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IN THE WISCONSIN SUPREME COURT

Case No. 2015AP001083CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARY L. WAYERSKI,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT III, AFFIRMING A JUDGEMENT OF CONVICTION AND AN ORDER DENYING A POST CONVICTION MOTION ENTERED IN THE DUNN COUNTY CIRCUIT COURT, THE HONORABLE WILLIAM C. STEWART AND THE HONORABLE MAUREEN BOYLE, BARRON COUNTY CIRCUIT COURT, PRESIDING.

CORRECTED REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

I. WAYERSKI HAS PROVED TRIAL COUNSEL WAS INEFFECTIVE WHERE HE DID NOT ASK THE TESTIFYING DEFENDANT DURING SURREBUTTAL TESTIMONY ABOUT THE PURPORTED CONFESSION HE GAVE TO JOHN CLARK, A JAIL INMATE AND REBUTTAL WITNESS, AND THE DEFENDANT WOULD HAVE DENIED HE CONFESSED TO CLARK.

A. Trial counsel's performance was deficient.

The State contends trial counsel's performance was not deficient. "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." (State's Brief 26-27). The argument is unpersuasive for a number of reasons.

First, no single piece of evidence and testimony of any witness in this trial, including the testimony of the accusers, was so absolutely

damning as John Clark's testimony that Wayerski had confessed committing sexual crimes involving, J.P. and J.H., the teenage victims. (118:215-226).

Second, the circuit court said that the only alleged error on trial counsel's part that "caused me to pause" was this one. (123: 80-84; App. 2:1-5). One other observation by the circuit court suggests that the circuit court believed trial counsel's performance to be deficient. "But he failed to ask him about the claims of Mr. Clark, and whether or not he had actually ever said those things to Mr. Clark. He didn't give him the opportunity to deny. Should he have? Probably." (123:81-82; App. 2: 1-5).

Third, Wayerski's trial counsel did not claim his performance in this respect was not deficient. To the contrary, he seemed to clearly acknowledge his failure without hiding behind an excuse that it was all strategy. (118: 215-226, 224, 226; 121: 6-22, 79-90, 117-126, 6-126, 126-128).

In determining the reasonableness of counsel's conduct, the Court "should keep in mind that

counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). Trial counsel failed to use surrebuttal as it is intended. He failed to ask Wayerski whether he had confessed to Clark. What the jury never heard was a denial of this jailhouse confession because trial counsel never put the most important questions to Wayerski. "The adversarial testing process" did not work in this case. The jury was left with one final impression before they began their deliberation. Wateyski didn't deny he had confessed to Clark. (118: 215-226, 224, 226, 233-234; 121: 6-22, 79-90, 117-126, 6-126, 126-128).

B. Wayerski has proven prejudice under the Strickland Test.

The State claims that this failure on trial counsel's part is all much a do about nothing. The State contends the evidence of guilt was overwhelming. And the State believes therefore Wayerski suffered no prejudice by his counsel's

failure to ask Wayerski whether he confessed to Clark. (State's Br. at 20-26).

The State's argument is wrong for many reasons. Not the least of which is the type of damning evidence at play - a confession by the accused. *See generally Bruton v. United States*, 391 U.S. 123, 139-140 (1968) (White, J., dissenting) ("the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him").

Contrary to the State's argument, the evidence of guilt was not overwhelming. The conclusion of the circuit court and the court of appeals on this point is wrong as well. (State's Br. 20-26; 123:80-84; App. 2: 1-5; *State v. Wayerski*, 2015AP1083, ¶¶45-47;App.5:20-22).The prosecution case was not strong and could be explained away. The possession of pornography was not direct evidence of guilt. The accusers could have accessed pornography on their own without Wayerski's knowledge and approval. (97; 117: 101-117, 109; 117: 89-101). The plate containing J.P.'s semen could have been put

