STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

Case No. 2020AP001876-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TOMAS JAYMITCHELL HOYLE,

Defendant-Appellant.

Appeal of a Judgment of Conviction and an Order Denying Postconviction Relief in Chippewa County Circuit Court, the Hon. James M. Isaacson, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

At the defendant's trial for sexual assault, the prosecution depended entirely on the complainant's credibility, as the state introduced no physical evidence or witness testimony corroborating any aspect of the complainant's allegations.

The issues presented are:

1. Whether the defendant is entitled to a new trial based on newly discovered evidence, when the complainant testified at trial that her unemotional demeanor on the stand was due to her receiving counseling for the assault, but after the trial told the PSI writer that she had not received any counseling for the assault.

   The circuit court denied the defendant's postconviction motion raising this issue.

2. Whether, as a result of the complainant's conflicting statements about the nature of her counseling, the defendant is entitled to post-conviction discovery of the complainant's counseling records.

   The circuit court denied the defendant's postconviction motion raising this issue.

3. Whether the prosecutor improperly commented on the defendant's exercise of his Fifth Amendment privilege not to testify at

trial, by repeatedly arguing that the evidence was "uncontroverted" when the defendant's testimony would be the only evidence that could controvert the complainant's allegations.

The circuit court granted, over trial counsel's objection, the prosecutor's motion to make such an argument, and further denied the defendant's postconviction motion raising the issue.

4. Whether the defendant was entitled to a new trial based on the state's failure to disclose the complainant's initial statements to the police, where they conflicted with her subsequent statements.

The circuit court denied the defendant's postconviction motion raising this issue.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant-appellant would welcome oral argument to address any factual or legal issues raised by the parties. The defendant-appellant does not anticipate that the court's opinion will warrant publication, as the appeal involves the application of facts to well-settled principles of law.

STATEMENT OF THE CASE

I. Introduction

This is a sexual assault case that depended entirely on the credibility of the 15-year-old complainant, HAL[1]. While discussing her drug abuse issues with a school police officer, HAL claimed that she had been sexually assaulted the prior month while she was on drugs, but would not identify her assailant. Two months later, after prompting by the police officer to disclose who had assaulted her, she claimed it was the defendant, the older step-brother of her former best friend.

There was no physical evidence supporting the charges: no DNA evidence, no phone records, no text messages, no cell phone tower location records, etc. Nor did any witnesses provide a prior consistent statement by HAL or otherwise corroborate any aspect of her allegations. In fact, the only witness besides HAL to testify at trial was the investigating officer, who asserted that based on HAL's description of the country road where the alleged assault, it occurred in the county of venue. However, the investigator did not confirm with HAL that the investigator identified the correct road. More importantly, the investigator did not even interview any of the potential corroborating witnesses.

[1] The victim is referred to by a pseudonym to preserve her confidentiality.

The State's case thus depended entirely on HAL's credibility, which in turn required the jury to assess her demeanor on the stand. The prosecutor sought to explain her unaffected demeanor by eliciting testimony from HAL that she had received counseling for the alleged sexual assault.

However, after the trial, HAL told the PSI writer that in fact she had *not* received any therapy or counseling for the alleged sexual assault. She only received treatment for her drug abuse problems, and did not tell her therapist about the assault because she did not want to relive it.

HAL's contradictory statements about her counseling, and the reason for her demeanor on the stand, is the kind of "newly discovered evidence" that warrants a new trial. "Wisconsin law has long held that impeaching evidence may be enough to warrant a new trial." *State v. Plude*, 2008 WI 58, ¶ 47, 310 Wis. 2d 28, 48, 750 N.W.2d 42. At the very least, Hoyle is entitled to post-conviction discovery of HAL's treatment records to determine what treatment she actually received. *State v. Robertson*, 2003 WI App 84, ¶ 26, 263 Wis. 2d 349, 365, 661 N.W.2d 105, 113.

In addition, the prosecutor repeatedly argued, over Hoyle's objection, that HAL's testimony was "uncontroverted" and that the jury "heard no evidence disputing [HAL's] account of that sexual assault." (R. 92:18-21). These comments invited the jury to draw a negative inference from Hoyle's decision to exercise his Fifth Amendment privilege not to testify

at trial, as it was only Hoyle who could controvert HAL's allegations. *State v. Johnson*, 121 Wis. 2d 237, 246, 358 N.W.2d 824 (Ct.App.1984). This violation of HAL's Fifth Amendment rights was not harmless given the scarcity of evidence supporting the prosecution.

Finally, Hoyle discovered after trial previously undisclosed police reports and communications regarding HAL's initial statements to the police about the alleged assault. The statements included inconsistencies from other statements as well as additional context that could have been used to impeach HAL's testimony. The failure to disclose the statements prior to trial violated Hoyle constitutional right to discovery. *Brady v. Maryland*, 373 U.S. 83 (1963) .

II. Procedural History

On October 2, 2017, the Chippewa County District Attorney's Office filed a criminal complaint charging Hoyle with two counts of second-degree sexual assault and two counts of sexual assault of a child under 16 years of age. Wis. Stat. §§ 940.225(2)(a), 948.02(2). (R. 1).

A jury trial was held from December 13-14, 2018. (R. 91-92). The jury found Hoyle guilty on all four counts. (R. 23-26). Hoyle was later sentenced to concurrent 18-year sentences comprised of 8 years initial confinement and 10 years extended supervision. (R. 40).

Hoyle filed a motion for postconviction relief asserting the issues raised in this appeal (among others). (R. 63-65). The court denied the motion after a hearing held on October 16, 2020. (R. 76). This appeal follows.

III. Factual Background

A. The Evidence at Trial

Sometime in February 2017, the 15-year-old HAL asked her mother if she could spend the night at a friend's house. (R. 91:138-40, 170). Her mother said no, but did allow HAL to walk over to the friend's house so she could tell her herself. (*Id.*) Notably, HAL testified that she "had taken some Vicodin and drank some alcohol" throughout the day – and later admitted that during the preliminary hearing, she claimed to have taken six Vicodin and three shots of vodka – but neither her mother nor any of the other three people in her household noticed. (R. 91:138, 140-141, 161, 175).

In any event, HAL testified that on her way to her friend's house Hoyle, the stepbrother of HAL's former best friend, "drove through and asked if I wanted to hang out." (R. 91:138, 142, 175-176). HAL got into the passenger seat of Hoyle's car. (R. 91:142). They drove towards Chippewa Falls, turned around in a marina parking lot, drove back past the trailer court towards Cadott, and then turned down a dead-end road. (R. 91:142-145).

