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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP2357-LV

In the matter of the commitment of:

STATE OF WISCONSIN,

Petitioner-Petitioner,

v.

ANTHONY JAMES JENDUSA,

Respondent-Respondent.

ON APPEAL FROM DENIAL OF A PETITION FOR LEAVE TO APPEAL A NONFINAL ORDER OF THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JOSEPH R. WALL, PRESIDING

BRIEF OF THE PETITIONER-PETITIONER

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TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Cases

Page

Page

Statutes

Regulations

Other Authorities

INTRODUCTION

The circuit court ordered the Department of Corrections to provide Anthony Jendusa's attorney with a complete, unredacted database containing private treatment information of over 1400 people. It further ordered a psychologist to use the data to research the recidivism rate of Wisconsin sex offenders, so that Jendusa can have the results of that research project to use in his chapter 980 sexually violent person commitment trial. It did so under the guise of discovery.

The order is far beyond a circuit court's authority in a chapter 980 proceeding and has four fatal flaws: (1) it does not come within chapter 980's discovery statute; (2) the information is not in the state's possession within the meaning of the discovery statute; (3) the order violates federal and state privacy laws; (4) and it meets no part of the test for disclosure under *Brady v. Maryland*, which does not apply to civil proceedings.

The court of appeals created a fifth issue by summarily denying the State's petition for leave to appeal without exercising its discretion.

To be clear, the State does not object to Jendusa's attorney or expert obtaining the data through DOC's research request protocols. Indeed, Jendusa's attorney was approved to have this data released to him and simply never followed up with DOC. But Jendusa cannot shoehorn the data into the chapter 980 discovery statutes and inapposite criminal case law as a way to avoid the protocol, which was designed to ensure that DOC does not violate state and federal privacy laws.

Jendusa has no statutory or due process right to have an expert use a particular comparison sample to evaluate him for trial, let alone a right to have the state provide the private

data of others to create one. This Court should reverse the decision of the circuit court.

ISSUES PRESENTED

1. Does the circuit court have authority to order DOC or its employees to provide a chapter 980 respondent with data that satisfies none of the discovery provisions of Wis. Stat. § 980.036?

The circuit court was unsure whether it had such authority. It granted Jendusa's motion without identifying an applicable chapter 980 discovery provision.

This Court should reverse the decision of the circuit court because the permissible scope of discovery is strictly delineated in section 980.036.

2. Does DOC, a non-investigatory, non-prosecutorial state agency that is not a party to a chapter 980 proceeding, fall under the umbrella of "the state" for the purposes of the chapter 980 discovery statutes such that anything DOC or its employees possess is in the state's possession?

The circuit court implicitly accepted Jendusa's argument that discovery provisions of chapter 980 entitle Jendusa to information about 1400 offenders in DOC possession.

This Court decides cases on the narrowest possible grounds, and it need not, and should not, reach this question. But if this Court reaches the question, it should reverse the decision of the circuit court.

3. Does the release of the protected treatment and identifying information of 1400 DOC inmates to Jendusa violate Wisconsin or federal laws that protect the privacy of such information?

The circuit court and Jendusa thought that some privacy issues could arise if the data were released, but believed they could be cured by a protective order despite having no specific order prepared or entered.

This Court should reverse the decision of the circuit court because both federal and state law prohibit disclosure under these circumstances.

4. Does *Brady v. Maryland*, 373 U.S. 83 (1963), impose any duty on a prosecutor in sexually violent person commitment trials?

The circuit court did not address this question.

This Court should reserve ruling on this question for a case that properly presents it and where it cannot be avoided. If this Court opts to address the question, it should hold that *Brady* does not apply to civil chapter 980 proceedings.

5. Did the court of appeals erroneously exercise its discretion in denying the State's petition for leave to appeal the order ordering DOC to turn this database over to Jendusa?

This Court should hold that the court of appeals erroneously exercised its discretion in denying the State leave to appeal because the denial contains no rationale showing any exercise of discretion, and no reasonable jurist could conclude that the petition met none of the permissive appeal criteria.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with any case significant enough to warrant this Court's review, oral argument and publication are appropriate.

STATEMENT OF THE CASE

The State appeals from a circuit court order to release the confidential treatment information from 1400 patients in Anthony Jendusa's sexually violent person commitment proceeding. On December 14, 2016, the State filed a petition to commit Jendusa for treatment as a sexually violent person following his sentence for a series of sexual assaults and related acts he committed in the 1980s and 1990s. (R. 1.) Jendusa sought the data after the court found probable cause following a preliminary hearing. (R. 21, Pet'r's App. 102–07; 43:72.)

The data includes the identifying information for all of these inmates, their AODA diagnoses, their scores on the various actuarial tests used, whether they have a paraphilia, whether they've been diagnosed with psychosis, mood disorders, anxiety, ADHD, pervasive developmental disorder, medical conditions, adjustment disorders, PTSD, and whether they've been committed. (R. 23.) All of this information was gleaned from the inmates' treatment records used for the Special Purpose Evaluations conducted by DOC's chapter 980 unit. (R. 45:12–15.)

Discussion about the treatment information arose during cross-examination at the probable cause hearing. The State called Dr. Christopher Tyre, a psychologist and supervisor of the DOC Chapter 980 Forensic Evaluation Unit, to testify. (R. 43.) He explained the evaluation method he uses and testified about the strengths, weaknesses, interpretation, and meaning of Jendusa's results on actuarial tools. (R. 43:28–44.) On cross-examination, Jendusa asked Tyre about the base recidivism rates of the comparison samples used in these tools. (R. 43:60.) Tyre explained that the base rate of reoffense changed depending on the sample selected. (R. 43:61–62.) Jendusa then asked about the base rate in Wisconsin. (R. 43:62.) Dr. Tyre said the 980 evaluation unit

at DOC "keeps track of all the evaluations," but he was not aware of a completed study on such a group. (R. 43:64–65.) Jendusa then asked if Dr. Tyre personally was "working on any research on this data?" (R. 43:65.) Dr. Tyre replied that he "did start a research project with Dr. Caldwell and two other evaluators that are with the department of health services." (R. 43:65.) He said that the data "was run through CCAP, but I have not seen any of the results of that information yet." (R. 43:65.)

Shortly thereafter, Jendusa filed a "Motion to Disclose Data for Analysis." (R. 21, Pet'r's App. 102–07.) This motion asked the court to order "the State and the Wisconsin Department of Corrections" to turn over the data that Dr. Tyre had mentioned, so Jendusa could calculate a Wisconsin-specific base recidivism rate. (R. 21:2, 5, Pet'r's App. 102, 105.) Jendusa insinuated that Dr. Tyre was lying when he said he and his colleagues had not had time to proceed with their project, and claimed Jendusa was entitled to this database to finish their project himself under the premise that it is discoverable under Wis. Stat. § 980.036(2)(h), (2)(j), and (5), and exculpatory under *Brady*. (R. 21:4–7, Pet'r's App. 104–07.)

The State opposed Jendusa's motion on several grounds, including that the data fell outside the plain language of Wis. Stat. § 980.036, and using a court order to conduct research improperly circumvented DOC's research protocols and compliance with HIPAA and other privacy laws. (R. 33:55–66.)

The circuit court held multiple hearings on the motion from June 26, 2018, to November 29, 2018, vacillating between denying and granting the motion. (R. 44–48.)

