STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP226-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JEFFREY L. HINEMAN,

Defendant-Appellant.

ON REVIEW FROM A DECISION OF THE COURT OF APPEALS REVERSING A JUDGMENT OF CONVICTION AND A DECISION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN RACINE COUNTY CIRCUIT COURT, THE HONORABLE MARK F. NIELSEN, PRESIDING

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

JOSHUA L. KAUL
Attorney General of Wisconsin

SARAH L. BURGUNDY
Assistant Attorney General
State Bar #1071646

Attorneys for Plaintiff-Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8118
burgundysl@doj.state.wi.us

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I. Appellate courts should not automatically cast credibility cases as "close" when assessing an error's reasonably probable effect on the verdict.

This case is not an effort by a conviction-hungry State to condemn an innocent defendant. (Hineman's Br. 20, 54–55.) Nor is the State asking this Court to reduce the materiality/prejudice/harmless error standards to sufficiency-of-the-evidence or a directed-verdict standard. (Hineman's Br. 20; Amicus Br. 7.)

This case is about due process, fairness, and how appellate courts assess whether there is a reasonable probability of a different outcome, based on errors that occurred at a credibility-based trial. Fairness forecloses what the court of appeals did here, where it declared the jury's verdict close, re-weighed the credibility of the State's witnesses, ignored Hineman's testimony, swept aside the factfinders' findings, and said that due process required a new trial and postconviction discovery, all seemingly because this case was a credibility contest.

This Court should clarify that courts assessing materiality, prejudice, or harmlessness in credibility cases should not start with a bias that anything could have made a difference in the outcome. Rather, these cases should be reviewed under the same standards as every other criminal case, which require a connection between the error and an otherwise unchallenged critical element of the case. *See, e.g.*, *State v. Hunt*, 2014 WI 102, ¶¶ 30, 35, 360 Wis. 2d 576, 851 N.W.2d 434; *State v. Rockette*, 2006 WI App 103, ¶ 41, 294 Wis. 2d 611, 718 N.W.2d 269; *see also Harrington v. Richter*, 562 U.S. 86, 112 (2011) ("The likelihood of a different result must be substantial, not just conceivable.").

The "close case" bias seems to turn on language in *Strickland* that "a verdict or conclusion only weakly supported by the record is more likely to have been affected

by errors than one with overwhelming record support." *Strickland v. Washington*, 466 U.S. 668, 696 (1984). But the text surrounding that quote reflects that courts assessing prejudice must connect the errors to the findings:

> Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. . . . Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Id. at 695–96.

Given that, this Court should also reiterate that appellate courts cannot re-assess witness credibility on a cold record. Rather, when the trier finds guilt, it unanimously finds the State's critical evidence so credible (and the defense so not credible) that the State's case satisfies the high beyond-a-reasonable-doubt standard. Thus, on review, deference to the factfinder's unique function is warranted in determining whether but for the complained-of errors, there is a substantial likelihood of a different result. *Accord, e.g.*, *State v. Hughes*, 2000 WI 24, ¶ 2 n.1, 233 Wis. 2d 280, 607 N.W.2d 621 (trier's function is to "assess each witness's demeanor and the[ir] overall persuasiveness" whereas "an appellate court, relying solely on a written transcript, cannot"); *State v. McCallum*, 208 Wis. 2d 463, 479–80, 561 N.W.2d 707 (1997) (deferring to the circuit court's assessment of whether a jury

would have had reasonable doubt based on the victim's credibility).[1]

II. The absence of the March CPS report from Hineman's trial was not material under *Brady*.

The State's and Hineman's disagreements about materiality boil down to (1) the value of the unduplicated information in the March CPS report and (2) how "crucial" to the State's case Hintz's testimony about the March CPS report was.

As argued, (State's Br. 20–21), the March CPS report had potential impeachment value. But, as the postconviction court found, all of its relevant impeachment material appeared in the police report that counsel received. (R. 62:6.) Both reports indicated that S.S. was sucking on a pen at school, he told a classmate that having "your privates sucked on" felt good, that he learned it from Garfield, that Dad told the original reporter that S.S. said that Hineman had told him those things, and that "no specific information was given" on if there was inappropriate touching between Hineman and S.S. (R. 41:30; 48.)

