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STATE OF WISCONSIN

IN SUPREME COURT

No. 2020AP226-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JEFFREY L. HINEMAN,

Defendant-Appellant.

PETITION FOR REVIEW AND APPENDIX

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ISSUES PRESENTED

1. In cases involving credibility contests between a complaining witness (here, S.S.) and the defendant (Hineman), to what extent can a reviewing court reweigh the witnesses' credibility in assessing whether, based on omitted evidence, there was a reasonable likelihood of a different result under the *Brady* materiality or *Strickland* prejudice standards?

The court of appeals reversed a jury verdict finding Hineman guilty of first-degree child sexual assault and ordered a new trial. It concluded that a child-protective-services report that the State had failed to turn over to Hineman (and that had relevant portions summarized in a turned-over police report) was material. In assessing materiality, the court effectively reweighed each witness's credibility and testimony, though seemingly in the light most favorable to Hineman.

2. The court of appeals also reached an abandoned *Shiffra/Green* issue and ordered in camera review of S.S.'s therapy files from his private therapist because the therapist acted as a mandatory reporter.

a. Did the court of appeals have authority to reach this issue, which Hineman did not raise as a direct claim on appeal, and did it have authority to reverse the postconviction court's ruling on a basis that Hineman never advanced?

b. Was the fact that S.S.'s therapist made a mandatory report, without more, enough to satisfy the *Green* pleading standard permitting in camera review of S.S.'s therapy files "related to the report"?

The court of appeals did not address the State's argument that Hineman had abandoned his *Strickland*-based *Shiffra/Green* issue. It granted in camera review on a factual

basis different from what Hineman argued to the postconviction court or on appeal.

CRITERIA FOR REVIEW

It is not unusual for claims of sexual assault to lack physical evidence or other witnesses, and to boil down to credibility contests between the complaining witness and the defendant. When courts review alleged errors in these cases for prejudice or materiality, they are supposed to consider the effect of the error based on the totality of evidence presented at trial. Yet, reviewing courts frequently focus solely on how the improperly admitted (or excluded) evidence would impact the credibility of the complaining witness, not that of the defendant. They further base that assessment on written transcripts, ascribing no weight to the factors a jury considers in its credibility determination, including the witnesses' demeanor, delivery, body language, and tone. Effectively, the appellate court re-determines the jury's credibility determination based on a paper-only review.

That's what happened here. After a three-day trial, at which the jury weighed the testimony of nine-year-old S.S. and that of Hineman, the jury convicted Hineman of first-degree sexual assault of a child. The charges were based on allegations by S.S. that when he was six years old, Hineman touched his privates. The court of appeals reversed that jury verdict based on the State's failure to turn over a report from a county child protective services agency that precipitated the later police investigation. The court of appeals held that because the missing report could have impacted S.S.'s credibility—contrary to the postconviction court's findings that the relevant portions of the report were disclosed, without scrutiny of Hineman's credibility, and with heavy scrutiny of S.S.'s statements—there was a reasonable probability of a different outcome. The court of appeals' analysis did not honor the standards requiring a totality-of-

the-evidence analysis for *Brady* materiality and *Strickland* prejudice. Beyond the court's reaching an incorrect result, this approach disproportionately imperils jury decisions in sexual assault cases, lowering a defendant's typically high burden to prove materiality or prejudice and making reversal in these credibility-based cases more likely.

Accordingly, this first issue considering the application of materiality and prejudice standards to cases turning on credibility involves "[a] real and significant question of federal . . . constitutional law," Wis. Stat. § (Rule) 809.62(1r)(a), and a decision by this Court "will help develop, clarify or harmonize the law, and . . . [t]he question presented . . . is [one] of law of the type that is likely to recur unless resolved by the supreme court." Wis. Stat. § (Rule) 809.62(1r)(c)3.

The second issue reflects a need for this Court's guidance on what constitutes a properly raised and preserved claim on appeal. Guidance is also needed to address the scope of the reviewing courts' authority to reverse a decision of the lower court on grounds that the defendant never advanced. *See* Wis. Stat. § (Rule) 809.62(1r)(c)2. (a decision by this Court will help clarify the law on a novel issue that will have statewide impact).

Finally, to the extent that the issues here involve error correction, review is nevertheless warranted. The court of appeals threw out a jury verdict finding Hineman guilty of first-degree sexual assault of a child, one of the most serious crimes in Wisconsin. It is extremely unlikely that S.S. can participate in a new trial, in part because of the trauma Hineman has inflicted on him. Given the seriousness of the conviction, the postconviction/trial court's conclusion that Hineman received a fair trial, and the unlikelihood that the State can retry Hineman, a second look by this Court is warranted.

STATEMENT OF THE CASE

A jury found Hineman guilty of first-degree child sexual assault, sexual contact with a person under age 13. (R. 31:1.) The charge was based on disclosures by S.S. that when he was six, Hineman touched S.S.'s "front private" and "back private" over his clothes. (R. 1:1–2.) The jury saw a video of a forensic interview in which S.S. disclosed the touching. Hineman denied the allegations; both S.S. and Hineman testified at trial.

Hineman re-entered S.S.'s life when S.S. was five.

