STATE OF WISCONSIN

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

DISTRICT I

Case No. 2023AP362

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SCOTT R. SHALLCROSS,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING WIS. STAT. § 974.06 POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEAN M. KIES, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 294-2907 (Fax)
obriendj@doj.state.wi.us

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ISSUES PRESENTED[1]

1. Should Defendant-Appellant Scott R. Shallcross be judicially estopped from arguing that he was not the driver in the fatal crash when he admitted at the plea hearing and sentencing that he was the driver?

The State raised the judicial estoppel issue below, but the trial court rejected it and reached the merits.

This Court should hold that Shallcross is judicially estopped from now arguing that he was not the driver when he unequivocally admitted at the plea hearing and sentencing that he was the driver.

2. Did the trial court properly exercise its discretion when it denied Shallcross's Wis. Stat. § 974.06 motion to withdraw his guilty plea based on newly-discovered evidence?

The trial court denied Shallcross's motion to withdraw his plea because he failed to prove at the evidentiary hearing a reasonable probability of a different outcome had he known before he pled guilty the results of the State Crime Laboratory's analysis of DNA found on the driver's side airbags.

This Court should affirm. The report established that Shallcross was a contributor of DNA recovered from the driver's side steering column airbag and his blood was found on the driver's side door airbag. Inculpatory as it was, the report would not have changed Shallcross's decision to forgo a trial and plead guilty.

3. Has Shallcross proven that the State violated its duty to disclose exculpatory evidence before he pled guilty?

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[1] The State presents the issues in this order because that is the order in which they were argued below. (R. 83; 91.)

The trial court held that the DNA analyst's report was not exculpatory.

This Court should affirm. Shallcross failed to prove that it is reasonably probable he would have gone to trial had he known of the DNA analyst's report before he pled guilty because the report does not exculpate him. It confirms circumstantially that he was the intoxicated driver of the car that struck the victims' truck at a high rate of speed and killed them both.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. This case involves the application of established legal principles to the facts.

Publication may, however, be of benefit if this Court addresses the issues raised by the State regarding judicial estoppel and the "reasonable probability" standard applicable to motions for plea withdrawal based on newly-discovered evidence.

STATEMENT OF THE CASE

An intoxicated Scott Shallcross slammed the Honda Civic he was driving into a truck at approximately 12:30 a.m. on November 27, 2009, in the City of Milwaukee. The truck's two occupants died in the crash and the fire that immediately ensued. Shallcross was driving at speeds of 80-100 miles per hour when the crash occurred. (R. 17:2–5.)

Represented by counsel, Shallcross pled guilty before Milwaukee County Circuit Court Judge Kevin E. Martens on May 14, 2010, to two counts of homicide by intoxicated operation of a motor vehicle. (R. 10:8–9.) Shallcross stipulated to the elements that he operated a motor vehicle while intoxicated and caused the victims' deaths. (R. 10:13.)

Shallcross assured the court that he was pleading guilty because he was guilty of those offenses. (R. 10:15.) The allegations in the complaint served as the factual basis for the plea. (R. 10:17.) The complaint included his confession to driving drunk and causing the crash. (R. 17:4–5.)

Shallcross was sentenced on September 3, 2010, to consecutive terms each consisting of twelve years in prison followed by six years of extended supervision. (R. 11:103.) At sentencing, defense counsel advised the court that Shallcross decided to plead guilty because he wanted to accept responsibility for his actions. (R. 11:62–63.) In his allocution, Shallcross expressed his deep remorse and apologized to the victims' families. (R. 11:67–70.) Shallcross also told the court that in the future he intends to "educate and teach how truly dangerous and devastating drinking and driving can be." (R. 11:69.) Shallcross admitted that he was the driver and apologized for his actions. (R. 11:69–70.)

Represented by new counsel, Shallcross moved to withdraw his guilty plea in 2011 on the ground that he was denied his right to the effective assistance of trial counsel in several respects. (R. 38.) The trial court, Judge Martens still presiding, denied the motion without an evidentiary hearing, and without ordering any discovery, in a decision and order issued on June 29, 2011. (R. 42.) The court held that Shallcross's motion failed to sufficiently allege prejudice caused by counsel's alleged failure to review witness statements or hire an accident reconstruction expert, (R. 42:2–3); failed to sufficiently allege deficient performance caused by counsel's decision not to move to suppress his inculpatory statements for a *Miranda* violation because Shallcross did not unequivocally invoke his right to counsel during the interview, (R. 42:3–4); failed to sufficiently allege prejudice caused by counsel's alleged failure to obtain copies of the recorded police interview of his passenger, (R. 42:4); and failed to sufficiently allege prejudice caused by counsel's

alleged failure to obtain the toxicology reports for the two victims, (R. 42:4–5).

Shallcross appealed. This Court affirmed in a per curiam opinion issued on October 23, 2012. (R. 55.) This Court agreed with the trial court that Shallcross's postconviction motion failed to sufficiently allege why counsel's investigative efforts, including his failure to hire an accident reconstruction expert, were deficient and prejudicial. (R. 55:4–5.) This Court next rejected Shallcross's claim that counsel was ineffective for not obtaining the victims' toxicology reports in advance of his plea. It found that counsel had given Shallcross copies of the toxicology reports two months before sentencing and Shallcross did nothing with them until after he received an unfavorable sentence. (R. 55:5–6.) He also failed to prove prejudice because the toxicology reports did not support the argument that the crash would have occurred even if Shallcross had been driving sober and with due care within the posted forty mile per hour speed limit. (R. 55:6–7.)

