STATE OF WISCONSIN

IN SUPREME COURT

No. 2018AP2005-CR

STATE OF WISCONSIN,

Plaintiff -Respondent,

v.

GARLAND DEAN BARNES,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

Petitioner Garland Dean Barnes seeks review of a court of appeals decision that affirmed a judgment of conviction and an order denying postconviction relief. *State v. Barnes*, No. 2018AP2005-CR, 2021 WL 969235 (Wis. Ct. App. Mar. 16, 2021) (per curiam). (Pet-App. 7–31.) This Court should decline review because the court of appeals' decision is correct, and the sole issue Barnes frames worthy of review—whether a criminal defendant can open the door to responsive evidence typically barred by the Confrontation Clause—has already been submitted on briefs and oral argument before the Supreme Court this very term. Barnes's other claims are fact- specific, and the court of appeals disposed of them using well-settled legal principles. Therefore, Barnes's claims do not meet the criteria enumerated in Wis. Stat. § (Rule) 809.62(1r), nor do they present any "special and important reasons" warranting this Court's review. *See* Wis. Stat. § (Rule) 809.62(1r).

BACKGROUND

In April 2013, the State charged Barnes with delivering more than 50 grams of methamphetamine to a police informant later identified as Charles Marciniak. (*See* R. 2; Pet-App. 8.) Originally represented by Attorney Chris A. Gramstrup, Barnes subsequently retained substitute counsel Richard S. Gondik, Jr. to represent him later that year. (R. 10.) Four months into his representation of Barnes, Attorney Gondik filed a written discovery demand on April 11, 2014. (R. 12.)

Two weeks later, the State filed a written response to that discovery demand indicating that Attorney Gondik had "verbally stated that he had received discovery in this matter from prior defense counsel." (R. 16:2.) The State also asserted that it had made its file available to Attorney Gondik on the same day as his formal discovery demand but that he had not requested discovery before April 11, 2014. (R. 16:2.)

In that regard, the State contended that "[i]tems of physical evidence" were available to "analyze, inspect, and copy upon a more specific request" while noting that Attorney Gondik was in possession of Superior Police Department evidence logs for "many months." (R. 16:2.) Along with that response to Barnes's discovery demand, the State submitted an anticipated witness and exhibit list for Barnes's upcoming trial. (R. 16:5; 20.) The exhibit list provided that the State intended to introduce "[c]ompact discs containing recorded phone calls and drug delivery transaction." (R. 16:5; 20.)

The parties proceeded to trial in July 2015, over one year after the State's discovery disclosure. (R. 166; 167.) Before the trial commenced, however, Barnes moved to exclude the recording of the controlled drug purchase, purportedly pursuant to Wis. Stat. §§ 901.03(3) and 901.04(3) (providing for preliminary determinations of evidence admissibility to be made outside the jury's presence) and on the grounds that the evidence's admission would violate his rights under the Fifth and Fourteenth Amendments. (R. 65:2.)

The court took up Barnes's motion before trial. (R. 167:3.) The court noted its understanding that the recording contained no audio between Barnes and Marciniak. (R. 167:7–8.) The prosecutor clarified that the audio recording "was running" but "no audible voices are heard" and "only background noises" were audible. (R. 167:8.) During the first day of the trial, however, Officer Jason Tanski testified that Marciniak's voice was indeed audible. (R. 167:235–36.) Outside the jury's presence, the court ordered the State to turn over the recording to Attorney Gondik, (R. 167:286), and the following day, Officer James Madden confirmed during his testimony that Barnes and the informant could be heard on the recording, (R. 166:10).

Thereafter, outside the jury's presence, the court addressed the perceived disconnect between the officers' testimony and prior representations that the controlled drug purchase recording contained no audible voices. (R. 166:54–55.)

The prosecutor explained that she was informed approximately two weeks before trial that another recording of the controlled drug purchase existed but that it contained only background noise. (R. 166:55.) The prosecutor further indicated that she conveyed that information in good faith to Attorney Gondik. (R. 166:55.) Moreover, the prosecutor explained that she followed up with Officer Tanski two days before trial, where he confirmed the recording contained only background noise. (R. 166:55–56.)