As of October 2014, S.S. lived with his father (Dad) and his father's wife; his father's mother (Grandma) also was a caregiver. S.S.'s mother was not in the picture. Hineman, who had dated S.S.'s mother through his birth to when he was 10 months old, reintroduced himself in S.S.'s life when S.S. was around five years old. (R. 78:103.) Between 2013 and March 2015, Hineman helped the family with home repairs and maintenance. To S.S., Hineman was "Uncle Jeff." Hineman considered himself a father figure to S.S. and bought S.S. gifts and took him on outings. (R. 78:44, 80, 83.)

In late October 2014, Dad fell seriously ill and was hospitalized for two weeks. (R. 78:63–64.) While Dad was in the hospital, Hineman stayed at Dad's house and took care of S.S. alone for one of those weeks. (R. 78:64, 70.)

For Christmas that year, Hineman bought a bunkbed for S.S. for him to use when he slept over at S.S.'s house. Around that time, Grandma noticed that something was not right between Hineman and S.S. (R. 78:67.) Grandma learned through Dad that S.S. "didn't want to be around" Hineman; Grandma said Hineman "would get real upset and angry." (R. 78:67, 71.) Grandma "knew something was wrong" and "kept asking" S.S. to tell her what it was. S.S. "kept saying nothing." (R. 78:67.)

In early 2015, the family and S.S.'s teachers saw distressing changes in S.S.'s behavior. (R. 78:64.) Grandma said that S.S. "was messing in his pants. Messing in the bathrooms at school. Being disrespectful. His grades were going down." (R. 78:64.)

CPS, and later the police, investigated concerns about S.S. and potentially Hineman.

In March 2015, as a result of S.S.'s behavior, CPS became involved. (R. 78:89–90.) In addition to S.S.'s other behavior, CPS learned from a mandatory reporter that S.S. had been sucking on a pen at school and told a classmate that "it feels good to have your privates sucked on." (R. 78:104–05.) When asked where he had learned that, S.S. first said he saw it in a Garfield comic or movie. (R. 78:105–06.) According to CPS, Dad said that when he talked to S.S. about the pen-sucking incident, S.S. reported that he learned it from Hineman. (R. 41:30; 48:4.) CPS memorialized this information in a report ("the March report").

That March, Dad and Grandma cut off Hineman from contacting S.S. (R. 78:65, 88.)

Law enforcement first became involved in June 2015, when CPS faxed the March report (along with additional reports from April and June) to the Racine County Sheriff's Department; Investigator Tracy Hintz was assigned to follow up. (R. 78:76.) In July, Hintz spoke to Dad and Grandma, who agreed for S.S. to have a forensic interview with a child advocacy center (CAC). (R. 78:106–08, 112.)

S.S. disclosed that Hineman touched his privates during a forensic interview and at trial.

The forensic interview of S.S. occurred in August 2015, at which S.S. disclosed that Hineman had touched his private parts. The video of that interview played at trial. (R. 78:40.) In the interview, S.S. presented as a meek, soft-spoken child. (*See generally* R. 86.) When first asked by the interviewer,

Heather Jensen, why he came to talk that day, S.S. replied, "Because—," paused, and then quietly said, "I can't remember." (R. 86 at 08:22; 41:40.) After some back-and-forth, Jensen asked, "Did something happen to your body that you don't like?" (R. 86 at 09:25; 41:41.) S.S. nodded yes immediately and responded that "Uncle Jeff" was hurting him by punching and kicking him when they were at his house watching TV. (R. 86 at 09:25–11:06; 41:41–42.)

Jensen then asked S.S. whether Hineman "ever [did] anything else that you didn't like?" to which S.S. immediately responded, "He touched my private parts." (R. 86 at 12:58–13:08; 41:44.) S.S. said that Hineman did this while they were on the couch and his parents were sleeping. (R. 86 at 13:18–28; 41:45.) S.S. said that Hineman "laughed at him," then S.S. woke his parents and told them. (R. 86 at 13:43–45; 41:45.) S.S. said that this touching occurred in winter and that Hineman did that "kind of touching" four times; later, he said it happened six times. (R. 86 at 15:54–55, 16:18–19, 30:08–25; 41:48, 59.) S.S. initially said that Hineman only touched his "front private" but later disclosed that Hineman also touched his back private. (R. 86 at 17:22–23, 19:00–06; 41:49–50.) S.S. said that the touching occurred over his clothes. (R. 86 at 19:15–52; 41:50–51.)

Jensen asked S.S. whether Hineman wanted S.S. "to do something to his privates." (R. 86 at 31:01; 41:59.) S.S. started shaking his head, then paused and said, "Yeah, but I didn't do it," when Hineman told S.S. to touch his privates with his hand. (R. 86 at 31:06–22; 41:59–60.)

S.S. also said that Hineman told him "[t]o not tell anybody" about what he did, but S.S. said that he told his mom and dad. (R. 86 at 21:21–47; 41:52.) S.S. said that Hineman was "staying" at his house and sleeping on the floor in his (S.S.'s) bedroom. (R. 86 at 21:54–22:20; 41:53.) When asked what he liked and disliked about Hineman, S.S. said that he liked Hineman because he "always used to buy me

toys," but didn't like him "[w]hen he was touching me." (R. 86 at 32:25–42; 41:61.)

When asked about the time "Uncle Jeff [was] taking care of you when your dad was away" (R. 86 at 22:25; 41:54), S.S. responded that Hineman was "taking bad care of me" by being mean, calling S.S. names, and pushing S.S. (R. 86 at 22:30–24:15, 28:45–30:04; 41:54–55). S.S. did not say that Hineman touched his privates during that time.

