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**SUPREME COURT**

STATE OF WISCONSIN  
SUPREME COURT  
Case No. 2020AP001876-CR

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STATE OF WISCONSIN,  
Plaintiff-Respondent,  
v.  
TOMAS JAYMITCHELL HOYLE,  
Defendant-Appellant.

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PETITION FOR REVIEW

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## ISSUES PRESENTED

The State's prosecution of Tomas Hoyle for sexual assault depended entirely on the complainant's credibility, as the State introduced no evidence corroborating any aspect of her allegations. At trial the prosecutor elicited from the complainant that her unemotional demeanor on the stand was because she received counseling for the assault. However, after trial she told the PSI writer that she did not receive any counseling for the assault.

The issues presented are:

1. Whether Hoyle is entitled to a new trial based on newly discovered evidence, when the case turned entirely on the complainant's credibility and her post-trial comments contradicted her explanation of her demeanor.
2. If Hoyle is not granted a new trial on the grounds that the PSI writer may not have accurately recorded the complainant's treatment history, whether Hoyle is entitled to a remand for an evidentiary hearing on the complainants treatment history.

The circuit court and court of appeals denied the defendant's requests for relief on the above grounds.

## REASONS FOR GRANTING REVIEW

Review is warranted to address the difficult subject of a defendant's postconviction remedies upon discovering evidence that the complaining witness testified falsely at a sexual assault trial. Although criminal defendants have a constitutional right to confront their accusers with such evidence at trial, after conviction defendants must rely upon the "newly discovered evidence" test. How to balance the defendant's interest in not being convicted of a crime he did not commit, the court's interest in ensuring that "perjury [does not] erode[] the integrity of our judicial system," *State v. Canon*, 2001 WI 11, ¶ 9, 241 Wis. 2d 164, 171, 622 N.W.2d 270, 273, and the victim's interest in finality, is a question of statewide importance befitting this Court's review. Wis. Stat. § 809.62(1r).

## STATEMENT OF THE CASE

### I. Introduction and Summary of the Argument

As often happens in sexual assault prosecutions, the only evidence connecting Tomas Hoyle to the crime alleged here was the testimony of his accuser, "Hannah".<sup>1</sup> There was no physical evidence or witness testimony corroborating Hannah's allegations, so the case hinged entirely on whether the jury believed Hannah. In order to bolster Hannah's credibility, the

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<sup>1</sup> This petition uses the same pseudonym as the Court of Appeals below.

prosecutor elicited from her that the reason for her unemotional demeanor on the stand was because she had received “counseling to help with dealing with this.” (R.91:167-168; App. 24-25). And this was not a one-off question: this line of questioning comprised the final nine questions of the prosecutor’s direct examination of Hannah.

However, after the trial Hannah told a different story. Hannah told the PSI writer that the counseling she had received was for substance abuse, and that “she has not discussed the sexual assault with her counselor because she does not want to constantly relive the assault.” (R. 31:4-5).

This is credible evidence that Hannah lied to the jury about the counseling she received in order make her testimony seem more believable. The Sixth Amendment rights to confrontation and to counsel largely exist so that defendants may confront their accusers with these kinds of inconsistent statements. However, because the inconsistent statement happened after trial, Hoyle had to raise the claim as newly discovered evidence. *State v. Plude*, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 48, 750 N.W.2d 42. And while the Court of Appeals assumed that Hannah’s statement to the PSI writer qualified as newly discovered evidence, the court concluded that there was not a “reasonable probability ... 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.

The Court first held that Hannah's demeanor was only a "collateral" issue, and that her contradictory statement did not address the substance of her claims. (App. 13). However, a witness's demeanor is critical to assessing the witness's credibility; indeed, this is one of the rationales for the right to confrontation. *State v. Thomas*, 144 Wis. 2d 876, 887, 425 N.W.2d 641, 645 (1988). Further, the evidence does not just negate the prosecution's explanation for Hannah's apparently unemotional demeanor, it suggests that Hannah lied to the jury about her demeanor. There is a reasonable probability that a jury would have a reasonable doubt about the rest of Hannah's testimony if the jury concluded that Hannah was not honest about the basis for her demeanor. Finally, because "perjury erodes the integrity of our judicial system," the court should not downplay the significance of Hannah possibly lying to the jury in order to bolster her credibility. *State v. Canon*, 2001 WI 11, ¶ 9, 241 Wis. 2d 164, 171, 622 N.W.2d 270, 273.

The Court of Appeals also reasoned that Hannah's testimony and subsequent statement to the PSI writer were not "wholly inconsistent." The court's attempt to reconcile the two is unconvincing, and statements do not need to be "wholly inconsistent" to cast doubt on the witness's credibility.

