]

On August 17, 2007, the motion court granted respondent's claim that the state had failed to comply with its discovery obligations (PCR L.F. 70). The court acknowledged that the victim's criminal history had not been in the state's possession at the time of trial, but the court concluded that the state had had a duty to discover the victim's Illinois criminal history (PCR L.F. 70). The court vacated respondent's conviction and sentence and ordered a new trial (PCR L.F. 71). On September 21, 2007, the state filed its notice of appeal (PCR L.F. 72).

On October 21, 2008, the Court of Appeals, Eastern District, affirmed the

[1] To avoid duplication, some additional details elicited at the evidentiary hearing are only included in the argument portion of the appellant's brief.

motion court's judgment. On February 24, 2009, this Court granted respondent's application for transfer.

POINT RELIED ON

The motion court clearly erred in finding that the state failed in its discovery obligations under *Brady v. Maryland* and Rule 25.03 because respondent did not prove by a preponderance of the evidence that the state failed to disclose material evidence in its possession, or material evidence that should have been discovered after due diligence, in that (1) the evidence showed that the state did not have T.B.'s criminal history in its possession at the time of trial; (2) the evidence showed that two state actors and defense counsel searched for T.B.'s criminal history prior to trial but did not find anything; (3) the evidence did not reveal that the state failed to employ due diligence in searching for T.B.'s criminal history; and (4) with regard to materiality, some of the information was not shown to be admissible.

Kyles v. Whitney, 514 U.S. 419 (1995);

United States v. Jones, 34 F.3d 596 (8th Cir. 1994);

State v. Petree, 568 S.W.2d 546, 549 (Mo. App. K.C.D. 1978);

Hollman v. Wilson, 158 F.3d 177, 181 (3d Cir. 1998);

Rule 29.15(*i*).

ARGUMENT

I.

The motion court clearly erred in finding that the state failed in its discovery obligations under *Brady v. Maryland* and Rule 25.03 because respondent did not prove by a preponderance of the evidence that the state failed to disclose material evidence in its possession, or material evidence that should have been discovered after due diligence, in that (1) the evidence showed that the state did not have T.B.'s criminal history in its possession at the time of trial; (2) the evidence showed that two state actors and defense counsel searched for T.B.'s criminal history prior to trial but did not find anything; (3) the evidence did not reveal that the state failed to employ due diligence in searching for T.B.'s criminal history; and (4) with regard to materiality, some of the information was not shown to be admissible.

The motion court concluded that the state failed in its discovery obligations under *Brady* and Rule 25.03 (PCR L.F. 29-33). But because the state did not have the information in question, and because the state's efforts in obtaining the information were reasonable (and because respondent failed to prove a lack of due diligence), the motion court clearly erred, and its judgment granting a new trial should be reversed.

A. The standard of review

"Appellate review of the denial of a post-conviction motion is limited to a

determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." *Moss v. State*, 10 S.W.3d 510, 511 (Mo. banc 2000). "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made." *Id*. Under Rule 29.15, "The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence." Rule 29.15(*i*).

B. Respondent did not prove by a preponderance of the evidence that the state failed to disclose evidence in its possession, or evidence that should have been discovered after due diligence, or that the state failed to exercise due diligence in discovering the T.B.'s criminal history

In his amended motion, respondent alleged that the state had "failed to abide by its discovery obligation and provide trial counsel with [T.B.'s] prior criminal history" (PCR L.F. 6). Respondent alleged that this failure deprived him of his "right to due process of law" as guaranteed by the United States Constitution (PCR L.F. 6). The motion further alleged that the state had failed to comply with Rule 25.03 (PCR L.F. 10). The motion did not specifically identify any prior convictions, but it alleged that T.B. had pled guilty "to misdemeanor and/or felonies" (PCR L.F. 6-7).

The motion alleged that post-conviction counsel learned about T.B.'s criminal record because counsel had "been advised by [respondent's] family members that [T.B.] has a criminal record" (PCR L.F. 10-11). The motion stated that "If an

evidentiary hearing is granted counsel will request that The Court order The State to provide a REGIS, NCIC, MULES or equivalent record check of [T.B.] aka [T.D.'s] criminal history" (PCR L.F. 11).