S.S., who was then nine, testified at trial. (R. 78:44.) He still had difficulty talking about the events at issue and acknowledged that he felt "nervous." (R. 78:48.) Ultimately, S.S. testified that "something happened" when his dad was ill and Hineman came to stay at S.S.'s house. (R. 78:46–47.) After initially repeating that he "didn't remember," he agreed that Hineman "did something to [him] that [S.S.] didn't like." (R. 78:47.) He disclosed that Hineman touched his body when they were on the couch watching cartoons. (R. 78:49.) He said it was daytime and they were alone. (R. 78:49.) "I just didn't feel right," S.S. said, because "I think he touched me on my private part." (R. 78:49.) S.S. said he used the private part to go "number one" in the bathroom. (R. 78:49–50.)

Hineman denied the allegations but made false and inconsistent statements.

Police did not begin investigating Hineman until August 2015, after S.S.'s CAC interview. The day after the interview, Investigator Hintz contacted Hineman at his home. (R. 78:81.) Hineman was not home, but while outside his apartment the police saw him in a truck that slowed past their parked squad car and drove on. (R. 78:81–82.) Within minutes, Hintz spoke to Hineman over the phone and asked him to return, but Hineman lied that he was an hour away and could not. (R. 78:82.) Within minutes, however, Hineman returned, was taken into custody, and was interviewed. (R. 78:82–83.)

Hineman told Hintz that he cared for S.S. "like he was his son" and that S.S. called him "Uncle Jeff." (R. 78:83.) Hineman bought S.S. toys, clothes, and a bunkbed. (R. 78:84–85.) Hineman said that he also gave S.S. money, that he created a savings account for S.S., and that he was saving for a boat to give S.S. when he was an adult. (R. 78:85.)

Hineman denied ever touching S.S. When Hintz asked why he thought the family cut him off and S.S. alleged the assault, Hineman suggested that the family was mad that they couldn't access the savings account he'd created for S.S. (R. 78:88.) When it was pointed out that the family cut him off months before they learned about the savings account, Hineman offered a different reason: they were mad because he stopped doing things to help Dad around the house. (R. 78:88–89.) When Hintz told Hineman that he'd been helping the family up until they cut off contact in March, Hineman didn't have an explanation. (R. 78:88–89, 91.)

Hineman testified. He generally agreed with the timelines that Grandma had described as to when he got involved in S.S.'s life, watching S.S. while Dad was hospitalized, and last seeing S.S. and his family in March. (R. 78:132, 134–35, 137, 146.) He denied ever striking or inappropriately touching S.S. (R. 78:140.) At trial, Hineman offered a new theory to explain the allegations: he saw a "significant change" in Dad after he was ill and Dad and Grandma got mad at him he expressed critical opinions. (R. 78:136–37.) At trial, Hineman also tried to downplay his involvement with S.S. and his family, denying (despite recordings to the contrary) that he described S.S. as his "son" to others and that S.S. regularly called him "Uncle Jeff." (R. 78:147–48.)

The jury found Hineman guilty. (R. 31:1.) After he was sentenced, Hineman filed postconviction motions (R. 40; 41; 55) in which he raised numerous grounds for relief, including allegations of a *Brady* violation and numerous claims of

ineffective assistance of counsel. The primary claims related to the fact that in discovery, Hineman did not receive the March report, which prompted the law enforcement investigation. In Hineman's view, the March report was important because it contained S.S.'s allegation regarding the pen-sucking incident. Accordingly, Hineman claimed that the lack of report was either a prejudicial *Brady* violation (based on the State's failure to turn it over to him)[1] or ineffective assistance of counsel (for failing to file a motion to compel production of the report).

As it relates to the court of appeals' decision and this petition, Hineman also claimed, among other allegations of ineffective assistance of counsel, that trial counsel should have filed a *Shiffra/Green* motion seeking in camera review of S.S.'s private therapy files. As a factual basis to support that claim, Hineman argued that based on the police report that counsel received, counsel should have filed a *Shiffra/Green* motion because "SJS was in counseling before the allegations surfaced in the spring of 2015 and continued in therapy afterwards," certain therapy techniques could risk creating false memories, and any discussions about Hineman or family relationships in therapy could affect the reliability of S.S.'s allegations and expose "other abusive elements in [S.S.'s] life." (R. 41:19–20.) Hineman later argued that the fact that the March CPS report reflected that S.S.'s therapist was the mandatory reporter would have supported a *Shiffra/Green* motion. (R. 55:8–9.)

The postconviction court was the same court that presided over trial. After two hearings, including a *Machner*

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[1] The State's failure to turn over the CPS reports was inadvertent: the prosecutor did not have the reports (the sheriff's office did not include them in the materials it had provided the prosecutor), and neither the prosecutor nor defense counsel followed up on that omission.

hearing at which Hineman's trial counsel testified, the postconviction court denied all the claims in a written decision and order. (R. 62.)

As for the claims related to the nondisclosure of the CPS reports, the court found that of the March, April, and June CPS reports, "[t]he March . . . report is the only report of consequence." (R. 62:6.) It said that the relevant information in that report, however, was "largely contained in the first report by Investigator Hintz," which Hineman had received in discovery. (R. 62:6.) The court explained that the March report stated "that the child had commented at school that it felt good to have your privates sucked on. The child was reported to have commented that this was information gleaned from Garfield." (R. 62:6.) It noted that "[a]ll of this information was in Inv. Hintz's reports." (R. 62:6.)