As argued, (State's Br. 26 n.3), the difference between the "no information" sentences that Hineman and the court of appeals highlight, (Hineman's Br. 27; Pet-App. 9)—the March report says "no information was given *by* [*S.S.*]" while the police report says "no specific information was given" about touching—is trivial. If there was a disclosure of touching, that

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[1] *McCallum* is a newly-discovered-evidence case, which employs the higher more-probable-than-not standard than the standard for prejudice or materiality. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). Yet nothing about that "slight" difference between the standards, *Harrington v. Richter*, 562 U.S. 86, 112 (2011), warrants disregarding the unique ability of the factfinder to assign weight and assess witness credibility.

information would have had to come from S.S., even if it was later conveyed by Dad or the therapist.

Hineman claims that the reporting therapist was a material fact witness on the theory that "she was the person who first developed a suspicion that Mr. Hineman was sexually abusing SJS." (Hineman's Br. 27–28.) Assuming that Hineman could have learned that S.S.'s therapist was the March reporter, she reported concerns about S.S.'s behavior and the little she knew, which was that Dad told her that S.S. told him that he learned about oral sex from Hineman. The therapist was not part of the police investigation. That investigation started months *after* she reported concerns about S.S.'s behavior to CPS, when CPS sent the report to police. And police did not approach Hineman until August, after S.S. disclosed an assault. For those same reasons, Hineman's claims that the report would have shown that the criminal investigation of him started in March, (Hineman's Br. 29, 33–34), are wrong. There was no criminal investigation initiated until July, at the earliest; Hineman was not a target of that investigation until Hintz approached him in August.

Further, the therapist could not have testified to her communications with S.S. because they remained privileged.[2] If there was unprivileged information, such as "information contained in a report of child abuse or neglect that is provided under s. 48.981(3)," Wis. Stat. § 905.04(4)(e)2m., Hineman does not identify what that information could be and how it is different from what is in the March report.

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[2] Hineman's claim that there was no privilege in S.S.'s records based on *State v. Denis L.R.*, 2005 WI 110, ¶ 55, 283 Wis. 2d 358, 699 N.W.2d 154, (Hineman's Br. 28), is inapt. That part of *Denis L.R.*'s holding was based on a now-repealed exception to the privilege statute and is not applicable.

As for S.S., there is nothing in the March report that could have directly impeached his testimony or impacted his credibility. The contents of the March report came up almost entirely during Hintz's cross-examination, so it was not crucial to the State's case-in-chief. Her testimony that she believed, but was unsure, that the March report contained an allegation of touching, was unhelpful to the State. (State's Br. 24–25.) It reflected poorly on Hintz, inasmuch as it suggested that Hintz possibly failed to memorialize *an actual allegation of child sexual assault* in her report, instead focusing on the pen incident that S.S. attributed to a cartoon cat. To that end, counsel effectively cross-examined Hintz and highlighted inconsistencies between what she "believed" was in the March report with what she included in her police report, without disclosing the unfavorable details of Hineman's association with the pen incident.[3] (State's Br. 22–24.)

Given Hintz's equivocations about the March report, that one or more jurors[4] asked about that report is not surprising. (R. 22; Hineman's Br. 28–29.) Yet a juror's curiosity about unavailable evidence does not make its absence material. Further, if the jury was confused by Hintz's

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[3] That counsel could have asked more questions of Hintz does not make her cross-examination deficient. (Hineman's Br. 24 & n.5.)

[4] Hineman writes that "we know for a fact that the jury wanted" to know more about "how, when, and why the reporter suspected Mr. Hineman of this crime" based on the jury question. (Hineman's Br. 28–29.) Three responses: first, we don't know whether the question came from one curious juror, a few of them, or the entire panel, or the importance of the answer. Second, the question was "How/When/Who" reported to CPS, not "why." (R. 22:1.) Third, the reporter was not reporting that she suspected Hineman of a crime; she was reporting concerns to CPS to follow up with S.S. based on his behavior.

testimony, it likely resolved its quandary in Hineman's favor. It was instructed on the presumption of innocence and that it must find that the State proved guilt beyond a reasonable doubt. (R. 79:6–8.) Since there was no evidence who reported to CPS or how they did so, the instructions required the jury to discount those facts. *See State v. Miller*, 2012 WI App 68, ¶ 22 n.3, 341 Wis. 2d 737, 816 N.W.2d 331 (juries presumptively follow their instructions).

