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STATE OF WISCONSIN

WISCONSIN SUPREME COURT

Case No. 2018AP2357-LV

In the matter of the commitment of:

STATE OF WISCONSIN,

Petitioner-Petitioner,

v.

ANTHONY JAMES JENDUSA,

Respondent-Respondent.

On Appeal from an Order Denying Leave to Appeal a Nonfinal Order Entered in the Milwaukee County Circuit Court, the Honorable Joseph R. Wall, Presiding.

BRIEF AND APPENDIX OF RESPONDENT-RESPONDENT

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INTRODUCTION

Evidence from other states demonstrates that experts are consistently overestimating the risk that sex offenders will reoffend. The state possesses data showing the same overestimation is occurring in Wisconsin ch. 980 cases. This evidence is exculpatory because it tends to show that Anthony James Jendusa does not satisfy the criteria for commitment under ch. 980, and it could be used to impeach the state's witnesses. The circuit court agreed that Jendusa should have access to the data because it is exculpatory. This Court should affirm, and permit Jendusa's expert to analyze the data in order to determine accurate rates of recidivism in Wisconsin.

ISSUES PRESENTED

1. Do the ch. 980 discovery rules require the state to disclose data showing that its experts routinely over-estimate the risk of recidivism?

The circuit court granted Jendusa's motion to compel discovery.

This Court should hold that the circuit court properly exercised its discretion, and affirm the finding that the DOC's data was discoverable.

2. Is the evidence possessed by the DOC—which investigates and refers cases for commitment—in the possession of the state?

The circuit court found that the evidence possessed by the DOC was "within the possession, custody, or control of the state."

This Court should hold that evidence possessed by the DOC—which screens and evaluates inmates for commitment, refers commitments to the Department of Justice for prosecution, and whose employees testify in favor of commitment—is in the state's possession.

3. Would disclosure of information kept by the DOC violate state or federal privacy laws?

The circuit court found no privacy law prohibited disclosure of the data.

This Court should hold that data the DOC collects during compulsory ch. 980 evaluations of inmates is not a genuine medical record as defined in any law, so its disclosure is not prohibited. And even if the data is confidential, it is discoverable because Jendusa has been authorized to access it.

4. Does the significant liberty interest at stake in ch. 980 cases require that a prosecutor disclose exculpatory evidence, as required by the Due Process Clause in *Brady v. Maryland*, 373 U.S. 83 (1963)?

The circuit court found that Jendusa had due process rights, and those logically included the right to exculpatory evidence.

This Court should hold that the significant due process rights of those facing involuntary

commitment requires the prosecutor to disclose exculpatory evidence in its possession.

5. Did the court of appeals erroneously exercise its discretion in denying the state's petition for leave to appeal a nonfinal order?

The circuit court did not address this issue. The court of appeals denied the state's petition for leave to appeal the nonfinal order granting Jendusa's motion to compel discovery.

This Court should adhere to its longstanding practice of refusing to review the court of appeals' discretionary orders denying a permissive appeal, hold that the state's petition for review was wrongly granted, and dismiss the appeal. If the Court reaches the merits, it should hold that the court of appeals must explain its reasons for denying permissive appeals.

POSITION ON ORAL ARGUMENT AND PUBLICATION

This case presents issues of statewide concern, meriting both oral argument and publication.

STATEMENT OF FACTS

When a person convicted of a sexually violent offense is scheduled to be released from prison, the DOC must determine whether the person should be referred for commitment under ch. 980. (45:12.) For inmates "determined to be in need of a full psychological evaluation," the DOC conducts a

Special Purpose Evaluation (SPE), wherein a DOC-employed psychologist determines whether the person meets the criteria for commitment;[1] those satisfying the criteria are referred to the Department of Justice for prosecution. (45:12.)

The DOC collects data from the completed SPEs, including names, birthdates, and psychological diagnoses, and keeps the information in a database. (23; 45:16.)

As part of the SPE, inmates are scored on actuarial instruments designed to predict sex-offense recidivism. (1:67.) The instruments compare known characteristics of the individual being assessed to the known characteristics of different groups of individuals who have been studied, in order to assess the likelihood that the individual will reoffend. (45:18-19.) For example, Jendusa scored a six on the Static-99R (1:67; 27:2); an evaluator could compare Jendusa to known individuals who also scored a six. But the actuarial instrument would predict a different rate of recidivism depending on whether he were compared to a "routine" subgroup of all offenders in the Static-99R, or a "high-risk/high-need" subgroup. (45:17-21 , 55.) The "high-risk/high-need" group is comprised entirely of offenders from Denmark and Canada. (45:57.)

[1] Those criteria are: (1) the person has been convicted of a sexually violent offense, (2) the person has a "mental disorder" that predisposes him to commit acts of sexual violence, and (3) the mental disorder makes it more likely than not that the person will engage in future acts of sexual violence. Wis. JI—Criminal 2502.

The creator of the Static-99R, Dr. David Thornton, recommends that evaluators compare subjects to similarly-situated offenders. (45:31, 55.) The most reliable way to predict Jendusa's likelihood to reoffend would be to compare him to similar Wisconsin sex offenders, who would be expected to experience similar treatment options and confinement/release conditions. (45:55.)

On December 14, 2016, the state filed a petition to commit Jendusa under ch. 980. (1.) Attached to the petition was an SPE from Dr. Christopher Tyre, the supervisor of the DOC's ch. 980 forensic evaluation unit, which is tasked with preparing SPEs. (1:61; 45:10.)

On May 9, 2018, Jendusa filed a discovery demand, seeking data from the DOC's SPE database in order to determine how often Wisconsin offenders evaluated by the DOC for ch. 980 commitment are found to recidivate. (21.) Jendusa argued he was entitled to the data under the ch. 980 discovery statute, and that *Brady v. Maryland*, 373 U.S. 83 (1963) should be applied to those facing commitment under ch. 980. (21.) Jendusa argued that the data was exculpatory because similar data from California and Florida had shown much lower rates of recidivism than the high-risk/high-needs group that Tyre used for comparison with Jendusa, meaning Jendusa's risk was arguably much lower than Tyre estimated. (44:7-8; 45:44, 57.)

The circuit court heard argument and testimony over five days.

June 26, 2018 Hearing

Jendusa asked the court to compel disclosure of the names and birthdates from the DOC database because that information was required to determine which offenders went on to reoffend. (44:6-7.) He also requested the actuarial scores from the SPEs so that his researcher could establish specific rates of recidivism for different scores (e.g., determine how often persons scoring a six on the Static-99R, like Jendusa, reoffended). (44:10, 12, 29.) Jendusa argued that the information was exculpatory because a similar study in California found a re-offense rate of only 6.5%, which was much lower than the 19% rate of recidivism of the non-American offenders in the high-risk/high-needs group. (44:8); Tamara Rice Lave & Franklin E. Zimring, *Assessing the Real Risk of Sexually Violent Predators: Doctor Padilla's Dangerous Data*, 55 Am. Crim. L. Rev. 705, 709, 722-23 (2018). This suggested that by comparing Jendusa to the high-risk/high needs group, Tyre was grossly over-estimating Jendusa's true recidivism risk. (44:8.)

Jendusa acknowledged that the database included mental health and substance abuse diagnoses, which might ordinarily be confidential under the Health Insurance Portability and Accountability Act (HIPAA), but he noted: (1) the compelled diagnoses in the SPE were not legitimate health records, so they were not protected, and (2) he did not need any of this information. (44:11-12, 29-30.)

The court suggested that Jendusa try to obtain the data pursuant to Executive Directive 36, before seeking it in discovery. (44:35-36, 41-42.) Directive 36 sets forth the DOC's protocol for disclosing inmate health information for legitimate research purposes, as authorized by HIPAA. (Pet. App. 282.)

