STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2022AP1747-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

KEVIN D. WELTON,
Defendant-Appellant.

ON APPEAL FROM THE JANUARY 27, 2020, JUDGMENT OF CONVICTION AS WELL AS THE SEPTEMBER 27, 2021, AND SEPTEMBER 19, 2022, ORDERS DENYING WELTON'S MOTIONS FOR POSTCONVICTION RELIEF AND FOR POSTCONVICTION DISCOVERY, FILED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE SUSAN M. CRAWFORD, PRESIDING.
DANE COUNTY CASE NO. 2018CF1563

DEFENDANT-APPELLANT'S BRIEF

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STATEMENT OF THE ISSUE

Whether the postconviction court erred in denying Welton's request for postconviction discovery when he presented a compelling case that records in the State's possession would contain favorable impeachment evidence of a State's witness that should have been turned over pretrial, amounting to a *Brady* violation?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Welton would welcome oral argument if of interest to the panel. The parties had a spirited oral argument before the circuit court during which the court obviously struggled with issues surrounding postconviction discovery and Welton's entitlement to it. Relatedly, publication is appropriate to advance the law regarding a defendant's entitlement—or lack thereof—to postconviction discovery.

STATEMENT OF THE CASE

One summer day in 2018, Dr. Barbara Knox walked her seven-year-old daughter Edith[1] into a police station to report a sexual assault. (*See* R.173:1.)[2] Over the next hour of police questioning, Dr. Knox involved herself in her daughter's interview, answered questions for Edith, spoke over Edith, and even corrected parts of Edith's story. (*See, e.g., id.*:2, 14, 27.) Dr. Knox—in front of Edith and before Edith was allowed to recite her own memory of events—told the officer that a man had touched Edith's private parts at a birthday party. (*Id.*:8-14.) Edith, Dr. Knox said, had been in the pool at the time and the man had touched her under the water. (*Id.*)

As would later come out at trial, the police station interview was at least the third time that Dr. Knox had spoken with Edith about what occurred at the pool party. (R.144:214-15.) She first spoke with Edith about the incident when she picked her up from a friend's house. (*Id.*:212.) Before going to or calling the police, Dr. Knox took Edith home to speak with her father. (*Id.*:214-15.) That was the second time that Dr. Knox and Edith performed a rendition of the pool party incident. (*Id.*) After their talk with Edith's father, Dr. Knox drove Edith to the police

[1] A pseudonym. *See* Wis. Stat. § (Rule) 809.86(4).

[2] During Welton's trial, the parties discussed with the Court preparing and providing a transcription of the bodycam video. (R.91:3-5.) The prosecution then told the Court that it was having trouble getting a transcript produced and did not have one. (*Id.*) No such transcript was ever entered into evidence or made part of the record. (*Id.*) Postconviction, Welton hired Verbatim Reporting, Ltd., a Madison-based transcription service to produce a transcript and submitted it along with his postconviction motion. (R.173.)

station where, for a third time, the pair discussed what had occurred at the pool party. (*Id.*:217; *see also* R.173.)

Early in the police-station inquiry, as Dr. Knox was telling the officer what she thought had happened to Edith at the pool, the following exchange occurred:

> DR. KNOX: And then -- then I turned the car to head down their driveway, and [Edith] started telling me about it immediately and told me that he touched her privates --
> OFFICER RIFFENBURG: Okay.
> DR. KNOX: -- her front private twice.
> [EDITH]: *But it might have been an accident.*
> DR. KNOX: *Well* --
> DR. KNOX: So we -- so we talked a little bit about that.
> OFFICER RIFFENBURG: Mm-hmm.
> DR. KNOX: And so I asked her some open-ended, non-leading questions about that, and she was able to tell me that he used the pads of his fingers, which were her words.
> OFFICER RIFFENBURG: Okay. Okay.

(R.173:14 (emphasis added).) Dr. Knox's dismissive "Well --" in response to her daughter's assertion that she might have been touched accidentally—and the tunnel vision towards abuse that it shows—is illustrative of an attitude that Dr. Knox exhibited not only in the interview room at the Middleton Police Department, but also in her day job.

When Dr. Knox took her daughter to the Middleton Police Department, she was employed as "a board certified child abuse pediatrician at the University of Wisconsin, School of Medicine and Public Health." (R.144:208.) But, in less than two years, Dr. Knox was gone from that position with a cloud hanging over her tenure there.

In 2020—four months after Dr. Knox testified at Welton's trial—Wisconsin Watch, a non-profit center for investigative journalism,[3] published an article detailing a "trail of accusations of bullying from colleagues [and] parents" that Dr. Knox left in her wake.[4] Wisconsin Watch's investigative reporting detailed Dr. Knox's history of bullying her colleagues into making unfounded child abuse

[3] *About Wisconsin Watch*, https://wisconsinwatch.org/about/ (last visited Jan. 10, 2023).
[4] *See* Dee J. Hall, *Univ. of Wis. child abuse doc. leaves a trail of accusations of bullying from colleagues, parents*, Wisconsin Watch (Feb. 29, 2020), https://bit.ly/2VfMgaS (last visited Jan. 10, 2023).

findings and lying to patients' families.[5] One former colleague eventually testified that Dr. Knox pressured him into making unfounded medical findings, which contributed to the conviction of Jennifer Hancock.[6] Indeed, the UW Health system was investigating allegations about Dr. Knox's workplace behavior at the time of Welton's prosecution.

The Dane County prosecutor's office knew, at the very least, some of that information at the time of Welton's trial. (*See* R.206:23.) Indeed, that office had sent a letter in August 2019—approximately two months *before* Welton's trial—to another defense attorney stating as much. (*Id.*) And, for nearly the entirety of the year before Welton's trial, the Dane County DA's office was litigating Hancock's postconviction motion in which, as mentioned above, she argued that one of Dr. Knox's colleagues had recanted his child abuse finding.[7]. As would come out later, that colleague attributed his recantation to having originally felt pressured by Dr. Knox to make an abuse finding.[8]

Sometime before Welton's trial, the prosecution showed his trial attorney a letter written by the Dane County DA's office regarding Dr. Knox. (*See* R.179:5.) That letter referenced an investigation that Dr. Knox's employer—the UW Health System—had commenced related to her performance. (*Id.*) The prosecution neither notified Welton's trial counsel of nor provided him with copies of any other material related to the investigation of Dr. Knox. (*See id.*)

As it turns out, the UW Health's investigation was only the tip of the iceberg. Following publication of the Wisconsin Watch article, "dozens of people . . . contacted [Wisconsin Watch] with stories about interactions with [Dr.] Knox."[9] One