HAL then got out of the car, and when Hoyle said to get back into the car, she climbed into the back passenger seat. (R. 91:146-147). According to HAL, Hoyle joined her on the back seat and began touching her upper thigh. (R. 91:148-149). When Hoyle began pulling off her pants, she told him to stop. (R. 150). However, he continued and was able to forcibly pull them off of her. (R. 91:151). According to HAL, Hoyle then assaulted her, penetrating her vagina with his fingers and his penis. (R. 91:151-159). After the assault, Hoyle returned HAL to her home, and supposedly said "that if anyone finds out about this, someone is going to end up dead." (R. 90:160).

HAL was gone for approximately 45 minutes when she only was supposed to take a few minutes to tell her friend that she could not spend the night. (R. 91:178). HAL's mother was upset and demanded an explanation, but HAL did not tell her about the alleged assault. (R. 91:178).

HAL disclosed the alleged assault to the school liaison officer, Officer Nelson. (R. 91:163).[2] Officer Nelson interviewed HAL, and then turned the investigation over to investigator Kari Anderson. (R. 91:163). Investigator Anderson interviewed HAL on March 15, 2017. (R. 91:164). HAL would not tell

[2] After the trial, and in response to Hoyle's motion for postconviction relief, the state produced the police report of Officer Joseph Nelson of the Chippewa Falls Police Department regarding HAL's initial disclosure of the alleged assault. (R. 74). According to this report, the disclosure occurred on March 13, 2017. (R. 74:4).

Investigator Anderson the name of the assailant. (R. 91:165).

HAL initially testified that it took her a couple of days to have the courage to tell the investigator the name of the assailant. (R. 91:165-166). However, she did not identify Hoyle as the assailant until May 2017, when she told Officer Nelson. (R. 91:166).

HAL could not narrow down when in February she saw Hoyle, such as whether it was before or after Valentine's Day, *i.e.* February 14th. (R. 91:165). Nor could HAL recall what day of the week the assault occurred or even if it was a weekday or on the weekend. (R. 91:169). There was no testimony regarding what time of day the assault allegedly occurred.

HAL's direct testimony ended with an extended explanation for why she was not emotional during her testimony.

> **DA:** You mentioned that it's traumatic to you today and upsetting to you today. Is there a reason why you are not crying now?
>
> **HAL:** I have gotten counseling to help with dealing with this.
>
> **…**
>
> **DA:** Do you still go to counseling for this?
>
> **HAL:** Yes.
>
> **…**

> **DA:** Are they able to help you process through this?
>
> **HAL:** Yes.
>
> **DA:** So as you mentioned, your ability to deal with it gets better and better as you deal with it professionally?
>
> **HAL:** Correct.

(91:167-168).

Investigator Anderson was the only other witness for the state. She testified that the road where the alleged assault occurred was in Chippewa County. (R. 91:182). She admitted that she did not speak with HAL's mother about the incident, and claimed that it was because she had arrested the mother for physically abusing HAL the week before she spoke with HAL in March 2017. (R. 91:183). Anderson did not speak with any of the other family members with HAL on the day of the alleged incident. (R. 91:185). Nor did Anderson speak with the friend that HAL was supposed to meet that day. (R. 91:185).

When Anderson interviewed HAL, HAL did not say that she had anything to drink or was otherwise under the influence. (R. 91:186). Anderson determined the location of the road where the alleged assault occurred based only on HAL's description of the location. (R. 91:186). Anderson did not take HAL to the location for HAL to confirm that Anderson had the correct road. (R. 91:186).

After the state rested, Hoyle exercised his right not to testify, and did not otherwise introduce any evidence. (R. 91:190-192).

B. The State's arguments concerning "uncontroverted evidence."

Prior to trial, the state then asserted that it was allowed to argue that the evidence was "uncontroverted." Specifically, the state claimed:

> The State is allowed to argue that the evidence is uncontroverted, meaning that you only have heard from [HAL]. That's not commenting upon the defendant's right to silence but commenting upon the evidence in front of the jurors at that time. I can't say it's uncontroverted because the defendant didn't testify, but I can say that her testimony is uncontroverted and that you haven't heard any testimony to the contrary.

(R. 91:13). Hoyle objected, and the court took the matter under advisement. (*Id.*) The court later granted the state's request at an unrecorded jury instruction conference.[3]

As a result of the court's ruling, the prosecutor repeatedly argued in his closing that HAL's testimony was "uncontroverted." For instance, the prosecutor argued that:

> [HAL's] testimony that she gave here yesterday is uncontroverted. You have heard no evidence

[3] The state stipulated at the postconviction hearing that the issue was preserved for appeal. (R. 94:16-19).

> disputing her account of that sexual assault. You heard nothing.
>
> …
>
> All of that is uncontroverted. There is absolutely no evidence disputing her account of what occurred.
>
> …
>
> None of that was controverted, meaning it was all uncontroverted, meaning there was nothing controverting her statements about what had occurred to law enforcement, at the preliminary hearing, and at the trial.

(R. 92:18-21).

C. HAL's statements to the PSI writer contradicts her trial testimony.

As noted above, HAL explained at trial that the reason she was not emotional on the stand was because she was receiving counseling for all of the issues in her life, including the assault. (91:167-168).

However, according to the PSI writer who interviewed HAL shortly after trial, HAL stated that the "[t]he counseling [she] attends is for substance abuse," and that HAL "admit[ted] she has not discussed the sexual assault with her counselor because she does not want to constantly relive the assault." (R. 31:4-5).

D. The State's failure to disclose HAL's initial statement to the police.

The state did not disclose during pre-trial discovery any documentation of HAL's initial allegation that she was a victim of a sexual assault, which was made to Officer Nelson, the school liaison officer. (R. 63:13-14). The state only produced Investigator Anderson's police report, which briefly mentions that HAL had initially disclosed the assault to Officer Nelson. (R. 64).

Hoyle's postconviction counsel obtained through an open records request an email from Officer Nelson to Investigator Anderson that described in detail his initial interview of HAL. (R. 63:14-15; 65). Officer Nelson stated in the email that "[t]his all came about because she was in my office talking about her drug dependence and she used this incident as an example of how low she goes when she is high/drunk." (R. 65). Officer Nelson also wrote that HAL said that he was the first person she told about the incident. (*Id*.) However, HAL later told Investigator Anderson that she "shared what happened with a friend of hers the night of the assault or the following night," although "she was not completely truthful with her friend." (R. 64:4).

