RECEIVED
01-06-2022
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP000226-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JEFFREY L. HINEMAN,

Defendant-Appellant.

RESPONSE TO PETITION FOR REVIEW

FRANCES REYNOLDS COLBERT
Assistant State Public Defender
State Bar No. 1050435

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8374
colbertf@opd.wi.gov

Attorney for Defendant-Appellant

INTRODUCTION

This Court should deny the state's Petition for Review of the Wisconsin Court of Appeals' decision in *State v. Hineman,* 2020AP000226-CR, unpublished slip op. (Wis. Ct. App. Nov. 24, 2021). This fact intensive case does not present any novel, unsettled or important legal issue. The state asks for review on three bases, but only the first one related to the *Brady*[1] claim could possibly meet the criteria for review as set forth in Wis. Stat. (Rule) 809.62(1r). The court of appeals' application of the *Brady* standard of materiality, however, is exactly in line with Wisconsin and federal case law and review here would serve only to reiterate establish precedent and will neither develop the law nor affect the outcome of this case.

Second, the state's contention that the court of appeals overstepped its authority and addressed an abandoned claim regarding *Shiffra/Green*[2] is simply a misreading of the procedural history and issues raised on appeal. True, Hineman alleged postconviction that trial counsel was ineffective for failing to bring a motion based on *Shiffra/Green.* (41:48). But this claim was raised early in the litigation, before the state was ordered to turn over the postconviction discovery that formed the basis for the *Brady* claim. Because the state wrongfully withheld the critical document, trial counsel was not in possession of all the information necessary to evaluate the strength of a *Shiffra/Green* motion and thus, being unaware of the state's discovery violation, her decision not to file the motion

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

[2] *State v. Shiffra*, 175 Wis. 2d 600, 605, 499 N.W.2d 719 (Ct. App. 1993); *State v. Green*, 2002 WI 68, ¶34, 253 Wis. 2d 356, 646 N.W.2d 298.

was not constitutionally deficient. (83:69). Hineman did not appeal the court's oral ruling on this.

Hineman did raise postconviction and again on appeal, however, that the full controversy was not tried because *had* that document been turned over pretrial, any reasonable prudent attorney in possession of all the pertinent information would have successfully brought a *Shiffra/Green* motion. (61:20-23; App. Brief-in-Chief at 36-37, 40-41). This squarely raised interest of justice claim was denied by the circuit court (62:12) but the court of appeals agreed that under the standards set forth in *Shiffra/Green*, Hineman is entitled to *in camera* review of the treatment records. *Hineman,* slip op., ¶¶49-50. There was no overreach on abandoned claims and the state's second argument provides no basis for review.

Third, the state invites this Court to ignore the criteria for review altogether and grant review because this case involves a serious crime and counsel for the state has reason to believe that Hineman will not be retried. Acquitting the guilty is detestable but so too is condemning the innocent. The criminal justice system, including the appellate process, is designed to guard against either unsavory outcome. To protect the interests of both the public and the accused, the Constitution, the Wisconsin statutes, and caselaw interpreting them, require a conviction be the product of a complete investigation and a fair trial. Applying the proper legal standards, the court of appeals determined that this did not happen below. This Court should decline the invitation to ignore the Wis. Stat. (Rule) 809.62(1r) criteria due to the nature of the crime involved and deny review.

Last, this case involves multiple, constitutionally significant errors that were not addressed by the court of appeals. Namely, Hineman claims trial counsel was ineffective for: failing to obtain the CPS report in advance of trial; failing to make an opening statement; failing to object to improper expert testimony elicited by the state at trial and perhaps most shocking, trial counsel conceded Hineman's guilt in her closing argument. (App. Brief-in-Chief at 19-35). Hineman also brought an interest of justice based on conceded prosecutorial errors (App. Brief-in-Chief at 36-39). The court of appeals did not address any of this because it determined it was unnecessary in light of the *Brady* violation, however, all of these fact intensive claims would be at issue should this Court grant review. *Hineman,* slip op., ¶1 n.1.

In sum, the state believes the court of appeals' decision is wrong. But even if true, which it is not, this Court's primary role is to develop the law, not correct errors. *See State ex rel. Swan v. Elections Bd.*, 133 Wis. 2d 87, 93-94, 394 NW.2d 732 (1986); *State v. McConnohie,* 113 Wis. 2d 362, 368, 334 N.W.2d 903 (1983). The state's disagreement with the court of appeals' application of the correct law to the facts is not a basis for review. This Court should deny the petition.

