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SUMMARY OF THE ARGUMENT

In Willie Harris's state court murder trial, the primary question was whether Harris shot Jones in self-defense – that is, whether Jones engaged in behavior before the shooting that caused Harris to fear for his life. Harris also contended that Jones had provoked him to a state of “sudden heat” – a mitigating factor that would have allowed the jury to convict on the lesser included offense of voluntary manslaughter. Jones's behavior was obviously a central factual issue for both of these defenses.

Unfortunately, Harris's counsel proceeded to trial without a critical piece of evidence concerning Jones's behavior: a toxicology report proving that Jones had been drunk and under the influence of cocaine at the time of the shooting. Both the defense and the prosecution knew before trial that a toxicology analysis was underway, and defense counsel also knew that its results were likely to be positive. Nevertheless, the prosecution failed to turn over the toxicology report, and Harris's trial counsel failed to exercise reasonable diligence in obtaining it. Harris's trial counsel himself has called this an “oversight” on his part and admits that there was “no explanation that could justify [his] not having [the report].” RP143, SA63. As a result of this “oversight,” Harris himself was left with a trial and a conviction that were fundamentally unfair.

The state courts rejected Harris's collateral attack on his sentence, principally because they doubted that the toxicology report would have changed the outcome of the trial. The relevant question, however, is whether there was a

“reasonable probability” that the outcome of the trial would have been different. Even the majority opinion in the state court of appeals recognized the value of the toxicology evidence, stating that if the jurors had been able to see and consider the toxicology report, they “may have credited Harris’ claim of Jones’ hostile and erratic behavior.” Op. on Collateral Review at 9, A12, SA30. But despite this acknowledgement, the majority ultimately held that counsel’s error was not prejudicial. As demonstrated below, that decision is “contrary to” and is “an unreasonable application of” Supreme Court authority.

Moreover, setting aside defense counsel’s lack of diligence, the prosecution had an independent obligation to discover and disclose the toxicology report. This Court’s cases hold that an inmate may not upset a conviction on the ground that the State suppressed evidence if that evidence was available to the defense through the exercise of reasonable diligence. But that rule does not and should not apply in instances where the evidence in question *is exclusively in the control of the State itself*. The state court’s analysis is directly contrary to *Brady* and its progeny, including to those cases holding that a defendant may obtain relief under *Brady* even if he never formally requested the suppressed information from the government. Accordingly, Harris is entitled to habeas relief under *Brady* as well.

STANDARD OF REVIEW

When reviewing a district court’s denial of federal habeas relief, this Court reviews findings of fact for clear error and findings of law *de novo*. See *Winters v. Miller*, 274 F.3d 1161, 1165 (7th Cir. 2001); *Washington v. Smith*, 219 F.3d 620 (7th

Cir. 2000). In this instance, the district court made no independent factual findings. Thus this Court's review of the district court's decision is *de novo*. *Warren v. Richland County Circuit Court*, 223 F.3d 454, 457 (7th Cir. 2000).

ARGUMENT

I. Standards for Federal Habeas Relief

Under the Antiterrorism and Effective Death Penalty Act of 1996, a court must grant a petition for federal habeas relief from a state court conviction if it finds that the state courts' adjudication of the claims (1) is "contrary to, or involve[s] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court"; or (2) is "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *See* 28 U.S.C. § 2254(d). Accordingly, in considering a petition for federal habeas relief, federal courts "are free to express an independent opinion on all legal issues in the case," because the statute does not "permit state courts to deviate from the Constitution." *Lindh v. Murphy*, 96 F.3d 856, 869, 870 (7th Cir. 1996), *rev'd on other grounds*, 521 U.S. 320 (1997).

A state court decision is "contrary to" Supreme Court precedent "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law" or "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [that of the Supreme Court]." *Williams v. Taylor*, 529 U.S. 362, 405 (2000); *see also Henry v. Page*, 223 F.3d 477, 480 (7th Cir. 2000). This Court

reviews *de novo* whether a state court decision is “contrary to” Supreme Court precedent. *Id.*

A state court decision involves an “unreasonable application” of precedent under the statute when it “identifies the correct governing legal rule from [Supreme Court precedent] but unreasonably applies it to the facts of the particular state prisoner’s case.” *Williams*, 529 U.S. at 407; *see also Henry*, 223 F.3d at 480.

Whether a state court disposition rests upon the “unreasonable application” of precedent is a mixed question of law and fact that this Court reviews *de novo*, though the state court’s decision is given deference if it is found to be reasonable. *Anderson v. Cowan*, 227 F.3d 893, 896-97 (7th Cir. 2000); *Henry*, 223 F.3d at 480.