After Hoyle asserted in his postconviction motion that the failure to produce Officer Nelson's email violated Hoyle's right to discovery (R. 63:14-18), the state produced Officer Nelson's actual police report of his initial conversation with HAL. (R. 74). Officer

Nelson's report included additional allegations that HAL did not make elsewhere. For instance, HAL told Officer Nelson that her assailant gave her cigarettes and later said "I gave you cigarettes, now you can give me something in return," and "then locked the doors on the vehicle." (R. 74:4). HAL did not repeat these allegations in her subsequent interview by Investigator Anderson or in her preliminary hearing or trial testimony. (R. 64, 87, 91).

ARGUMENT

I. Hoyle Is Entitled To A New Trial Based On Newly Discovered Evidence Of HAL's Inconsistent Statements Regarding Counseling.

A. Legal Standards

HAL's post-trial revelation that she did not actually receive counseling for the alleged assault constitutes newly discovered evidence that entitles Hoyle to a new trial. The State's case relied entirely on the jury believing HAL, because the State introduced absolutely no corroborating evidence of any sort. To bolster HAL's credibility by explaining her unemotional demeanor at trial, the state elicited testimony that HAL had received counseling for the assault. However, HAL contradicted this testimony shortly after trial, telling the PSI writer that she had not received any such counseling. In light of the absence of any physical evidence or any corroborating witnesses, if a jury had heard these contradictory statements, there is a reasonable probability that it

would find the state failed to meet its burden of proving Hoyle's guilt beyond a reasonable doubt.

The standard for granting a new trial based on the discovery of new evidence is well-established:

> When moving for a new trial based on the allegation of newly-discovered evidence, a defendant must prove: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. If the defendant is able to prove all four of these criteria, then it must be determined whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt.

State v. Plude, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 48, 750 N.W.2d 42.

"Newly discovered evidence" is not limited to substantive evidence of guilt or innocence. "Wisconsin law has long held that impeaching evidence may be enough to warrant a new trial." *Plude*, 2008 WI 58, ¶ 47. "It may well be that newly discovered evidence, impeaching in character, might be produced so strong as to constitute ground for a new trial, as for example where it is shown that the verdict is based upon perjured evidence." *Birdsall v. Fraenzel*, 154 Wis. 48, 142 N.W. 274, 275 (1913).

"The decision to grant or deny a motion for a new trial based on newly-discovered evidence is committed to the circuit court's discretion." *Plude*, 2008 WI 58,

¶ 31. "A circuit court erroneously exercises its discretion when it applies an incorrect legal standard to newly-discovered evidence." *Id*.

B. The newly discovered evidence.

The State's case depended entirely on HAL's credibility. There was no physical evidence of an assault, no text messages or phone records linking HAL and Hoyle, and no cell tower records placing Hoyle in the vicinity of the alleged incident in the relevant timeframe. HAL reported the incident several weeks after it allegedly occurred, and then waited an additional six weeks to name Hoyle as her assailant.

The prosecutor must have been concerned that HAL's demeanor on the stand could cause the jury to question HAL's credibility, because the prosecutor concluded his direct examination by asking her why she was not upset while recounting the alleged assault. HAL explained that she had gone through counseling regarding the assault. The entire passage is as follows:

> **DA:** You mentioned that it's traumatic to you today and upsetting to you today. Is there a reason why you are not crying now?
>
> **HAL:** I have gotten counseling to help with dealing with this.
>
> **DA:** So because it has happened so long ago, you've had professional help in dealing with the repercussions of what occurred.
>
> **HAL:** Correct.

> **DA:** So it's not that it doesn't affect you; it's that you are now better able to deal with it.
>
> **HAL:** Correct.
>
> **DA:** So just because you're not crying here today doesn't mean you're not sad about what occurred to you.
>
> **HAL:** Correct.
>
> **DA:** Do you still go to counseling for this?
>
> **HAL:** Yes.
>
> **DA:** And your counseling, is it related to just this or everything that's gone on in your life, like the stuff with your mom?
>
> **HAL:** Correct, everything.
>
> **DA:** So it's everything. So you talk both about issues with your mom, life in general, and this assault.
>
> **HAL:** Yes.
>
> **DA:** Are they able to help you process through this?
>
> **HAL:** Yes.
>
> **DA:** So as you mentioned, your ability to deal with it gets better and better as you deal with it professionally?
>
> **HAL:** Correct.

(R.91:167-168).

However, after the trial HAL denied to the PSI writer ever receiving any counseling for the assault.

Specifically, HAL spoke with the PSI writer, who reported that:

> She attends counseling once a week and feels this has helped her a lot. The counseling HAL attends is for substance abuse. She admits she has not discussed the sexual assault with her counselor because she does not want to constantly relive the assault.

(R. 31:4-5).

C. HAL's post-trial statements contradicting her claim that she received counseling for the assault satisfies the *Plude* criteria for newly discovered evidence.

The trial court acknowledged that the parties agreed that three of the four *Plude* criteria for newly discovered evidence were met, and only disputed whether the "materiality" element was satisfied. (R. 94:30; App. 30). However, the court did not address materiality itself, instead deciding the case on prejudice grounds. (*Id.*) Regardless, HAL's post-trial admission that she did not receive counseling for the assault, contrary to her clear trial testimony, satisfies the four *Plude* criteria for "newly discovered evidence." *Plude*, 2008 WI 58, ¶ 32.

First, the "evidence was discovered after conviction," as the revelation that HAL testified falsely about her counseling occurred after sentencing. *Plude*, 2008 WI 58, ¶ 32.

Second, Hoyle could not be "negligent" for not discovering it before trial, because it did not exist until after trial. *Plude*, 2008 WI 58, ¶ 32.

Third, the "evidence is material to an issue in the case": HAL's credibility. *Plude*, 2008 WI 58, ¶ 32. HAL's credibility was critical to the state's case, as there were no other witnesses and no physical evidence of the assault. Countless cases have explained that a witness's demeanor is a vital part of the jury's assessment of the witness's credibility. *Barber v. Page*, 390 U.S. 719, 725-26 (1968) (the Sixth Amendment confrontation right encompasses "the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness."); *State v. Johnson,* 2004 WI 94, ¶ 20, 273 Wis. 2d 626, 641–42, 681 N.W.2d 901, 908–09 ("The purpose and effect of the cross-examination of the … witness is to test that witness's credibility through his or her demeanor[.]"); *State v. Byrge*, 2000 WI 101, ¶ 42, 237 Wis. 2d 197, 222, 614 N.W.2d 477, 489 ("trial court findings, including competency to stand trial, should be afforded deference because their resolution hinges on witness credibility, and hence, evaluation of demeanor."); *Braun v. Indus. Comm'n*, 36 Wis. 2d 48, 57, 153 N.W.2d 81, 85 (1967) ("Where, as here, witnesses have directly contradicted each other, the impression the fact finder has of their demeanor is likely to be the decisive factor in determining who is telling the truth.")