1. Relevant facts

At trial, T.B. testified; she was not questioned about any prior convictions by either the state or respondent's trial counsel (Vol. III, Tr. 81-103). Detective Craig Hebrank testified that, as part of his investigation (after respondent claimed T.B. was a prostitute), he ran a criminal history check on T.B., but that there was no criminal history "whatsoever" (Vol. III, Tr. 83-84). On cross-examination, defense counsel elicited that it was "common" for prostitutes go by different names, but he did not ask whether Detective Hebrank had run a check on any other names (Vol. III, Tr. 87). Detective Hebrank's criminal history check took place in April 2002 or later (*see* Vol. III, Tr. 76).

At the post-conviction evidentiary hearing, respondent's trial counsel testified that, prior to trial (i.e., between April 2002 and April 2005), he deposed T.B., and that he ran a criminal background check using REJIS (PCR Tr. 18-19). Trial counsel did not find any criminal history (PCR Tr. 18-19). Counsel testified that in his pre-trial discovery request, he requested the criminal history of every witness, and that the state did not provide any criminal history for T.B.; thus, counsel believed (at the time of trial) that T.B. did not have any criminal history (PCR Tr. 19). (The direct-

appeal legal file confirms that trial counsel made this request (L.F. 12).)

Also at the post-conviction evidentiary hearing, the assistant prosecutor who tried respondent's case stated that she routinely has her investigator run a criminal history check on all witnesses prior to trial (PCR Tr. 79).[2] She stated: "We ran [T.B.] prior to trial, no convictions were on her record. He [the prosecutor's investigator] ran her in what is called the MULES, M-U-L-E-S, system, and nothing showed up" (PCR Tr. 79). The prosecutor stated that she had not known about T.B.'s criminal history prior to trial; she stated: "I did not know of those at the time when – and I absolutely would have disclosed them and did as soon as I got them" (PCR Tr. 79-80). Respondent presented no other evidence about the state's efforts to discover T.B.'s criminal history.

The state then called the prosecutor's investigator to testify. He testified that they normally run a criminal history check on all witnesses, and that it is his practice to highlight any pertinent information in the computer-generated printouts he obtains (PCR Tr. 81-82). He testified that he would have followed that practice when he ran T.B.'s records check (PCR Tr. 82). He stated that he had not looked in the file "to see what [he] originally ran back in 2005," and he stated that he could not be one

[2] In lieu of taking the stand, the parties agreed that the assistant prosecuting attorney would be allowed to make a statement as an officer of the court (PCR Tr. 73).

hundred percent sure that he had run variations of T.B.'s name (PCR Tr. 82). But he said it was his practice "run everybody" (PCR Tr. 82-83). He also stated that he would have given any printouts – even if there were no convictions – to the prosecutor (PCR Tr. 83). He was asked to look in the prosecutor's file to see if there were any printouts for T.B., but before that request could be carried out, post-conviction counsel asked a different question; thus, no record was made as to whether the state's file contained the printout that was obtained before trial (PCR Tr. 83). The investigator testified that he used REJIS to run criminal histories, but that he also had access to NCIC and MULES (PCR Tr. 84). He testified that he found "no FBI number or SID number," and he stated that if he had found either number he would have run it (PCR Tr. 84). He stated that the REJIS search should have revealed that T.B. had a warrant in St. Louis County (PCR Tr. 84). He could not explain "why REJIS, MULES or NCIC wouldn't pick up Sagaman County, Illinois" convictions, but he admitted that he did not know whether Sangaman County entered its information into its computers, and that he did not "know when they were linked into the REJIS system" (PCR Tr. 84-85).

The fact that T.B. had prior convictions at the time of trial, though, *was* established at the evidentiary hearing. The assistant prosecutor explained that in preparing for the evidentiary hearing, she again told her investigator to run a criminal history check on T.B. (PCR Tr. 79). The prosecutor also pointed out that

since the time of respondent's trial, the prosecutor's office had obtained access to a new system for checking criminal histories, the "L.E. Web system" (PCR Tr. 79). The prosecutor stated that "what we learned at that time was were about the three misdemeanor convictions from 1990, 1993, and 1997 in Springfield Illinois" (PCR Tr. 79). The prosecutor had not expected to find any prior convictions, but when she did, she turned the information over to post-conviction counsel (PCR Tr. 79-80). (Post-conviction counsel confirmed that the prosecutor had provided the criminal history to him (PCR Tr. 76, 78).) The prosecutor's investigator confirmed that, prior to the evidentiary hearing, he ran a criminal history check and found T.B.'s prior convictions using the L.E. Web system (PCR Tr. 83).