II. Ineffective Assistance of Counsel

In *Strickland v. Washington*, 466 U.S. 668 (1984), the U.S. Supreme Court set out principles for determining whether a criminal defendant received legal representation so inadequate that he was effectively denied the “Assistance of Counsel” guaranteed by the Sixth Amendment. U.S. Const. amend. VI. “It is past question that the rule set forth in *Strickland* qualifies as ‘clearly established Federal law, as determined by the Supreme Court of the United States.’” *Williams v. Taylor*, 529 U.S. 362, 391 (2000).

To obtain relief from a conviction based upon a claim of ineffective assistance of counsel, the petitioner must meet two requirements. First, he must show “that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the

defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. Second, the petitioner must show “that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.*

Harris’s claim of ineffective assistance meets both of these requirements. Through an admitted “oversight” for which he had “no explanation,” Harris’s trial counsel proceeded to trial without the results of a toxicology test that showed that the decedent was drunk and under the influence of cocaine at the time of the shooting – evidence that would have provided important and independent support for Harris’s contention that the decedent was behaving in a frightening and threatening manner. The state courts’ rejection of Harris’s claim is based upon an unreasonable application of *Strickland* and in certain respects is directly contrary to that decision, as shown below.

A. Trial Counsel’s Failure to Obtain the Toxicology Report Before Trial Was Objectively Unreasonable.

To establish that his counsel’s performance was ineffective, a “defendant must show that counsel’s representation fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688. Proof that counsel failed to conduct an adequate investigation before trial or to obtain significant evidence may meet this requirement. *Williams v. Taylor*, 529 U.S. 362, 395 (2000) (defendant proved ineffective performance by counsel based upon counsel’s failure to perform an adequate investigation before a sentencing hearing); *Brown v. Sternes*, 304 F.3d 677 (7th Cir. 2002) (counsel’s failure to demand action on an unexecuted subpoena for

defendant's medical records was ineffective assistance); *Cheung v. Maddock*, 32 F. Supp. 2d 1150, 1159-60 (N.D. Cal. 1998) (defense counsel's failure to investigate victim's medical records was ineffective assistance). There can be no doubt that counsel's failure to obtain the toxicology report in this case rendered his performance ineffective under *Strickland*.

The state court of appeals itself held that counsel did not have the toxicology report because he failed to take reasonable steps to get it. Although the court of appeals decided the *Strickland* claim based upon a lack of prejudice and thus did not need to reach the question of counsel's performance, its discussion of *Brady* demonstrates that counsel failed to take reasonable steps to obtain a copy of the report. According to the majority opinion, "the defense could have received the results of the toxicology report on its own with the exercise of reasonable diligence." Op. on Collateral Review at 7, A10, SA28. Defense counsel Woloshansky "knew that the toxicology report existed before the trial began" because "the autopsy report disclosed that blood and urine samples had been taken." *Id.* at 6-7, A9-10, SA27-28. He also knew how to request that toxicology reports be expedited, and he had done so in previous cases. *Id.* at 7, A10, SA28. The evidence of Jones's drug and alcohol use was directly relevant to the question of Jones's behavior, which in turn was "[u]ndoubtedly . . . critical to Harris' defense." *Id.* at 9, A12, SA30. These findings alone lead to the inescapable conclusion that Woloshansky failed to exercise "reasonable diligence" in his pretrial investigation.

Moreover, Woloshansky proceeded to trial without even attempting to obtain a continuance of trial pending his receipt of the report. According to the magistrate in this case, “it is standard performance . . . to request a continuance if all of the evidence isn’t received.”¹ Magistrate’s Findings & Conclusions, RP305, SA18.

Woloshansky knew how to obtain a continuance and had done so in previous cases, even in other cases where (as here) the defendant had requested a speedy trial.

RP152, SA72. In this case, however, Woloshansky did not request a continuance, apparently because he believed he was prepared for trial. *Id.*

Woloshansky’s failure to obtain the report before proceeding to trial was clearly a *mistake*, not the result of any considered trial strategy. *See Wiggins v. Smith*, 123 S. Ct. 2527, 2541 (2003) (“[S]trategic choices made after less than complete investigation are reasonable’ only to the extent that ‘reasonable professional judgments support the limitations on investigation’”) (quoting *Strickland*, 466 U.S. at 690-91). At the post-conviction hearing, Woloshansky testified that he was aware that the victim’s behavior before the shooting was “critical, absolutely critical” to Harris’s claims of self-defense and sudden heat.