there by J.P. solely to set Wayerski up. (116: 5-66) The ride alongs and visits prove nothing other than J.P. and J.H. spent time with Wayerski.(116: 134-182). This was a credibility contest between two teenage boys who were troubled law breakers and a police chief and law enforcement officer. Wayerski testified and proclaimed his innocence. (116:5-13,127-134;118: 77-201). Additionally defense witnesses cast doubt on the credibility of JP and JH and opined that J.P. and J.H. had set Wayerski up. Kay Detar testified that the boys were drinking and using Wayerski's computer without Wayerski's knowledge. Moreover J.P. admitted to Detar after Wayerski's arrest that "what they said to the cops was a lie". (118: 10-18). Tiffany Mullan testified that J.P. told her that all of the allegations against Wayerski were a "joke" and a "misunderstanding". (118: 33-37). Allan Meyer recounted how the boys told him that "We set him up. We got him". In particular, J.P. told Meyer that "[W]e got him. We ended up setting him up.". Wayerski was " too

nosy". The boys did what they did because of drugs. (118: 45-49).

Trial counsel failed to ask questions of Gary Wayerski on surrebuttal that would have rebutted the false claims of John R. Clark in his rebuttal testimony. (56:1-4; 118:215-231, 233-234; 121:126-128). Trial counsel admitted that he should have asked questions that allowed Wayerski to rebut the allegation by Clark. (121:108). The jury was left with the impression that Clark's testimony must be true. (118:215-231, 233-234)

The methodology for assessing prejudice in the context of an ineffective assistance of counsel claim is inadequately analyzed by the State . If this methodology is properly applied, Wayerski's conviction must be reversed. A defendant only needs to demonstrate that if not for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. *Strickland*, 466 U.S. at 694 (1984) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*; *State v. Smith* 207 Wis, 3d 258,

276, 558 N.W.2d 379,387 (1997). All that is required is that "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins v. Smith* 539 U.S. 510, 537 (2003). "Even if the odds that the defendant would have been acquitted had he received effective representation appear to be less than fifty percent, prejudice has been established so long as the chances of acquittal are better than negligible. '" *U.S. v. Leibach*, 347 F. 3d 219, 246 (7th Cir. 2003) (quoting *Miller v Anderson*, 255 F.3d 455, 459 (7th Cir.2001)).

The error by Wayerski's trial counsel establishes a reasonable probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Wayerski argues that this Court should conclude that "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537.

II. WAYERSKI HAS PROVED THE STATE VIOLATED *BRADY*, *GIGLIO*, AND *KYLES* WHEN IT DID NOT INFORM THE DEFENSE THAT JOHN CLARK, A JAIL INMATE AND REBUTTAL WITNESS, HAD PENDING CHILD-SEX CHARGES AT THE TIME OF HIS TESTIMONY

The State has conceded in the court of appeals and also before this Court that "Clark's pending charges were favorable to Wayerski because they tended to impeach Clark's ostensible concern for child sex abuse as his reason for testifying at trial. *See State v. Barreau*, 2002 WI App 198, ¶55, 257 Wis. 2d 203, 651 N. W. 2d 12 (right to confrontation 'includes the right to reveal potential bias' stemming from pending criminal charges)." (State's Br. 30: *State v. Wayerski*, 2015AP1083, ¶53; App.5:24).

Nevertheless the State contends that the prosecutor was under no obligation to inform Wayerski's attorney of the pending charges because information about the pending charges was available on CCAP. Thus, the State argues that the

prosecutor did not suppress this favorable impeachment information. (State's Br. 28-34).

This argument must be wholly rejected by this Court. First, the timing of when the impeachment information regarding Clark's pending charges became available on CCAP confirms that Wayerski's trial counsel had little or no chance of discovering this information before and during the commencement of this trial. Under the State's flawed argument, it becomes the defense attorney's obligation to daily check CCAP in the short four weeks before trial to determine whether the State is hiding impeachment information which should be disclosed under *Brady v. Maryland,* 373 U.S. 83 (1963)*, Giglio v. United States*, 405 U.S. 150, 154 (1972)*,* and *Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995) anyway.