Post-conviction counsel also described his efforts to find T.B.'s criminal history, but, unlike the prosecutor, he was only able to find T.B.'s pending charges in St. Louis County (PCR Tr. 74-75). He used REJIS to find that information (PCR Tr. 74-75). The REJIS printout that post-conviction counsel obtained indicated that T.B. had had pending charges at the time of her deposition (on April 30, 2004), and it indicated that those charges were still pending when she testified at trial (on April 11, 2005) (PCR Tr. 75).

2. The motion court's findings

Based on this record, the motion court found that "The evidence and testimony at the post-conviction hearings did not conclusively establish what steps

the State had taken in regard to discovering such information or what caused the State's failure to provide the information." (PCR L.F. 57). The motion court was convinced, though, "that the State did not have the information relating to the victim's three misdemeanor convictions in 1990, 1993, and 1997 for retail theft, or information relating the victim's outstanding charges and the fact of her being in warrant status at one point, which apparently coincided with the date of the deposition and/or trial" (PCR L.F. 57).

The motion court pointed out that under *Brady*, the state had an obligation to disclose material evidence "irrespective of the good faith or bad faith of the prosecution" (PCR L.F. 67). The court stated, "This Court does not believe the failure to disclose information in this case was intentional or the result of bad faith on the part of the prosecutor" (PCR L.F. 67). But, again, the court reiterated that "*Brady* may also be violated by failures which are inadvertent" (PCR L.F. 67).

The motion court then pointed out that "One commentator has suggested that due process imports an obligation to search for Brady material in addition to the classic Brady obligations, noting that the Supreme Court and certain federal and state cases since Brady have indicated that the government, in order to discharge its obligation, must sometimes seek out evidence favorable to the accused not yet in its possession, though noting courts have not addressed the concept squarely" (PCR L.F. 68). The motion court then quoted:

> "Search Brady analysis, thus, recognizes that the Due Process Clause is violated whenever the prosecutor does not disclose evidence favorable to the defense that the prosecutor should have known about. Sometimes he may not know of the evidence because of his own failure; other times other state agents may fail him. Either way, the defendant is denied due process by a state agent."

(PCR L.F. 68, quoting Comment: Brady v. Maryland and the Search for Truth in Criminal Trials, 63 U.Chi.L.Rev. 1673, 1700 (1996)).

The motion court then found support for a "search *Brady* analysis" in Rule 25.03(C), which "requires the State to use due diligence and make good faith efforts to make such information available to the defense, even when it is not in the possession of the State but in the possession or control of other governmental personnel" (PCR L.F. 69). The motion court then reiterated that *Brady* did not depend upon the good faith of the prosecutor, that a *Brady* violation can be inadvertent, and that "Due process may be violated even in the absence of negligent conduct" (PCR L.F. 69).

Finally the motion court concluded:

> As stated, the reason for the discovery failure was never established. The records may have been more difficult to locate because of aliases. It is not known. However, the records at issue were basic

criminal history records of the State's primary witness. The outcome of trial should not depend on the fortuitous outcome of a record search.

(PCR L.F. 70-71). Then, despite the motion court's findings that the state did not have the information to disclose, and despite its determination that "the reason for the discovery failure was never established," the motion court concluded that the alleged *Brady* violation warranted a new trial (PCR L.F. 71). This conclusion was clearly erroneous.

3. Respondent did not prove that the state failed in its obligations with regard to T.B.'s misdemeanor convictions

In concluding that there was a *Brady* violation, the motion court clearly erred. "A *Brady* violation occurs if: (1) the evidence is favorable to the accused because it is exculpatory or impeaching; (2) the evidence was suppressed by the state either willfully or inadvertently; and (3) the suppression must have prejudiced the defendant." *State v. Goodwin*, 43 S.W.3d 805, 812 (Mo. banc 2001) (citing *Strickler v. Greene*, 527 U.S. 263, 281 (1999)). To comply with *Brady*, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf *in this case*, including the police." *Kyles v. Whitney*, 514 U.S. 419, 437 (1995) (emphasis added).