RP131, SA54. He also agreed that the victim’s use of drugs or alcohol would have

¹ The magistrate judge went on to make the following statement: “I don’t know that that renders – the fact that he didn’t request a continuance, elected to proceed to trial without the report, I don’t think that renders his performance as something that’s below prevailing professional norms. But certainly, I think there isn’t any evidence of prejudice here. . . . I think it wouldn’t have made a difference in the outcome of the case.” RP305-06, SA18-19. It is unclear whether the magistrate intended this statement to represent a legal conclusion with regard to the “performance” prong – and if so, what the basis for this conclusion is. To the extent that it is a legal conclusion, however, it is clearly unreasonable in light of the particular facts of this case.

been a critical factor at trial. *Id.* Woloshansky explained that he had reason to believe before trial that Jones had been intoxicated at the time of the shooting, and that fact played a role in his defense strategy before trial. RP141-42, SA61-62. Nevertheless, despite knowing the importance of the report and the fact that its results were likely to be positive, Woloshansky proceeded without it. As he explained, it was “an *oversight* on [his] part not to wait for or ma[ke] additional requests to obtain this . . . certificate of analysis on the decedent knowing that one had been sent down.” RP143, SA63 (emphasis added). In Woloshansky’s own words, “I have no explanation that could justify my not having [the report].” *Id.*

Indeed, the fact that Woloshansky attempted to put on evidence of alcohol use at trial demonstrates that he had *not* made a strategic decision to proceed without evidence of intoxication. At trial, Woloshansky attempted to cross-examine Dr. Kim, the pathologist who had performed the autopsy on Jones, on Jones’s alcohol use and its potential effects. Op. on Collateral Review at 3-4, 9, A6-7, A12, SA24-25, SA30. But the trial court refused to allow this line of questioning because there was no evidence that Jones was intoxicated when he had his confrontation with Harris. *Id.* at 3-4, A6-7, SA24-25. The court permitted only limited questioning regarding the accuracy of the autopsy report, which noted no odor of alcohol emanating from the body. *Id.*; *see also* Magistrate’s Findings & Conclusions, RP299, SA12. Accordingly, the jury was actually left with the impression that there was *no* medical evidence that Jones was drunk when he began harassing Harris. In

view of this history, there is no reason to believe that Woloshansky's decision to proceed without the report was anything other than a mistake.

The only state court judge who expressly addressed counsel's performance under *Strickland* was the magistrate, and the basis for her ruling is unclear at best. *See* Magistrate's Findings & Conclusions, RP304-06, SA17-19. In her oral conclusions of law, the magistrate judge apparently *assumed* that counsel had a legitimate "strategic reason" to proceed to trial without the evidence – based simply on the fact that during his testimony at the post-conviction hearing, Woloshansky was never specifically asked whether he had a strategic reason. RP304-05, SA17-18 ("Counsel wasn't ever specifically asked if there was a strategic reason for proceeding to trial. . . . So I'm left with that – that assumption that it was a strategic decision"). This "finding" – to the extent that it is a finding of fact at all – is clearly unreasonable in light of Woloshansky's post-trial testimony that his failure to obtain the report was an "oversight" and that he had "no explanation that could justify my not having this." RP143, SA63.

The magistrate judge also suggested that Woloshansky's performance was not unreasonable because "it's not standard performance to request toxicology reports." Magistrate's Findings & Conclusions, RP305, SA18. This statement, which does not appear to be linked to any evidence presented at the post-conviction hearing, reflects an incorrect interpretation of *Strickland*. The relevant question is whether it was objectively reasonable for Wolshansky to proceed without the toxicology report *given what he knew about this case*. *Strickland*, 466 U.S. at 690

(courts must “judge the reasonableness of counsel’s challenged conduct on the facts of the particular case”). Based on his pretrial investigation, Woloshansky knew that the report was likely to show that Jones had been drinking. Op. on Collateral Review at 3, A6, S24. He also knew that Jones’s behavior at the time of the shooting was “critical” to his client’s defense. RP131, SA54. And he knew that medical evidence of intoxication would provide meaningful support to his client’s claim that Jones was behaving in a threatening or frightening manner. *E.g.*, RP151, SA71. Under these circumstances, Woloshansky’s failure to obtain the report before trial was plainly unreasonable.

The facts in the record on appeal, coupled with the state court of appeals’ holding that counsel failed to exercise reasonable diligence in obtaining the toxicology report, provide a sufficient basis for this Court to conclude that counsel’s performance was deficient under the performance prong of *Strickland*. The state magistrate’s suggestion to the contrary (to the extent that it was a conclusive finding at all) represents an unreasonable determination of the facts and an unreasonable application of federal law, as explained above. At a minimum, however – given the clear prejudice to Harris’s defense (*see infra*) – this Court should vacate the judgment and remand for further proceedings to determine whether counsel’s performance was indeed constitutionally deficient.

