IN THE

# Court of Appeals of Indiana



State of Indiana,

*Appellant-Respondent/Cross-Appellee*

v.

Jason Hubbell,

*Appellee-Petitioner/Cross-Appellant*

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September 1, 2026

Court of Appeals Case No.
25A-PC-2477

Appeal from the Bartholomew Circuit Court

The Honorable Kelly S. Benjamin, Judge

Trial Court Cause No.
03C01-2312-PC-6184

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**Opinion by Judge Mathias**
Judge DeBoer concurs.
Judge Kenworthy concurs in result with separate opinion.

**Mathias, Judge.**

[1] The State appeals the post-conviction court's judgment granting Jason Hubbell's petition for post-conviction relief and awarding him a new trial on the State's allegation that he murdered Sharon Myers in 1997. The State raises a single issue for our review, which we restate as whether the post-conviction court's determination that the State violated Hubbell's constitutional right to material exculpatory evidence, *see Brady v. Maryland*, 373 U.S. 83 (1963), is clearly erroneous.

[2] We affirm the post-conviction court's judgment for Hubbell.[1]

## Facts and Procedural History[2]

[3] In 1997, two murders captured state-wide attention. In May, shortly after she had returned to work from maternity leave, Sharon Myers disappeared from the parking lot of her work at the Arvin Industries Gladstone plant in Columbus, which is in Bartholomew County. Her shoes were recovered from the parking lot, and witnesses observed an approximately six-foot-tall blond man and a

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[1] Because we affirm the post-conviction court's judgment for Hubbell under *Brady*, we decline to consider Hubbell's argument on cross-appeal that the post-conviction court erred in not also awarding him a new trial on other grounds. Similarly, because we reject the State's arguments that the post-conviction court erred, we need not consider the State's additional, contingent arguments that the record the court should have considered was insufficient to support granting Hubbell relief. *See* Appellant's Br. at 49-54.

[2] We emphasize that our recitation of the facts in this appeal is based on factual findings entered by the post-conviction court following an evidentiary hearing. And, while the State challenges the legal significance of some of the post-conviction court's findings and conclusions, the State does not challenge the *correctness* of any of the court's factual findings. Further, we express no opinion on what evidence might or might not be presented to a trier of fact in a retrial or what verdict that trier of fact might render on the evidence presented to it, and nothing in this opinion shall be construed to the contrary.

white "cargo van" with no side windows (aside from the driver- and passenger-door windows) parked near Myers shortly before she disappeared. Ex. Vol. 30, p. 186. Her body was found in November near Teal Marsh at the Atterbury Wildlife Preserve in neighboring Johnson County. She had been strangled to death with her own clothing.

[4] In September, Kelly Eckart disappeared near her home in Franklin, which is in Johnson County. Her vehicle was found near her home on the side of the road with exterior damage. Eckart's body was found later that month near Teal Marsh at the Atterbury Wildlife Preserve. Her shoes had been removed and were located in a pit toilet. She had been strangled to death with her own clothing.

[5] The State eventually obtained substantial evidence that Michael Dean Overstreet, who is approximately six feet tall with blond hair, had raped and murdered Eckart. *See generally Overstreet v. State*, 783 N.E.2d 1140 (Ind. 2003). In particular, Overstreet's brother, Scott, informed investigating officers that, on the night of Eckart's disappearance, Overstreet had called him and told him that, while using Scott's "white cargo van," Overstreet had "taken a girl" and needed Scott to drive him to Atterbury so Overstreet could "take her into the woods and get her lost." Tr. Vol. 2, p. 210; *Overstreet*, 783 N.E.2d at 1147. Scott's cargo van had no side windows apart from the driver- and passenger-door windows.

[6] Overstreet's wife at the time, Melissa, also informed investigators that, around 3:00 a.m. the morning following Eckart's disappearance, she had picked up Overstreet from Atterbury using Scott's van after Scott had left it at her home. A few days later, Melissa observed Overstreet spending "about an hour cleaning and vacuuming the inside rear of the van," and he refused Melissa's offer to help him clean the van. *Overstreet*, 783 N.E.2d at 1147. Overstreet was also obsessed with news coverage of Eckart's disappearance.

[7] After investigators located Eckart's body, DNA testing identified semen in her vagina that matched Overstreet's DNA. Fibers found on Eckart's clothes were identical to fibers from inside Scott's van. And damage to the exterior of Scott's van matched the damage to Eckart's car.

[8] The State charged Overstreet with Eckart's rape and murder. Following a trial in 2000—which was after Hubbell had been tried and convicted—a jury found Overstreet guilty of Eckart's rape and murder and recommended that he receive the death penalty. The trial court entered its judgment of conviction against Overstreet and sentenced him to death. *Id.* at 1150.

[9] In the course of their investigation into Eckart's disappearance, Franklin Police Department investigators knew of the Columbus Police Department's investigation into Myers's disappearance. The similarities between the two disappearances were not lost on the Franklin Police Department. Officer John Borges, the lead investigator in the Eckart case, later testified that the use of the victims' clothing to strangle the victims to death and the removal of the victims'

shoes were, in particular, unlike "any other cases" he had ever heard of or worked on. Tr. Vol. 2, pp. 65, 67. And he believed that the manner in which both Eckart and Myers had been murdered demonstrated a "very personal" and "controlling way to end someone's life." *Id.* at 65.

[10] In November 1997, investigators located Myers's body about two miles from where Eckart's body had been found. After hearing a news report about the recovery of Myers's body, Johnny Roberts met with Franklin Police Department investigators. He informed them that he had been a co-worker with Overstreet at European Tanning Solutions from 1996 to mid-1997. While working together in late 1996, Overstreet told Roberts that Overstreet had been having an affair with a woman named Sharon in Columbus and that he had gotten her pregnant. Overstreet also stated that "he knew of remote places in Atterbury that nobody could find." Appellant's App. Vol. 31, p. 26.

[11] Melissa also spoke with investigators with the Franklin Police Department in November. She informed them that, on the day of Myers's disappearance, Overstreet woke up unusually early to go "job hunting," and one of the places he intended to apply at was "Arvin in Columbus." *Id.* at 16. Overstreet took Scott's cargo van, which struck Melissa as "different" and unusual. *Id.* Late that evening, Overstreet returned home in the van; he was disheveled and had "blood all over him." *Id.* A few days later, Melissa learned of Myers's disappearance. Overstreet obsessed over the news coverage of Myers's disappearance just as he later did with the coverage of Eckhart's.

[12] Melissa also informed investigators that she believed Overstreet was having an affair, that he was abusive, and that she was terrified of him. At one point in mid-1997, she and Overstreet got into a "fight" at a Walmart; Overstreet "pointed at a picture of Sharon Myers that was up on the wall . . . and made a mean face" at Melissa, which she "took . . . to mean to keep my mouth shut or else." *Id.* at 18 (cleaned up).

