STATE OF WISCONSIN

IN SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Respondent,

Circuit Court Case No: 2009CF5594

Appeal No: 2023AP362

v.

SCOTT R. SHALLCROSS,

Defendant-Petitioner.

Petition for Review of Published Decision, State of Wisconsin v. Scott R. Shallcross, 418 Wis. 2d 575 (2025), 2025 WI App 66, Court Of Appeals, District One, Affirming Circuit Court Decision Denying Motion for Post-Conviction Relief

SUPPLEMENTAL PETITION FOR REVIEW

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the circuit court and the court of appeals erred by re-characterizing petitioner's properly pled constitutional, and statutory violation pursuant to ***Brady v. Maryland***, 373 U.S. 83 (1983), and ***State v. Harris***, 272 Wis. 2d 80 (2004) as a newly discovered evidence claim, thereby applying the incorrect legal framework and avoiding the proper constitutional analysis required under ***Brady*** and its progeny?

Petitioner argued that the State committed a suppression violation by withholding a DNA report in its exclusive possession. Petitioner adamantly pursued a constitutional and statutory violation argued that the State violated ***Brady*** as well as its obligation under ***State v. Harris***, 272 Wis. 2d 80 (2004) in the circuit court.

The circuit court treated the undisclosed DNA report as newly discovered evidence under ***State v. McAlister***, 380 Wis. 2d 684 (2018) and applied a hybrid standard by combining the first four criteria of newly discovered evidence, and then substituted the fifth criterion by analyzing whether the "defendant would have still plead guilty" had the DNA reports been properly disclosed. In drawing this conclusion the circuit court weighed the undisclosed DNA report against the existing record to deny the motion. The circuit court never applied any other legal standard to the claims.

The court of appeals acknowledge that the circuit court applied an incorrect legal analysis in that approach, yet did not remand for the correct standard. Instead, the court of appeals applied its own analysis of the undisclosed DNA report as newly discovered evidence under ***State v. McCallum,*** 208 Wis. 2d 463 (1997), again weighing the undisclosed DNA report against the existing record as ***McCallum*** allows. The court of appeals did acknowledge petitioner's claim of the alleged ***Brady*** violation, but did not actually apply the constitutional standard.

2. Whether the court of appeals erred by declining to review a properly pled discovery violation pursuant to Wis. Stat. §971.23 on the grounds that the issue was not "constitutional or jurisdictional" in nature and therefore not "cognizable under Wis. Stat. §974.06"? Does such rule limit the scope of that statute, despite the statute's plain language authorizing collateral relief for violations of the laws of Wisconsin and for judgments otherwise subject to collateral attack?

The court of appeals concluded that the asserted discovery violation was categorically unreviewable under §974.06 because it was statutory rather than constitutional. In doing so, the court adopted a narrowed construction of the statute that conflicts with the plain language of the statute, and conflicts with normal, current State practices. This left the petitioner without any legal remedy of the claim, insulating the issue from review.

3. Whether the court of appeals misapplied ***Brady's*** materiality analysis by weighing the suppressed DNA report against the perceived strength of the existing record, rather than assessing whether the cumulative effect of the withheld evidence undermines confidence in the outcome, as required by ***Brady***, ***Kyles v. Whitley***, 514 U.S. 419 (1995) and Wisconsin counterparts.

As explained, the circuit court did not conduct any proper legal analysis concerning actual suppression of the evidence by the State. The court of appeals acknowledged that an alleged ***Brady*** violation occurred, however reasoned that the claim failed as the evidence was not exculpatory. Again, in reaching this conclusion, the court of appeals made the same assessment by agreeing with the circuit court, whom improperly weighing the undisclosed DNA report against the existing record– precisely what ***Kyles*** forbids. What's more concerning is that the court of appeals themselves already concluded that the circuit court applied an incorrect legal standard in the first instance, further perpetuating that error.