This Court also rejected Shallcross's claim that trial counsel was ineffective for not seeking suppression of his inculpatory statement to police. As trial counsel stated at the sentencing hearing, Shallcross told him *not* to pursue a suppression motion because he wanted to take responsibility for his actions and plead guilty. (R. 55:7–9.) In any event, there were no viable grounds for suppression of his inculpatory statements, either on the ground that they were coerced, or were obtained after he unequivocally invoked the right to counsel. (R. 55:9–13.) Because Shallcross failed to show his attorney's performance was deficient in any respect, his allegation that counsel's errors were cumulatively prejudicial also lacked merit. (R. 55:13.) This Court concluded that the trial court properly denied the motion without an evidentiary hearing because it failed to sufficiently allege deficient performance and prejudice. (R. 55:13–14.) Finally,

this Court rejected Shallcross's motion for postconviction discovery as inadequately developed. (R. 55:14–15.)

Shallcross filed an untimely petition for review. On November 29, 2012, the Wisconsin Supreme Court denied his motion that it deem the petition as having been timely filed. (R. 127.)

Shallcross returned to the trial court and filed a motion for collateral postconviction relief under Wis. Stat. § 974.06 on October 28, 2013. (R. 57.) He once again challenged the effectiveness of trial counsel on several new grounds, and also challenged the effectiveness of postconviction counsel for inadequately challenging trial counsel's effectiveness. The trial court, Judge Jeffrey A. Wagner now presiding, denied the motion without an evidentiary hearing on April 9, 2014. (R. 3.) It held that Shallcross failed to prove trial counsel was ineffective for not filing a suppression motion because Shallcross told counsel he wanted to accept responsibility instead, (R. 3:3), and his challenge to the voluntariness of his confession had been litigated on direct review, (R. 3:3). The court also rejected Shallcross's claim that the delay between his arrest and initial appearance in court was unreasonable. (R. 3:4.)

Shallcross appealed and this Court affirmed in a per curiam opinion issued on April 21, 2015. (R. 5.) It held that Shallcross did not sufficiently allege prejudice caused by trial counsel's failure to challenge the blood draw on the grounds that his arrest was without a warrant and without probable cause because: (a) police were authorized to take his blood without a warrant and without probable cause under the Implied Consent Law, (R. 5 ¶¶ 16–22)); and (b) Shallcross actually consented to the blood draw, (R. 5 ¶¶ 23–26). It follows that postconviction counsel was not ineffective for failing to raise a meritless challenge to trial counsel's performance with respect to the blood draw. (R. 5 ¶ 26.)

This Court declined to address Shallcross's renewed challenge to trial counsel's decision not to move to suppress his inculpatory statement because it had already resolved that issue against him on the direct appeal, making it the law of the case. (R. 5 ¶¶ 27–28.) This Court next rejected Shallcross's claim that trial counsel was ineffective for not challenging the delay between his arrest and the filing of formal charges because his allegation of actual prejudice was only speculative. (R. 5 ¶¶ 29–31.) This Court also rejected Shallcross's claim that he was entitled to an evidentiary hearing because "the record conclusively shows that [he] is not entitled to relief." (R. 5 ¶ 32.) Finally, this Court refused to address Shallcross's claim raised for the first time on appeal that the postconviction court was biased against him. (R. 5 ¶ 33.)

This time, Shallcross timely petitioned for review in the Wisconsin Supreme Court, but that court denied review on September 9, 2015. (R. 8.)

Shallcross then went into federal court and filed a petition for a writ of habeas corpus raising many of the same claims he raised in state court. The United States District Court for the Eastern District of Wisconsin denied the writ in an opinion issued on October 17, 2016. *Shallcross v. Pollard*, No. 15-CV-1136, 2016 WL 6072381 (E.D. Wis. Oct. 17, 2016). The district court rejected his various claims that trial counsel was ineffective, and his claim that the trial court improperly denied him an evidentiary hearing. *Id.* *5–*10. The United States Court of Appeals for the Seventh Circuit denied Shallcross's request for a certificate of appealability. *Shallcross v. Foster*, No. 16-4169, 2017 WL 11680207 (7th Cir. May 12, 2017). The United States Supreme Court denied his petition for a writ of certiorari. *Shallcross v. Foster*, 584 U.S. 938 (April 16, 2018).

Shallcross again returned to the trial court and filed on February 3, 2022, his second Wis. Stat. § 974.06 motion that

is under review here. (R. 82.) He alleged that newly-discovered evidence not known at the time of his plea and the State's failure to disclose exculpatory evidence require plea withdrawal and a trial.

The trial court, Judge Glenn H. Yamahiro now presiding, denied the motion in part and set the matter for an evidentiary hearing in a decision issued on August 3, 2022. (R. 94.) The court first rejected the State's argument that Shallcross should be judicially estopped from taking inconsistent positions on collateral review from those that he took at the plea hearing. (R. 94:3–4.) The court next denied the portion of Shallcross's motion that was based on the newly-discovered passenger's statements regarding his recollection of the crash because Shallcross could have found out before the plea what the passenger, a friend of his, recalled about the crash. (R. 94:5–6.) The court held in the alternative that the claim was procedurally barred because Shallcross did not provide a sufficient reason to excuse his failure to raise this issue relating to the passenger's statements, which he obtained during discovery in a civil case in 2010, either on direct review in 2011, or on collateral review in 2013. (R. 94:6.) The court scheduled an evidentiary hearing to determine whether a State Crime Laboratory report containing the test results of DNA recovered from the car's airbags was newly discovered and exculpatory, and whether Shallcross would have rejected the plea deal and gone to trial had the report been disclosed before the plea. (R. 94:5–6.)

