STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2022AP1747-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEVIN D. WELTON,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND DECISIONS AND ORDERS DENYING POSTCONVICTION RELIEF, ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE SUSAN M. CRAWFORD, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION

Kevin Welton was convicted of first-degree and attempted first-degree sexual assault of two children, ES and AS[1] after a jury found him guilty. Welton now contends that he is entitled to postconviction discovery of BK's, ES's mother, personnel file from UW Health Systems, her former employer, because that personnel file may contain some sort of disciplinary evidence that would have impeached BK. He also contends that the State committed a *Brady*[2] violation by not turning over the same.

Both of Welton's arguments fail at their outset because the UW Health Systems personnel files are not within the State's possession for either postconviction discovery or *Brady*. UW Health's personnel records are statutorily protected, and Welton has not explained how he or the State could possibly have access to them. UW Health Systems is not an arm of the prosecution nor did UW Health Systems assist in the investigation of this case. Further, to prove consequentiality and materiality, Welton merely speculates that "when there's smoke, there's fire." He does not explain what the records contain or how the records would have been admissible. That failure also means that there was no reasonable probability of a different result at trial.

Accordingly, Welton's claims are without merit, and this Court should affirm.

STATEMENT OF THE ISSUES

1. Is Welton entitled to postconviction discovery of ES's mother's UW Health Systems personnel file?

Answered by the circuit court: No.

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[1] The children are not related.

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

This Court should answer: No.

2. Did the State commit a *Brady* violation by not disclosing ES's mother's UW Health Systems personnel file?

Answered by the circuit court: No. Welton was unable to prove any of *Brady*'s three requirements, including that the personnel file was in possession of the State.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent and because resolution of this appeal requires only the application of well-settled precedent to the facts of the case.

STATEMENT OF THE CASE

Factual Background and Trial

This case involves two sexual assaults of young children at a pool in Middleton, separated by eight years. The first assault occurred in 2010 when then-six-year-old AS was leaving the pool after a private swim lesson. (R. 1:2; 144:94.) As she ascended the stairs, Welton used both hands to grab the front and back of her pubic area. (R. 1:2.) AS left the pool and told her mother, who then told AS's swim instructor and confronted Welton. (R. 1:2; 144:53–54.) Welton denied touching AS. (R. 1:2; 144:53.)

Eight years later, then-seven-year-old ES was at the same pool for a friend's birthday party. (R. 1:2.) ES was playing with her friends in the pool when she bumped into Welton. Welton "put his hand under the water" and touched ES's vagina. (R. 1:2.) ES said she was scared and slowly backed away from Welton. (R. 1:2.) Less than twenty minutes later, ES saw Welton swim toward her again. (R. 1:2.) She

said Welton tried to touch her again but was only able to touch her leg because she swam away from him. (R. 144:186–87.)

ES reported the assault to her mother, BK, when BK picked her up later that night. (R. 1:2.) ES then told her father about the assault and drew him and BK a picture of her attacker. (R. 144:214–17.) BK then took ES to the Middleton Police Department. BK told Officer Riffenburg what ES told her, and Riffenburg had ES relay the story to her as well. (R. 1:2; 144:217.) ES also participated in a forensic interview in Milwaukee, where she described the assault again to the forensic interviewer. (R. 1:3.)

As part of their investigation, Middleton Police pulled security footage from the pool. (R. 1:3.) The footage showed "ES accidentally bump[] into [a] man as the man is swimming." (R. 1:3.) The security footage then shows "[t]he man come[] out of the water and is face-to-face with ES. The man's right hand is not visible. ES slowly begins to back away from the man as the man looks back and forth. ES then swims to the south end of the pool." (R. 1:3.) The footage then shows that "sixteen minutes later, the man is observed looking in ES's direction and swimming over to ES. The man's right arm moves in ES's direction and ES reacts immediately." (R. 1:3.) A manager at the pool was able to confirm that the man in the footage was Welton. (R. 1:3.)

The State initially charged Welton with two counts of first-degree sexual assault of a child, one for each girl. (R. 1:1.) At Welton's trial, the jury heard testimony from AS's mother, AS, AS's swim instructor, ES's forensic interviewer, ES, BK, and Riffenburg, among others. Throughout the testimony, the jury heard accounts of similar sexual assaults of the two unrelated girls, years apart. AS described how she exited the pool after her swim lesson and Welton grabbed her under the water as she ascended the stairs. (R. 144:92, 95–99.) Her mother described that AS approached her upset and told her "that a man had hurt her." (R. 144:53.) There were no

questions regarding coaching during AS's or her mother's testimony.