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[5] *Id.*
[6] *Id.*
[7] *See* Hall, *Child abuse doc.*, https://bit.ly/2VfMgaS; *see also* Wis. Cir. Ct. Access, *St. v. Hancock, Dane Cty. Case 2007CF2381*, Docket Entries 2/12/2019-10/17/2019 (available at https://bit.ly/3zLfoW6) (last visited Jan. 10, 2023)
[8] *See* Hall, *Child abuse doc.*, https://bit.ly/2VfMgaS.
[9] Michelle Theriault Boots, *Allegations of "Bullying" Behavior in Previous Job Surface Against Alaska Child-Abuse Clinic Director*, Anchorage Daily News (Mar. 3, 2020) (updated April 19, 2020) (available at https://bit.ly/3lhA3xp) (last accessed Jan. 10, 2023).

family told investigators that Dr. Knox had falsely represented her qualifications to them "as a ruse to push for further testing."[10]

Significantly, occurrences at the time of Edith's initial statement to police and during her trial testimony contribute to a picture of Dr. Knox consistent with the one painted by her former colleagues. That is, someone who wanted to see abuse and make sure others saw it too. After Edith was done talking to the police officer, Dr. Knox pulled the officer aside separately and made very clear she believed her daughter was reporting an assault and she wanted the officer to believe it too:

> DR. KNOX: [Edith,] [y]ou sit right there, and I'll be right there. Okay? So in the little disclosure, she makes that, to me, seems like digital.
> OFFICER RIFFENBURG: Mm-hmm.
> DR. KNOX: You know?
> OFFICER RIFFENBURG: That's why I was trying to –
> DR. KNOX: (Inaudible) of that's digital penetration over the clothing --
> OFFICER RIFFENBURG: Mm-hmm.
> DR. KNOX: Or -- you know, I was trying to figure out when she talked about, "Well, maybe under." I'm like -- ugh.
> OFFICER RIFFENBURG: Mm-hmm.
> DR. KNOX: So -- but you know the -- just saying either the pointer or middle --
> OFFICER RIFFENBURG: Or middle.
> DR. KNOX: -- middle finger went inside, you know, which -- which she -- we -- we talk about labia, but she always just usually says "front part." So -- but I mean, please figure out who this is –
> OFFICER RIFFENBURG: Oh, yeah.
> DR. KNOX: -- because this is -- . . . I mean, for a perp to –
> OFFICER RIFFENBURG: Yeah, no. I --
> DR. KNOX: -- to prey on kids in the damn pool.
> OFFICER RIFFENBURG: Yeah. No, I -- I agree, and that's why I want to -- believe me, I'll do my best to figure out who it is.

(R.173:56-58.) Dr. Knox was clearly unwilling to explore Edith's original thought that she had, perhaps, been touched accidentally. (*See id.*) As Dr. Knox's statements to the police show, she had made up her mind that Edith was not touched accidentally; she was assaulted by "a perp" at the pool. (*See id.*)

[10] *Id.*

At trial and after Edith described the contact differently from what she had said in her care center interview, defense counsel asked,

> Q. Okay. Now [Edith], have you talked to your mom about this situation?
> A. Yes.
> Q. And did you talk to her about testifying?
> A. I think so.
> Q. And has she helped you or given you an idea or given advise on how you should talk when you testify?
> A. Yes.
> Q. And did she coached you a little bit and tell you what you should say?
> A. Kind of.
> Q. Okay. And after she coached you on what you should say did you change a little bit on how you described the situation?
> A. Just a little.
> . . .
> Q. Okay. And you also said that it may have been an accident. Did it seem to you like, at that time, that it may have been an accident?
> A. Now that I think of it, not really.
> Q. But at the time you thought it may have been an accident?
> A. Yes.
> Q. When you say that you think of it, is it since you talked to your mom about it and now you see it differently?
> A. Yes.
> Q. And talking to your mom she has convinced you that maybe it wasn't an accident? . . . After talking to your mom has she convinced you that it's not an accident?
> A. No one convinced me that it was not an accident. But I think that it was not an accident.

(R.144:198-203.)

Importantly, Dr. Knox testified at Welton's trial. (*See* R.144:2 (listing witnesses).) Her testimony opened the door to questions about her zealous pursuit of child abuse allegations, including instances of bullying her colleagues into reporting abuse that they had not otherwise seen. (*See id.*:219-221.) The prosecutor asked her two highly relevant questions.

First, the prosecutor asked Dr. Knox to define "the term coaching," which—over objection—she did from the perspective of someone "in [her] area of child abuse pediatrics." (*Id.*:219.) Dr. Knox defined "coaching" as "a concern that some adult, parent, guardian, may have tried to suggest certain statements for a child to make when being interviewed by others." (*Id.*:220.) Second, the prosecutor asked

whether Dr. Knox had "ever coached [Edith] about what to say." (*Id.*:221.) Dr. Knox answered, "Never." (*Id.*) That testimony was clearly offered to bolster Edith's testimony, given that Edith had previously admitted to being "coached" by her mother "[j]ust a little." (*Id.*:198.)

And yet, when evaluating the testimony of Edith and her mother, the jury knew nothing about Dr. Knox's history of bullying her adult colleagues into making child abuse allegations. In fact, neither did Welton's trial counsel. (*See* R.179:5.) Other than the brief glimpse that trial counsel got at the Dane County letter about Dr. Knox's workplace investigation, the prosecution turned over no material related to the allegations that had been made against Dr. Knox. (*See id.*)

And thus, trial counsel's cross examination of Dr. Knox was limited. (*See* R.144:223-227.) He asked her only to identify a person in the pool surveillance video. (*Id.*) He did not inquire of her whether she'd before been accused of manipulating child abuse allegations. He did not ask whether she'd been accused of lying to patients' families to solicit incriminating information. He did not ask her whether she'd before pushed her colleagues to make allegations of child abuse when they had earlier seen none. Given that trial counsel was unaware of Dr. Knox's propensity to bully people into seeing abuse, none of those facts ever made their way into Welton's trial or the jurors' assessment of the credibility of Edith's allegations.

Edith told the jury that she was at the pool for a friend's birthday party. (R.144:183.) While playing with another partygoer, Edith and her friend bumped into Welton as he rested on the side of the pool. (*Id.*) Video of the incident shows Edith and her friend riding a single pool noodle together and headed towards Welton. (R.91:23-24.) Welton's back is to the girls. (*Id.*:23.) When the girls collided with Welton, they both spilled off the pool noodle and were thrashing around in the water. (*See* R.193 (DVD of video); R.91:23-32 (stating relevant timestamps).) Welton turned around upon impact, and he and Edith can be seen looking at one another. (*Id.*) Welton's arm is not visible; it is under the water. (*Id.*) It was at this point, said Edith, that Welton touched her for the first time. (R.91:30.)