ARGUMENT

I. The court of appeals applied the correct standard when it determined the state's failure to turn over the March 12 CPS report was in violation of Hineman's due process rights and *Brady v. Maryland*, 373 U.S. 83 (1963).

In this case, the state refused to provide the defense with the child protective services report that was faxed to and in law enforcement's possession.[3] The report first identified Hineman as a suspect in sexually abusing a child and triggered the criminal investigation leading the charges in this case, though the report clearly stated that "there had been no disclosure of maltreatment by the child." (48:6). The court of appeals held the suppression of this favorable evidence was material to the defense and its suppression violated Hineman's constitutional due process rights under *Brady*. *Hineman,* slip op., ¶29. Having lost the appeal, the state now asks this Court to "clarify" the materiality standard.

In asking for review of the materiality standard, the state does not cite any conflicting approaches or varying interpretations of materiality under *Brady*. Rather, the state seems to be arguing that in cases where there is no physical evidence and guilt or innocence depends entirely on credibility determinations, and the *Brady* standard should not

[3] The state asserts this was inadvertent, however, the state continued to refuse to provide it when it was requested postconviction. Hineman had to file multiple motions and obtain a court order before the document was produced. (40, 41, 42, 91:2).

apply. The state, it seems, would prefer the sufficiency of the evidence standard, wherein, evidence is viewed in a light most favorable to the state and "convictions are upheld when the record shows a bare modicum of evidence from which a reasonable jury could find guilt." *State v. Sholar,* 2018 WI 53, ¶45, 381 Wis. 2d 560, 912 N.W.2d 89. But no court has ever said that this, or anything close to it, in cases involving violations of constitutional rights.

There parties agree – as articulated by the state in its petition – :

> 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).[4] *State v. Wayerski,* 2019 WI 11, ¶36, 385 Wis. 2d 344, 922 N.W.2d 468.

State's Pet. for. Rev. at 17-18.

[4] The state cites cases discussing a deferential standard of review in ineffective assistance of counsel claims. Pet. for Rev. at 17-18. The deferential standard is in reference to decisions trial counsel made and the deficient performance prong. This has nothing to do with a *Brady* claim. On appeal, whether undisputed facts establish a *Brady* violation is reviewed de novo. *See State v. Rockette*, 2006 WI App 103, ¶39, 294 Wis. 2d 611, 718 N.W.2d 269.

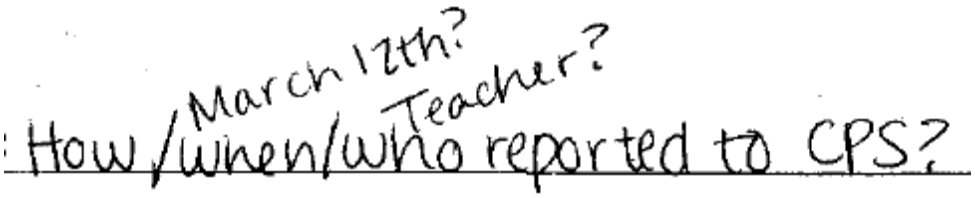
Thus, the inquiry centers on whether there is a "reasonable probability" of a different outcome had the errors not occurred. In establishing materiality, a defendant "need not prove the outcome would 'more likely than not' be different." *Sholar,* 381 Wis. 2d 560, ¶44 (*quoting Strickland,* 466 U.S. at 693). The issue is not whether the defendant is actually innocent, but instead whether he would have had a "reasonable chance" of acquittal absent the errors. *Stanley v. Bartley*, 465 F.3d 810, 814 (7th Cir. 2006) ("it needn't be a 50 percent or greater chance").

The court of appeals was right to consider the materiality question "in light of the lack of strength of the state's case." *Hineman,* slip op., ¶38. A prejudice or materiality inquiry must "consider the totality of the evidence before … the jury. A verdict … that is overwhelmingly supported by the record is less likely to have been affected by errors than one that is only weakly supported by the record." *Hough v. Anderson*, 272 F.3d 878, 891 (7th Cir. 2001) (citing *Strickland,* 466 U.S. at 696). The state takes issue with some of the ways the court of appeals characterized the evidence and spends much of its petition cherry-picking and recasting the evidence in a light most favorable to the state, but it simply cannot be said this was a case that displayed strong evidence of guilt. There was no consistent statement about what happened or when, there was a significant delay in reporting, there was no physical evidence, no third-party observations of inappropriate behaviors or other corroborating evidence.