Similar to AS, ES told the jury that after she accidentally bumped into Welton, Welton "started touching [her] front part." (R. 144:184.) She explained that the "front part" is used for "[g]oing to the bathroom." (R. 144:185.) ES also described how she saw Welton swim toward her and try and touch her again, but she was able to get out of the way. (R. 144:186–87.) BK testified that ES was upset when BK picked her up, and she told BK about a "scary man at the pool who had touched her privates." (R. 144:211.) BK testified that she asked ES "open-end-non-leading question[s]." (R. 144:212–13.) When BK took the stand, she told the jury that she was employed as a "board certified child abuse pediatrician at the University of Wisconsin, School of Medicine and Public Health." (R. 144:208.) She testified that she was familiar with open-ended-non-leading questions through her "training and experience in child maltreatment." (R. 144:213.)

The jury also watched ES's forensic interview, the pool surveillance footage that showed Welton approaching ES twice in the pool, and Riffenburg's interview with BK and ES, which was recorded on her bodycam. (R. 144:173–74; 143:42–57; 91:10–12.) The jury found Welton guilty of all counts.[3] (R. 152:7–8.)

[3] Pretrial, the State filed an amended information charging Welton with three counts of first-degree sexual assault of a child. (R. 38.) During trial, the circuit court agreed to add the lesser-included offense of attempted first-degree sexual assault of a child onto count 3. (R. 91:67–74.) The verdict forms confirm that the jury found Welton guilty of the lesser-included offense of attempted first-degree sexual assault of a child. (R. 64:3.)

Postconviction Proceedings

Following his conviction, Welton filed a motion to compel postconviction discovery of various items. (R. 171.) Included in Welton's discovery demand was "[c]opies of all materials related to the investigation conducted by the University of Wisconsin School of Medicine and Public Health regarding [BK's] 'workplace behavior, including unprofessional acts that may constitute retaliation against and/or intimidation of internal and external colleagues.'" (R. 171:1–2.) Welton simultaneously filed a motion for a new trial, alleging that the State committed a *Brady* violation when it did not disclose evidence "regarding [BK's] history of bullying her colleagues." (R. 172:19.)

The State countered, arguing that "no material impeachment evidence regarding witness BK exists." (R. 179:1.) The State's main argument below was that the internal investigation into BK and her personnel records were not discoverable and did not constitute material evidence. (R. 179:8–10.) The State argued "[t]he records pertain to a hospital's internal investigation of an employee. Those records are not in possession or control of the state, nor is the state privy to the contents of those confidential records." (R. 179:8.) The State argued that even if the evidence was discoverable, it was not material because UW Health Systems "took no action after its investigation." (R. 179:11.)

The circuit court held a hearing on Welton's motion. Regarding the news article that Welton referenced in his postconviction motion, the circuit court noted that the "article itself does not contain any allegations, let alone facts, that [BK] was fabricating evidence, bullying her colleagues into fabricating evidence, or really anything approaching . . . the way [Welton] characterized the article." (R. 195:9.) The court was also skeptical of Welton's argument that the State had the UW Health Systems internal investigation in its

possession or had an obligation to obtain and disclose it. (R. 195:16–18.)

The circuit court denied both of Welton's motions at that hearing. Regarding the discovery motion, the circuit court concluded that it "can't just order the district attorney to produce records that he may or may not have the authority to obtain." (R. 195:41.) Regarding Welton's *Brady* claim, the court found that Welton failed to meet any of *Brady*'s requirements. (R. 195:48–52.) It found that the evidence related to the investigation was not favorable impeaching evidence. (R. 195:48–49.) It also found that the evidence was not in the State's possession and that the evidence was not material even if it said what Welton speculated it said. (R. 195:49–52.) Because BK "was testifying in a civilian capacity," the court did not believe that the workplace allegations "would come into a case like this." (R. 195:51.)