[13] Franklin Police Department investigators also obtained statements from numerous other witnesses that Overstreet had told them things that supported the existence of a relationship between him and Myers. Another witness corroborated Melissa's statement regarding the Walmart incident. And, when Indiana State Police Department officers eventually searched Overstreet's home, they seized numerous clippings from newspaper articles regarding Myers's disappearance.

[14] Contemporaneous records along with witnesses from inside the Franklin and Columbus Police Departments at the time make clear that Franklin officers relayed all of the information discussed above about Overstreet's possible involvement in Myers's murder to Columbus officers. But Columbus officers informed their Franklin counterparts that Columbus investigators "w[ere not] interested in any of the information" because "[t]hey already had somebody." *Id.* at 19. Franklin officers "didn't understand" that position and were "exasperated." *Id.* (brackets omitted). Columbus officers also did not follow up with Melissa regarding her observations of Overstreet on the day of Myers's disappearance, which left her "upset" because she "believed Overstreet had

something to do with" Myers's murder. *Id.* (brackets omitted). Nor did they follow up with Roberts or other witnesses regarding Overstreet's alleged relationship with Myers.

[15] Instead, Columbus investigators, led by Dennis Knulf, had brought their focus onto Hubbell. A key reason for that focus was the observation of Sherry Young, another Arvin employee, who had informed investigators that she saw Myers leave the Arvin parking lot on the day of her disappearance in a white van with a six-foot-tall blond man. Young informed investigators that she had made a mental note of the license plate number of the white van, and she informed the investigators of that license plate number.

[16] That license plate number matched a white "minivan" owned by Hubbell, another Arvin employee. Ex. Vol. 25, p. 133. Hubbell's minivan had windows along each side in addition to the driver- and passenger-door windows. Hubbell also has brown hair. Nonetheless, Knulf learned that Hubbell had recently had an insurance dispute through his Arvin-provided insurer, and Myers was employed in Arvin's human resources department. Knulf concluded that that dispute established a motive for Hubbell to kidnap and murder Myers.

[17] Although pubic hairs had been recovered near Myers's body, the DNA recovered from them did not match Hubbell,[3] nor were Myers's fingerprints or DNA located in or on Hubbell's minivan or in his home. The State did recover

[3] It does not appear from the record that this DNA was ever compared to Overstreet's DNA.

"hundreds" of acrylic fibers of "numerous colors and numerous types" from inside the minivan. Ex. Vol. 28, pp. 188, 199-200. "[Ten]" of those fibers were "the same shape and . . . the same color" as acrylic fibers found on or near Myers's body; however, the State's forensic examiner of those fibers conceded that they were "common" acrylic fibers that "could have come from anything," including clothing. *Id.* at 200, 206-07.

[18] A State expert also identified two species of grass in the undercarriage of Hubbell's van. One, Kentucky Bluegrass, was "domina[nt] and . . . abundant" near Teal Marsh. Ex. Vol. 25, p. 52. Kentucky Bluegrass is "one of the most common grasses in the [M]idwest" and is also a "common lawn grass." Ex. Vol. 32, p. 191. The other grass recovered from under Hubbell's van was either *Bromus Sterilis* or *Bromus Tectorum*, which the State's expert described as "sporadic" near Teal Marsh. Ex. Vol. 25, pp. 44-45, 52-53. However, while the *Bromus* grasses are "very rare" in well-kept areas, the State's expert recognized that they were "common" to "abundant" grasses throughout Indiana. *Id.* at 49-51.

[19] The Bartholomew County prosecutor presented evidence of Hubbell's alleged murder of Myers to a grand jury. In the presence of armed officers, the grand jury returned an indictment against Hubbell for Myers's murder.[4] Hubbell,

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[4] Among other issues he raised on direct appeal, Hubbell argued that the presence of armed officers during the grand jury proceedings violated his rights. Our Supreme Court concluded that, although at least one witness's "demeanor was affected by the police officers" during the grand jury proceedings, no reversible error occurred on this issue. *Hubbell v. State*, 754 N.E.2d 884, 888 (Ind. 2001).

through his trial counsel, then requested the Bartholomew County prosecutor to produce all witness statements and possible *Brady* material. However, Hubbell "did not receive any materials from the State relating to Mr. Overstreet" or Eckart's murder. Appellant's App. Vol. 3, p. 84.

[20] Sometime after Hubbell's indictment and arrest, an inmate with Hubbell informed officers that Hubbell had confessed to Myers's murder. That inmate testified against Hubbell at Hubbell's ensuing trial. The inmate's mother, meanwhile, testified that her son's testimony had been secured only after "[t]he prosecutor" had "paid" him "[o]ne [h]undred and some dollars . . . ." Ex. Vol. 30, p. 5.

[21] Other evidence relied on by the State at Hubbell's trial included his absence of an alibi, the observations of neighbors showing that he was away from his home around the time of Myers's abduction, and the fact that Hubbell referred to Myers by her first name when an officer initially approached him about his possible involvement in her disappearance, which the officer described as "odd." Ex. Vol. 21, p. 211.

[22] The State also relied on a lengthy police interview Knulf had with Hubbell in which Hubbell repeatedly denied any involvement in Myers's disappearance. Toward the end of that interview, Knulf asked Hubbell how Young could have been "one hundred and ten percent sure she saw your van and that plate number" if Hubbell was not there with his van. Ex. Vol. 23, p. 81. Hubbell responded, "I can't explain it. I can't. I really can't." *Id.* Knulf then asked if

Hubbell's known sleepwalking disorder could have made it possible for Hubbell to have been at the Arvin parking lot at the time of Myers's disappearance. Hubbell responded that he had "never" operated "any kind of motorized vehicle" and had "never been [so] coordinated" while sleepwalking. *Id.* Hubbell added that, during a sleepwalking episode, he will "mumble" and "stumble around a little bit and then go back to bed . . . . That is about the only thing I can, I could possibly think of, and even in that time span, you know, [it would be] kind of highly irregular for me to get from point A to point B in different places in these time spans." *Id.* at 81-82.

