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IN THE

COURT OF APPEALS OF MARYLAND

DAVID R. FAULKNER,
APPELLANT,

v.

STATE OF MARYLAND,
APPELLEE

JONATHAN D. SMITH,
APPELLANT,

v.

STATE OF MARYLAND,
APPELLEE

ON WRIT OF CERTIORARI FROM
THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF FOR *AMICUS CURIAE*
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae is the National Association of Criminal Defense Lawyers ("NACDL" or "*Amicus*").[1]

NACDL is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, it has a nationwide membership of many thousands of direct members, and up to 40,000 counting affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers, and is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

Amicus submits this brief to address the errors in the Maryland Court of Special Appeals' interpretation of the due diligence requirement of Criminal

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[1] Pursuant to Maryland Rule 8-511, *Amicus* is filing this brief with the written consent of all parties to the appeal.

Procedure § 8-301(a)(2) given the State's affirmative obligation to disclose exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963) and Maryland Rule 4-263. The decision penalizes defense counsel for failing the impossible task of ferreting out and following up on the potential relevance of improperly withheld facts. If permitted to stand, the court's decision will impermissibly erode the due-process protections of *Brady* and undermine the feasibility of making out an actual innocence claim notwithstanding the reasonable efforts of defense counsel to timely bring newly discovered evidence to light.

STATEMENT OF THE QUESTION PRESENTED

Did the lower courts err by holding that evidence was not "newly discovered" for purposes of Maryland Code, Criminal Procedure, § 8-301, because defense counsel failed to investigate an incomplete summary of a witness statement, where the State suppressed a videotaped statement by that witness with material additional information?

BACKGROUND

Jonathan Smith and David Faulkner were convicted in March and April 2001 for the 1987 murder of Adeline Wilford. Compelling evidence has come to light that both men are actually innocent and that Ty Brooks and William Thomas are responsible for the murder. Appellants have challenged their convictions. *Amicus* refers the Court to Appellants' briefs for a full recitation of

the relevant facts. The following focuses on the factual and procedural background relevant to the issues considered in this brief.

This brief addresses the 2017 companion decisions by the Court of Special Appeals vacating the Circuit Court's initial denial of Appellants' petitions for a writ of innocence but upholding the Circuit Court's refusal to consider one of three critical categories of "newly discovered evidence" presented by Appellants. That category of evidence is a suppressed videotaped statement by a local hunting guide, Daniel Keene, who told the police that he had driven past Ms. Wilford's home just before she was killed and saw a car that did not belong to Ms. Wilford parked at the house. Smith Record Extract E1086-90. The State also failed to disclose handwritten notes by the Maryland State Police about Mr. Keene's observations. Smith Opening Br. 16 (Md. Ct. Sp. App. 2016).

As the Circuit Court acknowledged, and the Court of Special Appeals affirmed, Mr. Keene's observations were exculpatory for two reasons: (1) they contradicted the State's theory of the case that Appellants walked from Easton to the rural crime-scene and walked back again to Easton; and (2) they suggested that "someone else was at the residence at the time of the murder." *Smith v. State*, 233 Md. App. 372, 418 (2017). But the court declined to consider whether this evidence created a "substantial or significant possibility that the result[s] would have been different," as required for a new trial on actual innocence

grounds, on the theory that defense counsel failed to exercise due diligence in obtaining the evidence. *Id.* at 419–30 (internal quotation marks omitted).

The lower courts so concluded because the State had represented to the defense that it was using an open-file policy and allowed Appellants' counsel to review a 700-page file regarding the State's investigation. Contained in that file is a single paragraph, tucked into a 14-page police report, that contained part of the information Mr. Keene gave to the police investigating the crime. Faulkner Record Extract E003849-50. The paragraph in question reads, in its entirety:

> Same date [January 9, 1987], the writer [Sergeant Harmon] and [Sergeant Samuel] Shelly were contacted at the Easton Barrack by Danny Keene. He reported seeing a silver colored vehicle he believed to be an Olds Cutlass. He was taken to the victim's residence, at which time he showed the writer the location he observed the vehicle parked. The location was backed in next to the front porch, next to several bushes, bearing a similar type leaf as found in the living room floor of the victim [sic] house. He was [driven] around Easton, and upon observing a vehicle at the Bonanza Resta[u]rant, he stated it was a vehicle similar to the one he observed. He had picked out a 77 Old Cutlass. Refer to [Sgt.] Shelly's supplements for further details of this individuals [sic] interviews.