The prosecutor admitted her surprise to Officer Tanski's testimony indicating that the recording also contained some statements. (R. 166:56.) She explained that she since listened to the recording and identified communication between Marciniak and Barnes. (R. 166:56.) She also acknowledged that she did not intend to admit the recording at trial. (R. 166:56.) Defense counsel subsequently moved to dismiss the case based on the nondisclosure and Investigator Winterscheidt's false testimony that the recording contained no voices. (R. 166:58–59.) The court declined defense counsel's request, instead permitting wider latitude of cross-examination and a special jury instruction. (R. 166:60–61.)

Between the two days of trial testimony, the jury heard substantial evidence demonstrating that Barnes dealt methamphetamine to Marciniak during the controlled drug purchase and not the other way around, as defense counsel presented to the jury as an alternative view of the evidence consistent with Barnes's innocence. (*See* R. 166:202–03; 180:6.) As the court of appeals summarized, Marciniak testified to throwing a bag containing recorded buy money into Barnes' vehicle while Barnes threw the methamphetamine into Marciniak's vehicle, and the two left the area. (Pet-App. 8.) Police stopped Barnes's vehicle after a brief chase, discovering the recorded buy money in the center console. (Pet-App. 8.) Marciniak reunited with police shortly thereafter and recovered the purchased methamphetamine in his vehicle.

(Pet-App. 9.) That evidence convinced a jury beyond a reasonable doubt that Barnes, not Marciniak, was the dealer of the seized methamphetamine. (*See* Pet-App. 9.)

Barnes subsequently moved for postconviction relief raising a litany of claims, arguing (1) the circuit court should have dismissed the criminal complaint as a sanction for the State's discovery violations, (2) a new trial was warranted based on the State's discovery violations, the State's alleged noncompliance of Barnes's pretrial motion to exclude evidence of prior drug transactions between Barnes and Marciniak, and other prejudicial evidentiary errors, (3) defense counsel was ineffective for failing to object to those alleged errors, and (4) a new trial was warranted in the interest of justice. (Pet-App. 9–10.)

The circuit court denied Barnes's motions. (Pet-App. 9, 33, 44.) Concerning the claims surrounding the State's discovery violations, the court observed that the drug transaction recording was not exculpatory and its absence from trial was used by trial counsel to bolster the defense's trial theory of shoddy police work. (Pet-App. 9.) Turning to the alleged violation of Barnes's motion in limine, the court held that Marciniak's mention of drug transactions was not prejudicial because it was merely an "innocuous reference" to past conduct. (Pet-App. 9.) Finally, the court rejected Barnes's arguments regarding various evidentiary errors as either non-meritorious or resulting in only harmless error, and further, that trial counsel was not constitutionally ineffective. (Pet-App. 9–10.)

The court of appeals affirmed. (Pet-App. 31.) Beginning with Barnes's claim that dismissal or a new trial was warranted due to the State's discovery violations, the court observed that the complained of errors did not rise to a due process violation because, even assuming the State suppressed evidence, Barnes had not shown the recording was favorable to his defense or that it was material. (Pet-App. 12–15.) Moreover,

the court determined that the circuit court soundly exercised its discretion in fashioning a remedy for the State's discovery violations that did not require case dismissal. (Pet-App. 15–16.)

The court of appeals next rejected Barnes's claim that the circuit court erred by failing to grant a mistrial following Marciniak's testimony alluding to prior drug transactions with Barnes. (Pet-App. 16–19.) The court reasoned that the circuit court maintained broad discretion when deciding whether to grant a mistrial and that the circuit court explained its rationale for employing a less extreme remedy. (Pet-App. 17–18.) The court determined to sustain the circuit court's decision notwithstanding its reference to an incorrect legal standard. (Pet-App. 18–19.)