The June 26 Motion Hearing

The first hearing took place on June 26. The court said it was concerned about HIPAA "because it certainly appears . . . that these are – they are private records." (R. 44:9, Pet'r's App. 129.) The court observed that DOC has a process for obtaining and conducting research using inmates' private health records, Executive Directive 36, that established a research request protocol. (R. 44:9, Pet'r's App. 129.) Jendusa's attorney, Evan Weitz, said he did not think he was bound by Directive 36 because the request fell within the *Brady* doctrine (R. 44:9, 20, Pet'r's App. 129, 131), and he did not want to be bound by the directive's restrictions (R. 44:21, Pet'r's App. 132). The court ordered Weitz to submit a proposal through the directive, and to subpoena Dr. Tyre along with a subpoena deuces tecum for the data. (R. 44:41–42.)

The July 25 Motion Hearing

The court held an evidentiary hearing on July 25. (R. 45.) At the time of the hearing, DOC's research review committee was still considering Weitz's request. (R. 45:5.) Weitz also had pursued a subpoena for the database, but DOC legal counsel explained that federal privacy statutes, particularly 42 C.F.R. Part 2, prohibited disclosure through the subpoena. (R. 45:6–9.)

Dr. Tyre appeared. He testified that the data consists of information derived from "special purpose evaluations" of about 10% of potentially eligible offenders, identified through a screening process. (R. 45:12–13.) Of those offenders, Dr. Tyre said his unit typically found between 10% and 18% potentially met commitment criteria, amounting to roughly 1% to 2% of eligible inmates. (R. 45:14.) Dr. Tyre testified that the information was coded into a database in Microsoft Excel. (R. 45:15.)

Dr. Tyre and two colleagues from DHS, in their private, professional capacities, had submitted a research proposal to DOC and received approval to use this information to calculate a Wisconsin recidivism rate. (R. 45:41–43.) Although that preliminary data had been checked against CCAP to find inmates who had reoffended, it still needed to undergo further steps of analysis. (R. 45:28–30, Pet'r's App. 165–66.) Dr. Tyre said he did not want to turn over the partially-analyzed data from his research project "[i]n part because, . . . it would be someone essentially taking our research away from us." (R. 45:26, Pet'r's App. 163.)

Dr. Thornton, Jendusa's proposed expert, also testified. He said, "it would be nice to get the recidivism data" Dr. Tyre and his colleagues had produced and envisioned publishing the results himself. (R. 45:68, Pet'r's App. 185.) Noting that out-of-state studies showed lower sexual recidivism rates than previously expected, Dr. Thornton questioned whether Dr. Tyre's data "would lead us to think that the base rate in Wisconsin is lower than has been assumed and that would affect likely the commitment recommendations" for "people who are, as it were, on the margin." (R. 45:59.) Dr. Thornton acknowledged that he had "no idea how that would apply to the individual involved in this case." (R. 45:59.)

The court set another hearing date to discuss the testimony. (R.45:80–81.)

The July 31 Status Hearing

At the July 31 status hearing, the parties presented their respective positions.

Jendusa's counsel sought Dr. Tyre's partially-analyzed research data, now claiming he was entitled to the researchers' private data pursuant to *Brady*. (R. 46:6–7, Pet'r's App. 193–94.) Weitz acknowledged that DOC had approved his research request under Directive 36, but he had

not followed up with DOC. (R. 46:11, Pet'r's App. 198.) He suggested that obtaining Dr. Tyre's deidentified data would obviate the need to go through Directive 36. (R. 46:14–15.)

The State noted that Dr. Thornton had never told people not to use the existing base rates (R. 46:10, Pet'r's App. 197), and denied that Jendusa needed the data to receive a fair commitment trial (R. 46:10, Pet'r's App. 197).

The court set another hearing date for further testimony from Dr. Tyre. (R. 46:36–37.)

The November 9 Motion Hearing

Dr. Tyre testified at a hearing on November 9. (R. 47.) Dr. Tyre said he and his colleagues had not been able to coordinate their schedules to begin going through the data that had been run through CCAP and conduct their analysis. (R. 47:7–9.) Dr. Tyre said they also had "concerns" with Dr. Thornton attempting to appropriate their data because "that's not consistent with . . . how we understand research is followed." (R. 47:11.) Dr. Tyre said "sidestep[ping] the normal procedures that researchers undertake" may violate professional ethics. (R. 47:11, 18–23.)

Weitz complained he had not received the data from DOC even though his research request had been approved—but again made no showing he had followed up with DOC. (R. 47:57–58, Pet'r's App. 201–02.) He then claimed everyone was attempting to prevent him from getting the data, which Weitz alleged was "clearly exculpatory in nature;" and asked the court to order the data turned over to him so he could give it to Dr. Thornton to complete the research. (R. 47:58–64, Pet'r's App. 202–08.)

The court granted the motion. (R. 31; 47:62–65, Pet'r's App. 121, 206–09.) The court felt an order could be drafted to protect HIPAA information and that agents had been working

to keep the data from Jendusa's attorney. (R. 31; 47:62–65, Pet'r's App. 121, 206–09.)

The State filed a motion for reconsideration. (R. 29.)

The November 29 Hearing

At the hearing on the reconsideration motion, the court asked Weitz whether the data had "been determined to be exculpatory," about HIPAA concerns (R. 48:5, Pet'r's App. 213), and whether directive 36 would get the same information as through the court order (R. 48:11, Pet'r's App. 218). Weitz said the data would be exculpatory if it lowered the base rate (R. 48:5, Pet'r's App. 213), and that, even if HIPAA applied, it could be remedied through the protective order he suggested (R. 48:6). Weitz claimed that the DOC channels were insufficient (R. 48:12–13, Pet'r's App. 219–20), and that the data was constructively in the prosecution's possession because Dr. Tyre had discussed it with the prosecutor before the hearing (R. 48:19–22, Pet'r's App. 226–29). The prosecutor corrected that she had never seen, let alone had possession, of the data. (R. 48:23, Pet'r's App. 230.)

The court recognized there was a disconnect between what chapter 980 respondents were entitled to as discovery and what Jendusa's attorney sought. (R. 48:39–40.) The court agreed to stay its order, noting that there were significant statewide legal issues that needed clarification. (R. 48:41–44.)

Circuit Court Order

The court denied the State's motion to reconsider and ordered DOC to provide Weitz with "the full, un-redacted, database maintained by the DOC Chapter 980 Forensic Unit." (R. 31, Pet'r's App. 121.) It further ordered that Dr. "Thornton is to analyze the data on behalf of the Respondent." (R. 31, Pet'r's App. 121.) Finally, it said that "identifying information" for the 1400 inmates "shall be only used in so far

as it is necessary to determine recidivism information." (R. 31, Pet'r's App. 121.)

Appellate Proceedings

The State petitioned for leave to appeal the order and Jendusa responded. (R. 33.) Six months later, the court of appeals denied the petition in a two-sentence order. (R. 35, Pet'r's App. 281.) Its reasoning consisted of one line, stating, "[a]fter reviewing the petition, the response, and the circuit court's order, we conclude that the petition fails to satisfy the criteria for permissive appeal." (R. 35, Pet'r's App. 281.)

The State petitioned this Court for review, which this Court granted on February 7, 2020. (R. 42.)