Welton initially filed a notice of appeal of the circuit court's decision and order denying his motions. (R. 187.) After an open records request to UW Health Systems, Welton voluntarily dismissed the pending appeal and filed a supplemental postconviction motion. (R. 205; 207.) As discussed below, the information that Welton received from UW Health Systems delved somewhat deeper into the allegations against BK and her alleged workplace misconduct. (R. 206 (Welton's appendix containing UW Health Systems's open records response).) With the open records response in hand, Welton renewed his arguments for postconviction discovery and a new trial. (R. 205.) He continued to allege that UW Health Systems is an arm of the State and that the State had access to its employee personnel records, which it improperly suppressed. (R. 205:12.)

The State again responded that it did not possess any of the BK evidence that Welton sought. (R. 213:1, 10.) The State also argued that Welton "conflate[d] allegations of bullying in a professional capacity to unfounded allegations of

coaching a child victim in a personal capacity." (R. 213:1, 8–9.) Further, the State argued that Welton failed to prove how the extrinsic evidence of BK's alleged workplace misconduct would have been admissible, and it argued that Welton failed to demonstrate that the sought after evidence constituted material impeachment evidence. (R. 213:1, 5–6.)

The circuit court held another hearing on Welton's supplemental motion. The court recognized that "[t]here have been some troubling press reports relating to [BK's] professional conduct." (R. 221:20.) The court acknowledged that "the allegations, such as they are, would be more problematic in a case in which [BK] was a treating physician for a child victim. . . . This is just a very different context." (R. 221:20.) The court found that Welton had not met his burden to receive either postconviction discovery or a new trial. (R. 221:20–21.)

Welton now appeals his judgment of conviction and the circuit court's decision and order denying postconviction relief. (R. 222.)

STANDARDS OF REVIEW

"Whether to grant a motion requesting postconviction discovery is committed to the trial court's discretion." *State v. Kletzien*, 2008 WI App 182, ¶ 8, 314 Wis. 2d 750, 762 N.W.2d 788. This Court will "uphold a court's denial of postconviction discovery absent an erroneous exercise of discretion." *State v. Ziebart*, 2003 WI App 258, ¶ 32, 268 Wis. 2d 468, 673 N.W.2d 369.

This Court independently reviews whether a *Brady* violation occurred, but it "accept[s] the trial court's findings of historical fact unless clearly erroneous." *State v. Wayerski*, 2019 WI 11, ¶ 35, 385 Wis. 2d 344, 922 N.W.2d 468.

ARGUMENT

I. The circuit court properly exercised its discretion when it decided that Welton is not entitled to postconviction discovery of BK's UW Health Systems personnel file, or any internal investigations contained therein.

A. A defendant seeking postconviction discovery must prove by clear and convincing evidence that the sought-after evidence relates to an issue of consequence.

Wisconsin Stat. § 971.23 provides a defendant with pretrial discovery rights, but there is no statute providing for postconviction discovery. *State v. O'Brien*, 223 Wis. 2d 303, 319, 588 N.W.2d 8 (1999). The supreme court created a limited right to postconviction discovery rooted in a defendant's due process right to present a complete defense. *Id.* at 320. The process to obtain postconviction discovery is straightforward. Assuming that the sought-after evidence is discoverable at all, "a defendant has a right to post-conviction discovery when the sought-after evidence is relevant to an issue of consequence." *Id.* at 321. To meet his burden, a defendant must prove that "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 320–21. Said differently, "[e]vidence that is of consequence . . . is evidence that probably would have changed the outcome of the trial." *Id.* at 321.

Importantly, however, criminal defendants are not entitled to discovery beyond that which a prosecutor is statutorily and constitutionally required to disclose. *State v. Harris*, 2004 WI 64, ¶ 16, 272 Wis. 2d 80, 680 N.W.2d 737; *O'Brien*, 223 Wis. 2d at 319. And, unlike civil proceedings in which "parties may seek to impose upon opponents the duty of determining whether certain records exist, the criminal discovery provisions do not impose upon the State an

obligation to conduct this type of discovery for the defense." *State v. Behnke*, 203 Wis. 2d 43, 51, 553 N.W.2d 265 (Ct. App. 1996). Instead, "[t]he State is charged with knowledge of material and information in the possession or control of others who have participated in the investigation or evaluation of the case *and* who either regularly report or with reference to the particular case have reported to the prosecutor's office." *State v. DeLao*, 2002 WI 49, ¶ 24, 252 Wis. 2d 289, 643 N.W.2d 480 (emphasis added); *see also Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others *acting on the government's behalf in the case* . . . ." (emphasis added)).