Jendusa pointed out that Tyre had previously obtained this database pursuant to Directive 36, as part of his own research project with researchers from the Department of Health Services (DHS). (44:34-35; 45:21-22, 41.) Tyre had previously testified that his research team made a preliminary determination of which evaluated offenders went on to reoffend (21:8), but he had not opened an email with that recidivism information. The court suggested that Jendusa prepare a subpoena duces tecum, requiring Tyre to bring the recidivism information to determine if it was exculpatory. (44:54.)

Two weeks later, Jendusa submitted a request for the data under Directive 36, seeking access in order to determine the rate at which Wisconsin offenders reoffend. (45:5-6; 53:5-10.) He contacted the DOC to check the status of his request, and promptly responded to questions from the Research Review Committee, which was responsible for granting or denying the request. (53:12-15.) On July 24, 2018, the DOC advised him that he could expect an approval in the "next day or so." (53:11-15.)

July 25, 2018 Hearing

Tyre testified that the DOC's database included information from 1400 inmates who had been

subjected to an SPE. (45:16.) He testified that he had been granted access to the database with his own group of researchers, that they had determined which offenders from the database had reoffended almost a year earlier, but that in the last year he had not opened the email attachment from his co-researcher with recidivism information to determine the rate of re-offense. (45:21-23.) He agreed that the information from his research would be useful to factfinders in ch. 980 cases. (45:49.) He testified that despite the subpoena duces tecum, he did not bring the spreadsheet to court on the advice of DOC legal counsel. (45:24.)

Tyre acknowledged that he likely compared Jendusa to the non-American offenders in the high-risk/high-needs group (45:44), but that the general goal should be to compare the individual to the most similar group of offenders. (45:20-21.) He also agreed that if the recidivism information from his co-researcher showed rates of re-offense much lower than the high-risk/high-needs subgroup, it could undermine his comparison of Jendusa to that subgroup, and "may even create doubt about the utility of using the [actuarial] instrument." (45:45.)

Dr. Thornton testified that the SPE data maintained by the DOC "would be relevant to the decisionmaking in SVP context in Wisconsin." (45:69.) He testified that the high-risk/high-needs subgroup consisted entirely of offenders from Canada and Denmark (45:57, 70-71), but the most reliable assessment of risk would compare the subject to a similarly-situated group of offenders:

> And so when you are going to apply the results of one of these tools… you really need to be confident that that recidivism rate came from a collection of samples which had an overall base rate which is comparable to the rate which would apply to people like the individual you're actually assessing. So [that] would apply in the jurisdiction that you're operating, would apply under current release conditions, and so on.

(45:55.) Thornton also testified that studies of similar data maintained by Florida, Texas, and California all showed lower levels of recidivism than the current actuarials would have predicted. (45:58.)

After taking testimony, the court set another hearing to discuss how to proceed. (45:80-81.)

July 31, 2018 Hearing

At the next hearing, Jendusa's counsel explained that his request for the data under Directive 36 had been approved, but he still had not received the data. (46:6-7.) Jendusa's request was approved on July 27, 2018, and the DOC indicated it would disclose the data "as soon as possible." (27:1; 53:16-17.)

The court was dubious of Tyre's previous testimony that he had been too busy to read the one-year-old email from his colleague, pointing out that "the recidivism rate and the risk analysis seem to be a very, very big issue in the 980 area." (46:21.)

Jendusa asked the court to order Tyre to review the spreadsheet with the recidivism information and testify, in order to confirm that the data was

exculpatory. (46:26.) The court agreed, and entered an order instructing Tyre to "personally open and read the spreadsheet containing de-identified recidivism data" that had been compiled by his co-researchers, to bring the spreadsheet, and to be prepared to testify on its contents. (24; 46:30-31.)

On August 7, 2018, Jendusa contacted the DOC to determine the status of his request under Directive 36. (53:18.) The DOC responded that it was still trying to identify what data was being requested. (53:19-20, 25.) The DOC asked Jendusa to specify what specific information he was seeking from the DOC database. (53:26.) Jendusa responded with a list of information from the spreadsheet, including names, birth dates, and scores on actuarial instruments. (53:28.) Jendusa did not request psychological diagnoses or substance abuse information. (53:28.) On September 10, 2018, the DOC wrote to Jendusa, explaining that counsel would have to sign a memorandum of understanding before receiving the data, and that the memo would be submitted "as soon as possible." (53:32.) The DOC never sent Jendusa a memo, and never sent the data which had been approved for disclosure under Directive 36. (53:3-4.)

November 9, 2018 Hearing

Despite the court order to bring the spreadsheet, Tyre once again declined to bring it on the advice of counsel. (47:41.) However, Tyre testified that he had reviewed the data, and that of 913 released offenders evaluated for ch. 980 commitment, only seven percent were convicted of a new sexual

offense (including offenses that would not qualify under ch. 980).[2] (47:48-49.)

Tyre agreed that this would mean the base rate for the high-risk/high-needs subgroup was three times higher than the rate for Wisconsin offenders. (47:49.) He further conceded that if this rate withstood further analysis, it would be an even lower base rate than the rate of re-offense amongst those in the subgroup of *all* offenders used for comparison with the Static-99R. (47:50.)

Jendusa also sought to establish Tyre's motive to suppress the results of his analysis, and the DOC's coordinated effort to prevent him from accessing the data pursuant to Directive 36. Tyre testified that since 2016, he had made approximately $120,000 performing private evaluations for the state in ch. 980 cases (beyond his employment with DOC). (47:35-36.) He further testified that after Jendusa's research request was approved under Directive 36, the chair of the research review committee contacted Tyre to determine what data should be disclosed. (47:25-28.)

After Tyre testified, the court expressed serious concerns with his credibility, and found the DOC was acting deliberately to prevent Jendusa from accessing the data. (47:62, 66) ("I agree that there's an effort for you to not get [the data]."). The court suggested that

[2] The database contained information on 1400 offenders subjected to an SPE; Tyre's research group eliminated those recommended for commitment (many of whom would have been committed, and would not have been capable of recidivism in the community), and were able to determine recidivism information for 913 former inmates. (47:45-46.)

Tyre and the state may have sought to suppress the data because evidence that the state's experts were overestimating recidivism risk could threaten numerous ch. 980 prosecutions. (47:66.)

Although the state accuses Jendusa of seeking to steal Tyre's research (Petitioner's Brief at 8), Jendusa was clear that he only wanted the data from the DOC, not Tyre's independent research. (47:63.)

The court granted Jendusa's motion for the raw data (47:64), and signed an order compelling the state to provide "a copy of the full, un-redacted, database" maintained by the DOC. (31; App. 101.) The order further instructed the defense's expert, Thornton, to analyze the data, and prohibited Jendusa from using identifying information in the database for any purpose beyond determining recidivism. *Id.*

The state filed a motion for reconsideration. (29.)

November 29, 2018 Hearing

At the next hearing, the court reiterated its concern that Tyre's testimony was "very, very disappointing" (48:2-3), and could not believe that he and his co-researchers were acting in good faith by failing to review the recidivism data they had collected years earlier. (48:35.)

The court found that Jendusa, as a person facing involuntary commitment, was entitled to due process; the court then observed that the rights from *Brady* were due process rights, so they should logically apply here. (48:33.)

The court asked Jendusa what opportunity the state would have to scrutinize Thornton's analysis, and Jendusa agreed that the state would have access to the results of that analysis, and Thornton could be subject to cross-examination of his methods. (48:37-38.)

The circuit court agreed to stay the order compelling disclosure of the data pending this appeal. (32.)