Edith also told the jury that Welton had touched her a second time. (R.144:186.) She explained that Welton swam towards her when she was playing with her

friends and "kind of swiped across [her] leg" with "[h]is finger tip." (*Id.*) In her forensic interview, Edith said that, during the second contact, Welton had touched her with "[t]he outside of his hand." (R.60:9.) She did not initially state where Welton had touched her, but affirmatively answered the interviewer's leading question, "So when his arm was waiving it touched your front private part?" (*Id.*) When she was talking to the Middleton Police with her mother present—and after hearing her mother's prior rendition—Edith told the officer that "one of [Welton's] arms . . . might have accidentally" made contact with her "in the same part" that he had touched before "[e]xcept not up and down and side to side, just in the middle." (R.173:24-25.)

Thus, Edith's story changed over time. What is more, Edith opined multiple times pretrial that Welton might have accidentally touched her. She first said that when she spoke with the Middleton Police. (R.173:14.) Despite her mother's dismissive retort to that perspective early in the stationhouse interview (*see id.)*, Edith repeated it there (*Id.*:25) and then again during her forensic interview (R.144:201-02). And yet, by the time of trial, Edith was firmly convinced that Welton had purposefully, not accidentally, touched her. (*Id.*:202.) The prosecution seized upon that trial-time certainty when arguing for the jury to convict Welton. (R.141:18.)

In addition to the Edith incident, Welton's jury also heard about a second assault allegation that had occurred eight years prior. (R.144:92.) In 2010, six-year-old Alisha[11] said that a man had touched her inappropriately as she was exiting a pool after swim lessons. (R.1:2.) Alisha had been swimming in the same complex where the Edith incident occurred. (*Id.*:1.)

A pool employee then told police that Welton had been in the pool around the time that Alisha claimed to have been assaulted. (*Id.*:2.) Police spoke with Welton about the incident, and he denied anything had occurred. (*Id.*) The investigation stopped, and no charges were filed. (*See id.*)

[11] A pseudonym. *See* Wis. Stat. § (Rule) 809.86(4)

However, in 2018, with Edith's allegations in hand, prosecutors resurrected Alisha's allegations and charged Welton with assaulting both girls. (*Id.*)

There were no eyewitnesses to the events with Alisha. She testified that she was at the pool with her mother for swim lessons. (R.144:93-94.) Alisha's mother, Judy[12], explained that she was sitting near the pool during lessons watching Alisha and her instructor. (*Id.*:49-50.) After Alisha's lesson ended, Judy was keeping a close eye on her and could see the man later identified as Welton. (*Id.*:63-64, 68.) When Alisha was getting out of the pool, Judy briefly turned around to grab Alisha's towel from the wall. (*Id.*:82.) She never saw anything occur between Alisha and Welton. (*See id.*:72-73.)

Alisha said that her encounter with Welton happened as she was exiting the pool. (R.144:93-95.) She described Welton as sitting on the pool stairs, staring blankly. (*Id.*:97.) As Alisha walked towards the stairs and then past Welton, the two locked eyes for what she said was forty seconds. (*Id.*:95-96.) As she exited the pool, Welton touched her private parts. (*Id.*:96.) At trial, she described Welton as touching her continuously for eight to ten seconds. (*Id.*:98) Alisha testified that Welton touched her "lower butt" and "lower in [her] vagina area" with one hand. (*Id.*:99.) Other than touching her, said Alisha, Welton did nothing else with his hands. (*Id.*:99-100.) He merely "kind of placed [his hand] there and kept it there." (*Id.*) Alisha denied that Welton had squeezed or hurt her. (*Id.*:100.)

Alisha's original story to police differed significantly from her trial testimony. Originally, she told police that Welton had grabbed her with two hands—one in the front and one in the back—and pushed them together. (R.143:7.) Using her own body, Alisha had demonstrated for the interviewing officer how Welton touched her: "she placed one hand on her vagina and the other on her butt and squeezed." (*Id.*) Alisha described the touch as feeling like Welton was squeezing his hands together. (*Id.*) And she said that it had hurt. (*Id.*)

After the incident, Alisha approached Judy and told her that something had happened. (*Id.*:102.) Judy took Alisha into the locker room where she told Alisha's swim teacher, Kathy, that a man in the pool had touched Alisha. (*Id.*:131.) Kathy

[12] A pseudonym. *See* Wis. Stat. § (Rule) 809.86(4)

knew Welton as a regular at the pool complex. (*Id.*:132-33.) She had seen him in the pool area during Alisha's lessons. (*Id.*:133.)

Kathy explained that Alisha remained with her in the locker room while Judy went back to confront Welton about the incident. (*Id.*) Judy said that Welton denied touching Alisha and left the area shortly after she had confronted him. (*Id.*:53.) However, Kathy contradicted that. Kathy said that, when Judy returned to the locker room after confronting Welton, Kathy went back to the pool and Welton was in the same spot as before. (*Id.*:151.)

Other than Alisha's story, there was no direct evidence of the encounter with Welton. There was no video recording, and Welton made no inculpatory statements. (*See id.*:17.) Although police investigated the complaint, the case was closed without a referral to the prosecutor's office. (*Id.*)

But then Dr. Knox and Edith arrived at a police station in 2018 with a story that again involved Welton and that bore a similar fact pattern. The State's theory at trial was that the two allegations proved each other; they showed a pattern of conduct. (R.141:64-65.) Welton, argued the State, "ha[d] a very specific type." (*Id.*:60.) He liked blonde, young, petite girls who swam in the same pool as him; he even passed on touching another young girl in the pool, argued the State, because "she [wa]s not blonde." (*Id.*:14, 60.) The fact that Welton assaulted both girls while other people were in the pool showed his "motive operandi." (*Id.*:62.) It went "to his sexual gratification that he can touch little girls underwater with people watching and he thinks that he can get away with it and that's where his sexual gratification comes from." (*Id.*) "All of the evidence," argued the prosecutor,

> add[s] up to the fact that [Welton] gets sexually gratified from touching six to seven year olds, both prepubescent, both tiny, both blonde, both at the Harbor Athletic Club, in the pool. And that's what sexually gratifies him and both with people around. Because all of the evidence in this case -- because you're to focus on the evidence, and use your commonsense, you're to use life experiences and the Judge also told you that you are not to speculate. All of the evidence in this case shows that this man gets off touching little girls in the water. And because of all evidence he's guilty of first degree sexual assault of a child.

(*Id.*:64-65.)

