STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP1083-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARY LEE WAYERSKI,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS AFFIRMING A JUDGMENT OF CONVICTION AND ORDER ENTERED IN THE DUNN COUNTY CIRCUIT COURT, THE HONORABLE WILLIAM C. STEWARD, JR. AND THE HONORABLE MAUREEN D. BOYLE, PRESIDING

STATE'S RESPONSE BRIEF

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ISSUES PRESENTED

1. During Gary Wayerski's trial for child sexual assault, the State called John Clark in rebuttal. Clark testified that Wayerski told him that he had committed the charged offenses. When Wayerski testified in sur-rebuttal, trial counsel did not ask Wayerski whether he had admitted his crimes to Clark, and Wayerski now claims that he would have denied making the admissions had counsel asked. Did Wayerski prove that counsel was ineffective for failing to ask Wayerski whether he had confessed to Clark?

The circuit court answered: No.

The court of appeals answered: No.

This Court should answer: No.

2. Under *Brady v. Maryland*, 373 U.S. 83 (1963), the State violates due process when it suppresses evidence in its possession that is favorable to an accused and material to guilt or punishment. Days before trial, the prosecutor learned through a check of CCAP records that another district attorney's office had recently charged Clark, the State's rebuttal witness, with new crimes. Did the prosecutor's failure to disclose that information, which was otherwise available to the general public, violate Wayerski's due process rights?

The circuit court answered: No.

The court of appeals answered: No.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case merits oral argument and publication.

INTRODUCTION

Two teenage males, J.P. and J.H., alleged that Gary Wayerski, the police chief for a Dunn County village committed several indecent acts against them. A jury found Wayerski guilty of these offenses including sexual assault of a child by a person who works or volunteers with children (eight counts); child enticement (two counts); exposing genitals or pubic area (two counts); exposing a child to harmful materials (two counts); and causing a child older than 13 to view or listen to sexual activity (two counts).

Wayerski unsuccessfully challenged his conviction on several grounds in the circuit court and in the court of appeals. This Court granted Wayerski's petition seeking review of two claims that the lower courts rejected.

First, Wayerski contends that his trial counsel was ineffective for failing to ask him questions in sur-rebuttal that would have countered John Clark's rebuttal testimony that Wayerski made incriminating statements to Clark when they were incarcerated together before Wayerski's trial. Both the circuit court and the court of appeals appropriately rejected this claim. Based on the overwhelming evidence against Wayerski and the opportunity that he had to present his defense that J.P. and J.H. fabricated the allegations against him, the lower courts reasonably concluded that Wayerski failed to prove that his trial counsel's allegedly deficient performance prejudiced him. On this record, Wayerski cannot demonstrate that the outcome of his trial would have been any different if he had had the opportunity to deny making incriminating statements to Clark in sur-rebuttal.

Second, Wayerski asserts that the State violated its discovery obligations under *Brady* when the prosecutor failed to disclose exculpatory impeachment evidence about

Clark's pending case in another county. The court of appeals reasonably determined that the State did not suppress evidence because Wayerski could have readily learned about Clark's pending case through a CCAP search. Further, the court of appeals also concluded that even if the prosecutor had suppressed favorable evidence, there was no reasonable probability that the disclosure of Clark's pending case would have resulted in a different outcome at trial.

STATEMENT OF THE CASE

I. Wayerski's trial.

The State tried Wayerski for several crimes, including sexual assault of a child by a person who works or volunteers with children, contrary to Wis. Stat. § 948.095(3)(a) (eight counts); child enticement, contrary to Wis. Stat. § 948.07(3) (two counts); exposing genitals or pubic area, contrary to Wis. Stat. § 948.10(1)(a) (two counts); exposing a child to harmful materials, contrary to Wis. Stat. § 948.11(2)(a) (two counts); and causing a child older than 13 to view or listen to sexual activity, contrary to Wis. Stat. § 948.055(1) & (2)(b) (two counts). (R. 38:1–2.)[1]

The charges stemmed from allegations that two juveniles, J.P. and J.H., made against Wayerski after he had investigated them for property crimes that they individually committed in the Village of Wheeler, where Wayerski served as the police chief. (R. 1:1–5.)

[1] The Honorable William C. Stewart, Jr. presided over Wayerski's trial and sentencing. The Honorable Maureen D. Boyle decided Wayerski's postconviction motion.

Wayerski's interactions with J.P. When J.P. was 16 years old, J.P. broke into the safe at his church. (R. 116:6, 10.) Wayerski investigated the theft complaint. (R. 118:80.) J.P. admitted the offense to Wayerski. (R. 116:10–11; 118:81.)

J.P.'s mother stated that Wayerski volunteered to help J.P. get on the right track and keep him out of trouble (R. 116:91.) According to Wayerski, J.P.'s parents told him that they were having difficulties with J.P. and asked for Wayerski's help getting J.P. off drugs. (R. 118:82.) J.P's parents and Wayerski agreed that if other juveniles saw J.P. with Wayerski, they would think that J.P. was an informant and they would not give him drugs. (R. 118:83, 141.)

Social worker Melissa Duffenbach handled J.P.'s juvenile referral from Wayerski. (R. 118:211.) According to Duffenbach, Wayerski expressed a willingness to work with J.P. and speak with him. Wayerski suggested that if other juveniles saw that J.P. was speaking with Wayerski, the juveniles might leave J.P. alone. (R. 118:213.)

J.P. stated that Wayerski knew his probation officer and offered to mentor him. (R. 116:12.) As part of this process, J.P. participated in ride-alongs with Wayerski twice a week, for a few months. (R. 116:13, 18–19.) During these ride-alongs, Wayerski talked about sex with J.P. (R. 116:15, 83.) Wayerski stated that he stayed in touch with J.P. through the ride-alongs. (R. 118:83.)

In addition to the ride-alongs, Wayerski also took J.P. to his apartment. During J.P.'s first visit to Wayerski's apartment, Wayerski directed J.P. to take off his shirt and pants so that Wayerski could see J.P.'s muscle tone and determine appropriate workouts for him. Wayerski hit J.P. in the chest and told him how solid J.P. was and that he

liked pounding on him. (R. 116:21–22). Wayerski also had J.P. squat in front of him with his arms around Wayerski's neck. Wayerski would slap J.P. in the face and then "ball tap" him, which meant that Wayerski would slap J.P.'s testicles to get his "endorphins moving" and enhance his workout. (R. 116:24–25.) Wayerski then masturbated J.P. (R. 116:26.)

J.P. stated that he and Wayerski discussed pornography and that Wayerski offered to allow J.P. to look at pornography. (R. 116:32.) J.P. noted that Wayerski was into bondage pornography and fetishes. They would also watch videos that showed intimate body parts and sex acts. (R. 116:33–34.) The pornography that they watched was either over the computer or through Charter cable television. (R. 116:55.) Wayerski would turn on the pornography that J.P. watched on television. (R. 116:54). J.P. said that he and J.H. would always ask Wayerski first before they watched pornography and that Wayerski "was always sitting next to us" when they watched pornography. (R. 116:50).

During J.P.'s second visit to Wayerski's apartment, Wayerski masturbated J.P. while they watched pornography. (R. 116:35, 69.) This happened more than twenty times from March through July of 2011. (R. 116:37.)

J.P. also testified about other incidents. On one occasion, after Wayerski "ball tapped" him, Wayerski directed J.P. to face against the wall with his legs spread and hands against the wall; Wayerski then spanked him. (R. 116:41, 73.) J.P. also recalled an incident in which he was in a semi-truck with Wayerski. Wayerski took J.P. to the back of the semi, stripped him down, laid him across his lap, spanked him, and then masturbated him. (R. 116:40.)

