STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Circuit Court Case No: 2009CF5594

Appeal No: 2023AP362

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SCOTT R. SHALLCROSS,

Defendant-Appellant.

ON APPEAL FROM A DECISION OF THE MILWAUKEE COUNTY CIRCUIT COURT, HONORABLE JEAN KIES PRESIDING, DENYING DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

Shallcross wants to make perfectly clear to this Court that this appeal is not about the admissibility of statements, the credibility of witnesses', or any other "circumstantial evidence" as the State would like you to have it, because, yes, these are not "valid ground[s] for plea withdrawal." **(State's Br. 34)** What constitutes as valid grounds for plea withdrawal are the issues created by the State when it failed to disclose exculpatory DNA evidence to Shallcross before he pled guilty -- a violation that was not discovered until six years after his conviction.

This case exemplifies some of the most egregious conduct the State can commit when violating the principles of ***Brady*** or its discovery obligations, because unlike the cases of ***Sturgeon*** or ***Harris***, [1] the State here never attempted to disclose the report; in fact, it was only through the diligence of Shallcross himself that this report was discovered.

Additionally, due to the long delay between Shallcross' conviction and discovery of the exculpatory evidence, in which the prosecutor had the duty to discover and disclose, [2] the State forfeited Shallcross' ability to litigate these issues on direct appeal as a matter of right, [3] in which Shallcross would've had the constitutionally protected right to effective counsel. [4] To exacerbate the matter, the State responded with a brief that is replete with inconsistencies, misrepresentations, and incomplete legal theories that this Court should disregard.

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[1] ***Brady v. Maryland***, 373 U.S. 83 (1963); ***State v. Sturgeon***, 231 Wis.2d 487 (Ct. App. 1999); ***State v. Harris***, 272 Wis.2d 80 (2004)

[2] see ***Strickler v. Greene***, 527 U.S. 263, 281 (1999) "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the governments behalf in this case, including the police."

[3] see Wis. Stat. §973.18; Wis. Stat. §974.02

[4] see ***State ex rel. Flores v. State***, 183 Wis.2d 587, 604 (1994)

I. THE STATE'S JUDICIAL ESTOPPEL ARGUMENT IS INCOMPLETE, AND FAILS TO SHOW HOW SHALLCROSS USED ANY MANIPULATIVE PERVERSION OF THE JUDICIAL PROCESS.

The State posits that Shallcross should be judicially estopped from asserting "that he was not the driver when he admitted to the court at the plea and sentencing hearing that he was the driver," [5] **(State's Br. 16)** because, "[t]here 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." **(State's Br. 20)** [6]

This argument is immaterial, and has no merit; actual innocence is not required to prevail on the claims concerning whether the State violated Shallcross' due process rights under ***Brady***, or whether the State was derelict in its statutory obligations under ***Harris***. see ***State v. Reppin***, 35 Wis.2d 377, 386 (1967) ("[t]he test at this stage is not whether the defendant is guilty but whether he was fairly convicted.")

Even more, for judicial estoppel to apply, three elements must be met: (1) the later position must be clearly inconsistent with the earlier position; (2) the facts at issue should be the same in both cases; and (3) the party to be estopped must have convinced the first court to adopt its position. And yet, the court applies estoppel at its discretion. See ***State v. Harrison***, 391 Wis.2d 161, 172-74 (2020)

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[5] The statement referred to here was Shallcross' "offer of proof" to the court on why the withheld DNA evidence would have been relevant to his decision making process in deciding to plead guilty, an element of prejudice in ***Sturgeon*** and ***Harris***. **(R101:41-42) (R114:17-20)**

[6] Conversely, see ***State v. Hadaway***, 384 Wis.2d 185 (Ct. App. 2018) Hadaway petitioned to have his plea withdrawn claiming he was actually innocent of the crime, this Court order the circuit to allow him to do so. see also ***State v. Nash***, 394 Wis.2d 238, 275-81 (2020) (Bradley, R. J. concurring opinion explaining how innocent defendant's plead guilty) see ***State v. Brain K. Avery***, 345 Wis.2d 407, 459 (2013) (Ann Walsh Bradley, J. dissenting: explaining 25 percent of people exonerated by the Innocence Project were found to have given a false confession or plead guilty to the crime.) The State's judicial estoppel theory would have prevented all these defendants from seeking justice.