ARGUMENT

I. This Court should conclude the data does not fall within any chapter 980 discovery provision.

A. Standard of review and principles of statutory interpretation for a statutory discovery provision.

Whether Wis. Stat. § 980.036 authorizes the circuit court to order DOC, or anyone else, to provide this data to Jendusa is a question of statutory interpretation reviewed de novo. *State v. Hemp*, 2014 WI 129, ¶ 12, 359 Wis. 2d 320, 856 N.W.2d 811. Questions of judicial authority are also questions of law reviewed de novo. *State v. McClaren*, 2009 WI 69, ¶ 14, 318 Wis. 2d 739, 767 N.W.2d 550.

Courts employ statutory interpretation to determine the meaning of a statute "so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. Submission to the plain meaning of a statute requires courts to begin with the language of the statute,

which is given "its common, ordinary, and accepted meaning." *Id.* ¶ 45.

If the language of a statute is clear and unambiguous, the court applies the statute according to its plain meaning and the inquiry ceases. *Kalal*, 271 Wis. 2d 633, ¶ 46. "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.*

B. Wisconsin Stat. § 980.036 provides an exhaustive list of the discovery available to a respondent in a chapter 980 proceeding.

"[P]retrial discovery procedures should be determined by statute or by rule of court, and should not be decided by the courts on a case-by-case basis." *State ex re. Lynch v. County Court, Branch III*, 82 Wis. 2d 454, 466, 262 N.W.2d 773 (1978). A circuit court has no authority to compel production of discovery that exceeds the scope of the discovery statute governing the type of case before it. *Id.*

In 2005 Wisconsin Act 434, the Legislature's amendments to chapter 980 included restrictions on discovery in chapter 980 proceedings. *See* 2005 Wis. Act 434, § 93. Section 980.036 delineates the type of evidence discoverable in chapter 980 proceedings and loosely mirrors the criminal discovery statute, Wis. Stat. § 971.23. Section 980.036(11) clarified that chapter 804, the civil procedure discovery chapter, "does not apply to proceedings under [chapter 980]" and that Wis. Stat. § 980.036 is the "only" means of obtaining discovery in chapter 980 proceedings.

Thus, in order to be discoverable in Jendusa's chapter 980 proceeding, the data here must meet the definition of discoverable evidence under one of the subsections of Wis. Stat. § 980.036. In the circuit court, Jendusa claimed

three subsections of Wis. Stat. § 980.036 entitled him to this data: Wis. Stat. §§ 980.036(2)(h), (j), and (5). The data falls under none of those subsections.

1. The data does not fall under Wis. Stat. § 980.036(2)(h) because it is not the basis for any examination, test, instrument, experiment, or comparison and the prosecutor had no intention to offer it in evidence.

Wisconsin Stat. § 980.036(2)(h) requires the prosecutor to disclose "any physical or mental examination or any scientific or psychological test, instrument, experiment, or comparison" results "that the prosecuting attorney intends to offer in evidence at the trial or proceeding, and any raw data that were collected, used, or considered in any manner as part of the examination, test, instrument, experiment, or comparison." Wis. Stat. § 980.036(2)(h).

The data Jendusa seeks does not fall under this subsection because no "examination, . . . test, instrument, experiment, or comparison" has yet been performed using the data. Instead, Jendusa's aim is to use the data himself for his own analysis. Further, because no analysis using this data exists, the prosecutor could not "intend[] to offer in evidence" anything related to it. Wis. Stat. § 980.036(2)(h).

2. This database does not fall under Wis. Stat. § 980.036(5) because neither Jendusa nor the State ever intended to introduce the raw data at trial.

Wisconsin Stat. § 980.036(5) does not apply for similar reasons. That subsection states that "[o]n motion of a party, the court may order the production of any item of evidence or raw data *that is intended to be introduced at the trial* for testing or analysis under such terms and conditions as the

court prescribes." Wis. Stat. § 980.036(5). Jendusa specifically stated that he did not intend to introduce this data at trial. (R. 48:8–13.) And the State did not intend to introduce this data at the trial, either. (R. 36:8–9.).

3. This data does not fall under Wis. Stat. § 980.036(2)(j) because it is neither evidence nor exculpatory.

Wisconsin Stat. § 980.036(2)(j) requires the prosecuting attorney to provide "[a]ny exculpatory evidence." This data is neither evidence nor exculpatory.

First, this data is not evidence. Evidence is "[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact." *Evidence*, Black's Law Dictionary (11th ed. 2019). Here, what would "tend to prove or disprove" whether Jendusa meets the criteria for commitment is the score he achieves on actuarials, not the data itself nor the new base rate sample Jendusa wants to create with it.

Second, this data is not exculpatory. "Exculpatory evidence" has "a particular meaning in the law," and when interpreting statutes such terms "are ordinarily interpreted according to their technical meaning." *Hemp*, 359 Wis. 2d 320, ¶ 13 (citation omitted). "'Exculpatory' means 'tendency to clear from a charge of fault or guilt.'" *Dobratz v. Thompson*, 161 Wis. 2d 502, 510 n.1, 468 N.W.2d 654 (1991) (citation omitted). In *State v. Harris*, 2004 WI 64, ¶¶ 24–27, 272 Wis. 2d 80, 680 N.W.2d 737, this Court interpreted an identical provision contained in the criminal pretrial discovery statute, Wis. Stat. § 971.23(1)(h). The court defined "'[e]xculpatory evidence' . . . as '[e]vidence tending to establish a criminal defendant's innocence,'" *Harris*, 272 Wis. 2d 80, ¶ 12 n.9 (alteration in original) (citing *Black's Law Dictionary* 578 (7th ed. 1999)), and "[i]mpeachment evidence" as "[e]vidence used

to undermine a witness's credibility," *Id.* ¶ 12 n.10 (alteration in original) (citation omitted).

Under that definition, a prosecutor must provide a chapter 980 respondent with evidence in the prosecutor's possession that: (1) would tend to establish that he didn't commit any criminal acts of which he was accused, or (2) undermines a witness's credibility. Of course, chapter 980 proceedings are not concerned with determining guilt or innocence. Statutory language is interpreted in the context in which it is used, however, and in the context of chapter 980 the provision is reasonably read as meaning that the prosecuting attorney must disclose evidence either that tends to show the person does not meet criteria for commitment or impeaches a witness.

Evidence is not exculpatory when it is simply raw data requiring analysis. "Evidence lacks apparent exculpatory value when, as here, analysis of that evidence would have offered 'simply an avenue of investigation that might have led in any number of directions.'" *Hubanks v. Frank*, 392 F.3d 926, 931 (7th Cir. 2004) (quoting *Arizona v. Youngblood*, 488 U.S. 51, 57 n.* (1988)); *State v. Leudtke*, 2015 WI 42, ¶¶ 7, 39–48, 362 Wis. 2d 1, 863 N.W.2d 592 (citing *Youngblood*).

Here, the raw data Jendusa seeks would require analysis and interpretation before it could tend to show anything. The data itself shows nothing, and whether analysis would be exculpatory is speculative. Analysis could lead in any number of directions. Indeed, Jendusa admitted that calculating a Wisconsin-specific re-offense base rate from this data would be exculpatory only "if the data from the Department of Corrections database, upon analysis, shows that the rate of reoffending is not as high as Dr. Tyre opines." (R.21:5, Pet'r's App. 105). But as in *State v. Franszczak*, 2002 WI App 141, ¶ 23, 256 Wis. 2d 68, 647 N.W.2d 396,

Jendusa's hoped-for "exculpatory spin" on what an analysis might produce does not make the data exculpatory.