Finally, Hoyle has acknowledged the possibility of a court denying Hoyle a new trial on the narrow grounds that the PSI is not strong enough evidence that Hannah did not receive the treatment she

claimed during her trial testimony. For instance, the PSI writer may have misheard Hannah. Accordingly, Hoyle originally requested, as an alternative form of relief, postconviction discovery of Hannah's actual treatment records under the in camera review process required by *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993) and *State v. Robertson*, 2003 WI App 84, ¶ 26, 263 Wis. 2d 349, 365, 661 N.W.2d 105, 113. This Court overturned *Shiffra* and its progeny while this appeal was pending. *State v. Johnson*, 2023 WI 39, ¶ 2, 407 Wis. 2d 195, 199, 990 N.W.2d 174, 176. Accordingly, Hoyle requests, as an alternative form of relief, remand to the circuit court for an evidentiary hearing on whether Hannah's actual treatment records support her trial testimony or her statement to the PSI writer, with the court resolving all the related privilege issues. *Id.* at ¶ 67 (Rebecca Grassl Bradley, J., concurring) (observing that "the majority has restored a statutory privilege unaltered by the judicial pen.")

## 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).

Hoyle appealed, and on January 11, 2022, the Court of Appeals overturned the conviction and ordered a new trial based on the prosecutor repeatedly arguing that Hoyle should be convicted because the evidence was “uncontroverted.” The Court of Appeals did not address Hoyle’s other grounds for appeal. This Court later granted the State’s petition for review, and reversed the Court of Appeals on March 31, 2023.

The case was remanded to the Court of Appeals to decide the remaining issues raised by Hoyle. After supplemental briefing addressing this court’s decision in *State v. Johnson*, 2023 WI 39, ¶ 2, 407 Wis. 2d 195, 199, 990 N.W.2d 174, 176, the Court of Appeals affirmed Hoyle’s convictions in an opinion issued on January 18, 2024.

### **III. Factual Background**

The opinion below adequately sets out the facts necessary to decide the petition. Any additional facts are discussed in context below.

## ARGUMENT

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

#### **A. The newly discovered evidence.**

The State's case depended entirely on Hannah's credibility. There was no physical evidence of an assault, no text messages or phone records linking Hannah and Hoyle, and no cell tower records placing Hoyle in the vicinity of the alleged incident in the relevant timeframe. Hannah 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 Hannah's demeanor on the stand could cause the jury to question Hannah's credibility, because the prosecutor concluded his direct examination by asking her why she was not upset while recounting the alleged assault. Hannah 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?

**Hannah:** 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.

**Hannah:** Correct.

**DA:** So it's not that it doesn't affect you; it's that you are now better able to deal with it.

**Hannah:** Correct.

**DA:** So just because you're not crying here today doesn't mean you're not sad about what occurred to you.

**Hannah:** Correct.

**DA:** Do you still go to counseling for this?

**Hannah:** 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?

**Hannah:** Correct, everything.

**DA:** So it's everything. So you talk both about issues with your mom, life in general, and this assault.

**Hannah:** Yes.

**DA:** Are they able to help you process through this?

**Hannah:** Yes.

**DA:** So as you mentioned, your ability to deal with it gets better and better as you deal with it professionally?

**Hannah:** Correct.

(R.91:167-168; App. 24-25).

However, after the trial Hannah denied to the PSI writer ever receiving any counseling for the assault. Specifically, Hannah spoke with the PSI writer, who reported that:

She attends counseling once a week and feels this has helped her a lot. The counseling Hannah 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).

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

The State conceded below that the four *Plude* criteria were met here. (App. 10). The State instead argued only that there was not a reasonable probability that a jury would have found a reasonable doubt of Hoyle's guilt if the jury heard that contrary to her trial testimony, Hannah claimed that she had not discussed the sexual assault with her counselor. The Court of Appeals agreed with the State, holding that Hannah's statement to the PSI writer:

would have impeached only her testimony on the collateral issue of why her demeanor on the witness stand was unemotional. It would not have impeached any of Hannah's substantive testimony regarding the circumstances of the

sexual assault or her identification of Hoyle as her assailant.

(App. 13).

Hannah's "demeanor" was not a collateral issue in a case that relied entirely on her credibility as a witness. This Court has frequently remarked that witness demeanor is critical to a factfinder's determination of credibility. *See, e.g., State v. Johnson*, 2004 WI 94, ¶ 20, 273 Wis. 2d 626, 642, 681 N.W.2d 901, 909; *State v. Thomas*, 144 Wis. 2d 876, 887, 425 N.W.2d 641, 645 (1988).

Hannah's demeanor and credibility may have been "collateral" if there was evidence of Hoyle's guilt besides her testimony. But there was none. The state's case relied exclusively on Hannah'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 Hannah's description of the car.

Similarly, according to Hannah'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, Hannah 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 Hannah's friend or any of Hannah's family members to testify about a time Hannah was out of the house unexpectedly. In fact, the investigating officer did not even interview any of these potentially corroborating witnesses. (R. 91:185).

Further, it was the prosecutor, not Hoyle, who introduced the issue of Hannah's demeanor. Given the lack of any corroborating evidence, the prosecutor undoubtedly was aware Hannah's demeanor was critical to the jury believing her testimony. And the prosecutor must have been concerned with Hannah'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). Notably, when this Court previously held that the prosecutor's argument that Hoyle should be convicted because Hannah's testimony was "uncontroverted" did not violate Hoyle's right not to testify, it did so in part because in context the comment was focusing the jury on permissible factors, including Hannah's "demeanor." *State v. Hoyle*, 2023 WI 24, ¶ 36, 406 Wis. 2d 373, 397, 987 N.W.2d 732, 743. Hannah's demeanor cannot fairly be called "collateral" just because it was not the substance of her allegations.