J.P. told Wayerski that he was uncomfortable with Wayerski's sexual contact with him. According to J.P., Wayerski threatened to make J.P.'s home life worse and "threatened to put me in juvie" if J.P. told anyone of Wayerski's contact. (R. 116:39.)

Wayerski's interactions with J.H. When J.H. was 17 years old (R. 116:127), Wayerski confronted J.H. about the theft of an MP3 player at church. J.H. admitted to committing the theft. Wayerski issued J.H. a ticket and J.H. was ordered to perform community service. J.H. stated "I was . . . on a probation type deal for about six months." (R. 116:130–31.) According to J.H.'s father, Wayerski told him that if J.H. admitted the theft and returned the victim's property, Wayerski would give J.H. a citation that would include a fine and community service. (R. 116:110–11.)

Wayerski acknowledged that he investigated the complaint related to the theft of an MP3 player. (R. 118:126–27). Wayerski confirmed that he told J.H.'s father that he would cite rather than jail J.H. if J.H. admitted the theft. (R. 118:96–97.) According to Wayerski, the village attorney issued the citation and asked Wayerski to handle the community service. (R. 118:129–31.) Wayerski stated that the village president asked Wayerski to watch over J.H. and J.P. while they performed community service on a park project. (R. 118:132–33.)

Like he did with J.P., Wayerski also brought J.H. to his apartment. During J.H.'s first or second visit to Wayerski's apartment, Wayerski offered to help J.H. with physical training. (R. 116:137, 139.) Wayerski asked J.H. to take off his shirt and pants so that he could check his muscle tone and see what needed improvement. (R. 116:138.) Wayerski then massaged J.H.'s body, including his butt and penis. Wayerski explained to J.H. that he was attempting to

build up J.H.'s endorphins or testosterone. (R. 116:140.) Eventually, Wayerski masturbated J.H. (R. 116:141.)

On another occasion, J.H. stated that Wayerski performed an act that Wayerski characterized as "milking [J.H.] out." (R. 116:150.) J.H. got onto a table on all fours in the doggy position, naked. Wayerski placed Vaseline on his hand and masturbated him. Wayerski would tell J.H. that he was a fine looking young stud or buck and call J.H. "his bull boy." (R. 116:150–51.)

J.H. reported being at Wayerski's apartment 15 to 20 times. While there, Wayerski would show him pornography, either online or through his cable provider, Charter. (R. 116:152.) Wayerski would set up the pornography videos for him to watch through a website, "pornhub." (R. 116:155.) When J.H. watched "on demand" adult pornography on Charter, Wayerski would allow J.H. to select the movie with the remote control. (R. 116:162.) J.H. recalled Wayerski becoming furious with him and J.P. after receiving a Charter bill, "because of all the videos he would order and allow us to . . . watch." (R. 116:172.)

Wayerski was in the room with J.H. and J.P. when they viewed pornography. (R. 116:153.) The pornography included unclothed persons engaged in sex acts in which penises, vaginas, breasts, and buttocks were visible. (R. 116:154, 163.) J.H. denied using the computer by himself. (R. 116:163.) While the videos played, Wayerski would direct J.H. to disrobe and would rub J.H.'s body and masturbate J.H. (R. 116:156.) J.H.'s interactions at the apartment included consuming alcohol, watching pornography, and Wayerski's touching him in various ways. (R. 116:161.) J.H. recalled Wayerski bending J.H. over a chair or Wayerski's knee and "beat[ing] his ass with a spoon." (R. 116:148–49.)

J.H. felt blackmailed by Wayerski. (R. 116:144.) J.H. stated that he returned to Wayerski's residence because Wayerski suggested that J.H. could still be arrested. Wayerski told J.H. that the whole ticket could be brought back up and Wayerski could put J.H. "in jail or something along those lines." (R. 116:143–44.)

J.P. and J.H. report the assaults. The night before J.P. and J.H. reported Wayerski's conduct, both were present at Wayerski's apartment. Wayerski stripped them down. Wayerski sat between J.P. and J.H., turned on pornography, and proceeded to masturbate them both. (R. 116:49, 159–60.)

J.H. and J.P. contacted J.H.'s father and asked him to pick them up after they left Wayerski's house. They reported to J.H.'s father that "some weird stuff had been happening for a while" and that Wayerski had been molesting them. (R. 116:119.) J.H.'s father observed that they had been drinking. (R. 116:120.) Both J.P. and J.H. testified that Wayerski had given them alcohol. (R. 116:49, 73, 120, 185–86.)

Detective Scott Kuehn, who had extensive experience investigating sexual assault cases (R. 116:203), interviewed both J.P. and J.H. Kuehn observed that both had demeanors that were consistent with other victims of sexual assault cases that Kuehn had investigated. (R. 116:205–08.)

Wayerski's statements to authorities. After officers executed a search warrant at Wayerski's apartment, Kuehn spoke with Wayerski by telephone. Kuehn did not tell Wayerski what he was investigating. (R. 116:228.) Wayerski told Kuehn that he was contemplating suicide. (R. 116:231–32.) Wayerski acknowledged that he knew that J.P. and J.H. consumed alcohol and did nothing to stop them. (R. 116:233.) At trial, Wayerski said that he did not know that J.P. and

J.H. were using alcohol or watching pornography at his residence. (R. 118:166–67, 169–70.)

Wayerski volunteered that officers would find "really kinky stuff" on his computer, including bondage, sadomasochism, spanking, and "homosexual stuff." (R. 116:228–29.) Wayerski stated that a former roommate, Zach, placed child pornography on the computer. (R. 116:229.)

Zach's testimony. Zach testified that he stayed at Wayerski's apartment. He disputed Wayerski's assertions that Zach had viewed pornography on the computer or had been thrown out of the apartment for viewing "kiddy" pornography. (R. 117:47.) Zach stated that on one or two occasions, he saw a younger male with the name of "J" at Wayerski's apartment.[2] On one occasion, Zach saw "J" sitting on a couch without a shirt while Wayerski was present and clothed. (R. 117:43–44.)

Recovery of physical evidence. During the execution of a search warrant at Wayerski's apartment, officers recovered a green plate with a dried substance on it. The plate was consistent with one that J.P. told police—and later testified—that he had masturbated onto at Wayerski's direction. (R. 116:46–48, 209, 211, 213.) DNA extracted from the dried substance on the plate belonged to J.P. (R. 117:81–82.)

Officers also found a Vaseline container consistent with the description that J.H. provided. (R. 116:211–13.) The Vaseline was found in a box with a dog leash. There was no evidence of a dog in the apartment. (R. 116:217.)

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[2] J.P. and J.H. share the same first name (R. 116:5, 127) and it is the same name that Wayerski used in Zach's presence.

Consistent with J.P.'s and J.H.'s statements, officers also recovered a Charter bill in Wayerski's name with charges for pornographic titles. (R. 116:222.) Officers also found a vodka bottle and computers. (R. 116:217–18, 220.)

Officers searched a cell phone and found a photographs of J.P. and Wayerski. (R. 117:177–79.) J.P. identified a photograph of himself, shirtless, after he spent a night at Wayerski's apartment, holding a cup that would typically contain alcohol. (R. 97:Ex.2; 116:57.) Wayerski identified several photographs from his phone including those of himself in various states of undress and J.P.'s photograph. (R. 118:192–93.)