Here, the newly discovered evidence demonstrates that the jury was given an incorrect

explanation for HAL's unemotional demeanor on the stand: that she had received counseling for the sexual assault. The newly discovered evidence is thus material to the issue of HAL's credibility.

In addition to showing that HAL's credibility should not have been bolstered with her claim that she had received counseling for the assault, the newly discovered evidence gives a reason to question her credibility. In light of the inconsistency, a jury could reasonably conclude that HAL did not give truthful testimony about her treatment, and in turn did not give truthful testimony about the assault.

The State seemed to argue below that the evidence was not "material" because it was impeachment evidence, citing *Birdsall*. (R. 94:21). However, *Birdsall* in no way announced a categorical rule excluding impeachment evidence from the world of newly discovered evidence. In fact, *Birdsall* acknowledged that "newly discovered evidence, impeaching in character, might be produced so strong as to constitute ground for a new trial, as for example where it is shown that the verdict is based upon perjured evidence." *Birdsall*, 154 Wis. at 48. And more recently, the supreme court plainly stated in *Plude* that "Wisconsin law has long held that impeaching evidence may be enough to warrant a new trial." 2008 WI 58, ¶ 47.

Indeed, the newly discovered evidence in *Plude* operated similarly to the newly discovered evidence here. In *Plude*, the jury heard conflicting expert

opinion testimony explaining the mechanism of the death of the defendant's wife. 2008 WI 58, ¶¶ 41-46. It was discovered after the verdict that one of the experts lied about his credentials, specifically a professorship. *Id*. at ¶ 30. The newly discovered evidence thus removed the bolstering effect of his credentials, and reduced his credibility by demonstrating that he had an untrustworthy character.

Finally, the evidence is not "cumulative." "[E]vidence is cumulative where it tends to address 'a fact established by existing evidence.'" *State v. McAlister*, 2018 WI 34, ¶ 37, 380 Wis. 2d 684, 707, 911 N.W.2d 77, 88 (quoting *State v. Thiel*, 2003 WI 111, ¶78, 264 Wis. 2d 571, 665 N.W.2d 305) (emphasis supplied). There was no evidence, and it was in no way "established," that HAL did not receive counseling for the alleged sex assault.

D. There is a reasonable probability that if the jury heard HAL's conflicting statements about receiving counseling for the assault, it would have had a reasonable doubt as to Hoyle's guilt.

There is a "reasonable probability" that if a jury had heard both HAL's claim that her demeanor was explained by her receiving counseling for the assault, and her subsequent claim that she actually had not received any counseling for the assault, the jury would have had a reasonably doubt as to Hoyle's guilt. "A reasonable probability of a different outcome exists if there is a reasonable probability that a jury, looking at both the old evidence and the new evidence, would

have a reasonable doubt as to the defendant's guilt." *Plude*, 2008 WI 58, ¶ 33 (quotation marks, citations, and brackets omitted).

Once again, the state's case relied exclusively on HAL's credibility. There was absolutely no corroborating physical evidence or witness testimony. While the late reporting made it unlikely that investigators would find any DNA or other medical evidence of a sexual assault, there were other potential sources of corroborating evidence that were not introduced at trial. For example, there were no cell phone tower records showing that Hoyle was in the area of the alleged assault at any point during the alleged time frame. Nor was there evidence that Hoyle owned or otherwise had access to a car matching HAL's description of the car.

Similarly, according to HAL's testimony, she told her family she was running over to a friend's house for a few minutes to relay a message, but Hoyle had her in his car for about 45 minutes. (R. 91:178). Indeed, HAL testified that her mother was upset with her for being out longer than expected. (*Id*.) Yet the prosecution did not call to the stand either HAL's friend or any of HAL's family members to testify about a time HAL was out of the house unexpectedly. In fact, the investigating officer did not even interview any of these potentially corroborating witnesses. (R. 91:185).

With that lack of evidence in the backdrop, the prosecutor undoubtedly was aware HAL's demeanor was critical to the jury believing her testimony. And

the prosecutor must have been concerned with HAL's unemotional affect, and so solicited testimony to explain her demeanor: that she had received counseling for the assault that allowed her to testify without becoming emotional on the stand. (91:167-168).

The newly discovered evidence thus went straight to the heart of the critical issue at trial: whether HAL's demeanor during her testimony leant her enough credibility to convince the jury of Hoyle's guilt beyond a reasonable doubt. If the jury heard that shortly after trial HAL claimed that she had *not* received any treatment, the jury could reasonably conclude that her demeanor was not because she received counseling, but because the assault did not actually happen.

Again, *Plude* is instructive. The supreme court observed that the expert's testimony was "critical" to explaining the prosecution's theory for the mechanism of the decedent's death. 2008 WI 58, ¶ 36. Other expert witnesses disagreed or were equivocal on the point. The court concluded that

> in a trial rife with conflicting and inconclusive medical expert testimony about a case the circuit court observed was based on 'circumstantial evidence,' there exists a reasonable probability that, had the jury discovered that Shaibani lied about his credentials, it would have had a reasonable doubt as to Plude's guilt. Our conclusion is based on Shaibani's testimony as a quasi-medical expert notwithstanding his lack of a medical education and on the link that Shaibani's testimony provided to other critical

> testimony that related to the manner of Genell's death.

Plude, 2008 WI 58, ¶ 36. The newly discovered evidence both here and in *Plude* involved evidence bolstering the key witness's credibility. In *Plude*, it was evidence about the expert's credentials. Here, it was evidence about HAL's demeanor. There is a reasonable probability that a jury, hearing all the evidence, would have a reasonable doubt about Hoyle's guilt.

E. The trial court erroneously exercised its discretion when it applied the incorrect legal standard to facts not supported by the record.