Most relevant though, judicial estoppel is meant to prevent "cold manipulation" and "not unthinking or confused blunder," it will *not* apply when a "[defendant's] assertions were based on fraud, inadvertence, or mistake … it should not be used where it would work an injustice." ***State v. Petty***, 201 Wis.2d 337, 347-351 (1996) Also in weighing this equity, it's appropriate to consider the State's own misconduct in this assessment. see ***Keystone Driller Co. v. General Excavator Co.***, 290 U.S. 240, 243 (1933) (party invoking equity "must come into court with clean hands")

First and foremost, the State never cited or followed the standard, specifically the State failed to argue how Shallcross prevailed in an earlier proceeding, and for that reason alone this Court should disregard the argument wholesale. see ***State v. Pettit***, 171 Wis.2d 627, 647 (Ct. App. 1992) (declining to address undeveloped arguments) Arguendo, estoppel still should not be applied because it was not "cold manipulation" that caused Shallcross to change his position, it was "fraud" committed by the State through the withholding of exculpatory evidence. [7]

II. THE TRIAL COURT APPLIED THE WRONG LEGAL STANDARD TO SHALLCROSS' ISSUES; SHALLCROSS' ISSUES ARE NOT BARRED UNDER WIS. STAT. §974.06; AND THE WITHHELD EVIDENCE IS EXCULPATORY, EVEN BY THE STATE'S OWN INDIRECT ASSERTION.

The rest of the State's brief focuses on whether the trial court properly exercised its discretion when it denied Shallcross' "newly-discovered evidence" claim pursuant to ***State v. McCallum***, 208 Wis.2d 463 (1997); **(State's Br. 21-29)** whether Shallcross' issue concerning the statutory violation is cognizable under Wis. Stat. §974.06, **(State's Br. 29-30)** whether Wis. Stat. §974.06(4) bars

[7] As argued in his brief-in-chief, Shallcross was involved in a violent crash and suffered from amnesia. **(Shallcross' Br. 33)** Shallcross originally pled not guilty in this case, and only after reviewing the information he had available did he, reluctantly, decide to change his plea to guilty. **(R101:10, 32, 36-39) (R114:17-18)** Under the State's theory of estoppel presented here, one should be barred from changing a plea of "not guilty", to a plea of "guilty."

Shallcross' argument **(State's Br. 16)**; and whether the withheld evidence is exculpatory. **(State's Br. 30-34)**

A. *McCallum* is not applicable to Shallcross' issues.

Shallcross has never put forth a claim of "newly discovered evidence" concerning the withheld DNA reports pursuant to ***McCallum*** or any of its progeny as the State suggested. **(State's Br. 21-29)** Rather Shallcross explicitly argued that the court erroneously exercised its discretion because the court improperly analyzed the claim as a "newly discovered evidence" issue. **(Shallcross' Br. 16-20)**

For an issue to be "newly discovered evidence" under ***McCallum*** or any line of this jurisprudence, the evidence would've had to been *unknown* by either party, prior to conviction, and discovered afterwards. see ***State v. Steven A. Avery***, 213 Wis.2d 228, 239 (Ct. App. 1997), quoting ***U. S. v. Agurs***, 427 U.S. 97, 111 (1976) ("[t]he fact that such evidence was available to the prosecutor and *not submitted* to the defense places it in a *different* category than if it had simply been discovered from a *neutral source* after trial…") The fact that the DNA report was known by the State, in its exclusive possession, and not disclosed to Shallcross before he pled guilty, establishes the issue as a Constitutional and/or a statutory violation. see ***Sturgeon***; ***Harris,*** *supra.*

The standard for "newly discovered evidence" under ***McCallum*** is determinative on whether there is a "reasonable probability" that Shallcross *would* succeed at a jury trial. It's essentially a sufficiency of the evidence test, by comparing "the old evidence" with the "new evidence" to make this determination. ***Id.*** at 475. And that's the problem; the standard under ***McCallum*** is more stringent. The standard for Shallcross' issue is a "reasonable probability of a

different outcome," ***Harris***, at 97 "not whether the defendant will be successful on the trial." see ***Reppin***, *supra*, at 390 [8]

B. Statutory violation issues are cognizable under Wis. Stat. §974.06. [9]

The State also puts forth a counterfeit argument that Shallcross' issue concerning the State's violation of the discovery statute is essentially barred as not being cognizable "because Wis. Stat. §974.06 can only be used to raise constitutional or jurisdictional challenges." **(State's Br. 30)** This is a clear misrepresentation of the law; the plain language of the statute reads that:

> "After the time for an appeal or postconviction remedy provided in s. 974.02 has expired, a prisoner in custody under sentence of a court … claiming the right to be released upon the grounds that the sentence was imposed in violation of the U.S. constitution or the constitution or *laws of this state … or is otherwise subject to collateral attack* may move the court which imposed the sentence to vacate, set aside or correct the sentence." see Wis. Stat. §974.06(1).

Shallcross' statutory argument is clearly cognizable.