An evidentiary hearing was held over three days: October 14, 2022, (R. 101); November 23, 2022, (R. 104); and December 20, 2022, (R. 114). The trial court, Judge Jean M. Kies now presiding, denied the motion from the bench at the close of the December 20 hearing. (R. 114:30–42.) The court held with respect to both the newly-discovered and exculpatory evidence claims that the results of the State Crime Laboratory's analysis of DNA recovered from the

airbags were not exculpatory and, it follows, Shallcross failed to prove it is reasonably probable he would not have pled guilty and would have gone to trial had he known of the report before the plea. (R. 114:33–35.) "This evidence is not exculpatory. Indeed it is more or less determinative of the issue of who was driving." (R. 114:35.) Shallcross's testimony that he would not have pled guilty had he known of the report "is not credible." (R. 114:36.) "I find that Mr. Shallcross's testimony about the DNA analysis is not credible. It is not exculpatory." (R. 114:40.) Adding the DNA analysis to the other evidence known at the time of the plea would not have produced a different result because Shallcross would not have declined the plea offer and gone to trial simply based on the DNA report. (R. 114:41–42.) The court issued a written order denying the motion. (R. 115.) Shallcross appeals. (R. 116.)

STANDARD OF REVIEW

The issue whether Shallcross should be judicially estopped from taking inconsistent positions in legal proceedings is addressed to the trial court's discretion. *State v. English-Lancaster*, 2002 WI App 74, ¶ 18, 252 Wis. 2d 388, 642 N.W.2d 627.

The issue whether Shallcross proved by clear and convincing evidence a "manifest injustice" entitling him to withdraw his guilty plea after sentencing is addressed to the trial court's discretion. *State v. Taylor*, 2013 WI 34, ¶¶ 48, 56, 347 Wis. 2d 30, 829 N.W.2d 482; *State v. Roou*, 2007 WI App 193, ¶¶ 10, 13–15, 305 Wis. 2d 164, 738 N.W.2d 173.

The specific issue presented here, whether Shallcross should be allowed to withdraw his guilty plea on the ground of newly-discovered evidence also is addressed to the trial court's sound discretion. This Court must give great deference to the trial court's findings of fact and credibility determinations when reviewing that exercise of discretion.

State v. Plude, 2008 WI 58, ¶ 31, 310 Wis. 2d 28, 750 N.W.2d 42; *State v. Boyce*, 75 Wis. 2d 452, 457, 249 N.W.2d 758 (1977).

This Court independently determines whether the State denied Shallcross due process by suppressing exculpatory evidence, but it does so in light of the circuit court's not clearly erroneous findings of fact. *State v. Wayerski*, 2019 WI 11, ¶ 35, 385 Wis. 2d 344, 922 N.W.2d 468.

This Court independently reviews whether Shallcross's postconviction motion is procedurally barred under Wis. Stat. § 974.06(4). *State v. Tolefree*, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997). Whether Shallcross provided a sufficient reason in his motion to excuse his failure to raise his claims on direct review is a question of law reviewed by this Court de novo. *State v. Romero-Georgana*, 2014 WI 83, ¶ 30, 360 Wis. 2d 522, 849 N.W.2d 668.

ARGUMENT

I. This Court should hold that Shallcross is judicially estopped from arguing that he was not the driver when he admitted to the court at the plea and sentencing hearings that he was the driver.

The State argued below that Shallcross should be judicially estopped from claiming that he was not the driver because he admitted in open court at the plea and sentencing hearings that he was the driver. (R. 91:10–11.) The trial court rejected this estoppel argument and proceeded to address Shallcross's claims on their merits. (R. 94:3–4.) This Court should apply judicial estoppel because Shallcross's factual assertions on collateral review are diametrically opposed to his factual assertions at the plea and sentencing hearings.

A. The judicial estoppel rule prevents a party from playing fast and loose with the courts.

Wisconsin's judicial estoppel rule is an equitable principle that precludes a party from adopting inconsistent positions in legal proceedings. *English-Lancaster*, 252 Wis. 2d 388, ¶ 18. "The purpose of judicial estoppel is to preserve the integrity of the judicial system and prevent litigants from playing 'fast and loose' with the courts." *Id*. "Judicial estoppel is an equitable rule applied at the discretion of the court to prevent a party from adopting inconsistent positions in legal proceedings." *Id*. The rule "applies to inconsistent positions taken in judicial actions and proceedings." *In re H. N. T.*, 125 Wis. 2d 242, 253, 371 N.W.2d 395 (Ct. App. 1985); *see State v. Michels*, 141 Wis. 2d 81, 97–98, 414 N.W.2d 311 (Ct. App. 1987).

B. Shallcross admitted that he was the driver at the plea and sentencing hearings, but denied that he was the driver at the postconviction evidentiary hearing.

Shallcross told the court at the plea hearing that he operated the car while he was intoxicated. He stipulated to the elements of the crime that included his admission that he operated the car while intoxicated. (R. 10:13.) He agreed that the complaint would serve as the factual basis for his plea. (R. 10:17.) The complaint includes his detailed confession admitting that he drove the car while drunk and crashed into the victims' truck. (R. 17:4–5.) Finally, at sentencing, Shallcross admitted in his allocution to the court (and to the victims' families) that he made "a horrible decision that night" to drive his friend's car while drunk and he was sorry. (R. 11:69–70.)

But, at the postconviction evidentiary hearing, Shallcross testified under oath that he was not the driver (R. 101:41.) An unidentified third man drove and fled the

scene before first responders arrived. (R. 101:46.) Shallcross said he confessed only because that is what the police wanted to hear from him. (R. 101:24–26.)

C. The trial court erroneously exercised its discretion when it held that application of the judicial estoppel rule would violate this Court's controlling precedent.

The trial court (Judge Yamahiro presiding at that point) refused to apply the judicial estoppel rule in part because the State improperly relied on an unpublished per curiam decision, but also because application of the estoppel rule here would be contrary to this Court's decision in *State v. Ferguson*, 2014 WI App 48, 354 Wis. 2d 253, 847 N.W.2d 900. (R. 94:3–4.) The court was wrong because *Ferguson* said nothing about whether a party is estopped from taking diametrically opposite factual positions in succeeding legal proceedings in the same case. Judicial estoppel was not raised by anyone in *Ferguson*.