[23] A few days later, assistant investigator Jeff Williams also interviewed Hubbell. Williams "told him point blankly that [Williams] believed [Hubbell] was responsible for" Myers's disappearance. Ex. Vol. 24, p. 10. According to Williams's later recollection, Hubbell responded that "it might be possible. That he can't say that he did do it, but he has prayed to God every night since then that it isn't so." *Id.* at 12. Williams asked Hubbell to "explain that further," and Williams recalled Hubbell saying that "he sometimes does things during his [sleepwalking] episodes that he can't remember, so he now has doubts about things that he could have done." *Id.*

[24] In his defense at trial, Hubbell attacked the quality of the State's investigation and argued that someone else had murdered Myers. Among other possible suspects, Hubbell suggested that Myers's husband, David, might have been her murderer. Hubbell's theory against David was that there had been a dispute between David and Myers after she had learned that she was pregnant in 1996

because the timeline of the pregnancy suggested that she was out of state, in Tennessee, while David was in Indiana at the time of conception. But David testified at Hubbell's trial that, despite his initial concerns, he believed the child was his and thus did not have a paternity test done, and the State presented evidence to show that David had an alibi at the time of Myers's disappearance. *See* Ex. Vol. 18, pp. 56-57. The jury found Hubbell guilty of Myers's murder, and the trial court entered its judgment of conviction and sentenced him to seventy-five years in the Department of Correction.

[25] Hubbell raised numerous issues on direct appeal. Among other issues, he argued that the trial court abused its discretion when it permitted the State to enter into evidence a firearm and ammunition owned by Hubbell. Our Supreme Court agreed that the firearm and ammunition had no relevance and were unduly prejudicial. *Hubbell v. State*, 754 N.E.2d 884, 890 (Ind. 2001) ("*Hubbell I*"). Hubbell also argued that the trial court erred in allowing the State to make suggestions to the jury that left the jury with the false inference that Myers's fingerprints were found inside his van, and our Supreme Court agreed with Hubbell on this point as well. *Id.* Further, Hubbell argued that the trial court erred in admitting Young's pre-trial identification of him in a single-person lineup six hours after Myers had disappeared because the lineup was unduly suggestive to Young that Hubbell was the person responsible for Myers's disappearance. Our Supreme Court again agreed with Hubbell and held that the trial court abused its discretion in admitting Young's testimony. *Id.* at 892.

[26] Nonetheless, our Supreme Court held that the evidentiary errors were harmless, stating:

> the State presented evidence that a man matching Hubbell's description and driving Hubbell's van left the Arvin parking lot with a woman who looked like Myers. Fibers and grass near Myers'[s] body matched fibers and grass from Hubbell's van. Finally, Hubbell confessed to a jail inmate that he murdered Myers.

*Id.* at 890, 892.[5] The Indiana Supreme Court did not rely on the State's other trial evidence in concluding that the evidentiary errors were harmless. *Id.*

[27] Following the conclusion of his direct appeal, Hubbell filed his first petition for post-conviction relief, which he later amended. At the ensuing evidentiary hearing on that petition, the post-conviction court declined to obtain the record from Hubbell's criminal proceedings and instead required Hubbell to produce that record to the court himself. After Hubbell failed to do so, the post-conviction court denied his petition. On appeal, we reversed and remanded with instructions that the post-conviction court obtain the underlying record and hold a new evidentiary hearing on Hubbell's petition. *Hubbell v. State*, 58 N.E.3d 268, 277-78 (Ind. Ct. App. 2016) ("*Hubbell II*").

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[5] We note that our Supreme Court's harmless-error analysis in *Hubbell I*, which was not based on the probable impact of the errors on the trial outcome but instead on the sufficiency of the remaining evidence against Hubbell, has since been superseded by our Supreme Court. *See Hayko v. State*, 211 N.E.3d 483, 491-92 (Ind. 2023) ("Importantly, [the probable-impact test for reversible error under Indiana Appellate Rule 66(A)] is not a review for the sufficiency of the remaining evidence; it is a review of what was presented to the trier of fact compared to what should have been presented.").

[28] On remand, Hubbell filed a motion for discovery of records relating to the State's investigation of Overstreet. The post-conviction court denied Hubbell's request. At the ensuing evidentiary hearing before the post-conviction court, Hubbell asked his original trial counsel about investigating Overstreet; his trial counsel testified that, based on the evidence he had at the time of Hubbell's trial, he did not consider Overstreet "a viable alternative suspect" and pursued other possible suspects instead. *Hubbell v. State*, No. 19A-PC-2058, 2020 WL 2109247, at *4 (Ind. Ct. App. May 4, 2020) (mem.), *trans. denied* ("*Hubbell III*"). Further, the State successfully objected to at least some of Hubbell's questions to his counsel about counsel's investigation into Overstreet on the ground that "the facts of the Overstreet case . . . ha[ve] nothing to do with this case." Appellant's App. Vol. 3, p. 47.

[29] The post-conviction court again denied Hubbell's petition, and he again appealed. Among other issues, Hubbell argued on appeal that the post-conviction court erred in denying his request for records in the State's possession relating to Overstreet. In its brief to our Court on this issue, the State argued: "The possibility that Overstreet committed the crime was thoroughly investigated at the time, and he was ruled out as a suspect to the satisfaction not just of the police but also of the defense team." Ex. Vol. 38, p. 12. The State added that Hubbell's argument to the contrary had "no credibility." *Id.*

[30] A unanimous panel of our Court agreed with the State and chastised Hubbell for pursuing the record of an "unrelated criminal case" in his post-conviction proceedings. *Hubbell III*, 2020 WL 2109247, at *3. In particular, and relying on

*Roche v. State*, 690 N.E.2d 1115, 1132 (Ind. 1997), our Court stated that "post-conviction is not [a] device for investigating possible claims" but instead is a "means for vindicating actual claims." *Id.* at *4. We thus rejected Hubbell's discovery argument on the ground that "[t]here was no basis for the [post-conviction] court to allow Hubbell to engage in a fishing expedition fueled merely by his speculation or hope that there is relief to be found." *Id.*[6]

[31] After our decision in *Hubbell III*, Hubbell filed a petition for habeas corpus with the United States District Court for the Southern District of Indiana. *See Hubbell v. Reagle*, No. 1:20-cv-2217-JPH-KMB ("*Hubbell IV*"); *see also* Appellant's App. Vol. 3, pp. 80-99. The district court appointed habeas counsel for Hubbell and ordered the State to comply with Hubbell's discovery requests pertaining to the State's investigation into Overstreet. Upon receiving that additional discovery, Hubbell sought our Court's permission to file a successive petition for post-conviction relief on the ground that the State had violated his *Brady* rights, which we granted. *See* Ind. Post-Conviction Rule 1(12).

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[6] In-between *Hubbell II* and *Hubbell III*, Judge Najam, writing for a unanimous panel of our Court, reluctantly followed the "dichotomy adopted by the Indiana Supreme Court in *Roche* between 'investigating possible claims' and 'vindicating actual claims'" with the following observation: "To prohibit an investigation into possible claims, which after an investigation turn out to be actual claims, does not meet . . . Sixth Amendment standards." *Hinkle v. State*, 97 N.E.3d 654, 666 (Ind. Ct. App. 2018) (discussing *Roche*, 690 N.E.2d at 1132-33), *trans. denied*. While Judge Najam's concerns were focused on the right to effective assistance of counsel, they are no less applicable to *Brady* claims supported by specific allegations that show reason to believe the petitioner may be able to demonstrate that he is entitled to relief. *See Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997) (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)). We thus join in Judge Najam's observation and think Hubbell's case has, unfortunately, proven the point.