And even Jendusa's assumption about base rates is wrong. A base rate sample showing that Wisconsin offenders tend to recidivate at lower rates than the previous comparison groups would not constitute "exculpatory evidence" because recidivism rates across a sample are not "exculpatory" as to Jendusa. It does not tend to show that he, personally, is less likely to reoffend. Jendusa very well may be found to be over the threshold for commitment regardless of what comparison sample is used.

And contrary to Jendusa's claim below, a Wisconsin-based sample with a lower recidivism rate also would not "impeach" anyone. Even Jendusa's expert, Dr. Thornton, has not invalidated the samples being used or advised against using the samples that Dr. Tyre and other researchers and evaluators have used. (R. 45:55–59, 70–74.) Moreover, there is no requirement that any evaluator use a particular sample to evaluate a respondent, and selection among the available samples is universally regarded as scientifically appropriate (R. 45:19–21, 30–32); meaning the sample itself could not be used to "impeach" any expert.

Jendusa's definition of "exculpatory" as meaning anything that could lead to something potentially helpful to a respondent suggests returning to some version of the rules of civil discovery. *See* Wis. Stat. § 804.01(2)(a). But when it amended chapter 980, the Legislature specified that "[c]hapter 804 does not apply to proceedings under this chapter," Wis. Stat. § 980.036(11), instead imposing a stricter and more limited discovery regime in chapter 980 cases. Wis. Stat. § 980.036(11).

This data falls under no provision of Wis. Stat. § 980.036. Because there is no statute requiring the prosecution to procure and provide Jendusa with the data, the circuit court had no authority to order DOC to release it.

II. The data is not in the "state's possession" as contemplated by the chapter 980 discovery statute.

The State was also not required to provide the data because it was not in the State's possession.

Under chapter 980, the State must produce evidence "within the possession, custody, or control of the state." Wis. Stat. § 980.036(2).

In the criminal context, evidence is typically considered in the state's possession if it's evidence the prosecutor or the prosecution team possesses or has the right to possess. *State v. Lynch*, 2016 WI 66, ¶ 29, 371 Wis. 2d 1, 885 N.W.2d 89. The prosecution team includes other prosecutorial and investigative agencies acting on the prosecution's behalf, like police agencies or other state agencies tasked with investigating criminal allegations. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *Lynch*, 371 Wis. 2d 1, ¶ 29. But that does not extend to "information possessed by an agency that has no connection to the investigation or prosecution of the criminal charge against the defendant . . . and the prosecutor does not have the duty to search for or to disclose such material." *People v. Superior Court,* 96 Cal. Rptr. 2d 264 (Cal. Ct. App. 2000); *see also State v. Darcy N.K.*, 218 Wis. 2d 640, 651–56, 581 N.W.2d 567 (Determining that Mendota Mental Health Institute records were not in the State's possession).

The data was not something the prosecutors possessed or were entitled to possess. DOC does not provide it or any part of it to the prosecutors.

Instead, the data was within the possession of DOC, and DOC was not the State for purposes of the statute. DOC is not acting on the government's behalf in the case in a chapter 980 proceeding. DOC does not investigate or pursue a chapter 980 commitment. Its role is simply to notify, "each appropriate district attorney and the department of justice" within 90 days of the person's anticipated release from a sentence for a qualifying offense. Wis. Stat. § 980.015(2). The notice includes "[t]he person's name, identifying factors, anticipated future residence and offense history," as well as, "[i]f applicable, documentation of any treatment and the person's adjustment to any institutional placement." Wis. Stat. § 980.015(3). In the chapter 980 context, DOC does not act in an investigative or prosecutorial role.

It is the Department of Health Services, not DOC, that is tasked with investigating whether a person is eligible for commitment. Wis. Stat. § 980.04(3). Once the court determines that there is probable cause, "the court shall order . . . the person to be transferred . . . to an appropriate facility specified by the [D]epartment [of Health Services] for an evaluation by the department as to whether the person is a sexually violent person." *Id*.

DOC's notice obligations involve no investigatory function, and Dr. Tyre was not engaged in this research on DOC's or any prosecutorial agency's behalf. The data collected is not for purposes of confining any particular offender, including Jendusa himself.

Jendusa's claim of entitlement to anything DOC has in its possession must rely on the fact that DOC is a state agency. That interpretation of "in the possession, custody, or control of the state" would make the prosecutor responsible for providing information held by any state agency that an individual might be able to use to his advantage in a commitment proceeding—an impossible standard.

Evidence in the possession of DOC or other non-investigatory, not prosecutorial state agencies is not evidence in "the possession, custody, or control of the state" under Wis. Stat. § 980.036(2). If this Court reaches this issue, it should reverse the decision of the circuit court.

III. Releasing this data violates federal and Wisconsin privacy law, as well as the *Alt* privilege.

A. Standard of review and general legal principles.

This question requires this Court to interpret federal and state statutes and administrative rules. The application of an administrative rule and the application of a statute to undisputed facts are questions of law that this Court reviews de novo. *DaimlerChrysler v. LIRC*, 2007 WI 15, ¶ 10, 299 Wis. 2d 1, 727 N.W.2d 311.

When interpreting administrative regulations, this Court uses "the same rules of interpretation [it applies] to statutes." *DaimlerChrysler*, 299 Wis. 2d 1, ¶ 10. "When an administrative agency promulgates regulations pursuant to a power delegated by the legislature, [this Court] construe[s] those regulations 'together with the statute to make, if possible, an effectual piece of legislation in harmony with common sense and sound reason.'" *Id.* (citation omitted).

B. Federal privacy regulations prohibit release of the data.

1. Federal privacy regulations protect the privacy of sensitive health and substance use information.

a. HIPAA safeguards protected health information (PHI) with strict rules governing disclosure.

In 1996, the Health Insurance Portability and Accountability Act (HIPAA) "created significant safeguards protecting the confidentiality" of protected health information (PHI). *State v. Randall*, 2019 WI 80, ¶ 15, n.5, 387 Wis. 2d 744, 930 N.W. 2d 233. HIPAA established a set of national standards to protect health information and address the use and disclosure of PHI.[1]

The HIPAA privacy rule, found in 45 C.F.R. Subt. A, Subch. C, part 164, states: "[a] covered entity . . . may not use or disclose protected health information, except as permitted or required by this subpart or by subpart C of part 160 of this subchapter." 45 C.F.R. § 164.502(a). "Protected health information means individually identifiable health information" (PHI) that is transmitted or maintained in any form. 45 C.F.R. § 160.103. PHI includes information that "[i]s created or received by a health care provider" and "[r]elates to the past, present, or future physical or mental health or condition of the individual" or "the provision of health care to an individual." 45 C.F.R. § 160.103. PHI also includes "demographic information collected from an individual . . .

[1] U.S. Dep't of Health & Human Servs., *Summary of the HIPAA Privacy Rule,* https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html (last visited June 15, 2020).

[t]hat identifies the individual" and when "the information can be used to identify the individual[s]." 45 C.F.R. § 160.103.

The HIPAA privacy rule in the federal code authorizes disclosure of PHI under certain enumerated circumstances. 45 C.F.R. § 164.512. However, it permits these types of disclosures only under strict conditions listed in the respective subsections.

b. Part 2 of the federal code prohibits substance use disorder (SUD) disclosures.

