STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Circuit Court Case No: 2009CF5594

Appeal No: 2023AP362

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SCOTT R. SHALLCROSS,

Defendant-Appellant.

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

BRIEF IN CHIEF FOR DEFENDANT-APPELLANT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Because the Defendant-Appellant is a *pro se*, incarcerated litigant, oral argument is moot; however publication is left to the discretion of this Court.

ISSUES PRESENTED

1. DID THE CIRCUIT COURT ERRONEOUSLY EXERCISE ITS DISCRETION WHEN IT APPLIED THE MORE STRINGENT STANDARD FOUND IN ***STATE v. MCALISTER***, 380 Wis.2d 684 (2018) TO SHALLCROSS' CONSTITUTIONAL DUE PROCESS ***BRADY***, STATUTORY CLAIM AS EXPLAINED IN ***UNITED STATES v. AGURS***, 427 U.S. 97 (1976)?

This issue has been presented to this Court for the first time on appeal as a review of the circuit court's order.

2. DID THE STATE VIOLATE SHALLCROSS' CONSTITUTIONAL DUE PROCESS RIGHT UNDER THE 14TH AMENDMENT, AS EXPLAINED IN ***BRADY v. MARYLAND***, 373 U.S. 83 (1963), AND ***STATE v. STURGEON***, 231 Wis.2d 487 (Ct. App. 1999), WHEN THE STATE FAILED TO DISCLOSE THE EXCULPATORY RESULTS OF A DNA TEST PERFORMED BY THE STATE'S CRIME LAB PRIOR TO SHALLCROSS PLEADING GUILTY?

Although this issue was presented to the circuit court, the court did not rule.

3. DID THE STATE VIOLATE WIS. STAT. §971.23, WISCONSIN'S RECIPROCAL DISCOVERY STATUTE, AS EXPLAINED IN ***STATE v. HARRIS***, 272 Wis.2d 80 (2004) WHEN THE STATE FAILED TO DISCLOSE THE EXCULPATORY RESULTS OF A DNA TEST PERFORMED BY THE STATE'S CRIME LAB PRIOR TO SHALLCROSS PLEADING GUILTY?

Although this issue was presented to the circuit court, the court did not rule.

4. WOULD EITHER OF THESE VIOLATIONS PERMIT SHALLCROSS TO WITHDRAW HIS GUILTY PLEA?

Although this issue was presented to the circuit court, the court did not apply the correct legal standard in determining whether Shallcross was permitted to withdraw his guilty plea.

STATEMENT OF CASE

These current issues deal with the State's failure to disclose a DNA report from the steering wheel airbag that was held in its exclusive possession prior to the defendant, Scott R. Shallcross, (Shallcross), pleading guilty. Shallcross discovered this report during the litigation of a federal lawsuit in 2016. This report showed a mixture of DNA from at least three different individuals was located on that airbag in which Shallcross was only a possible contributor. This report also showed that an individual sample of Shallcross' DNA could not be located on that airbag. **(R85:25-27; Appx. 4)** Subsequently, Shallcross retained counsel to file a post-conviction motion requesting to withdraw his plea based, *inter alia*, on the allegation the State violated its Constitutional and discovery obligations prior to Shallcross pleading guilty. **(R82) (R83:13-16)**

After an evidentiary hearing on the matter, the circuit court, in an oral decision, applied the analysis found in ***State v. McAlister,*** 380 Wis. 2d 684 (2018), concluding that Shallcross met the four prongs of the newly discovered evidence analysis, however determined there was not a reasonable probability that if a trial would be had, Shallcross would be acquitted, and therefore denied the motion. **(R114:30-43; Appx. 3) (R115)** For this reason the circuit court erroneously exercised its discretion by applying the wrong legal standard to Shallcross' claim. see ***United States v. Agurs***, 427 U.S. 97 (1976), and ***State v. Avery***, 213 Wis.2d 228, 234-42 (Ct.App.1997)

Relevant Procedural Background and Facts

On December 6, 2009, the State filed a criminal complaint charging Shallcross with five criminal counts due to an automobile crash on November 27, 2009. **(R17)** These counts are as follows:

Count 1. Homicide by Intoxicated use of a Motor Vehicle pursuant to Wis. Stat. §940.09(1)(a); Class D Felony

Count 2. Homicide by Intoxicated use of a Motor Vehicle pursuant to Wis. Stat. §940.09(1)(am); Class D Felony

Count 3. Homicide by Intoxicated use of a Motor Vehicle pursuant to Wis. Stat. §940.09(1)(a); Class D Felony

Count 4. Homicide by Intoxicated use of a Motor Vehicle pursuant to Wis. Stat. §940.09(1)(am); Class D Felony

Count 5. Operating a Motor Vehicle without a License Causing Death pursuant to Wis. Stat. §343.44(1)(b) Class A Misdemeanor

In this case there has never been any dispute that Shallcross occupied the striking vehicle, or that he was intoxicated at the time of the crash. The only issue from the onset was whether Shallcross was the operator of that vehicle at the time of the crash.

Evidence fuelling the debate of operation can be found in the police reports that were induced by the State and are as follows:

1. The striking vehicle did not belong to Shallcross; it belonged to Daniel Gorectke, (Gorectke), who occupied the front passenger seat at the time of the crash. Gorectke has given many statements in this case, all of which are contradictory to the previous. Gorectke's first statement was given as he was being extricated from the vehicle. Police asked him what happened and who was driving his car, he responded that an unknown "white male", who he met earlier that night at a bar called "City Lounge" was driving his car at the time of the crash and Shallcross was in the backseat. When asked where this "white male" went, he stated he did not know. The description of a "white male" was corroborated at the scene by an independent citizen eye-witness named Blake Borucki, (Borucki). **(R84:3-4)**

2. Borucki stated he was driving in front of the striking vehicle, and after that vehicle passed him at a high rate of speed in the parking lane, it struck the victim's vehicle as it was attempting to make a left turn across Howell Ave. to eastbound Plainfield Ave. Borucki stated that immediately upon impact, the truck exploded, and rolled several times; he also described how the striking vehicle rolled several times before both vehicles came to a rest in a strip mall parking lot. Borucki went on to further state that when a Milwaukee County Sheriff's Deputy arrived on the scene, he immediately attended to the victim's vehicle as it was engulfed in flames. He further stated as the deputy returned to his vehicle from the burning truck, he looked across the parking lot towards the area where the striking vehicle was located to observe a "white male" in his mid-20's, wearing blue jeans, and a dark hoodie, cross in front of the striking vehicle and head westbound across Howell Ave. He then looked back at the striking vehicle to see that the driver's side door, which had been previously closed, was now open. **(R84:5-6)**