If the trial court was of the view that judicial estoppel can never be applied to a plea withdrawal case, it was wrong. Certainly, a defendant may move to withdraw a guilty plea if a reasonably competent attorney, non-disclosed evidence, or, as in *Ferguson*, corroborated recanting witnesses, would have changed his decision to forgo a trial. *Ferguson*, 354 Wis. 2d 253, ¶¶ 9, 20, 31. Neither *Ferguson* nor any other case, however, stands for the proposition that a defendant may make a factual admission at the plea and sentencing hearings and move to withdraw his plea based on the diametrically opposite factual assertion under oath at the postconviction hearing.

The supreme court's decision in *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997), does not preclude application of the doctrine when a defendant takes diametrically opposed factual positions in separate

proceedings. That case involved a motion to withdraw an *Alford* plea where the defendant pled guilty while maintaining his innocence. *Id*. at 468; *see North Carolina v. Alford*, 400 U.S. 25, 37 (1970); *State v. Garcia*, 192 Wis. 2d 845, 856–60, 532 N.W.2d 111 (1995). Here, Shallcross said he was pleading guilty because he was guilty.

This Court's precedent supports application of the judicial estoppel rule here. In *Michels*, the defendant was charged with and tried for second-degree murder. He requested and received a jury instruction on the lesser-included offense of manslaughter, heat of passion, based on his argument that the evidence supported it. *Michels*, 141 Wis. 2d at 97. On postconviction review, Michels argued that there was insufficient evidence to support the jury's verdict finding him guilty of manslaughter, heat of passion. *Id*. This Court held that he was judicially estopped from making that argument because it was directly contrary to the position he took at trial.

> Michels argues that the evidence is insufficient to support his conviction for manslaughter, heat of passion. The manslaughter, heat of passion charge was, however, submitted to the jury at Michels' request as a lesser-included offense of second-degree murder. In making this request, Michels argued that there existed sufficient evidence to support his conviction on the lesser charge. . . . Consequently, we conclude that Michels is judicially estopped from raising this issue because it is directly contrary to that argued in the trial court.

Id. at 97–98 (citation omitted).

The same reasoning applies here. When he waived his right to a jury trial and pled guilty, Shallcross assured the court that he was doing so because he was guilty of driving drunk and causing the crash. Shallcross again admitted at sentencing that he drove drunk and caused the fatal crash. Shallcross took the "directly contrary" position under oath postconviction that he was not the driver, an unidentified

third man was, and he should now be awarded a jury trial to make the State prove that he was the driver.

Shallcross did not, as in *McCallum*, maintain his innocence while choosing not to contest his guilt. He did not even plead "no contest." Shallcross solemnly admitted to the court at the plea and sentencing hearings that he was "guilty" of driving drunk and causing the fatal crash. *State v. Jenkins*, 2007 WI 96, ¶¶ 62–63, 303 Wis. 2d 157, 736 N.W.2d 24 (when a plea colloquy is sufficient, the defendant seeking to withdraw his plea before sentencing must "be able to show why it is fair and just to disregard the solemn answers the defendant gave in the colloquy."); *State v. Shanks*, 152 Wis. 2d 284, 290, 448 N.W.2d 264 (Ct. App. 1989) ("[I]ncriminating statements by a defendant subsequent to the plea could, as a practical matter, make a defendant's guilty or no contest plea irrevocable.").

There is no law that allows a defendant to unequivocally admit at a plea hearing that he committed an act and turn around at a later court hearing and unequivocally deny under oath that he committed that same act. That is the definition of playing fast and loose with the courts. That is precisely what the judicial estoppel rule was designed to prevent. It should be enforced here.

Shallcross has essentially admitted that he lied to the court at the plea and sentencing hearings. He threw himself on the mercy of the court presumably in hopes that it would favorably impact the length of his sentence. This Court should not countenance his duplicity. It should apply the doctrine of judicial estoppel because the equities all favor the State and not him. It should apply this equitable doctrine to prevent Shallcross from playing fast and loose with the courts and to preserve the integrity of these proceedings. Application of the doctrine is especially proper here because it upholds the "strong societal interest in finality [that] has 'special force

with respect to convictions based on guilty pleas.'" *Lee v. United States*, 582 U.S. 357, 368–69 (2017) (citation omitted).

II. The trial court properly exercised its discretion when it denied Shallcross's newly-discovered evidence challenge to his plea because he failed to prove a reasonable probability of a different outcome had he known the results of the Crime Laboratory's analysis of DNA recovered from the driver's side airbags before he pled guilty.

Shallcross testified at the postconviction hearing and argues here that had he known the results of the crime lab's analysis of DNA recovered from the airbags, he would have rejected the plea deal and gone to trial. The trial court (Judge Kies now presiding) did not believe him (R. 114:36, 40.). This Court must affirm because that credibility determination was not clearly erroneous. It was spot on.

A. Shallcross must prove a manifest injustice by clear and convincing evidence to withdraw his plea.

Shallcross must prove a "manifest injustice" by clear and convincing evidence to justify withdrawal of his guilty plea. *State v. Dillard*, 2014 WI 123, ¶ 36, 358 Wis. 2d 543, 859 N.W.2d 44; *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). Shallcross must provide some reason other than his belated desire to go to trial or misgivings about his decision to plead guilty. *Jenkins*, 303 Wis. 2d 157, ¶¶ 32, 74. He must prove there was a serious flaw in the fundamental integrity of the plea, not just disappointment in a lengthier than expected sentence. *Taylor*, 347 Wis. 2d 30, ¶ 49.

This daunting burden of proof is imposed on him to protect the State's strong interest in preserving the finality of the conviction once the plea has been accepted and sentence has been imposed. *Taylor*, 347 Wis. 2d 30, ¶ 48. It protects the "strong societal interest in finality [that] has 'special force

with respect to convictions based on guilty pleas.'" *Lee*, 582 U.S. at 368–69 (citation omitted).