After the hearing, Jendusa's counsel reminded DOC legal counsel—who was at the hearing—that this litigation would be unnecessary if the DOC would disclose the data pursuant to Jendusa's previously-approved request under Directive 36. (52:1.) DOC legal counsel responded that it would not honor the approval while this separate litigation was ongoing. (52:1-2.)

The state petitioned the court of appeals to review the circuit court's nonfinal discovery order. The court of appeals denied the state's petition, finding it had not satisfied the criteria for a permissive appeal. Wis. Stat. § 808.03(2).

This Court granted the state's petition for review from the order denying leave to hear the appeal from a nonfinal order. The Court further instructed the parties to brief the merits of the appeal, not simply whether the court of appeals erroneously exercised its discretion when denying the state's petition to appeal the nonfinal order.

ARGUMENT

I. Jendusa is entitled to the exculpatory data under ch. 980's discovery provisions.

Jendusa is entitled to information in the DOC's database under three provisions of ch. 980's discovery statute, which require disclosure of (1) exculpatory evidence, (2) raw data used for testing that will be admitted at trial, and (3) raw data collected as part of a test that will be admitted at trial.

A. This Court reviews a circuit court's discovery order for an erroneous exercise of discretion.

"The ends of justice and civil peace are best served when our trial procedure results in an informed resolution of controversy. The basic objective of our trial system, then, is the ascertainment of the truth, whether by court or jury, on the basis of those factors legal and factual, best calculated to effect a decision which comports with reality. The thought, of course, is that justice can more likely be done if there is a preliminary determination of the truth of facts." *State ex rel. Dudek v. Circuit Court for Milwaukee Cty.*, 34 Wis. 2d 559, 576, 150 N.W.2d 387 (1967). "Thus the function of pretrial discovery is to aid, not hinder, the proper working of the adversary system." *Id.* "[T]o use the adversary system to shield facts necessary to an enlightened decision would defeat the fundamental objective of the system." *Id.* at 57.

This Court reviews "the circuit court's discovery order for an erroneous exercise of discretion.

Borgwardt v. Redlin, 196 Wis.2d 342, 350, 538 N.W.2d 581 (Ct. App.1995). "The burden is on [the appellant] to show that the trial court misused its discretion and we will not reverse unless such misuse is clearly shown." *Lane v. Sharp Packaging Sys., Inc.*, 2002 WI 28, ¶19, 251 Wis. 2d 68, 88, 640 N.W.2d 788.

Contrary to the state's claim, this is not an issue of statutory interpretation subject to de novo review. (Petitioner's Brief at 10-11.) The parties do not dispute the language of the statute; rather, the dispute centers on whether the circuit court properly concluded that the data was discoverable. This is a matter left to the circuit court's discretion. *Burnett v. Alt*, 224 Wis. 2d 72, 83, 589 N.W.2d 21 (1999) ("A circuit court has discretion whether to compel discovery.")

B. Jendusa is entitled to the DOC data under ch. 980's discovery statute.

The circuit court acted within its discretion when ordering the state to disclose data showing its witness was overestimating Jendusa's recidivism risk. The court found Tyre's testimony incredible, and properly concluded that the low rate of recidivism for Wisconsin sex offenders warranted disclosure of the data DOC compiled from SPEs.

1. The data is discoverable because it is exculpatory.

The state is required to disclose the DOC data because it is exculpatory. The ch. 980 discovery statute requires the prosecuting attorney to disclose "[a]ny exculpatory evidence." Wis. Stat.

§ 980.036(2)(j). Jendusa agrees with the state that this means "the prosecuting attorney must disclose evidence either that tends to show the person does not meet the criteria for commitment or impeaches a witness." (Petitioner's Brief at 14.)

The data that the circuit court has ordered the state to disclose satisfies both definitions.

The data is exculpatory because it tends to show Jendusa is unlikely to reoffend. The state bears the burden of proving Jendusa is "more likely than not" to commit an act of sexual violence in the future. Wis. Stat. § 980.01(1m), (7). Thus, any evidence tending to show he is less likely to reoffend is exculpatory.

Tyre testified that a preliminary review of the data shows rates of re-offense that are much lower than 50%. He testified that of 913 offenders evaluated for ch. 980 commitment, only seven percent were convicted of a new sexual offense (including offenses that do not qualify under ch. 980—meaning the true rate may be even lower). (47:48-49.) Tyre tried to blunt the impact of this low rate, explaining that this was only a preliminary assessment, but his explanations do not alter the exculpatory nature of the evidence. Rather, they are matters for a jury to consider.

Moreover, Thornton testified that the additional assessment Tyre was contemplating may be unnecessary or improper. (45:63-64.) For example, contrary to Tyre's claim, the data did not need to be "scrubbed" to account for individuals who passed away because the life expectancy of a sex offender is a

legitimate consideration in their likelihood to reoffend. (45:63-64.) Even accounting for the possibility that the base rate rises after further analysis, Tyre's testimony was sufficient to support the circuit court's discretionary discovery order. The seven percent base rate that Tyre identified was nearly a third of the base rate for non-American high-risk/high need offenders, and even slightly below the Static-99R's routine sample of all offenders. (47:49-50.)

Similar studies in other jurisdictions confirm that this data is exculpatory. A study of persons released from California's sexually violent person program *without treatment* "had just a 6.5% rate of contact sex crimes during an almost five-year exposure in the community." Lave, *supra*. Similarly, a study of Florida sex offenders recommended for commitment found "[o]ver 90% of these men are not detected to sexually recidivate within 5 years after their release, and by 10 years after release their detected-sexual-recidivism rate is no greater than that of randomly selected sex offenders." Gregory DeClue & Amanda Rice, *Florida's released "Sexually Violent Predators" are not "High Risk,"* 8 Open Access Journal of Forensic Psychology, 22, 45 (2016).

These studies reflect a systemic overestimation of recidivism for sex offenders, and Tyre's examination of the Wisconsin-specific data confirms that the same overestimation is happening under ch. 980. Thornton testified to this very concern:

> So there's a range of studies which give us reason to be concerned that if the kind of data Dr. Tyre was describing was analyzed properly and made

> available, it would lead us to think that the base rate in Wisconsin is lower than has been assumed and that would affect likely the commitment recommendations of psychologists in relation to people who are, as it were, on the margin. That is to say, people who are seen as just meeting the risk criteria, but not by very much. And there are quite a significant number of individuals like that.

(45:58-59.) The state may seek to dispute these statistics, but that is a matter for the jury to resolve, not the court. Jendusa has made a threshold showing that the evidence is exculpatory, and the circuit court acted within its discretion to find the evidence exculpatory and discoverable. Therefore, Jendusa is entitled to this exculpatory information before being indefinitely and involuntarily committed by the state.

The evidence is also exculpatory because it could be used to impeach Tyre, or any other witness the state calls to prove Jendusa is more likely than not to reoffend. Tyre concluded that Jendusa should be compared to the high-risk/high-needs subgroup of offenders. (47:50.) The DOC data could be used to impeach Tyre's decision to compare Jendusa to that subgroup. The DOC data shows the base rate for all Wisconsin offenders (regardless of Static-99R score) is lower than the base rate for all offenders considered in the Static-99R, supplying a legitimate basis for Tyre to be impeached with the Wisconsin-based data. Tyre admitted that a low base rate among Wisconsin offenders could be used, not only to impeach his own opinion, but to impeach use of the Static-99R altogether (45:45); therefore, the circuit

court acted within its discretion by requiring disclosure of the exculpatory data.

The state argues: "Here, what would 'tend to prove or disprove' whether Jendusa meets the criteria for commitment is the score he achieves on actuarials, not the data itself nor the new base rate sample Jendusa wants to create with it." (Petitioner's Brief at 13.) But Jendusa's score on any actuarial instrument is meaningless without a sample of offenders to compare him to. (45:18-19.) If Tyre told a jury that Jendusa scored a six on the Static-99R, the jury would have no useful information about his likelihood to reoffend. It is only after Tyre compares Jendusa against another group of individuals that the score takes on meaning.