B. Under *Strickland*, Counsel’s Deficient Performance Prejudiced Harris’s Ability To Prove His Defenses.

“The standard for evaluating prejudice under *Strickland* is whether, but for counsel’s errors, there is a reasonable probability that the outcome of the proceeding

would have been different.” *Freeman v. Lane*, 962 F.2d 1252, 1258 (7th Cir. 1992). A defendant “need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” *Strickland*, 466 U.S. at 693. Rather, the defendant need only show a “probability sufficient to undermine confidence in the outcome.” *Id.* at 694; *accord Williams v. Taylor*, 529 U.S. 362, 391 (2000).

- The Toxicology Report Would Have Corroborated Harris’s Claim of Self-Defense.**

Harris’s principal contention at trial was that he acted in self-defense. In Indiana, “[a] person is justified in using reasonable force against another person to protect [himself] from what [he] reasonably believes to be the imminent use of unlawful force.” Ind. Code § 35-41-3-2(a). To establish a claim of self-defense, the defendant must show that he was in a place where he had the right to be, that he “acted without fault,” and that he was “in reasonable fear or apprehension of death or great bodily harm.” *Miller v. State*, 720 N.E.2d 696, 699-700 (Ind. 1999). Once a criminal defendant raises a claim of self-defense, the “State bears the burden of disproving at least one of these elements beyond a reasonable doubt.” *Id.* The trier of fact must determine whether a reasonable person in the same situation would have been placed in reasonable fear or apprehension of death or great bodily harm. *See Shepard v. State*, 451 N.E.2d 1118 (Ind. Ct. App. 1983).

The toxicology evidence here would have been directly relevant to the single most important fact to this claim of self-defense – that is, the nature of Jones’s behavior on the night of the shooting and whether it appeared threatening from Harris’s perspective. Although Harris testified in his own defense about Jones’s

behavior immediately before the shooting, the report would have provided medical evidence that would have served as important and independent corroboration of his testimony. As Harris's trial counsel testified, "Witnesses can say anything, but a report like this in final argument to the jury, conveys a lot more and would probably be corroborated at least to some extent by at least one witness at the scene. . . . It's been my experience that people that are intoxicated tend to become more unruly than those who are not intoxicated. And unruliness is an element of sort[s] to the kind of self defense and sudden heat issues that were present in this case." RP150-51, SA70-71. Accordingly, as Judge Barnes recognized in his dissent in state court, "had the jury been advised of the cocaine and blood level, there is a 'reasonable probability' that their collective perception regarding Harris' conduct would have changed." Op. on Collateral Review at 12, A15, SA33 (Barnes, J., dissenting).

Indeed, even the state court majority opinion recognized that Jones's behavior was "[u]ndoubtedly ... critical to Harris' defense," and that "[h]ad the jurors known of Jones' blood alcohol level and his use of cocaine, they may have credited Harris' claim of Jones' hostile and erratic behavior." Op. on Collateral Review at 9, A12, SA30. Given these facts – that the toxicology evidence may have caused the jury to credit the defendant's testimony on an issue "critical" to his defense – counsel's failure to obtain that evidence necessarily "put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995) (applying "reasonable probability" standard to evaluate

prejudice). Under established Supreme Court precedent, nothing more is required to show prejudice.

Despite these findings, the state court of appeals still refused to find prejudice under *Strickland* because – in its view – Harris’s claim of self-defense depended on his contention that Jones had pulled a gun. Op. on Collateral Review at 9, A12, SA30 (“[A]ggression on the part of Jones was not enough to show Harris acted in self-defense. . . . Harris must have been in reasonable fear or apprehension of death or great bodily harm. Harris testified that he was in reasonable fear of death because Jones pulled a gun . . .”) (citation omitted). According to the court of appeals, the State presented “considerable evidence” undermining Harris’s testimony that Jones had pulled a gun. *Id.* at 10, A13, SA31. Although Anna Harris had testified at trial that she too saw Jones pull a gun, that evidence was impeached by her previous statements to the police. In addition, Essie Johnson testified that after the shooting, she found Jones’s gun in his pants pocket under his coat. In light of that evidence, the court concluded that even if the toxicology results had been available, the jury would have rejected Harris’s claim of self-defense because of the weakness in the gun evidence. *Id.*

This is an unreasonable application of *Strickland’s* “prejudice” requirement. As noted above, *Strickland* does not require conclusive proof that the outcome would have been different without counsel’s error.² Given the significance of Jones’s

² Although they cited *Strickland* and some language therein, neither the magistrate judge nor the state court of appeals purported to apply *Strickland’s* “reasonable probability” standard. Instead, they apparently required Harris to show that counsel’s error was

(cont’d)

behavior to the defense, evidence that would tend to show that Jones was behaving erratically would directly support Harris’s testimony that he perceived Jones to be a threat to his safety.