The federal code provides robust protection for the privacy of substance use disorder (SUD) information, generally referred to in Wisconsin as alcohol and other drug abuse (AODA) records. *See* 42 U.S.C. § 290dd-2(a), (b), (e). 42 U.S.C. § 290dd-2(a) states that records of "any patient which are maintained in connection with the performance of any program or activity relating to substance [abuse] education, prevention, training, treatment, rehabilitation, or research which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall . . . be confidential." Such records may only be disclosed "for the purposes and under the circumstances expressly authorized" by subsection (b). *Id.*

Administrative rules, known as "Part 2," were promulgated to effectuate 42 U.S.C. § 290dd-2. 42 C.F.R. § 2.1. It authorizes a court to order a SUD disclosure only in three narrow circumstances: (1) to protect against an existing threat to life or serious bodily injury; (2) in connection with an investigation or prosecution of "extremely serious crime" committed by the patient; and (3) "in connection with litigation or an administrative proceeding in which the patient offers testimony or other evidence pertaining to the

content of the confidential communications." 42 C.F.R. § 2.63(a).

A party applying for a court order to disclose PHI for a noncriminal purpose, such as a sexually violent person commitment, must provide the patient and recordholder adequate notice and opportunity to object. 42 C.F.R. § 2.64. The patient and record holder must receive adequate notice and an opportunity to file a written response or appear in court. *Id*. § 2.64(b)(1)–(2).

An order authorizing a SUD disclosure "is a unique kind of court order." 42 C.F.R. § 2.61(a). The court first must "weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services." 42 U.S.C. § 290dd-2(b)(2)(C). A court must find: (1) the information is unavailable or ineffective through other ways; and (2) the public interest and need for disclosure outweighs the patient and treatment interest. 42 C.F.R. § 2.64(d)(1)–(2). The court must determine "the extent to which any disclosure of all or any part of any record is necessary" and "impose appropriate safeguards against unauthorized disclosure." 42 U.S.C. § 290dd-2(b)(2)(C). A court then must include in the content of the order safeguards that: (1) limits disclosure to essential parts of the patient's records; (2) limits disclosure to the person or people who need the information; and (3) includes other necessary safeguards, such as sealing records. 42 C.F.R. § 2.64(e)(1)–(3).

Any person who violates these provisions is subject to criminal penalty. 42 C.F.R. § 2.3; *see also* 42 U.S.C. § 290dd-2(f) (penalty).

c. The court's order violates Part 2.

The court's order unambiguously violates Part 2. It is undisputed that the database contains protected SUD information from confidential records, as Dr. Tyre testified that the data contains all of these 1400 inmates' AODA diagnosis and treatment information. (R. 25; 47:33.) And though Dr. Thornton testified AODA information was not necessary to calculate a Wisconsin-based recidivism rate (R. 45:64), the court did not limit or cabin the information in the data in any way: the court ordered "the full, un-redacted, database maintained by the DOC Chapter 980 Forensic Unit" (R. 31).

The release of the SUD information violates every relevant requirement of federal law. First, the disclosure falls outside the three narrow circumstances authorizing disclosure, so the order violates 42 C.F.R. § 2.63(a). Second, Jendusa failed to comply with the notice requirements in 42 C.F.R. § 2.64. Third, the court neither weighed injury to the patients under 42 U.S.C. § 290dd-2(b)(2)(C) nor made findings required under 42 C.F.R. § 2.64(d)(1)–(2). And the court's order for "full, un-redacted" disclosure clearly runs afoul of the safeguard determinations required in 42 U.S.C. § 290dd-2(b)(2)(C) and 42 C.F.R. § 2.64(e)(1)–(3). Moreover, the order violates 42 C.F.R. § 2.62 that specifically states that "[a] court order under the regulations in this part may not authorize qualified personnel, who have received patient identifying information without consent for the purpose of conducting research, audit or evaluation, to disclose that information."

The court's order for the "full, un-redacted, database" unambiguously violates federal law.

C. State privacy statutes and regulations prohibited the order.

1. State statutes and regulations protect the privacy of sensitive health and substance use information.

Wisconsin statutes mandate that all registration, treatment, and patient health care records "shall remain confidential." Wis. Stat. §§ 51.30(4)(a) (treatment records); 146.82(1) (patient health care records); *see also* Wis. Admin. Code DHS § 92.03(1)(a) ("treatment records or spoken information which in any way identifies a patient are considered confidential and privileged"). These conditions "shall be broadly and liberally interpreted in favor of confidentiality to cover a record in question." Wis. Admin. Code DHS § 92.03(p).

"'Treatment records' include the registration and all other records that are created in the course of providing services to individuals for mental illness, developmental disabilities, alcoholism, or drug dependence . . . ." Wis. Stat. § 51.30(1)(b). Patient health care records include "all records related to the health of a patient prepared by or under the supervision of a health care provider." Wis. Stat. § 146.81(4). Psychologists licensed under ch. 455 are health care providers. Wis. Stat. § 146.81(1)(h).

Permissible disclosures of treatment records are delineated by Wis. Stat. §§ 51.30(4) and 146.82. Such records may be released under a "lawful order of a court of record." Wis. Stat. §§ 51.30(4)(b)4., 146.82(2)(a)4.; *see also* Wis. Admin. Code DHS § 92.04(4) (lawful court order release). But the lawful court order exception for treatment records is narrow. *See Billy Jo W. v. Metro (In re Mental Condition of Billy Jo W.)*, 182 Wis. 2d 616, 627, 514 N.W.2d 707 (1994).

In interpreting the phrase "lawful order of the court" in Wis. Stat. § 51.30(3)(c) and (4)(b), this Court stated that release is authorized by Wis. Stat. § 51.30(4)(b) when the requested access either fits within or is "distinct from but substantially similar to" the enumerated statutory exceptions. *Metro*, 182 Wis. 2d at 637. An order is not "lawful" when beyond a court's discretionary authority, such as beyond the civil discovery for inspection of medical documents. *Id*. An order is lawful when it does not violate another statute, such as ordering the release of information not protected by the physician-patient privilege. *Crawford ex rel. Goodyear v. Care Concepts, Inc.*, 2001 WI 45, ¶¶ 39, 41, 243 Wis. 2d 119, 625 N.W.2d 876. But a court should be concerned even with the release of unprivileged information, and "examine[] [the information] in camera . . . for a determination of whether any privileged information is potentially at risk of exposure." *Id*. ¶ 42.

And the lawful court order exception is not a mechanism for the unbridled release of confidential records and privileged information. *See Metro*, 182 Wis. 2d at 637–39; *Ambrose v. Gen. Cas. of Wis.*, 156 Wis. 2d 306, 316, 456 N.W.2d 642 (1990). Even a lawful order requires appropriate safeguards to protect the privacy of treatment and patient health care records. *See Goodyear*, 243 Wis. 2d 119, ¶ 42.

Where there is a difference between Wisconsin and federal privacy laws, the more stringent privacy law governs. A state circuit court cannot order the release of protected records or information unless it complies with all governing federal and state privacy regulations. "HIPAA expressly provides that it preempts state law when a 'standard, requirement, or implementation specification . . . is contrary to a provision of State law.'" *State v. Straehler*, 2008 WI App 14, ¶ 14, 307 Wis. 2d 360, 745 N.W.2d 431 (emphasis omitted)

(quoting 45 C.F.R. § 160.203). But it does not preempt a state statute that is "more stringent" than HIPAA's protections. 45 C.F.R. § 160.203(b). A state statute or regulation is more stringent when it increases the privacy afforded or provides greater restrictions on the disclosure or use of health information than HIPAA. 45 C.F.R. § 160.202. So, any more stringent provisions of Wis. Stat. §§ 51.30 and 146.82 control over any more lenient provisions of HIPAA, and vice versa. Jay E. Grenig and Jeffery S. Kinsler, 8 Wisconsin Practice Series, Civil Discovery § 16:4 (Thomson/West 2008). Abiding by all privacy regulations ensures compliance with the robust protections created by HIPAA, Part 2, and Wis. Stat. §§ 51.30(4)(a) and 146.82(1).