Id. at 397 (alterations in original). This paragraph is referred to throughout this brief as the "Keene Statement."

The State inaccurately informed the defense that the 700-page file, which contained the Keene Statement, covered all of the information in the State's possession that was relevant to Appellants' case. The State also affirmatively

represented to defense counsel that it was unaware of any exculpatory evidence under relevant state or federal decisions. Faulkner Record Extract E2025. But the file nowhere referenced that the police had videotaped Mr. Keene in February 1987 and also had prepared handwritten notes of what Mr. Keene had told them. Nor did the Keene Statement include the most critical information Mr. Keene had provided regarding the case—that he had seen the suspicious car only minutes before Ms. Wilford was murdered. *Smith*, 233 Md. App. at 398. The police investigating the crime found Mr. Keene's information so significant that they made efforts, including hypnotizing Mr. Keene, to obtain more information regarding Mr. Keene's sighting of the car. *Id*.

The State's 700-page file did, however, contain substantial other information. It included 486 pages of police reports, referencing at least 300 potential witnesses. The file also contained at least 15 references to vehicles spotted in the area of the crime scene. RX 7. Unlike the Keene Statement, three of the sightings in the file referred to vehicles spotted on the day of the murder. *Id.* The police report also contained multiple references to vehicles spotted before and after the murder. Two cars were seen, for example, days before the murder. And page 95 mentions a gray Ford in the area "acting in a suspicious manner" several days after the murder. *Id.*

The Court of Special Appeals nonetheless concluded defense counsel had been obligated to follow up on the Keene Statement for two reasons: (1) because the defense was provided access to the paragraph in question, which included a partial description of the information provided by Mr. Keene, and (2) because vehicle sightings undercut the State's theory that Appellants traveled to the crime scene on foot and were thus inherently relevant. *Smith*, 233 Md. App. at 418. The court's analysis does not consider the broader context of the competing leads in the file.

The Court of Special Appeals remanded Appellants' petitions for a writ of innocence to the Circuit Court to determine whether there was substantial or significant possibility that the results would have been different based on two of the three categories of evidence that formed the basis for the petitions, but the Keene Statement was not among them. *Id.* at 439. The Circuit Court once again denied the petitions, and the Court of Special Appeals affirmed, in an opinion addressing only the two categories of evidence it had deemed "newly discovered."

This Court granted the Writ of Certiorari on September 9, 2019.

ARGUMENT

Appellants do not seek relief in this appeal under *Brady v. Maryland*, 373 U.S. 83 (1963), under which the prosecution must disclose all material,

exculpatory evidence to the defense, or Rule 4-263(d)(5), which requires that the prosecution disclose to the defense "information in any form, whether or not admissible, that tends to exculpate the defendant or negate or mitigate the defendant's guilt or punishment." But one of the principles underlying both *Brady* and Rule 4-263 is central to this case. The principle is that, "in a system constitutionally bound to accord defendants due process," "a rule . . . declaring 'prosecutor may hide, defendant must seek,' is not tenable." *Banks v. Dretke*, 540 U.S. 668, 696 (2004). That principle necessarily lies at the center of any analysis of defense counsel's diligence obligations, which are at issue in this appeal.

By not considering the State's disclosure obligations in its analysis of Appellants' due diligence, the Circuit Court applied an "inappropriate legal standard[ ]," and thereby abused its discretion. *Wilson-X v. Dep't of Human Res.*, 403 Md. 667, 675 (2008) ("trial judges do not have discretion to apply inappropriate legal standards, even when making decisions that are regarded as discretionary in nature"); *LeJeune v. Coin Acceptors, Inc.*, 381 Md. 288, 301 (2004) (trial court abuses discretion where it fails to "exercise its discretion in accordance with correct legal standards").