The data in the state's possession is exculpatory because it shows the group Tyre wants to compare Jendusa to is reoffending much more frequently than Wisconsin-based offenders reoffend; meaning Tyre is overstating Jendusa's likelihood to reoffend. Tyre compared Jendusa to a subgroup of the highest risk offenders, a group made up entirely of non-American offenders. (45:44, 57-58; 47:50.) But this group reoffended three times as often as the Wisconsin-based data, and Thornton, the creator of the Static-99R, testified that it would be preferable to use a local sample, if available. (45:55, 69-70, 72-73; 47:49-50.) This is an important subject on which the defense could impeach Tyre.

The state claims Jendusa is only entitled to data that is "apparent[ly] exculpatory." (Petitioner's Brief at 14.) For support, the state cites two cases

that take that phrase from *Arizona v. Youngblood*, 488 U.S. 51 (1988). But *Youngblood* only requires a defendant to show that evidence is "apparently exculpatory" when asserting a *Brady* violation after evidence has been destroyed. *Id.* at 56 n.*. That heightened burden exists to prevent a convicted defendant from obtaining a windfall. A convicted defendant cannot obtain relief by belatedly claiming that properly destroyed evidence *may* have been exculpatory; he must show that the evidence was apparently exculpatory, or that it was destroyed in bad faith. *State v. Luedtke*, 2015 WI 42, ¶39, 362 Wis. 2d 1, 863 N.W.2d 592. The court has not held a defendant to that standard when he seeks exculpatory evidence that is readily available. And Jendusa is in no position to obtain a windfall; he is merely seeking data that would inform a more accurate assessment of his likelihood to reoffend.

The state also claims raw data cannot be exculpatory because, without analysis, it is meaningless. (Petitioner's Brief at 14.) Indeed, the data itself is not exculpatory, but the state cannot ignore the testimony from Tyre, its own expert, and the head of the Chapter 980 Forensic Evaluation Unit, that the data showed a base rate significantly lower than the base rate he used to anchor his evaluation of Jendusa. (1:65-67; 47:48-49.) The state cannot knowingly suppress exculpatory data in its possession where the analytical results of the data are unfavorable. "A criminal defendant has a right to raw data, too, should it be exculpatory." *Com., Cabinet for Health & Family Servs. v. Bartlett*, 311 S.W.3d 224, 228 (Ky. 2010).

It was within the circuit court's discretion to determine that this data was exculpatory, and the state is unable to show that the court erroneously exercised its discretion. *Borgwardt*, 196 Wis. 2d at 350 ("A trial court's decision whether to order discovery is vested in its sound discretion.), *see also Shibilski v. St. Joseph's Hosp. of Marshfield, Inc.*, 83 Wis. 2d 459, 471, 266 N.W.2d 264 (1978). The circuit court properly considered Tyre's and the state's potential motives to suppress the evidence (47:65; 48:2-3), and there was ample evidence for the court to properly conclude that it would be exculpatory both because it would tend to show Jendusa did not meet the criteria for commitment, and that it could be used to impeach Tyre.

2. The data was discoverable under Wis. Stat. § 980.036(5).

The data was also discoverable under Wis. Stat. § 980.036(5), which states: "On motion of a party, the court may order the production of any item of evidence or raw data that is intended to be introduced at the trial for testing or analysis under such terms and conditions as the court prescribes."

This provision is distinct from subsection 980.036(2), which lists the materials and information that the prosecutor must disclose if "within the possession, custody, or control of the state." Wis. Stat. § 980.036(2). In contrast, this raw data is discoverable only "on motion of a party," and with a court order. There is no requirement that the data be in the state's possession. Here, Jendusa moved for

the raw data (21), and the court ordered that it be disclosed for testing and analysis. (31; App. 101.)

The state argues this statute does not apply because "Jendusa specifically stated that he did not intend to introduce this data at trial." (Petitioner's Brief at 12-13.) In support, the state does not cite a specific statement by Jendusa's counsel, but rather a six-page section of a transcript, but nowhere within does Jendusa say he will not introduce the data (48:8-13.) Rather, Jendusa's counsel explained to the court how he anticipated having the data analyzed, but never explained that it would not be admitted at trial. (Petitioner's Brief at 13.) Jendusa's counsel explained that the data would be "de-identified" for analysis (meaning personal identifying information would be removed (48:9)), but data on other inmates' scores on actuarial instruments would still be used at trial when discussing Jendusa's likelihood to reoffend.

The state's reading of Wis. Stat. § 980.036(5) is unreasonable. The state suggests this statute only applies if a party seeks to introduce the raw data itself, not the results of testing or analysis based on the raw data. Statutory language must be interpreted "reasonably, to avoid absurd or unreasonable results." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110.

Raw data is frequently unhelpful to a fact finder in the absence of testing or analysis. For example, Jendusa's score on the Static-99R means

nothing if not subject to further analysis with samples of other offenders. (45:18-19.)

"Context is important to meaning. So, too, is the structure of the statute in which the operative language appears."*Kalal*, 2004 WI 58, ¶46. The statute does not permit a party to discover raw data for the sake of possessing raw data. Rather, it specifically makes raw data discoverable "for testing or analysis." Wis. Stat. § 980.036(5). Therefore, the more reasonable reading of the statute is that raw data is discoverable if a party intends to introduce the results of testing or analysis of the data. In this case, Jendusa intends to admit his expert's analysis of the data in order to show that he is unlikely to reoffend; therefore, the data is discoverable.

If the state's reading is correct, then a party seeking raw data would be incentivized to fabricate an intent to use the raw data at trial, when all that it really seeks to introduce is the analysis. Jendusa's counsel could have told the trial judge that he would leave the identifiers on the data, and submit the data to the jury as part of its presentation of Jendusa's recidivism risk. Under the state's reading, that assurance would be enough to entitle Jendusa to the raw data. But in the interest in minimizing the use of personal identifying information, Jendusa has reasonably agreed to eliminate that portion of the raw data before presenting his analysis to the jury. (48:9.)

The most reasonable reading of the statute requires disclosure of raw data where a party intends to admit the result of testing or analysis of that data.

Here, Jendusa intends to admit the results of his expert's analysis of the data, so the data is discoverable.

3. The data was discoverable under Wis. Stat. § 980.036(2)(h).

The state must turn over: "The results of any physical or mental examination or any scientific or psychological test, instrument, experiment, or comparison that the prosecuting attorney intends to offer in evidence at the trial or proceeding, and *any raw data that were collected, used, or considered in any manner* as part of the examination, test, instrument, experiment, or comparison." Wis. Stat. § 980.036(2)(h) (emphasis added). The data is discoverable under this provision because the raw data here was collected as part of Tyre's SPE of Jendusa, and compiled for examination with other SPE data. It is irrelevant that the state does not intend to introduce the results from its data collection (Petitioner's Brief at 12); the statute requires disclosure of "any raw data" that were collected, regardless of intent to admit the results at trial. The prosecutor is only permitted to withhold "the results" of the test or examination if they will not be used at trial; the prosecutor may not suppress the underlying data. Further, the state seemingly intends to introduce Tyre's opinion, and intends to admit evidence of Jendusa's likelihood to offend, so it is required to disclose raw data implicating his likelihood to reoffend.