"It is well settled that [under the due process clause] the government has the obligation to turn over evidence in its possession that is both favorable to the

accused and material to guilt or punishment." *Pennsylvania v. Richie*, 480 U.S. 39, 57 (1987); *State v. Parker*, 886 S.W.2d 908, 916-917 (Mo. banc 1994); *State v. Taylor*, 944 S.W.2d 925, 931 (Mo. banc 1997). But the government has no obligation to disclose information that it does not have. *United States v. Dierling*, 131 F.3d 722, 736 (8th Cir. 1997); *State v. Stewart*, 18 S.W.3d 75, 92 (Mo. App. E.D. 2000). "This duty to disclose includes not only information that is actually known to the prosecutor, but also information that may be learned through reasonable inquiry." *State v. Rippee*, 118 S.W.3d 682, 684 (Mo. App. S.D. 2003).

Rule 25.03 provides that "the state shall, upon written request of defendant's counsel, disclose to defendant's counsel such part or all of the following material and information within its possession or control designated in said request: . . . any record of prior criminal convictions of persons the state intends to call as witnesses at a hearing or the trial." Rule 25.03(A)(7). (As the prosecutor pointed out at the evidentiary hearing, this rule does not require disclosure of pending charges or arrests.)

Here, in concluding that the state committed a *Brady* violation with regard to the victim's prior misdemeanor convictions, the motion court clearly erred. As the record shows, and as the motion court concluded, T.B.'s criminal history was *not* in the state's possession at the time of trial (PCR Tr. 79-80; PCR L.F. 57, 67). The record shows that the prosecutor conducted a search for the victim's criminal history, but

that the records check revealed nothing (PCR Tr. 79-80). Trial counsel and a detective were similarly unsuccessful in discovering any sort of criminal history for the victim (PCR Tr. 19; Vol. III, Tr. 84).

To suppress evidence, even inadvertently, it must be in the state's possession, or, at least, reasonably discoverable if it is in the possession of a foreign jurisdiction. Here, the evidence was not discovered by respondent's trial counsel, the prosecutor's investigator, or the detective who ran a criminal history. In short, three independent records checks revealed nothing. Yet, the motion court concluded that the state's failure to discover and disclose three convictions from the State of Illinois violated the state's obligation to provide *Brady* information.

But the state should not be deemed to have knowledge (or the ability to find) every prior conviction in every jurisdiction simply because the information is held by the "government" in that jurisdiction. Indeed, while the state would have no quarrel with a rule that requires it to conduct a reasonable records check (and thereby obtain reasonably available information from other jurisdictions), the state should not be convicted of a *Brady* violation when it fails to comprehensively search every jurisdiction (manually if necessary) to ensure that no criminal history exists. Such a rule is not in line with *Brady* or its progeny.

The motion court did not conclude in this case that the state's pre-trial efforts were deficient; rather, the motion court was seemingly convinced that the state's

efforts were "good faith" efforts, but that the state had simply failed to turn up T.B.'s criminal history (and, thus, that the state was liable for the non-disclosure of the information). But a mere failure to find information held by another jurisdiction should not be held against the state, particularly where the only evidence to explain the late discovery was the state's use of a newly available database (the L.E. Web system).

As the record shows, the City of St. Louis prosecutor's office has, since the time of respondent's trial, changed its records check system (PCR Tr. 79-80). There was no evidence that the earlier records checks were not done correctly, or that a different type of computerized search before trial could have turned up T.B.'s criminal history. Thus, it appears from the record of the evidentiary hearing that either the new system (L.E. Web) is more comprehensive, or that new information was added to the computerized databases in the period after trial but before the evidentiary hearing. Either conclusion is possible. And in this age of increasing automation, either conclusion is very likely. But the state's obligation under *Brady* should not increase over time due to scientific advancements or the timeliness with which information is entered into a computerized database by government agents in a foreign jurisdiction.

If the state's *Brady* obligation is to be governed by such an evolving set of circumstances, the state will be forced to engage in wide-ranging fishing expeditions

in every jurisdiction to turn up prior convictions of state's witnesses in order to comply with *Brady* or risk a subsequent reversal. And, as more jurisdictions, courts, and law enforcement agencies automate (or as searchable databases become more complete or accurate), the state will inevitably be punished for not finding and revealing information that it did not have at the time of trial, as it was in this case. That has not been the rule in the past, and it should not be the rule now.