Welton has failed to show how BK's UW Health Systems personnel records are discoverable or how they would have changed the outcome of the trial.

B. Neither Welton nor the State have access to BK's UW Health Systems personnel file or any internal investigations contained therein.

The threshold problem with Welton's argument is that he assumes that the district attorney's office has or had unfettered access to BK's UW Health Systems internal employee records. (Welton's Br. 27 (arguing in his *Brady* section that "[a]t least three State entities possessed the [BK] information").)

At the outset, Welton's assertion that "MPD had, at the very least, a police report detailing how [BK] has falsified a medical record" is wrong. (Welton's Br. 27.) First, what Welton cites is not a police report. Rather, it is a letter from the Public Defender's office to UW Health Systems that references a police report that "documents that [BK] was instrumental in having a medical record changed so that the medical record . . . would support [BK's] theory of abuse." (R. 206:21.) That BK was "instrumental" in having a medical

record reflect her diagnosis does not mean that she *falsified* the record, and Welton provides no other evidence (i.e., the police report itself) to substantiate his claim. What's more, that information is still related to BK's workplace conduct, allegations that are irrelevant to this case.

There are two additional fundamental flaws with Welton's assumption that the State (i.e., the prosecution/police) possessed BK's UW Health Systems personnel records. To begin, pursuant to Wis. Stat. § 233.13(2), UW Health Systems "may keep records of . . . [d]ismissals, demotions and other disciplinary actions" closed to the public.[4] Welton complains that UW Health Systems "refused to turn those records over," (Welton's Br. 22), but he does not acknowledge that it was UW Health Systems' right to do so. Additionally, to the extent the records contain "[i]nformation relating to one or more specific employees that is used by" UW Health Systems "for staff management planning, including performance evaluations, judgments, or recommendations concerning future salary adjustments or other wage treatments, management bonus plans, promotions, job assignments, letters of reference, or other comments or ratings relating to employees," UW Health Systems is statutorily prohibited from disclosing those records. Wis. Stat. § 19.36(10)(d).

Welton identifies no authority from which he, the prosecution, or the court could compel the disclosure of employment records of a non-complaining witness in a

[4] Wisconsin Statutes Chapter 233 pertains to the University of Wisconsin Hospitals and Clinics Authority (UWHCA). Wis. Stat. ch. 233. UWHCA is the governing body of UW Health Systems. *Our Health System*, UWHealth.org, https://www.uwhealth.org/aboutus#6JTKFayeOlRqtM7WHGFLBG (last visited March 27, 2023).

criminal trial unrelated to the witness's employment in light of the above statutes.[5]

Next, Welton's argument appears to be based on the false premise that UW Health Systems is a state entity, and therefore, the DA's office had access to or was obligated to search BK's UW Health Systems personnel files. While the governing body of UW Health Systems is a creature of the legislature, Wis. Stat. § 233.02, it does not follow that either entity is "the State" in the criminal law context. Rather, in this context, "the government" or "the state" means the prosecutor and law enforcement agencies investigating on the prosecutor's behalf. *United States v. Morris*, 80 F.3d 1151, 1169 (7th Cir. 1996) ("[N]either *Kyles* nor *Fairman* can be read as imposing a duty on the prosecutor's office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue."); *DeLao*, 252 Wis. 2d 289, ¶ 24; *Kyles*, 514 U.S. at 437.

UW Health Systems simply does not fall into the category of an "agency investigating on the prosecution's behalf." In this case, UW Health Systems is a private employer with private employee personnel files totally divorced from the present litigation. The present litigation is not related to BK's employment with UW Health Systems, nor was UW Health Systems involved in the prosecution against Welton. In turn, the prosecution was not required to have, let

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[5] These statutes are also fatal to Welton's request for in camera review under *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). In *Ritchie*, the Supreme Court recognized a difference between statutes that "grant [an entity] the absolute authority to shield its files from all eyes" and those that "contemplated *some* use of [the] . . . records in judicial proceedings." *Id.* at 57–58. Wisconsin's statutes in this instance permit UW Health Systems to "shield its files from all eyes" except the employee or the employee's representatives. Wis. Stat. §§ 19.36(1), 233.13. *Ritchie* is therefore inapposite.

alone disclose, BK's personnel file that Welton believes *might* contain impeaching disciplinary evidence. The employment records are therefore beyond the scope of criminal discovery, and the circuit court correctly denied Welton's motion.