Other sexually oriented evidence offered at trial and Wayerski's testimony about the evidence. Jeff Nocci, an Eau Claire County Sheriff's Deputy, examined a computer seized from Wayerski. He observed pornography in the form of photographs and videos. Much of the evidence involved "male/male" activities that included bondage and spanking. He described a majority of the subjects depicted in the material as males between 16 and 20 years old. (R. 117:95–96.)

Nocci described how the material was organized under the user name "Gary." Picture folders contained subfolders that included a number of sexually oriented titles including "milking," "punish," "spanking," and "stances." (R. 117:100.) The images contained in the picture folder had a date range from May 30, 2011, through July 16, 2011. (R. 117:126.)

At trial, Wayerski denied that he showed either victim pornography or engaging in sexual conversations with them. (R. 118:183.) But Wayerski acknowledged the possibility that he organized his computer folders with themes including "punish," "milking," and "spanking." (R. 118:177).

He did not dispute that the admitted photographs were recovered from his computer and that he may have had an interest in those types of materials. (R. 118:180–82.) Wayerski also admitted an interest in a website entitled "teens-boys world." (R. 118:182–83.)

Nocci also recovered instant messenger chat logs tied to the email address "dairymilkfarmer123@yahoo.com." (R. 117:132.) Wayerski confirmed that the email address was his. (R. 118:187.) Nocci testified that the chat logs included discussions of several sexually oriented themes including degradation and punishment. (R. 117:135–38.) This email address was linked to a phone number listed to Wayerski. (R. 117:139.) Wayerski confirmed this user name and did not dispute conversations under this user name. (R. 118:187.) A list of websites under "Gary['s]" favorites included themes such as "young guy, slave boys, torture, leather, bondage, spanking." (R. 117:151.)

At trial, the State offered two photographs recovered from Wayerski's computer that depicted an officer standing behind four males with their buttocks exposed, facing a wall, with their legs spread. In one photograph, the males had their arms extended and hands on jail bars in front of them. (R. 97:Exs. 27, 28; 117:122–23.) Exhibit 27 was located in a subfolder labeled "punish," while Exhibit 28 was found in a folder labeled "degrading." (R. 117:128.) Several photographs depicted nude males bent over with exposed buttocks being spanked by another person. (R. 97:Exs. 29, 30, 32.) Another photograph recovered in a "spanking" subdirectory depicted a beaten buttock with a penis next to it. (R. 97:Ex. 31; 117:125.) The exhibits included photographs of young males in posed positions. (R. 97:Ex. 33–35; 117:131.)

Wayerski's defense at trial. In Wayerski's opening and closing statements, Wayerski's counsel asserted that J.P.

and J.H. fabricated the charges against him because of a drug investigation that Wayerski was conducting. (R. 115:230–31; 119:76–79.) Wayerski testified that he had developed information about several individuals dealing drugs in Wheeler who were connected to J.P. and J.H. (R. 118:113–14.) In support of his claim that J.P. and J.H. had fabricated the allegations against him, Wayerski presented four witnesses at trial.

First, Kendra Berg testified that she asked J.P. about what was going on with Wayerski and J.P. replied that none of it was true and that he wished it had never happened. (R. 117:205–06.) Second, according to Kay Detmar, J.P. told her that J.P. and J.H. were drinking and looking at pornography on Wayerski's computer and Wayerski was mad at them. J.P. then told Detmar that he crossed the line and that what he said to the cops was a lie. (R. 118:13–15.) Detmar also claimed that J.P. told her that Wayerski was "going down" because Wayerski was putting a stop to the drug abuse in Wheeler. (R. 118:29.) Third, Tiffany Mullan testified that J.P. told her that J.P. and J.H. were going to do something funny and it involved Wayerski. (R. 118:34–35.) J.P. later told her that the incident involving J.H. and J.P. was not true and that it was a lie. (R. 118:34.) Fourth, Allen Mayer stated that he heard J.P. and J.H. say that they had "set [Wayerski] up. We got him." (R. 118:46.) Later, Mayer clarified that J.P. made these statements about setting up Wayerski and Mayer understood J.P. to mean that Wayerski was "too nosey" as it related to investigating drug activity. (R. 118:47.)

Jail inmate John Clark's rebuttal testimony. Clark, who had 20 prior conviction for misdemeanors and felonies, was in the Chippewa County jail on a probation hold in August and September 2011. (R. 118:216, 231.) Clark and

Wayerski were housed together during this period. (R. 118:216–17.) Wayerski asked Clark for help on how to beat the charge. (R. 119:219, 227.) Wayerski told Clark that he wanted to make the two victims, who were 16 and 17 years old, look like liars. (R. 118:219–20.) Clark claimed that Wayerski told him that the two individuals came to his house and watched pornography on the computer and that Wayerski gave them booze. According to Clark, Wayerski claimed that he masturbated them and did not engage in oral sex. (R. 118:221.) Wayerski described only one incident to Clark. (R. 118:224.) Clark reported his conversation with Wayerski to authorities. Clark testified that he was neither offered anything nor asked for a lighter penalty or sentence in any other matter in return for his testimony. (R. 118:225–26.)

Clark acknowledged that he had access to news media in jail. (R. 118:228.) In sur-rebuttal, Wayerski confirmed that he had access to news media while in jail. Further, Wayerski acknowledged that he was in jail with Clark, who was just one of 56 inmates with whom Wayerski had contact while awaiting trial. (R. 118:234.)

The jury found Wayerski guilty of the charged offenses. (R. 38:1–2.) The circuit court sentenced Wayerski on each count to a term of imprisonment, ordering some terms to be served concurrently and others consecutively to each other. (R. 38:1–8.)

II. Postconviction proceedings.

Wayerski moved for postconviction relief. (R. 57.) He raised nine different claims of ineffective assistance of counsel (R. 57:4–8), two claims of circuit court error related to the admission of certain evidence (R. 57:8), a claim of circuit court error related to the circuit court's decision to

deny Wayerski's motion for a change of venue (R. 57:8), a claim that the prosecutor violated its obligations under *Brady* (R. 57:9–16).

The circuit court conducted an evidentiary hearing. Witnesses included Wayerski's trial counsel (R. 121:6–122), Wayerski (R. 121:126–149), and Eau Claire County Sheriff's Detective Scott Kuehn (R. 122:6–59).

Trial counsel testified that he called Wayerski in surrebuttal. Trial counsel said that he put Wayerski "back on the stand" to ask "him a question that he was beating me about on the deal." (R. 121:109.) The question that Wayerski insisted that trial counsel ask—and that trial counsel did ask—related to the number of inmates Wayerski was incarcerated with while awaiting trial. (R. 121:107–108.) Trial counsel stated that he "could think of no reason" why he did not ask Wayerski if he confessed to Clark. (R. 121:9–10, 108.) But trial counsel also explained that Wayerski "had a habit of trying to talk into my ear while I was trying to listen in or ask questions[.]" (R. 121:109.) Wayerski conceded that "I was a pain because I was forever in his ear saying ask this, ask this, why don't you do this . . . and I was probably more annoying to [trial counsel] than a help." (R. 121:139.)

Trial counsel stated that the jury was aware of Clark's prior convictions and that Clark was on a hold facing revocation, but that the prosecutor did not tell him that Clark had pending charges in Chippewa County. (R. 121:15, 20.) The charges were filed against Clark on September 7, 2012, and Wayerski's trial began on October 8, 2012. (R. 115:1; 121:88.) Trial counsel testified, "I suppose [that] I could have found out about" Clark's charges. (R. 121:21.) Trial counsel was aware of Clark's criminal background, acknowledging that he checked Clark's background on

CCAP, "just concentrating on his convictions." (R. 121:21, 68.) Later, trial counsel stated that he could not recall "CCAPing" Clark or they just relied on his criminal history. (R. 121:69.)