3. Based on Gorectke's statement that he and Shallcross had been at "City Lounge" just prior to the crash, detectives did a follow up at that location in an attempt to gather further information. Once there detectives interviewed Dawn Wojtysiak, (Wojtysiak), the bartender who was working the night of the crash. Wojtysiak told police that both Shallcross and Gorectke were there the night of the crash, once earlier in the evening around 9:00 p.m. only to leave shortly after, and returned around 11:30 p.m. that same night. Wojtysiak told police that when Shallcross and Gorectke returned for the second time that night they sat at the end of the bar, which was also occupied by a third individual. **(R84:7-8)**

Additional medical reports showed Shallcross suffered numerous injuries from the crash, a significant one being a traumatic brain injury (TBI). **(R85:11, 13)** This injury left Shallcross amnesic to the crash, forfeiting his ability to say with certainty what happened, including whether he was driving. **(R85:1, 9, 11)**

Pre-Trial Investigation and Strategy

Shallcross' dilemma with preparing for his case was the fact he could not say with certainty that he was driving due to his amnesia caused by this brain injury. Based on this fact and the foregone evidence, Shallcross was inclined to proceed to trial on the defense he was not the operator of the car at the time of the crash. **(R101:35-37) (R114:16-19)**

After requesting and reviewing discovery from his attorney, Shallcross discussed certain challenges to evidence, along with his desire to proceed to a jury trial with counsel. **(R101:28-32)** Counsel informed Shallcross that the evidence to convict was strong, expressing the fact Shallcross made an incriminating statement, and although claimed such statement was false, and nothing more than a regurgitation of the details fed to him during his three days of interrogations, it was still admissible.[1] Counsel further informed Shallcross that Gorectke was willing to testify, inculpating him as the driver, and that there was no useful forensic evidence to support a defense. **(R101:34-40)**

[1] Shallcross had discussed with counsel whether or not they could suppress either the blood test results or his statements, counsel advised that no such grounds existed for either. **(R101:30-32)**

Counsel further advised Shallcross that his best option at avoiding a lengthy prison sentence was to enter into a plea bargain with the State, in which Shallcross would be required to admit to guilt.[2] **(Id.)** Counsel advised that this strategy would allow the court to look upon Shallcross favorably, in turn, mitigating his sentence. Counsel also informed Shallcross that any decision to accept a plea deal from the State had to be made by May 14, 2010 as the court would not honor any deal after that point; as a jury trial was scheduled to begin on May 24, 2010.[3] **(Id.)**

Even though Shallcross felt that he had to be absolutely positive he was guilty in order for him to plead to such, he felt that a conviction was unavoidable, therefore, on May 14, 2010, just minutes before final pretrial began, Shallcross reluctantly decided to accept the State's plea offer. **(R22)** The fact that Shallcross would have the ability to argue for an appropriate sentence in exchange for his plea of guilty was a logical decision for Shallcross to make at the time as he felt a conviction was unavoidable. Shallcross' thought process was, "Why take the harder path to the same destination?"

Shallcross ultimately received a sentence of 24 years of initial confinement for his pleas. This was just six years less than the maximum 30 years he faced had he been convicted of all charges at trial. **(R35)**

Discovery of the DNA Report and Relevant Information

In 2015, Shallcross filed a federal lawsuit against the City of Milwaukee challenging whether or not he had been lawfully arrested at the hospital after the crash. **(R85:5) (R101:40-41)** In the context of that civil case Shallcross made a

[2] Counsel also informed Shallcross that any deal was contingent on a plea of guilty, a no contest or Alford plea would not be acceptable to obtain a deal. **(R101:35) (R114:15)**

[3] It should be noted that it was already trial counsel's perceived strategy to plead this case out. This was discussed at the scheduling conference with Honorable Martens on January 15, 2010 outside Shallcross' presence. Honorable Martens asked trial counsel if he simply wanted to schedule the matter for a plea date only, and forgo scheduling the matter for trial. Counsel informed the court that he was not comfortable with this approach as he is still waiting on and reviewing discovery from the State. **(R53:3-5)**

discovery demand which was completed in May 2016. The city's discovery response included a DNA report pertaining to Shallcross' criminal case that he had not previously received. This report was finalized on May 6, 2010 and contained information highly germane to the defense Shallcross wished to pursue before he decided to plead guilty: that he was not the operator of the car at the time of the crash. **(R85:25-27)**

Specifically, the report documented how a DNA analysis of the factory sealed steering wheel airbag showed that biological matter was located in the form of a mixture of DNA from at least *three* different individuals, in which Shallcross was only a possible contributor. **(R85:26-27)** This report also indicated that an isolated sample of Shallcross' DNA could not be located on that airbag. **(Id.)** This information cast a whole new doubt on Shallcross' belief that he might have been driving, which would have dramatically altered his decision to accept the State's guilty plea offer. **(R101:10, 32, 36-39) (R114:19-20)**

ARGUMENT

Standard of Review for Plea Withdrawal

Ordinarily, a motion for plea withdrawal is addressed to the trial court's discretion, and a defendant must establish by clear and convincing evidence that withdrawal is necessary to correct a "manifest injustice." In order to sustain this discretionary decision, the reviewing court must ensure that the trial court's determination was not "clearly erroneous," that is, it was made upon the facts of record and in reliance on the appropriate and applicable law. see ***Hatcher v. State***, 83 Wis.2d 559, 564 (1978).

However, as here, Shallcross' request for plea withdrawal is also based upon his claim that the State violated his Constitutional Due Process right by failing to produce material exculpatory evidence within its exclusive control, or what is

commonly known as a ***Brady*** violation, prior to Shallcross pleading guilty.[4] **(R83:13-14)** This invokes an exception to this rule, so far as a motion to withdraw a guilty plea poses a question addressed to the discretion of the trial court. Under this exception, where a defendant establishes a denial of a relevant Constitutional right, he may withdraw his guilty plea as a *matter of right* by demonstrating: (1) that a violation of a Constitutional right has occurred; (2) that this violation caused the defendant to plead guilty; and (3) that at the time of the plea, the defendant was unaware of the potential Constitutional challenge to the case against him because of the violation. ***Hatcher***, at 565. see also ***State v. Sturgeon***, 231 Wis.2d 487, 495-97 (Ct.App.1999) and ***State v. Harris***, 2004 WI 64, ¶ 39, 272 Wis. 2d 80[5]

Under this standard, when reviewing questions of ultimate Constitutional fact, the Court of Appeals does not apply the conventional "clearly erroneous" standard; instead, the Court reviews such determinations independently, or *de novo*, to determine whether any Constitutional principles have been offended. However, the underlying historical facts remain subject to the "clearly erroneous" test. ***Sturgeon***, at 496.

