STATE OF WISCONSIN
IN SUPREME COURT
Case No. 2006 AP 1826-CRAC

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

RONALD SCHAEFER,
Defendant-Appellant.

APPEAL FROM A NON-FINAL ORDER
QUASHING A SUBPOENA DUCES TECUM
ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY,
THE HONORABLE RALPH M. RAMIREZ, PRESIDING

AMICUS CURIAE BRIEF OF THE STATE PUBLIC DEFENDER AND THE WISCONSIN INNOCENCE PROJECT

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ARGUMENT

This case concerns a criminal defendant's attempt to obtain investigation reports from the police prior to the date set for his preliminary hearing by means of a subpoena *duces tecum*. The circuit court quashed the subpoena, concluding that there is no statutory authorization for the procedure the defendant attempted to use and that the defendant has no due process right to obtain discovery materials in advance of the preliminary hearing. *State ex rel. Lynch v. County Court*, 82 Wis. 2d 454, 466, 262 N.W.2d 773 (1978).

One issue presented in this case is whether current discovery procedures and prosecutorial practices should be augmented to enhance the reliability of fact-finding and dispositions in criminal cases.

I. Denying defense counsel prompt access to investigative information contributes to wrongful prosecutions and convictions

The growing number of DNA exonerations,[1] combined with official[2] and scholarly[3] inquiry into the causes of wrongful convictions, has increased awareness of the structural deficiencies and recurring problems that contribute to wrongful convictions. In Wisconsin, prosecutors, judges, police, defense attorneys, and victims are working together to propose reforms toward a common goal: increasing the reliability of the criminal justice system, to prevent wrongful conviction of the innocent and concomitant failure to convict the truly guilty.[4]

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[1] *See, e.g.*, Innocence Project, *available at* http://www.innocenceproject.org.

[2] *See, e.g.*, Report of the Former Governor George H. Ryan's Commission on Capital Punishment, *available at* http://www.idoc.state.il.us/ccp/ccp/reports/index.html.

[3] *See* Symposium, *Preventing Wrongful Convictions: Re-Examining Fundamental Principles of Criminal Law to Protect the Innocent*, 2006 Wis. L. Rev. 2 (collecting articles addressing the problem of wrongful convictions).

[4] For example, the University of Wisconsin Law School, Marquette University Law School, the State Bar of Wisconsin, and the Wisconsin Attorney General's Office have jointly sponsored a Wisconsin Criminal Justice Study Commission, charged with examining the causes of wrongful convictions and proposing reforms to improve the reliability of the criminal justice system. *See* http://www.wcjsc.org/.

The inability of defense counsel to access investigative information in a timely manner has been identified as a major cause of error in criminal cases.[5] Exoneration cases show that suppression of evidence was a major factor in a significant number of wrongful convictions.[6] Withholding relevant information from criminal defendants is inconsistent with the systemic goal of seeking the truth.[7]

Wisconsin statutes, as well as the compulsory process clause, give defendants the power to issue subpoenas, including subpoenas *duces tecum*. Wis. Stat. §§ 885.01 and 805.07(1) (2006). Nothing in the statutes prohibits a defendant's issuance of subpoenas *duces tecum* for police reports prior to the preliminary hearing. Because access to the police reports at the earliest possible point in the proceedings helps prevent wrongful prosecutions and convictions, is not prohibited by law, and imposes no unreasonable burdens on the State, this Court should resist the State's demand to deny such access.

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[5] Innocence Comm'n for Va., A Vision for Justice: Report and Recommendations Regarding Wrongful Convictions in the Commonwealth of Virginia 10, 59-68 (2005), *available at* http://www.wcl.american.edu/innocenceproject/ICVA/full_r.pdf?rd=1.

[6] Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 Wis. L. Rev. 541, 572 n. 114.

[7] *See* Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 Wis. L. Rev. 740, 835.

II. Early access to police reports facilitates the purposes of the preliminary hearing and helps prevent tunnel vision.

The preliminary hearing serves an important function in protecting the innocent from the embarrassment, expense, and trauma of standing trial for a crime he or she did not commit. *See State v. Richer*, 174 Wis. 2d 231, 496 N.W.2d 66, 69 (1993). Access to police reports facilitates defense counsel's ability to discover deficiencies in the State's case, and produce evidence of innocence that might curtail a miscarriage of justice in its nascent stages. In addition, decisions about whether to waive a preliminary hearing or to plead guilty rest in part on the defense attorney's assessment of the available evidence. If access to that evidence is limited, then counsel's assessment of the evidence may be flawed, and the outcome of the case may not reflect the truth.