[32] Thereafter, the post-conviction court held a five-day evidentiary hearing on Hubbell's successive petition. Evidence presented at that hearing included the following:

- Similarities between Eckart's murder and Myers's murder that were not publicly known at the time of Hubbell's trial, such as the fact that both victims were strangled to death with their own clothing;
- Testimony from Roberts regarding the information he had provided to Franklin Police Department investigators in November 1997;
- Testimony from Melissa regarding the information she had provided to Franklin Police Department investigators in November 1997;
- Numerous statements from witnesses that, albeit based in apparent hearsay, appeared to corroborate Roberts's statements and Melissa's statements and further connect Overstreet to Myers;
- Testimony and records from Franklin Police Department officers showing that they had provided evidence of Overstreet's possible involvement in Myers's murder to Columbus Police Department investigators;
- Testimony and records from Columbus Police Department officers showing that they had received evidence of Overstreet's possible involvement in Myers's murder from Franklin officers;
- Testimony from Knulf in which he conceded that he had been made aware of substantially all of the information discussed above prior to Hubbell's indictment; that "any reasonably trained law enforcement officer" would have followed up on the information he had been provided about Overstreet, although he did not, Tr. Vol. 3, p. 177; that known information regarding Overstreet's possible involvement in Myers's murder had been omitted or removed from Columbus Police Department records, *id.* at 235; that the information known to him about Overstreet's possible involvement in Myers's murder, and prior to the indictment against Hubbell, was exculpatory to Hubbell; that the similarities between Eckart's murder and Myers's murder were "striking," *id.* at 158; and that none of the information discussed above was provided to Hubbell prior to his trial;

- Testimony from Hubbell's trial counsel that he had initially considered Overstreet to be an alternate suspect in Myers's murder, Tr. Vol. 4, p. 94; that he dropped Overstreet from his defense strategy prior to trial because the State's disclosures left him with "better alternate suspects," *id.* at 103; and that, had he known of the vast amount of evidence the State had not disclosed, he "[a]bsolutely" would have "investigated it[,] talked to" the people who had provided statements, "tr[ied] to corroborate" those statements and "use" the evidence, and "definitely" would have "put [Overstreet] forth to the jury" as an "alternate suspect," *id.* at 109-10, 149; and that, "[i]f everything" the State had suppressed "panned out," Overstreet "would've been an extremely strong alternate suspect" and likely "the strongest" one, *id.* at 149.

[33] Following the evidentiary hearing, the post-conviction court entered an eighty-three page order supported by findings of fact and conclusions of law. In particular, the court found and concluded that the State had violated Hubbell's constitutional rights under *Brady* to material exculpatory evidence. The court thus vacated Hubbell's conviction and awarded him a new trial.

[34] The State now appeals the post-conviction court's judgment for Hubbell.

## Standard of Review

[35] As our Supreme Court has explained:

> When the State appeals from a grant of post-conviction relief, we apply the clearly-erroneous standard of review. *State v. Oney*, 993 N.E.2d 157, 161 (Ind. 2013) (quoting Ind. Trial Rule 52(A)). Under this standard, we reverse the post-conviction court's judgment "only upon a showing of 'clear error'—that which leaves us with a definite and firm conviction that [a] mistake has been made." *State v. Greene*, 16 N.E.3d 416, 418 (Ind. 2014) (alteration in original) (citation omitted). However, we review

> the post-conviction court's legal conclusions de novo. *State v. Hollin*, 970 N.E.2d 147, 151 (Ind. 2012).

*State v. Stidham*, 157 N.E.3d 1185, 1190 (Ind. 2020).

## Discussion and Decision

[36] The State appeals the post-conviction court's judgment[7] and argues that Hubbell failed to meet his burden before the post-conviction court to establish his claim that the State violated his constitutional rights under *Brady*. "[W]hen the State withholds from a criminal defendant evidence that is material to his guilt or punishment, it violates his right to due process of law in violation of the Fourteenth Amendment." *Cone v. Bell*, 556 U.S. 449, 469 (2009) (citing *Brady*, 373 U.S. at 87).[8]

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[7] The State complains that at least part of the post-conviction court's order adopted proposed findings and conclusions submitted by Hubbell. As the State well knows, our Court prefers trial and post-conviction courts not adopt either party's findings and conclusions, but doing so is not per se reversible error and does not affect our standard of review. *See, e.g.*, *Russell v. State*, 234 N.E.3d 829, 857-58 (Ind. 2024).

[8] The Supreme Court of the United States has also noted that a prosecutor may have ethical or statutory obligations to disclose evidence to a defendant that go beyond *Brady*, stating:

> Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations. . . . As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure.

*Cone*, 556 U.S. at 470 n.15 (citations omitted). As noted in detail in part 2 below, "material evidence" under *Brady* means evidence that, after the fact of a trial, is sufficient to undermine our confidence in the trial outcome. *Kubsch v. State*, 934 N.E.2d 1138, 1145 n.4 (Ind. 2010). The Indiana Rules of Professional Conduct, meanwhile, state that, prior to trial, "[t]he prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . . ." Ind. Professional Conduct Rule 3.8(d).

[37] As our Supreme Court has summarized:

> "To prevail on a *Brady* claim, a defendant must establish: (1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that the evidence was material to an issue at trial." *Minnick v. State*, 698 N.E.2d 745, 755 (Ind. 1998) (citing *Brady*, 373 U.S. at 87, 83 S. Ct. 1194).

*Kubsch v. State*, 934 N.E.2d 1138, 1145 n.4 (Ind. 2010). The State argues on appeal that it did not suppress evidence of Eckart's murder from Hubbell and, further, any evidence it did suppress regarding Overstreet's involvement in either Eckart's murder or Myers's murder was immaterial to Hubbell's conviction. We address each argument in turn.

## 1. The post-conviction court's conclusion that the State suppressed evidence regarding Eckart's murder is not clearly erroneous.

[38] We first consider the State's argument on appeal that it did not suppress evidence regarding Eckart's murder from Hubbell. According to the State, news reports prior to Hubbell's trial broadly discussed similarities between Eckart's murder and Myers's murder, and Hubbell knew the State had charged Overstreet with Eckart's murder at the time of Hubbell's trial, which was prior to Overstreet's trial. The State thus asserts that the evidence in its possession regarding specific details of Eckart's murder was not information that it needed to disclose to Hubbell because Hubbell's own counsel had all the information he needed to find those specific details out for himself.