4. Whether in a plea base conviction, the ***Brady*** materiality standard, which is the same as the prejudice standard in ***Strickland v. Washington***, 466 U.S. 668 (1984), may be satisfied where the suppression of favorable evidence could lead to a "reasonable probability of a different outcome," that outcome being things other than going to trial such as: a defendant's decision to plead guilty, the terms in which the defendant decided to plea, or the sentence the defendant ultimately received a in light of the United States Supreme Court's recognition of plea bargaining as a critical stage in ***Lafler v. Cooper***, 566 U.S. 156 (2012) and ***Missouri v. Frye***, 566 U.S. 134 (2012)?

This is a question of first impression. No case articulates whether "a reasonable probability of a different outcome" includes outcomes other than trial verse plea, however both ***Frye*** and ***Lafler*** have recognized that prejudice can be shown if an error reasonable would have resulted things other than the defendant opting to head to trial. Exculpatory evidence is material if it can lead to a better offer, or the ability to leverage that evidence during negotiations.

CRITERIA FOR GRANTING REVIEW

This petition presents a set of interrelated questions that go to the core of Wisconsin post-conviction practice and the constitutional integrity of plea-based convictions. The court of appeals' published decision in ***State v. Scott R. Shallcross***, 418 Wis. 2d 575 (2025), 2025 WI App 66, establishes controlling law that narrows the protections of ***Brady v. Maryland***, 373 U.S. 83 (1963); restricts the reach of Wis. Stat. §974.06; and misapplies governing materiality standards in a way that insulates serious prosecutorial errors from review.

More than ninety percent of criminal conviction in Wisconsin are obtained through plea negotiations. Yet the governing legal framework has not kept pace with the modern plea-driven system. Since this Court last addressed ***Brady*** obligations and guilty pleas, which was in ***State v. Harris***, 272 Wis.2d 80 (2004) over two decades ago, the United States Supreme Court has expressly recognized plea bargaining as a critical stage of the criminal process in in ***Lafler v. Cooper***, 566 U.S. 156 (2012) and ***Missouri v. Frye***, 566 U.S. 134 (2012). Those decisions fundamentally altered how prejudice and materiality must be understood when constitutional errors undermines a defendant's bargaining position rather than the outcome of a trial.

Absent this Court's intervention, these issues will persist statewide and undermine confidence in the fairness of criminal adjudications. Clarification from this Court is necessary to ensure uniformity, fidelity to constitutional doctrine, and fairness in a system where the overwhelming majority of criminal cases are resolved by plea. The issues presented affect not only this case, but the administration of justice statewide.

STATEMENT OF CASE

The current issues deal with the State's failure to disclose a DNA report that was held in its exclusive possession prior to the defendant pleading guilty. **(R85)** The defendant discovered this report during the litigation of a federal lawsuit in 2016, years after his direct appeal, and subsequent collateral appeal was finalized. The report showed a mixture of DNA from at least three different individuals was located on the steering column airbag in which petitioner was only a possible contributor. **(R85:25-27)** This report was directly relevant to the key factually premise of the identity of the operator of the vehicle involved in a fatal crash. The petitioner ultimate raised several issues by motion to the circuit court related to the suppression of the DNA report. **(R82) (R83:13-16)**

The State conceded that the report had been in its exclusive possession and had not been disclosed to the defense, ever. **(R91:11-12)** The circuit court scheduled an evidentiary hearing exclusively on those suppression claims. **(R94. Appx. pp. 4-9)** At the close of the final potion of the evidentiary hearing, defense requested supplemental briefing as the hearings spanned several sessions for several months, however that request was denied. **(R114:27)** The circuit court then direct counsel to present closing arguments orally, in which the defense adamantly argued that the petitioner should be permitted to withdraw his guilty pleas under ***Brady***, and ***Harris***. **(R114:27-29)**

Rather than analyzing the claim under the proper framework of those cases, the circuit court analyzed the suppressed DNA report under the newly discovered evidence doctrine in ***McAlister***, applying a hybrid standard that combined the first four criteria of newly discovered evidence with a substituted fifth criterion, which analyzing whether the "defendant would have still plead guilty" had the DNA reports been properly disclosed. The circuit court never addressed any other legal argument. **(R114:30-43. Appx. pp. 10-23)**