The Circuit Court abused its discretion in a second way as well. Its ruling "does not logically follow from the findings upon which it supposedly rests" — that is, it cuts "against the logic and effect of facts and inferences before the

court." *Alexis v. State*, 437 Md. 457, 478 (2014) (quoting *North v. North*, 102 Md. App. 1, 14 (1994), *cert denied*, 462 Md. 262 (2019)). As the Court of Special Appeals itself repeatedly acknowledged, the Circuit Court was required to consider the "totality of the circumstances and the facts known to" the defense when assessing whether the defense had met its due diligence obligations. *Smith v. State*, 233 Md. App. 372, 418 (2017) (quoting *Argyrou v. State*, 349 Md. 587, 605 (1998)). And yet in holding that the single-paragraph Keene Statement gave defense counsel what it needed to uncover the exculpatory information that the State suppressed, the Circuit Court imposed on the defense the impractical expectations that come of 20/20 hindsight, and failed to consider the competing burdens placed on defense counsel in the course of preparing for trial. The paragraph was buried in a file replete with references to other vehicles and omitted the crucial information that would have cued defense counsel to the significance of the sighting—the fact that Mr. Keene had seen the vehicle on the day and within minutes of the murder. *Id.* at 417.

Mr. Keene's videotaped statement and the detective's notes are quintessential "newly discovered evidence." The Court of Special Appeals should be reversed.

I. The Courts Below Committed Legal Error In Not Considering The State's Affirmative Obligations To Disclose Exculpatory Evidence.

Newly discovered evidence put forward to support a petition for actual innocence must satisfy three requirements. The evidence itself must, first, "speak[] to" the petitioner's actual innocence and, second, create "a substantial or significant possibility that the result may have been different." Maryland Code, Criminal Procedure § 8-301. The third requirement goes to the events underlying the original trial: the petitioner must also show that the evidence "could not have been discovered by due diligence in time to move for a new trial." Md. Rule 4-331(e).

A. The State's duty to disclose exculpatory information necessarily informs defense counsel's diligence obligations.

While a court's decision as to whether defense counsel acted diligently is reviewed for abuse of discretion, *Smith*, 233 Md. App. at 416, "the court's discretion is always tempered by the requirement that the court correctly apply the law applicable to the case." *Bass v. State*, 206 Md. App. 1, 11 (2012) (internal quotation marks omitted); *see, e.g.*, *Wilson-X*, 403 Md. at 675. In cases like this one, where the question is whether the defense was diligent in developing evidence that it was supposedly made aware of by the prosecution's incomplete disclosure, both the prosecution's own duties of disclosure—arising under both the U.S. Constitution and Maryland rules—and its representations regarding its

compliance with those duties must be considered. Because the Court of Special Appeals and Circuit Court did not do so, they committed legal error.

Where the evidence in question is in the State's possession and partially or fully withheld, the court's analysis of the defense's due diligence obligations is necessarily informed by *Brady*, which imposes on the State the duty to disclose all exculpatory information. That is already apparent from this Court's *Brady* case law. Post-conviction proceedings under Rule 4-331 that assert *Brady* claims also require that the evidence in question could not have been discovered with the exercise of diligence. *See Cornish v. State*, 461 Md. 518, 535–37 (2018).

In that context, this Court has already acknowledged the error in concluding that "the State's failure to disclose [*Brady* material] is excused, or negated, by the defendant's ongoing discovery duty." *State v. Williams*, 392 Md. 194, 198–99 (2006). As this Court stated in *Williams*, "[a] defendant's duty to investigate simply does not relieve the State of its duty to disclose exculpatory evidence under *Brady* and Maryland Rule 4-263(g)." *Id.* at 227; *see also Walker v. Kelly*, 195 F. App'x 169, 175 (4th Cir. 2006) (rejecting State's argument that defense could not rely on prosecution's representations regarding compliance with *Brady* as "violative of due process, as it condones prosecutor's ability to conceal documents and requires a defendant to search for *Brady* material").

In *Williams*, this Court strongly implied what is in any event self-evident: When the lead for the newly discovered evidence comes from an incomplete disclosure by the State, the measure of the defense's due diligence necessarily involves the State's incomplete disclosure. There, the State had provided the defense with the criminal record of its star witness (confusingly also named Williams), but had not disclosed that the witness was a paid informant. 392 Md. at 226.[2] Although the defense had the criminal record of the star witness and could have discovered his status as a paid informant by investigating that record, the Court easily concluded it was "not persuaded" by the State's argument that the defense had not been diligent. 392 Md. at 227.

The *Williams* Court invoked the Supreme Court's decision in *Banks* rejecting a "rule thus declaring 'prosecutor may hide, defendant must seek.'" *Id.* (quoting *Banks*, 540 U.S. at 696).[3] More important here, it further endorsed the Supreme Court's understanding that both courts and litigants alike presume that

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[2] The decision in *Williams* from the Court of Special Appeals confirms that it was the prosecution that had provided the star witness's criminal record to the defense. *Williams v. State*, 152 Md. App. 200, 223 (2003), *aff'd* 392 Md. 194 (2006).