2. The court's order here violated Wisconsin privacy protections.

Here, the data contains mental health diagnoses, AODA information, and patient demographic information, and meets no portion of Wis. Stat. § 980.036. It does not fall under the lawful court order exception to these statutes. It meets none of the statutorily-defined purposes set out by the legislature and is not distinct from but substantially similar to any of the enumerated statutory exceptions allowing disclosure in Wis. Stat. § 51.30(4)(b).

D. DOC's executive directive conforms to the research exceptions in HIPAA and Wisconsin law, but the court order here does not.

The only potential exception under HIPAA and Wisconsin law applicable here would be for research purposes. Those exceptions are strictly regulated, and indeed, DOC's executive directive is crafted to comply with them. But the court order here violated those laws.

1. HIPAA and Wisconsin law exceptions for research are limited and specific.

a. HIPAA strictly limits the use of PHI for research purposes.

45 C.F.R. § 164.512(i)(1)(i) allows disclosure for research purposes only if numerous criteria are met. The subsection requires that an institutional review board or a privacy board, as described in the relevant regulations, has approved a waiver of the individual consent requirement. That authorization must include documentation showing that the disclosure meets all of the listed criteria, including:

- An adequate plan to protect the identifiers from improper use and disclosure;
- An adequate plan to destroy the identifiers at the earliest opportunity;
- Adequate written assurances that the information will not be reused or disclosed, except as required for oversight of the research or for other permitted research;
- A showing that the research cannot realistically be conducted without the waiver;
- A showing that the research cannot realistically be conducted without access to and use of the PHI;
- A brief description of the PHI for which use or access the institutional review board or privacy board has determined to be necessary;
- The waiver of the individual consent requirement has been reviewed and approved by the appropriate body;
- The documentation of the waiver of authorization is signed by the chair or other member of the privacy board.

45 C.F.R. § 164.512(i)(2).

b. Wisconsin law strictly limits the disclosure of PHI for research purposes.

Both Wis. Stat. §§ 51.30(4)(b) and 146.82(2)(a) contain subdivisions specifically delineating when, how, and to whom protected health information may be disclosed for the purpose of research. Wis. Stat. §§ 51.30(4)(b)3., 146.82(2)(a)6. Wisconsin Stat. § 51.30(4)(b)3. requires the research project to have "been approved by the department and the researcher has provided assurances that the information" will be used and protected appropriately. It requires the department disclosing the records "to impose any additional safeguards needed to prevent unwarranted disclosure of information." *Id.* Wisconsin Stat. § 146.82(2)(a)6. allows disclosure of patient health care for the purposes of research only "if the researcher is affiliated with the health care provider."

2. The court order did not fit within the federal or state research exceptions.

Executive Directive 36 was designed specifically to ensure that disclosures of this information for research complies with HIPAA and Part 2 and Wisconsin law. (R. 33:265–273, Pet'r's App. 282–90.) The court's order did not comply with these laws.

None of the federal requirements have been met. Jendusa's attorney abandoned his research request because he did not want to be bound by such restrictions. (R. 44:21, Pet'r's App. 132.) The court's ordering DOC to disclose this database without fulfilling these requirements violates 45 C.F.R. § 164.512(i).

The exception in 45 C.F.R. § 164.512(e)(1), which allows disclosures "for judicial and administrative proceedings" in response to a court order, does not apply. Subsection 45 C.F.R. § 164.512(e)(2) states that, "[t]he provisions of this paragraph

do not supersede other provisions of this section that otherwise permit or restrict uses or disclosures of protected health information." So, this exception cannot be used to circumvent the requirements of 45 C.F.R. § 164.512(i) and allow the court to order release of this data to conduct this research.

As to Wisconsin law, Jendusa's purpose is not "distinct from but substantially similar to" one of the statutory exceptions. Jendusa wants this data to conduct research on the Wisconsin recidivism rate for inmates evaluated for chapter 980 commitment. That is not "distinct from" conducting research with this data. *Metro*, 182 Wis. 2d at 637–39. It *is* conducting research with this data. Accordingly, disclosure for this purpose is governed solely by Wis. Stat. §§ 51.30(4)(b)3. and 146.82(2)6. The additional requirements that must be met before allowing disclosures for research imposed by these subdivisions cannot be circumvented by using a court order to commandeer protected data to conduct research.

DOC approved the research request from Jendusa's attorney and was attempting to work with him to ensure that the information he said he needed was covered by his research request and to institute "any additional safeguards needed" to ensure the privacy of the information. Jendusa's attorney simply decided he did not want to go that route and asked the court to order the information turned over. But the court had no authority to order DOC to disclose this information without following these requirements.

E. The court's order violated *Alt.*

Finally, the circuit court had absolutely no authority to order Dr. Thornton to perform research using human subjects simply so Jendusa could have a different comparison sample to use on his actuarials. (R. 31, Pet'r's App. 121.) "[A]n expert

only can be compelled to give previously formed opinions and cannot be required to engage in any out-of-court preparation." *Burnett v. Alt*, 224 Wis. 2d 72, 88, 589 N.W.2d 21 (1999). While Dr. Thornton has no objection here to performing this research, allowing a court to order an expert to perform certain research, particularly relating to human subjects, invites untenable ethical and moral complications for scientific professionals. Furthermore, it flies in the face of the broad qualified privilege for experts this Court recognized in *Alt*. *Id.*

In sum, this order was unlawful. It violates all of the relevant privacy statutes and the expert privilege established in *Alt*. This Court should reverse the circuit court.

IV. *Brady v. Maryland* does not apply to civil chapter 980 proceedings, but this Court should avoid the question because Jendusa would not be entitled to this data even if *Brady* applied.

A. Standard of review.

If this Court decided to review it, this issue requires this Court to interpret and apply *Brady v. Maryland*. The proper interpretation and application of case law to undisputed facts is a question of law this Court reviews de novo. *State v. Starks*, 2013 WI 69, ¶ 28, 349 Wis. 2d 274, 833 N.W.2d 146.

B. This Court should not reach the question of whether *Brady* applies to chapter 980 proceedings because *Brady* would not entitle Jendusa to the data even if it applied.

It is a fundamental precept that this Court decides cases on the narrowest possible grounds, and "[i]ssues that are not dispositive need not be addressed." *Maryland Arms Ltd. P'ship v. Connell*, 2010 WI 64, ¶ 48, 326 Wis. 2d 300, 786 N.W.2d 15. This issue can be avoided because Jendusa is

not entitled to this data under *Brady* even if it applied to chapter 980 proceedings.

Brady applies only where there (1) is evidence (2) that is exculpatory or impeaching and (3) is in the State's possession. "The rationale of Brady does not apply to evidence not in existence." *Turner v. State Dep't of Motor Vehicles*, 541 P.2d 1005, 1007 (Wash. Ct. App. 1975). It does not apply to evidence that might, or might not, be exculpatory. In *Harris*, this Court rejected Jendusa's precise argument that he is due under *Brady* anything that could lead to something favorable. *Harris*, 272 Wis. 2d 80, ¶ 16. It held that "the court of appeals . . . misstated the law when it held that 'the State violates the Constitution if it withholds the type of information that could form the basis for further investigation by the defense,'" and overturned the court of appeals' holding "that a constitutional violation occurs when the State refuses to disclose 'potentially exculpatory' evidence." *Id*. (citation omitted).