The court of appeals correctly found the exculpatory evidence was material to the defense because it could have been used to impeach the

investigating officer's false testimony that the March 12 report contained a statement that SJS had previously reported inappropriate touching. *Hineman,* slip op., ¶¶20, 39-40, 46-47. Had this evidence been used to impeach Officer Hintz, this alone would have created a reasonable probability the jury would have acquitted. But the court of appeals also correctly recognized that there is a reasonable probability that the suppression of this evidence truncated the defense's ability to probe the reliability of the state's entire investigation. *Id.*, ¶¶43-44.

Notably, the record in this case contains concrete evidence that shows the jury was concerned and wanted more information about the circumstances of the disclosure that lead to the March 12 report:



(Jury Question #1 (22)).

Because the defense went to trial having no idea who reported concerns of sexual abuse to CPS or how Hineman became a suspect, there was no way it could have presented evidence regarding these questions at trial or effectively crossed the state's witnesses on these issues. The court of appeals applied the correct standard when it determined that it was reasonably probable that the suppression of the March 12 CPS report affected the outcome of this case. There is nothing about the court of appeals' application of the *Brady* materiality standard that warrants review.

II. The court of appeals correctly ruled that Hineman is entitled to an in camera review of SJS's treatment records based on Hineman's interest of justice claim.

As noted above, Hineman's request for an in camera review of SJS's treatment records was based on a squarely raised interest of justice claim, not an abandoned ineffective assistance of counsel claim. *See State v. Zdzieblowski*, 2014 WI App 130, ¶24, 359 Wis. 2d 102, 857 N.W.2d 622 (an appellate court may reverse a conviction if it determines the real controversy has not been fully tried); *see also* Wis. Stat. § 752.35.

At the *Machner*[5] hearing, trial counsel testified that she did not bring a *Shiffra/Green* motion because she thought SJS was in therapy for behavior problems that had nothing to do with the alleged sexual abuse. (82:30). She further testified that had she known that the mandatory reporter was SJS's therapist, and/or that it was the therapist who developed the concern that SJS's misbehaviors were a result of being sexually abused by Hineman, she would have filed a *Shiffra/Green* motion. (82:30). The fact is, she did not know because the report was not disclosed to her. Because she was missing information the state should have turned over – information directly relevant to the *Shiffra/Green* motion – a deficient performance argument becomes convoluted and Hineman did, in fact, abandon the ineffective assistance of counsel claim with respect to *Shiffra/Green.*

[5] *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

Hineman did not abandon the claim that SJS's therapy records "contain relevant information necessary to a determination of guilt or innocence and is not merely cumulative to other evidence available to the defendant." *Green*, 253 Wis. 2d 356, ¶34. Citing the relevant law governing the disclosure of treatment records, Hineman requested an in camera review of the records pursuant to an interest of justice claim. (App. Brief-in-Chief at 40).

The court of appeals agreed that there was "at least 'a reasonable likelihood that the therapists records' related to her report to CPS on March 12 contain relevant information…" *Hineman,* slip op., ¶52 (*citing Green,* 253 Wis. 2d 356, ¶34). The state does not argue that court of appeals cited the wrong standard or misapplied it, only that it reached the wrong result. As pointed out above, being disappointed with the result does not create a basis for this Court's review.

III. The seriousness of the crime and speculation that Hineman will not be retried is not a basis for this Court's review.

Wisconsin. Stat. (Rule) 809.62(1r) lists the criteria for this Court's review. The fact that a case involves a serious crime or that there is speculation that the defendant may not be retried is not among the criteria listed. Review is not warranted.

CONCLUSION

This Court should deny the state's Petition for Review.

Dated this 6th day of January, 2022.

Respectfully submitted,

FRANCES REYNOLDS COLBERT
Assistant State Public Defender
State Bar No. 1050435

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8374
colbertf@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 2,254 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, including the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after 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 6th day of January, 2022.

Signed:

FRANCES REYNOLDS COLBERT
Assistant State Public Defender