The State's argument, if accepted, is a license for gamesmanship when it comes to *Brady* obligations. And it would be an "intolerable burden" on the defense to constantly be checking on CCAP to make sure the State is disclosing what it

should be disclosing in the first place. *See State v. Randall*, 197 Wis 2d 29, 38, 539 N.W.2d 708 (Ct. App. 1995). To make it the defense burden to check CCAP and go fishing for pending charges allows the prosecution to bury their *Brady* obligation to make sure cases against jail house snitches or cooperating witnesses or confidential informants are filed within four or three or two weeks or even the fist week of trial to increase the chances that the defense won't find out. (State's Br.30-34: *State v. Wayerski*, 2015AP1083, ¶¶ 49-57; App.5:24). This Court should reject the State's invitation to take the law of *Brady* where it has not been before. (State's Br.30-34). All of this would render the holdings in *Bradv*, *Giglio*, and *Kyles* of little importance.

Wayerski's counsel in this Court mistakenly omitted listing all of the charges in the criminal complaint pending against Clark in his initial brief. He also mistakenly listed a charge which was not in the complaint, but was found instead in a later amended information in the same case. (82:1-2) He now correctly lists all of charges as described

in the Clark complaint discussed below. Wayerski's counsel apologizes for any confusion caused by this drafting mistake. At the time of Wayerski's trial, Clark was charged in Chippewa County Circuit Court Case Number 2012CF000399 by criminal complaint with the following offenses: one count of Soliciting a Child for Prostitution , a Class D Felony, and two counts of Sexual Intercourse with a Child, a class A Misdemeanor, and three counts of Delivery of Schedule III Non-Narcotics, Distribution to Minors. The crimes were said to have occurred in the beginning of August, 2011. (85:1-4). So Clark was facing prosecution for a number of child sex offenses as well as drug distribution to minors in the complaint filed on September 7, 2012, only one month prior to the commencement on October 8, 2012 of Wayerski's jury trial. Clark appeared in court on these charges on or about September 14, 2012. (Id.; 84:1-5). The prosecutor was aware of the pending charges against Clark before Wayerski's trial commenced. He claimed he learned about Clark's pending case

a few days before trial through a CCAP search. He also acknowledged he had a copy of the criminal complaint. (82:2;84:1- 5; 85:1-4; 86:1-6; 88: 1-24, 19; 118: 215-231; 121: 6-22, 79-90, 87-89, 117-126,126-128; 122:18-43; 123:11). Yet, no disclosure to Wayerski's counsel. The prosecutor here chose not to do so. (Id.)

Given that all of this was occurring during the eleventh hour before the commencement of this trial, this failure to disclose a copy of the compliant against Clark before Wayerski's trial commenced compounds the seriousness of the *Brady* violation. The prosecutor failed to disclose the criminal complaint to Wayerski's trial counsel. And it is beyond debate that a criminal complaint and other charging documents are not found on CCAP. (88:19; 123: 10-11, 130-31.)

Concentrating on the short window of opportunity afforded to Wayerski's trial counsel in a complex prosecution involving numerous counts, it is indeed an intolerable burden to place upon the defense the obligation to go searching daily during

four short weeks for any new charges against any of the numerous prosecution witnesses in this case. The circuit court did not rule that the prosecutor here was under no obligation to turn this information regarding Clark's pending child sex charges over to the defense. The contrary is true. "So I am finding that there was a failure on the part of the State to disclose this evidence, **and that it should have been disclosed**. This evidence was not deemed to be relevant by the State in this case. And, therefore, while I don't believe it was an intentional withholding of evidence to procure a better position in this matter, I think it was simply a misunderstanding of the State's obligation to provide this information." (123:130-131; App.3:3-4). (emphasis added).

The State also believes that Wayerski has not proved that the State's suppression 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. *See United States v. Bagley*, 475 U.S. 667, 682 (1985).