In an oral decision (R. 123:139) and written order (R. 94), the circuit court denied Wayerski's postconviction motion. The circuit court addressed Wayerski's claim that trial counsel was ineffective for failing to ask Wayerski on sur-rebuttal whether he actually admitted his crimes to Clark in the jail. Based on its review of the record, the circuit court noted that Wayerski was "pretty uncontrollable during his direct examination, and his cross-examination[,] he was even worse—never just answering the question, volunteering all kinds of information, throwing stuff out there, offering explanation after explanation." (R. 123:81.) The circuit court observed that trial counsel "probably" should have given Wayerski an opportunity to deny Clark's claims. (R. 123:81–82.) But based on "the overwhelming amount of evidence against Mr. Wayerski in this case" and Wayerski's "opportunity to present his defense[,]" the circuit court determined that trial counsel's providing Wayerski with an opportunity to refute Clark's testimony "would [not] have changed the outcome of this trial." (R. 123:82–83.) Based on the totality of the circumstances, the circuit court determined that trial counsel "was not overall so deficient as to have not provided . . . constitutionally sound representation." (R. 123:83–84.) "[H]e absolutely addressed the major issues in this case and provided the representation that he was required to provide." (R. 123:84.)

The circuit court found that trial counsel was not aware of Clark's pending charges at the time of Wayerski's trial and that the prosecutor obtained a copy of the complaint after a CCAP search. (R. 123:11.) The circuit court

also determined that the prosecutor had a responsibility to provide that information to Wayerski even though it was available on CCAP. (R. 123:129–30.) The circuit court found that the prosecutor did not intentionally withhold the "evidence to procure a better position." (R. 123:130–31.) Based on its review of the record, the circuit court determined that any error was harmless because of the "compelling evidence" of Wayerski's guilt apart from Clark's testimony. (R. 123:133, 135, 139.)

III. The court of appeals' decision.

Wayerski appealed his judgment of conviction and the circuit court's order denying postconviction relief. Wayerski raised six claims on appeal. *State v. Gary Lee Wayerski*, Case No. 2015AP1610-CR, 2017 WL 5046629, ¶ 1 (Dist. III, Wis. Ct. App., October 31, 2017). The court of appeals rejected each claim, affirming the judgment of conviction and circuit court's order denying postconviction relief. *Id.* ¶ 2.[3]

The court of appeals addressed the two claims that Wayerski presented to this Court for review. First, as for the ineffective assistance claim, the court of appeals did not decide whether trial counsel performed deficiently. Instead, it determined Wayerski failed to show prejudice. The court of appeals noted that Clark's credibility had been called in to question, in part, based on his 20 prior convictions. Further, Wayerski testified that the victims' allegations were false and Wayerski presented four witnesses who claim that they

[3] The court of appeals remanded the matter to the circuit court to correct an error on the judgment of conviction. *Wayerski*, 2017 WL 5046629, ¶ 2 n.5.

heard J.P. recant the accusations. *Id.* ¶ 46. Finally, based on its review of the trial record, the court of appeals determined that "the evidence of Wayerski's guilt was overwhelming, regardless of whether he denied Clark's testimony regarding the jailhouse confession." *Id.* ¶ 47.

Second, as for the *Brady* claim, the court of appeals determined that the defense knew that Clark was a witness who was in jail and that his pending charges could have readily been determined through CCAP. Accordingly, the court of appeals determined that a CCAP check did not place "an intolerable burden" on Wayerski and as a result, the court concluded, no *Brady* violation occurred. *Id.* ¶ 56.

Alternatively, the court of appeals determined that even if the State violated *Brady*, there was not a reasonable probability of a different result had the State disclosed the CCAP information. The court of appeals noted that Clark was impeached based through evidence of his 20 prior convictions. Further, the court of appeals determined that "the State's case-in-chief provided 'very compelling' evidence of guilt on the multitude of offenses apart from Clark's testimony on the jailhouse confession." *Id.* ¶ 57.

IV. Wayerski's petition for review.

Wayerski presented two claims to this Court for review. First, Wayerski asserted that his trial counsel was ineffective for failing to ask Wayerski on sur-rebuttal whether he confessed to Clark. (Wayerski's Pet. 17–22.) Second, Wayerski contended that the State violated his due process rights under *Brady* when it did not inform him that authorities in another county recently filed charges against Clark. (Wayerski's Pet. 23–32.) This Court granted Wayerski's petition.

STANDARD OF REVIEW

A claim of ineffective assistance of counsel presents a mixed question of law and fact. *State v. Carter*, 2010 WI 40, ¶ 19, 324 Wis. 2d 640, 782 N.W.2d 695. "The factual circumstances of the case and trial counsel's conduct and strategy are findings of fact" that this court will not overturn unless they are clearly erroneous. *State v. Breitzman*, 2017 WI 100, ¶ 37, 378 Wis. 2d 431, 904 N.W.2d 93 (citations omitted). Whether trial counsel was ineffective, including whether counsel's performance was deficient and whether any deficient performance prejudiced a defendant, presents a legal question that this Court independently reviews. *Id.* ¶¶ 37–39.

Whether the State violated the defendant's right to due process under *Brady* presents a question of constitutional fact subject to this court's independent review. *See State v. Harris*, 2004 WI 64, ¶ 11, 272 Wis. 2d 80, 680 N.W.2d 737. The underlying historical facts as found by the trial court remain subject to the clearly erroneous test. *Id.*

ARGUMENT

I. Wayerski has not proved that his trial counsel was ineffective for failing to ask him whether he had actually admitted misconduct to Clark.

A. General legal principles.

The Sixth and Fourteenth Amendments to the United States Constitution and article I, section 7 of the Wisconsin Constitution guarantee a criminal defendant the right to effective assistance of counsel. *State v. Lemberger*, 2017 WI 39, ¶ 16, 374 Wis. 2d 617, 893 N.W.2d 232.

A defendant alleging ineffective assistance of trial counsel has the burden of proving both that counsel's performance was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If the defendant fails to establish one prong of the test, the court need not address the other. *Id*. at 697.

To prove deficient performance, the defendant must show that his counsel's representation "fell below an objective standard of reasonableness" considering all the circumstances. *Id*. at 688. The defendant must demonstrate that specific acts or omissions of counsel fell "outside the wide range of professionally competent assistance." *Id*. at 690. In assessing the reasonableness of counsel's performance, a reviewing court should be "highly deferential," making "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id*. at 689. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Id*.

To demonstrate prejudice, the defendant must affirmatively prove that the alleged deficient performance prejudiced him. *Id*. at 693. The defendant must show something more than that counsel's errors had a conceivable effect on the proceeding's outcome. *Id*. Rather, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694. "The focus of this

inquiry is not on the outcome of the trial, but on 'the reliability of the proceedings.'" *State v. Thiel*, 2003 WI 111, ¶ 20, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted).

B. Wayerski cannot prove prejudice because of the overwhelming evidence of his guilt.

Because the circuit court and the court of appeals correctly resolved Wayerski's claim of ineffective assistance on prejudice grounds, the State addresses prejudice first.

Here, the lower courts determined that Wayerski failed to meet his burden of showing a reasonable probability that the result of the proceeding would have been any different had Wayerski testified in sur-rebuttal that he did not confess to Clark. (R. 123:82–83.) *Wayerski*, 2017 WL 5046629, ¶¶ 46–48. In determining that his trial counsel's performance did not prejudice Wayerski, the lower courts considered three things: Wayerski's ability to present his defense, other evidence that undermined Clark's credibility, and, most importantly, the overwhelming evidence against Wayerski. (R. 123:80–84.)