The jury convicted Welton on the charged counts: two counts of sexual assault for the incident with Edith and one for the incident with Alisha. (R.64:1-3.)[13] He was sentenced to an aggregate ten-year term of imprisonment (four-years' initial confinement and six-years' supervision). (R.113; A-Ap 3.)

Welton then commenced postconviction proceedings. *See* Wis. Stat. § (Rule) 809.30. (R.117.) He simultaneously filed a motion for postconviction discovery and a motion for postconviction relief. (R.171, R.172.) The overarching theme of both pleadings was that the State had failed to turn over records of the UW Health system's investigation into Dr. Knox's workplace behaviors. (*See id.*) Welton averred in his postconviction motion that the nondisclosure of those records was a *Brady* violation.[14] (R.171:1.) In part, that motion necessitated assumption about the impeaching quality of the nondisclosed records. (*See id.*:19.) After all, Welton has never seen those records, and thus their precise content is unknown. But, Welton offered an explanation as to why he anticipated those records would contain evidence concerning Dr. Knox's credibility. (*Id.*:3-5.) In his discovery motion, Welton asked the Court to order the State to turn over Dr. Knox's records. (R.171:4-5.) Welton relied on the allegations in his postconviction motion to establish the evidence's consequentiality (a necessary proof to trigger entitlement to postconviction discovery). (*Id.*)

The circuit court held a hearing on Welton's motions and denied both. (R.195, R.186; A-Ap 5, 59.) With respect to Welton's substantive claim for relief—pursuant to *Brady*—the court held that the sought-after evidence wasn't "favorable," within the meaning of *Brady*, because all the State allegedly possessed was evidence that "Dr. Knox was under an investigation by her former employe[r] for some workplace conduct that involved how she treated her colleagues in some respect and that's about as far as it went." (R.195:49; A-Ap 53.) The court also concluded that the Dr. Knox evidence wasn't "suppressed" because it wasn't in the State's possession. (*Id.*). And, finally, the court reasoned that the evidence wasn't "material," insofar as the evidence didn't create a reasonable probability of a different outcome (*Id.*:50; A-Ap 54.) The circuit court used that same logic to

[13] One of the counts involving Edith was an attempted, not a completed, sexual assault. (R.64:3.)
[14] *Brady v. Maryland*, 373 U.S. 83 (1963).

resolve the accompanying postconviction discovery motion. Providing for a possible second look at Welton's claim, the court allowed that, if "there [wa]s legal authority that call[ed] into question the Court's ruling[,] [Welton] c[ould] make a motion for reconsideration." (*Id.*:52; A-Ap 56.)

Welton filed an appeal from the circuit court's decision. (R.187.) He also filed an open records request with the UW Health system to see if he could obtain by that route the records that the court had refused to order disclosed. (R.206:2.) Welton asked for "the complete contents of [Dr. Knox's] official employee personnel record folder—including but not limited to personnel files, disciplinary records, background investigation files, and internal investigation files." (*Id.*) In response, the UW Health system turned over some material. However, it withheld material that it identified as having been "used for purposes of staff management planning, evaluation, or job assignment." (*Id.*:5) Such material, wrote the UW Health system, included "'information relating to one or more specific employees that [wa]s used by an authority . . . for staff management planning, including performance evaluations, judgments, . . . promotions, job assignments, . . . or other comments or ratings relating to employees." (*Id.* (ellipses in original).)

In addition to his open records request, Welton continued his investigation into Dr. Knox via secondary sources. And, that additional investigation bore more fruit.

Welton learned that, although Dr. Knox's serious misconduct stretches back years, it all started coming to a head April of 2019. That month, UW sent Dr. Knox a "letter of expectation;" a corrective action meant to put Dr. Knox on notice of deficiencies in her behavior at work. (R.206:10-12.) The heart of the letter, seven "expectations" for Dr. Knox going forward, is partially redacted. (*Id.*:11.) But despite the beclouded bureaucratese throughout the letter, it still contains startling facts. For example, Dr. Knox's colleagues reported that she is more focused on "collecting evidence" than providing patient care. (*Id.*10.) Colleagues were intimidated by Dr. Knox and feared retaliation if they disagreed with her. (*Id.*) The letter also implies that Dr. Knox has a problem with acting honestly, fairly, beyond the scope of her knowledge, and engaging in "hostile or intimidating behavior." (*Id.*:10-11.)

Welton also uncovered a partially redacted letter written by the Director of the Wisconsin State Public Defender's Assigned Counsel Division relaying some of the

problems surrounding Dr. Knox around the time of the his trial. (R.206:21-22.) This includes discussion of a Madison police department report seemingly inculpating Dr. Knox in falsifying medical records:

> Dr. Barbara Knox, MD, was instrumental in having a medical record changed so that the medical record (radiological interpretation) would support Dr. Knox's theory of abuse. Detective Johnson also indicates that Dr. Knox told her (Detective Johnson) that the child's medical findings "were only consistent with abuse" and "they were not from an accidental or medical cause."
>
> Dr. Knox's allegation (only consistent with abuse) is misleading at best. [portion redacted in record] There is simply no evidence (just assumption) the child was abused right before the 911 call.
>
> In this same case, it appears the UW CPP consult report was changed. It is inaccurate. As noted on page 366 of the attached medical records, under the heading [redacted] the findings contained under that heading did [redacted]. The report was changed to reflect the [redacted] "revised" interpretation that favors Dr. Knox's child abuse allegation.

(*Id.*:21.) So not only is it reported that Dr. Knox likely manipulated at least one medical record, but the Madison Police department was aware of the incident. (*See id.*)

What little Welton received of UW Health's internal emails is also telling. For example, when discussing an in-person meeting to correct Dr. Knox's behavior, Dr. Sabrina M. Butteris (at the time, an Associate Professor of Pediatrics, and the Vice Chair of Clinical affairs) powerfully references the scope of the problem:

> Unrelated to the investigation, I am really concerned about my phone call with [redacted] this morning and that other family. I worry about how many other families there are like them out there. And how many families from disadvantages groups who don't have a voice may have been treated the same or worse. This leave a pit in my stomach and I do not have clarity about what to do about it. No need to address all of this by email, just wanted to put it out there.

(*Id.*:14.)

That last impression from Dr. Butteris sounds grave, but we don't know the full extent it because it didn't "need to [be] address[ed] by email." (*Id.*)

That's all part of the pattern of UW Health and other agents of the State obfuscating the true extent of Dr. Knox's misconduct as much as possible. In fact, when Dr. Knox "resigned," she and UW Health entered a "Settlement Agreement and Release of Claims." (*Id.*15-20.) The principal aim of that document is maintaining secrecy and publicly disclosing only a sanitized version of Dr. Knox's history; the agreement is a straightforward *quid pro quo*, both parties agree to keep quiet as much as possible, because it's in both of their best interests. In fact, not even the agreement itself can be disclosed, except in limited circumstances. (*Id.*17.)