On appeal, the court of appeals concluded that the circuit court had erroneously exercised its discretion by applying that hybrid standard, **(Appx. pp. 26)** and instead of remanding the case for the proper application of the correct framework, the court of appeals conducted its own analysis of the undisclosed DNA report as newly discovered evidence under ***McCallum***, essentially conducting a fact-finding examination, and concluding that the claim failed because the DNA report did not outweigh the perceived strength of the existing record. **(Appx. pp. 26, 38-41)**

The court of appeals further declined to review the petitioner's discovery issue pursuant to ***Harris*** on the ground that it was non-constitutional in matter and therefore not cognizable under Wis. Stat. §974.06. **(Appx. pp. 34 Fn. 9)** Concerning the ***Brady*** issue, the court of appeals only provided lip service to the standard, summarily concluding the issue failed as the DNA report was not exculpatory. **(Appx. pp. 34)**

ARGUMENT FOR REVIEW

I. THE LOWER COURTS ERRED BY RE-CHARACTERIZING THE PETITIONER'S PROPERLY PLED SUPPRESSION AND STATUTORY VIOLATION AS A NEWLY DISCOVERED EVIDENCE CLAIM.

The first issue warrants review because the lower courts departed from controlling due process doctrine by converting an asserted, and properly pled suppression/statutory violation into a newly discovered evidence claim, resolving it under an inapplicable standard. That approach conflicts with settled United States Supreme Court precedent and Wisconsin precedent that recognize ***Brady*** claims, and statutory violation as analytically distinct from claims based on newly discovered evidence. see ***United States v. Agurs***, 427 U.S. 97 (1976), and ***State v. Avery***, 213 Wis. 2d 228, 234-42 (Ct.App.1997)

The court of appeals decision conflicts with controlling ***Brady*** principles and creates a framework that permits constitutional violations to be reframed and diluted. Both lower courts treated the state's nondisclosure of the DNA report as something other than a suppression issue. By converting the claim into a newly discovered evidence theory, the courts avoided ***Brady's*** constitutional framework and applied a standard that is analytically incompatible with suppression issues. This approach conflicts with federal precedent holding of ***Agurs*** as well as settled established Wisconsin doctrine.

Here the State conceded that the DNA report was in its exclusive possession and was never disclosed to the defense, twice. **(R91:11-12) (R114:29)** That concession satisfies ***Brady's*** and ***Harris'*** suppression element as a matter of law, and forecloses any treatment of the report as "newly discovered" under post-conviction doctrine. ***Agurs*** explains at 111:

> "[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."

Evidence withheld by the prosecution cannot be recast as newly discovered without collapsing the constitutional distinction ***Brady*** was designed to enforce. Therefore the suppressed evidence must be evaluated under ***Brady*** and ***Kyles v. Whitley***, 514 U.S. 419 (1995), with materiality assessed cumulatively and with responsibility for the evidentiary deficit resting squarely on the State. The decision below invites future courts to sidestep protections whenever suppressed evidence emerges post-conviction, weakening constitutional safeguards that are meant to operate precisely in such circumstances.

Review is warranted to reaffirm that suppression claims must be analyzed under the correct constitutional standard, to clarify suppressed evidence cannot be transformed into newly discovered evidence by judicial re-characterization, and to

ensure that Wisconsin courts remain aligned with controlling federal precedent on due process and fair disclosure.

II. THE COURT OF APPEALS ERRED BY DECLINING TO REVIEW PETITONER'S DISCOVERY VIOLATION ON THE GROUND THAT IT WAS NOT CONSTITUTIONAL, CONTRARY TO THE PLAIN LANGUAGE AND FUNCTION OF WIS. STAT. §974.06.