The court said that defense counsel should have received (or requested) the CPS reports before trial, but concluded that Hineman failed to demonstrate prejudice resulting from the omission because the relevant information in the March report had been reproduced in Hintz's police report: "The issue is whether harm was done. None seems to have been. The information in Investigator Hintz's report corresponded to the information in the March . . . report." (R. 62:6.)

The court further held that the information in the March report would not have allowed counsel to better cross-examine Investigator Hintz because Hintz never testified that the CPS report contained an allegation that Hineman touched S.S. The court also noted that had counsel questioned Hintz from the March report, the jury would have learned that S.S. told his Dad that Hineman had told him about oral sex. (R. 62:7.) Counsel, in the court's view, wisely "decided to let the matter drop rather than to delve into it" to avoid the danger of the jury's learning of Hineman's possible connection to S.S.'s knowledge of oral sex. (R. 62:7.)

As for the ineffective assistance claim based on counsel's failure to file a *Shiffra/Green* motion for S.S.'s records, the postconviction court concluded that Hineman merely speculated "that some of his statements in therapy would bear upon the issues at trial," and that Hineman failed to satisfy the "fact specific evidentiary showing" required under *Green* to obtain in camera review of the records. (R. 62:12.)

Hineman appealed, and the court of appeals reversed, ordering a new trial. It effectively re-weighed the relative credibility of S.S. to Hineman based on a review of the transcripts, minimizing Hineman's statements and actions that undermined his credibility, and highlighting inconsistencies in nine-year-old S.S.'s word choices and inability to nail down details of the alleged assault between the forensic interview and trial. (Pet-App. 112–14.)

It then concluded that the March report was material because it could have been used to impeach Hintz's testimony, which in its view "no doubt" bolstered S.S.'s credibility and "misled the jury" in what was a "close" case. (Pet-App. 113–20.)

The court also reached the *Shiffra/Green* issue that Hineman had raised as a basis for a claim of ineffective assistance of counsel in the postconviction motion, but that he did not pursue on appeal. (Pet-App. 121–23.) It did not address the State's argument that the claim was abandoned or Hineman's arguments to the postconviction court. Instead, the court of appeals developed a factual basis based on the fact that S.S.'s therapist was a mandatory reporter to conclude the Hineman satisfied his burden under *Green*. It ordered production and in-camera review of S.S.'s private therapy files related to the mandatory report on remand. (Pet-App. 123.)

ARGUMENT

I. Review is warranted to clarify how courts are to apply the *Brady* materiality or *Strickland* prejudice standard in cases turning on the credibility of the victim and the defendant.

The first issue involves Hineman's claim that the absence of the March 12 CPS report from discovery violated his due process rights, either based on the State's duty to turn over that report under *Brady*, or his trial counsel's failure to file a motion to compel production of the report. The issue is not whether Hineman should have obtained the report. As the State conceded below, either the prosecutor should have sought it from the police or defense counsel should have filed a motion to compel production of it. The question is whether Hineman established that the omission was prejudicial, under either of the identical standards set forth in *Brady* and *Strickland*. This is a high standard for defendants to satisfy. Yet in sexual assault cases that turn on credibility, courts tend to (as the court of appeals did here) reframe the witnesses' credibility based on their reading of the transcript, call the case "close" because it turned on credibility, and not afford any additional deference to the jury or trial court that watched the trial, saw the witnesses in person, and considered the witnesses' tone, delivery, body language, and other intangibles.

The result, in the State's view, is a thumb on the scale toward reversal in these hard-fought cases. Approaching the question of materiality or prejudice as the court of appeals did here reduces the defendant's high burden of proof, it discounts the jury's credibility determination, and it fails to account for the postconviction court's factual findings and determinations. On that last point, this approach is particularly problematic when the postconviction court, like the jury, observed the trial witnesses and formed a perspective on the proceedings that the court of appeals

cannot reproduce with its paper-only review. Accordingly, this Court's guidance is warranted on the application of this constitutional standard.

A. Materiality under *Brady* and prejudice under *Strickland* require a defendant to show a reasonable probability of a different result.

Evidence is material for *Brady* purposes "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *State v. Garrity*, 161 Wis. 2d 842, 850, 469 N.W.2d 219 (Ct. App. 1991) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). The test for materiality is the same as the test for prejudice in *Strickland v. Washington*, 466 U.S. 668 (1984). *State v. Wayerski*, 2019 WI 11, ¶ 36, 385 Wis. 2d 344, 922 N.W.2d 468.

"Impeachment evidence is *not* material, and thus a new trial is *not* required 'when the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable.'" *State v. Rockette*, 2006 WI App 103, ¶ 41, 294 Wis. 2d 611, 718 N.W.2d 269 (citation omitted). "Generally, where impeachment evidence is merely cumulative and thereby has no reasonable probability of affecting the result of trial, it does not violate the *Brady* requirement." *Id.* (quoting *United States v. Dweck*, 913 F.2d 365, 371 (7th Cir. 1990)).