[39] The Indiana Supreme Court recognizes as a rule under *Brady* that "the State will not be found to have suppressed material information if that information was available to a defendant through the exercise of reasonable diligence." *Stephenson v. State*, 864 N.E.2d 1022, 1057 (Ind. 2007) (quoting *Conner v. State*, 711 N.E.2d 1238, 1245-46 (Ind. 1999)); *see also United States v. Morris*, 80 F.3d 1151, 1170 (7th Cir. 1996) (recognizing the same rule in the Seventh Circuit). But the Indiana Supreme Court has applied that rule only in circumstances where the records purportedly suppressed were records the defendant had actual and specific reasons, prior to trial, to know already existed.

[40] For example, in *Conner*, the defendant argued that the State suppressed a report prepared by a psychologist who had examined the defendant several months prior to trial. Our Supreme Court rejected that argument, noting that multiple mental-health experts had examined the defendant, and several of their reports, known to defense counsel up to five months prior to trial, referenced the purportedly suppressed report. *Conner*, 711 N.E.2d at 1245-46. Our Supreme Court held that any reasonably diligent defense counsel thus would have known of the purportedly suppressed report prior to trial, and the State could not be said to have suppressed that report within the meaning of *Brady*. *Id.*; *see also Denney v. State*, 695 N.E.2d 90, 94-95 (Ind. 1998) (holding that the defendant had actual knowledge of a court-ordered blood test prior to trial, and, thus, the State could not have suppressed the results of that test within the meaning of *Brady*); *Johnson v. State*, 693 N.E.2d 941, 947 (Ind. 1998) (holding that the defendant's argument that the State suppressed evidence that the defendant

committed the offense with an accomplice "was information (if true) [the defendant] had available to him at the time of trial").[9]

[41] The State's attempt to use the "reasonable diligence" rule here is inconsistent with our Supreme Court's use of that rule. Here, the State had possession of evidence that showed key details regarding Eckart's murder, and Hubbell had no actual and specific reason, prior to his trial, to know that that evidence existed. For example, the State knew that both Eckart and Myers had been strangled to death with their own clothing, which was one of the key facts that led Borges, the lead investigator in Eckart's murder, to conclude that the two murders were unlike "any other cases" he had ever heard of or worked on. Tr. Vol. 2, pp. 65, 67. The State identifies nothing in the record to show that Hubbell specifically or the public generally had that knowledge prior to Hubbell's trial.

[42] And Hubbell did not fail to follow-up on the broad, generally known information between the two cases that was available to him prior to his trial. The Supreme Court of the United States has made clear that it is "reasonable for trial counsel to rely on, not just the presumption that the prosecutor would

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[9] The only other times our Supreme Court has referenced its "reasonable diligence" rule under *Brady* involved cases in which the State never had possession of the purportedly suppressed evidence in the first place. *See Stephenson*, 864 N.E.2d at 1057 (holding that the State never had possession of a purportedly suppressed surveillance video); *Carter v. State*, 738 N.E.2d 665, 672-73 (Ind. 2000) (holding that the State never had possession of purportedly suppressed medical records). But, of course, "[t]he prosecutor in a criminal case has a constitutional mandate to turn over material exculpatory evidence" only when that evidence is in the prosecutor's "*possession*." *Goudy v. State*, 689 N.E.2d 686, 695 (Ind. 1997) (emphasis added).

fully perform his duty to disclose all exculpatory materials, but also the implicit representation that such materials would be included" in the State's response to defense counsel. *Strickler v. Greene*, 527 U.S. 263, 284 (1999). Here, Hubbell's counsel specifically asked the Bartholomew County prosecutor to disclose any and all *Brady* evidence prior to trial.[10] In the State's responsive disclosures, Hubbell received no information about Overstreet or the details of Eckart's murder. Hubbell had the right to rely both on what the State disclosed to him and on the implicit representation from the State's disclosure that there was no further relevant information to disclose, which, in turn, also implied that any further independent investigation on Hubbell's own part would be fruitless. *See id.*

[43] The State's position that more was required of Hubbell's trial counsel is, on this record, contrary to law. *See id.* at 287-88 (stating that, at least with respect to raising a *Brady* claim for the first time in a successive petition for habeas corpus, "a defendant cannot conduct the 'reasonable and diligent investigation' mandated [by habeas corpus precedent] to preclude a finding of procedural default when the evidence is in the hands of the State"); *see also Conner*, 711 N.E.2d at 1245-46 (applying the reasonable-diligence rule to records the defendant had actual and specific reasons, prior to trial, to know already existed). Accordingly, the State is unable to show that the post-conviction

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[10] To be sure, the State's "duty to disclose [*Brady*] evidence is applicable [against the State] even though there has been no request by the accused" for it. *Strickler*, 527 U.S. at 280; *see also* Prof. Cond. R. 3.8(d).

court's determination that the State suppressed evidence relating to Eckart's murder is clearly erroneous.

### 2. The post-conviction court's conclusion that the evidence suppressed by the State was material to the State's allegation against Hubbell is not clearly erroneous.

[44] We thus turn to the State's other argument on appeal, namely, that it did not suppress any "material" evidence. *See Kubsch*, 934 N.E.2d at 1145 n.4. As the Supreme Court of the United States has long recognized:

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evi[de]nce is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

*United States v. Agurs*, 427 U.S. 97, 112-13 (1976) (footnotes omitted). In other words:

> Evidence is material under *Brady* "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine

> confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

*Kubsch*, 934 N.E.2d at 1145 n.4.

[45] We consider the State's materiality argument in three parts: whether the State preserved its argument on appeal that the suppressed evidence regarding Eckart's murder is immaterial; whether the State's argument, that certain suppressed evidence regarding Myers's murder cannot be material because it contained hearsay, is a correct understanding of law; and whether the suppressed evidence, evaluated in the context of the entire record, undermines our confidence in Hubbell's conviction.

### 2.1. The State failed to preserve for appellate review its argument that the suppressed evidence of Eckart's murder is immaterial.

[46] We first address the State's argument that the evidence it suppressed from Hubbell regarding Eckart's murder was immaterial to its allegation against him because none of that evidence would have been admissible at Hubbell's trial or on retrial. In particular, the State argues that evidence pertaining to Overstreet's murder of Eckart would be inadmissible under Indiana Evidence Rule 404(b) because, according to the State, that evidence could only be offered to show Overstreet's character in order to show that he acted in accordance with that character (that is, that he committed Myers's murder because he is a murderer).