The second issue warrants review because the court of appeals adopted an unduly narrow construction of Wis. Stat. §974.06 to only allow constitutional and jurisdictional challenges. That rule narrows the scope of the statute, conflicts with its plain language, undermines actual appellate practice in the State of Wisconsin. It also creates a procedural dead end for defendants who discover serious statutory violations only after the direct appeal has concluded. **(App. p. 34, Fn. 9)**

Wis. Stat. §974.06 authorizes a prisoner to seek relief on the ground that a sentence or conviction was imposed "in violation of the U.S. constitution or the constitution or *laws of this state*," or is "*otherwise subject to collateral attack.*" The statute *does not* limit its scope to constitutional or jurisdictional claims as once held by this Court. To the contrary, its plain language expressly encompasses violations of state law and broadly preserves collateral review for judgments subject to attack on non-constitutional grounds.

Despite this text, the court of appeals relied on older decisions suggestion that Wis. Stat. §974.06 is confined to constitutional or jurisdictional errors. Those case predate significant developments in Wisconsin post-conviction practice and cannot be reconciled with how §974.06 is applied today. Wisconsin courts routinely adjudicate non-constitutional claims under Wis. Stat. §974.06, including motions based on newly discovered evidence, see ***McAlister***, (Defendant raised a claim for a new trial based on newly discovered evidence that was adjudicated by this Court)

and claims seeking relief in the interest of justice, see ***State v. Henley***, 328 Wis. 2d 544, ¶44 (2010), issues that have no constitutional grounds or framework.

In fact, by definition and procedure, any motion filed after a direct appeal, or the time to do so has expired, attacking the conviction, is a motion brought pursuant to Wis. Stat. 974.06. Despite whatever title is present on the motion itself, there is no alternative statutory vehicle for bringing such claims once direct appeal rights have been exhausted. See ***Henley***, at ¶44 (2010) (Explaining that the only procedural vehicles for defendants challenge their conviction are Wis. Stat. §974.02, and §974.06)

Here the petitioner raised claims through §974.06 motion, as required by Wisconsin procedure. The circuit court adjudicated a non-constitutional issue -albeit erroneously- by addressing the claim as newly discovered evidence. The court of appeals then *declined* to review the separate discovery violation on the ground that it was not constitutional, and yet, again -albeit erroneously- adjudicated the non-constitutional newly discovered evidence claim. The combined effect of these rulings highlights the confusion by the courts on when §974.06 applies.

Furthermore, section §974.06 was designed to ensure that unlawful convictions are not insulated from review by procedural happenstance. A rule that bars review of a violation that was discovered after defendant's direct appeal has become finalized is precisely the kind of remedial gap that §974.06 was enacted to prevent. see ***State v. Lo***, 264 Wis. 2d 1, ¶21 (2003) (Explaining that Wis. Stat. §974.06 was designed as a remedy for all grounds for attacking the validity of a conviction or sentence in a criminal case after direct appeal) It also produces an untenable result: defendants are left without any procedural mechanism to challenge serious violations of Wisconsin law once direct appeals rights have been foreclosed.

Review is warranted to clarify the proper scope of §974.06, to reaffirm that the statute is not limited to claims of constitutional and jurisdictional issues, and to

resolve the conflict between the courts restrictive interpretation and the statute's plain language, and modern day application of the statute. Because the decision is published, the issue has a statewide significance and pose to reoccur in Wisconsin post-conviction practices unless this Court intervenes.

III. THE COURT OF APPEALS ERRED BY ASSESSING *BRADY* MATERIALITY THROUGH RECORD-WEIGHING, RATHER THAN BY DETERMINING WHETHER THE SUPPRESSED DNA REPORT UNDERMINES CONFIDENCE IN THE OUTCOME.

The third issue warrants review because the court of appeals misapplied the ***Brady*** materiality standard by weighing the suppressed DNA report against the perceived strength of the existing record, instead of asking the constitutionally required question: whether the nondisclosure of the evidence creates a reasonable probability of a different result, such that confidence in the outcome is undermined. **(App. p. 34-35)**

Under ***Brady*** and its progeny, materiality does not turn on whether the suppressed evidence would have outweighed the prosecution's case or produced an acquittal. The proper inquiry is whether the cumulative effect of the suppressed evidence reasonably undermines confidence in the result. Courts are expressly prohibited from conducting a sufficiency-of-the-evidence analysis or from discounting the suppressed evidence because other inculpatory evidence exists in the record. see ***Kyles,*** at 451.