The test for materiality under *Brady* and prejudice under *Strickland* both carry presumptions against reversal. Reviewing courts presume that counsel provides reasonable representation and apply "a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 690–91. Likewise, there is a "general presumption of regularity and

propriety" applied to the prosecutor's discharge of their *Brady*-mandated duties. *See State ex rel. Lynch v. County Court*, 82 Wis. 2d 454, 467–68, 262 N.W.2d 773 (1978).

It's a high burden for defendants to overcome. As *Strickland* teaches, "[c]ounsel need not be perfect, indeed not even very good, to be constitutionally adequate." *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted). That standard applies to *all* cases, regardless whether they are credibility contests. True, one serious error can support a finding of prejudice, and the relative strength of the State's case factors into the materiality and prejudice analyses. But simply calling a credibility case "close" and deeming any missing evidence that could possibly bear on credibility a game-changer can't be a sound application of the materiality or prejudice standards. Otherwise, it is hard to see how any a credibility-based sexual assault trial would withstand this sort of challenge on appeal. Rather, to show prejudice, the defendant has to show exactly how the complained-of error undermined the reliability of the proceedings. And when the case turns on a credibility determination, the totality of the evidence considered must include not just the transcribed testimony, but also the less-tangible things that the jury considered observing the witnesses.

Here, the court of appeals effectively reweighed credibility to the extent that it failed to consider the factors outside a clinical reading of the transcript that could have affected the jury's credibility determination, for failing to defer to the postconviction court's findings, and for speculating on the relative effect that the missing report could have had in this case. And in doing so, it ordered a new trial based on non-production of a document whose relevant contents *were* disclosed to the defense in another report and that, as the circuit court found, may very well have harmed the defense had it been introduced at trial.

B. The court of appeals' reasoning effectively usurped the jury's credibility determination by reframing the facts in the light most favorable to Hineman.

To start, the court of appeals correctly stated that this case came down to whether the jury found S.S. or Hineman more credible. (Pet-App. 112.) But the court's analysis took an abrupt turn when it effectively reframed the facts in the light most favorable to Hineman.

For example, it acknowledged that Hineman avoided the police and lied to them when they first contacted him in August and that Hineman suggested that the allegations and the family's cutting him off stemmed from other slights that couldn't have been the cause. (Pet-App. 112.) But it dismissed the significance of those things, saying that those acts had innocent explanations as well. (Pet-App. 112.)

S.S., on the other hand, had, according to the court of appeals, "very problematic" trial testimony and a videotaped interview. (Pet-App. 112.) It emphasized that S.S. peppers his claims with uncertainties, such as, "I *don't remember what he did* but I know we were on the couch" and "I *think* he touched me on my private part." (Pet-App. 112–13.) In the court's view, those equivocations provided the jury reason to question S.S.'s reliability or could have left "the jurors wondering if [S.S.] and Hineman, who viewed himself as a father-figure to [S.S.], were just wrestling or 'horsing around' innocently and Hineman accidentally made contact with [S.S.'s] 'private part' or [S.S.] thought he had made such contact."[2] (Pet-App. 113,

[2] This theory from the court of appeals is especially puzzling; Hineman certainly didn't testify that he and S.S. did this sort of "horsing around" or "roughhousing" when he stayed with S.S. He didn't offer it as a possible explanation for S.S.'s claims. The court of appeals' theory seems to also depend on the notion that S.S. lacked an understanding between the difference in bad touches and

117.) The court also highlighted inconsistencies between the child's testimony and his forensic interview. (Pet-App. 113–14.)

But the court neither extended the same benefit of the doubt nor invented theories to support S.S.'s testimony or statements that it extended to Hineman's. It's true that there were inconsistencies between the forensic interview and S.S.'s testimony. The State acknowledged as much at trial. (R. 79:18.)

But the court of appeals assumed that those inconsistencies could only lead the jury to believe that S.S. was making up the allegations or somehow misunderstood a wholly innocent interaction with Hineman. The court failed to consider that the jury saw S.S. for who he was: a shy and scared nine-year-old child, sitting in court or in a forensic interview, accusing one of the few trusted adults in his life with a serious crime that occurred while he was six and at his most vulnerable due to his father's serious illness. It certainly could have understood that sexual assault is extremely difficult and traumatic to recount, especially for a young child, especially if the assaults occurred years earlier, especially when that young child is accusing a so-called father figure, and especially while that person is sitting in the same room. To that end, the jury could have imputed common-sense explanations for why S.S. struggled to offer consistent and more descriptive details of the assaults.

The court also posited that the evidence at trial "could have given the jury the impression that Hineman acted as a father-figure for [S.S.]—buying [S.S.] his first bike and other gifts, taking him trick-or-treating, setting up a bank account for him, etc." (Pet-App. 114–15.) Those facts, in the court of

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accidental ones. But there was no evidence at trial or in the forensic interview that S.S. somehow lacked capacity to understand the difference between an accidental and an intentional bad touch.

appeals' view, worked just one way: they could have led jurors to "certainly conclude that [Dad], and [Grandma]" felt threatened by Hineman's generosity and "had a motive to turn [S.S.] against Hineman." (Pet-App. 115.) As with the "horsing around" theory, this notion appeared to be cut from whole cloth by the court of appeals. What's more, the court didn't consider that the father-figure evidence could work against Hineman, especially if it viewed Hineman's generosity with S.S. and his "father figure" role to be efforts to gain (and exploit) S.S.'s trust.[3]

The court of appeals' summation of the case as hanging by a thread on credibility discounts the factors that drive that jury determination. Here, the jury was instructed to consider the witnesses' words, body language, tone, and demeanor. *See* Wis. JI–Criminal 300 (2000). (R. 79:11–12.) It considered their clearness (or lack thereof) of recollection, the reasonableness of their testimony, their apparent intelligence, and any bias or possible motives for falsifying testimony. (R. 79:11–12.) The court instructed the jury to "use your common sense and experience. In everyday life you determine for yourselves the reliability of things people say to you and you should do the same thing here." (R. 79:12.)