As discussed above in sections I and II, the data here is not evidence because it does not tend to disprove any fact relevant to Jendusa's commitment proceeding; it is not exculpatory, but only something Jendusa thinks might help, if his analysis turns out a particular way; and it is not in the prosecution's possession.

And Jendusa's claim has an additional fundamental flaw: *Brady* does not allow defendants to compel pretrial discovery. *Brady* is not a discovery rule. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one."); *Britton v. State*, 44 Wis. 2d 109, 118–19, 170 N.W.2d 785 (1969) (distinguishing "disclosure" and "discovery"); *United States v. Gray*, 648 F.3d 562, 567 (7th Cir. 2011) ("The *Brady* rule is not a rule of pretrial discovery.").

There is no such thing as a "pretrial" *Brady* violation. *State v. Harris*, 2008 WI 15, ¶ 63, 307 Wis. 2d 555, 745 N.W.2d 397.

This Court should reserve its ruling on the question of whether *Brady* applies to chapter 980 proceedings for a case where the facts of the case demand it. This is not that case.

C. If this Court addresses the question, it should hold that *Brady* does not apply outside of criminal proceedings.

Brady holds that "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 punishment." *Brady*, 373 U.S. at 87. *Brady* exculpatory evidence is the only substantive disclosure mandated by the U.S. Constitution. *See Weatherford,* 429 U.S. at 559. That constitutional mandate arises out of the heightened due process concerns raised by criminal proceedings; accordingly, the Supreme Court has not extended it beyond criminal proceedings. *Id.*

This Court should not extend this rule to apply to civil commitment proceedings like those at issue in chapter 980 because civil commitment proceedings are substantively and procedurally different from a criminal trial, and the statutes already afford the types of protections that *Brady* would offer.

The reason for heightened constitutional protections for criminal defendants is the gravity of a finding of guilt coupled with the gravity of the State's concomitant ability to punish, and from the State's responsibility to seek justice in criminal cases rather than simply to convict the defendant. *See (Ronell) Harris*, 307 Wis. 2d 555, ¶¶ 36–39. Accordingly, the constitution affords criminal defendants many rights that civil litigants do not have, and imposes obligations on the State in criminal proceedings that do not apply in other contexts. *Brady* stemmed from substantive due process

concerns implicated by this broad array of constitutional protections carved out exclusively for criminal defendants.

Civil commitment proceedings are a wholly different animal than criminal proceedings. This Court has unambiguously held that commitment under chapter 980 is not punishment. *State v. Carpenter*, 197 Wis. 2d 258, 259, 541 N.W. 2d 105 (1995). Though there is a significant liberty interest at stake, commitment proceedings under chapter 980 are not criminal in nature, and they are not concerned with either guilt or punishment. *State v. Kaminski (In re Commitment of Kaminski)*, 2009 WI App 175, ¶ 11, 322 Wis. 2d 653, 777 N.W.2d 654. They seek to identify those who have a mental illness that predisposes them to acts of sexual violence, and provide them treatment in a confined setting so they can successfully and safely rejoin the community. *Carpenter*, 197 Wis. 2d at 258–259, 270–271. It is an exercise of the State's parens patriae power; it is not punitive or retributive.

Moreover, unlike in criminal proceedings, the trial is not the final adjudication of the respondent's status in a chapter 980 proceeding. A commitment trial under chapter 980 is the beginning of proceedings, not the end. A person found to be a sexually violent person at a chapter 980 commitment trial can be kept in the custody of DHS only "until such time as the person is no longer a sexually violent person." Wis. Stat. § 980.06. By statute, DHS must "conduct a reexamination of the person's mental condition within 12 months after the date of the initial commitment . . . and again thereafter at least once each 12 months." Wis. Stat. § 980.07(1). Additionally, the court "may order a reexamination of the person at any time." Wis. Stat. § 980.07(3). Further, the committed person may petition for supervised release once per year, Wis. Stat. § 980.08, and "may petition the committing court for discharge at any time."

Wis. Stat. § 980.09. In short, unlike criminal defendants, chapter 980 respondents are constantly being reevaluated to determine whether they should be released. A commitment trial is not a final proceeding like a criminal trial, the stakes are not the same, and the due process considerations attendant to the two proceedings accordingly differ.

Few jurisdictions have addressed whether *Brady* should apply to sexually violent person proceedings, and those that have offered little by way of analysis on the question. Washington and Texas have not applied *Brady* to sexually violent person commitment proceedings, whereas California and Illinois have, along with a North Carolina federal district court. *Compare In re Detention of West*, 147 Wash. App. 1017, 2008 WL 4867147, *5 (Wash. Ct. App. Nov. 10, 2008) *and In re Commitment of Alexander*, 2013 WL 2444184, *1–*2 (Tex. App. May 30, 2013), *with People v. McClinton*, 240 Cal. Rptr. 3d 775 (Cal. Ct. App. 2018); *People v. Howe*, 2014 IL App (4th) 140054, ¶¶ 40–43, 21 N.E.3d 775 (Ill. App. Ct. 2014); *United States v. Edwards*, 777 F. Supp. 2d 985, 993, 998 (E.D.N.C. 2011). But the analysis from these courts has been lacking. *See, e.g., Howe*, 21 N.E.3d at 784; *Edwards*, 777 F. Supp. 2d at 990 (simply observing "significant liberty interests" at stake).

Statutory safeguards already ensure a chapter 980 respondent has access to exculpatory evidence in the state's possession. First, Wis. Stat. § 980.036(2)(j) requires the State to turn over actually exculpatory material in its control, custody, or possession. A chapter 980 respondent has all the procedural tools available to other litigants to compel discovery of materials that fall under that provision—unless another provision of chapter 980 provides a different rule—and the courts have the power to effectuate and enforce it. Wis. Stat. §§ 753.03, 801.01(2). Second, Wis. Stat. § 980.036(9) provides sanctions for failure to comply with the other

provisions of Wis. Stat. § 980.036, such as subsection (2)(j). Third, prosecutors have special ethical responsibilities that prevent them from prosecuting cases that they do not believe have merit, SCR 20:3.8(a), "made actionable via SCR 20:8.4(f)." *OLR v. Riek* (*In re Disciplinary Hearings Against Riek)*, 2013 WI 81, ¶ 1, 350 Wis. 2d 684, 834 N.W.2d 384.

In short, *Brady* should not be extended outside of criminal proceedings. If this Court addresses the question, this Court should hold that a civil chapter 980 proceeding is too far removed from the criminal process at issue in *Brady*, and decline to extend it to chapter 980 commitments.

V. The court of appeals erroneously exercised its discretion in denying the State's petition for leave to appeal the order at issue in this case.

A. This issue is moot, but this Court should address it because it almost uniformly evades review.

Because this Court opted to address the merits of the four issues the State raised in its petition for leave to appeal, the question of whether the court of appeals erroneously exercised its discretion in denying the petition is moot. *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶ 3, 233 Wis. 2d 685, 608 N.W.2d 425.