First, trial counsel's failure to ask a question that would allow Wayerski to refute Clark's testimony did not undermine Wayerski's ability to present his defense. "[T]here was never any doubt that Wayerski claimed innocence of all charges during the trial." *Wayerski*, 2017 WL 5046629, ¶ 46. In both opening and closing statements, trial counsel asserted that J.P. and J.H. made up the allegations to set up Wayerski. (R. 115:230–31; 119:76–79.) Trial counsel argued that the allegations coincided with a drug investigation that Wayerski was conducting. (R. 119:88–89.)

In addition, trial counsel presented evidence to support his defense. In his testimony, Wayerski denied

touching J.P. or J.H. in a sexual manner, spanking them, showing them pornography, or providing them with alcohol. (R. 118:105–08, 144.) Wayerski explained how his relationship with J.P. and J.H. developed when J.P. and J.H. got into trouble and their parents asked Wayerski for help keeping their sons away from drugs. (R. 118:82–83, 95–96.) While Wayerski was mentoring J.H. and J.P., Wayerski became aware that they were slipping back into drug activity. (R. 118:109, 113.) When J.H. and J.P. made the allegations against him, Wayerski claimed that he knew who was responsible for supplying drugs, that he had enough information to charge five or six people with felony drug offenses, and that those people were connected to J.P. and J.H. (R. 118:114.)

Trial counsel also presented testimony from witnesses supporting Wayerski's defense that J.P.'s and J.H.'s allegations were false and that J.P. and J.H. were motivated to set Wayerski up. According to Berg, Mullan, and Detmar, J.P. told them that "none of this is true. I wish it would have never happened" and that he and J.H. had "crossed the line" and what he said to the cops was a lie. (R. 117:205–06; 118:13–15, 34.) Detmar and Mayer similarly claimed that J.P. stated that he and J.H. were setting up Wayerski because of Wayerski's investigations into drug activity in Wheeler. (R. 118:29, 46–47.)

Second, "Clark's credibility was questioned regardless of whether Wayerski directly denied Clark's accusations." *Wayerski*, 2017 WL 5046629, ¶ 46. The jurors knew that Clark was in jail on a probation hold when he and Wayerski spoke. Further, Clark had approximately 20 convictions, some of which were felonies, and that he had served prison time. (R. 118:216, 219, 231.) In support of Wayerski's closing argument that Clark's information came from media

available to inmates and not Wayerski (R. 119:80), trial counsel elicited testimony from Clark and Wayerski that jail inmates had access to television, newspapers, and the Internet (R. 118:227–28, 234).

Third, and most importantly, the State presented "overwhelming" evidence of Wayerski's guilt "regardless of whether he denied Clark's testimony regarding the jailhouse confession." *Wayerski*, 2017 WL 5046629, ¶ 47. The court of appeals noted that J.P. and J.H. provided detailed testimony and substantial evidence recovered from Wayerski's apartment corroborated their accounts. The victims' parents and other witnesses also corroborated Wayerski's interaction with J.P. and J.H. *Id.*

Both J.P. and J.H. provided consistent, detailed testimony about how their relationship with Wayerski developed and how it led to Wayerski's assaults of them. In J.P.'s case, Wayerski investigated J.P. for theft and referred him to juvenile authorities. (R. 116:110–11; 118:80–81.) J.P. stated that Wayerski knew his probation officer and agreed to mentor him. (R. 116:12.) The juvenile social worker confirmed that Wayerski offered to work with J.P. (R. 118:211–13.) J.P.'s parents asked Wayerski to help J.P. out of trouble and away from drugs. (R. 116:91; 118:82–83, 141.) Wayerski took J.P. on ride-alongs. (R. 116:13, 18–19; 118:83.) During ride-alongs, Wayerski discussed sex J.P. (R. 116:15, 83.)

During his first visit to Wayerski's house, Wayerski asked J.P. to take off his shirt and pants so that he could check his muscle tone. (R. 116:21–22.) Wayerski slapped J.P.'s testicles to get his endorphins moving. (R. 116:24–25.) Wayerski then masturbated J.P. (R. 116:26.) Wayerski allowed J.P. to watch pornography at Wayerski's house on

the computer and through cable service. (R. 116:32–34, 54–55.) J.P. stated that he and J.H. did not watch pornography without first asking Wayerski and that Wayerski sat next to them when they looked at pornography. (R. 116:50.) Wayerski would masturbate J.P. when they watched pornography. (R. 116:35.)

Similarly, J.H.'s relationship with Wayerski developed through a theft complaint. (R: 116:130–31.) J.H.'s father confirmed that Wayerski agreed to handle the matter with a citation and community service if J.H. admitted the offense. (R. 116:131; 118:96–97.) During an early visit to Wayerski's apartment, J.H. said that Wayerski offered to help J.H. with physical training and asked him to take off his clothes so that he could check his muscle tone. (R. 116:137–139.) Wayerski massaged J.H.'s body, including his butt and penis, to build up his "endorphins" and "testosterone," and eventually masturbated him. (R. 116:139–41.) Wayerski showed J.H. pornography online or through the cable provider. (R. 116:152, 155, 162.) Wayerski directed J.H. to disrobe, would rub J.H.'s body and masturbate him while the videos played. (R. 116:161.)

Both J.P. and J.H. reported that Wayerski threatened them if they reported him. When J.P. told Wayerski that he was uncomfortable with the sexual contact, Wayerski told J.P. that he would make J.P.'s home life difficult and "threatened to put me in juvie." (R. 116:39.) J.H. continued to return to Wayerski's residence because Wayerski said that he would arrest J.H. (R. 116:143–44.)

Officers searched Wayerski's computer and located pornographic material that reflected an interest in young males between the ages of 16 and 20 and included pictures arranged under titles labelled "milking," "punish," "spanking," and "stances." (R. 117:95–96, 100.) Wayerski

admitted these interests (R. 118:177, 180–83.) And most importantly, both J.P. and J.H. described contact consistent with Wayerski's interests. Wayerski directed J.P. to place his hands against a wall and spread his legs and then spanked him. (R. 116:41, 73.) On another occasion, Wayerski directed J.P. to strip down and lay on his lap. Wayerski then spanked and masturbated him. (R. 116:40.) J.H. reported that Wayerski would have him bend over and would proceed to "beat his ass with a spoon." (R. 116:148–49.) On another occasion, Wayerski directed J.H. to kneel so that he could "milk" him out. Wayerski proceeded to masturbate him and called J.H. his "bull boy." (R. 116:150–51.)

Wayerski's roommate Zach denied watching pornography on Wayerski's computer. (R. 117:47.) Zach said that he saw a younger male introduced to him with the same first name as the victims' first name sitting on a couch without a shirt while Wayerski was present. (R. 117:43–44.) Officers searched Wayerski's phone and found photographs of J.P. and Wayerski. (R. 117:177–79.) J.P. was shirtless and was holding a cup that would typically contain alcohol when he was at the apartment. (R. 97:Ex.2; 116:57.) Wayerski identified several photographs from his phone including J.P.'s photograph and photographs of himself in various states of undress. (R. 118:192–93.)

Other seized physical evidence also supported J.P.'s and J.H.'s version of events including the recovery of a plate that Wayerski directed J.P. to masturbate on. (R. 116:46–48, 209, 211, 213.) DNA extracted from the plate belonged to J.P. (R. 117:81–82.) The circuit court observed that Wayerski offered no alternative explanation for how the victim's DNA was found in the apartment. (R. 123:137.) Officers found a Vaseline container consistent with the description that J.H. provided. (R. 116:211–13.) Consistent with J.P.'s and J.H.'s

statements, officers also recovered a Charter bill in Wayerski's name with charges for pornographic titles. (R. 116:222.) Officers also found a vodka bottle and computers. (R. 116:217–218, 220.)