In fact, in *Plude* this court held that evidence that an expert witness lied about his credentials was

enough to grant the defendant a new trial, even though there was no evidence that the expert lied about the substance of his testimony (the mechanism of the decedent's death). 2008 WI 58, ¶ 36. Not only did the witness lack the credentials that made him a believable witness, the fact that the witness lied about his credentials impeaches his overall credibility.

The Court of Appeals below does not address this last point: that if the jury concludes that Hannah lied about her counseling history in order to falsely boost her credibility, the jury could reasonably question the veracity of all of her testimony, including her allegations against Hoyle. Countenancing Hannah's ostensibly false trial testimony is inconsistent with this court's frequent admonition that "perjury erodes the integrity of our judicial system[.]" *State v. Canon*, 2001 WI 11, ¶ 9, 241 Wis. 2d 164, 171, 622 N.W.2d 270, 273.

The Court of Appeals also denied Hoyle's request for a new trial on the grounds that Hannah's statement to the PSI writer was not "entirely inconsistent" with her trial testimony. The thrust of the court's reasoning seems to be that in both versions, Hannah stated that the counseling helped her, even if she told the PSI writer that the only counseling she had received was specifically for her substance abuse issues. However, Hannah repeatedly testified at trial that her counseling was for the assault. It is more believable, and better bolsters her credibility, if she received counseling specifically for her assault. And if the jury found out that Hannah lied to them about the

nature of her counseling in order to bolster her credibility, there is a reasonable probability that the jury would find Hannah not to be a credible witness, and reasonably doubt Hoyle's guilt.

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

In the prior rounds of litigation, Hoyle anticipated the state arguing and/or the court finding that Hoyle was not entitled to a new trial due to the possibility that the PSI version of Hannah's counseling history did not reflect her actual treatment record. That is, there is a possibility that the PSI writer did not accurately convey Hannah's claims about her treatment history during her interview, or that Hannah misremembered or misspoke during the PSI interview, and that her trial testimony was the truth.

To address this possibility, Hoyle sought as alternative relief the postconviction discovery of Hannah's counseling records, relying upon *State v. Green*, 2002 WI 68, ¶34, 253 Wis. 2d 356, N.W.2d 298, *State v. Robertson*, 2003 WI App 84, ¶ 26, 263 Wis. 2d 349, 365, 661 N.W.2d 105, 113, and *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993). More specifically, Hoyle requested an in-camera review by the circuit court of the counseling records; and if the court determined that any of the records are "consequential to an issue in the case," Hoyle requested access to those records and an opportunity to file an amended postconviction motion based on the records. *Robertson*, 2003 WI App 84, ¶ 26.



While this case was pending in the Court of Appeals, this court overturned the *in camera* review procedure set out in *Shiffra*. *State v. Johnson*, 2023 WI 39, ¶ 2, 407 Wis. 2d 195, 199, 990 N.W.2d 174, 176. The *Johnson* dissenters pointed out that by overturning *Shiffra*, the court left “nothing” “in its place” to balance the rights of defendants and victims. 2023 WI 39 at ¶ 108 (Ann Walsh Bradley, J., dissenting). A concurrence rejoined that “[o]n the contrary, the majority has restored a statutory privilege unaltered by the judicial pen.” 2023 WI 39 at ¶ 67 (Rebecca Grassl Bradley, J., concurring).

As a consequence of the *Johnson* decision, Hoyle filed a supplemental brief replacing his postconviction *Shiffra* claim with a request for a remand to the circuit court for an evidentiary hearing. More specifically, if the court denied Hoyle’s request for a new trial based on the possibility that the PSI version of Hannah’s statement was not accurate, Hoyle requested an evidentiary hearing to determine whether Hannah actually received the counseling that she claimed at trial. If Hannah claimed that the counseling records were privileged, the circuit court would sort out whether the privilege applied and if so, whether Hannah’s trial testimony waived the privilege.

However, the court of appeals did not rule on this ground. The court held that even if “Hannah’s counseling records confirm the accuracy of her statement to the PSI author,” there is not a reasonable probability of the jury finding Hoyle not guilty. But if this court grants review, and decides that Hoyle is not

entitled to a new trial due to the possibility that the PSI does not faithfully depict Hannah's actual counseling history, then remand is appropriate.

### CONCLUSION

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

Dated this 19<sup>th</sup> day of February,  
2024.

Respectfully submitted,

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## CERTIFICATIONS

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b), (bm) and 809.62(4). The length of this petition is 2,988 words.

I hereby certify that filed with this petition is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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

Dated this 8th day of February, 2024.

Signed:

*Electronically signed by Thomas B. Aquino*

Thomas B. Aquino

Assistant State Public Defender

**APPENDIX**

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