For its part, UW Health agreed to provide a letter to Dr. Knox stating that her administrative leave was not due to "dishonesty, clinical skills, medical diagnostic abilities, or incorrect medical diagnoses." (*Id.*:16) UW Health also agreed not to disparage Dr. Knox. (*Id.*17.) Dr. Knox agreed not to disparage UW Health and released it from all claims. (*Id.*:17-18.)

Additional investigation into Dr. Knox's employment after leaving UW Health raised further concerns of bullying and misdiagnoses, bolstering potential impeachability. In October 2019, following her "resignation" from UW Health, Dr. Knox became the medical director of Alaska CARES, a child abuse treatment unit.[15] Following Dr. Knox's arrival, a "mass exodus" from CARES ensued. Within two years, the entire medical staff at the CARES unit was gone, following complaints against Dr. Knox that went unanswered by hospital administrators.[16] A forensic nurse, who formerly worked at CARES was so troubled by Dr. Knox's behavior that she penned an opinion for the local newspaper, urging the hospital to fire her.[17]

CARES didn't immediately relent. But Wisconsin Public Radio,[18] an Alaskan newspaper, and Wisconsin Watch continued their ongoing investigations. And

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[15] Theriault Boots, *Allegations of 'bullying'*, https://bit.ly/3lhA3xp.

[16] Brenda Wintrobe & Michelle Theriault Boots, *Mass exodus at Alaska child abuse clinic as former Wisconsin doctor accused of bullying, misdiagnoses*, Wisconsin Watch & Anchorage Daily News (Nov. 15, 2021), available at https://bit.ly/3CGEjhD (last accessed Jan. 10, 2023).

[17] Sarah Wood, *Alaska's children deserve better*, ANCHORAGE DAILY NEWS (Jan. 27, 2022), https://www.adn.com/opinions/2022/01/26/alaskas-children-deserve-better/ (last accessed Jan. 10, 2023).

[18] Brenda Wintrode, *Parents recount terror of wrongful child abuse diagnoses from former University of Wisconsin doctor*, WISCONSIN PUBLIC RADIO (Nov. 27, 2021),

following the publication of a joint investigation,[19] Dr. Knox "resigned" from CARES, just over two years after having obtained the position.[20]

Armed with the UW Health system's response to his records request and the additional facts gleaned during his continued investigation, Welton moved to dismiss his prior appeal and to return to the circuit court for further postconviction litigation. He then filed a supplemental postconviction motion explaining what he'd learned since his original motions were denied and once more asking for discovery and relief. (R.205.) This time, Welton proposed an alternative to direct disclosure of the sought-after records. (R.221:10-13; A-Ap 69-72.) Namely, he lobbied that if the court was uncomfortable ordering disclosure of Dr. Knox's records, it could undertake a discovery procedure like the one established in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). (*Id.*) That is to say, the court could order the production of those records for its in camera review to identify and separate the favorable evidence from the otherwise irrelevant material, and then disclose only the former to Welton. (*Id.*) That argument derived from the State's protestation that the confidentiality of Dr. Knox's records was statutorily protected—an argument that the postconviction court seemed to find foreclosed Welton's attempt to gain access to it. (*See id.*; *see also* R.195:49-50, R.213:11-12, R.179:8-9; A-Ap 53-54.)

After a hearing on Welton's motion, the circuit court again found that he'd not adduced a sufficient basis to warrant compelling disclosure, or in camera review, of Dr. Knox's records. (*Id.*:21; A-Ap. 80.) On that same basis the court also denied the request for a new trial based on a *Brady* violation. (*Id.*) Welton appeals.

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https://www.wpr.org/parents-recount-terror-wrongful-child-abuse-diagnoses-former-university-wisconsin-doctor (last accessed Jan. 10, 2023).

[19] Brenda Wintrode & Michelle Theriault Boots, *'We were robbed': Alaska couple loses custody of kids after erroneous abuse diagnosis from former UW doctor* (Jan. 20, 2022), https://bit.ly/3ZsBISb (last accessed Jan. 10, 2023).

[20] Michelle Theriault Boots & Brenda Wintrode, *Embattled former UW child abuse pediatrician resigns Alaska position*, (Jan. 28, 2022), https://bit.ly/3IERnb7 (last accessed Jan. 10, 2023).

SUMMARY OF THE ARGUMENT

This is a postconviction discovery case. Welton's appeal is, at its heart, about whether the postconviction court should have ordered the State to turn over records regarding UW Health's investigation into Dr. Knox.

Welton argues that such records would be consequential—the threshold for postconviction discovery—because they would provide valuable impeachment evidence against Dr. Knox. And, Welton's argument goes, because those records would provide consequential impeachment evidence, the State violated its pretrial discovery obligations in not turning them over pretrial.

Welton offers the following in support.

ARGUMENT

I. Welton was entitled to postconviction discovery of the Knox evidence.

A. A bit about postconviction discovery procedure.

Wisconsin entitles criminal defendants to postconviction discovery. *State v. O'Brien*, 223 Wis. 2d 303, 320-21, 588 N.W.2d 8 (1999). But it does so through a somewhat wonky process. *See id.* at 323.

Unlike during pretrial proceedings, there is no statutory entitlement to discovery. *See* Wis. Stat. § 971.23(1). Instead, the right to postconviction discovery derives from a person's due process right to present a complete defense. *O'Brien*, 223 Wis. 2d at 320-21, 588 N.W.2d 8. When a defendant seeks postconviction discovery, there's a threshold proof that must be met before the State is made to turn it over. *Id.* at 323. Namely, the defendant must prove that the material being sought is "relevant to an issue of consequence." *Id.* In the absence of such proof, postconviction discovery is unwarranted. *Id.*

Wisconsin's consequential evidence test has its foundation in Supreme Court precedent explaining that evidence can be called consequential "'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the

result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.'" *Id.* 320-21 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985) (plurality opinion)). As such, a defendant seeking postconviction discovery must be able to prove that the sought-after material creates a reasonable probability of a different result. *Id.*

On its face, that's all fairly straightforward. However, the matter of proving the consequentiality of unseen evidence causes things to become squiggly. The trick is that a defendant must prove the impact of evidence that is, at the time of the proof, inaccessible to the defendant. In other words, the defendant's proof of consequentiality must be done *before* having access to the purportedly consequential material.