J.H.'s father also testified about the day that he picked up J.H. and J.P. after they left Wayerski's house and they reported that Wayerski had molested them. (R. 116:119.) J.H.'s father observed that they had been drinking (R. 116:120), which was consistent with J.P.'s and J.H.'s statements and testimony that Wayerski had plied them with alcohol. (R. 116:49, 73, 120, 185–86.) Detective Scott Kuehn, who had extensive experience investigating sexual assault cases (R. 116:203), interviewed both J.P. and J.H. Kuehn observed that both had demeanors that were consistent with other victims of sexual assault cases that Kuehn had investigated (R. 116:205–08).

On this record, Wayerski has not demonstrated a reasonable probability that the jury would have found Wayerski not guilty if trial counsel had asked him on sur-rebuttal whether he had admitted misconduct to Clark. Both J.P. and J.H. relayed similar, compelling stories about how their initial contacts with Wayerski through their misdeeds culminated in his sexual offenses against them. Considerable physical evidence and testimony from citizens and law enforcement corroborated their testimony. The jury had the opportunity to fully consider and reject Wayerski's defense that J.P. and J.H. fabricated their stories to set him up. Wayerski has not met his burden of demonstrating that any deficient performance on trial counsel's part prejudiced his defense.

Accordingly, this Court may affirm based on Wayerski's failure to prove prejudice; in any event, as

explained below, Wayerski has also failed to demonstrate deficient performance.

C. Trial counsel's performance was not deficient.

The court of appeals resolved Wayerski's ineffective assistance of counsel claim on prejudice grounds and did not decide whether trial counsel's performance was deficient. *Wayerski*, 2017 WL 5046629, ¶¶ 46–48. The circuit court acknowledged that Wayerski's claim of ineffective assistance gave it pause, but it ultimately determined that trial counsel "was not overall so deficient as to have not provided . . . constitutionally sound representation." (R. 123:80, 83–84). "[H]e absolutely addressed the major issues in this case and provided the representation that he was required to provide." (R. 123:84). The record supports the circuit court's determination.

To be sure, trial counsel could not explain why he failed to ask Wayerski whether he admitted his conduct to Clark. (R. 121:108.) But as trial counsel observed, "[T]his is the benefit of 20/20 hindsight." (R. 121:109.) Indeed, the Supreme Court has cautioned courts "to eliminate the distorting effects of hindsight" and "to evaluate the conduct from counsel's perspective at the time." *See Strickland*, 466 U.S. at 689.

During sur-rebuttal, trial counsel did what Wayerski asked him to do. He asked questions about the number of people who were in jail with him and whether inmates had access to media. (R. 118:234; 121:109.) These questions bolstered trial counsel's attack during his cross-examination of Clark and in closing argument that Clark's knowledge of Wayerski's offenses came from media access, rather than

from any communications between Wayerski and Clark. (R. 118:228; 119:79–80). Further, by noting Clark's significant criminal history, trial counsel effectively challenged the credibility of Clark's entire testimony, including Wayerski's alleged admissions to him. (R. 118:231.)

Contrary to Wayerski's assertion, trial counsel's failure to ask Wayerski whether he admitted his offenses to Clark was not "tantamount to an admission of guilt" and did not undermine his right to present a defense. (Wayerski's Br. 17, 21.) Not only did trial counsel challenge Clark's credibility, trial counsel emphasized throughout trial that Wayerski denied the offenses and that J.P. and J.H. made up the allegations to destroy him as a result of Wayerski's ongoing drug investigation into their associates. (R. 115:230–31; 119:76–79, 88–89.)

Based on trial counsel's efforts throughout the trial to challenge the credibility of witnesses who provided the most damning testimony against him, trial counsel's failure to ask Wayerski whether he admitted his crime to Clark did not constitute deficient performance. And, as argued above, he failed to demonstrate prejudice. Wayerski is not entitled to relief on this claim.

II. Wayerski has not proven that the States suppressed favorable information that was publicly available on CCAP or, assuming suppression, that it prejudiced Wayerski.

A. General legal principles.

A prosecutor's suppression of evidence favorable to an accused violates due process when the evidence is material to guilt or to punishment. *Brady v. Maryland*, 373 U.S. 83,

87 (1963). *Brady* also encompasses impeachment evidence. *Giglio v. United States*, 405 U.S. 150, 154 (1972).

A *Brady* violation has three components. First, the "evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching." *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). Second, the State must have suppressed the evidence, either willfully or inadvertently. Third, prejudice must have ensued from the suppression of the evidence. *Id.* at 282. The defendant bears the burden of proving a *Brady* violation. "In order to establish a *Brady* violation, the *defendant must*, in addition to demonstrating that the withheld evidence is favorable to him, *prove* that the withheld evidence is 'material.'" *Harris*, 272 Wis. 2d 80, ¶ 13 (emphasis added, citation omitted).

Evidence favorable to the accused. "Evidence is favorable to an accused, when, 'if disclosed and used effectively, it may make the difference between conviction and acquittal.'" *Id.* ¶ 12 (quoting *United States v. Bagley*, 473 U.S. 667, 676 (1985)). Evidence favorable to the accused includes both exculpatory and impeachment evidence. *Strickler*, 527 U.S. at 281–82. For *Brady* purposes, the Supreme Court has rejected "any such distinction between impeachment evidence and exculpatory evidence." *Bagley*, 473 U.S. at 676.

The State's suppression of the evidence. "Evidence is 'suppressed' when (1) the prosecution fail[s] to disclose the evidence in time for the defendant to make use of it, and (2) the evidence was not otherwise available to the defendant through the exercise of reasonable diligence." *Carvajal v. Dominguez*, 542 F.3d 561, 567 (7th Cir. 2008) (citation omitted). Similarly, as this Court has recognized, an "important factor in determining there was no denial of due process is the fact that the defendant failed to pursue

information that was available to him." *State v. Clarke*, 49 Wis. 2d 161, 179, 181 N.W.2d 355 (1970). When evidence is otherwise available to a defendant, it is not within the State's exclusive possession. And this Court has repeatedly "held that due process is not violated under *Brady v. Maryland, supra*, unless the information in question is within the exclusive possession and control of authorities." *State v. Amundson,* 69 Wis. 2d 554, 573, 230 N.W.2d 775 (1975) (and cases cited therein); *State v. Sarinske*, 91 Wis. 2d 14, 36, 280 N.W.2d 725 (1979).

The materiality or prejudice standard. In *Bagley*, the Supreme Court applied *Strickland*'s reasonable probability standard for assessing the materiality of the undisclosed evidence. *Bagley*, 473 U.S. at 682; and *Harris*, 272 Wis. 2d 80, ¶ 14. "The evidence is material 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." *Bagley*, 473 U.S. at 682. A defendant does not suffer "prejudice" under *Brady* unless "the favorable evidence could reasonably be taken to 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). "[S]trictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler*, 527 U.S. at 281.

In *State v. Rockette*, 2006 WI App 103, 294 Wis. 2d 611, 718 N.W.2d 269, the court of appeals addressed materiality in the context of impeachment evidence. "Impeachment evidence is not material, and thus a new trial is not required when the suppressed impeachment evidence

merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable." *Id.* ¶ 41 (citation omitted). "Generally, where impeachment evidence is merely cumulative and thereby has no reasonable probability of affecting the result of trial, it does not violate the *Brady* requirement." *Id.* ¶ 41 (*quoting United States v. Dweck*, 913 F.2d 365, 371 (7th Cir.1990).