C. Discovery of *Brady* material constitutes sufficient reason for the subsequent postconviction motion.

The State highlights that this is Shallcross' third postconviction motion, and Shallcross' second motion pursuant to Wis. Stat. §974.06. **(State's Br. 12-14)** A defendant may not raise an issue in a Wis. Stat. §974.06 motion for postconviction relief if the issue could have been raised in a prior postconviction motion or on direct appeal unless the defendant can show a "sufficient reason" for failing to

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[8] Shallcross does agree with the State that the standard for plea withdrawal under "newly discovered evidence" is daunting and confusing, and would invite this Court to change it. **(State's Br. 23-25)** However our Supreme Court has implicitly stated that this is the standard to follow for even those who have pleaded guilty. see ***McCallum***, at 474.

[9] Before the State claims that Shallcross' issue concerning the statutory violation is not cognizable, the State tries again to misconstrue Shallcross' claim, this time as to be the withholding of exculpatory ***impeachment*** evidence. **(State's Br. 29)** Shallcross asserted, and has argued that the withheld report is ***material exculpatory*** evidence which required disclosure under ***Brady*** before he pled guilty. ***Sturgeon***, *supra*.

raise the issue earlier. ***State v. Escalona-Naranjo***, 185 Wis.2d 168, 181-82 (1994) Whether a defendant has established a sufficient reason for failing to bring available claims earlier is a question of law that is reviewed independently. ***State v. Romero-Georgana***, 360 Wis.2d 522, 539-40 (2014)

Shallcross discovered the exculpatory evidence at the heart of this appeal in May of 2016 during the litigation of a federal civil suit. **(R85:25)** Shallcross' previous postconviction motion was filed in October of 2013, and was finalized by this Court on April 21, 2015, (Petition for Cert. denied September 09, 2015), **(State's Br. 12-15)** therefore, the discovery of the evidence after the previous motion constitutes sufficient reason as Shallcross could not raise the issue any earlier. see ***State v. Love***, 2005 WI 116, ¶¶21, 51-56, 284 Wis.2d 111 (discovery of new evidence may constitute a sufficient reason for a second or subsequent postconviction proceeding under §974.06).

D. The DNA report is clearly exculpatory, even by the State's logic.

The State seems to hang its hat on the argument that the DNA report is not exculpatory, because it is inculpatory. **(State's Br. 33)** The State argues that a blood stain found on the driver's side-side airbag matched Shallcross, therefore it was impossible that anyone but Shallcross drove. [10] **(State's Br. 33)** Even if this were true, which it's not, it would be irrelevant. As explained in ***Strickler***, *supra*, at 282 n. 21, which was quoted in ***Harris***, *supra,* at 108, the Court "reject[ed] respondent's contention that [the] documents do not fall under ***Brady***" because

[10] Shallcross does not deny that his blood was found there, however as explained by Shallcross, this particular airbag ejected from the back of the driver's seat and covered the entire side of the car to protect, not only the driver from a side impact, but also the driver's side rear passenger, where Shallcross was located. **(Shallcross' Br. 31)** Also, the blood stain being referenced to here was nothing more than a drop, and as highlighted in Shallcross' brief-in-chief, this was a violent rollover crash, in which trace evidence typically gets disburses throughout the vehicle, easily explaining how Shallcross' blood may have been found there. **(Shallcross' Br. 32)** Or again, it could have been placed there by the State's own logic, "The presence of … DNA … could have been from one of the first responders who extricated the two men from the car … Many people were inside the passenger compartment after the crash and could have touched the ***airbags***." (Emphasis added) **(State's Br. 34), (R91:12), (Shallcross' Br. 31-32)**

they were "inculpatory." "[C]ases make clear that ***Brady*** … extend[s] to materials that, *whatever their other characteristic"* requires disclosure. ***Id.*** see also ***Socha v. Richardson***, 874 F.3d 983, 988 (7th Cir. 2017) ("…evidence was subject to ***Brady*** though it had 'an inculpatory and an exculpatory effect.'") [11]

Most importantly, the State "confuses the weight of the evidence with its favorable tendency" see ***Kyles v. Whitley***, 514 U.S. 419, 451 (1995), and examines the evidence in isolation, not collectively. ***Kyles***, at 436 (materiality of ***Brady*** evidence is viewed "collectively, not item by item") Utilizing the mixture DNA, in which Shallcross was only a possible contributor, and not the primary source, **(R85:27)** with witness testimony, creates an overwhelming argument for reasonable doubt whether someone other than Shallcross was driving at the time of the crash, hence it's exculpatory. [12]