Relevantly, when the Wisconsin Supreme Court recognized a defendant's right to postconviction discovery, it did so with citation to another discovery process that involves a similar chicken-and-egg conundrum: *State v. Shiffra*, 175 Wis. 2d 600, 605, 499 N.W.2d 719 (Ct. App. 1993). *O'Brien*, 223 Wis. 2d at 320, 588 N.W.2d 8. *Shiffra* is the Wisconsin case that extended the reasoning of *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), from governmentally held records to privately held ones. 175 Wisat 606-07, 499 N.W.2d 719. That distinction (privately vs. publicly held) has been the fount of much recent litigation, with the State consistently maintaining that *Shiffra* overreached and pushed *Ritchie* too far. *See State v. Lynch*, 2016 WI 66, 371 Wis. 2d 1, 885 N.W.2d 89, *State v. Johnson*, 2013 WI 59, 348 Wis. 2d 450, 832 N.W.2d 609 (per curiam), *reconsideration granted*, 2014 WI 16, 353 Wis. 2d 119, 846 N.W.2d 1 (per curiam); *see also* State's Supplemental Brief at 12, *State v. Alan Johnson*, 2019AP664-CR (filed Dec. 6, 2021) (available on WSCCA via hyperlink at https://bit.ly/3QxQL8Y) (last accessed Jan. 10, 2023).

But whether *Shiffra* overstepped is irrelevant to Welton's case. The records that Welton's after are governmentally held, and thus subject to *Ritchie*'s analysis. And thus derives the relevance of *O'Brien*'s citation to *Shiffra i*n Welton's case: *Shiffra*'s reliance on *Ritchie*.

In *Ritchie* the defendant was seeking records from a Children and Youth Services (CYS) file related to abuse charges as possibly containing exculpatory

information. *Ritchie,* 480 U.S. at 43. CYS refused to turn the file over, claiming privilege under Pennsylvania state statute. *Id.* The Supreme Court determined that

> Ritchie is entitled to have the CYS file reviewed by the trial court to determine whether it contains information that probably would have changed the outcome of his trial. If it does, he must be given a new trial. If the records maintained by CYS contain no such information, or if the nondisclosure was harmless beyond a reasonable doubt, the lower court will be free to reinstate the prior conviction.

Id. at 58. Notably, the Court also commented that, "At this stage, of course, it is impossible to say whether any information in the CYS records may be relevant to Ritchie's claim of innocence, because neither the prosecution nor defense counsel has seen the information, and the trial judge acknowledged that he had not reviewed the full file." *Id.* at 57. Even so, the Supreme Court held

> that Ritchie's interest (as well as that of the Commonwealth) in ensuring a fair trial can be protected fully by requiring that the CYS files be submitted only to the trial court for in camera review. Although this rule denies Ritchie the benefits of an "advocate's eye," we note that the trial court's discretion is not unbounded. If a defendant is aware of specific information contained in the file (e.g., the medical report), he is free to request it directly from the court, and argue in favor of its materiality. Moreover, the duty to disclose is ongoing; information that may be deemed immaterial upon original examination may become important as the proceedings progress, and the court would be obligated to release information material to the fairness of the trial.

Id. at 60.

To Welton, the fact that Dr. Knox's governmentally-held records may be somehow protected by a confidentiality statute puts his case on par with *Ritchie*. *See id.* The discovery procedure that *Ritchie* established for a defendant to gain access to otherwise inaccessible records in the State's possession should apply in Welton's case. The cart-and-horse conundrum that so commonly occurs in pretrial attempts to gain access to confidential records is front and center here. Welton's trying to gain access to evidence—Dr. Knox's records—the specific content of which he does not know. But, as he explains below, he has a strong reason to believe both that those records exist and that their contents would be consequential. Welton avers that the postconviction court should have undertaken a *Ritchie*-esque

approach and ordered the State to turn over Dr. Knox's records for in camera inspection.

B. There's a strong case that the evidence Welton seeks exists and is consequential; the postconviction court erred in not granting Welton's discovery request.

Let's start with their existence. We know that Dr. Knox was under investigation by UW Health at the time of Welton's prosecution. (R.206:10-12.) The State's attorney provided Welton with a letter indicating as much. (*Id.*:23-24.) And, because of a public records request that Welton filed postconviction, we know that UW Health located records in Dr. Knox's file related to staffing—including "staff management planning, including performance evaluations, judgments,… promotions, job assignments,… or other comments or ratings"—but refused to turn those records over. (*Id.*:3-9.) We also know that Dr. Knox departed UW Health under a dark cloud and entered into a termination agreement in which UW Health agreed to keep mum about the reason she was leaving. (*Id.*:15-20.)

Add into those facts all the ancillary information about Dr. Knox's ongoing problems and there's more than enough reason to believe that her records are ripe with evidence that would go to her credibility. Numerous individuals have talked to investigative journalists detailing their run-ins with Dr. Knox. Her peers at the UW Health system have suggested that she was instrumental in their changing their diagnoses to support abuse. The entire staff of the Alaska CARES organization quit within two years of her arrival there. And there is reason to believe that Dr. Knox has before manipulated a medical record to support her theory of abuse. The information available to Welton establishes the old adage: where there's smoke, there's fire. Dr. Knox's history creates a long trail of smoke strongly suggesting that there's a fire in her UW Health records.

As for consequentiality, the evidence that Welton seeks would have raised a doubt about the extent to which Edith's account was tainted by pressure or influence from her mother, Dr. Knox. In a child sexual assault case, evidence that a child witness's mother had a history of not only deceiving others in cases of child abuse, but also pressuring others into making unfounded child abuse allegations is both independently exculpatory and powerful impeachment evidence.

Although it would have been important in any case, in the context of Welton's trial the Dr. Knox evidence would have been particularly powerful. Edith's first alleged disclosure was to Dr. Knox. (R.144:187.) Following that, Edith's account of the incident varied significantly over the course of her initial interview with the Middleton Police, the forensic interview, her direct testimony, and finally on cross-examination. Most significantly, Edith gave differing accounts about how Welton allegedly touched her. (*See* R.60:1-13; R.144:178-206.) Counsel drew out these differences on cross-examination, getting Edith to admit that her description at trial of how Welton had touched her "was a little bit different than what's on the video" of her forensic interview. (R.144:195-97.) On cross-examination Edith also testified that Dr. Knox had coached her on what to say at trial. (R.144:198.) Dr. Knox testified that she hadn't coached Edith (*Id.*:220-21.)

In closing, defense counsel tried to play up the inconsistencies and the coaching evidence. (*E.g.*, R.141:41-42, 47-48.) Obviously, the jury didn't find that persuasive because it convicted Welton. And frankly, that's fair. Most people wouldn't think much of even fairly significant inconsistencies in an eight-year old's testimony. And they'd probably attribute the "coaching" testimony to either natural parental concern or a juvenile misunderstanding of the significance of that term. So, without more evidence to bolster his argument about Edith and Dr. Knox, Welton couldn't push the point too hard. In fact, the State powerfully rebutted Welton's (extremely tame) Edith and Dr. Knox arguments by casting him as a "victim blame[r]." (*Id.*:59.) The State also lambasted Welton's concern about Dr. Knox's apparent zealousness as a "conspiracy theory." (*Id.*:56.)