[3] To be clear, it was undisputed in *Williams* that the particular prosecutor in that case was not *intentionally* "hiding" the information. *See Williams*, 152 Md. App. at 217.

the State's disclosure obligations "will be 'faithfully observed.'" *Id.* at 228 (quoting *Banks*, 540 U.S. at 696); *see also Juniper v. Zook*, 876 F.3d 551, 572 (4th Cir. 2017) (by failing to disclose exculpatory evidence, prosecution disregarded its "role as architect of a just trial").

That "*presumption*" was not applied in this case. *Williams*, 392 Md. at 228 (emphasis added). Defense counsel, to be sure, have duties to act diligently in pursuing evidence before trial, especially when viewed through the lens of whether a convicted individual deserves a new trial. But the diligence obligations of the defense operate against the backdrop of the prosecution's disclosure obligations. The prosecution has a duty under both the Constitution and Maryland rules to provide the defense with exculpatory information.

Here, the key fact about Mr. Keene's observations at the Wilford home is that he made those observations on the day of—indeed, at the time of—the murder. That key fact, known to the police investigating the crime, is nowhere to be found in the materials turned over to the defense. Instead, what the defense received gave it no reason to suspect that Mr. Keene's observations were any different from the at least 15 other references to vehicles spotted in the area of the crime scene. RX 7. Indeed, defense counsel had good reason to believe that Mr. Keene's observations were not from the day of the crime at all. Whereas other written statements gave dates for the vehicle sightings mentioned, the Keene

Statement did not. Such an inference from defense counsel would have been, of course, wrong; but it would have been a fair inference to make from the supposed open file in light of the different contents of the witness statements not yet reviewed. *See supra* p. 9.

Only the State was aware that Mr. Keene had provided a videotaped statement that indicated that he had seen the car at the time of the murder. Because the defense was entitled to rely on the "presumption" that the State would fulfill its duties to provide information of that kind of importance to the defense, *Williams*, 392 Md. at 228, the defense acted diligently. The lower courts' contrary conclusion is legally erroneous.

Applying *Williams*, and the other decisions of this Court and the Supreme Court on which it is based, this Court should conclude that the defense's diligence must be assessed in light of the State's failures in regards to the Keene Statement and conclude that the diligence standard was met. The State possessed the key exculpatory details about Mr. Keene (he saw the car on the day and time of the murder, and the police felt Mr. Keene was so critical a witness they hypnotized him to try to enhance his memory) yet disclosed only the most meager and innocuous aspects of Mr. Keene's statements to the defense. In light of the State's background duties of disclosure, the defense was therefore misled into not attaching importance to Mr. Keene.

B. The defense was entitled to rely on the State's open-file policy.

The courts below further overlooked that the prosecution had represented that it was using an open-file policy. In Maryland, it is well-settled that a petitioner is entitled to "reasonably rel[y] upon the State's open file policy as fulfilling the prosecution's duty to disclose the evidence [petitioner's counsel] requested." *Conyers v. State*, 367 Md. 571, 603 (2002); *see also Strickler v. Greene*, 527 U.S. 263, 283 n.23 (1999) ("if a prosecutor asserts that he complies with Brady through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*"); *Walker*, 195 F. App'x at 174 (concluding "it was not unreasonable for [defense counsel] to assume no additional *Brady* material existed" based on the prosecution's representation that it had disclosed all such material). In *Conyers*, the Court concluded that the defense had been entitled to rely on the State's representation that it was fulfilling its obligation under Rule 4-263 to provide "[a]ny material or information tending to negate or mitigate the guilt" of the defendant through its open-file policy. *Conyers*, 367 Md. at 588–89 & 589 n.25.[4]

[4] At the time *Conyers* was decided, the relevant provision was Rule 4-263(a)(1). It is now Rule 4-263(d)(5).

The same conclusion applies here. The defense was entitled to infer that the State did not possess exculpatory information from Mr. Keene outside of what appeared in the Keene Statement. The State not only provided the file, but also noted in its automatic discovery and request for discovery that it was unaware of any exculpatory evidence under relevant state or federal decisions. Faulkner Record Extract E2025. This was an affirmative representation about the nature of the information that the State was providing to defense counsel, and defense counsel was entitled to rely upon it when determining its course of investigation. *Conyers*, 367 Md. at 603; *see Ware v. State*, 348 Md. 19, 48 (1997) ("When the defendant makes a specific request and the State responds that it knows of no such evidence, the defendant is more likely to rely upon that representation and possibly, based on the State's response, forgo avenues of investigation.").