Here, the court of appeals evaluate materiality by agreeing with the circuit court that the DNA report is "more or less determinative" on the issue of who was driving.

(App. p. 35)[1] However the circuit court reached that conclusion by measuring the report against what it viewed as the overall strength of the existing record.[2] The court concluded that the DNA report was "more or less determinative of the issue of who was driving," especially given the strength of the State's other evidence showing that petitioner was the driver. The court of appeals specifically stated and quoted the circuit court's reasoning. Court of appeals at ¶14:

> After the evidentiary hearing, the circuit court closely scrutinized the DNA report and other evidence, and it concluded that the DNA report was not exculpatory. Shallcross claimed that the DNA report supported the assertion that a third person, observed running from the scene but who was not seen exiting the vehicle, was the driver. The circuit court acknowledged that the DNA report showed the presence of three different individuals' DNA on the steering column airbag of the vehicle (namely, that of Shallcross, Gorectke, and an unidentified third person), however, it observed that Shallcross's blood, and only Shallcross's blood, was found on the driver's side, side airbag of Gorectke's vehicle. The court concluded that the DNA report was "more or less determinative of the issue of who was driving," *especially given the strength of the State's other evidence showing that Shallcross was the driver.* It then stated:
>
> In the final analysis, the DNA report, *when analyzed in the context of all of the available evidence at the time of the plea would not produce a different result in this case.*
>
> That different result, of course, would have been that the defendant would have declined to enter a plea or insisted on a trial.
>
> Accordingly, it denied Shallcross's motion.

(Appx. pp. 30)

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[1] The circuit court failed to consider the DNA mixture found on the steering column airbag, the relative exculpatory element of the DNA report. Instead the court focused on a blood stain found on the driver's side airbag to make that "more or less" determination that the evidence was not exculpatory. However, as explained in ***Strickler v. Greene***, 527 U.S. 263 (1999) ,at 282 n. 21, which was quoted in ***Harris***, *supra,* at 108, the Court "reject[ed] respondent's contention that [the eveidence] do not fall under ***Brady*** because they were "inculpatory." "[C]ases make clear that ***Brady*** … extend[s] to materials that, *whatever their other characteristic"* requires disclosure. See also ***Socha v. Richardson***, 874 F.3d 983, 988 (7th Cir. 2017) makes clear ("…evidence was subject to ***Brady*** though it had 'an inculpatory and an exculpatory effect.'")

[2] As addressed *supra,* the court of appeals themselves already concluded that the circuit court applied an incorrect legal standard in the first instance, further perpetuating that error.

That approach is incompatible with ***Brady*** doctrine. Materiality cannot be assessed by asking whether the remaining evidence was strong enough to sustain the conviction. Nor can courts assume that suppressed evidence is immaterial simply because the record contains other incriminating facts.

The error is in this case is especially pronounced because the suppressed DNA report directly undercuts a key factual premise relied upon by the State during charging and plea negotiations, the identity of the driver of the striking vehicle.[3] Evidence that weakens an essential component of the prosecution's narrative necessarily affects the defense's evaluation of risk, leverage, and strategy. When such evidence is withheld, the resulting conviction cannot be insulated by post-hoc reliance on the strength of the remaining record.

The court of appeals' analysis mirrors the very methodology ***Brady*** and ***Kyles*** reject. By weighing the DNA report against the record, the court effectively asked whether the conviction was still justified despite the violation. The constitutional inquiry, however, is whether the violation itself casts doubt on the fairness and reliability of the outcome.

Review is warrant to reaffirm the correct ***Brady*** materiality framework, to reject record-weighing as a substitute for constitutional analysis, and to ensure uniform application of federal and Wisconsin precedent. Because the decision is published, the error threatens to normalize an approach that erodes ***Brady's*** protections and diminishes the state's disclosure obligations statewide.

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[3] The DNA report would have further bolstered eye-witnesses accounts of the crash.