While those intangible factors can get lost when reviewing transcripts, the closing arguments provided a sense of them. As the prosecutor stated, S.S. was deeply uncomfortable testifying. (R. 79:16.) He had difficulty answering questions, especially regarding the assaults and Hineman, who was sitting directly across from him. (R. 78:45–

[3] Even Hineman, at trial, seemed to try to distance himself from his earlier claims that he was a father figure or family to S.S. He testified (inconsistently with recorded statements he made to police) that he never held S.S. out as his son and that S.S. rarely called him "Uncle Jeff." The court of appeals did not consider those contradictions by Hineman in judging the strength of the State's case.

57.) The prosecutor described S.S. as "very communicative with his body" and "his tone."(R. 79:17.) He "took long pauses and carefully considered the questions that were asked before he answered them." (R. 79:17.) He "shrunk down in his chair" when talking about the assault. (R. 79:17.) The prosecutor acknowledged that S.S. was inconsistent between his CAC interview and his testimony, but emphasized that he was consistent on key points: it was at home, it was on the couch, they were watching TV, and Hineman touched S.S.'s penis over his clothes. (R. 79:18.)

In contrast, Hineman was an adult who told police he was an hour away when he was clearly minutes away; who testified that he'd never called S.S. his son even though he told the police the opposite; and who testified that S.S. "seldom" called him Uncle Jeff when he told police (and S.S.'s testimony reflected) the opposite.

The jury weighed those things against the backdrop of what was not offered: a reasonable explanation why S.S. would fabricate the allegations. Even if the court of appeals' proposed reasoning—that Grandma and Dad resented Hineman's closeness with S.S.—didn't add up. In March 2015, they had successfully cut off Hineman from contacting them or S.S. There was nothing to suggest that they had a motive to up the ante and compel S.S.—a shy child with significant anxiety—to make up sexual assault allegations, disclose them in a forensic interview, and testify to them in court.

By framing the evidence in that way, the court took Hineman's denials at face value, heavily scrutinized S.S.'s testimony and the family's motivations, and invented factors beyond what the transcripts supported. In determining that those things may have contributed to the jury's assessment of credibility, the court of appeals' analysis effectively reweighed the evidence and usurped the jury's credibility determination.

C. The court of appeals' selective and lopsided view of the evidence led to an erroneous conclusion that the March report was material.

The court of appeals drew from its skewed view of the evidence and stated, "[i]n light of the lack of strength in the State's case overall, we conclude that the March 12 report was indeed material." (Pet-App. 115.) In its view, Hineman could have used the March report to impeach Hintz to the extent that she said she thought that there was an allegation of touching in the March report and that the "investigator's erroneous testimony undoubtedly bolstered [S.S.'s] credibility and reliability in the eyes of the jury. (Pet-App. 115–16.) It posited that S.S.'s meeting with a therapist at the time "would have provided an obvious opportunity for [S.S.] to reveal if he had been inappropriately touched by Hineman, yet [S.S.] made no such revelations." (Pet-App. 116.) It suggested that the March report could have been used by Hineman to ask the jury to speculate that S.S. had been asked directly by the therapist whether Hineman had touched him and that S.S. said no. (Pet-App. 116.)

The court went on to assert that obtaining the March CPS report would have paved the way for the defense to get the April and May CPS reports. (Pet-App. 117.) Ignoring the postconviction court's finding that only the March report was "of consequence," the court of appeals homed in on a remark in one of the reports that "an autistic son" could have been the maltreater. (Pet-App. 118.) From that, the court then posed all sorts of hypothetical questions that defense could have asked Hintz about the thoroughness of the investigation and

viewed "the investigator" and "videotape interviewer"[4] as focused solely on Hineman. (Pet-App. 118.)

And the court further disregarded the postconviction court's findings that the relevant information from the March report was in the police report. In the court of appeals' view, the police report did not contain everything pertinent in the CPS report because the report revealed that the mandatory reporter was a therapist, and (according to the court) the report could have been used to allow the jury to speculate about what S.S. was asked or said in counseling. (Pet-App. 119.)

But the linchpin for the court was that Hintz's testimony "would have left the jury with the clear impression that she had personally reviewed the March 12 CPS report and that her recollection was that the CPS report contained a statement from [S.S.] that Hineman *had* inappropriately touched [S.S.], which, of course, is incorrect and misled the jury." (Pet-App. 119–20.) It then leaned on a statement that the trial court made at sentencing that it "thought that the verdict could have gone either way" to support its conclusion. (Pet-App. 120.) Yet that same circuit court judge, in his postconviction capacity, did not view the March report as material. (Pet-App. 120.) Moreover, the court of appeals disregarded that the lower court made that "either way" statement to provide context for why it found Hineman's claims of innocence unpersuasive, given his failure to be forthcoming about his criminal history and the court's

[4] The State assumes that, by the "videotape interviewer," the court appeals mean Jensen, the forensic interviewer. To that end, it is unclear why the court of appeals viewed Jensen as inappropriately focusing S.S. on Hineman. Hineman certainly never alleged that Jensen improperly conducted the forensic interview to target Hineman. And the police did not approach or even begin investigating Hineman until after S.S. disclosed in the forensic interview in August that Hineman touched him.

obtaining of credible other-acts allegations that Hineman sexually abused his own son as a child. (R. 80:24–27.)