II. The DOC's database of SPE information is discoverable because it is "in the state's possession."

The DOC is part of "the state" under the discovery statute, so the state is required to disclose the data under the discovery rules in Wis. Stat. § 980.036(2)(j) and (h) and pursuant to *Brady v. Maryland*. *State v. Wayerski*, 2019 WI 11, ¶35, 385 Wis. 2d 344, 922 N.W.2d 468 ("a defendant has a due process right to [exculpatory and impeachment evidence] that is in the State's possession."). The discovery statute requires the prosecuting attorney to disclose "material or information [that] is within the possession, custody, or control of the state." Wis. Stat. § 980.036(2). The DOC is the state agency responsible for investigating whether an inmate should be committed under ch. 980, it refers commitments for prosecution, and its employees testify for the state recommending commitment. The DOC's close ties to the investigation and prosecution of ch. 980 commitments makes it a part of "the state" under the discovery statute.

A. The prosecutor is required to disclose discoverable evidence possessed by a state agency.

The state must disclose the DOC-collected data because the unambiguous language of the statute requires it to turn over information possessed by "the state." The DOC, as a state agency, is indisputably a part of the state; therefore, the plain language of the discovery statute requires disclosure. The statute requires the prosecutor to turn over all materials

"within the possession, custody, or control of *the state*." It is not this Court's role to question the wisdom of the legislature's decision to require the state to turn over any exculpatory information in its collective possession. The statute's plain language applies to the state as a whole.

The state asserts, without any supporting argument, that this would be an impossible standard. (Petitioner's Brief at 17.) But there is nothing impossible about it—and the statute demands it. In practice, the state will only have to turn over records from the DOC—which investigates and recommends cases for commitment (43:8-9; 45:12)—and the DHS—which confines and examines candidates for commitment and those already committed. Wis. Stat. § 980.04.

The state's argument that this would make the prosecutor responsible for uncovering information possessed by any state agency is a red herring. There is no serious concern that the Department of Natural Resources or the Department of Tourism will need to scour their files for potentially exculpatory evidence. Ch. 980 civil commitments are initially investigated by the DOC and the person is eventually transported to, and evaluated by, DHS. In every case, these will be the only agencies with information pertaining to ch. 980 commitment, and the discovery statute requires disclosing exculpatory information in their possession.

"Ours is a society of written laws. Judges are not free to overlook plain statutory commands . . . ." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1754 (2020).

The statute is clear that the prosecuting attorney must turn over information in the state's possession and the DOC is part of the state.

B. The prosecutor is required to disclose discoverable evidence in the DOC's possession because of its central role in prosecutions under ch. 980.

Even if the Court applies a narrower definition of "the state," the prosecutor must still disclose information in the DOC's possession. The state acknowledges that in criminal cases, "the state" includes other prosecutorial and investigative agencies, "like police agencies or other state agencies tasked with investigating criminal allegations." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

The DOC is so intimately intertwined with the pre-prosecution and prosecution of commitment under ch. 980 that its role is easily analogized to that of police in criminal cases. Jendusa was eligible for commitment because he was in DOC custody. Wis. Stat. § 980.015(2). Tyre and the four psychologists he supervises evaluate every inmate convicted of a qualifying offense with the specific purpose of determining whether they qualify for commitment under ch. 980. (45:11-12.) As part of that evaluation, they review "everything contained in their [D]epartment of [C]orrections files, their probation and parole file. Often times it involves making contact with the district attorney's offices where someone has been prosecuted to see if there's additional information in those files." (43:8-9.) They will also investigate out-of-state records when

necessary. (43:8-9.) Those who are recommended for confinement are then referred to the Department of Justice for prosecution. (45:12.)

Jendusa's specific prosecution under ch. 980 would not be possible without the DOC. Tyre—a DOC employee—relied exclusively on DOC records to conclude Jendusa should be committed:

> The following materials were reviewed in preparation of the present Special Purpose Evaluation. The subject's institution files, including his Social Service file, Legal file and Psychological Services file. In addition, the undersigning examiner had an opportunity to review the subject's probation and parole file. It is the opinion of the undersigning examiner that the records utilized in the preparation of present evaluation were of sufficient quantity and quality so as to provide the basis for the opinions contained herein. Additionally, the records utilized are consistent with those kept in the ordinary course of business by the Wisconsin Department of Corrections and with those routinely utilized when completing a Special Purpose Evaluation.

(1:62.) Tyre was the only witness called to testify for the state at the probable cause hearing to commit Jendusa. (43.)

The DOC is as integral to the state's prosecution under ch. 980 as the police are to prosecution of crime. The DOC produced records about Jendusa, his institutional adjustment, and his psychological functioning in prison. Those files were then reviewed to determine whether he met the criteria for commitment, and a referral was made to

the Department of Justice to determine whether he should be charged as a sexually violent person. (1:61-70.) This is substantively no different from the police investigating a crime, generating police reports, and referring charges to the prosecutor, who may then decide what charges to file.

The state implicitly concedes that records possessed by DHS are discoverable because DHS "is tasked with investigating whether a person is eligible for commitment." (Petitioner's Brief at 17.) But the DOC also "investigate[s] whether a person is eligible for commitment," simply at an earlier stage of the prosecution, by screening offenders, preparing SPEs and referring cases for prosecution. Moreover, the fact that DHS records are possessed by the state is not evidence that DOC records are *not* possessed by the state. There is no rule that only one state agency may possess records related to ch. 980 commitment. The DOC's essential role in the evaluation and prosecution of ch. 980 commitments means that its records must be considered in the state's possession.[3]

[3] Even if this Court finds the data is not in the state's possession, disclosure is still required by Wis. Stat. § 980.036(5), which does not require the evidence to be in the state's possession. Evidence is discoverable if the respondent seeks and obtains a court order, as occurred here. The legislature properly concluded that third parties may possess evidence relevant to recidivism, *see State v. Loomis*, 2016 WI 68, ¶¶46-66, 371 Wis. 2d 235, 881 N.W.2d 749 (discussing the DOC's use of a proprietary algorithm to predict criminogenic needs and recidivism risk), and that such evidence should be disclosed before the state seeks to commit a person who has served his sentence, and is only believed to be a risk of future crimes.

The DOC plays a crucial role in the prosecution of commitments under ch. 980, so it should be construed to be part of "the state" for such commitments. A respondent will be subject to commitment only after (1) a DOC review board has concluded that an SPE is appropriate (45:12-13), (2) a DOC psychologist has reviewed the person's DOC file, prosecutorial files, and out-of-state records (43:8-9), (3) that DOC psychologist has prepared an SPE concluding that the person should be committed for commitment (45:12-13), (4) that DOC recommendation has been referred to the Department of Justice for prosecution (45:12-13), and (5) the DOC psychologist has testified at the probable cause hearing in favor of commitment. (43.) Under these circumstances, the Court should find that the DOC is part of "the state" in commitment cases under ch. 980.

III. No state or federal privacy statute prohibits disclosure of the DOC data to Jendusa.

No state or federal law prohibits Jendusa from receiving information in the DOC's database. First, Jendusa does not need any protected health information, and he would stipulate to an amended order requiring disclosure of the non-health information that he requested from the DOC under Executive Directive 36. (53:28.) Second, the SPE database does not include any protected health information because it is comprised entirely of data involuntarily collected from inmates in order to determine whether they meet the criteria for commitment; it is not medical information obtained

for a voluntary treatment purpose. Finally, Jendusa's counsel has already been granted access to the data pursuant to Directive 36, the DOC's preexisting protocol for obtaining protected health information, so it was proper for the circuit court to authorize disclosure. (27:1; 47:23.)

A. Jendusa is not seeking health information, regardless of its protected status.

The state laboriously discusses state and federal laws generally prohibiting disclosure of patient health information. (Petitioner's Brief at 19-28.) The state claims these laws prohibit disclosure of the DOC data—even though the information is used to assess commitment, not to provide medical services—because the database includes mental health and substance abuse diagnoses. (Petitioner's Brief at 22, 25.)