Moreover, the post-conviction court overstated the significance of the gun evidence to Harris’s claim of self-defense. The question under Indiana law is whether Harris perceived himself to be at risk – not whether the decedent actually pointed a gun at him. *Shepard v. State*, 451 N.E.2d 1118 (Ind. App. 1983) (defendant may show he acted in self-defense as long as he believed in good faith that he was in danger, even if no actual danger existed). In addition, the magistrate judge did not rely on the gun evidence at all in evaluating prejudice, concluding instead that the evidence was not “material” because the jury had already heard testimony that the victim had been in a bar and appeared to be “belligerent.” Magistrate’s Findings & Conclusions, RP303, SA16. Thus, although the magistrate entered limited factual findings with respect to the gun, she clearly did not regard the gun as the exclusive basis for Harris’s claim of self-defense. Similarly, on direct appeal, the court affirmed the jury’s rejection of Harris’s self-defense claim based upon both the weakness in Harris’s claim about the gun *and* “the evidence that Harris shot Jones at close range . . . *after a minor scuffle.*” Op.

(... cont’d)

necessarily outcome-determinative. *E.g.*, Op. on Collateral Review at 10, A13, SA31 (if the toxicology results had been admitted, “the results of the trial would not have changed”); Op. on Reh’g at 5, A21, SA38 (“we do not find that the outcome of the trial would have been different had the jury known of the alcohol and drugs in Jones’ system”); Magistrate’s Findings & Conclusions, RP306, SA19 (“I think it wouldn’t have made a difference in the outcome of the case”). In this respect, the state courts’ adjudication of Harris’s claims was directly “contrary to” *Strickland* itself.

on Direct Appeal at 4, SA8 (emphasis added). If the jury had known that Jones was under the influence of cocaine and alcohol at the time, however, it may well have concluded that his behavior amounted to more than just a “minor scuffle.”

In any case, even assuming that the self-defense claim did turn entirely on whether Jones pulled a gun, the court of appeals unreasonably failed to consider whether the toxicology evidence would have changed the jury’s credibility determinations with respect to the gun evidence. Harris testified that Jones began to pull a gun from his pocket immediately before the shooting, but Essie Johnson testified that she found the gun after the shooting still tucked in Jones’s right-hand pocket. Although Anna Harris initially testified that she too had seen the gun before the shooting, that testimony was impeached. Accordingly, the jury was apparently left to choose between Johnson’s version of the facts and Harris’s. But if the jury had also had the toxicology report – which would have provided independent corroboration for other aspects of Harris’s account – it is also quite likely that this corroboration would have prompted the jury to make more of an effort to harmonize Harris’s testimony about the gun with Johnson’s. For example, the jury might have concluded that Harris saw Jones reach for the gun in his right-hand pocket with his right hand – the hand that was not holding the jumper cables – even if the gun was never fully removed from Jones’s pocket. Harris’s perception of what Jones was doing with the gun may also have been affected by the fact that Jones was under the influence of drugs and alcohol and thus may have been moving erratically and excitedly. For these reasons, the toxicology report may have had an

impact on the gun issue as well – an impact that the various state courts in this case did not consider at all.

2. The Toxicology Report Would Have Corroborated Harris's Defense of “Sudden Heat.”

With respect to Harris’s defense of “sudden heat,” the state courts’ conclusion on the “prejudice” element is equally unreasonable. If the toxicology report had been available at trial, there is at least a “reasonable probability” that the jury would have found “sudden heat” and convicted Harris on the lesser included offense of voluntary manslaughter.

Under Indiana law, “sudden heat” is a mitigating factor that distinguishes voluntary manslaughter from murder. *Crain v. State*, 736 N.E.2d 1223, 1237 (Ind. 2000); Ind. Code § 35-42-1-3. Even if a defendant’s actions took him beyond the bounds of self-defense, he still may have acted in “sudden heat,” which would give him a partial defense to a murder charge and would result in conviction on the lesser included offense of voluntary manslaughter. *See Russell v. State*, 419 N.E.2d 973, 976 (Ind. 1981); *Pinegar v. State*, 553 N.E.2d 525 (Ind. Ct. App. 1990). To show “sudden heat,” the defendant must show “sufficient provocation to engender . . . passion.” *Crain*, 736 N.E.2d at 1237 (quoting *Johnson v. State*, 518 N.E.2d 1073, 1077 (Ind. 1988)). Sufficient provocation is demonstrated by “such emotions as ‘anger, rage, sudden resentment, or terror [that are] sufficient to obscure the reason of an ordinary person, prevent deliberation and premeditation, and render the defendant incapable of cool reflection.” *Id.* For purposes of the “sudden heat” defense, the adequacy of the provocation is judged based on an

objective, ordinary person standard. *Morrison v. State*, 588 N.E.2d 527, 531 (Ind. Ct. App. 1992).