C. Even if Welton had a right to access BK's records, he has not shown how a different result is reasonably likely.

Even if the UW Health Systems personnel files were discoverable in postconviction discovery, Welton has not demonstrated a reasonable probability of a different outcome. Welton faces two insurmountable hurdles in his attempt to apply *O'Brien*'s consequentiality test.

First, as Welton admits in his brief, he has no idea whether the personnel records contain what he seeks. (Welton's Br. 14 ("Welton has never seen those records, and thus their precise content is unknown.").) Instead, based on the open records request response from UW Health Systems, the termination agreement between BK and UW Health Systems, and "ancillary information about [BK's] ongoing problems," Welton speculates that "where there's smoke, there's fire." (Welton's Br. 22.)

The "long trail of smoke" that Welton lays out, however, is nonexistent. For example, while the open records request response indicated that there was information that it was precluded from disclosing, there is no indication that the withheld information contained *any* disciplinary records. Instead, the response indicated that the withheld files included items "that were used for purposes of staff management planning, evaluation, or job assignment," none of which suggest the existence of an impeachable disciplinary record. (R. 206:5.) The termination agreement similarly doesn't expound on the reason for the mutual resignation, but it does say that UW Health Systems would provide a letter informing future employers that "[t]he reason [BK] was

placed on leave *did not* relate to dishonesty, clinical skills, medical diagnostic abilities, or incorrect medical diagnoses. No disciplinary action was taken by the University of Wisconsin School of Medicine and Public Health." (R. 206:16 (emphasis added).) The letter provided to Welton's trial counsel by the DA's office similarly indicated that the UW Health Systems internal investigation did not lead to any disciplinary action. (R. 180.) In short, Welton is attempting to embark on a fishing expedition into evidentiary waters that neither he nor the State have access to in hopes that BK's UW Health Systems personnel file *might* yield something impeaching.

Second, even if one were to assume that the records that Welton seeks do exist within BK's UW Health Systems personnel records, he has not presented clear and convincing evidence that the result of the trial would have been different if he had access to those records.

To begin, Welton fails to show how the various parts of BK's personnel file would have been admissible, relevant evidence during his trial. The articles and available UW Health Systems records reveal only allegations of potential workplace misconduct. For example, according to the Wisconsin Public Radio article cited in Welton's brief, BK was suspended for "allegedly bullying her hospital colleagues."[6] The article does not, however, describe what that alleged bullying entailed, nor does it provide any substantiating information.[7] Coworkers at a different job allegedly made

[6] Brenda Wintrode, *Parents recount terror of wrongful child abuse diagnoses from former University of Wisconsin doctor*, Wisconsin Public Radio (November 27, 2021, 7:45 AM), https://www.wpr.org/parents-recount-terror-wrongful-child-abuse-diagnoses-former-university-wisconsin-doctor.

[7] *Id.*

"dozens of complaints about [BK's] management and medical judgment."[8]

As for the available UW Health Systems records, they indicate that BK's colleagues viewed her as "condescending, brusque and non-collaborative." (R. 206:10.) BK's colleagues also apparently disagreed with her interactions with patients and felt "intimidated" by her. (R. 206:10.) Finally, the letter provided by Attorney Pakes from the Public Defender's office raises concerns with "the system used to diagnose and prosecute child abuse." (R. 206:21.) But that letter also merely relates to allegations of workplace misconduct that are wrapped in layers of hearsay. (R. 206:21–22.)