(State's Br. 34-37). Wayerski disagrees. As detailed in Section I. B of Wayerski's reply brief, above, the evidence against Wayerski was neither compelling or overwhelming.

The State wrongly relies on the holding in *State v. Rockette*, 2006 WI App 103, 294 Wis. 2d 611, 718 N.W.2d 269. Wayerski's case is different. Evidence about Clark's pending case is highly material. This is especially so when Clark, the hypocrite jail bird, claims he is motivated to come forward and testify solely because the case involves "kids." If Clark had been confronted with the pending charges involving sexual intercourse with children, soliciting a child for prostitution, and drug distribution to minors, the result of this trial would have been different. Clark's ostensible concern for child sex abuse as his reason for testifying could be shown to be a lie. This line of impeachment could have made a huge difference for the defense. First, such impeachment information would have shown his bias in that he wanted to curry favor with the prosecution on open cases to ensure he would not be

severely punished. Second, the nature of the charges would have destroyed his credibility with the jury because he would have been shown to be not only a career criminal, but also a hypocritical liar. Had the pending child sex crimes been raised with him on cross examination, Clark might have invoked the fifth amendment and refused to testify in order to avoid opening himself up to incriminating statements and perjury because the defense could show he might have a different motive for his testimony than being a champion against child sex abuse. Knowing that he was lying under oath about his motivation for testifying, the jury might reasonably suppose that he was lying about the jail house confession of Wayerski. The point to all of the above being this impeachment is not merely "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). (State's Br. 36). Impeachment about Clark's pending child sex crimes would be far more

powerful than the number of convictions in his past.

Here the State implicitly seems to suggest that the suppression of impeachment information regarding Clark was in effect harmless because the State had such compelling evidence against Wayerski. (State's Br. 34-37). This is sheer speculation. The State is wrong on this point and so is the circuit court and the court of appeals. (123: 80-84, 128-139; App. 2: 1-5; App. 3:1-11; *State v. Wayerski*, 2015AP1083 20-22, 22-27; App. 5: 20-22, 22-27). The harmless error rule calls upon a reviewing court not to "become in effect a second jury," see *Neder v. United States*, 527 U.S. 1, 19 (1999), but to determine "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* at 15, quoting *Chapman v. California*, 386 U.S. 18, 24 (1967). The harmless error standard is very difficult to meet. And the harmless error standard has most certainly not been satisfied in this case.

Last year, the United States Court of Appeals

for the Seventh Circuit reversed a conviction because the prosecution had failed to disclose impeachment information regarding one of their witnesses in a heroin conspiracy case. There the Court found a *Brady* violation. The government attacked that the materiality of the impeachment information. First, like the prosecution in this case, the government argued that the remaining evidence supporting its case was so strong that the suppressed *Brady* impeachment information could not have made any difference. Second, like the prosecution in this case, the government argued that the use of the suppressed *Brady* impeachment information to impeach the government's witness credibility would have made no difference because the credibility of the witness was already so damaged. The Court rejected both of the government's argument. "We do not need to find, however, that "but for" the failure to disclose Nesbitt's impeachment evidence, the defendants would not have been convicted. The standard is only whether there is a reasonable probability of a different outcome. We conclude that

the evidence meets this standard." *United States v. Walter*, 870 F.3d 622, 630 (7th Cir. 2017).

And this Court should do the same in Wayerski's case.

CONCLUSION

For all the reasons set forth in this reply brief and his initial brief in this Court, Wayerski asks this Court to reverse the judgment of conviction and grant him a new trial.

Dated at Milwaukee, Wisconsin, this 20th day of June, 2018.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(b) and (c) for a brief produced using the following font: Times New Roman: 16 characters per inch; 2 inch margin on the left and right; 1 inch margins on the top and bottom. The brief's word count is 2950 words.

Dated at Milwaukee, Wisconsin, this 20th day of June, 2018.

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CERTIFICATE OF COMPLIANCE WITH RULE 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 s. 809.19(12). I further certify that: 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 at Milwaukee, Wisconsin, this 20th day of June, 2018.

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