In *United States v. Jones*, 34 F.3d 596 (8th Cir. 1994), for example, the defendant contended on appeal that the prosecutor failed to disclose a government witness's convictions which could have been used to impeach the witness. Prior to trial, the defendant moved for production of the arrest and convictions reports for all witnesses the government intended to call. *Id*. at 598. "The prosecution made a records check of Donald Ray, which included a review of the Missouri Uniform Enforcement records, which did not show any convictions." *Id*. On the morning of the defendant's trial, Ray told the prosecutor that he had served time in Illinois for burglary. *Id*.[3] The prosecutor informed the defendant of this conviction, which the

[3] The victim in respondent's case gave no indication that she had prior convictions. Appellant did not allege in his motion that the prosecutor failed to ask T.B. about her prior criminal history, and no evidence along those lines was elicited from the assistant prosecutor or T.B. at the evidentiary hearing (T.B. did not testify at the evidentiary hearing).

defendant used in his cross-examination of Ray. *Id*.

Ray, in fact, had multiple prior convictions, including two convictions for possession of a stolen vehicle, aggravated battery, armed robbery, and theft. *Id*. "Each of these convictions was in Illinois state proceedings, and was a 'public record.'" *Id*. On appeal, the defendant argued that the prosecution's failure to disclose the additional convictions violated *Brady*, and therefore, due process. *Id*. at 599. The Eighth Circuit disagreed, stating that the state had no duty to disclose information that it did not possess; the court stated:

> The fatal flaw in this contention is that *Brady* requires the prosecution to disclose to the defendant only evidence in the prosecution's possession. Prior to trial, however, the only conviction of Ray that the prosecution knew about was his burglary conviction.

Id. The court also stated that the government has no affirmative duty to take action to discover information which it does not possess. *Id*. (citing *United States v. Tierney*, 947 F.2d 854, 864 (8th Cir. 1991)). There is no *Brady* violation if the government does not possess the material at issue. *Id*. Additionally, "the prosecution has no duty to undertake a fishing expedition in other jurisdictions in an effort to find impeaching evidence." *Id*. (quoting *United States v. Stuart*, 923 F.2d 607, 612 (8th Cir. 1991)).

The defendant argued that the government could have discovered the other convictions if it had made a proper inquiry into Ray's criminal history by checking

the records of the Federal Bureau of Investigation or the National Crime Information Center (NCIC). *Id*. The Eighth Circuit rejected this argument, finding that "the government did make a records check – of the criminal records of Missouri, the state where the crimes committed – and found nothing." *Id*. Further, there was nothing in the record to indicate that a check of the records of the FBI and NCIC would have disclosed Ray's other state convictions. *Id*. at 600; *see also State v. Petree*, 568 S.W.2d 546, 549 (Mo. App. K.C.D. 1978) (finding no discovery violation where the prosecutor's reasonable records check had not discovered a witness's prior conviction).

At bottom, the question in this case is how broadly to construe the prosecutor's duty to search for a witness's criminal history. A number of courts have held that prosecutors suppress evidence if they fail to search for criminal histories of witnesses that are readily available through routine investigation of other government agencies or databases; but appellant knows of no court that requires prosecutors to search every state for prior criminal convictions of government witnesses without having a reason to believe a criminal history exists. *See Hollman v. Wilson*, 158 F.3d 177, 181 (3d Cir. 1998) ("Thus, we, along with several other circuits have imposed upon the prosecution a duty to search accessible files to find requested exculpatory material."); *East v. Scott*, 55 F.3d 996, 1003 (5th Cir. 1995) (citing *United States v. Auten*, 632 F.2d 478, 480 (5th Cir. 1980)) (explaining that the

prosecution is deemed to have knowledge and possession of its witnesses' criminal history information that would be revealed by routine check of FBI and state databases, including a witness's state rap sheet, where such information is readily available); *United States v. Brooks*, 966 F.2d 1500, 1502-04 (D.C. Cir. 1992) (explaining that a prosecutor has a duty to search files of other agencies closely aligned with prosecution where there was explicit request for apparently easy examination and non-trivial prospect that examination might yield material exculpatory information); *United States v. Perdomo*, 929 F.2d 967, 970-71 (3d Cir. 1991) (holding that federal prosecutor's failure to conduct search of local Virgin Islands records to verify witness's criminal background constituted suppression under *Brady* because information was readily available to it). "However, where the government has diligently searched, no *Brady* violation will be found." *Hollman*, 158 F.3d at 181 (holding that government's failure to disclose witness's full criminal history did not amount to a *Brady* violation, where the failure was the result of clerical error and information was not readily available to prosecution).