B. Shallcross faces a daunting burden in seeking to withdraw his plea on the ground of newly-discovered evidence.

Shallcross faces a decidedly uphill battle in seeking plea withdrawal based on newly-discovered evidence. "Motions for a new trial based on newly discovered evidence are to be entertained with great caution." *State v. Morse*, 2005 WI App 223, ¶ 14, 287 Wis. 2d 369, 706 N.W.2d 152 (citation omitted). The evidence must be newly discovered and sufficiently strong to show that his conviction was a "manifest injustice." *State v. McAlister*, 2018 WI 34, ¶ 31, 380 Wis. 2d 684, 911 N.W.2d 77; *Plude*, 310 Wis. 2d 28, ¶ 32.

To prevail on his claim that newly-discovered evidence establishes a manifest injustice, Shallcross must prove all of the following by clear and convincing evidence: "(1) the evidence was discovered after [his] conviction; (2) [he] was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) it is not merely cumulative." *McCallum*, 208 Wis. 2d at 473.

If Shallcross satisfies all four criteria, he must also prove a reasonable probability of a different outcome at a trial. *Id.* "'A reasonable probability of a different result exists if there is a reasonable probability that a jury, looking at both the old and the new evidence, would have a reasonable doubt as to the defendant's guilt.'" *McAlister*, 380 Wis. 2d 684, ¶ 32 (citations omitted). This is "[t]he hardest requirement to meet." *Lock v. State*, 31 Wis. 2d 110, 117, 142 N.W.2d 183 (1966).

Shallcross bears the burden of proving all five criteria. *State v. Carnemolla*, 229 Wis. 2d 648, 656, 600 N.W.2d 236 (Ct. App. 1999). If he fails to satisfy any one of the five criteria,

he will not receive a new trial. *State v. Eckert*, 203 Wis. 2d 497, 516, 553 N.W.2d 539 (Ct. App. 1996).

C. Shallcross failed to prove it is reasonably probable that a jury looking at the new DNA test results on the airbags and the "old" evidence proving that he was the driver would have a reasonable doubt as to his guilt.

Before launching into its argument, the State asks this Court to clarify the test for the fifth criterion that must be met to withdraw a guilty plea based on newly-discovered evidence—a reasonable probability of a different outcome.

1. The question should be whether Shallcross proved it is reasonably probable he would have rejected the plea offer and gone to trial had he known of the DNA report.

The defendant in *McCallum*, like Shallcross, moved to withdraw his guilty plea based on newly-discovered evidence. After finding that he satisfied the first four criteria for proving a newly-discovered evidence claim, the Court applied in the plea withdrawal context the same fifth criterion applicable to motions for a new trial based on newly-discovered evidence *after a trial*—a reasonable probability that a jury looking at both the old evidence and the new evidence would have a reasonable doubt as to guilt. *McCallum*, 208 Wis. 2d at 473. But this test makes no sense when there has been no previous trial at which "old" evidence was presented against which to compare "new" evidence to assess its impact on a hypothetical jury's verdict. The test employed in every other context involving plea withdrawal motions is whether it is reasonably probable the defendant would gave rejected the plea agreement and gone to trial but for the alleged error.

When claiming ineffective assistance of trial counsel as the basis for plea withdrawal, the defendant must prove that it is reasonably probable he would not have pled guilty and would have gone to trial but for counsel's deficient performance. *State v. Jeninga*, 2019 WI App 14, ¶¶ 11–12, 386 Wis. 2d 336, 925 N.W.2d 574. When a defendant proves that the trial court erroneously denied a suppression motion, he is not allowed to withdraw the guilty plea if the State proves harmless error, i.e., that it is not reasonably probable the defendant would have rejected the plea agreement and gone to trial had the evidence been suppressed. *State v. Semrau*, 2000 WI App 54, ¶¶ 21–22, 233 Wis. 2d 508, 608 N.W.2d 376; *see id.* ¶ 22 ("Based on the entire record in this case, we conclude that there is no reasonable probability that Semrau would not have entered into the plea agreement.").

Moreover, as will be shown below, when the plea withdrawal motion is tied to proof that the State failed to disclose exculpatory evidence, the defendant must prove it is reasonably probable he would not have pled guilty and would have gone to trial had the exculpatory evidence been disclosed before the plea. *State v. Sturgeon*, 231 Wis. 2d 487, 503–04, 605 N.W.2d 589 (Ct. App. 1999).

Finally, when a defendant seeks to withdraw a guilty plea on *any* constitutional ground, our supreme court has held that he must prove not only that the constitutional violation occurred and he was unaware of it at the time of the plea, but also "that this violation caused him to plead guilty." *State v. Harris*, 2004 WI 64, ¶ 11, 272 Wis. 2d 80, 680 N.W.2d 737 (citation omitted).

The same test should be applied when the basis for plea withdrawal is a claim of newly-discovered evidence. The defendant wins plea withdrawal only if he proves that it is reasonably probable he would have gone to trial had he known of the new evidence, just as he would prevail if he proves that it is reasonably probable he would have gone to trial had he

known of exculpatory evidence that the State failed to disclose before his plea. In that sense, the defendant has proven it is reasonably probable that the errors caused him to plead guilty. *Id*.

This removes the need for a reviewing court to engage in the tortuous exercise of comparing "old" evidence never presented at a trial against "new" evidence never presented at a trial to determine whether a hypothetical jury at a hypothetical trial would find the defendant guilty. As in every other plea withdrawal context, the inquiry would focus on the defendant's decision-making and not only on the likelihood of a conviction after a trial. *State v. Savage*, 2020 WI 93, ¶ 33, 395 Wis. 2d 1, 951 N.W.2d 838.