The trial court, while parroting the correct legal standard at the outset of its analysis, did not actually apply the correct standard and made factual conclusions that were clearly erroneous. The court's analysis was as follows:

> With regard to what I think are the more critical issues, the test of newly discovered evidence. As [the prosecutor] points out, it's a test -- it's clear and convincing evidence. … And I note that everybody agrees that this information was discovered after the trial, after the conviction. We'll agree that the defense was not negligent in not seeking it. I also I think note that the parties agree that it wasn't cumulative. The issue, as everybody agrees, is, was it as to a material issue? And then if I find that it was as to a material issue, if all A through D -- one through four -- of those banners are met, is there a reasonable probability that a different result would be reached at a new trial? … Is there a reasonable

> probability that a jury, looking at the evidence both old and new, would have reasonable doubt as to the guilt of the defendant?
>
> Here, I think [the prosecutor] points out correctly, that we're trying to impeach a 15-year-old witness testifying about a sexual assault that happened some time prior to the trial. I think -- I don't recall the details, [the prosecutor] maybe does -- but I'm sure the defense counsel, who I respect as a very capable attorney, if there had been inconsistencies between the prelim and the trial, would certainly have made hay with that. So we're looking at whether or not the fact that this witness said she hadn't talked about it with her counselor when, in fact, she had or vice versa. Is that going to erode my confidence in the end result? And I will find that that would not erode my confidence in the decision. It does not rise to what I would call clear and convincing evidence that she lied about anything. Again, we're talking about a 15-year-old witness recalling a -- if you believe her, and the jury did -- a very tragic incident in her life. So I don't see that as an issue.

(R. 94:29-31; App 106-08).

First, the court did not consider all of the evidence at trial, as it must. *Plude*, 2008 WI 58, ¶ 33. The court did not consider that there was no corroborating evidence of any sort, and that the entire case hinged on the jury's assessment of HAL's credibility. In contrast, the *Plude* court reviewed the significant amount of expert evidence introduced at the trial, and explained how the newly discovered evidence impeached the witness whose "testimony was a critical link in the State's case." 2008 WI 58, ¶ 46.

Second, the court noted that there were no inconsistencies between HAL's testimony at the preliminary hearing and at trial. However, this was not the case: trial counsel pointed out that while HAL testified at trial that she had drank some unknown alcohol and taken an indeterminate number of pills on the day of the alleged assault, at the preliminary hearing she testified that she had six Vicodin pills and three shots of vodka. (R. 91:138, 140-141, 161, 175). Further, at no point did the state introduce evidence of HAL's prior consistent statements at the preliminary hearing in order to suggest she was a credible witness.

Third, the court concluded that the newly discovered evidence "does not rise to what I would call *clear and convincing evidence* that she lied about anything," which presumably included the assault. (R. 94:31; App 108) (emphasis supplied). However, the supreme court has made crystal clear that the "clear and convincing evidence" standard only applies to the first four criteria for newly discovered evidence under *Plude*. It does not apply to the "reasonable probability" test. *State v. Armstrong*, 2005 WI 119, ¶ 162, 283 Wis. 2d 639, 704, 700 N.W.2d 98, 130 ("we withdraw language from [*State v. Avery*, 213 Wis.2d 228, 234, 570 N.W.2d 573 (Ct.App.1997)] that concludes the reasonable probability determination must be made by clear and convincing evidence.")

Finally, to pass the "reasonable probability" test, Hoyle did not have to show that HAL "lied" about the assault. Instead, it is enough that there is a reasonable

probability that the jury, in light of the inconsistent statements regarding her counseling, would reasonably doubt Hoyle's guilt. For example, in *Plude*, the reasonable probability test was satisfied *not* because the court was convinced that the expert had "lied" about the substance of his testimony, *i.e.* about the mechanism of the decedent's death. Instead, because the newly discovered evidence established that the expert did not have the credentials he claimed at trial, there was a reasonable probability that the jury would not find his explanation of the mechanism of death sufficiently credible to find the defendant guilty beyond a reasonable doubt. 2008 WI 58, ¶ 49.

II. Hoyle Is Entitled To Postconviction Discovery Of Counseling Records.

If this court does not grant a new trial based on HAL's post-trial statement that she did not actually receive counseling, Hoyle is entitled to postconviction discovery of her counseling records. *State v. Green*, 2002 WI 68, ¶34, 253 Wis. 2d 356, 646 N.W.2d 298; *State v. Robertson*, 2003 WI App 84, ¶ 26, 263 Wis. 2d 349, 365, 661 N.W.2d 105, 113; *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993). More specifically, Hoyle is entitled to an in-camera review by the circuit court of the counseling records; and if the court determines that any of the records are "consequential to an issue in the case," Hoyle is entitled to those records and an opportunity to file an amended postconviction motion based on the records. *Robertson,* 2003 WI App 84, ¶ 26.

A. Legal standards

In *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), the court of appeals first set forth the process under which criminal defendants in Wisconsin may obtain *in camera* review of otherwise privileged treatment records upon a showing of "materiality." The Wisconsin Supreme Court later modified the "materiality" requirement under *Shiffra*, stating: "the preliminary showing for an in-camera review requires a defendant to set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence and is not merely cumulative to other evidence available to the defendant." *State v. Green*, 2002 WI 68, ¶34, 253 Wis. 2d 356, 646 N.W.2d 298. Further, "information will be necessary to a determination of guilt or innocence if it tends to create a reasonable doubt that might not otherwise exist." *Id.* (citations and quotation marks omitted).

If a defendant meets the initial materiality burden under *Shiffra/Green* for *in camera* review and the complainant authorizes release of the sought-after records, the court reviews the records *in camera* to "determine whether the records contain any relevant information that is 'material' to the defense of the accused." *State v. Solberg*, 211 Wis. 2d 372, 386, 564 N.W.2d 775 (1997) (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 (1987)). If the complainant refuses to disclose the records, "the only method of protecting [the defendant's] right to a fair trial [is] to

suppress [the complainant's] testimony [.]" *Shiffra*, 175 Wis. 2d at 612.

In *Robertson,* the court of appeals explained how the *Shiffra/Green* framework is applied when treatment records are sought as postconviction discovery in support of a newly discovered evidence claim. 2003 WI App 84, ¶ 26. The court applies three of the four criteria for newly discovered evidence discussed above: that the evidence was discovered after trial, was not negligently ignored before trial, and is not cumulative. *Id*. The only difference in the first part of the analysis is that the remaining criterion for newly discovered evidence, materiality, is assessed under the *Shiffra/Green* standard. *Id*.