Hineman argues that Hintz's testimony bolstered S.S.'s credibility on the theory that if the jury believed that S.S. reported touching in March, it was much more likely to believe that he truthfully disclosed it in August and at trial. (Hineman's Br. 29–32.) Hineman assumes that S.S. was "interrogated" multiple times by multiple people before the August interview. (Hineman's Br. 29–30.) Those assertions lack support. There is no evidence that S.S. was questioned about sexual assault between March and August. Even if the jury believed that S.S. had reported touching in March, it received no details of that touching to compare with S.S.'s August interview or trial testimony, which each contained internal and external inconsistencies.

III. Hineman's counsel provided effective assistance.

Similarly, counsel's failure to obtain the March CPS report pretrial did not prejudice Hineman. (State's Br. 22–24; R. 62:5–6.) Pretrial, counsel received the police report, which, as the postconviction court found, (R. 62:6), summarized all of the relevant information from the March CPS report and contained all of the information that counsel needed to question Hintz. (State's Br. 10–11, 22.) Contrary to Hineman's claims, (Hineman's Br. 24, 30), counsel effectively cross-examined Hintz without opening the door to inculpatory information that was in both the CPS and police report, i.e.,

S.S. said that having one's privates sucked on felt good and that he reportedly learned that fact from Hineman.

In all, counsel effectively represented Hineman and advanced a sound reasonable-doubt defense under the circumstances. Hineman cannot establish ineffectiveness with his hindsight-based proposals for what he now thinks counsel should have done.

Hineman argues that, had counsel obtained the March CPS report, she would have also accessed the April and May CPS reports,[5] which in his view were consequential. (Hineman's Br. 36–37.) But the postconviction court found that the March report was the only CPS report "of consequence." (R. 62:6.) That finding was not clearly erroneous, given that the April and May reports note additional deterioration in S.S.'s behavior, but no allegations of sexual assault. (R. 48:8–17.)

Hineman asserts that the reports would have changed the whole "trajectory of the defense investigation and trial strategy." (Hineman's Br. 37–39.) But his basis for that assertion—a physician examining S.S. found no physical signs of abuse—would not have helped either side given the assault S.S. described would not have left physical evidence.

Hineman also theorizes that the reports could have supported alternate but vague defense theories, including a third-party perpetrator, tunnel-vision profiling of Hineman by police, or external influences and therapy techniques that

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[5] To be clear, the State had an obligation to turn over the March report only, since that is the only report that law enforcement received from CPS. Pretrial, counsel would have had to file a *Bellows* motion to access any additional CPS reports.

S.S. may or may not have experienced.[6] (Hineman's Br. 36–39.) But theories are not enough. Hineman has to show what admissible evidence, testimony, and alternative defense theory an investigation based on the April and May reports would have revealed. *See State v. Leighton*, 2000 WI App 156, ¶ 38, 237 Wis. 2d 709, 616 N.W.2d 126. He has to persuade that that new defense strategy rendered unreasonable counsel's choice to present a reasonable-doubt theory at trial. He doesn't, and he can't.

As for the other *Strickland* claims, Hineman offers no solid argument supporting his claim that counsel's decision to waive opening argument entitles him to relief. (Hineman's Br. 39–40.) Regarding Jensen, counsel reasonably diffused her testimony about delayed disclosure *and* highlighted the inconsistency in S.S.'s August disclosure about his having told his parents right away, when the evidence established that he had not. And counsel reasonably argued that S.S.'s allegations were more illogical than piecemeal.

As for the concession-of-guilt argument, the State did not mention the disparity between the transcripts at the postconviction hearing and in the appellate record, (Hineman's Br. 42–45), because the discrepancy[7] makes no difference here. Counsel did not concede guilt. This is true regardless which version of the transcript we consult,

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[6] As for the proposed expert, Hineman litigated and lost that claim in the postconviction proceedings. The postconviction court held that counsel soundly determined that a defense expert was not needed at Hineman's trial, that it was "highly unlikely" that Hineman's proposed expert, David Thompson, would have been allowed to testify, and that Hineman's argument fatally "cobbled together speculation and conjecture rather than sticking to the facts." (R. 62:8.)