Thereafter, the court of appeals examined each of Barnes's various evidentiary ruling challenges. (Pet-App. 20–28.) The court rejected Barnes's argument that the court improperly admitted inadmissible hearsay from Investigator Paul Winterscheidt, holding that the circuit court could reasonably conclude that the offending testimony was offered not to establish the truth of the matter asserted—that another officer witnessed the drug transaction—but to show why he took subsequent steps in the investigation. (Pet-App. 20.) In so holding, the court explicitly refused Barnes's invitation to adopt the test discussed in *United States v. Reyes*, 18 F.3d 65, 70–71 (2d Cir. 1994), while also observing that several *Reyes* factors actually supported the evidence's admission. (Pet-App. 21.)

Next, the court of appeals rejected Barnes's position that the admission of Investigator Winterscheidt's testimony violated his constitutional right to confront his accusers. (Pet-App. 21–22.) The court observed that Barnes's entire argument was tethered to his evidentiary assertions and failed to explain how his rights were violated if Investigator Winterscheidt were permitted to testify to his awareness that another officer witnessed the drug transaction. (Pet-App. 22.)

Finally, the court of appeals rejected Barnes's remaining evidentiary challenges.[1] (Pet-App. 22–28.)

Barnes petitioned this Court for review on May 10, 2021. (Pet. 1.) This Court ordered the State to respond to Barnes's petition by an order dated September 14, 2021.

DISCUSSION

Barnes's case does not meet this Court's criteria for review.

A. Barnes's various evidentiary challenges do not warrant review because, by his own admission, they are fact-specific and governed by existing precedent.

Barnes dedicates nearly half of his petition's argument section to convincing this Court that the circuit court made evidentiary errors during his trial. (Pet. 25–37.) For all but one of those alleged errors, Barnes hardly references the court of appeals' reasoning for rejecting his claims, let alone explains why the court's decision was wrong. (*See* Pet. 25–37.) And he certainly makes no attempt to show how further review of those claims would satisfy any of the criteria enumerated in Wis. Stat. § (Rule) 809.62(1r). (*See* Pet. 25–37.)

Rather, Barnes explicitly acknowledges that his various evidentiary claims "are fact-specific and controlled by existing precedent" and raised solely to preserve the ability to seek federal habeas review. (Pet. 9.) In so admitting, Barnes concedes that those claims fail to satisfy this Court's criteria for review. *See* Wis. Stat. § (Rule) 809.62(1r)(c)1. (review warranted where a decision will develop, clarify or harmonize

[1] As the State later explains, Barnes effectively concedes that further review of those remaining evidentiary claims is unwarranted as they are "fact-specific and controlled by existing precedent." (Pet. 9.) Thus, in the interest of brevity, the State does not address the court of appeals' analysis of each underlying claim.

the law and case merits application of new doctrine "rather than merely the application of well-settled principles to the factual situation").

The State will not belabor the reasons that Barnes's analysis is flawed; the court of appeals already did that when it rejected each of his evidentiary claims based on firmly rooted legal principles, including harmless error. (Pet-App. 19–28.) Suffice to say, this Court is tasked with law development, not error-correction, and there is no reason to grant review to reapply the same established legal standards employed by the court of appeals to facts unique to Barnes's case on the off chance that this Court might arrive at a different result.

B. Review is unnecessary to clarify the limits of a circuit court's sanction authority in response to a State discovery violation.

Barnes also insists that review is necessary because "no Wisconsin case directly addresses whether dismissal is an appropriate remedy when the State commits repeated, egregious discovery violations." (Pet. 8.) But even accepting that as true, the overarching issue in Barnes's appeal is not whether the circuit court *could have* ordered Barnes's case dismissed. Rather, the issue presented in this appeal is whether the circuit court erroneously exercised its discretion when choosing an appropriate remedy for the State's discovery violations. (*See* Pet-App. 10–16.)

On that point, the law is already clear on a circuit court's broad discretion in fashioning remedies for discovery violations, and the court of appeals recognized the same. (Pet-App. 15–16.) Relevant here, Wis. Stat. § 971.23(7m)(a) permits a circuit court to exclude witnesses or evidence that the State fails to properly disclose, and Wis. Stat. § 971.23(7m)(b) allows for a curative instruction to inform the jury of the nondisclosure. Although neither statute explicitly

provides for case dismissal, it goes without saying that court-ordered exclusion of evidence integral to the State's case would have the practical effect of leaving the State no option *but* to dismiss the defendant's case.