Once again, the critical issue for the “sudden heat” defense is how Jones behaved before the shooting. The toxicology report would have been directly relevant to that issue, as it would have provided objective corroboration for Harris’s testimony about Jones’s behavior. As the court of appeals found, “[h]ad the jurors known of Jones’ blood alcohol level and his use of cocaine, they may have credited Harris’ claim of Jones’ hostile and erratic behavior.” Op. on Collateral Review at 9, A12, SA30. Without that report, Harris’s efforts to prove “sudden heat” was significantly prejudiced.

The state court’s finding of no prejudice represents an unreasonable application of *Strickland* and the “reasonable probability” standard. In its opinion on rehearing, the state court of appeals found that counsel’s error did not prejudice Harris’s ability to prove “sudden heat” because, “with the exception of Harris’ claim that Jones was pulling a gun on him, there was no dispute as to the behavior of Jones.” Op. on Reh’g at 4, A20, SA37.³ According to the court, the jury heard testimony that Jones was “insulting Harris” and “grabbed the jumper cables,” and that the two men “shoved” each other. *Id.* Surely, though, a jury would have evaluated that evidence differently if there were medical confirmation that Jones was acting under the influence of alcohol and cocaine. Given the findings in the

³ Although the Opinion on Rehearing issued by the court of appeals continues to discuss whether Jones pulled a gun, that fact is not relevant for purposes of the “sudden heat” defense. The “sudden heat” defense does not necessarily require that the criminal defendant be in fear of death or serious bodily injury.

opinion on collateral review – that is, that the toxicology report may have caused the jury to accept Harris’s claim that Jones’s behavior was “hostile” and “erratic” – the court of appeals could not reasonably hold that counsel’s mistake did not cause Harris any prejudice.⁴

The court of appeals (and the trial court) also suggested that Harris was not prejudiced by his counsel’s error because “Harris *did not know* Jones had alcohol and cocaine in his system. Harris shot Jones based solely upon Jones’ behavior that evening without knowing whether Jones’ behavior was due to the alcohol and cocaine.” Op. on Reh’g at 4, A20, SA37 (emphasis added); *see also* Magistrate’s Findings & Conclusions, RP303, SA16. This statement misses the point of the evidence. The fact that Jones had been drinking and using cocaine is evidence that his behavior at the time was altered and erratic. That evidence directly corroborates Harris’s contentions about how he perceived Jones’s behavior at the time. Thus, whether Harris knew about the intoxication or not, the evidence is still highly relevant to Harris’s state of mind.

III. State Suppression of Evidence

The state court of appeals rejected Harris’s *Brady* claim on the ground that Harris’s trial counsel knew about the toxicology analysis before trial and could have obtained the result from the coroner through the exercise of “reasonable diligence.”

⁴ The court also held that “[t]he presence or absence of alcohol and drugs in Jones’ system does not change the testimony concerning Jones’ behavior that evening.” Op. on Reh’g at 4, A20, SA37. While that may be true, the report may well corroborate one witness’s version of the facts over another’s. Here, as the court itself found, if the jury had been aware of Jones’ drug and alcohol levels, it may well have “credited” Harris’s testimony about how he perceived Jones’s behavior. Op. on Collateral Review at 9, A12, S30.

Op. on Collateral Review at 6-7, A9-10, SA27-28. This decision is both contrary to and an unreasonable application of *Brady* and the U.S. Supreme Court decisions that followed it. Under these cases, if the State fails to disclose material exculpatory evidence that is uniquely within its possession, the defendant is entitled to relief regardless of whether he could or should have requested that the State produce the evidence.

In *Brady*, the Supreme Court held that the suppression by the prosecution of evidence favorable to an accused “violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady v. Maryland*, 373 U.S. 83, 87 (1963). To establish a violation of *Brady*, the petitioner must show that (i) “the prosecution suppressed evidence,” (ii) “the evidence . . . was favorable to the defense,” and (iii) “the evidence was material to an issue at trial.” *United States v. Walton*, 217 F.3d 443, 450 (7th Cir. 2000); *United States v. Morris*, 80 F.3d 1151, 1169 (7th Cir. 1996).

The obligations imposed on the government by *Brady* reflect “the special role played by the American prosecutor in the search for truth in criminal trials.” *Strickler v. Greene*, 527 U.S. 263, 281 (1999). Within the federal system, for example, the federal prosecutor is “the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” *Id.* (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

Because of their unique role, the Constitution requires prosecutors to turn over material exculpatory evidence even when the defense has not requested it. *United States v. Agurs*, 427 U.S. 97, 106-07, 110 (1976); *see also United States v. Bagley*, 473 U.S. 667, 682 (1985) (Blackmun, J.) (the *Strickland* test for prejudice – *i.e.*, that there is a “reasonable probability” that the result would have been different, with “reasonable probability” meaning “a probability sufficient to undermine confidence in the outcome” – applies in *Brady* cases whether or not the defense has made a specific request for the undisclosed evidence).