Welton's concern about Dr. Knox would not look like a conspiracy theory in light of the undisclosed evidence. The *Brady* evidence of Dr. Knox's history of deceit and bullying in child abuse cases transforms Welton's concerns about coaching from speculation into well-founded impeachment and reliability evidence. Similarly, the inconsistencies in Edith's account raise more than a reasonable doubt about their veracity; not because Edith concocted a plan to lie, but rather because, as Dr. Knox's child, she would have been particularly susceptible to Dr. Knox's distorting influence. That evidence has special force given the fact that Dr. Knox was the first person to whom Edith disclosed the alleged assault. In the absence of the *Brady*

evidence, Welton couldn't make much of these arguments. The arguments that he leveled at trial would have been greatly enhanced by the *Brady* evidence.

In addition to greatly enhancing trial counsel's ability to impeach Dr. Knox and introduce facts demonstrating that her bullying behavior could have influenced Edith's description of the incident, the State's disclosure of the Knox evidence would also have been cause for trial counsel to present expert testimony on point. Research has shown that interviewer bias can greatly affect the outcome of a child's report of sexual assault. *See, e.g.,* David Faust & K.A. Faust, *Clinical Judgment & Prediction,* in Coping with Psychiatric & Psychological Testimony 147-208 (David Faust, ed., Oxford Univ. Press 6th ed. 2012). Dr. Knox's history of seeing abuse and bullying her colleagues to see it too is demonstrative of the bias that she would have brought into her discussions with Edith. An expert witness could have explained to the jury that extant, empirically verified studies have shown that such bias likely would have had an adverse impact on the reliability of Edith's account. *See id.* Such expert evidence would have significantly advanced the case that Edith's recollection of the event was unreliable.

Impeaching the reliability of Edith's allegations based on her mother's penchant for pushing abuse findings would certainly create a likelihood of a different result on the jury's verdict for the Edith incidents. But, because of the way the State presented its case, impugning Edith's allegations would also make probable a different verdict on Alisha's allegations.

Importantly, the prosecution argued that Welton should be convicted of assaulting both Edith and Alisha because of the factual similarity between the two incidents. "[A]ll of the evidence" when viewed together, argued the State, proved that Welton was a predator with a type: he got sexually aroused by assaulting little girls in the pool. (R.141:65.) The jury could thus be sure that Welton had sexually assaulted both Edith and Alisha, said the State, because their stories complemented and proved one another.

That argument makes sense given the limited evidence available to prove the Alisha incident. Unlike in Edith's case, there was no video of the Alisha incident. Alisha remembered it differently at trial than she had originally described it eight years earlier. And, there was some tension in her version of events—she stared at

Welton for forty seconds and he touched her for eight—and her mother's purported close watch on her daughter in the pool without seeing anything transpire between the two. What is more, a discrepancy existed in the remembered timing of the events with Alisha and her mother after the purported assault. Despite Judy claiming to have confronted Welton only to have him run away, Kathy claimed that he was in the pool when she went to check after Judy's confrontation. All of that poked holes in the believability of Alisha's allegation.

The importance of Edith's allegation to the State's proof of Alisha's allegation is demonstrated by the fact that the police did not even refer Alisha's complaint in 2010. At that time, police decided that there was not enough evidence to prosecute Welton. And yet, in 2018 following Edith's allegations, the State resurrected Alisha's complaint and charged Welton with the previously unprovable sexual assault. The choice to proceed with the Alisha matter in 2018 very clearly shows the significance of Edith's allegations to proving that Welton had assaulted Alisha in 2010.

But Welton's jury decided his guilt on both Edith's and Alisha's allegations without important evidence impugning the reliability of Edith's story. Undercutting the reliability of Edith's allegations would, in tandem, undercut the reliability of Alisha's because the State made its case for a conviction based on the complimentary nature of the victims' allegations. An infirmity in the evidence supporting one allegation is an infirmity in the evidence as a whole.

In addition, the Madison police department reports, which were included in the supplemental postconviction motion, can be read to indicate that Dr. Knox went against the evidence and altered medical records to support her own theory.

In sum, there's far more than a "reasonable probability" that if the evidence sought includes what the growing collateral indicators suggest, availability to the defense would have led to a different verdict—it would have created a reasonable doubt as to the veracity of both allegations that didn't exist without it. *See State v. Wayerski*, 2019 WI 11, ¶36, 385 Wis. 2d 344, 922 N.W.2d 468 (quoted source omitted).

In sum, the sought-after evidence in Welton's case passes *O'Brien*'s consequential evidence test. He's sufficiently proven that reason enough exists to

believe that where there's smoke, there's fire. Given everything that we know about Dr. Knox and her tenure at UW Health, there's reason to believe that records of the investigation that led to her departure would afford Welton material impeachment evidence. Under those circumstances, the postconviction court should have granted Welton's discovery motion. That it did not was clearly erroneous, and this Court should reverse. *O'Brien*, 223 Wis. 2d at 314, 588 N.W.2d 8.

II. The State violated *Brady* by not turning over the Dr. Knox evidence.

A defendant has a constitutional due process right to "favorable" evidence in the State's possession. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). When the State runs afoul of this right, it's known as a "*Brady* violation." *State v. Wayerski*, 2019 WI 11, ¶35. "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." *Id.* If all three elements are present, the defendant is entitled to a new trial for the constitutional violation. *See id.*

A. A primer on the test for a *Brady* violation.

The first component is self-explanatory. Evidence is favorable if it's *either* exculpatory or impeaching. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). In the *Brady* context, those terms carry their ordinary legal meaning. *See, e.g.*, *id.*

The second component bears more explanation. The original language from *Brady* uses the term "suppression," but that language is slightly misleading insofar as it implies malicious or intentional conduct by the prosecution. *See Brady*, 373 U.S. at 86. In fact, "suppression" for *Brady* purposes can happen regardless of the prosecutor's intent. *See Wayerski*, 2019 WI 11, ¶¶46-55. Under *Brady* evidence is "suppressed" if it's in the State's possession and not turned over to the defense. *See id.* That's it. There's no intent element or any other kind of restriction. The Wisconsin Supreme Court recently overruled several cases adding other elements to the second *Brady* component. *See id.*

The third component, "materiality," is the same as the prejudice prong from *Strickland*'s ineffective assistance of counsel test. *Id.*, ¶36; *Strickland v.*

Washington, 466 U.S. 668, 694 (1984); *see also Bagley*, 473 U.S. at 682. Therefore, evidence is "material" under *Brady* if there is a "reasonable probability that the suppressed evidence would have produced a different verdict." *Wayerski*, 2019 WI 11, ¶36 (quoting *Strickler*, 527 U.S. at 281).