Next, if the four steps of the combined tests are met, then the court conducts an *in camera* review of the treatment records. The court must then release to the defendant any treatment records that meet the standard for postconviction discovery, *i.e.* that it is "consequential to an issue in the case." *State v. O'Brien*, 223 Wis. 2d 303, 323, 588 N.W.2d 8, 16 (1999); *Robertson,* 2003 WI App 84, ¶ 26.

B. Hoyle meets the requirements for the postconviction discovery of the records of the treatment HAL referenced at trial and in her comments to the PSI writer.

In light of HAL's inconsistent statements regarding the nature of her treatment, and the state's reliance on her treatment to explain her demeanor on the stand and thus establish her credibility, Hoyle is

entitled to postconviction discovery of the relevant treatment records. Hoyle meets the four criteria for *in camera* review set out in *Robertson*. 2003 WI App 84, ¶ 26.

First, Hoyle did not receive any counseling records prior to trial, so the counseling records would be discovered after conviction.

Second, Hoyle was not negligent for not seeking the counseling records prior to trial. As documented in Investigator Anderson's police report, during HAL's initial police interview in March 2017, she did say she was receiving counseling. However, she also stated that she did not discuss the assault with her counselor. (R. 64:4). Thus, Hoyle would have had no basis to file a *Shiffra/Green* motion, as "[m]ere speculation or conjecture as to what information is in the records is not sufficient." *Robertson*, 2003 WI App 84, ¶ 26.

Importantly, at the time of the trial in December 2018, HAL's March 2017 statement that she did not discuss the assault with her counselor was not necessarily inconsistent with her testimony that she did discuss the assault with her counselor: as far as Hoyle knew, HAL may have sought counseling in the intervening months. Thus, Hoyle cannot be faulted for not bringing up at trial there was any inconsistency between her March 2017 statement and December 2018 trial testimony regarding counseling.

Third, the counseling records meet the *Shiffra/Green* standard for materiality, as there is "a specific factual basis demonstrating a reasonable

likelihood that the records contain relevant information necessary to a determination of guilt or innocence." *Green*, 2002 WI 68, ¶34. Based on HAL's own statements to the PSI writer, the counseling records will show that she did not discuss the sex assault with her counselor, in direct contradiction to her trial testimony. As discussed above, her claim that she received counseling specifically for the sexual assault bolstered her credibility by explaining her unemotional demeanor on the stand. Because her demeanor was the only basis for crediting her claim that Hoyle assaulted her, and HAL's credibility was the only basis for the state's case against Hoyle, the counseling records are "necessary to a determination of guilt or innocence."

Finally, the counseling records are not "cumulative" to any evidence already introduced at trial, as no such records were introduced at trial.

Accordingly, the court should have ordered an *in camera* review of the counseling records to determine if they contain information "consequential to an issue in the case." *Roberston*, 2003 WI App 84, ¶ 22 (*quoting O'Brien*, 223 Wis. 2d at 323). The circuit court did not do that. The court instead decided, before the fact, that the treatment record would not have been "consequential." The court's entire analysis was as follows:

> Closely tied to that [i.e., Hoyle's newly discovered evidence argument], I think, is the postconviction discovery and in-camera inspection of records. Again, I'm looking at a different case than you

> folks cited, *State v. O'Brien*, 214 Wis.2d 328. To obtain postconviction relief, the defense must show evidence is -- this is their word -- consequential to an issue in the case. The fact that she did not tell her counselor about the assault, that's a long jump for the Court to take from that point to where that issue is consequential. It's just -- there's a -- in the Court's logical approach, there's a disconnect there. I don't see it. And I guess I think my comments in response to the first issue kind of assumes that maybe there was no disclosure. So let's assume it wasn't or was or vice versa, and the, again, de minimis -- is the word [the prosecutor] used -- was appropriate, again, after a day's trial, what a 15-year-old recalled from a tragic incident.

(R. 94:32).

The circuit court plainly applied the wrong legal standard. First, the court cited the Court of Appeals decision in *O'Brien*, not the Supreme Court of Wisconsin decision in the same case that modified the Court of Appeals decision. *O'Brien*, 223 Wis.2d at 321, ¶ 25. Second, and more importantly, the Court of Appeals stated in no uncertain terms in *Robertson* "that the *O'Brien* 'consequential evidence' test should not be used to decide whether to conduct an *in camera* review." *Robertson*, 2003 WI App 84, ¶ 22.

Regardless, "[w]hether the defendant submitted a preliminary evidentiary showing sufficient for an *in camera* review implicates a defendant's constitutional right to a fair trial and thus raises a question of law" that the court reviews de novo. *Robertson*, 2003 WI App 84, ¶ 24. Because Hoyle met these requirements, the court should remand the case back to the circuit

court for an in-camera review of HAL's counseling records under the *O'Brien* "consequential evidence" standard.

III. The State's repeated argument that the evidence was "uncontroverted" violated Hoyle's Fifth Amendment right not to testify at trial.

The "Fifth Amendment [privilege against self-incrimination] forbids … comment by the prosecution on the accused's silence … that such silence is evidence of guilt." *Griffin v. California*, 380 U.S. 609, 615 (1965). Such arguments, if not corrected by the court, amount to "a penalty imposed by courts for exercising a constitutional privilege." *Id*.

Even indirect comments about the defendant's silence will violate the privilege, such as when the prosecutor points out a lack of evidence that only the defendant could provide by waiving their privilege and testifying. *See Bies v. State*, 53 Wis. 2d 322, 325–26, 193 N.W.2d 46, 49 (1972); *United States v. Cotnam*, 88 F.3d 487, 499 (7th Cir. 1996). Accordingly, "[t]he test for determining whether remarks are directed to a defendant's failure to testify is 'whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *State v. Johnson*, 121 Wis.2d 237, 246, 358 N.W.2d 824 (Ct.App.1984) (quotation marks and citation omitted).

Here, the prosecutor repeatedly emphasized in his closing argument that the evidence was "uncontroverted." Specifically, the State argued:

> You're supposed to just focus on what you heard yesterday with the testimony. [HAL]'s testimony that she gave here yesterday is uncontroverted. You have heard no evidence disputing her account of that sexual assault. You heard nothing.
>
> …
>
> All of that is uncontroverted. There is absolutely no evidence disputing her account of what occurred.
>
> …
>
> None of that was controverted, meaning it was all uncontroverted, meaning there was nothing controverting her statements about what had occurred to law enforcement, at the preliminary hearing, and at the trial.