Moreover, prompt access to police reports can help prevent "tunnel vision." Official inquiries into wrongful convictions have noted the role that tunnel vision has played in individual cases of injustice.[8] Tunnel vision in the criminal justice system is generally understood to mean the natural human tendency to "focus on a suspect, select and filter the evidence that will 'build a case' for conviction, while ignoring or suppressing evidence that points away from guilt." Diane L. Martin,

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[8] *See, e.g.*, Ryan Commission, *supra* note 2 at 20; FPT Heads of Prosecution Comm. Working Group, Report on the Prevention of Miscarriages of Justice 35 (2004), *available at* http://canada.justice.gc.ca/en/dept/pub/hop/; Province of Manitoba, The Inquiry Regarding Thomas Sophonow, http://www.gov.mb.ca/justice/publications/sophonow/toc.html; Innocence Comm'n for Va., *supra* note 5.

Lessons About Justice from the "Laboratory" of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence, 70 UMKC L. Rev. 847, 848 (2002).

Tunnel vision is the product of a variety of forces, including cognitive biases, such as "confirmation bias,"[9] institutional pressures inherent in the adversary system, and certain rules—such as limitations on pretrial access to case information—that make it difficult to envision or develop evidence of innocence. *See* Findley & Scott, *supra* note 9, at 295; *see also* Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 Am. Crim. L. Rev. 1123, 1163 (2005). Because confirmation bias and tunnel vision become more entrenched the longer police and prosecutors operate with an unchallenged conclusion of guilt, it is important that investigative information be shared as early as possible with those who have an incentive to present alternative perspectives or interpretations of that evidence. Findley & Scott, *supra* note 9 at 390.

III. Police investigation should be viewed as objective, non-adversarial fact-gathering.

Implicit in the State's position—that police files should be available only to the State prior to the first judicial proceedings—is the assumption that police are an instrument of the prosecution, and that they share the prosecution's adversarial goal of compiling sufficient evidence against a specific suspect to obtain a conviction.

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[9] "Confirmation bias" refers to the natural human tendency—a tendency that occurs once a person has reached a conclusion about a matter—to seek, recall, and interpret data in a way that confirms the initial conclusion, and to avoid data or interpretations inconsistent with that initial conclusion. *See* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis. L. Rev. 291, 307-16.

While this view may seem to reflect the reality of our system, conceptualizing the police as an instrument of the prosecution is perilous. It encourages police to view investigation as a process geared toward convicting a specific suspect, rather than discovering all the relevant facts about a crime.

This Court should consider a different view of the police function: to objectively gather all available evidence in order to aid both the prosecution and defense in providing relevant facts to the jury. This conception encourages police to think of investigation as an objective pursuit of the truth, rather than an attempt to build a case against a suspect, and it therefore helps police avoid the tunnel vision discussed above that can lead to wrongful convictions. Finally, and most directly relevant to this case, viewing the police as neutral fact-gatherers suggests that the results of their investigation should be equally available to both the prosecution and defense, to the extent that such disclosure will not jeopardize legitimate investigative interests in confidentiality.

This view of police is not new. Some states effectively mandate open investigation files.[10] In many northern European countries, police compile a single investigative file that is then disclosed fully to both the prosecution and defense.[11] In England, police have implemented a method of interviewing suspects that re-defines police as neutral fact-gatherers, rather than interrogators extracting confessions through

[10] *See, e.g.*, N.J. Ct. R. 3:13-3(c)(6).

[11] Darryl K. Brown, *The Decline of Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 Cal. L. Rev. 1585, 1623-24.

psychological persuasion.[12] The method is based in part on research suggesting that psychological interrogation techniques are not necessary to elicit confessions, and that police obtain more thorough and accurate information when they approach suspect interviews with the goal of obtaining all relevant information, not just the suspect's confession.[13]

IV. Early access to police reports is consistent with our system's deep-seated notions of fairness.

The U.S. Supreme Court has recognized that fairness demands access to evidence for both sides:

> The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as "due process" is concerned, for [a rule] which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.

Wardius v. Oregon, 412 U.S. 470, 474 (1973) (quoting *Williams v. Florida*, 399 U.S. 78 (1970)). Here, the prosecutors seek the right to "conceal their cards until played," in a manner that impedes the search for the truth.

The prosecution already enjoys other institutional advantages. The prosecution has greater access to evidence and superior resources, such as the assistance of

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[12] *See, e.g.,* Thomas M. Williamson, *From Interrogation to Investigative Interviewing: Strategic Trends in Police Questioning*, 3 J. Community and Applied Soc. Psychol. 89 (1993).

[13] *See, e.g.*, Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 Psychol. Sci. in the Pub. Int. 33, 44 (2004).

law enforcement and technical personnel, cooperation of citizens, early access to crime scenes, and pretrial investigative forums such as John Doe and grand jury proceedings. Providing the defense with prompt access to investigative information helps to equalize the advantages that necessarily accrue to the prosecution. There is no legitimate reason—from the perspective of ensuring fairness and reliability of the proceedings—to deny defense access to investigative materials early in the process.