The circuit court ordered the DOC to disclose the complete, un-redacted spreadsheet, (31; App. 101), but Jendusa only seeks names and birthdates (to identify recidivists), and scores on actuarial instruments and the information comprising those scores (to assess recidivism risk). (44:29-30, 32; 53:28.) Jendusa does not need diagnostic information, substance abuse information, or any other health information that may be contained in the spreadsheet. (44:12; 45:64.)

As argued below, none of the information kept in the DOC's spreadsheet is protected because it is not a genuine health record. Nevertheless, Jendusa is not seeking mental health or substance use

information because it is not necessary to determine recidivism of inmates referred for an SPE. Therefore, Jendusa asks this Court to remand to the circuit court with instructions to amend its order to exclude from disclosure information in the database revealing mental health and substance abuse diagnoses.

B. State and federal privacy laws do not apply to the DOC data because the information is collected for purposes of a compulsory evaluation for civil commitment, not voluntary treatment.

Disclosure of the data would not violate any state or federal law because the DOC's database of compelled information is not a legitimate health record.

HIPPA generally protects against disclosure of protected health information (PHI). PHI includes information that "[i]s created or received by a health care provider, health plan, employer, or health care clearing house" *and* "[r]elates to the past, present, or future physical or mental health or condition of an individual." 45 C.F.R. § 160.103. The state *defines* PHI, but makes no argument that disclosure of the data is prohibited by HIPAA. (Petitioner's Brief at 19-20.)

Federal law also generally prohibits disclosure of substance abuse information, but only when that information is collected in order to "provide[] substance use disorder diagnoses, treatment, or referral for treatment." 42 C.F.R. § 2.11; 42 U.S.C. § 290dd-dd-10. The state argues that disclosure of the DOC data violates these regulations, colloquially

referred to as Part 2. (Petitioner's Brief at 22.) The state makes no argument that the DOC's database was "created or received by a healthcare provider," or that the data DOC collects is to be used for substance abuse diagnosis or treatment. And there would be no argument for the state to make. The data is not compiled to "provide[] substance use disorder diagnoses, treatment, or referral for treatment." 42 C.F.R. § 2.11. The SPE is not used for treatment, or even to deliver a substance abuse diagnosis to a willing patient. The SPE information is collected as part of a compulsory evaluation to determine whether a person should be committed involuntarily, not to provide substance-abuse services.

The state's reliance on state statutes fails for the same reason; the SPE database does not satisfy the definition of any category of protected record. Wisconsin statutes generally protect treatment records and patient health care records. Treatment records are "records that are created in the course of providing services to individuals for mental illness, developmental disabilities, alcoholism, or drug dependence . . . ." Wis. Stat. § 51.30(1)(b). But the SPE data is not kept "in the course of providing services," it is kept in the pursuit of involuntary civil commitment. The evaluations summarized in the DOC database are conducted, not for the purpose of providing treatment, but instead for the purpose of offering an opinion as to the ch. 980 legal requirements. Therefore, it falls outside the definition of a "treatment record" under Wis. Stat. § 51.30.

The DOC data also fails to satisfy the definition of "patient health care records." Patient health care records includes "all records related to the health of a patient prepared by or under the supervision of a health care provider . . . ." Wis. Stat. § 146.81(4). A "patient" means "a person who received health care services from a health care provider." Wis. Stat. § 146.81(3). An inmate subjected to an SPE is not a "person receiv[ing] health care services," so an SPE cannot be a health care record. Again, the DOC psychologists conducting these evaluations are performing a legal function, regardless of the subject's consent, Wis. Stat. § 980.015(2); the evaluator is not providing services related to the inmate's health. The evaluator is tasked with determining whether the inmate meets the criteria for commitment, not providing health care services. Therefore, the DOC's SPE data is not a patient healthcare record, and it does not fall within any confidentiality provision.

C. Even if the Court finds that the involuntarily collected data is protected, Jendusa has been approved to access the confidential information in the database.

This Court should affirm the circuit court order to disclose the un-redacted data because Jendusa has already been approved to receive that data. (27:1; App. 102.) The state concedes that confidential health information may be disclosed for legitimate research purposes. (Petitioner's Brief at 25.) In Wisconsin, the process for applying for this confidential health information is set forth in Executive Directive 36. (Pet. App. 282.)

At the circuit court's suggestion, Jendusa applied for the SPE data pursuant to Directive 36. (44:41-42; 47:57; 53:5-10.) Jendusa's request was approved by the Research Review Committee (27:1), but the data was never disclosed. (53:3-4.)

The state claims Jendusa "abandoned his research request because he did not want to be bound by [Directive 36's] restrictions." (Petitioner's Brief at 27.) This is demonstrably false. Jendusa's request under Directive 36 was approved, and he diligently pursued the data pursuant to that approval. (27:1; 53:18-32.) However, the DOC has refused to honor the approval, and has indicated it will continue to do so while this litigation is ongoing. (52:1-2.)

But this litigation should have no bearing on Jendusa's separate request under Directive 36. Jendusa complied with Directive 36's requirements, he responded to the DOC's request for more information, and his request was approved. The DOC's failure to disclose the data has no effect on the state's arguments that disclosure is not required by Wis. Stat. 980.036 or *Brady*. Instead, the DOC's refusal to honor this approval reflects a coordinated effort to suppress this exculpatory evidence.

The circuit court acted within its authority, having been presented with evidence of the DOC's approval of Jendusa's research request, to order disclosure of the data while Jendusa remained in pretrial custody. There was no risk that disclosure would violate any state or federal privacy law because the DOC Research Review Committee had already concluded that Jendusa's request satisfied

the research exceptions to those laws. (27:1; 53.) The DOC's approval under Directive 36 remains in effect, so no confidentiality rule would be violated by ordering disclosure of the data. Therefore, this Court should affirm the order for disclosure of the un-redacted data.

D. The circuit court order does not violate *Alt* by instructing Thornton to conduct research that he agreed to conduct.

Finally, the state argues the circuit court order was improper because it ordered the defense expert, Thornton, to analyze the SPE data to determine a base rate of recidivism. (Petitioner's Brief at 28-29.) In support, the state cites *Burnett v. Alt*, 224 Wis. 2d 72, 589 N.W.2d 21 (1999). *Alt* has no bearing on this case because it prohibited the *involuntary* appointment of an expert witness, *id.* at 86-87, which is not the case here, where Thornton has agreed to his appointment to analyze the recidivism data.

Even if this Court concludes *Alt* prohibits the circuit court from ordering Thornton to analyze the data, this Court should remand with instructions to amend the order to remove that command, leaving Thornton to analyze the data strictly voluntarily. The propriety of this provision of the circuit court's order is not otherwise fatal to the order that the data be disclosed.

IV. *Brady v. Maryland* applies to ch. 980 proceedings, and requires the state to disclose the exculpatory data in its possession.

A. Standard of review.

Whether *Brady v. Maryland* should apply in ch. 980 proceedings is a question of law that this Court reviews de novo. *Wayerski*, 2019 WI 11, ¶35 ("we independently review whether a due process [*Brady*] violation has occurred, but we accept the trial court's findings of historical fact unless clearly erroneous.").

B. This Court should hold that due process requires the state to disclose exculpatory evidence under *Brady* when seeking involuntary commitment under ch. 980.

"[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979). *Brady* applies to persons facing involuntary civil commitment because it is a protection guaranteed by the Due Process Clause, not the rights directed only to criminal defendants in the Sixth Amendment. *Brady* is not premised on a defendant's constitutional right to compulsory process or confrontation; it is based on the person's right not to be deprived of liberty without due process. *Brady*, 373 U.S. at 87. This is the same due process right that protects Jendusa from involuntary civil commitment. *State v. Post*, 197 Wis. 2d 279, 302, 541 N.W.2d 115 (1995); *Addington*, 441 U.S. at 425. Therefore, this Court should find that *Brady* applies to ch. 980 commitments.