I. THE CIRCUIT COURT ERRONEOUSLY EXERCISED ITS DISCRETION WHEN IT APPLIED THE MORE STRINGENT STANDARD OF "NEWLY DISCOVERED EVIDENCE" FOUND IN *STATE v. MCALISTER*, 380 Wis.2d 684 (2018) TO SHALLCROSS' CONSTITUTIONAL DUE PROCESS *BRADY*, STATUTORY CLAIM AS EXPLAINED IN *UNITED STATES v. AGURS*, 427 U.S. 97 (1976).

The original argument in the defendant's brief in support of the post-conviction motion was a conflation of two items of evidence that were discovered after his conviction; **(R83)** one of those being a set of interrogatories from the State's star

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[4] The term "***Brady*** violation" is commonly used to refer to any breach of the broad Constitutional obligation to disclose exculpatory evidence under ***Brady v. Maryland***, 373 U.S. 83 (1963); see ***Strickler v. Greene***, 527 U.S. 263, 281-82 (1999)

[5] In ***Sturgeon*** the court referred to this as the ***Hatcher*** analysis. ***Sturgeon***, at 497

witness, Daniel Gorectke, which was filed in the wrongful death suit concerning this case, **(R85:14-24)** and the other being the DNA report. **(R85:26-27)** The relevant information concerning Gorectke's sworn interrogatories included an attestation that he had no recollection of the events surrounding the accident due to his injuries sustained in the crash, and combined consumption of alcohol and prescription medication from the night of the crash. **(R85:17-19)** This was a sharp contrast to what the State alluded that Gorectke was willing to testify to at trial. In the State's response in opposition of Shallcross' motion, the State argued that Gorectke's interrogatories were barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168 (1994), however, conceded that the DNA report was never disclosed to Shallcross and constituted newly discovered evidence. **(R91:11-12)**

Ultimately the circuit court granted a hearing on this motion; however limited the relief Shallcross could seek. **(R93, Appx. 2)**[6] The court ruled that the interrogatories of Gorectke were barred under ***Escalona-Naranjo*** as the defendant failed to state a "sufficient reason" for not bringing the claim in previous appeals, and the defendant does not dispute that in this appeal. However, concerning the DNA reports, the court stated:

> "[w]hile Gorectke's sworn Statements were made after the defendant's plea hearing, as noted above, the DNA report was finalized before [] the court finds a hearing is the most appropriate way to determine, if need be, whether there was a ***Brady*** violation if the State failed to turn over the DNA report or if trial counsel was constitutionally ineffective for failing to advise the defendant of the report prior to the plea hearing."

(R93:3, 5)

This order substantially limited the arguments that could be made moving forward; it also alleviated any argument that the DNA report could be argued as "newly discovered evidence" as discussed by ***McAlister***, *supra*.

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[6] The record from the circuit court has the decision and order for the evidentiary hearing as number 94, whoever the document is labeled as number 93. For purpose of this brief, defendant will use the number on the document for reference.

After ordering the evidentiary hearing, the court by its bi-annual rotation, reassigned Shallcross' case.[7] At the beginning of the evidentiary hearing, the court asked if either party would wish to make any sort of opening remarks related to this motion prior to taking testimony. **(R101:4-5)** Defense counsel proceeded with this response:

> [Defense Counsel]: Yeah, Your Honor. I do have a couple of things that I think might be helpful.
>
> [Defense Counsel]: The primary issue here, as the court probably knows, is Mr. Shallcross has pled guilty without the benefit of a DNA report that arose from an analysis of the driver's air bag. We know, from the DNA report, that it was not completed until roughly one week or so before he pled guilty [] The State has conceded, in its response, that the DNA is newly-discovered evidence for purpose of this motion. So we have a concession that Mr. Shallcross never saw the DNA evidence. [] So, in my mind, we don't have an ineffective assistance of counsel claim here, because it seems here that Mr. Shallcross's attorney never received it, and we therefore at least in my mind, don't need testimony from him on that front.
>
> THE COURT: So you are just saying it is a ***Brady*** violation, is that correct?
>
> [Defense Counsel]: I think it is a ***Brady*** violation, statutory claim.
>
> THE COURT: Okay. All right, thank you for that.

(Id.)

Again, counsel put the court on notice that it has narrowed its claim even further. Counsel went on to inform the court that he would like to submit additional briefs after the conclusion of the hearing as some nuances had rose due to the State's concession. **(Id.)** However, at the conclusion of the hearing, nearly three months later, counsel's renewed request for additional briefing on the matter was declined by the court, and counsel was directed to proceed with closing arguments. **(R114:23-24)**

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[7] Honorable Glenn H. Yamahiro, Branch 34, reviewed the motion and ordered the evidentiary hearing. Honorable Jean M. Kies, Branch 45, presided over the hearing and denied the motion.

During closing, counsel argued Shallcross should be permitted to withdraw his plea pursuant to ***State v. Harris***, 272 Wis.2d 80 (2004) as the State conceded to its failure to disclose the report, and Shallcross extensively testified he would not have accepted the State's plea deal had he been provided with that information. **(R114:19-20) (R114:29-30)**

The State closed by again conceding that they failed to disclose the report, and that Shallcross had a right to the report, [8] **(R114:29)** but ultimately argued that the evidence was overwhelming to convict. **(R114:26-29)**

The circuit court, in an oral decision, applied the analysis found in ***State v. McAlister,*** 380 Wis. 2d 684 (2018)[9] concluding that Shallcross met the four prongs of the newly discovered evidence analysis, **(R114:33)** however, extensively focused on other information that was found in the DNA report to deny Shallcross' motion, that being a blood stain found on the driver's side-side airbag that matched Shallcross. **(R114:35, 40-42)** This was almost the exclusive reason in denying the motion. **(R115)** As a result, the court erroneously exercised its discretion for two reasons; First, Shallcross' issue was not one of newly discovered evidence as explained in ***McAlister***; it was a Constitutional ***Brady*** claim, that being the withholding of exculpatory material evidence by the State. As explained in ***State v. Avery***, 213 Wis.2d 228, 239 (Ct. App. 1997):

> "[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" and "[f]or that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal."