[47] But the State acknowledges that evidence might be admissible under Rule 404(b) to prove the identity of Myers's murderer. *See* Ind. Evidence Rule

404(b)(2); *see, e.g.*, *Ramirez v. State*, 174 N.E.3d 181, 194 (Ind. 2021) ("A defendant may introduce evidence of other persons' prior bad acts to show identity under Rule 404(b) if the crimes are so 'strikingly similar' that one can say with reasonable certainty that one and the same person committed them."). And so the State also contends that using the evidence of the two murders here to show a common *modus operandi* would not render the evidence admissible because the two murders lack sufficient similarities.[11] Relatedly, the State further argues that the suppressed Eckart-related evidence would be inadmissible under Evidence Rule 403, which allows the trial court to exclude otherwise admissible evidence when the "probative value is substantially outweighed by a danger of . . . unfair prejudice."[12]

[48] The State did not argue in the post-conviction court that evidence relating to Eckart's murder was immaterial under *Brady* on the theory that that evidence would be inadmissible against Hubbell under Evidence Rules 403 and 404. The State may not raise those arguments for the first time on appeal. As we have often noted, we are a court of review, and we will not say that our trial and post-conviction courts erred on an issue or argument they never had an

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[11] We are aware that the State has argued to our Court that a *modus operandi* can exist on less compelling facts than those here. *See, e.g.*, *Hemphill v. State*, ___ N.E.3d ___, No. 25A-CR-3265, at 2 (Ind. Ct. App. Aug. 10, 2026) ("Contrary to the State's claim, [the defendant's multiple child-molesting charges] did not share a common *modus operandi* simply because they all occurred in his bedroom.").

[12] The State's argument under Rule 403 is that, because Hubbell's trial preceded Overstreet's, admitting evidence at Hubbell's trial that incriminated Overstreet would have violated Overstreet's right to a fair and impartial trial later. But we think that excluding exculpatory evidence because another trial is pending would be an extremely questionable solution to the purported problem.

opportunity to consider. *Davis v. State*, 278 N.E.3d 1178, 1187 (Ind. Ct. App. 2026) (quoting *GKC Ind. Theatres, Inc. v. Elk Retail Invs., LLC*, 764 N.E.2d 647, 651 (Ind. Ct. App. 2002)).

[49] Nonetheless, in its Reply Brief to our Court, the State argues that we should consider the merits of its unpreserved arguments because "the State could not have predicted that the [post-conviction] court would clearly err by relying" on the suppressed evidence regarding Eckart's murder. State's Reply Br. at 17-18. The State's argument here is equivalent to saying that alternative arguments need not be presented to our trial and post-conviction courts and can instead be raised for the first time on appeal, which is contrary to Indiana precedent. *See, e.g.*, *Plank v. Cmty. Hosps. of Ind., Inc.*, 981 N.E.2d 49, 53 (Ind. 2013) ("[A]ppellate review presupposes that a litigant's arguments have been raised and considered in the trial court. To abandon that principle is to encourage the practice of sandbagging: suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later—if the outcome is unfavorable—claiming that the course followed was reversible error.") (quotation marks omitted). Accordingly, the State has not preserved its arguments regarding the suppressed Eckart-related evidence and Evidence Rules 403 and 404 for our review, and we will not consider them.

### 2.2. The State's argument that inadmissible evidence cannot be "material" evidence under *Brady* is incorrect as a matter of law.

[50] The State also argues that, although it suppressed evidence relevant to Hubbell's claim that Overstreet was in fact the one who had murdered Myers,

much of that suppressed evidence cannot be "material" under *Brady* because it contains inadmissible hearsay. Roberts's statements to Franklin Police Department officers in November 1997 is a good example of this. In those statements, Roberts informed officers that he had been a co-worker with Overstreet from 1996 to mid-1997, and, while working with Overstreet in late 1996, Overstreet told Roberts that he was having an affair with a woman named Sharon in Columbus and that he had gotten her pregnant. Overstreet also stated that "he knew of remote places in Atterbury that nobody could find." Appellant's App. Vol. 31, p. 26. If Roberts were to testify at Hubbell's trial to Overstreet's out-of-court statements to prove the truth of the matters asserted, his testimony would be classic hearsay and at least presumptively inadmissible.[13] *See* Evid. R. 801(c), 802.

[51] According to the State, inadmissible evidence is "not evidence at all" and therefore cannot be "material" evidence under *Brady*. Appellant's Br. at 36-37. The State derives its proposition from the following analysis of the Supreme Court of the United States:

> If the prosecution's initial denial that polygraph examinations of the two witnesses existed were an intentional misstatement, we would not hesitate to condemn that misrepresentation in the strongest terms. But as we reiterated just last Term, evidence is "material" under *Brady*, and the failure to disclose it justifies setting aside a conviction, only where there exists a "reasonable

[13] Hubbell does not identify a possible basis under which Roberts's hearsay statements might be admissible for their truth.

probability" that had the evidence been disclosed the result at trial would have been different. To begin with, on the [Ninth Circuit] Court of Appeals'[s] own assumption, the polygraph results were inadmissible under state law, even for impeachment purposes, absent a stipulation by the parties, and the parties do not contend otherwise. *The 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. To get around this problem, the Ninth Circuit reasoned that the information, had it been disclosed to the defense, might have led respondent's counsel to conduct additional discovery that might have led to some additional evidence that could have been utilized. *Other than expressing a belief that in a deposition [one of the witnesses] might have confessed* to his involvement in the initial stages of the crime—a confession that itself would have been in no way inconsistent with respondent's guilt—*the Court of Appeals did not specify what particular evidence it had in mind*. Its judgment is based on mere speculation, in violation of the standards we have established.

At trial, respondent's strategy was to discredit [the witness's] damaging testimony by suggesting [he] was lying in order to downplay his own involvement in the crime. *That strategy did not involve deposing [the witness]*. It is difficult to see, then, on what basis the Ninth Circuit concluded that respondent's counsel would have prepared in a different manner, or (more important) would have discovered some unspecified additional evidence, merely by disclosure of polygraph results that, as to two questions, were consistent with respondent's preestablished defense.

In speculating that the undisclosed polygraph results might have affected trial counsel's preparation, and hence the result at trial,

> the Ninth Circuit disagreed with, or disregarded, the view of respondent's own trial counsel. . . .
>
> Trial counsel's strategic decision to limit his questioning of [the witness] undermines the suggestion by the Court of Appeals that counsel might have chosen to depose [the witness] had the polygraph results been disclosed. *But of even greater importance was counsel's candid acknowledgment that disclosure would not have affected the scope of his cross-examination. That assessment is borne out by the best possible proof: The Federal District Court below went so far as to permit respondent's habeas counsel, armed with the information about the polygraph examinations, to question [the witness] under oath. Even though respondent's counsel was permitted to refer to the polygraph results themselves—reference to which would not be permissible on retrial—counsel obtained no contradictions or admissions out of [the witness].*
>
> In short, it is not "reasonably likely" that disclosure of the polygraph results—inadmissible under state law—would have resulted in a different outcome at trial. Even without [the witness's additional] testimony, the case against respondent was overwhelming. To acquit of aggravated murder, the jury would have had to believe that respondent's single action revolver discharged accidently, not once but twice, by tragic coincidence depositing a bullet to the back of the victim's head, execution style, as the victim lay face down on the floor. In the face of this physical evidence, as well as [both witnesses'] testimony . . . it should take *more than supposition on the weak premises offered by respondent to undermine a court's confidence in the outcome*.