Oddly, the Court of Special Appeals expressly acknowledged the State's open-file policy in this case, *Smith*, 233 Md. App. at 424, but did not consider it in the context of the Keene Statement. With respect to the Bollinger-Haddaway tapes, the Court of Special Appeals held that defense counsel had met their due diligence obligations because "where the State uses open file discovery to satisfy its obligations, and defense counsel has no reason to believe that the State has not satisfied those obligations, due diligence does not require defense counsel to

scavenge for hints of undisclosed *Brady* material." *Id.* (internal quotation marks omitted). The Court of Special Appeals was correct as to the Bollinger-Haddaway tapes, but its conclusion applies equally to the videotape statement of Mr. Keene. As to Mr. Keene, "defense counsel ha[d] no reason to believe that the State ha[d] not satisfied those obligations." *Id.* Accordingly, "due diligence [did] *not* require defense counsel to scavenge for hints of undisclosed *Brady* material." *Id.* (emphasis added). The incomplete description of Mr. Keene's observations in the Keene Statement does not change that.

II. The Circuit Court Abused Its Discretion By Not Considering Some Of The Most Probative Evidence Regarding Defense Counsel's Diligence In Regards To The Keene Statement.

Due diligence requires that "the defendant act reasonably and in good faith to obtain the evidence, in light of the totality of the circumstances and the facts known to him or her." *Smith*, 233 Md. App. at 418 (quoting *Argyrou*, 349 Md. at 605). The Court of Special Appeals purported to analyze the totality of the circumstances to assess whether the Circuit Court abused its discretion in holding the Keene Statement was not newly discovered evidence. *Id.* at 417. But it failed to consider three of the most important "circumstances." The first two—the State's background duties of disclosure and its affirmative representations that it was using an open-file policy—are discussed above. The third is the context of the prosecution's disclosure itself.

By the lower courts' assessment, defense counsel was obliged to follow up on the Keene Statement because vehicle sightings were inherently relevant given that any sighting potentially undercut the State's theory that Appellants traveled to the crime scene on foot. *Id.* at 418. That is, at best, an oversimplification. The relevance of a vehicle sighting hinges on the proximity of the sighting to the crime's occurrence. The defense had no idea that Mr. Keene saw the car at the crime scene at the time of the murder.

Given that, and in light of the rest of the disclosure that defense counsel received from the State, it was reasonable for the defense to not focus on the Keene Statement. Recall that the Keene Statement was lodged in a 700-page open file. Mr. Keene barely figured in that file. He was just one of over 300 witnesses referenced; dozens of witnesses appeared with far greater frequency. *See* Faulkner Br. 42-43.

Indeed, the Keene Statement was not even one of the more prominent vehicle sightings. Many vehicle sightings were tied to the day of the crime. For example, page 37 of the police report notes that a witness observed one blue pickup truck and one red pickup truck parked near Ms. Wilford's home a couple hours before she returned home. RX 7. Page 40 notes that on the date and around the time of the murder, a witness saw a small light metallic blue vehicle occupied by two males who quickly departed when they noticed the witness. *Id.*

And page 58 describes the statement of a witness who noticed a dark blue pickup truck with a camper body leave the area of the Wilford home on the day of the crime. *Id.*

The police report also contained multiple references to vehicles spotted before and after the murder. Page 39 states that a witness observed a blue old model Maverick or Comet two days before Ms. Wilford's murder. *Id.* Page 90 notes the police's investigation of a suspicious vehicle that was seen in the Easton area five days after Ms. Wilford was murdered. *Id.* And page 95 mentions a gray Ford in the area "acting in a suspicious manner" several days after the murder. *Id.*

Any of these car sightings would have appeared more probative than the Keene Statement. All of these descriptions expressly noted that the cars were seen close in time to the murder. Two of them—regarding the dark blue pickup and gray Ford—involved witnesses describing the occupants of the car being suspicious.