Quoting ***United States v. Agurs***, 427 U.S. 97, 111 (1976)

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[8] In doing so, the State conceded that the report is exculpatory as the State is only obligated to turn over "…exculpatory evidence."

[9] In ***McAlister*** the issue was whether McAlister's Wis. Stat. § 974.06 motion for a new trial is sufficient to entitle him to an evidentiary hearing based on a newly discovered evidence claim. ***Id.*** at ¶ 25.

Second, under ***Brady*** the consideration of the blood stain would be error, because the reasoning "confuses the weight of the evidence with its favorable tendency." see ***Kyles v. Whitley***, 514 U.S. 419, 451 (1995) As will be argued, *infra*, a defendant needs only to show the withheld evidence is favorable. ***Kyles***, *supra.* [10]

Instead, the circuit court should have analyzed the claim pursuant to either ***Sturgeon,*** or ***Harris***, *supra*, where the relevant inquiry, *inter alia*, is whether Shallcross was prejudiced by the State's non-disclosure. ***Harris,*** at ¶15.

What Shallcross believes was fatal to the circuit court's analysis of his claim was the fact that this evidentiary hearing was bifurcated into three different sessions that spanned the length of several months, **(R101, R104, R114)** and at the conclusion of the hearing, the circuit court rejected defense counsel's request for post-hearing briefing. **(R114, *Supra*)** The issues were anything but clear going into the hearing, and this denial for post hearing briefing hindered counsel's ability to properly raise the issue and litigate the facts to support the argument. Defense counsel should have had the opportunity to fully brief the issues once they became ripe, as he requested. see ***Slawinski v. Milwaukee City Fire & Police Comm'n***, 212 Wis. 2d 777 (Ct. App. 1997) (Explaining the importance of post-hearing briefing and the factual development of the record)

However, the erroneous application of law in this case should be moot as the issues are reviewed *de novo* by this Court.

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[10] The court also noted that due to the blood stain evidence Shallcross' testimony about the DNA analysis was not credible. **(R114:40)** This conclusion should be deemed erroneous as a matter of law for the same reasoning as explained in this sentence.

II. THE STATE VIOLATED SHALLCROSS' CONSTITUTIONAL DUE PROCESS RIGHT UNDER THE 14TH AMENDMENT, AS EXPLAINED IN *BRADY v. MARYLAND*, 373 U.S. 83 (1963), AND *STATE v. STURGEON*, 231 Wis.2d 487 (Ct. App. 1999) WHEN THE STATE FAILED TO DISCLOSE THE EXCULPATORY RESULTS OF THE DNA TEST PERFORMED BY THE STATE'S CRIME LAB PRIOR TO SHALLCROSS PLEADING GUILTY.

A. Violation of a Constitutional Right

A defendant has a Constitutional right to all material exculpatory evidence in the hands of the prosecutor. see ***State v. DelReal***, 225 Wis.2d 565, 570 (Ct. App. 1999); see also ***Brady,*** *supra.*

Essentially, a ***Brady*** violation has three components: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) and prejudice must have ensued. see ***Harris***, at ¶ 15, citing ***Strickler v. Greene***, 527 U.S. 263, 281-82 (1999)

(1) The DNA Report is Favorable and Exculpatory. [11]

Favorable evidence is evidence that is exculpatory. ***Strickler,*** at 282. Wisconsin defines favorable evidence in ***DelReal***, at 571 as evidence that has some weight and tendency to supply a favorable inference of one's innocence to the jury. see also ***Kyles,*** at 451. Under the standard of favorability, a showing of innocence is not required. see ***DelReal,*** at 574, "The negative evidence may not disprove a defendant's guilt, but it certainly has a "tendency" to make it "less probable." see also ***Kyles***, at 450-453.

The DNA report is undoubtedly exculpatory as it has several components that would have been favorable to Shallcross in the event of a trial. First, it shows that

[11] It should be noted that the circuit court did make a finding of fact that the DNA report is exculpatory and material to Shallcross' case. **(R114:33)**

a mixture of DNA from at least three different individuals was located on the airbag, in which Shallcross was only a *possible contributor*.[12] **(R85:27)** This directly places a third unidentified person in the vehicle at the time of the crash. see ***Manyfield v. State of Mississippi***, 296 So. 3d 240, 249, ¶30 (Miss. Ct. App. 2020) ("Watts testified that airbags deploy when there is impact to the vehicle and that the only way that someone's DNA or blood would be on the airbag is if the person were in the [vehicle] when the airbag deployed." Robert Watts is a State crime scene investigator for the Jackson, MS Police Department.)[13]

Furthermore, this information lends an imprimatur of science and credibility to the statements of Gorectke, Borucki, and Wojtysiak. **(R84:3-8)** As detailed *supra,* this would reasonably insinuate to a jury that the unidentified third person in this mixture is the person reported by Wojtysiak to be seated at the end of the bar at "City Lounge" with Shallcross and Gorectke, who was the "white male" Gorectke reported to have been driving his car at the time of the crash, whom he "met earlier that night." And that person was the "white male" Borucki observed leaving the scene of the crash.

Secondly, the report shows that an individual sample of Shallcross' DNA could not be located on the airbag. **(R85:27)** A fact that is peculiar given one would assume that since this was a violent, high speed collision, in which the striking vehicle rolled several times, Shallcross' isolated DNA would have undoubtedly been present on that airbag had he been driving, the absent of such proves otherwise.

Shallcross would have bolstered this by hiring an accident reconstructionist to examine and explain the likelihood of an airbag strike given the parameters of the

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[12] Mixture DNA contains a major or primary source, along with minor contributors. The major source is typically the person that placed the DNA. see ***United States v. Hagler***, 700 F.3d 1091, 1095 (7th Cir. 2012) see also ***United States v. Gissantener***, 990 F.3d 457, 460-63 (6th Cir. 2021)

[13] Shallcross has not cited this case for any legal authority; it's simply to support his position that he could find experts to support his argument for defense.

crash and Shallcross' stature, presenting probabilities and testimony that because the airbag lacked his DNA, it was unlikely he was driving, a defense known as occupant kinematics. see **Crash factors and car occupant kinematics**, 65 Am. Jur. Proof of Facts 3d 1, at § 20. **(R114:19-20)**

(2) The State Failed to Disclose the DNA Report to Shallcross, Ever.