For the same reason, prosecutors are also obligated to do more than simply disclose what they know. They must discover potentially exculpatory evidence that is in the hands of others within the prosecution team. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *see also Morris*, 80 F.3d at 1169 (holding that the prosecutor’s duty to discover and disclose exculpatory information in the hands of other government agencies is limited to agencies that are “part of the team that investigated th[e] case or participated in its prosecution”). “[A] prosecutor’s office cannot get around *Brady* by keeping itself in ignorance, or compartmentalizing information about different aspects of a case.” *Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir. 1984).

A prosecutor’s obligations under *Brady* are not unlimited, however. As this Court has recognized, “*Brady* does not require the government to gather information or conduct an investigation on the defendant’s behalf.” *United States v. Tadros*, 310 F.3d 999, 1005 (7th Cir. 2002). As a result, this Court has held that “[t]he *Brady* rule does not apply to evidence not in the possession of the government

that a defendant would have been able to discover himself through reasonable diligence.” *Id.* In *Tadros*, for example, the Court held that a defendant could not prove a violation of *Brady* based upon the government’s failure to turn over audiotapes that were made by (and were in the possession of) a third party, because the defendant himself could have obtained the information from the third party through the exercise of reasonable diligence. *Id.* Similarly, in *United States v. Senn*, 129 F.3d 886, 893 (7th Cir. 1997), this Court held that the federal prosecutors in the U.S. Attorney’s Office did not violate *Brady* when they failed to turn over their star witness’s criminal record obtained from a state jurisdiction, because the defense could (and ultimately did) obtain the file by requesting it directly from that state government. *Id.* at 892-93.

Significantly, this Court has required “reasonable diligence” by the defense only when the defense can obtain the evidence in question from a source *other than* the government itself. *See Tadros*, 310 F.3d at 1005 (“[t]he *Brady* rule does not apply to evidence *not in the possession of the government* that a defendant would have been able to discover himself through reasonable diligence”) (emphasis added). For example, in *United States v. White*, 970 F.2d 328 (7th Cir. 1992) – on which the district court relied (1/10/03 Mem. & Order at 2, A2) – this Court held that the defendants were not entitled to relief under *Brady* because the documents that had allegedly been suppressed were actually part of a bankruptcy file that had been provided to the defendants before trial. 970 F.2d at 337. Thus, in *White*, the defendants could have obtained the evidence by performing a more careful

inspection of the documents in their possession. According to this Court, “[w]hen defendants miss the exculpatory nature of documents in their possession or to which they have access, they cannot miraculously resuscitate their defense after conviction by invoking *Brady*.” *Id.*; see also, e.g., *United States v. Grintjes*, 237 F.3d 876 (7th Cir. 2001) (no *Brady* violation because the defense had copies of the documents in question and could have discovered on its own whether they were forgeries); *Senn*, 129 F.3d 886 (no *Brady* violation by federal prosecutors because the defense could have obtained the evidence from a state government entity); *United States v. Rodriguez-Andrade*, 62 F.3d 948 (7th Cir. 1995) (no *Brady* violation because defense could have subpoenaed the relevant material from a third party).⁵

In this case, both the state court and the district court took this principle too far and applied it in a manner flatly inconsistent with *Brady* and its progeny. Here, the toxicology report was in the possession of an agent of the State *and no one else*. As discussed above, the prosecutor has an affirmative obligation to discover and disclose evidence in the possession of an agent of the State, as long as that agent is part of the team involved in the investigation and prosecution of the defendant’s case. See *Kyles*, 514 U.S. at 437. To impose a “reasonable diligence” requirement

⁵ But see *United States v. Dimas*, 3 F.3d 1015 (7th Cir. 1993) (concerning a *Brady* claim based upon the government’s failure to disclose allegations of corruption made by an Assistant United States Attorney against a government agent who was a key witness at trial). So far as counsel is aware, *Dimas* is the only case in which this Court has even suggested that a defendant is not entitled to relief under *Brady* if he could have obtained information in the hands of the government through the exercise of reasonable diligence. *Dimas* did not squarely address the issue, however; it merely listed the “reasonable diligence” issue as one of the issues that the district court should consider on remand. Moreover, it is not clear from the opinion whether the information might have been available to the defense from a source outside the government.

on defense counsel in this context would be to take the *Brady* obligation away from the prosecutor and put the burden on the defendant to seek out information in the hands of the State.