On appeal, this Court "independently review[s] whether a due process violation has occurred, but [it] accepts the trial court's findings of historical fact unless clearly erroneous." *Id.* ¶35.

B. The State violated *Brady* by not turning over the Dr. Knox evidence.

"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." *Wayerski*, 2019 WI 11, ¶35. Because Welton can satisfy all three components, this Court should reverse the circuit court. *See id.* Welton begins with the second *Brady* element (possession), and thereafter turns his attention to the evidence's favorability and materiality.

1. The State possessed the evidence.

At least three State entities possessed the Dr. Knox information: the Madison police department (MPD), the Dane County prosecutor's office, and UW Health System. The MPD had, at the very least, a police report detailing how Dr. Knox has falsified a medical record. (See R.206:21-22.) The Dane County's prosecutor's office was aware of the UW investigation—it sent letters to local defense attorneys. (*Id.*:23-24.) UW was aware of Dr. Knox's problems via its own investigations. (*Id.*:10-14.)

At the first postconviction motion hearing on September 21, 2021, the State argued that the underlying records were not in the State's possession. (R.195:37-38.) But that is wrong. The MPD is part of the State; the Dane County's prosecutor's office is part of the State; and UW Health is part of the State. A cornucopia of cases make this point clear. *See, e.g.*, *Ritchie*, 480 U.S. at 56-59 (child protective services); *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (police); *Wayerski*, 2019 WI 11, ¶¶56-59 (collecting cases); *Lynch*, 2016 WI 66, ¶¶24-29.

In Welton's case, the prosecution violated *Brady* by failing to turn over the Dr. Knox evidence. That evidence demonstrated that Dr. Knox was a deceitful bully, who pressured colleagues into making unfounded child accusations. At the time of Welton's trial, the prosecution knew—at a bare minimum—that Dr. Knox was under investigation for such conduct. The Dane County prosecutor's office even sent a letter to a different defense attorney about Dr. Knox in August 2019, before Welton's trial. Nonetheless, the prosecution didn't turn over the evidence to Welton.

At a bare minimum, the Madison Police Department, the Dane County Prosecutor's office, and the University of Wisconsin all possessed Dr. Knox's records. (R.213:12-13.) Those are *state* entities. They possessed the evidence. And their possession wasn't just some sort of passing awareness either. The State quite literally investigated and documented Dr. Knox's concerning behavior. There is simply no recognized compartmentalization of the prosecutorial agency from all other government agencies for *Brady* purposes. *Kyles*, 514 U.S. at 438-39.

Indeed, the United States Supreme Court has before recognized that the content of a prosecutor's file is not alone dispositive of what evidence *Brady* requires to be turned over. *Id.* Instead, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id.* at 438. As the Second Circuit explained in a case comprehensively evaluating extant *Brady* law, "a prosecutor can 'suppress' evidence even if he has acted in good faith and even if the evidence is 'known only to police investigators *and not to the prosecutor*.'" *United States v. Coppa*, 267 F.3d 132, 140 (2d Cir. 2000) (quoting *Kyles*, 514 U.S. at 438) (emphasis added). As such, for *Brady* purposes, it is an insufficient retort to say that the State had no disclosure obligation because it did not possess the challenged evidence. *Kyles*, 514 U.S. at 438-39, *Coppa*, 267 F.3d at 140.

The State most certainly possessed Dr. Knox's records.

2. The Dr. Knox evidence was both favorable and material.

As Welton previously detailed when arguing about consequentiality (*see supra* pages 22-26), the Dr. Knox evidence was both "favorable" and "material" for the same reason—it would have raised a doubt about the extent to which Edith's account was tainted by pressure or influence from her mother. In a child sexual assault case, evidence that a child witness's mother had a history of not only deciding differently than others in cases of child abuse—now including, altering medical records—but also pressuring others into making unfounded child abuse allegations is both independently exculpatory and powerful impeachment evidence.

Although such evidence would have been powerful in *any* child abuse case, in the context of Welton's trial it would have been particularly powerful. Welton will not here repeat his entire consequentiality argument. But, in summary, he offers the following:

(1) Welton's trial theory was that accidental, non-sexual contact had been blown out of proportion by one alleged victim who was, in her mother's own words, a "drama queen" (Alisha), and another whose mother unduly influenced her testimony (Edith).

(2) Edith gave differing accounts of the allegation over the course of her initial interview with Middleton police, the forensic interview, her direct testimony, and finally on cross-examination.

(3) Edith testified that Dr. Knox coached her.

(4) The State castigated Welton's argument about Dr. Knox's overzealousness as Welton being a "victim blamer" who had a "conspiracy theory" about Dr. Knox.

(5) Dr. Knox's coaching, and her penchant for bullying, intimidating, and finding child abuse around every corner, regardless of the evidence, would have impeached Dr. Knox.

(6) The Dr. Knox evidence would have provided an independent basis for Welton to present expert testimony. Specifically, research has shown that

> interview bias can greatly affect the outcome of a child's report of sexual assault.

In sum, evidence in Dr. Knox's UW Health records would, under *Brady*, be both favorable and material for the very same reasons that it is consequential, under *O'Brien*. There's far more than a "reasonable probability" that the inclusion of the suppressed *Brady* evidence would have led to a different verdict—it would have created a reasonable doubt as to the veracity of both allegations that didn't exist without it. *See Wayerski*, 2019 WI 11, ¶36 (quoted source omitted).

Welton should have a new trial.

CONCLUSION

Welton asks this Court to remand his case to the circuit court with directions to grant his request for postconviction discovery. Whereas there is a confidentiality statute protecting the sought-after evidence, he believes the proper remedy is to engage in a *Ritchie*-esque procedure: have the records turned over for in camera inspection so that the court can separate the wheat from the chaff. Anticipating that such in camera inspection will produce the anticipated impeachment evidence, Welton asks that he be given a new trial because the prosecution did not turn it over before trial, and thus violated *Brady*.

Dated this 10th day of January, 2023.

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RULE 809.19(8g)(a) CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 9,231 words, as counted by the commercially available word processor Microsoft Word.

Dated this 10th day of January, 2023.

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RULE 809.19(8g)(b) CERTIFICATION OF APPENDIX CONTENT

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Section 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings 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 of 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 first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 10th day of January, 2023.

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