The prosecutor has "a duty to learn of any favorable evidence known to the others acting on the government's behalf including the police," and to disclose such material evidence although there has been no formal request by the accused.[14] ***Strickler***, at 280, see also ***Kyles***, at 433

This report was in the exclusive possession of the State Crime Lab, and was finalized on May 6, 2010. **(R85:26)** This was eight days before Shallcross pled guilty, and 18 days before he was scheduled for a jury trial, **(R53)**, however, the discovery of the DNA report was through the diligence of Shallcross, and was never disclosed by the State.[15] This is a point the State conceded during brief in opposition to the motion, **(R91:11-12)** and in the closing arguments at the evidentiary hearing. **(R114:26-27; R114:29)** This suppression is beyond egregious as it was nearly six years after this report was made that Shallcross discovered it, and if Shallcross would have never filed that federal civil suit, this information would never have come to light.

Based on the argument, *supra*, Shallcross has demonstrated that the State violated his Constitutional Due Process rights under ***Sturgeon***. see ***Id.*** at 507 "We

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[14] Milwaukee County has a rule prohibiting the filing of discovery motions unless made on certain grounds. see Milwaukee Cty.Ct.R. Rule 4.27, WI ST LCR MILWAUKEE Rule 4.27(D): Discovery demands, including without limitation demands made pursuant to Wis. Stat. § 971.23(1), and motions relating to them, shall not be filed unless the demand is contested and the defendant requests that the demand or motion be heard by the court.

[15] This fact negates any argument that its disclosure was or could have been timely. Or that Shallcross could been aware of the violation prior to pleading guilty, the third prong of the ***Hatcher*** analysis.

hold that the evidence in question was exculpatory and within the exclusive control of the State. Thus, Sturgeon has established a constitutional violation."

III. THE STATE VIOLATED WIS. STAT. §971.23, WISCONSIN'S RECIPROCAL DISCOVERY STATUTE, AS EXPLAINED IN *STATE v. HARRIS*, 272 Wis.2d 80 (2004), WHEN THE STATE FAILED TO DISCLOSE THE EXCULPATORY RESULTS OF THE DNA TEST PERFORMED BY THE STATE'S CRIME LAB PRIOR TO SHALLCROSS PLEADING GUILTY.

Although the Due Process Clause of the Fourteenth Amendment, as interpreted by ***Brady***, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations, see ***Kyles***, at 437 and such is true in the State of Wisconsin.

Here, the State failed to fulfill its statutory obligation under Wis. Stat. §971.23(1)(h) which reads:

> "(1) What a district attorney must disclose to a defendant. Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney and permit the defendant or his or her attorney to inspect and copy or photograph all the following materials and information, if it is within the possession, custody or control of the State:
>
> (h) any *exculpatory evidence*."

There's no dispute that the evidence is exculpatory, therefore the State failed to fulfill its statutory obligation to disclose, again, a point the State conceded throughout the proceeding concerning this motion.

"Two purposes of the criminal discovery statute are to ensure fair trials and to encourage defendants to enter pleas after learning the strength of the State's case. (internal citations omitted) Both purposes are thwarted when the State fails to provide the information required of it before trial begins." see ***State v. DeLao***, 252 Wis.2d 289, 318 (2002) Such a violation undermines fairness and rises to the level of a "manifest injustice." see ***Harris***, at 117.

IV. THE DNA REPORT PREJUDICED SHALLCROSS' DECISION TO PLEAD GUILTY; THEREFORE SHALLCROSS SHOULD BE PERMITTED TO WITHDRAW HIS GUILTY PLEA.

B. Causation

Not only does a defendant need to demonstrate that the withheld evidence is favorable; a defendant needs to also show that they were prejudiced by the non-disclosure. see ***Harris***, at ¶15, citing ***Strickler***, at 290

Prejudice is equated with the materiality element of ***Brady***. The standard for materiality is analogous with the prejudice prong to a claim of ineffective assistance of counsel found in ***Strickland.***[16] "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ***Harris***, at ¶14. Although materiality is typically determined by what value the suppressed evidence would have at a trial, in cases where a guilty or no contest plea has been entered, materiality is established by determining how the suppressed evidence would have altered the defendant's decision to plead guilty. see ***Sturgeon***, at 503–04 Once there has been a showing of materiality sufficient to establish a Constitutional violation, that error cannot be considered harmless. ***Kyles***, at 434

In assessing material prejudice under the ***Strickland*** formulation the Court in ***U.S. v. Bagley***, 473 U.S. 667 (1985) stated:

> "[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."

[16] ***Strickland v. Washington***, 466 U.S. 668 (1984)

Id. at 683, see also ***DelReal***, at 570–71, ***Harris***, at ¶14.

The United States Supreme Court has explicitly refused to evaluate prejudice as an "outcome-determinative" standard, i.e. had Shallcross proceeded to a trial, would he have been convicted or acquitted. see ***Lee v. United States***, 137 S. Ct. 1958, 1965 (2017) That is because, while courts ordinarily "apply a strong presumption of reliability to judicial proceedings," they cannot accord any such presumption "to judicial proceedings that never took place." see ***Roe v. Flores–Ortega***, 528 U.S. 470, 481 (2000) (the likelihood of a better outcome from a forfeited proceeding is not the correct prejudice standard because such a proceeding enjoys no presumption of reliability. We instead consider whether the defendant was prejudiced by the "denial of the entire judicial proceeding ... to which he had a right.") The Wisconsin Supreme Court has rejected the same sentiment in ***Harris***, at ¶ 34:

> "The State's argument requires us to reconstruct how a hypothetical trial would have proceeded and speculate as to how the jury would have viewed the evidence. We decline to do so."

Here, the withholding of the exculpatory evidence resulted in "a serious flaw in the fundamental integrity of the plea." ***Harris***, at ¶ 39. The State's violation of Shallcross' Due Process rights, as well as its discovery obligations under Wis. Stat. §971.23 prejudiced Shallcross' decision to accept the State's plea offer, and denied Shallcross the entire judicial proceeding of a trial by coercing his decision to waive such. ***Boykin v. Alabama***, 395 U.S. 238, 244 (1969) (Holding waivers of Constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.)

With that being said, the "[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded [absent the error]," and "should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." ***Lee***, at 1967. The ***Sturgeon*** court listed

several factors to be considered, "which may bear upon this question," these include: 1. the relative strength and weakness of the State's case and the defendant's case; 2. the persuasiveness of the withheld evidence; 3. the reasons, if any, expressed by the defendant for choosing to plead guilty; 4. the benefits obtained by the defendant in exchange for the plea; and 5., the thoroughness of the plea colloquy. ***Id.*** at 504-05.