Contrary to these cases, here, the motion court concluded that the state failed to find and disclose information from another jurisdiction – even though the motion court did not conclude that the state's efforts were deficient, or that the state could (or should) have found the information in question. The motion court seemingly concluded that simply because the state did not find the information, the state was

liable for the non-disclosure. The court cited no good authority for this conclusion.

The motion court relied on *Crivens v. Roth*, 172 F.3d 991 (7th Cir. 1999), but the facts and holding of *Crivens* do not support the motion court's conclusion. In *Crivens*, the state failed to disclose the criminal history of a government witness. *Id*. The witness had a prior conviction for possession of crack cocaine with intent to deliver and was sentenced to thirty months probation before the defendant's trial. *Id*. at 994. During the probation period and four months before the defendant's trial, the witness was charged with criminal trespass to a vehicle. *Id*. The defendant specifically requested that the state disclose the prior criminal records of state witnesses and "make specific inquiries of each of its witnesses as to any criminal convictions." *Id*. at 994.

Six years after trial, the defendant learned that the witness had a prior conviction and that the state had failed to disclose this information. *Id*. The state claimed that "no violation occurred because it did not suppress or withhold this information deliberately and, therefore, should not be found to have violated the first aspect of the *Brady* test." *Id*. The Seventh Circuit disagreed, finding that if the state "indeed asked for the criminal history records" of the witness, it would be rather implausible that the Chicago police department could not have found the witness's prior conviction. *Id*. at 997. The Court further found as follows:

While we have determined in prior cases that a prosecutor's failure to

> provide evidence of a witness's criminal record did not rise to the level of a suppression of withholding so as to create a *Brady* concern, we reached this result only after concluding that "the government diligently searched the pertinent criminal records for information on the witness, asked the witness directly about his criminal history, and disclosed all of its information to the defendant."

Id. (citing *United States v. Young*, 20 F.3d 758, 764 (7th Cir. 1994)). The Court in *Crivens* specifically contrasted the situation in *Crivens* to the facts of *Young*, a case more similar to respondent's case:

> In *Young*, the defendant raised a *Brady* claim the Illinois prosecutor failed to provide him with a witness's Mississippi criminal records. Unlike the prosecutor in *Young*, who did not possess the information about a witness's criminal record that was in the possession of another state, the state in this case had the information at its disposal. We agree with other circuits that have explained that "the availability of information is not measured in terms of whether the information is easy or difficult to obtain but by whether the information is in the possession of some arm of the state."

Id. (citing *United States v. Perdomo*, 929 F.2d at 971; *Martinez v. Wainwright*, 621 F.2d 184, 186-187 (5th Cir. 1980)). Thus, the analysis in *Crivens* actually indicates that the

facts of respondent's case do not support the finding of a *Brady* violation.[4]

In sum, the motion court clearly erred when it placed a duty on prosecutors to "undertake a fishing expedition in other jurisdictions in an effort to find impeaching evidence." *Jones*, 34 F.3d at 599. Here, for whatever reason, evidence of T.B.'s prior convictions in Illinois was not available through the usual avenues. But the State should not be held responsible for other jurisdictions' delays in updating their records, nor should it be held responsible for technological failures or advances in computerized databases or search engines. Instead, while a prosecutor has "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case," *Kyles*, 514 U.S. at 437, when a prosecutor is asked to obtain

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[4] The "materiality" analysis was also distinguishable. In *Crivens* the court found that the prior convictions were material because the witness's "use of aliases as they related to these convictions could have damaged his credibility in the eyes of the state trial court." 172 F.3d at 998. "By assuming new identities, Childs [the witness] has demonstrated a propensity to lie to police officers, prosecutors, and even judges." *Id*. Here, there was no evidence that the victim assumed new identities or that she lied to the police about her former name. The only evidence was that the victim had a different last name in 2002 (there was no evidence why she had a different last name in 2002), but the victim stated on direct examination that she had a different last name in 2002 (Vol. II Tr. 81).

information that might be extant in a foreign jurisdiction, a prosecutor should only be required to conduct a reasonable search of readily accessible computerized records. The motion court clearly erred in imposing a heavier burden.