Here, Shallcross told the court at the plea hearing that he decided to plead guilty because he was guilty; he was the driver and was truly sorry for what he did. No doubt, his decision was influenced by the advice of counsel and the strength of the State's case. The DNA analyst's report would have changed none of that. Counsel's advice would not have changed and the State's case would not have been any less compelling. Shallcross's claim that he would have gone to trial had he known of the report rings every bit as hollow as his apology and expression of remorse at sentencing.

The State will, however, proceed under the existing test requiring Shallcross to prove that it is reasonably probable a jury looking at the "old" evidence in the record, and the "new" evidence in the form of the DNA analyst's report, would have had a reasonable doubt as to his guilt. *McCallum*, 208 Wis. 2d at 473. Because Shallcross failed to satisfy that test, it necessarily follows that counsel's advice to accept the plea offer would not have changed and Shallcross's decision to accept the plea offer would not have changed.

2. Shallcross failed to prove it is reasonably probable that a jury looking at the "old" evidence of record and the "new" DNA analyst's report would have had a reasonable doubt as to his guilt.

The trial court correctly held that Shallcross failed to prove it is reasonably probable that a jury looking at the "old" evidence of record and the DNA analyst's report would have had a reasonable doubt as to his guilt. (R. 114:41–42.)

The new evidence offered by Shallcross is the May 3, 2010, report prepared by State Crime Laboratory Analyst Lisa M. Treffinger containing the results of her comparison of a buccal DNA swab obtained from Shallcross with swabs taken from the driver's side steering column and side door airbags. (R. 85:26–27.) Shallcross insists that this report proves he was not the driver at the time of the crash and he would have gone to trial so he could use the report in his defense. (R. 101:41.) He is flat wrong. The report adds further proof atop the mountain of "old" evidence that he was the driver.

The following is what the DNA analyst's findings were, in pertinent part:

> A male STR DNA profile was developed from the bloodstain from the driver side, side air bag (Item Cl). *This profile was compared to and matched the profile that was developed from the standard profile of Scott R. Shallcross (Item F2). In the opinion of this analyst, the most reasonable explanation for this result is that Scott R. Shallcross is the source of the DNA from the profile developed from the blood found on the side driver's side, air bag* (Item Cl).
>
> . . . .
>
> The STR profile developed from item B2 is a mixture from at least three individuals. No individual profiles could be determined and the results obtained are not suitable for entry into the Wisconsin DNA Databank.

> *Scott R. Shallcross (Item F2) is included as being a possible contributor to this mixture. The probability of randomly selecting an unrelated individual who could be a contributor to this DNA mixture is rarer than one in 2 million.*

(R. 85:26–27 (emphasis added).)

The trial court aptly noted that Shallcross, "conveniently fails to incorporate into his analysis the portion of the DNA report that clearly indicates" his blood was found on the driver's side door airbag. (R. 114:35.) "It is not credible to allege that the defendant would have declined to enter a guilty plea and insist on a trial that would have included all of the findings in the DNA report." (R. 114:36.)

In short, this report circumstantially puts Shallcross behind the wheel when the crash occurred. It is, as the trial court aptly found, "more or less determinative" of the issue that Shallcross was the driver. (R. 114:35.) It would do nothing to diminish the compelling proof of Shallcross's guilt set out in the criminal complaint that served as the factual basis for his plea. (R. 17:2–6.) This included his passenger, Daniel Gorectke's, statement that Shallcross drove. (R. 17:4.) Most important, the complaint that provided the factual basis for Shallcross's plea included his detailed confession:

> When they were leaving the City Lounge Mr. Shallcross drove the vehicle, that being a gray Honda Civic. . . . Mr. Shallcross stated that he then began accelerating the Honda Civic that he was driving on Layton Avenue up to approximately 85 miles per hour passing Amelia's and Big Mouth Frog on Layton Avenue. Mr. Shallcross stated that he then turned up Howell Avenue. Mr. Shallcross stated that he was coming up to Howell Avenue near the intersection where the accident happened. . . . Mr. Shallcross stated that he then saw a red pick-up truck. Mr. Shallcross stated that he tried to maneuver his car away from the door and he hit the truck square in the gas tank. Mr. Shallcross stated that they then spun and spun and that he knew they were in an accident.

> Mr. Shallcross stated that he looked over at Dan Gorectke and asked if he was ok. Mr. Shallcross stated that Dan Gorectke was leaning over the dashboard. He then realized that the other car was on fire. Mr. Shallcross stated that he then unbuckled his seatbelt and crawled into the back seat and he heard screams and the fire growing bigger and bigger from the other car. He then heard an explosion and he knew that it was the truck.

(R. 17:5.)

Shallcross confirmed the veracity of his confession when he admitted the following while exercising his right of allocution at sentencing:

> After getting a DUI back in August 1 vowed to make changes, I refused to drive. I wanted to make a better decision and get on a better track in life. I made a horrible decision that night. I was asked to drive when we left the bar and I should have said no, but I didn't. I hurt many people that night. I will forever have to live with that and it will always remind me of how truly sorry I am. Once again, I am sorry.

(R. 11:69–70.)

Shallcross correctly admits that, "[i]t's hard to imagine a trial in which a juror would disregard a defendant's admission of guilt over his self-serving testimony that he falsely confessed." (Shallcross's Br. 28.) It is also hard to imagine that, if the case were to go to trial, a juror would disregard Shallcross's confession or his admission on cross-examination at a trial that he lied to the court at sentencing when he said that he "made a horrible decision that night" by driving drunk and was sorry. (R. 11:69–70.) The DNA analyst's report would only confirm the veracity of Shallcross's confessions to police and in court.

It is not reasonably probable that a jury looking at this report and all of the other evidence would have a reasonable doubt as to Shallcross's guilt. (R. 114:33–36, 41–42.) The

report would have had no conceivable impact on his attorney's advice to accept the plea offer.