To start, Hintz's testimony about what was in the March report was wholly equivocal. She made clear that she couldn't remember what the March report said. (R. 78:107–08.) She prefaced any statement about what was in the March report with the equivocal "I believe." (R. 78:107–08.) Hintz's only unequivocal statement with regard to the timing of S.S.'s disclosure was that the August CAC interview was the first time she heard S.S. disclose that Hineman had touched him. (R. 78:107.) As for whether that was the first time S.S. ever disclosed touching, Hintz admitted that she "d[id]n't know." (R. 78:107.) In addition, Hintz also agreed that as of July 2015, none of the adults she spoke with stated that S.S. had claimed any inappropriate touching. (R. 78:106–07.)

Given those equivocations, they do not support the court of appeals' conclusion that Hintz's statement was "incorrect," "left a clear impression that she had personally reviewed the March 12 CPS report," and "misled" the jury. (Pet-App. 119–20.) Indeed, when S.S. made similar "I think" and "I don't remember" equivocations in his testimony and interview, the court of appeals viewed those things as fertile ground for the jury to doubt him. It is unclear why the court of appeals viewed Hintz's similarly equivocal statements to have "of course" "misled the jury" and "no doubt bolstered [S.S.'s] credibility and reliability." (Pet-App. 116, 120.)

What's more, Hineman's counsel impeached Hintz. These points all came out during cross-examination. Counsel also highlighted that Hintz could not explain why, if the March report contained an allegation of sexual touching, she did not convey that in her report. (R. 78:107–08.) The testimony at trial was consistent that police did not get involved until June and did not investigate Hineman until August. And to the extent that Hintz stated her belief that the

March report contained a disclosure was accurate: S.S. had told Dad that Hineman told him about oral sex.

And the court of appeals further failed to acknowledge that for counsel to have attempted to impeach Hintz further with the CPS report, it was not risk-free, given that the March report contained inculpatory information. Had counsel pressed Hintz to confirm that it did not contain a disclosure of touching, it would have allowed Hintz to explain that in March, S.S. told Dad that Hineman told him about oral sex—an inculpatory fact that the jury did not hear otherwise—with S.S.'s later disclosure that Hineman had touched his privates. As the postconviction court astutely observed, it was reasonable for trial counsel to avoid opening the door to these statements. (R. 62:7.)

In all, the court of appeals' analysis regarding whether there was a reasonable probability of a different result started from a skewed reformulation of the evidence in the light most favorable to Hineman. It afforded no deference to the court or jury that watched Hineman and S.S. testify and that watched S.S.'s forensic interview. This approach—and view that in credibility-based cases, any additional piece of evidence could have made a difference—magnifies individual errors in credibility-based child sexual assault cases to effectively lower the defendants' high burden of proving materiality or prejudice. This Court's review is warranted to clarify how reviewing courts must apply the materiality and prejudice standard when credibility is the primary issue at trial.

II. Review is warranted to make clear the court of appeals' authority to reach and develop abandoned issues, and to clarify the *Green* pleading standard to the extent it remains applicable.

The court of appeals also agreed with Hineman that "the circuit court erred in ruling, postconviction, against an in

camera review of [S.S.'s] counseling and therapy records." (Pet-App. 120.) The court held that the postconviction court so erred and that, based on the fact that S.S.'s therapist reported to CPS the pen-sucking incident pursuant to her duty as a mandatory reporter, "Hineman is entitled to in camera review of the therapist's records related to her report to CPS" in March. (Pet-App. 121–23.)

This decision was an overreach by the court of appeals. To start, on appeal, Hineman did not directly challenge the postconviction court's ruling "against in camera review" of S.S.'s counseling and therapy records. Postconviction, Hineman argued that counsel was ineffective for failing to file a *Shiffra/Green* motion based on the fact that S.S. was in therapy in March 2015 and that certain therapies risked affecting memory. (R. 41:18–20.) As a factual basis for the claim that such a motion filed by counsel would have succeeded, Hineman speculated generally that therapy "may affect the reliability of memory" and that S.S.'s therapy may have involved discussion of sexual issues, created false memories, revealed other abuse in S.S.'s life, and included discussions of family and relationships. (R. 41:19–20.)

The postconviction court rejected Hineman's *Strickland* claim because in trying to establish a factual basis, Hineman merely speculated "that some of [S.S's] statements in therapy would bear upon the issues at trial" and he failed to show "in this record a 'fact specific evidentiary showing' that the records of [S.S.'s] therapy support any defense to this charge." (R. 62:12 (citing *State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298).)

On appeal, Hineman did not re-raise his *Strickland* claim on this basis; rather, he argued as part of an interest-of-justice claim, again advancing speculations that the therapy records could contain information about how S.S. implicated Hineman to Dad regarding the pen incident (notwithstanding, again, that there was no implication of

Hineman or investigation of him until after S.S. disclosed touching in August). (Hineman's Br. 46–48.) The State argued that Hineman abandoned this *Strickland* claim and was attempting to repurpose it as support for a new trial in the interest of justice (even though at most he could only be entitled to a retrospective postconviction in camera review). (Amended State's Br. 42–43.)