Even if it existed, what Welton seeks is not at all admissible, and inadmissible evidence cannot have reasonably led to a different result. *See, e.g.*, *Wood v. Bartholomew*, 516 U.S. 1, 5–6 (1995) (per curiam) (discussing why inadmissible polygraph results could not have led to a different result and were therefore not material under *Brady*). As already discussed, the workplace allegations are based on out-of-court statements from other coworkers and patients regarding BK's workplace conduct; it is unclear how Welton hoped to clear the initial hearsay hurdle to admit this evidence. Wis. Stat. § 908.01 (defining hearsay). Further, Welton's entire argument is based on the improper premise that BK, in the interaction with her daughter, acted in conformity with her alleged character trait of pressuring colleagues into agreeing with her diagnoses. Despite Welton's framing of the sought-after evidence as "impeaching," Welton actually seeks inadmissible character evidence. Wis. Stat. § 904.04(1). Lastly, whatever evidence may exist in BK's UW Health Systems personnel file is irrelevant. Wis. Stat. § 904.01 (defining relevant evidence). This case has nothing to do with BK's alleged workplace misconduct. BK was not

[8] *Id.*

acting in a professional capacity in this case—BK did not "diagnose" her daughter as being the victim of child abuse nor did she pressure others to conform to that diagnosis as the articles seem to allege she did professionally.

Rather, BK's only involvement in this case is that of a concerned mother who had just been informed that a total stranger sexually assaulted her then-seven-year-old daughter at a local pool. That BK may have been cold toward her patients and abrasive toward her colleagues is not relevant to her credibility in this case. The allegations in the articles and in the available UW Health Systems records, which all discuss her interactions with adults in a professional capacity, in no way tend to prove that BK pressured *her daughter* into fabricating a traumatic sexual assault allegation against someone whom neither of them had ever met. (R. 144:184, 221.) Any evidence related to BK's alleged workplace misconduct is therefore irrelevant and could not have led to the reasonable probability of a different result.

Finally, even if Welton had access to the personnel file and the personnel file did have some allegedly impeaching (and admissible) evidence, that evidence would not have overcome the State's other evidence adduced at trial. The jury heard details of similar assaults of two unrelated girls at the same pool perpetrated by the same person separated by eight years. Both AS and ES described assaults wherein Welton grabbed or touched the girls' vaginas with his hands under water. (R. 144:95–99, 184–86.) Both mothers recounted how upset their daughters were about the assaults. (R. 144:53, 211–12.)

ES's testimony was credible, consistent, and detailed for an eight-year-old testifying about a traumatic assault. Her answers and description of the assault were age appropriate (e.g., describing that Welton touched her "front part," which she explained is used for "[g]oing to the bathroom") and did not reflect adult interference or manipulation. Welton's trial

counsel tried to impeach ES by asking her questions about her mother coaching her. (R. 144:198.) On redirect, however, ES confirmed that, while she talked to her mother about the assault, her mother did not tell her what to say. (R. 144:203.) Importantly, despite the questions about coaching to ES and BK, there were no allegations that AS's mother coached her similar statement or testimony in any way.

In addition to the above testimony, the State presented ES's drawings that she made for her parents and for the police, her forensic interview, the bodycam interview with Riffenburg, and security footage from the pool showing Welton twice approaching ES in the pool. (R. 144:173, 190; 143:42–58; 91:10–12.) At bottom, the State had a strong case against Welton, and allegedly impeaching evidence related to a single witness would not have changed that.

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In sum, Welton seeks access to a private employer's private employee records that may or may not have information within that may or may not have been impeaching. The State has no access to BK's UW Health Systems personnel records, and the records were entirely unrelated to Welton's trial. The records therefore are not within the ambit of criminal discovery in this case, and they would not have led to a different outcome. This Court should affirm the circuit court's discretionary decision denying Welton's motion to compel postconviction discovery.

II. There was no *Brady* violation when the State did not disclose BK's UW Health Systems personnel file or the results of any UW Health Systems internal investigation into BK.

A. A *Brady* violation occurs only if the State suppressed material and favorable evidence.

Under the Fourteenth Amendment, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). *Brady* therefore creates a constitutionally mandated duty to disclose evidence favorable to the accused. *Strickler v. Greene*, 527 U.S. 263, 280 (1999). This duty is distinct from any duties imposed by state discovery statutes, and the two obligations are not co-extensive. *Harris*, 272 Wis. 2d 80, ¶ 24. Discovery involves the defendant's right to "obtain access to evidence," *Britton v. State*, 44 Wis. 2d 109, 117, 170 N.W.2d 785 (1969), and "[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). Conversely, disclosure requires only that certain information be "ma[d]e available" by the State. *Britton*, 44 Wis. 2d at 117. Because it relates to disclosure, *Brady* focuses on whether the State suppressed the evidence—i.e., withheld information—that should have been made available "in time for its effective use" at trial. *Harris*, 272 Wis. 2d 80, ¶ 35 (citation omitted).