It is obvious that Shallcross has been trying to weasel out of his guilty plea for many years not because he is innocent, but only because he is unhappy with his sentence. This is not a valid basis for withdrawing a guilty plea as a matter of law. *Taylor*, 347 Wis. 2d 30, ¶ 49.

III. Shallcross failed to prove that the State suppressed exculpatory evidence.

Shallcross argues in the alternative that he should be allowed to withdraw his guilty plea because the State failed to disclose the DNA analyst's report before his plea in violation of the discovery statute, Wis. Stat. § 971.23, and of its constitutional requirement to disclose exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963).

A. The State was not as a matter of due process required to disclose the analyst's report before Shallcross accepted the plea agreement.

To the extent that the analyst's report might have somehow impeached any of the State's witnesses at trial, the prosecution was not required to disclose it to Shallcross before he accepted the plea agreement. *Harris*, 272 Wis. 2d 80, ¶ 2 ("[D]ue process does not require the disclosure of material exculpatory impeachment information before a defendant enters into a plea bargain."). For that reason alone, Shallcross has failed to prove a due process violation.

However, a defendant who makes a demand for exculpatory evidence under the discovery statute, Wis. Stat. § 971.23, may be entitled to exculpatory impeachment evidence before he enters into a plea agreement if it is within the time frame during which the prosecution was required by

the statute to disclose the requested information. *Harris*, 272 Wis. 2d 80, ¶¶ 24, 38.

Shallcross's claim that the prosecution violated the discovery statute, Wis. Stat. § 971.23 (Shallcross's Br. 24), is not cognizable under Wis. Stat. § 974.06. His statutory claim must be rejected without reaching the merits because Wis. Stat. § 974.06 can only be used to raise constitutional or jurisdictional challenges. Wis. Stat. § 974.06(1); *Vara v. State*, 56 Wis. 2d 390, 392, 202 N.W.2d 10 (1972); *State v. Nickel*, 2010 WI App 161, ¶ 7, 330 Wis. 2d 750, 794 N.W.2d 765. That leaves only his *Brady* claim. This Court should affirm because Shallcross failed to prove a due process violation and any claimed violation of the discovery statute is not cognizable under Wis. Stat. § 974.06.

B. Shallcross must prove that the DNA analyst's report was both exculpatory and material.

Under the Fourteenth Amendment, "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*, 373 U.S. at 87; *see State v. Nerison*, 136 Wis. 2d 37, 54, 401 N.W.2d 1 (1987).

The evidence must be "favorable to the accused, either because it is exculpatory or impeaching," it "must have been suppressed by the State, either willfully or inadvertently," and it "must be material" to the defendant's guilt or punishment. *Wayerski*, 385 Wis. 2d 344, ¶ 35; *see Brady*, 373 U.S. at 87. The *Brady* rule is codified at Wis. Stat. § 971.23(1)(h). *Harris*, 272 Wis. 2d 80, ¶ 27 ("[A]t a minimum, § 971.23(1)(h) requires that a prosecutor disclose the type of information required under *Brady*.").

Assuming for the sake of argument that the State inadvertently suppressed the DNA analyst's report,

Shallcross must also prove that it was favorable and "material." Suppressed 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. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *State v. Garrity*, 161 Wis. 2d 842, 850, 469 N.W.2d 219 (Ct. App. 1991) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)); *see Banks v. Dretke*, 540 U.S. 668, 698, 702–03 (2004). The test for materiality is the same as the test for prejudice adopted by the court in *Strickland* to prove an ineffective assistance of counsel claim. *Wayerski*, 385 Wis. 2d 344, ¶ 36. The evidence is not "material" unless the failure to disclose it "was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Id.* (quoting *Strickler v. Greene*, 527 U.S. 263, 281 (1999)).

As noted above, when a plea withdrawal motion is tied to proof that the State failed to disclose exculpatory evidence, the defendant must prove it is reasonably probable he would not have pled guilty and would have gone to trial had the exculpatory evidence been disclosed before the plea. *Sturgeon*, 231 Wis. 2d at 503–04.

C. Shallcross failed to prove that the crime laboratory analyst's report was exculpatory or material.

1. Shallcross testified postconviction that the analyst's report proves that he was not the driver.

Shallcross testified at the postconviction hearing that he did not remember the crash yet also denied being the driver when initially questioned by police. (R. 101:14–15.) In the second interview, he told police only that "I didn't want Dan [Gorectke] to take responsibility if I was driving [because] it was not his fault." (R. 101:20–21.) Finally in the

third interview, after a detective allegedly told Shallcross, "well listen, if you tell me what I want to hear, I will let you make a call" (R. 101:24), he felt "defeated" and "extremely guilty." (R. 101:24.) Shallcross said "I just didn't know what to do other than this to tell them what they wanted to hear so they could leave me alone." (R. 101:25.) "I made up a narrative that was a plausible situation that I felt it was going to be good enough for them to leave me alone." (R. 101:26.)

Shallcross claimed he would have gone to trial had he known of the DNA analyst's report because it "proves to me I was not driving." (R. 101:41.) He believed it supports the theory that a third unidentified person drove. (R. 101:46.) Shallcross also testified he wanted to put on the defense at trial that, if he was the driver, the victims were drunk and caused the crash. (R. 101:28–29.) He claimed that counsel advised against moving to suppress the confession because it would be ruled admissible and the jury would decide whether to believe it. (R. 101:31–32.) Shallcross claimed he did not want to plead guilty but did so anyway because counsel advised him that he was not likely to prevail at trial based on the evidence against him and he might receive the maximum sentence. (R. 101:36, 38–39.)