(R. 92:18-21).

The prosecutor was quite clearly, and repeatedly, inviting the jury to draw a negative inference from the lack of any evidence controverting HAL's testimony. However, the only person who could controvert HAL's testimony was Hoyle. The only witnesses of the alleged assault were HAL and Hoyle. Thus, the only way for a jury to accept the prosecutor's invitation to draw a negative inference from the lack of evidence controverting HAL's account was to draw a negative inference from Hoyle exercising his right not to give such evidence through testimony. The comments were "of such character that the jury would

naturally and necessarily take it to be a comment on the failure of the accused to testify." *Johnson*, 121 Wis. 2d at 246.

At the postconviction hearing, the state relied on *Bies*, 53 Wis. 2d 325–26, in which the court approved the prosecutor's argument that certain evidence was "uncontroverted." (R. 94:26-27). However, the *Bies* court was careful to explain that the prosecutor did not use this argument with respect to any aspect of the case that the defendant did actually dispute. As the court explained:

> the defendant's strategy was not to deny the occurrence of the acts surrounding the murder and robbery, but rather to show that his intoxication negated the necessary intent. Since the district attorney's comments referred to evidence of the acts rather than to evidence of intoxication, we conclude that the argument was a proper comment on the testimony.

Bies, 53 Wis. 2d at 325–26. Here, of course, Hoyle did dispute whether the "acts" occurred. Hoyle argued that the state failed to meet its burden of proving that any sort of contact, let alone sexual, occurred. (R. 92:28-39).

This case thus falls in the class of cases where courts have found that the prosecutor's comments on the lack of evidence contradicting the state's case violated the defendant's Fifth Amendment privilege against self-incrimination. As the Seventh Circuit has observed, "[i]t appears obvious that using the word 'uncontroverted' in referring to government

evidence—which was this particular prosecutor's favorite—where it is highly unlikely that anyone beyond the non-testifying defendant could contradict the evidence, is just as improper as using the words 'uncontradicted,' 'undenied,' 'unrebutted,' 'undisputed,' and 'unchallenged' in the same situation." *United States v. Cotnam*, 88 F.3d 487, 499 (7th Cir. 1996) (collecting cases).

The state conceded below that the issue was preserved during the unrecorded jury instruction conference. Accordingly, it is the state's burden to prove that the court's error in allowing the prosecutor to argue that the evidence was "uncontroverted" was harmless beyond a reasonable doubt. *State v. Mayo,* 2007 WI 78, ¶ 47, 301 Wis. 2d 642, 668, 734 N.W.2d 115, 127.

IV. Hoyle is Entitled To A New Trial Based On The State's Failure to Disclose HAL's Initial Statement to the Police.

A. Legal standards

A defendant's due process right to present a defense obliges the government to turn over to the defendant evidence in its possession that is exculpatory, *Brady v. Maryland*, 373 U.S. 83 (1963), and/or impeaches a prosecution witness. *Giglio v. United States*, 405 U.S. 150 (1972). The Wisconsin Supreme Court recently explained that a "*Brady* violation has three components: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching; (2) the evidence must

have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must be material." *State v. Wayerski*, 2019 WI 11, ¶ 35, 385 Wis. 2d 344, 362, 922 N.W.2d 468, 477.

Although the state's case was built entirely upon HAL's allegations, the state failed to disclose to Hoyle before trial two versions of HAL's initial allegation to her school liaison officer, Officer Nelson: an email from Officer Nelson to Investigator Anderson describing HAL's statement to him and Officer Nelson's police report about his interview of HAL. Both versions of HAL's initial statement to Officer Nelson contain inconsistencies with her later statements, and suggest possible explanations for why HAL would falsely accuse Hoyle of the assault. The state's failure to disclose these statements before trial violated Hoyle's right to a fair trial.

B. The State failed to disclose evidence of HAL's initial allegations

The only documents provided by the state during discovery regarding HAL's initial disclosure of the sexual assault was a police report prepared by Investigator Anderson. Specifically, Investigator Anderson's report said the following about the initial disclosure:

> On Tuesday, 03/14/17, I Inv. Anderson, received an email from Officer Joseph Nelson with Chippewa Falls Police Department. Officer Nelson informed me [HAL] told him she was sexually assaulted.

> [HAL] told officer Nelson the assault took place near Cadott, Wisconsin. [HAL] did not tell Officer Nelson who the suspect was but she stated he was 22 years old and it was not consensual sex.
>
> I emailed Officer Nelson back and told him I would meet with [HAL] on 3/15/17 at 1000 hours at [the] school to interview her.

(R.64).

The state did not provide any other documents reflecting HAL's initial disclosure of the assault, such as a report prepared by Officer Nelson or the email from Officer Nelson to Investigator Anderson referenced in Anderson's report. Hoyle, through counsel, obtained through an open records request a copy of the email from Officer Nelson to Investigator Anderson. The email contains important details not included in Investigator Anderson's report.

Specifically, the email – which was sent on March 13, not March 14 as Investigator Anderson reported – states the following:

> Hello Inv. Anderson,
>
> I got a doozie for you now! I just made DHS aware of this information as well. [HAL], our child abuse victim from last week who tells me EVERYTHING mentioned today that she was the victim of a sexual assault "about a month ago." The suspect is 22 and she did not tell me his name. She said I am the first person she told, and she said people know this guy. Her location is fuzzyy (*sic*), but she thought it was near Cadott somewhere.

> This all came about because she was in my office talking about her drug dependence and she used this incident as an example of how low she goes when she is high/drunk. She was clear that it was not consensual, and he told her he would kill her if she told anyone. Right now she did not seem interested in getting this guy in trouble, but I think I can convince her otherwise.
>
> She also said he is "gross" and we would know who he is. I talked with Matt at DHS and he was going to let Erica know too. There does not seem to be any evidence of continuing contact between her and him either.

(R. 65).