V. Statutory and constitutional discovery rights do not foreclose or obviate the need for subpoenas prior to the preliminary hearing.

It is true that, if probable cause is found, the prosecution will then be required to give Schaefer discovery, specifically all exculpatory materials and any relevant written or recorded witness statements. This requirement stems from constitutional, statutory, and ethical duties. *See* Wis. Stat. § 971.23(1) (2006), *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Agurs*, 427 U.S. 97 (1976); Wis. S. Ct. R. 20:3.8(d). This responsibility extends to materials possessed by the police department. *Strickler v. Greene*, 527 U.S. 263 (1999). But the fact that a defendant will ultimately obtain much or in some cases all of these materials if he is bound over for trial does not lessen the importance of obtaining police reports before the preliminary hearing.

First, as argued above, timing matters, and discovery rules alone are inadequate to guarantee that disclosure comes early enough to protect a defendant's interests. The current discovery rules in Wisconsin leave it to the prosecutor to decide what a "reasonable time before trial" for disclosure of exculpatory evidence

means, and, in the context of most cases where there is no trial, what "in time for its effective use" means. *State v. Harris*, 2004 WI 64, ¶¶35-37, 272 Wis. 2d 80, 680 N.W.2d 737.

Second, formal discovery rules do not provide for access to the full range of information contained in police files that interests in fairness and truth ought to require. Relying solely on the formal discovery requirements that arise after a bindover in effect invests prosecutors with the sole authority to determine whether a particular piece of information is material, and therefore subject to discovery rules. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995). When prosecutors weigh the materiality of a particular piece of evidence, they alone attempt to divine whether there is a reasonable probability that, if the evidence is disclosed, the result of the proceeding would be different. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

But the task of determining what evidence to disclose is difficult. While prosecutors attempt to act as neutral observers, they are also advocates charged with prosecuting a defendant. Natural cognitive biases make it unlikely that they can envision a different outcome or fully appreciate the value of evidence to the defense. The prosecutor does not know what defense counsel knows, and can not appreciate whether undisclosed evidence corroborates other defense evidence or whether undisclosed evidence supports a potential defense strategy. *See generally*, Stephanos Bibas, *The Story of* Brady v. Maryland: *From Adversarial Gamesmanship Toward The Search for Innocence?*, *in* Criminal Procedure Stories (Carol Steiker ed., 2005).

Moreover, the prosecutor's decision is guided by a definition of materiality that focuses on what a prosecutor must do to avoid reversal after conviction, instead of focusing on what should be done to reach a reliable result. Prosser, *supra,* at 567. A prosecutor is not constitutionally required to disclose impeachment evidence to the defense prior to entering into a plea agreement, and may not be required to disclose evidence of actual innocence prior to a plea. *United States v. Ruiz*, 536 U.S. 622, 633 (2002); *State v. Harris*, 2004 WI 64 at ¶17.

It is true that many prosecutors attempt to avoid the difficult task of deciding what evidence is material or exculpatory, and simply maintain an "open file" policy. Indeed, the prosecutor in the instant case has such a policy. (Appellant Br. App. 136). While such a policy may be helpful in promoting full disclosure, it does not solve the problem because prosecutors define "open file" in many different ways.

Indeed, University of Wisconsin law students working as interns in state prosecutor offices recently surveyed those offices regarding open file policies. Each office said they had an "open file" policy, but the policy was seldom written, and offices varied in how they defined "open file." The survey indicated, among other things, that: (1) lawyers conducted discovery informally; (2) most of the information disclosed was inculpatory rather than exculpatory; (3) the amount of information disclosed varied depending on the defense attorney's personal relationship with the prosecutor; and (4) there were many working exceptions to the stated "open file" policy. Prosser, *supra*, at 593-94 n.215.

By focusing solely on the reach of formal discovery rules, we lose sight of the broader question of whether prosecutors, courts, and legislatures provide adequate assurances that cases are resolved, by plea or trial, through adequate fact-finding. We should be examining whether procedures exist to ensure that information in the possession of the prosecution is critically scrutinized and subjected to challenge. When we narrowly frame disclosure issues, we fail yet again to counterbalance the substantial institutional advantages enjoyed by the State in the control over investigatory information. The more we know about wrongful convictions, the less it makes sense to deprive a defendant of access to relevant evidence at the earliest possible opportunity. Prosser, *supra* at 614.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this court reverse the circuit court's order quashing the subpoena *duces tecum*, and recognize that criminal defendants have a statutory and constitutional right to access police investigation reports by subpoena prior to the preliminary hearing.

Dated this ____day of July, 2007.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Wis. Stat. § (Rule) 809.19 (8) (b) and (c) for a brief produced in a proportional serif font. The length of the brief is 2191 words.

Dated this ____day of July, 2007.

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