4. Respondent did not prove that the state failed in its obligations with regard to T.B.'s pending charges in St. Louis County

In addition to three Illinois convictions, a review of T.B.'s criminal history revealed that T.B. had pending criminal charges in St. Louis County at the time of trial. The trial in this case took place in St. Louis City.

Although the victim's pending charges were in another political subdivision of the state, the pending charges were not known to, or in the possession of, the prosecutor (PCR Tr. 79-80). Additionally, the pending charges were not reasonably discoverable because the prosecutor, a detective, and respondent's trial counsel were all unable to discover any criminal history of the victim, including the pending charges, prior to trial (PCR Tr. 19, 79, 84; Vol. III Tr. 84). Thus, like the victim's prior convictions, the victim's pending charges were not known to the prosecutor or "known to the others acting on the government's behalf in this case, including the police." *Kyles v. Whitney*, 514 U.S. at 437.

Moreover, even if the pending charges were in the prosecutor's possession or should have been discovered by virtue of the fact that they were pending in a political subdivision of the state, the motion court clearly erred in determining this

non-disclosure violated *Brady*. Under *Brady* the impeachment evidence withheld by the state must be "material." *Pennsylvania v. Richie*, 480 U.S. at 57.

"[E]vidence is 'material' under *Brady*, and the failure to disclose it justifies setting aside a conviction, only where there exists a 'reasonable probability' that had the evidence been disclosed the result at trial would have been different." *Wood v. Bartholomew*, 516 U.S. 1, 5 (1995); *Anderson v. State*, 196 S.W.3d 28, 37 (Mo. banc 2006). Here, there was no reasonable probability of a different result at trial because evidence of the victim's pending charges was not admissible.

The motion court stated that the admissibility of the victim's arrest record could have only been determined in the specific context of a trial (PCR L.F. 64). Thus, the motion court did not conclude that the prior charges were actually admissible to impeach T.B; and, as such, respondent failed to prove materiality. Moreover, respondent failed to prove any means of admitting evidence of T.B.'s pending charges, and whether such evidence would have been admissible can readily be determined.

The record shows that the victim had been charged with three counts of fraudulent use of a credit card in St. Louis County (PCR Tr. 79). The charges were pending in St. Louis County, and had not been disposed of prior to trial (PCR Tr. 79). But "the credibility of a witness may not be attacked by showing his arrest and a pending charge which has not resulted in a conviction." *State v. Lockhart*, 507 S.W.2d

395, 396 (Mo. 1974). "There are three exceptions to this general rule: (1) where the inquiry demonstrates a specific interest of the witness; (2) where the inquiry demonstrates the witness' motivation to testify favorably for the state; or (3) where the inquiry demonstrates that the witness testified with an expectation of leniency." *State v. Franklin*, 16 S.W.3d 692, 695 (Mo.App. E.D. 2000).

Appellant did not prove that any of these exceptions was present in this case. The pending charges would not have shown a specific interest. The pending charges were pending in another county; thus, the prosecutor in respondent's case had no authority to make any deals in the pending cases. Moreover, there was no allegation in respondent's amended motion (and no evidence presented at the evidentiary hearing) that the victim had any sort of deal, that the victim expected any deal, or that the victim had an expectation of leniency at the time of respondent's trial.

Inadmissible evidence cannot form the basis for a *Brady* violation because it is simply not "material." In *Wood*, the defendant claimed a *Brady* violation based upon the State's failure to disclose the results of inadmissible polygraph examinations of a witness. *Wood*, 516 U.S. at 4-5. The United States Supreme Court determined that "[t]he information at issue here, then – the results of a polygraph examination of one of the witnesses – is not 'evidence' at all. Disclosure of the polygraph results, then, could have had no direct effect on the outcome of trial, because respondent could have made no mention of them either during argument or while questioning

witnesses." *Id*. at 6. Similarly, here, because he failed to prove that the pending charges were admissible, respondent failed to prove that they were material.

C. Conclusion

In sum, the motion court clearly erred in finding a *Brady* violation under the facts of this case. The state conducted a reasonable search for *Brady* material that might have been extant in other jurisdictions, and the state should not be required to conduct an impossibly comprehensive search of all jurisdictions in an effort to find potential impeachment evidence.

CONCLUSION

The judgment of the motion court, insofar as it granted respondent's claim that the state failed in its discovery obligations, should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Rule 84.06(b) and contains 7,304 words, excluding the cover, this certification, the signature block, and the appendix, as determined by Microsoft Word software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus free; and

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