In evaluating the diligence of defense counsel, one has to consider the number of probative leads before defense counsel. According to the Court of Special Appeals, the defense should have investigated *any* lead about a car at the Wilford home, because such a sighting "would have been *relevant*" to the defense, "either to counter the State's theory that appellant travelled on foot to

and from Ms. Wilford's residence or to develop whether someone else was at the residence at the time of the murder." *Smith*, 233 Md. App. at 418 (emphasis added). Considering only the information contained in the files provided by the State, that would mean investigating 15 leads.

Assuming defense counsel focused on vehicle sightings, there were three witness statements involving four total cars that immediately seemed most important out of those 15, because they involved a car being at the crime scene on the day of the crime. Three other witness statements appeared also significant, because they involved unexpected cars at the Wilford home around the day of the murder. There was nothing *known to the defense* that made the Keene Statement any more significant than any of those leads—or even any of the other 15 car sightings in the police file.

With the benefit of 20/20 hindsight, vehicle sightings now appear particularly probative. At the time, however, they were but *one* avenue for developing alternative-perpetrator evidence. Others that would have been equally capable of bearing fruit were leads about individuals committing burglaries, especially during the day, or leads about people making suspicious statements. Those leads also would have been "*relevant*" as well. *Smith*, 233 Md. App. at 418 (emphasis added).

And, of course, the defense had many "relevant" areas to investigate besides alternative-perpetrator evidence. Typical areas of inquiry include impeachment of the State's witnesses and any alibi defenses. Another is analyzing the State's investigation itself.

Nor was the defense limited to leads contained in the State's "open file." In a locally infamous case like this one, there would have been many avenues for alternative-perpetrator evidence, as well as other categories of evidence. This case involves a home invasion and murder and a police investigation that dragged on for years. Both the crime itself and the investigation garnered intense local media scrutiny.

A "totality of the circumstances" analysis requires an examination of this bigger picture in determining whether defense counsel "act[ed] reasonably and in good faith to obtain the evidence." *Id.* at 418. Whenever one looks at a case with the benefit of hindsight, it is tempting to zero in on the lead that mattered and consider in isolation why trial counsel did not follow it. But the reality is that defense counsel was not, metaphorically speaking, looking at a field with one stone and neglected to turn it over. Defense counsel was standing in front of a proverbial rock pile; the State's "open file" contained approximately 300 witness statements alone. The lower courts' failure to consider that broader context amounts to an abuse of discretion.

Indeed, that broader context also should include the other functions of a criminal defense lawyer. Like any lawyer working on a case, criminal defense lawyers must "interview their clients properly, . . . file appropriate motions, conduct necessary fact investigations, negotiate responsibly with the prosecutor, [and] adequately prepare for hearings," as well as bear certain unique responsibilities like securing a client's pretrial release. The Constitution Project, Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel 7 (2009) ("*Justice Denied*").

Defense counsel's abilities to meet these responsibilities is undermined by the imbalance of resources in criminal litigation. In nearly every case, "the prosecution has the advantage of a large staff of investigators, prosecutors, and grand jurors, as well as new technology." *United States v. Tavera*, 719 F.3d 705, 712 (6th Cir. 2013). Indeed, some courts have observed that a policy reason for the *Brady* rule is for government investigators will "assist the defendant who normally lacks this assistance and may wrongfully lose his liberty for years if the information they uncover remains undisclosed." *Id.* The imbalance between prosecutorial and defense resources has become so pronounced, however, that there exists a risk that powerful exculpatory information will languish "in a huge open file" where "the defendant will never find it." *United States v. Skilling*, 554

F.3d 529, 577 (5th Cir. 2009), *aff'd in part & vacated in part by* 561 U.S. 358 (2010).[5] Of course, the chances that the defense will be able to locate exculpatory information in a large file become vanishingly remote when the file omits the information that renders the lead worth investigating, as happened here.

The asymmetry in resources was particularly striking in Appellants' cases because, like a great number of criminal defendants, they were represented at trial not by private counsel but by the Office of the Public Defender (OPD) and a panel attorney appointed by the OPD, respectively. Public defenders shoulder "crushing caseloads" that often "make it impossible for them" to effectively represent their clients. Norm Lefstein, Securing Reasonable Caseloads: Ethics