*Wood v. Bartholomew*, 516 U.S. 1, 5-8 (1995) (emphases added; citations omitted).

[52] The State's proposition that *Wood* means that inadmissible evidence cannot be material evidence under *Brady* is incorrect. The *Wood* Court's analysis was *not* that inadmissible evidence is immaterial evidence under *Brady*, full stop. *See id.* Rather, the Court stated that inadmissible evidence "could have had no *direct* effect on the outcome of trial"; however, from there, the Court went on to consider whether the record supported the circuit court's analysis that the polygraph results might still have an *indirect* effect through the discovery of admissible evidence. *Id.* at 6 (emphasis added); *see also House v. State*, 535 N.E.2d 103, 107 (Ind. 1989) (stating that a court reviewing a *Brady* claim "may consider . . . any adverse effect the prosecutor's failure . . . might have had on the defendant's preparation or presentation of his case").

[53] The *Wood* Court concluded that the Ninth Circuit's speculation about what indirect effects pretrial discovery of the polygraph results might have resulted in was expressly contrary to the district court's factual record. 516 U.S. at 7-8. The Court noted that the only possible indirect effect the polygraph results might have resulted in was a pretrial deposition of the witness. *Id.* at 6. But defense counsel had testified that such a deposition would have been contrary to his already-determined trial strategy. *Id.* at 6-8.

[54] Moreover, and regardless, the district court still permitted defense counsel to question the witness under oath using the polygraph results. *Id.* at 7-8. The *Wood* Court did *not* critique the district court for that procedure—which would be an odd omission under the State's reading of *Wood*—and indeed the Court instead recognized the record the district court had developed as "the best

possible proof" of the suppressed evidence's lack of materiality to the trial outcome. *Id.* at 7-8 ("Even though respondent's counsel was permitted to refer to the polygraph results themselves—reference to which would not be permissible on retrial—counsel obtained no contradictions or admissions out of [the witness]."). *Id.* at 8. We therefore conclude that *Wood* represents no major departure from *Brady*'s otherwise established materiality analysis.

[55] And our reading of *Wood* is consistent with precedent from both the Indiana Supreme Court and the United States Court of Appeals for the Seventh Circuit. As our Supreme Court has stated: "The fact that [suppressed] evidence would have been inadmissible under the Rule[s] of Evidence does not necessarily resolve [a] *Brady* claim." *Lambert v. State*, 743 N.E.2d 719, 750 (Ind. 2001). The Seventh Circuit has been even more to-the-point: "*Brady*'s materiality standard is not an admissibility test." *Sims v. Hyatte*, 914 F.3d 1078, 1089 (7th Cir. 2019). Accordingly, the State's attempt to exclude from a materiality analysis evidence the State suppressed that connects Overstreet to Myers, but which might be inadmissible in-and-of itself at trial, fails as a matter of law.

### 2.3. In the context of the entire record, our confidence in Hubbell's conviction for Myers's murder has been undermined by the State's suppression of exculpatory evidence.

[56] All of the above brings us to the ultimate issue for Hubbell's *Brady* claim: whether there is a reasonable probability that, had the suppressed evidence been disclosed to Hubbell prior to his trial, the result of his trial would have been different. *Kubsch*, 934 N.E.2d at 1145 n.4. Again, a "reasonable probability"

here "is a probability sufficient to undermine confidence in the outcome." *Id.* We agree with Hubbell and the post-conviction court that, in the context of the entire record, the evidence suppressed by the State undermines our confidence in Hubbell's conviction. *See Agurs*, 427 U.S. at 112-13.

[57] We begin this analysis by noting that the evidentiary support for Hubbell's conviction was not strong. Eyewitness descriptions of the man who was near Myers in the Arvin parking lot near the time of her disappearance were not entirely consistent with Hubbell's appearance; all of the eyewitnesses agreed that the man they saw had blond hair, but Hubbell has brown hair. Likewise, Hubbell's white minivan did not entirely match eyewitness descriptions of the vehicle seen near Myers, which several witnesses described as a white cargo van. Pubic hairs recovered near Myers's body were not a DNA match to Hubbell. And the State's theory of Hubbell's motive for murdering Myers—he had an insurance dispute with his employer-provided insurer, and Myers was employed in the human resources department of his employer—was not a theory entirely consistent with Borges's opinion that the manner in which Myers was murdered was "very personal." Tr. Vol. 2, pp. 65.

[58] Further, statements Hubbell made to officers about his sleepwalking disorder were, at first, unambiguously not inculpatory. Yet, when pressed by another officer several days later that that officer believed Hubbell to be responsible, Hubbell (according to the officer's later recollection) stated that "it might be possible" because sometimes Hubbell "does things during his [sleepwalking] episodes that he can't remember . . . ." Ex. Vol. 24, p. 12. This is not strong

evidence in support of Hubbell's conviction because it simply shows Hubbell acknowledging that he does not know what happens during his sleepwalking episodes.

[59] We agree with our Supreme Court's assessment in *Hubbell I* that the State's case against Hubbell was largely supported by three pieces of evidence. 754 N.E.2d at 890, 892. First, the State relied on acrylic fibers found near Myers's body that allegedly matched fibers in Hubbell's minivan. But the State's evidence here was fragile: out of "hundreds" of acrylic fibers of "numerous colors and numerous types" recovered from inside the minivan, "[ten]" were "the same shape and . . . the same color" as fibers found on or near Myers's body. Ex. Vol. 28, pp. 188, 199-200, 206. The State's forensic examiner conceded at trial that those fibers were "common" and "could have come from anything," including clothing. *Id.* at 206-07.

[60] Second, the State introduced evidence of two grasses that had been recovered from under the minivan and argued to the jury that those grasses were consistent with grasses near Teal Marsh. But the two grasses were Kentucky Bluegrass and either *Bromus Sterilis* or *Bromus Tectorum* grass. Kentucky Bluegrass is a "common lawn grass" throughout Indiana, and the *Bromus* grasses are likewise "abundant" throughout Indiana. Ex. Vol. 25, pp. 49-51; Ex. Vol. 32, p. 191. Finding those grasses on a vehicle in Indiana simply shows that the vehicle ran over grass somewhere in Indiana—and even being that specific might be questionable.