Moreover, the state court's decision is inconsistent with the Supreme Court's decision in *Agurs*, which held that a prosecutor has an affirmative obligation to disclose evidence under *Brady* even if defense counsel could have specifically requested the suppressed information in discovery and failed to do so. *See Agurs*, 427 U.S. at 106-07, 110; *see also Bagley*, 473 U.S. at 682 (Blackmun, J.) (setting a standard for materiality that applies whether the case involved "no request" or a "specific request" for the suppressed evidence). "[T]he prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge." *Banks v. Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995). "[I]f the prosecution possesses evidence that, in the context of a particular case[,] is obviously exculpatory, then it has an obligation to disclose it to defense counsel whether a general request is made or whether no request is made." *Id.* (citing, *inter alia*, *Bagley*, 473 U.S. at 682 (Blackmun, J.)). If a defense counsel's "reasonable diligence" required that it demand production of evidence that is uniquely within the state's possession, as the state court here held, then a request by the defense *would* be necessary before the defendant may obtain relief under *Brady*.

The toxicology report in this case clearly should have been disclosed under *Brady*. As discussed above (in Part II.B), the report was highly relevant to the

question of the victim's behavior before the shooting (Op. on Collateral Review at 9, A12, SA30), and thus it meets the test of materiality.⁶ It was also favorable, as it would likely have led the jury to credit Harris's claim that Jones was behaving in a "hostile and erratic" manner. *Id.* Although the report was not in the possession of the prosecution itself at the time of trial, it was prepared more than a week before trial by a laboratory under the direction of the State Department of Toxicology. *See* RP70, SA50 (toxicology report dated June 28, 1993). Thus, the report was in the possession of an agent of the State who was working as part of the investigation and prosecution team in Harris's case. Under *Kyles*, the prosecutor was therefore charged with the responsibility of discovering and producing the report to the defense. Indeed, to the extent that there was any problem in transmitting these materials from agency to agency in a smooth and efficient manner, the prosecutor's office itself is best situated to create "procedures and regulations" that can ensure "communication of all relevant information on each case to every lawyer who deals with it." *Kyles*, 514 U.S. at 438 (citation omitted).

Because the State and its agents must disclose favorable, material evidence regardless of defense counsel's conduct, a defendant may state both a *Brady* claim and a claim for ineffective assistance based upon the same facts. In *Cheung v. Maddock*, 32 F. Supp. 2d 1150 (N.D. Cal. 1998), for example, the court found that

⁶ The "prejudice" requirements under *Brady* and *Strickland* are the same: in both contexts, the petitioner must show "a reasonable probability that . . . the proceeding's results would have been different." *Jones v. Cooper*, 311 F.3d 306, 315 n.4 (4th Cir. 2002) (citing *Bell v. Cone*, 535 U.S. 685 (2002) (*Strickland*), and *Strickler v. Greene*, 527 U.S. 263 (1999) (*Brady*)); *see also Bagley*, 473 U.S. at 682 (Blackmun, J.).

defense counsel was ineffective under *Strickland* because counsel had failed to obtain the victim's medical records before trial, and those medical records would have cast doubt on the victim's identification of the defendant. *Id.* at 1159-60. The court also found that the State's failure to disclose the medical records that were in its possession was a violation of *Brady*. *Id.* at 1159. Accordingly, this Court need not treat Harris's *Brady* and *Strickland* claims as alternatives; it can and should grant relief on both grounds.

CONCLUSION

For the reasons set out above, Petitioner respectfully requests that the judgment of the district court be reversed and that he be granted relief under 28 U.S.C. § 2254. Alternatively, Petitioner requests that the judgment be vacated and remanded for further evidentiary proceedings as this Court deems necessary.

Respectfully submitted:

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REQUIRED SHORT APPENDIX

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CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30(d)

Pursuant to Circuit Rule 30(d), the undersigned counsel for Petitioner-Appellant Willie Harris states that the appendices contain all materials required by Circuit Rules 30(a) and 30(b).

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CERTIFICATE OF COMPLIANCE WITH RULE 31(e)(1)

Pursuant to Circuit Rule 31(e)(1), the undersigned states that the materials included in the required short appendix and the supplemental appendix are not available electronically.

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*One of the Attorneys for
Petitioner-Appellant Willie Harris*

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

Pursuant to Fed R. App. P. 32(a)(7)(C), the undersigned counsel for Petitioner-Appellant Willie Harris certifies that the foregoing brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and contains 10,418 words, excluding the disclosure statement, statement concerning oral argument, table of contents, table of authorities, appendix, and certificates of compliance.

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that she caused two copies of the foregoing **BRIEF OF PETITIONER-APPELLANT WILLIE HARRIS**, together with one copy of the **SUPPLEMENTAL APPENDIX OF PETITIONER-APPELLANT WILLIE HARRIS** and one diskette containing the text of the brief, to be served on:

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by U.S. Priority Mail, Next Day Delivery, postage prepaid, on this 15th day of September, 2003. The diskette was scanned to ensure that it is free of computer viruses.

Linda T. Coberly