1. The relative strength and weakness of the State's case and the defendant's case.

The State's evidence is only probative at this point and is far from unassailable. Any idea of how a jury trial would actually play out is merely speculation that was rejected by the ***Sturgeon*** and ***Harris*** courts.

Additionally the ***Kyles*** Court at 434-36 explained that the bearing of materiality is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict.[17] Moreover, no matter how much evidence the State possesses, and no matter how strong the case is, a defendant is presumed innocent until proven guilty, and has a right to test the State's case by being afforded a meaningful opportunity to present a *complete* defense. see ***California v. Trombetta***, 467 U.S. 479, 485 (1984)

Nonetheless, had this case proceeded to trial, the main dispute would have been whether or not Shallcross was the driver of the vehicle at the time of the crash. In order to establish that Shallcross was driving, the State was undoubtedly going to utilize two pieces of evidence, one being Shallcross' own inculpatory statement, the other, Daniel Gorectke's testimony.

[17] This is exactly what the circuit court did in its denial, "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." **(R114:41)**

a. Shallcross' statements, although admissible, are open to attacks of credibility.

It's hard to imagine a trial in which a juror would disregard a defendant's admission of guilt over his self-serving testimony that he falsely confessed, however the DNA evidence lends further credibility to that accusation by showing the evidence of the third party.

Before finally inculpating himself as the driver of the vehicle, Shallcross had undergone complicated bowel reconstruction, **(R101:11)** and was being medicated with morphine throughout his interrogation. **(R114:10)** "Wisconsin is in accord, holding that objections to the admissibility of inculpatory Statements based on intoxication largely affect the *trustworthiness* and *credibility* of the Statements, rather than their admissibility." ***State v. Clappes***, 136 Wis.2d 222 (1987)

During the first interrogation Shallcross repeatedly stated to detectives he did not remember the crash due to both his intoxication and his traumatic brain injury, and stated that he felt it was unlikely he would have been the driver. **(R101:13-14)** Over the next few days detectives continued to interrogate Shallcross and use his amnesia as a tool in making him believe he was in fact the driver, they accomplished this by insinuating they had video evidence showing him driving, and summarizing the facts of the crash Shallcross could not remember;[18] **(Id.)** Detectives went as far as setting up a "chance encounter" with one of the victim's mothers while Shallcross was being moved, under police guard, through the hospital, in which he was told by this mother, that he was driving, and was encouraged to "do the right thing." **(R101:16-17)**

Also relevant now, but unknown to Shallcross at the time, was the detective that eventually obtained an incriminating statement from Shallcross, Milwaukee

[18] This tactic is not uncommon and Shallcross' argument is that his inculpatory Statement was nothing more than "confabulation" caused by his brain injury and desire to remember. see ***State v. Hoppe***, 261 Wis.2d 294, 304, 312 (2003)

Police Detective Rodolfo Gomez, was found civilly liable in 2012 for knowingly lying on an affidavit for a search warrant in 2008 that resulted in a home owner being shot by police. see ***Betker v. Gomez***, 692 F.3d 854 (7th Cir. 2012). Gomez was later arrested and indicted for beating a suspect during a separate interrogation in 2012, a charge he later pleaded guilty. Gomez was sentenced to one year in federal prison for that crime. Shallcross has long argued in previous appeals that he felt pressured into giving an incriminating statement to Gomez, before any of these allegations became public. **(R38; R57)**

All these factors weigh in Shallcross' favor to attack the credibility of his statements at a jury trial.

b. Daniel Gorectke's credibility is severely doubted.

Gorectke would be considered the State's "star witness" in this case, however that consideration is questionable. According to the police reports, Gorectke originally stated at the scene of the crash that someone other than Shallcross was driving his car at the time of the crash, and only described him as a "white male." He further reported Shallcross to be in the backseat at the time of the crash. **(R84:3-4)**

While in custody, **(R84:4)** Gorectke was later questioned while in the I.C.U. According to that police report he stated that he was unsure what happened that night in regards to where he and Shallcross were, where they went, or what they did, but stated that he did remember giving his keys to Shallcross after dropping a family friend off earlier in the evening, and that Shallcross drove for the remainder of the night. **(R84:12) (R91:7)**

Gorectke was again questioned the day after that, and according to that police report, he now recalled every detail of the night, however changed a major component of the facts, Gorectke now stated that he gave Shallcross his keys only after leaving the last bar for the night, just minutes before the crash.

Much of the alleged Gorectke evidence, like everything in this case, is simply speculation at this point. Gorectke has yet to take the stand, undergo direct examination, or cross, but what Gorectke has done, which was part of this post-conviction motion, and not an issue of this appeal, was make a sworn statement in the wrongful death case resulting from this crash. In his sworn interrogatories dated August of 2010, Gorectke stated that due to the combination of his injuries, consumption of prescription medication and alcohol, he could not remember anything prior, during or after the crash, including who was driving. He also denied ever making a statement to police inculpating Shallcross as the driver. **(R85:18-19)**

Therein lies the problem with speculation of evidence, and how one might testify at a trial, even if you put them on the stand, it's always uncertain what they will actually testify to, but with the introduction of the third party DNA evidence, this now lends science and credibility to that first Statement of Gorectke's, the one borne free from any police influence or pressure, the "on the scene" assessment before anyone ever knew the true extent of the circumstances. see ***Christensen v. Economy Fire & Cas. Co.***, 77 Wis.2d 50, 58 (1977) (Explaining the trustworthiness of on the scene statements from a declarant who has been significantly injured; "It is the condition of excitement that temporarily stills the capacity for reflection which is *the significant factor assuring trustworthiness*, assuring that the declarant *lacked the capacity to fabricate*.")

If Gorectke were now to take the stand in a jury trial, he most definitely would be impeached; this factor leans heavily in Shallcross' favor.

c. Other relevant evidence.

The State has also stood firm on the fact that Shallcross was driving because he suffered an abdominal injury from the lap belt portion of the seatbelt. The State has long referenced a police report stating that a detective inspected the driver's

seatbelt and rear passenger seat belt, determining that the position of the rear seat belt indicates it was not used during the crash. **(R91:10)** Again, although a good trial argument, this is not dispositive. The report is incomplete; at no time was there ever any actually testing of the seatbelts, or observations concerning stretching, webbing, or any damage to the seatbelts to prove dispositive that Shallcross could not have been belted in the rear passenger seat. see **American Jurisprudence Trials, The SeatBelt defense,** 35 Am. Jur. Trials 349.