B. Evidence regarding Clark's pending case constituted evidence favorable to Wayerski.

A defendant has a right to challenge a witness' bias. The existence of pending criminal charges is a source of bias and an appropriate subject matter for cross-examination. *See State v. Barreau*, 2002 WI App 198, ¶ 55, 257 Wis. 2d 203, 651 N.W.2d 12. Clark's pending case in Chippewa County constituted evidence favorable to Wayerski because it provided grounds for him to impeach Clark by challenging his potential bias. While Clark's pending case constituted favorable evidence, a *Brady* violation did not occur because the State did not suppress the evidence, or alternatively, there is not a reasonable probability that disclosure of this evidence would have produced a different verdict.

C. The State did not suppress evidence about Clark's pending charge that was publicly available to Wayerski through CCAP and, therefore, was not within the State's exclusive possession.

The court of appeals correctly determined that the State did not suppress information about Clark's pending charges in a neighboring county because the information was otherwise available through the exercise of reasonable diligence, i.e., a public CCAP search. *Wayerski*, 2017 WL 5046629, ¶¶ 55–56. The record supports the court of appeals'

determination that the State did not suppress evidence of Clark's recently filed pending charges.

Clark reported his jailhouse conversations with Wayerski to Deputy Kuehn in September 2011. (R. 122:8.) Clark did not seek consideration for his cooperation and law enforcement did not offer him anything for his cooperation. (R. 122:43–44.) When Kuehn spoke to Clark, Kuehn was aware of a probation hold, but unaware of any pending charges. (R. 122:55, 58.) Chippewa County authorities filed charges almost one year later, on September 7, 2012. (R. 85:1; 122:57.) Clark appeared for his initial appearance on September 14, 2012, and Clark's case remained pending when Wayerski was tried in October, 2012. (R. 123:10.)

The prosecutor, who was not from Chippewa County, learned about Clark's pending case a few days before trial "through a CCAP search, a normal public record search, not through NCIC."[4] (R. 88:19; 123:11.) The prosecutor subsequently obtained a copy of the complaint. (R. 123:10–11.) The prosecutor did not disclose Clark's pending case to trial counsel and trial counsel was unaware of Clark's pending case. (R. 88:19; 123:10–11, 130–31.)

But the prosecutor's nondisclosure of Clark's pending Chippewa County case did not constitute suppression under *Brady*. Information about Clark's pending case was not within the State's exclusive possession. Rather, this

[4] NCIC refers to the "National Crime Information Center." "NCIC is an electronic clearinghouse of crime data that can be tapped into by virtually every criminal justice agency nationwide, 24 hours a day, 365 days a year." *See State v. Subdiaz-Osorio*, 2014 WI 87, ¶ 21 n.10, 357 Wis. 2d 41, 849 N.W.2d 748. While the public has access to court records through CCAP, access to NCIC is limited to law enforcement agencies.

information was available to Wayerski through the exercise of reasonable diligence, i.e., through a simple CCAP search.

This Court has recognized "the creation of CCAP has facilitated efficient use of court resources and greater access to court information by the public." *State v. Bonds*, 2006 WI 83, ¶ 47, 292 Wis. 2d 344, 717 N.W.2d 133. Indeed, trial counsel candidly acknowledged using CCAP to check witness backgrounds. (R. 121:68.) With respect to Clark, trial counsel testified that he checked CCAP for information about Clark, but "was just concentrating on his convictions." (R. 121:21.) Although later, he testified, "I can't state with one hundred percent specificity that I did any CCAPing on him." (R. 121:69.)[5]

In concluding that the State did not suppress evidence of Wayerski's pending charges, the court of appeals applied the "intolerable burden" standard that it adopted in *State v. Randall*, 197 Wis. 2d 29, 38, 539 N.W.2d 708 (Ct. App. 1995). *Wayerski*, 2017 WL 5046629, ¶¶ 55–56. In *Randall*, Randall asserted that the State's failure to disclose impeachment evidence related to a witness's pending case undermined his Sixth Amendment right to attack the credibility of witnesses. *Randall*, 197 Wis. 2d at 37–38. While the court of appeals generally referenced the State's duty to disclose exculpatory evidence, including impeachment evidence, it did not apply the *Brady*'s framework—favorable evidence, suppression, materiality—

[5] An attorney's failure to exercise reasonable diligence and search CCAP for information about potential witnesses might well form the basis for a claim of ineffective assistance of counsel. But that claim is not before this Court. Even if it were, Wayerski could not prove that any deficient performance on trial counsel's part prejudiced him for the reasons advanced in Section II.D., below.

for assessing whether a due process violation occurred. *Id*. at 37. Rather, the court of appeals simply stated that requiring a defendant to timely search public records for a witness's pending charges would place "an intolerable burden on the defense; namely, to continually comb the public records to see if any of the State's witnesses are facing pending criminal charges." *Randall*, 197 Wis. 2d at 38.[6]

Whether or not the *Randall*'s intolerable burden standard should apply to a *Brady* claim, the court of appeals reasonably declined to extend its "intolerable burden" standard to information obtainable through a CCAP search. Instead, it determined, consistent with *Randall*, "[that] it was not an 'intolerable burden on the defense' to search CCAP for pending criminal charges of a witness prior to trial." *Wayerski*, 2017 WL 5046629, ¶ 56. Therefore, the court of appeals reasonably concluded the State did not "suppress" the CCAP record of Clark's pending charges. *Id*.

While acknowledging the suppression component of a *Brady* claim, Wayerski simply assumes that suppression occurs whenever the State does not disclose favorable information. (*See* Wayerski's Court of Appeals Br. 35, 43.) Wayerski's analysis ignores any discussion of this Court's predicate requirement for a *Brady* claim that the favorable evidence must be under the State's exclusive control. *Amundson,* 69 Wis. 2d at 573. Evidence available to a defendant through the exercise of reasonable diligence is not

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[6] While the "intolerable burden" standard guided the court of appeals' assessment of whether the State suppressed evidence in Wayerski's case, neither the Supreme Court nor this Court has used an "intolerable burden" to assess whether a *Brady* violation occurred. This Court can use this case to decide what role, if any, *Randall*'s "intolerable burden" standard has in assessing whether the State suppressed evidence under *Brady*.

evidence within the State's exclusive possession. As the court of appeals appropriately recognized, suppression only occurs when the evidence is "not otherwise available to the defendant through the exercise of reasonable diligence." *Wayerski*, 2017 WL 5046629, ¶ 55 (quoting *Carvajal v. Dominguez*, 542 F.3d 561, 567 (7th Cir. 2008)).

Contrary to Wayerski's assertion, the court of appeals did not create "a new and unprecedented burden on the defense to search for *Brady* material" nor will it "lead to a whole scale withering of the state's obligation to disclose *Brady* material." (Wayerski's Br. 34.) Rather, the court of appeals' decision simply reinforced what both the Supreme Court and this Court have always required to sustain a *Brady* violation: the State's suppression of favorable evidence. *Harris*, 272 Wis. 2d 80, ¶ 15, *citing Strickler*, 527 U.S. at 281–82.

Because Clark's CCAP information was not in the State's exclusive possession and was available to Wayerski through the exercise of reasonable diligence, this Court should determine that the State did not suppress favorable evidence and, therefore, that no *Brady* violation occurred.

D. Wayerski has not proved that the State's nondisclosure of information about Clark's pending case was material because there was no reasonable probability of a different result had the State disclosed the evidence.