To determine what process is due, courts balance three factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Wilkinson v. Austin*, 545 U.S. 209, 224-25 (2005).

Here, the private interest in being free from involuntary and indefinite commitment is extremely high. "Freedom from physical restraint is a fundamental right that 'has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.'" *Post*, 197 Wis. 2d at 302 (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). "Although commitment is not necessarily punitive, it deprives an individual of their right to live freely among society. Commitment also has a social stigma. The stigma is punctuated here because an individual facing commitment must bear the label of "[sexually violent person]." *United States v. Edwards*, 777 F. Supp. 2d 985, 990-91 (E.D.N.C. 2011).

Next, the risk of erroneously detaining an individual is significant, particularly in light of Tyre's preliminary conclusion that those evaluated for SPEs in Wisconsin have a base rate for re-offense of only seven percent. (47:48-49.) Tyre concluded that Jendusa satisfied the criteria for commitment by comparing him to the recidivism rates of a group of

non-American offenders. (47:50.) The base rate of recidivism amongst Wisconsin offenders suggests Tyre significantly overestimated Jendusa's risk, and creates a considerable danger that Jendusa, or another similarly situated person, could be erroneously detained. The risk of erroneous detention is magnified considerably if the state is permitted to continue suppressing the exculpatory evidence in its possession.

Finally, the state has no legitimate interest in withholding exculpatory evidence in its possession. Applying *Brady* in ch. 980 cases imposes virtually no burden on the state because it merely requires the state to disclose exculpatory evidence, which is already required by Wis. Stat. § 980.036(2)(j). Moreover, as discussed above, there is no practical concern that exculpatory information will exist outside of the DHS, the DOC, or the criminal prosecutor's file. All respondent-specific information from the DOC and DHS can readily be turned over, and generally is turned over. Insofar as the DHS or DOC engages in ch. 980-specific research, it should be prepared to disclose that information when it is exculpatory. The state has a legitimate interest in protecting the public "from those people who are likely to harm others." *Edwards*, 777 F. Supp. 2d at 995. But "[a]llowing the Government to trample the rights of one group weakens the rights of all of society. The Government cannot be permitted to establish such a precedent." *Id.* at 996.

As discussed in sections I and II of this brief, the data here is exculpatory, both because it tends to show Jendusa does not satisfy the criteria for

commitment and because it could be used to impeach the state's witnesses, and the evidence is in the state's possession because it is being kept by the DOC, a state agency that is the state's preliminary investigator and advisor in ch. 980 commitments.

C. Applying *Brady* to ch. 980 commitment is consistent with practice in other jurisdictions.

This Court should adopt the reasoning from other jurisdictions, applying *Brady* to civil commitments of sex offenders. These courts properly recognized the "compelling liberty interest in avoiding both detainment as well as civil commitment," and the need for *Brady* protections to protect respondents' due process rights. *Edwards*, 777 F. Supp. 2d at 990.

The North Carolina federal district court in *Edwards* addressed the issue when the government failed to turn over an exculpatory report from one of its experts in a sex offender civil commitment case. *Id.* at 989. The court thoroughly analyzed the respondent's liberty interests, *id.* at 990-91, the requirements imposed by due process, *id.* at 991-95, and weighed those considerations against the government's countervailing interests in not disclosing the exculpatory evidence, *id.* at 995-96. The court concluded that "[o]rdinary rules of civil procedure are inadequate here because civil commitment hearings are not an ordinary civil matter. At issue is not a claim for damages or equitable relief. Instead, the issue is whether someone will be locked away." *Id.* at 994. Therefore,

the court held that *Brady* must be applied to the civil commitment of sex offenders.

Appellate courts from Illinois and California have reached the same result. In Illinois, the court acknowledged that *Brady* generally only applied to criminal proceedings, but noted that the serious due process concerns implicated by indefinite civil commitment required more protection for respondents than for litigants in ordinary civil cases. *People v. Howe*, 21 N.E.3d 775, 783-84 (Ill. App. Ct. 2014). The court considered the burdens this would impose on the prosecution, but concluded that due process required disclosure of exculpatory evidence: "Given the significant liberty interests at stake in cases under the Act, and considering the importance of scrupulously ensuring the fairness of judicial proceedings that may result in indefinite commitment of a person determined to be sexually dangerous, we find the principles of *Brady* apply in this type of case." *Id.* at 784 (internal quotations and citation omitted).

In California, the court concluded that "a prosecution's *Brady* discovery obligations logically apply in" sexual offender commitment cases because "civil commitment proceedings fundamentally involve a deprivation of liberty comparable to criminal proceedings." *People v. McClinton*, 240 Cal. Rptr. 3d 775, 799 (Ct. App. 2018) (depublished).

The state argues these decisions should carry little weight because they lacked analysis, and extended *Brady* by "simply observing significant liberty interests at stake." (Petitioner's Brief at 33)

(quotation marks omitted). First, a claim that the *Edwards* decision lacked analysis grossly misrepresents the court's detailed consideration of both the respondent's interests and the government's interests. Second, the analysis is sufficiently logical that in-depth discussion is not necessary. A person facing involuntary civil commitment is entitled to considerable due process rights in light of the significant liberty interests at stake. The Supreme Court held in *Brady* that due process requires a prosecutor to disclose evidence favorable to a person facing a loss of personal liberty. Therefore, the right to exculpatory evidence should extend to involuntary civil commitment in order to protect the accused's weighty liberty interests. Due process demands that the government—"a potent entity with vast resources"—not be permitted to seek involuntary and indefinite commitment of a person while suppressing evidence tending so show that the commitment is improper.

Moreover, the cases from Washington and Texas—where *Brady* protections were not applied—did not actually analyze the issue at all. In Texas, the respondent sought to depose a state expert under *Brady*, but the trial court quashed the subpoena. *In re Commitment of Alexander*, 2013 WL 2444184, *1 (Tex. App. May 30, 2013). The appellate court reviewed this as a discovery question, not a legal question, and deferred to the trial court's discretionary decision. *Id.*, *1. The court simply stated that the rules of civil procedure applied to civil commitment, and concluded the trial court had not abused its discretion when quashing the subpoena. *Id.*, *1-*2. The court did not consider whether *Brady*

offered additional protections beyond the rules of civil procedure.

Likewise, the Washington court did not address the issue, holding that the respondent could not show that the suppressed evidence was material, so even if *Brady* applied, he would not be entitled to relief. *In re West*, 147 Wash. App. 1017, 2008 WL 4867147, *5 (2008).

D. The state's arguments that *Brady* should not apply to ch. 980 commitments are unpersuasive.

The state argues it does not need to turn over data where the suppressed evidence might simply lead to a favorable discovery. (Petitioner's Brief at 28). But the evidence in this case is not merely potentially exculpatory. Tyre has established that it is, in fact, exculpatory. The base rate of re-offense for persons subjected to an SPE is only seven percent (47:48-49), far below the threshold for commitment, and one third the base rate for offenders in the high-risk/high-needs group that Tyre used to justify committing Jendusa. (47:50.) As argued in Section I, this evidence is exculpatory because it tends to show that Jendusa does not meet the criteria for commitment, and because it could be used to impeach Tyre. Jendusa can legitimately argue that comparison to Wisconsin offenders is the most reliable way to assess recidivism risk (45:55, 69-70, 72-73; 47:49-50), so reliance on other samples is a proper subject for impeachment.