In any regard, at a trial, Shallcross could retain a seatbelt expert to affirm his defense that he was in fact buckled in the rear passenger seat at the time of the collision, regardless of the State's theory. see **Proof of Seatbelt defense,** 65 Am. Jur. Proof of Facts 3d 1.

The DNA report also detailed that a blood stain located on the driver's side-side airbag matched Shallcross. **(R85:26-27)** The State relied heavily on this fact in support of denying Shallcross' current motion, and it was with this reasoning the circuit court ultimately did. The court's logic was that it would be impossible for Shallcross' blood to be on that airbag, if Shallcross, in fact, was not driving.[19] **(R114:40)** This logic is flawed for many reasons; first, by the State's own theory in their response to the motion, that DNA can be transferred by responding medical personnel. see pg. 12 of State's response: **(R91:12)**

> 1. "The DNA report does not, contrary to what Defendant implies in his brief, establish that someone other than Shallcross was driving. All the DNA report establishes is that at least three individuals touched the driver's side front airbag. It does not establish that an unknown person was driving. As outlined above, members of the Milwaukee Fire Department had to enter the Honda Civic, through the driver's side door because the passenger's side door could not be opened, to provide assistance to Gorectke and Shallcross. Their presence inside of the vehicle

[19] As alluded to *supra*, the most fatal flaw of this argument is it confuses the weight of the evidence with its favorability. Shallcross does not need to demonstrate that the withheld evidence proves he is actually innocent, only that it is exculpatory.

> provides a reasonable explanation for a DNA mixture of at least three persons being on the driver's side front airbag."

This was not a huge smear, or the typical covering one might expect with this type of crash, this was a smudge, therefore based on this logic, the State would also have to accept this position in explaining how Shallcross' blood could reasonably be found on the driver's side-side airbag. Therefore, by the State's own admission, it's reasonable to conclude that one of the medical personnel could have possibly transferred Shallcross' blood to that airbag.

Second, this was a violent roll over crash, and as explained by experts, these crashes have the tendency to disperse trace evidence throughout the vehicle. see ***State v. Monahan***, 383 Wis. 2d 100, ¶ 16, (2018)[20]

> "Erdtmann [crash reconstruction expert] also testified that he inferred that the second DNA profile found on the driver's side airbag was R.C.'s. [R.C. was a passenger in a roll over crash.] He testified that, given the jostling that occurred inside the Saab while it was rolling, the DNA was inconclusive as to seat position—meaning that Monahan's DNA could have fallen on the driver's side airbag from the passenger's seat when the Saab was rolling."

Again all these factors weigh in Shallcross' favor.

d. Strength of defendant' case.

The Strength of the defendant's case is illustrated throughout this brief in various ways. Shallcross had a defense that he wasn't driving, but all the evidence to support that defense was testimonial, and it's hard to predict how a jury would have received such testimony. This chance factor, weighed against the State's case was too great for Shallcross to proceed to trial. However, the introduction of the DNA test lends credibility to all aspects of Shallcross defense.

2. The persuasiveness of the withheld evidence.

[20] Cited for factual reference only, not for legal authority.

The persuasiveness of the withheld evidence is the same argument as why it is exculpatory. Oftentimes witness credibility is hard to obtain, jurors will disregard one witness' testimony over another for simple reasons such as body language, mannerisms, and lack of eye contact, but this DNA evidence fits hand and glove with all three Statements made by Gorectke, Borucki, and Wojtysiak, and bolsters the witnesses' credibility.

Combining the DNA evidence with the witness testimony about the reported third person, and supplying expert testimony from one certified in occupant kinematics and occupant placement evidence that it was unlikely that Shallcross was driving based on his absence of DNA on the steering wheel airbag, is more than enough to establish reasonable doubt, however, the true weight and value of the evidence is unknown. As the United States Supreme Court has Stated, "the significance of an item of evidence can seldom be predicted accurately until the entire record is complete" ***Agurs***, *supra*, at 108.

3. Shallcross' subjective testimony on why he would not have accepted the State's plea deal.

Due to Shallcross' TBI, he was unable to remember the crash, and therefore tasked with the decision to plead guilty based on the information he had in the police reports, along with the advice of counsel, but Shallcross doubted his own guilt. **(R101:10, 32, 36-39) (R114:17-18)**

What made the lack of DNA on the airbag so troubling to Shallcross was that he believed given the violent circumstances of the crash, the high speed of the collision, the multiple roll-overs, and Shallcross' stature, that there would have been no doubt his DNA would be located on that airbag had he been driving at the time of the crash. **(R101:41-46) (R114:19)** Even more, it was alleged that after the crash, Shallcross unbuckled his seatbelt and crawled into the backseat, in doing so,

he would have had to done this without touching that airbag, which covered the entire cockpit of this vehicle; this seemed like an impossible task.

Shallcross also believes, as highlighted in this brief, that the mixture DNA is enough to prove his theory that the unidentified third person, whom he argues is in that mixture, was the unidentified "white male" reported by eyewitnesses, establishing reasonable doubt at a trial. **(R101:41-42) (R114:17-20)**

4. Shallcross received no benefit in exchange for his guilty plea.

Shallcross was originally charged with four class D felonies, and one class A misdemeanor. see *supra*. The State's offer, in exchange for Shallcross' plea of guilty on counts 1 & 3, would be to drop counts 2, 4, & 5, and make a recommendation for a substantial amount of time on both counts to be ran consecutive to each other, which is essentially the same result of a guilty verdict following a jury trial, because pursuant to Wis. Stat. §940.09(1m)(b), counts 1 & 2, and 3 & 4 would have to been combined for sentencing purposes.

Out of that 30 year maximum sentence Shallcross was facing had he lost at trial, Shallcross ultimately received 24 years. Shallcross received no benefit for pleading guilty. And as will be argued further, *infra*, Shallcross received no benefit because the State withheld Shallcross biggest bargaining chip, the DNA report. This factor weighs in Shallcross' favor.

5. The thoroughness of the plea colloquy.

While the plea colloquy was sufficient under ***State v. Bangert***, 131 Wis.2d 246 (1986), it mostly consisted of the court asking Shallcross questions that required a "yes" or "no" answer. **(R10)** At no time did Shallcross give any dialogue to the commission of the crimes, nor did he ever waive his right to receive exculpatory information. Nonetheless, the ***Sturgeon*** court stated, "this is the least persuasive of the factors because a plea colloquy, no matter how thorough, could never address a situation in which the State has withheld exculpatory evidence because such an

event is unknown to the trial court at the time of the plea." ***Id.***, at 506-07 This factor is a wash.