[7] To be clear, the State shares Hineman's concern there was an unexplained difference between the transcripts. Nevertheless, the difference is not relevant to the merits of Hineman's claim.

whether counsel misspoke, or whether the reporter mis-transcribed counsel's words. A few omitted words within a cohesive closing argument that the postconviction court personally recalled listening to and found argued against a finding of guilt, (R. 62:11–12), is not a concession.[8]

IV. Discretionary relief and in camera review is not warranted.

As argued, (State's Br. 45), this Court should not exercise its discretion to grant a new trial in the interests of justice. Hineman argues for this extraordinary relief based on prosecutorial errors in failing to notice Jensen and Hintz as experts, and then eliciting testimony from the former about piecemeal and delayed disclosure, and from the latter about grooming. (Hineman's Br. 46–48.) As argued above, counsel effectively responded to Jensen's testimony.

As for Hintz's mention of grooming, Hineman reanimates a rejected and abandoned ineffective assistance of counsel claim, in which the postconviction court held that counsel was not deficient or prejudicial when she successfully objected to Hintz's mention of grooming but did not seek a curative instruction or mistrial. (R. 62:10–11.) It explained that Hintz had discussed "Hineman's role as a savior of this family," which was positive to Hineman, and counsel immediately and successfully objected when Hintz opined that that behavior "struck her as grooming." (R. 62:10.)

The postconviction court determined that more was not needed, because a curative instruction was unlikely to help, and counsel reasonably did not seek a mistrial where "[t]he

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[8] Hineman's persistence in pushing this last argument underscores the State's larger point about the limits of appellate review on a cold record. Just as a few omitted words alone does not prove a concession, a reviewing court cannot re-assess credibility and weight on a transcript.

only thing that had gone wrong [at trial] was that a person had made a reference to grooming behavior [but i]t had not been defined." (R. 62:11.) Hence, counsel's reasonable responses to both Jensen and Hintz do not support discretionary relief.

Finally, in camera review of S.S.'s treatment records is not warranted. Hineman speculates that given the five-month delay between the March report and S.S.'s August disclosure, S.S.'s disclosure might have been influenced by others during that time or by his ADHD diagnosis. (Hineman's Br. 49–50.) He also invokes *State v. Denis L.R.*, 2005 WI 110, 283 Wis. 2d 358, 699 N.W.2d 154, to assert that there is no privilege in information about sexual assault in treatment records when a therapist makes a mandatory report. (Hineman's Br. 50.)

Hineman's proposed factual showing for in camera review, (Hineman's Br. 49–50), is a conjecture-based fishing expedition. As the postconviction court determined, "[s]peculation is not an adequate basis to invade the privilege." (R. 62:12.) And S.S.'s therapy records remain privileged. *Denis L.R.*'s holding suggesting otherwise is based on a repealed exception to the privilege statute in Wis. Stat. § 905.04(4)(e)2. (2001–02). *Denis L.R.*, 283 Wis. 2d 358, ¶ 55. Wisconsin Stat. § 905.04(4)(e)2m. (2019–20) provides that "[t]here is no privilege for information contained in a report of child abuse or neglect that is provided under s. 48.981(3)," that is, there is no privilege for information in the *report*. Treatment records, regardless whether the provider makes a mandatory report, remain privileged.

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This case is about fairness. Hineman's trial, like virtually every criminal trial, was not error-free. But it was fair. And the fact that this was a credibility case, on its own, does not relieve Hineman's burden to establish a nexus between the alleged errors and critical findings such that it is

reasonably likely that the errors impacted the verdict. Hineman cannot satisfy that burden.

CONCLUSION

This Court should reverse the decision of the court of appeals.

Dated this 20th day of October 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

SARAH L. BURGUNDY
Assistant Attorney General
State Bar #1071646

Attorneys for Plaintiff-
Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8118
(608) 294-2907 (Fax)
burgundysl@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,962 words.

Dated this 20th day of October 2022.

SARAH L. BURGUNDY
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12) (2019-20)

I hereby certify that:

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

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 20th day of October 2022.

SARAH L. BURGUNDY
Assistant Attorney General