Moreover, to the extent that Barnes contends that his case is the appropriate vehicle for this Court to adopt a brand new rule born from various federal circuits, his stance is overstated. Yes, the State failed to disclose an officer's police report in discovery, so the circuit court imposed a harsh sanction of excluding the officer's testimony in its entirety. (R. 68; 69.) And given Bobbi Reed's former refusal to testify, the court granted defense counsel's request to exclude her testimony as an additional sanction for the State's discovery violations. (R. 166:153–56.)

Furthermore, due to confusion between the prosecutor and investigating officers about the controlled drug purchase surveillance video, the State was unable to show the jury video evidence of the alleged transaction, and defense counsel was afforded wider latitude to cross-examine the State's witnesses. (*See* R. 166:56–61.) In so ordering, the circuit court recognized that Barnes effectively got the "best of both worlds" by excluding the State's recording while gaining the ability to impeach Investigator Winterscheidt's testimony as false. (R. 180:75–76.)

Moreover, the court of appeals astutely recognized that Barnes failed to show that the purportedly suppressed evidence was actually favorable to his defense or that it was material. (Pet-App. 13.) Perhaps case dismissal might be an appropriate remedy where the State engaged in a flagrant *Brady* violation, but that did not occur. (*See* Pet-App. 12–14.) There is no need to break ground to craft a new remedy disproportionate to the State's discovery violations, particularly where the circuit court weighed its options and imposed several harsh but appropriate sanctions during Barnes's trial.

C. Review is unnecessary to clarify whether a defendant can open the door to evidence excluded under the Confrontation Clause.

Finally, Barnes contends that review is necessary because his case presents a real and significant question of federal constitutional law concerning "whether and under what circumstances a criminal defendant can open the door to responsive evidence otherwise barred by the Confrontation Clause." (Pet. 8.) Admittedly, Barnes's position on that point would typically prove persuasive; as he correctly observes, "[n]o Wisconsin courts have addressed this issue. It is squarely presented in this case." (Pet. 8.)

The problem with Barnes's logic, however, is he readily admits that the Supreme Court will decide this exact issue later this term. (*See* Pet. 8–9.) While this Court generally grants review when confronted with a real and significant question of federal or state constitutional, it is beyond debate that the Supreme Court will have issued a decision answering the question Barnes poses before this Court could grant review, allow the parties sufficient opportunity to brief this issue, schedule and complete oral argument, and issue a decision.[2]

Furthermore, this Court generally applies Supreme Court precedents when interpreting the Sixth Amendment and analogous provisions under the Wisconsin Constitution, *State v. Hanson*, 2019 WI 63, ¶ 16, 387 Wis. 2d 233, 928 N.W.2d 607, *cert. denied*, 140 S. Ct. 407 (2019). While a stay of Barnes's appeal may be appropriate as he suggests, (*see*

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[2] The Supreme Court granted the petition for certiorari in *Hemphill v. New York* on April 12, 2021, the parties completed their briefing by September 3, 2021, and the Supreme Court heard oral argument earlier this month. *Darrell Hemphill v. New York*, No. 20-0637, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-637.html.

Pet. 24 n.4), there is simply no need for this Court to grant review to break new ground on an issue that will soon be decided by the Supreme Court.

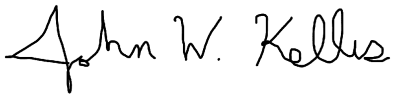
CONCLUSION

The court of appeals correctly affirmed Barnes's judgment of conviction and the order denying postconviction relief, and further review by this Court is unnecessary and unwarranted.

Dated this 28th day of October 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin



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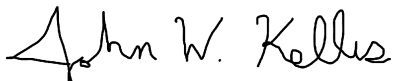
FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rule) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 2,709 words.

Dated this 28th day of October 2021.



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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ 809.19(12) and 809.62(4)(b)(2019-20)

I hereby certify that:

I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

This electronic petition 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 petition filed with the court and served on all opposing parties.

Dated this 28th day of October 2021.

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