The state also complains that *Brady* has no bearing in the pretrial context. (Petitioner's Brief at

30-31.) Indeed, *Brady* is generally a post-conviction remedy, where a defendant alleges a *violation* of *Brady*. *See, e.g., Strickler v. Greene*, 527 U.S. 263, 281 (1999). But *Brady*'s command is directed at the prosecution's pretrial obligation to disclose evidence, so while this case does not present a vehicle to determine whether the state has already violated *Brady*, it remains an ideal vehicle to define the state's constitutional obligation to disclose evidence favorable to a person facing indefinite commitment. Indeed, it would be preferable to define the state's obligations now, rather than run the risk of having a second trial if the state is found to have violated *Brady* at the first.

The state argues that *Brady* need not apply to civil commitment because it is non-punitive confinement, unlike imprisonment. (Petitioner's Brief at 31-32.) The state also points out that civil commitment is not final, because a person may seek discharge or supervised release. (Petitioner's Brief at 32.) But civil commitment's lack of finality is not a mark in the state's favor. Civil commitment is indefinite, and could plausibly last much longer than a criminal sentence. The "significant deprivation of liberty" caused by civil commitment "requires due process protection." *Foucha*, 504 U.S. at 80. And due process protects a person's right to exculpatory evidence. *Brady*, 373 U.S. at 86.

Finally, the state points out that the discovery statute already requires the prosecution to disclose exculpatory evidence under Wis. Stat. § 980.036(2)(j). (Petitioner's Brief at 33.) But the statute has no effect on Jendusa's *constitutional* rights. The criminal

discovery statute has a similar provision, Wis. Stat. § 971.23(1)(h), but that does not render a defendant's constitutional right to exculpatory evidence any more robust.

This Court should extend *Brady* to cover ch. 980 commitment proceedings. The state has no legitimate interest in suppressing exculpatory evidence before seeking to involuntarily commit an individual, and the extraordinary threat to personal liberty created by involuntary commitment warrants the application of *Brady*.

V. This Court should dismiss this appeal as improvidently granted and adhere to the longstanding rule that it will not review court of appeals' decisions denying permissive review. If the Court chooses to reach the merits, it should require the court of appeals to provide reasons for denying permissive appeals.

This case is before the Court on review of a court of appeals decision denying the state's petition for leave to appeal a nonfinal order. This Court has repeatedly held that it will not review "the court of appeals' discretionary determination to grant or deny a permissive appeal." *Leavitt v. Beverly Enterprises, Inc.*, 2010 WI 71, ¶44, 326 Wis. 2d 421, 784 N.W.2d 683; *Aparacor, Inc. v. Dep't of Indus., Labor & Human Relations*, 97 Wis. 2d 399, 403, 293 N.W.2d 545, 547 (1980); *State v. Jenich*, 94 Wis. 2d 74, 77 n.2, 288 N.W.2d 114 (1980); *State v. Whitty*, 86 Wis.2d 380, 388, 272 N.W.2d 842 (1978). Consistent with

that longstanding rule, this Court should dismiss this appeal as improvidently granted.

The court of appeals exercises discretion when deciding whether to accept a permissive appeal. *Aparacor*, 97 Wis. 2d at 403. The procedure for permissive appeals was enacted "to discourage interlocutory appeals" and to "avoid unnecessary interruptions and delay in the trial court" as well as "to reduce the burden on the appellate courts." *Bearns v. ILHR Department*, 102 Wis. 2d 70, 74, 306 N.W.2d 22 (1981).

"The language of [this Court's] case law is strong. We have stated that '[w]here the court of appeals denies permission to appeal from an order conceded by the parties to be nonfinal, no review by this court is permitted.'" *Leavitt*, 2010 WI 71, ¶45. This Court does not review these discretionary decisions because (1) this Court only reviews court of appeals decisions "which finally determine[] the matter presented," and a court of appeals order denying permissive appeal does not satisfy that requirement, *Jenich*, 94 Wis. 2d at 77 n.2, and (2) granting review of the court of appeals' decision denying a permissive appeal "would divest the court of appeals of the discretion entrusted to is by sec. 808.03(2)." *Aparacor*, 97 Wis. 2d at 404.

This Court also rejects such appeals to prevent unnecessary delays in litigation, and to discourage a flood of petitions for review to this Court. *In Interest of J.S.R.*, 111 Wis. 2d 261, 263, 330 N.W.2d 217 (1983) (quoting *Jenich*, 94 Wis. 2d at 96 (Coffey, J., dissenting). For these reasons, this Court should

adhere to its longstanding rule of denying such petitions and dismiss this appeal as improvidently granted.

However, if the Court chooses to set aside this long-standing precedent and address the merits of the case, Jendusa agrees with the state that the court of appeals should be required to exercise discretion "on a rational and explainable basis" by explaining the reasons for denying a petition under Wis. Stat. § 809.50. *State v. Gallion*, 2004 WI 42, ¶49, 270 Wis. 2d 535, 678 N.W.2d 197. "Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards." *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971).

The reasons for granting a permissive appeal are outlined in Wis. Stat. § 808.03(2). The court of appeals should hear a permissive appeal only if the appeal will: (1) materially advance the termination of the litigation or clarify further proceedings in the litigation, (2) protect the petitioner from substantial or irreparable injury, or (3) clarify an issue of general importance in the administration of justice. Wis. Stat. § 808.03(2). The court of appeals should, at a minimum, "provide… a brief explanation of why a petition does not meet any of [those criteria]." (Petitioner's Brief at 37.)

In this case, however, even though the court of appeals did not provide a reasoned explanation for

denying the state's petition for leave to appeal, this Court should still search the record for reasons to sustain the lower court's decision. *State v. Evers*, 139 Wis. 2d 424, 452, 407 N.W.2d 256 (1987).

Here, the state argues that the court of appeals should have granted review because this case presents issues "of general importance in the administration of justice." (Petitioner's Brief at 38.) Jendusa agrees that "[t]here are virtually no appellate cases, published or unpublished, addressing" discovery under Wis. Stat. § 980.036. (Petitioner's Brief at 38). But review is not warranted to analyze the unambiguous language of an unambiguous statute. Moreover, the circuit court has not ordered a "third party to provide material that does not fall under the statute"; rather, it has ordered an arm of the state to disclose exculpatory information, which falls plainly within the discovery statute.

The state also argues that not hearing the appeal would cause irreparable injury. (Petitioner's Brief at 38.) But there is no risk of irreparable harm here. As discussed above, there are no legitimate concerns that disclosure of this data would violate state or federal law. Jendusa has already been granted access to the data pursuant to the DOC's policy for disclosure of confidential records. (27:1; 47:24.) Moreover, Jendusa is willing to stipulate to an amended order granting him access to the non-health information in the database.

For these reasons, this Court should affirm the court of appeals' discretionary decision denying the

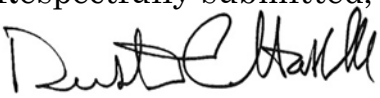
state's petition for leave to appeal, and dismiss this appeal. However, if the Court decides to reach the merits, it should require the court of appeals to explain the reasons for granting or denying permissive appeals.

CONCLUSION

For the reasons argued above, this Court should dismiss the state's appeal as improvidently granted. If the Court elects to reach the merits of the case, it should affirm the decision of the circuit court, and remand for the state to disclose the DOC database. Alternatively, Jendusa would stipulate to an amended circuit court order, granting him access only to the fields of data identified in his request under Directive 36. (53:28.)

Dated this 17th day of September, 2020.

Respectfully submitted,



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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,999 words.

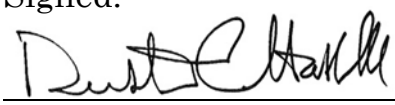
CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 17th day of September, 2020.

Signed:



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CERTIFICATION AS TO APPENDIX

I certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 17th day of September, 2020.

Signed:

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APPENDIX

INDE X
TO
APPENDIX

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