[61] Third, the State relied on the testimony of an inmate with Hubbell who testified that Hubbell had confessed to Myers's murder. But Hubbell's counsel effectively called the inmate's credibility into doubt. The inmate's own mother testified at trial that he was not credible and that the prosecution had "paid" him more than $100 for that testimony. Ex. Vol. 30, p. 5.

[62] Further, in his direct appeal, our Supreme Court recognized that the State's case against Hubbell had seemingly been bolstered by several pieces of inadmissible evidence. That evidence included irrelevant and highly prejudicial evidence of a firearm and ammunition, the State's improper and erroneous suggestion to the jury that Myers's fingerprints had been found inside his van, and Young's pre-trial identification of Hubbell, which was the result of an unduly suggestive State procedure. *Hubbell I*, 754 N.E.2d at 890, 892.

[63] Moreover, Hubbell's defense at trial was focused on exactly the issues the suppressed evidence spoke to. In particular, Hubbell questioned the quality of the State's investigation into alternate suspects. He argued that someone else was Myers's murderer, including the possibility that David had committed the offense. In support of that theory, Hubbell argued that David had a superior motive for taking Myers's life, as the timeframe for Myers's pregnancy called into question his paternity of the child.

[64] And Hubbell had considered Overstreet as a possible alternate suspect. Overstreet matched the physical description of the man seen near Myers more closely than Hubbell did, and Scott's cargo van was likewise more consistent

with witness observations than Hubbell's minivan. However, Hubbell abandoned arguing Overstreet as a possible alternate suspect at trial because, based on the State's incomplete pretrial disclosures, Hubbell concluded that he had better suspects.

[65] And yet the evidence suppressed by the State paints a compelling picture of Overstreet's possible involvement in Myers's murder, and it does so to the exclusion of Hubbell as a suspect. That evidence included what Knulf himself referred to as "striking" similarities in how both Eckart and Myers were murdered, including the "very personal" manner in which they had both been strangled to death with their own clothing. Tr. Vol. 2, pp. 65; Tr. Vol. 3, p. 158. And the evidence before the post-conviction court made clear that investigators had suppressed, omitted, or removed evidence of Overstreet's possible involvement in Myers's death and his possible relationship to her from the State's records. At a minimum, the clear evidence of the State's suppression of evidence relating to Overstreet would have been admissible to impeach the State's witnesses regarding the quality of the State's investigation and bolster that aspect of Hubbell's defense at trial. *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 447-49 (1995).

[66] The State's suppressed evidence also included Melissa's November 1997 statements to Franklin Police Department officers that, on the day of Myers's disappearance, Overstreet left home unusually early in Scott's white cargo van. When he returned late that evening, he was disheveled and covered in blood. And Overstreet then obsessed over the news coverage of Myers's

disappearance, just as he had done with the coverage of Eckart's. Melissa also believed that, in a moment of intimidation at a Walmart that was supported by another witness's statements, Overstreet had suggested to her that he would do to her what he had done to Myers when he pointed at a picture of Myers and gave her a mean look during an argument. Melissa's statements, coupled with the similarities in Eckart's and Myers's murders and the proximity of their bodies to each other near Teal Marsh, would have been compelling, direct evidence in support of Hubbell's defense of an alternate suspect.

[67] The evidence suppressed by the State also included evidence that might not have had a direct effect on the outcome of Hubbell's conviction but nonetheless had a meaningful indirect effect, such as Roberts's hearsay statements that Overstreet had said that he had gotten a woman named Sharon in Columbus pregnant and numerous other witness statements along the same lines. Here, unlike the unsupported speculation rejected by the Court in *Wood*, the indirect effect of the suppressed hearsay evidence is substantial: the suppressed hearsay statements were directly on point with Hubbell's pretrial and in-trial theory that Myers had been impregnated by another man and that her murder had been connected to her pregnancy. And Hubbell's trial counsel was unambiguous to the post-conviction court: had the State properly disclosed the evidence in its possession, he would have investigated those leads and argued Overstreet to the jury as an alternate suspect.

[68] In the context of the entire record, we conclude that the evidence suppressed by the State was material exculpatory evidence. The proper evidentiary foundation

for Hubbell's conviction was not strong; Hubbell's defense was premised on a substandard investigation and on another person having committed the murder, with that connection possibly being related to Myers's pregnancy; the similarities between the manner of Myers's and Eckart's deaths and the location of their bodies near Teal Marsh would have supported Hubbell's defense; Melissa's statements to officers would have supported Hubbell's defense; and the State's suppression of numerous, corroborating witness statements, even if those statements were hearsay, denied Hubbell meaningful pretrial opportunities to bolster his defense. As a result of the State's suppression of the exculpatory evidence, we must conclude that our confidence in Hubbell's conviction has been undermined.

## Conclusion

[69] For all of these reasons, we affirm the post-conviction court's judgment granting Hubbell's petition for relief and awarding him a new trial.

[70] Affirmed.

DeBoer, J., concurs.
Kenworthy, J., concurs in result with separate opinion.

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**Kenworthy, Judge, concurring in result.**

[71] I respectfully concur in result.

[72] Like the majority, I agree the State failed to disclose evidence to the defense and the evidence was exculpatory. *See* slip op. at ¶ 68. I also conclude the undisclosed evidence was material to an issue at trial. *See id.* But materiality is not a sufficiency of the evidence test. *Kyles v. Whitney*, 514 U.S. 419, 434 (1995). In determining the materiality of the suppressed evidence, I accept that the State's evidence was sufficient to convince a jury of Hubbell's guilt, as well as the Supreme Court on direct appeal, and the post-conviction court in its analysis of Hubbell's newly discovered evidence claim. *See Appellant's App. Vol. 31* at 80 (post-conviction court noting the newly discovered evidence standard requires that the evidence "presents a sufficient probability of a different result by creating a reasonable doubt that did not otherwise exist"). Accordingly, I do not consider the relative strength or weakness of that evidence. *Cf. slip op.* at ¶¶ 57, 68 (evaluating the State's evidence as "not strong"). Particularly in this procedural posture, I believe any characterization of the evidence is best left to the parties.

[73] Instead, I focus solely on whether the suppressed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. The "touchstone of materiality" is a reasonable probability of a different result. *Id.* at 434. "The question is not whether the defendant would more likely than not have received a different

verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id*.

[74] My confidence in the outcome of Hubbell's trial is undermined because Hubbell did not have all the information he needed to investigate thoroughly, formulate trial strategy, and present a full defense. The undisclosed evidence doesn't contradict the key pieces of evidence the Supreme Court and post-conviction court found compelling enough to mention as supporting the verdict. Yet there is a reasonable probability the outcome may be different because the defense will be different. It will now be up to a jury to determine whether the evidence as a whole supports a conviction.

[75] The post-conviction court's judgment correctly resets the stage and grants Hubbell a new trial with benefit of all the information he should have had before his first trial. I therefore concur in affirming the judgment.