6. The withholding of the DNA report hindered Shallcross' ability to negotiate for a better plea deal. This constitutes a breach of the plea agreement, in which prejudice should be presumed.

The ***Sturgeon*** court was the first Court to address this issue in the State of Wisconsin, and set the standard, focusing on contemporaneous evidence to determine if a defendant was prejudiced by the non-disclosure, however, left open the courts' jurisdiction to expand on that standard. "... *this list was not intended to be exhaustive* and a particular case may present other relevant considerations." ***Id.*** at 504-05. However, ***Sturgeon***, and ***Harris*** for that matter, were decided over 20 years ago.[21] Since then plea bargaining has been recognized as a "critical stage" of the criminal justice process, see ***Padilla v. Kentucky***, 559 U.S. 356, 373 (2010), because our criminal justice system "is for the most part a system of pleas, not a system of trials." ***Lafler v. Cooper***, 566 U.S. 156 (2012)

In 2012, the United States Supreme Court decided both ***Missouri v. Frye***, 566 U.S. 134 (2012) and ***Cooper***, *supra*, in which a defendant can establish prejudice by showing that a Constitutional violation harmed them during the "critical stage" of plea bargaining. The Court also recognized that "any amount of additional jail time has [Constitutional] significance." see ***Frye***, at 147

Although a criminal defendant does not have a Constitutional right to plea bargaining, when the prosecutor decides to endeavor in this process, it becomes Constitutionally protected, in which *fairness* is the cornerstone. If a prosecutor decides to walk the path of plea bargaining, he is essentially entering into a contract with the defendant; ***State v. Tourville***, 367 Wis. 2d 285, 300 (2016) and when that prosecutor makes an offer without fulfilling their Constitutional and

[21] ***State v. Harris***, 272 Wis.2d 80 (2004) is the last published case in Wisconsin on this issue.

statutory obligations, it is a violation of that contract, and "cast the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice," ***Brady***, at 88; nor does it past the Constitutional muster of fairness.

There is no standard to plea bargaining; the results are typically complex negotiations that include pleading to a lesser charge, dismissal of charges, and/or recommendations for a specific amount of time in prison. The State usually bases these negotiations on the strength of its case; and a defendant's decision to accept a plea deal is heavily influenced by his appraisal of that strength. ***Brady v. United States***, 397 U.S. 742, 756 (1970) These 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 Wisconsin Supreme Court in ***Smith***, *supra*, determined that a defendant was automatically prejudiced when there was a breach in the prosecution's plea agreement, because it undermines the "fairness of the adversary proceeding." ***Id.***, at 277. A breach is defined as a deprivation to the defendant of a material and substantial benefit for which they have bargained, ***Id.*** at 272, and the act of bargaining is a "substantial benefit" that is Constitutionally protected. Since we ordinarily "presume that public officials have properly discharged their official duties" ***Banks v. Dretke***, 540 U.S. 668, 696 (2004), the failure to disclose exculpatory evidence prior to the acceptance of a plea deal should constitute a breach as it deprives that defendant of his substantial benefit; that being his ability to bargain. This violation undermines the "fairness of the adversary proceeding" because how can one bargain if they do not have all the facts?

It's hard to evaluate how this undisclosed DNA report would have helped Shallcross in negotiations, any speculation to such would be inappropriate. As the United States Supreme Court stated in ***Santobello v. New York***, 404 U.S. 257, 262 (1971):

> "We need not reach the question whether the sentencing judge would or would not have been influenced had he known all the details of the negotiations for the plea. He stated that the prosecutor's recommendation did not influence him and we have no reason to doubt that. Nevertheless, we conclude that the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case to the state courts for further consideration."

Here the non-disclosure placed Shallcross "on the horns of a dilemma," either he goes to trial and loses, which undoubtedly would have resulted in Shallcross receiving a long prison sentence, or accepts the State's offer and plea for mercy at the sentencing hearing. Where is the fairness in that judicial proceeding?

Ordinarily the remedy for a Constitutional violation is to restore the victim of the violation to the position he would have occupied had the violation not occurred. see ***Betts v. Litscher,*** 241 F.3d 594 (7th. Cir. 2001) As the Wisconsin Supreme Court put it, "[t]he penalty for the breach of disclosure should fit the nature of the proffered evidence and remove ***any*** harmful effect on the defendant." see ***State v. DeLao***, 252 Wis.2d 289, 317 (2002) Here the proper remedy for this case would be remand with instructions to allow Shallcross to withdraw his guilty pleas, restoring Shallcross back to pre-trial stages; anything less would be unconstitutional. Besides, a violation of ***Brady*** is a violation of Due Process, and a plea obtained in violation of Due Process is considered void. ***McCarthy v. U.S.***, 394 U.S. 459, 466 (1969)

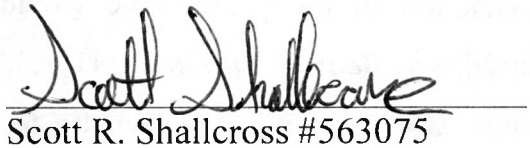
Conclusion

The only appropriate remedy in this case is to allow Shallcross to withdraw his guilty plea. The State created this violation. They should not be able to profit from a windfall; they should not be able to violate the Constitution as well as State law, and then get the opportunity to present an argument in hindsight, that it was no big deal. If a criminal defendant violates a procedural rule or State law during post-

conviction proceedings, the burden wouldn't be on the State to prove they were prejudiced by such, no; the defendant would be procedurally barred from pursuing his claim. Why should it be any different the other way around? We might need finality in our justice system, but first there needs to be justice.

Dated this 20th day of February, 2024.

Respectfully Submitted,



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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stats. §809.19(8)(b) for a brief. The length of this brief is 9141 .

Dated this 20 th of February 2024.

Signed: Scott Shallcross

Scott R. Shallcross #563075

CERTIFICATION OF MAILING

I certify that this brief was deposited in the Stanley Correctional Institution mailbox located on the unit wing as required by institution policy and procedures for delivery to the Clerk of the Court of Appeal on 2-20-24. That a properly completed DOC-184 form, "DISBURSEMENT REQUEST" was filled out and accompanied that brief, requesting postage to be added for first-class mail by the United States Post Office. That the address for delivery was to the:

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110 East Main Street, Suite 215
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At that time this brief should be considered filed pursuant to ***State ex rel. Nichols v. Litscher***, 247 Wis.2d 1013 (2001). see also Wis. Stat. §809.80(3)(c)

Dated this 20 th of February 2024.

Signed: Scott R Shallcross

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