Despite his failure to preserve this issue, in his reply brief, Hineman declared that he was "absolutely challenging" the postconviction court's rejection of his *Shiffra/Green* pleading, then re-asserted that access to the therapy files could reveal therapy techniques that might have impacted S.S.'s memory or had suggestive effect. (Hineman's Reply Br. 16.) That statement in Hineman's reply brief appeared to be enough for the court to consider Hineman's *Shiffra/Green* claim as a direct claim.[5]

Without addressing the State's argument that the claim was abandoned, the court of appeals held that Hineman was entitled to in camera review of S.S.'s therapy files "related to [the therapist's] report to CPS on March 12." (Pet-App. 123.) The court did this without addressing Hineman's actual pleading, which speculated that the records could contain information about its potential effect on S.S.'s memory and recall, and instead created a factual basis for Hineman based on the fact that S.S.'s therapist first alerted CPS to S.S.'s pen-sucking statement. (Pet-App. 122–23.) By doing this, the court of appeals overstepped its authority in developing

[5] Oddly enough, the court of appeals deemed a separate request by Hineman for records from S.S.'s school counselor to be "throw[n] in" and "something of an afterthought" that Hineman failed to sufficiently develop. (Pet-App. 121 n.8.) While the court was correct that Hineman did not preserve or develop a request for school records, it is not clear why the court declined to consider that argument when it effectively developed Hineman's argument related to S.S.'s therapy records.

Hineman's argument for him and reversing the postconviction court's correct decision based on the pleading Hineman preserved there. (Pet-App. 136 ("Speculation is not an adequate basis to invade the privilege.").)

Worse, the court of appeals did no better at developing a "specific factual basis" showing a reasonable likelihood that the records were "necessary to a determination of guilt or innocence" to satisfy *Green* than Hineman did. *See Green*, 253 Wis. 2d 356, ¶ 32. In the court's view, the therapist made the report because S.S. appeared to have sexual knowledge of oral sex "and purportedly learned at least the comment from a 'family friend,' Hineman." (Pet-App. 122–23.) Again, that information was in police report. The only noncumulative and relevant information from the March report was the identity of the mandatory reporter (though it is not apparent that the State had a duty to disclose that identity). In the court of appeals' view, since the therapist had concerns about the pen incident and that S.S. might be too scared to share if he had been sexually assaulted, that was a factual basis supporting the *Green* standard. But at bottom, that reasoning is speculative and would allow in camera review in any case where the victim was in therapy and the therapist saw enough red flags to make a mandatory report. It is especially not warranted here where Hineman had evidence, through the police reports, that S.S. did not disclose touching to his therapist.

III. Review is warranted given the seriousness of the conviction and the high unlikelihood that a new trial will occur.

The State anticipates that Hineman will argue that this petition is requesting error correction, which is generally not a basis for accepting discretionary review. As argued, the court of appeals' decision implicates the stated criteria for

review. Moreover, even though this case, like all cases, involves a degree of error correction, review is vital here.

Without additional review, the court of appeals will have thrown out a jury verdict (and a decision upholding that verdict by the court that presided over trial) convicting Hineman of an extremely dangerous and serious crime. Though the relief here isn't exoneration, but rather a new trial, it is a distinction without a difference. The prosecutors have informed appellate counsel for the State that it is highly unlikely that S.S. will be able to testify at a new trial. S.S. had an extraordinarily difficult time testifying at the first trial and has endured significant trauma in his short life. Denial of the petition will almost certainly mean Hineman's release and the non-prosecution of these serious allegations, which the State continues to believe are legitimate and which the jury fairly and correctly found to support the conviction.

The State also anticipates that if this Court grants review, the parties will also address the following claims that Hineman raised on direct appeal but that the court of appeals declined to reach: (A) ineffective assistance of counsel for (1) not filing a motion to compel production of the March report; (2) not objecting to parts of Jensen's testimony; (3) reserving opening argument; and (4) making a statement at closing that Hineman argued conceded his guilt; and (B) whether Hineman is entitled to a new trial in the interest of justice. The State maintains that Hineman is not entitled to relief on any of these additional claims.

CONCLUSION

The State respectfully asks this Court to grant this petition.

Dated this 23rd day of December 2021.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 7,981 words.

Dated this 23rd day of December 2021.

SARAH L. BURGUNDY
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULES) 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. §§ (Rules) 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 petition 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 23rd day of December 2021.

SARAH L. BURGUNDY
Assistant Attorney General

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APPENDIX CERTIFICATION

I hereby certify that filed with this petition, either as a separate document or as a part of this petition, is an appendix that complies with Wis. Stat. § (Rule) 809.62(2)(f) and that contains, at a minimum: (1) a table of contents; (2) the decision and opinion of the court of appeals; (3) the findings or opinion of the circuit court necessary for an understanding of the petition; and (4) a copy of any unpublished opinion cited under Wis. Stat. § (Rule) 809.23(3)(a) or (b).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials 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.

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SARAH L. BURGUNDY
Assistant Attorney General

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I further certify that:

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

Dated this 23rd day of December 2021.



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