Shallcross admitted on cross-examination that he did not tell the author of the presentence investigation report, the author of the private presentence report prepared for the defense, or the court at the plea hearing and sentencing that he was not the driver. (R. 104:18.) Shallcross finally admitted at the postconviction hearing that, "I told him [the judge] in court, I admitted to the fact that I was driving, yes." (R. 104:23.) Shallcross admitted further that his injuries were consistent with wearing a seatbelt and that he was not wearing a seatbelt when he was found lying in the rear seat. (R. 114:20.) He also acknowledged that Gorectke gave a second statement naming Shallcross as the driver. (R. 114:21.) Gorectke told police that Shallcross crawled into

the back seat after the crash and told him to lie and tell police that another man drove and fled the scene. (R. 17:4.)

2. The analyst's report is not exculpatory.

Shallcross's *Brady* challenge is meritless for the obvious reason, as explained above, that the DNA analyst's report is *inculpatory* in that it puts him and no one else behind the wheel. Only in that sense is the report material to the issue whether Shallcross was the driver. It proves that he was. The report proves that Shallcross's blood containing his DNA was found on the driver's side door airbag, and he was included as a possible contributor of DNA found on the driver's side steering column airbag as well. (R. 85:26–27.) No one else was identified as a contributor. There is no reasonable probability that Shallcross would have rejected the plea offer and gone to trial had the State disclosed the report sooner because it does nothing to diminish the powerful evidence of guilt, including his detailed confession.

Shallcross argues nonetheless that the report is exculpatory because the analyst's report identified three different sources of DNA on the steering column airbag. This, he believes, would support the theory that a mystery man drove and fled the scene on foot in the seconds before police arrived to find only the badly injured Shallcross and Gorectke inside. Only Shallcross's DNA on the steering column airbag could, however, be matched with a known source. Daniel Gorectke's DNA was not matched with any of the DNA on the airbag even though he was in the passenger seat and was the car's owner. (R. 101:8.) The absence of Gorectke's DNA makes it unlikely that he drove and supports his statement that he did not, but Shallcross did. Gorectke unequivocally told police that, after the crash, Shallcross crawled into the back seat and told Gorectke to tell police that a third man drove and fled the scene. (R. 17:4; 91:7–8.) Shallcross confirmed this,

eventually admitting to police that "he previously lied about claiming he was the rear passenger, because he got scared at what he had done. . . . Shallcross stated he was the driver of the car when the accident occurred. . . . Shallcross stated he slid his body into the rear seat of the vehicle and claimed he was a passenger." (R. 91:9.)

The presence of an unidentified third person's DNA on the steering column airbag is easily explained. It could have come from one of the first responders who extricated the two men from the car, from a member of the crew that collected the wrecked car, or even from the factory worker who installed the airbag. More likely, though, it came from a police officer. A police report reveals that an "Officer Beaver removed the airbags and placed them on inventory at the Milwaukee Police Department." (R. 91:10.) Many people were inside the passenger compartment after the crash and could have touched the airbags. Again, the only identified source of DNA on both of the driver's side airbags was Shallcross.

Moreover, Shallcross could have gone to trial with the far-fetched defenses that an unidentified mystery man drove, or the drunk victims actually caused the crash, but he voluntarily and intelligently waived his right to put on those defenses long ago. Shallcross spills much ink challenging the credibility and admissibility of his confession, the credibility of the corroborating statement by Gorectke putting him behind the wheel, and the credibility of other circumstantial evidence putting him behind the wheel. (Shallcross's Br. 28–34.) His belated desire to now have that trial to put on those defenses and challenge that evidence is not, as a matter of law, a valid ground for plea withdrawal. *Jenkins*, 303 Wis. 2d 157, ¶¶ 32, 74. Shallcross's obvious dissatisfaction with the length of his sentence also is not, as a matter of law, a valid ground. *Taylor*, 347 Wis. 2d 30, ¶ 49. Shallcross has not

proven that there was a serious flaw in the fundamental integrity of his plea. *Id.* [2]

3. There is no reasonable probability that Shallcross would have rejected the plea agreement and gone to trial.

For the same reasons that Shallcross failed to prove a reasonable probability of a different outcome had the newly-discovered DNA analyst's report been disclosed before the plea hearing, he has failed to prove it is reasonably probable that he would have rejected the plea deal and gone to trial had the State disclosed that report before the plea hearing. The report only strengthens the circumstantial evidence that Shallcross was the driver. It does nothing to diminish the impact of Gorectke's statement that Shallcross drove but crawled into the back seat and told him to lie to police and say that an unidentified third man drove and fled. The report confirms Shallcross's detailed confession that he drove drunk and crashed into the victims' truck, then crawled into the back seat and told Gorectke to tell police that an unidentified third man drove and fled on foot. Counsel still would have advised him to plead guilty in the face of this evidence and Shallcross still would have followed that advice.

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[2] Shallcross makes the tag-end argument that the State somehow violated the plea agreement by not disclosing the DNA analyst's report before he pled guilty. (Shallcross's Br. 35–37.) This claim is not properly before the court because he did not raise it in his postconviction motion. (R. 83.) This Court generally will not review claims raised for the first time on appeal. *E.g. State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). Furthermore, because the DNA analyst's report was neither exculpatory nor material, Shallcross failed to prove by clear and convincing evidence that any plea breach, if it occurred, was material and substantial. *State v. Bangert*, 131 Wis. 2d 246, 289, 389 N.W.2d 12 (1986).

CONCLUSION

This Court should affirm the order denying Shallcross's most recent Wis. Stat. § 974.06 motion.

Dated this 12th day of April 2024.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Daniel J. O'Brien
DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 294-2907 (Fax)
obriendj@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,360 words.

Dated this 12th day of April 2024.

Electronically signed by:

Daniel J. O'Brien
DANIEL J. O'BRIEN

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 Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

I further certify that a copy of the above document was mailed today to:

Scott R. Shallcross # 563075
Stanley Correctional Institution
100 Corrections Drive
Stanley, WI 54768-6500

Dated this 12th day of April 2024.

Electronically signed by:

Daniel J. O'Brien
DANIEL J. O'BRIEN