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[5] The *Skilling* court noted the risk that an unscrupulous prosecutor could seek to engineer such a result, but also noted the "general rule [that] the government is under no duty to direct a defendant to exculpatory evidence within a larger mass of disclosed evidence." *Id.* at 576. That purported "rule" has come into question as some courts have indicated that *Brady* requires the prosecution do more than merely provide bare access to evidence. *See, e.g.*, *United States v. Quinones*, No. 13–CR–83S, 2015 WL 6696484, at *2 (W.D.N.Y. Nov. 2, 2015); *United States v. Blankenship*, No. 5:14–cr–00244, 2015 WL 3687864 (S.D.W. Va. June 12, 2015); *United States v. Salyer*, No. S–10–0061 LKK, 2010 WL 3036444, at *2 (E.D. Cal. Aug. 2, 2010); *United States v. Chen*, No. C05–375 SI, 2006 WL 3898177, at *3 (N.D. Cal. Nov. 9, 2006); *United States v. Hsia*, 24 F. Supp. 2d 14, 29 (D.D.C. 1998).

and Law in Public Defense 13 (Am. Bar Assoc. 2011) ("*Securing Reasonable Caseloads*") (quoting *Justice Denied* at 7).[6] In considering the totality of the circumstances, the Court should be aware that it is often "not humanly possible" for many public defenders to undertake the tasks "that normally would be undertaken by a lawyer with sufficient time and resources." *Securing Reasonable Caseloads* at 13 (quoting *Justice Denied* at 7).

Incautiously articulated due diligence standards are always a concern from the perspective of resource-strapped defendants, but there is particular injustice in burdening defendants with undue diligence obligations because the State has failed to comply with its own obligations under the Constitution and Maryland

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[6] These conditions have been detailed at length in recent years in workload studies commissioned by the ABA Standing Committee on Legal Aid and Indigent Defendants (often in partnership with third parties, including *Amicus*) in states across the country with overburdened public defender systems that lack the resources to adequately serve indigent defendants. *See, e.g.*, Nat'l Assoc. of Crim. Defense Lawyers, *The Rhode Island Project: A Study of the Rhode Island Public Defender System and Attorney Workload Standards* (Nov. 2017), https://tinyurl.com/v7qjn75; RubinBrown et al, *The Colorado Project: A Study of the Colorado Public Defender System and Attorney Workload Standards* (Aug. 2017), https://tinyurl.com/v68ac6d, Postlethwaite & Netterville, *The Louisiana Project: A Study of the Louisiana Public Defender System and Attorney Workload Standards* (Feb. 2017), https://tinyurl.com/uqod5c8; RubinBrown, *The Missouri Project: A Study of the Missouri Public Defender System and Attorney Workload Standards* (June 2014), https://tinyurl.com/ut82akj; *see also* Dottie Carmichael et al., *Guidelines for Indigent Defense Caseloads: A Report to the Texas Indigent Defense Commission* (Jan. 2015), https://tinyurl.com/w6levom.

rules. This is a paradigmatic case in which the State seeks to "flip [its] obligation, and enable a prosecutor to excuse his failure by arguing that defense counsel could have found the information himself." *Amado v. Gonzalez*, 758 F.3d 1119, 1136 (9th Cir. 2014). "Especially in a period of strained public budgets, a prosecutor should not be excused from producing that which the law requires him to produce, by pointing to that which conceivably could have been discovered had defense counsel expended the time and money to enlarge his investigations." *Id.* at 1136–37.

By failing to consider the other leads presented in the 700-page police file, the courts below reached a decision that runs counter to "the logic and effect of facts and inferences before the court." *Alexis v. State*, 437 Md. 457, 478 (2014) (internal quotation marks omitted). They compounded that abuse of discretion with legal errors. Defense counsel's diligence obligations are informed by the prosecution's disclosure obligations. And that is never more true than when the prosecution claims that it is following an open-file policy. The courts below legally erred, and therefore also abused their discretion, in erecting a due-diligence standard that did not account for those fundamental principles.

CONCLUSION

For the reasons above, *Amicus* respectfully asks that the Court reverse the Court of Special Appeals on the question of whether the Keene Statement constitutes newly discovered evidence.

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Respectfully submitted,

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 5,228 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements of stated in Rule 8-112.

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CERTIFICATE OF SERVICE

In accordance with Maryland Rule 20-201(g)(3) and 20-404(c), I, Kristin Saetveit, counsel for *Amicus Curiae*, certify that, on November 22, 2019, I caused the attached Brief for *Amicus Curiae* National Association of Criminal Defense Lawyers in Support of Appellants to be electronically filed using the MDEC System, which sent electronic notification of filing to all persons entitled to service, listed below. The document does not contain confidential or restricted information as defined by Maryland Rule 20-101(r).

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