Two of the established exceptions to avoiding moot issues apply here: "the [issue] is of great public importance," and "the issue is 'capable and likely of repetition and yet evades review.'" *In re Commitment of J.W.K.*, 2019 WI 54, ¶ 12, 386 Wis. 2d 672, 927 N.W.2d 509 (citation omitted). This issue is of great public importance because it deals with a matter of appellate procedure that impacts every litigant seeking a permissive appeal. It is capable and likely of repetition because the court of appeals issues boilerplate orders when denying petitions. The question of whether that

order is sufficient to show a proper exercise of discretion also nearly always evades review, given this Court's general policy of refusing to grant review of such decisions. *See Aparacor, Inc. v. DILHR*, 97 Wis. 2d 399, 403, 293 N.W.2d 545 (1980).

Consequently, State asks this Court to address the issue and hold that, pursuant to *State v. Scott*, 2018 WI 74, ¶¶ 35–41, 382 Wis. 2d 476, 914 N.W.2d 141, the court of appeals' standard single–sentence order stating that a petition "does not meet criteria" for an interlocutory appeal is insufficient to explain its decision. If this Court determines that the order provided sufficient explanation under *Scott*, it should still hold that the court of appeals erroneously exercised its discretion in this case because its determination that none of the criteria for an appeal were met was not a decision a reasonable judge could reach.

B. The court of appeals erroneously exercised its discretion when it denied the State's petition for leave to appeal.

Whether to permit an appeal of a non-final order is a discretionary decision for the court of appeals. *Leavitt v. Beverly Enterprises, Inc.*, 2010 WI 71, ¶ 42, 326 Wis. 2d 421, 784 N.W.2d 683; Wis. Stat. § 808.03(2). "Section 808.03(2) provides the standard by which the court of appeals exercises its discretion in determining whether to grant a permissive appeal." *Leavitt*, 326 Wis. 2d 421, ¶ 42; Wis. Stat. § 808.03(2). Under Wis. Stat. § 808.03(2), an order not appealable as a matter of right may be appealed if the appeal will: (1) materially advance the termination of the litigation or clarify further proceedings, (2) protect a party from substantial or irreparable injury, or (3) clarify an issue of general importance in the administration of justice. Wis. Stat. § 808.03(2)(a)–(c). A petition that shows only one of the criteria may be sufficient to warrant permission to appeal. *Id.*

In addition, the petitioner must show a substantial likelihood of success on the merits. *Hass v. Wisconsin Court of Appeals*, 2001 WI 128, ¶ 13, 248 Wis. 2d 634, 636 N.W.2d 707.

"Discretion is not synonymous with decision making." *Klinger v. Oneida County*, 149 Wis. 2d 838, 846, 440 N.W.2d 348 (1980). A court properly exercises its discretion only if it "appl[ies] a correct view of the law to the relevant facts to reach a decision that a reasonable judge could reach." *State v. Sibley*, 151 Wis. 2d 228, 444 N.W.2d 391 (Ct. App. 1989). This Court has long required a circuit court to "make a record of its reasoning" in order to properly exercise its discretion. *Klinger,* 149 Wis. 2d at 847. This is so because requiring an on-the-record explanation "ensure[s] the soundness of [the circuit court's] own decision making and [facilitates] judicial review." *Id*.

In *Scott*, 382 Wis. 2d 476, ¶¶ 35–41, this Court extended the requirement that courts explain the rationale for their discretionary decisions to the court of appeals. This Court determined, "the justification that this [C]ourt has relied upon to require a circuit court to explain its discretionary decision-making applies equally to the court of appeals." *Id.* ¶ 40. This Court then held that "the court of appeals should explain its discretionary decision-making," *id.*, and "that the court of appeals' failure to explain its exercise of discretion . . . is an erroneous exercise of discretion." *Id.* ¶ 41.

1. The court of appeals failed to explain the rationale for its decision.

Here, as is its customary practice, the court of appeals denied the State's petition for leave to appeal with a single sentence, stating only that "[a]fter reviewing the petition, the response, and the circuit court's order, we conclude that the petition fails to satisfy the criteria for permissive appeal." (R. 35). It did not explain how any of the criteria were unmet

or how it reached that conclusion. (R. 35.) Pursuant to *Scott*, the court of appeals erroneously exercised its discretion by failing to provide any explanation of its decision. *Scott*, 382 Wis. 2d 476, ¶ 41.

The State recognizes that the court of appeals is a busy court with a largely non-discretionary docket, and that addressing petitions for leave, and granting permissive appeals, adds to the court's already-heavy workload. The State further recognizes that many petitions for leave to appeal facially fail to meet any of the statutory criteria, and explaining the rationale for denying these insufficient petitions requires more work on the part of the court of appeals. Accordingly, the State is not asking this Court to require the court of appeals to explain in lengthy detail its reasons for denying petitions for leave to appeal.

The court of appeals' current practice of denying petitions with this single rote sentence, however, provides no explanation why the court believed the criteria were unmet. Coupled with this Court's usual practice of refusing to review such decisions, unsuccessful petitioners are left with no explanation of the decision and no recourse. The court of appeals' routine failure to provide any reasons for denying leave to appeal, coupled with no real avenue for review of that decision, makes the court of appeals' decision-making appear arbitrary, rather than discretionary.

This Court should hold that these single-sentence rote orders denying petitions for leave to appeal constitute an erroneous exercise of the court of appeals' discretion pursuant to *Scott*. It should require the court of appeals to provide at least a brief explanation of why a petition does not meet any of the criteria for review. *Scott*, 382 Wis. 2d 476, ¶ 41.

2. The court of appeals' determination that none of the statutory criteria for a permissive appeal were met here was unreasonable.

The court of appeals' determination that none of the criteria warranting a permissive appeal were met here was simply not a conclusion that a reasonable judge could reach. There is no question an appeal is necessary to clarify the substantial issues of state and federal law at stake here, which is an "issue of general importance in the administration of justice." Wis. Stat. § 808.03(2)(c). There are virtually no appellate cases, published or unpublished, addressing the scope of discovery under Wis. Stat. § 980.036, or whether some other font of authority allows a circuit court to order a third party to provide a respondent with material that does not fall under the statute, particularly the private health information of individuals not involved in the case. An appeal was necessary to prevent substantial and irreparable injury because the private information cannot be un-released. Wis. Stat. § 808.03(2)(b). Finally, the State showed a substantial likelihood of success on the merits for the reasons identified in the petition and explained above.

Accordingly, even if this Court holds that the court of appeals' order here contained a sufficient explanation for its decision, this Court should hold that the court of appeals erroneously exercised its discretion because its determination that none of the Wis. Stat. § 808.03(2) criteria were met was not reasonable. If this Court so holds, the State asks this Court to remind the court of appeals that "[t]he Wisconsin appellate court system functions fairly and efficiently only if the court of appeals fulfills its responsibility" to grant petitions when one or more of the statutory criteria are met. *Deutsche Bank Nat'l Tr. Co. v. Wuensch*, 2018 WI 35, ¶ 26 n.13, 380 Wis. 2d 727, 911 N.W.2d 1. This Court issued such

admonishment in *Deutsch Bank* regarding the court of appeals' duty to publish opinions, which is, similarly, a discretionary decision guided by statutory criteria. The court of appeals' decision here suggests the need for a similar directive regarding permissive appeals.

CONCLUSION

This Court should reverse the decision of the circuit court and remand this case to the circuit court for further proceedings consistent with this opinion.

Dated this 16th day of June 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,702 words.

Dated 16th day of June 2020.

LISA E.F. KUMFER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (Rule) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Dated 16th day of June 2020.

LISA E.F. KUMFER
Assistant Attorney General

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § (Rule) 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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

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

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