"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*, 385 Wis. 2d 344, ¶ 35. A defendant's inability to

prove any one of *Brady*'s elements necessarily means that his *Brady* claim fails. *See id.* ¶ 62 (no *Brady* violation because the evidence was not material); *see also State v. Hineman*, 2023 WI 1, ¶ 36, 405 Wis. 2d 233, 983 N.W.2d 652 (same).

B. Welton has failed to prove any of *Brady*'s requirements.

1. There was no suppression because the UW Health Systems internal employee investigation was not in the State's possession for purposes of *Brady*.

Welton's Brady claim fails at the outset because the State's *Brady* obligations extend only to documents in the government's possession. "[A] failure to show that the records a defendant seeks are in the government's possession is fatal to [a] defendant's [*Brady*] claim . . . ." *State v. Lynch*, 2016 WI 66, ¶ 53, 371 Wis. 2d 1, 885 N.W.2d 89 (lead op.) (*quoting United States v. Hach*, 162 F.3d 937, 947 (7th Cir. 1998)). Accordingly, "if the documents are not in the government's possession, there can be no 'state action' and consequently, no violation of Fourteenth Amendment." *Hach*, 162 F.3d at 947.

While the 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," *Kyles*, 514 U.S. at 437, "*Brady* does not require the government to gather information or conduct an investigation on the defendant's behalf." *United States v. Tadros*, 310 F.3d 999, 1005 (7th Cir. 2002).

Accordingly, for all the same reasons discussed in Section I.B., the State did not suppress the UW Health Systems personnel file because the State did not possess BK's UW Health Systems personnel file. Without possession, there can be no suppression, and without suppression, there is no *Brady* violation. The inquiry can therefore stop there, and this Court can affirm.

2. No one knows what BK's UW Health Systems personnel file says, so there is no way to prove either favorability or materiality.

Welton's *Brady* claim cannot satisfy the second or third elements of *Brady* either. Both arguments fail for the simple fact that Welton's argument is based only on his speculation of what the records might contain. To that end, Welton has not shown how BK's personnel file is favorable to his defense. It is entirely unclear how her personnel file could reveal anything exculpatory. Exculpatory evidence is "[e]vidence tending to establish a criminal defendant's innocence." *Exculpatory evidence*, *Black's Law Dictionary* (11th ed. 2019). There is no evidence that BK dealt with Welton in a professional capacity or that anything in BK's personnel file would tend to prove Welton's innocence. The most Welton could allege is that her personnel file might contain impeaching information. But that argument also fails because Welton has not, with any certainty, shown what the personnel file *actually* says. Again, he simply speculates that where there's smoke, there's fire. That is not sufficient, though.

Finally, Welton has not, and indeed cannot, demonstrate materiality. Under *Brady*, evidence is material "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." *Hineman*, 405 Wis. 2d 233, ¶ 30. Materiality looks to the "totality of the circumstances." Further, as our supreme court explained, "[t]he materiality requirement of *Brady* is the same as the prejudice prong of the *Strickland* analysis." *Wayerski*, 385 Wis. 2d 344, ¶ 36. That is important because in the ineffective assistance of counsel context, a defendant must "offer more than rank speculation to satisfy the prejudice prong." *State v. Erickson*, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999).

Welton's "where there's smoke, there's fire" argument is nothing but speculation. He has not shown that BK's personnel file has anything so impeaching that it would undermine this Court's confidence in the trial. Further, for the same reason that the evidence was not consequential under *O'Brien* based on its irrelevance and its inability to overcome the totality of the evidence adduced at trial, there is similarly no reasonable probability of a different result under *Brady*.

****

As the circuit court correctly decided, Welton's *Brady* argument fails not one, not two, but all three of *Brady*'s elements. BK's UW Health Systems personnel file was not in the possession of the State, so there was nothing the State could have suppressed. Further, there is no evidence that the personnel file contains anything exculpatory or impeaching—and, absent that evidence, Welton fails to prove that the personnel file was material. Welton falls woefully short of meeting his burden to prove a *Brady* violation here, and this Court should affirm.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Dated this 11th day of April 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,554 words.

Dated this 11th day of April 2023.

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 11th day of April 2023.

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