IV. IN A PLEA BASE CONVICTION, THE "REASONABLE PROBABILITY OF A DIFFERENT OUTCOME," STANDARD CAN BE SATISFIED WHERE SUPPRESSED EVIDENCE COULD HAVE ULTIMATELY CHANGED THE DEFENDANT'S PLEA POSITION.

The fourth issue presents a question of first impression for this Court. Wisconsin courts have traditionally framed the "reasonable probability of a different outcome" in binary terms, trial-verse-plea. That framing is incomplete by today's standards of criminal justice. Modern constitutional doctrine recognizes that plea bargaining is a critical stage of the criminal process and that constitutional prejudice may occur when misconduct such as ineffective assistance of counsel affects the terms, timing, or viability of a plea, not merely the ultimate choice to plead guilty or go to trial. see ***Frye*** and ***Lafler*** *supra.*

Those federal precedent recognizes plea bargaining as a critical stage and holds that prejudice may be shown where errors negatively affect the outcome of that process. The last time this Court meaningfully addressed materiality and ***Brady*** obligations in the context of a plea was more than two decades ago in ***Harris***, before the United States Supreme Court clarified the constitutional centrality of plea negotiations.

Brady and ***Strickland*** share the same prejudice framework: reasonable probability of a different result sufficient to undermine confidence in the outcome. ***U.S. v. Bagley***, 473 U.S. 667, 682 (1985), see also ***State v. Wayerski***, 385 Wis. 2d 344, ¶36 (2019) In assessing material prejudice under the ***Strickland*** formulation the Court in ***Bagley*** stated at 683:

> "[T]he reviewing court may consider directly ***any*** adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course

> that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response."

Also see ***Harris***, at ¶14.

When favorable evidence is suppressed before a plea, the relevant outcome should not be limited to plea-verse-trial. It should include the entire fairness of the plea bargaining process. There is no standard to plea bargaining, but bargaining can including a change in charging decisions, leverage, risk assessment, sentencing exposure, and negotiated terms which are typically determinative of the preserved strength or weakness of the prosecution's case. The results of these complex negotiations, and concessions by the State are "important, significant, and influential in the courts' ultimate sentencing decisions." ***State v. Smith***, 207 Wis. 2d 258, 270 (1997)

The logic holds that if the prejudice standard under ***Lafler*** and ***Frye***, are the same as ***Strickland,*** and ***Strickland*** prejudice standard is the same as in ***Brady***, then ***Brady*** showing of prejudice can be expanded to a greater protection then its current binary outcomes. After all, materially is relevant to both guilt and *punishment*. See ***Strickler,*** *supra.* Review is necessary to provide uniform guidance and ensure that constitutional protections keep pace with modern criminal practice.

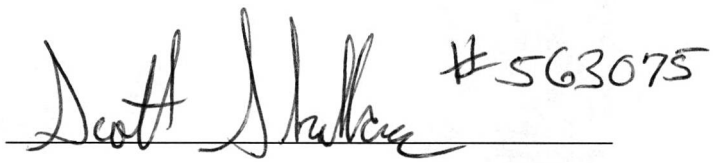
Conclusion

This case will present recurring and consequential questions about the proper application of ***Brady*** in plea-based conviction, the scope of Wis. Stat. §974.06 and the standard governing materiality and review of late discovered violations because the court of appeals decision is published, binding law for the state of Wisconsin. That opinion reflect doctrinal confusion, inconsistent application of controlling precedent and an approach that risks insulating serious prosecutorial errors from meaningful review.

For these reasons, the petitioner respectfully requests that this Court grant review.

Dated this 30th day of January, 2026.

Respectfully Submitted,



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CERTIFICATION OF MAILING

I certify that this petition was deposited in the Fox Lake Correctional Institution mailbox located on the unit wing as required by institution policy and procedures for delivery to the Clerk of the Courts on 1-30-26. 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 to the:

Clerk of the Courts
110 East Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

At that time this petition is 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 30 th of Jan 2026.

Signed: Scott Shallcross #563075

Scott Shallcross #563075