After Hoyle filed his motion for postconviction relief, the state produced Officer Nelson's actual report of his initial conversation with HAL. The relevant portions of the report are as follows:

> On 03/13/17 at approximately 1322 hours, I school resource officer Joe Nelson of the Chippewa Falls Police Department, was contacted in my office by a female whom I knew from prior contacts as [HAL]. [HAL] was not wishing to report a crime. [HAL] wanted to speak with me as a person she trusted to talk to about her ongoing issues at school and home. During the conversation, [HAL] had spoken to me about her past dependence and addiction to prescription medications and other drugs. [HAL] had told me at one point during the conversation that she had, this super bad thing happened to me. [HAL] stated she did not want to tell anybody because it would have to be reported. [HAL] elaborated, stating, I was on a bunch of pills, and smoked weed. [HAL] stated, it was a really scary night. I asked [HAL] if it was a sexual assault that occurred. [HAL] shook her head yes, and mumbled uh huh. [HAL] advised, it didn't

> happen that long ago, probably like a month ago. [HAL] explained during the incident she went down a dead end road, and again stated it was, so scary. [HAL] stated the male subject, whom she did not identify, asked her to go for a ride somewhere and she agreed. [HAL] stated, he was like 22 years old.
>
> I asked [HAL] to explain where the incident occurred. [HAL] thought the incident would have occurred in Chippewa County somewhere, possibly near Cadott, WI. I asked [HAL] if it was actually sexual intercourse, and she stated it was sexual intercourse. I asked [HAL] if the male provided the drugs. [HAL] informed me she was high before she met with a male, but he did provide her cigarettes. [HAL] stated the male then told her, I gave you cigarettes, now you can give me something in return. [HAL] advised the suspect then locked the doors on the vehicle. [HAL] also informed me that, this was the first time she told anybody, not a single person. [HAL] advised she took, like three showers after the incident. How did not provide a name of the male. In my follow-up to the questioning [HAL] advised that the male told her she could not tell anybody or somebody will end up dead, and it's going to be you.

(R.74:4).

C. The undisclosed evidence was favorable to Hoyle.

The first component of a *Brady* claim is that "the evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching." *Wayerski*, ¶ 35. Here, the more detailed versions of Hal's statement to Officer Nelson include inconsistencies with HAL's later statements, and

suggest possible reasons for why she falsely accused Hoyle of the assault.

First, according to both the email and the report, HAL told Officer Nelson that he was the first person she told about the assault. (R. 65, 74:4). This is significant because she later said to Investigator Nelson that she had told a friend about the assault the night it happened or the night after. (R. 64:4). Hoyle could have used this inconsistency to impeach HAL's credibility, and to point out that there was yet another potential witness that the state neither investigated nor called to the witness stand.

Second, according to the report, HAL told Officer Nelson that she was "on a bunch of pills, and smoked weed." (R. 74:4). However, HAL later told Investigator Anderson, and subsequently testified, when she later claimed that she had taken pills and was drinking vodka. (R. 91:138, 140-141, 161, 175). Hoyle could have used this inconsistency to impeach HAL's credibility.

Next, according to the report, HAL claimed that Hoyle gave her cigarettes, and then said "I gave you cigarettes, now you can give me something in return." (R. 74:4). Although HAL testified extensively about what Hoyle supposedly said and did leading up to the alleged assault, she makes no mention of Hoyle providing her with cigarettes or suggesting some kind of quid pro quo.

Similarly, according to the report, after Hoyle made the comment about the cigarettes "Hoyle then locked the doors" and began the assaulted. (R. 74:4).

However, HAL testified that she got out of the car, then went back into the backseat of the car, and Hoyle then climbed over the backseat to join her. (R. 91:146-147). Again, at no point subsequent to her initial conversation with Officer Nelson did HAL claim that Hoyle locked her in his car.

In addition to these inconsistencies, the undisclosed statements clarify that HAL's initial disclosure did not come about as a result of HAL seeking to speak with someone about the alleged assault. Instead, it came up only because HAL was confiding in Officer Nelson about her drug use, and she used it "as an example of how low she goes when she is high/drunk." (R. 65). A jury could reasonably discount HAL's credibility because she first brought up the assault as an aside when discussing her drug use, as opposed to being driven to disclose the incident by the assault itself.

Relatedly, the manner in which HAL first disclosed the assault, her initial refusal to name the assailant, and other comments in the reports suggesting that law enforcement were pressuring HAL to name someone, suggests why HAL falsely implicated Hoyle in an assault.

That is, while discussing her drug and alcohol abuse with Officer Nelson, HAL started telling him about a sexual experience she regretted, became embarrassed, and claimed it was forced rather than consensual. And because she did not want to get her

actual partner in trouble, she refused to identify the alleged assailant.

However, law enforcement then pressured her to name *someone*, and she later chose Hoyle, whom she knew through her former best friend. For instance, Officer Nelson states "Right now she did not seem interested in getting this guy in trouble, but I think I can convince her otherwise." (R. 65). Similarly, according to Investigator Anderson's report, HAL first named Hoyle as her assailant in May 2017 when Investigator Anderson asked Officer Nelson to speak with HAL about identifying the assailant. Officer Nelson spoke with HAL, and she "confirmed" that Hoyle was her assailant. (R. 64:4). Investigator Anderson's use of the word "confirmed" suggests that *Officer Nelson*, not HAL, was the first one to name Hoyle as HAL's assailant. If so, this would support a defense argument that HAL was simply going along with the government's suggestions.

D. The evidence was "suppressed" under *Brady*.

In *Wayerski*, the supreme court clarified that "suppression" under *Brady* is simply "nondisclosure or the withholding of evidence from the defense. The prosecutor's mindset or 'passivity' is irrelevant to this suppression inquiry." 2019 WI 11, ¶ 58. The state's failure to turn over Officer Nelson's email and report meet this standard.

E. The evidence was "material."

Regarding the third requirement for a *Brady* claim, the email was "material," as "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id*. at ¶ 61. Again, the case was entirely about HAL's credibility. There is a reasonable probability that the jury would have found the state failed to meet its burden if it heard evidence that HAL had made inconsistent statements about the incident, and initially disclosed the assault obliquely as an aside regarding her drug use. Accordingly, Hoyle is entitled to a new trial.

CONCLUSION

For the reasons stated above, Hoyle is entitled to a new trial, or in the alternative, postconviction discovery of HAL's counseling records.

Dated this 1st day of March, 2021.

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 9,393 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, including the appendix as a separate attachment, if any, which complies with the requirements of Wisconsin Supreme Court Order 19-02: Interim Court Rule Governing Electronic Filing in the Court of Appeals and Supreme Court.

Dated this 1st day of March, 2021.

Electronically signed by Thomas B. Aquino
THOMAS B. AQUINO
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

I hereby certify that I have submitted an electronic copy of this appendix to brief, which complies with the requirements of Wisconsin Supreme Court Order 19-02: Interim Court Rule Governing Electronic Filing in the Court of Appeals and Supreme Court.

Dated this 1st day of March, 2021.

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