Finally, the State, with a single line in its brief, inadvertently solidified Shallcross' entire argument concerning the DNA report and why it's exculpatory, "[t]he absence of Gorectke's DNA makes it unlikely that he drove." [13] **(State's Br. 33)** This statement is the fundamental principle of this entire case and is exactly what Shallcross has been attempting to explain since discovering the reports

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[11] This is also why Shallcross was not required to make an argument about the blood stain in his postconviction motion, or as the circuit court stated it, "conveniently fails to incorporate into his analysis…" **(State's Br. 27) (R114:35)** Even if the undisclosed evidence has some inculpatory value, the only relevant argument was whether the undisclosed evidence is exculpatory in any fashion, which, in fact, the circuit court did find. **(R114:33)** It was only after the court compared the old evidence with the new evidence did it conclude that the evidence was not exculpatory. **(R114:36)** see **(State's Br. 15)** "Adding the DNA analysis to the other evidence known at the time of the plea would not have produced a different result …" **(R114:41-42)**

[12] As the State would like you to think, "[t]he presence of an unidentified third person's DNA on the steering column airbag is easily explained," **(State's Br. 34)** but any explanation for this matter would be a trial argument, not an argument on why the evidence is not exculpatory. see ***State v. DelReal***, 225 Wis.2d 565, 576 (Ct. App. 1999) ("… affects its probative value, which is for a jury to determine.")

[13] The State also really attempts to hit the point home that no person other than Shallcross was a match to any DNA found inside the car. **(State's Br. 26-27, 33-34)** This is a true statement but a misrepresentation. Shallcross' DNA was the only profile found because it was the only profile used for testing even though they had Gorectke's buccal swabs available. **(R85:26)**

himself – he believes he is innocent because the absence of his individual sample of DNA on the steering wheel front airbag "makes it unlikely he drove," and therefore would not have pled guilty. This is Shallcross' belief because one would expect if a person drove a car, crashed, rolled several times, unbuckled their seatbelt, and climbed into the backseat, then there DNA should be located on the steering wheel front airbag, **(R101:41-46) (R114:17-20)**, which seems to be the State's theory as well.

Bottom line, since the State theorizes that it was unlikely that Gorectke drove because his DNA is absent from the airbag, than that same logic must also apply to the absence of Shallcross' DNA, and the evidentiary value on the withheld report. **(Strong Emphasis Added)**

E. Shallcross' "tag-end" argument is properly before this Court.

To prevail on plea withdrawal a defendant needs to show, either there was "a serious flaw in the fundamental integrity of the plea," or "a reasonable probability" that the "proceeding would have been different." see ***Harris*** at 97, 116. Shallcross' argument highlighted the fact that since the last published case that dealt with these issues in Wisconsin, which was ***Harris*** in 2004, there have been several cases decided by the Supreme Court of the United States addressing guilty pleas and how prejudice ensued. Shallcross argued that the State's neglect of its duty to disclose was a "serious flaw in the fundamental integrity of the plea." ***Id.*** at 116, and that there this a "reasonable probability the result of the proceeding would have been different" -- that being a better plea deal, and less time in prison, because these concessions by the State are "important, significant, and influential in the courts' ultimate sentencing decision." see ***State v. Smith***, 207 Wis.2d 258, 270 (1997)

Conclusion

Here the State kept exculpatory information secret in the hopes that it would not be discovered, and when it was, was able to make a speculative argument as to the results of a hypothetical trial that never took place, this is "cold manipulation" and "playing fast and loose" with the judicial system. Under no circumstances should Shallcross' guilty pleas be affirmed, to do so would perversely reward the State for such misconduct. This Court should review Shallcross' issues *de novo*, permitting Shallcross to withdraw his pleas, or remand this case back to the circuit court with instructions to apply the proper legal standard to Shallcross' claims.

Dated this 28 th day of May 2024.

Respectfully Submitted,

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stats. §809.19(8)(b) for a brief. The length of this brief, including footnotes, is 2955.

Dated this 28th of May 2024.

Signed: Scott Shallcross

Scott R. Shallcross #563075

CERTIFICATION OF MAILING

I certify that this brief was deposited in the Stanley Correctional Institution mailbox located on the unit wing as required by institution policy and procedures for delivery to the Clerk of the Court of Appeal on 5-28-24. That a properly completed DOC-184 form, "DISBURSEMENT REQUEST" was filled out and accompanied that brief, requesting postage to be added for first-class mail by the United States Post Office. That the address for delivery was:

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At that time this brief should be considered filed pursuant to ***State ex rel. Nichols v. Litscher***, 247 Wis.2d 1013 (2001). see also Wis. Stat. §809.80(3)(c)

Dated this 28th of May 2024.

Signed: Scott Shallcross

Scott R. Shallcross #563075