The court of appeals also correctly determined a *Brady* violation did not occur because Wayerski failed to show a reasonable probability of a different result had the State disclosed evidence about Clark's pending case. *Wayerski*, 2017 WL 5046629, ¶ 57. The court of appeals reached this decision in part because Clark had already been impeached through his prior convictions and the State's case in chief

provided compelling evidence of Wayerski's guilt apart from Clark's testimony. *Id*.[7] The record supports the court of appeals' determination that the State's nondisclosure of Clark's pending case information did not prejudice Wayerski.

In Section I.B., above, the State argued that trial counsel's allegedly deficient performance did not prejudice Wayerski. Because the standard for assessing materiality or prejudice when reviewing a *Brady* claim is the same standard for assessing prejudice when reviewing an ineffective assistance of counsel claim, the State relies on the same grounds to argue that the State's nondisclosure of Clarks's pending case was not material or prejudicial in a *Brady* sense.

The State presented compelling evidence of Wayerski's guilt. J.P. and J.H. provided detailed and consistent testimony about Wayerski's contacts with them. In both cases, Wayerski investigated them for property crimes. Wayerski informally supervised them with their parents' permission. Their visits with Wayerski began in his squad car and led to apartment visits. Wayerski's first physical contact with both was under the guise of improving their physical conditioning. These contacts led to sexual contact. In addition, both reported that Wayerski would masturbate

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[7] The circuit court applied the harmless error test to resolve Wayerski's *Brady* claim. (R. 123:131.) It denied Wayerski's *Brady* claim because it found the evidence of Wayerski's guilt to be substantial. (R. 123:139.) The test for harmless error is "essentially consistent with the test for prejudice in an ineffective assistance of counsel claim under *Strickland*." *State v. Harvey*, 2002 WI 93, ¶ 41, 254 Wis. 2d 442, 647 N.W.2d 189. The only distinction between the two tests is that under the harmless error test, the State bears the burden of proof. *Id*.

them while they watched pornography. J.P. and J.H. described Wayerski's sexual contact, which was consistent with Wayerski's admitted sexual interests and the pornography that he organized on his computer. Both J.P. and J.H. feared legal consequences if they reported Wayerski's molestation. Officers located other physical evidence that corroborated J.P.'s and J.H.'s version of events, including a plate found at Wayerski's that had J.P.'s DNA on it, a photograph of a shirtless J.P. on Wayerski's phone holding a cup that J.P. said usually contained alcohol, and a container of Vaseline consistent with J.H.'s statement. *See* Sec. I.B., above.

Further, Wayerski fully presented his theory of defense. He denied committing the sexual assaults in his case-in-chief. Wayerski also presented several witnesses to support his claims that J.P. and J.H. were motivated to lie and set up Wayerski because of Wayerski's investigation of local drug trafficking. *See* Sec. I. B., above. (R. 119:90.)

Finally, even if Wayerski did not impeach Clark about his pending case, the jury was well aware of several factors that undermined Clark's credibility, including Clark's status on a probation hold and his 20 prior convictions. Further, relying on both Clark's and Wayerski's testimony about jail inmate access to media, Wayerski asserted that Clark's information came from the media and not Wayerski, which undermined Clark's assertion that Wayerski made admissions to him. *See* Sec. I. B., above. (R. 119:79–80.) Under the circumstances, evidence about Clark's pending case was not material because it "merely furnish[ed] an additional basis on which to impeach [Clark] whose credibility has already been shown to be questionable." *See Rockette*, 294 Wis. 2d 611, ¶ 41 (citation omitted).

Wayerski asserts that if the State had disclosed Clark's pending case he could have investigated the case and

located witnesses to impeach Clark's credibility. (Wayerski's Br. 31.) Wayerski's claim is at best speculative. Clark was not a surprise, rebuttal witness, but a potential witness whose identity the State had disclosed before trial. (R. 115:3–4.) More importantly, Wayerski did not identify any witnesses in the postconviction proceedings whom he would have called to further impeach Clark's credibility.

On this record, Wayerski has not demonstrated that the State's nondisclosure of Clark's pending case information was material and prejudiced him. Based on the substantial evidence supporting Wayerski's guilt, Wayerski's full presentation of his defense, and other evidence in the record that undermined Clark's credibility, there is not a reasonable probability that Wayerski would have been acquitted at trial.

E. This Court should not address whether the State violated its statutory discovery obligations under section 971.23(1) when it did not disclose information about Clark's pending case.

Wayerski argues that the State's failure to disclose impeachment information about Clark's pending case also violated its discovery obligation to disclose exculpatory evidence under Wis. Stat. § 971.23(1)(h). (Wayerski's Br. 26–28.) A claim grounded in a statutory discovery violation rests on a different footing than a *Brady* claim. For example, in *Harris*, this Court noted that the State's nondisclosure of certain information may violate a discovery obligation under section 971.23(1) without violating a defendant's due process rights. *Harris*, 272 Wis. 2d 80, ¶ 40. In *State v. Lynch*, 2016 WI 66, ¶ 54, 371 Wis. 2d 1, 885 N.W.2d 89, this Court has noted that a defendant has a statutory right to obtain information through discovery under section 971.23. "In contrast, a defendant has a constitutional right,

under *Brady*, to material information but only when that information is held by the prosecutor, including others acting on the prosecutor's behalf." *Lynch*, 371 Wis. 2d 1, ¶ 54.

This Court should decline to address Wayerski's section 971.23(1) claim on procedural grounds. Wisconsin Stat. § (Rule) 809.62(2) provides in part that a petition's statement of the issues should "identify any issues the petitioner seeks to have reviewed that were not decided by the court of appeals." Wisconsin Stat. § (Rule) 809.62(6) provides in part that if the Court grants a party's petition, "the parties cannot raise or argue issues not set forth in the petition unless ordered otherwise by the supreme court." This Court has firmly stated that it "decline[s] to consider issues not raised in petitions for review." *Preisler v. Gen. Cas. Ins. Co.*, 2014 WI 135, ¶ 59, 360 Wis. 2d 129, 857 N.W.2d 136.

This Court should decline to address Wayerski's section 971.23(1) discovery claim because he did not raise it in his petition for review. Wayerski's petition for review identifies two issues: his *Strickland* claim and his *Brady* claim. (Wayerski's Pet. 1.) He did not ask this Court to address whether the State's nondisclosure of information about Clark's pending case violated Wayerski's discovery rights under section 971.23. Nor did Wayerski squarely flag any potential statutory discovery issue in his discussion of the *Brady* claim. (Wayerski's Pet. 23–32.)

Wayerski criticizes the court of appeals' determination that Wayerski did not develop his argument that the State violated its statutory discovery obligations under section 971.23. (Wayerski's Br. 28, citing *Wayerski*, 2017 WL 5046629, ¶ 54 n.9.) Wayerski's criticism is misplaced. The court of appeals correctly determined that Wayerski did not develop his statutory discovery argument in his court of

appeals' brief. Wayerski merely noted the State's section 971.23(1) discovery obligations in a single paragraph. (Wayerski's Court of Appeals' Br. 34.) Wayerski never developed the argument that the State violated its obligations under section 971.23(1) even if it did not violate its *Brady* obligations. The court of appeals was not obligated to develop this argument for Wayerski. *See State v. Pettit*, 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992).

CONCLUSION

The State respectfully requests this Court to affirm the court of appeals decision which affirmed Wayerski's judgments of conviction and the circuit court's order denying postconviction relief.

Dated this 31st day of May, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,338 words.

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DONALD V. LATORRACA
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 31st day of May, 2018.

_____
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