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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT 4

Case No. 2011AP001467-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONYIL LEEITON ANDERSON, SR,

Defendant-Appellant.

On Appeal from the Judgment of Conviction and the Order Denying Post-Conviction Relief Entered in the Circuit Court for Rock County, the Honorable James P. Daley Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Whether the circuit court erred at the trial in instructing the jury that a mental responsibility defense, Wis. Stat. § 971.15(1), cannot be sustained by evidence that Anderson's temporary mental state was brought into existence, in part, by his lawful use of prescribed medicine?

Trial court answered: Judge Daley instructed the jury, in relevant part, that "[a] temporary mental state which is brought into existence by the voluntary taking of drugs or alcohol does not constitute a mental disease or defect." (App. 123; 49:14; 93:139).

2. Whether, in the alternative, the real controversy was not fully tried and a new trial should be granted in the interests of justice because the jury instructions were confusing and misleading with respect to the effect of Anderson's voluntary use of alcohol?

Trial court answered: Not answered by the circuit court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Defendant-Appellant Donyil Anderson requests oral argument because this brief raises a novel issue of Wisconsin law which is of statewide importance, and is likely to recur, concerning the applicability of the mental responsibility defense, Wis. Stat. § 971.15(1), to the use of prescribed medicine. Compare Wis. Stat. Rule § 809.22(2).

Publication of the Court of Appeals' opinion is warranted for the same reasons. The court's decision is likely to enunciate a new rule of law which distinguishes existing rules of law relating to a person's use of illegal controlled substances on an issue of substantial public interest. Wis. Stat. Rule § 809.23(1)(a)1., 5.

STATEMENT OF THE CASE

Defendant-Appellant Donyil Leeiton Anderson, Sr., ("Anderson") appeals from his judgment of conviction of first-degree intentional homicide contrary to Wis. Stat. § 940.01(1)(a), and attempted first-degree intentional homicide contrary to Wis. Stat. §§ 939.32 and 940.01(1)(a), entered on August 2, 2010 (58; 59), and also from the order denying post-conviction relief entered on June 7, 2011 (73), in the Rock County Circuit Court, the Honorable James P. Daley presiding.

The case was commenced on August 12, 2008, with the filing of a two-count criminal complaint which alleged that Anderson had intentionally stabbed to death his ex-girlfriend, Stacey Hosey, and had attempted to intentionally stab to death her companion, Brandon Beavers-Jackson, in the early morning hours of August 9, 2008, in the City of Beloit. (1).

Anderson was bound over for trial at the conclusion of a preliminary hearing. (77). He entered alternative pleas of not guilty and not guilty by reason of mental disease or defect to a two-count information which renewed the same charges as the criminal complaint. (8; 78).

Trial was held to a jury. (88; 89; 90; 91; 92; 93). After the state presented evidence in the "guilt" phase of trial,

Anderson entered *Alford*-type pleas of no contest to both of the counts and the court accepted his new pleas. (44; 90:106-16). The parties then presented additional evidence in the "mental responsibility" phase of trial (92:18-243; 93:17-101).

After the presentation of all evidence was concluded, the circuit court conducted a jury instructions conference (93:108-31). During that conference, the prosecutor requested the court to submit "two [optional] stock instructions. . . [which state that] a voluntary induced state of intoxication by drugs or alcohol does not constitute a mental. . . .defect," over Anderson's objection. (App. 109-15; 93:116-22).[1] The gist of Anderson's objection to the optional language was that it did

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[1] ***Wis. J.I. – Criminal: No. 605*** provides, in relevant part, as follows:

"Mental disease or defect is an abnormal condition of the mind which substantially affects mental or emotional processes.

The term 'mental disease or defect' identifies a legal standard that may not exactly match the medical terms used by mental health professionals. You are not bound by medical labels, definitions, or conclusions as to what is or is not a mental disease or defect to which the witnesses have referred.

You should not find that a person is suffering from a mental disease or defect merely because the person committed a criminal act, or because of the unnaturalness or enormity of the act, or because a motive for the act may be lacking.

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE

* * *

[A voluntarily induced state of intoxication by drugs or alcohol or both does not constitute a mental disease or defect.]

[A temporary mental state which is brought into existence by the voluntary taking of drugs or alcohol does not constitute a mental disease or defect.]"

* * *

not properly apply to a factual situation which arose from his lawful use of prescribed medicine. (*id.*).

The court granted the prosecutor's request with respect to one of the two optional standard jury instructions about voluntary use of drugs or alcohol [*sic*]: "[Anderson's] taking Strattera was a prescribed drug, I think is, if this is simply that, that would not be a, then I think I would be right because prescription, following the advice of a doctor, a competent doctor I think is not a voluntary taking of a drug as the statute prescribes. However, if, in fact, he did certain things after that, which includes the consuming alcohol, which might exacerbate it, or continuing to take it when he realized he was getting worse, I guess an argument could be made that, in fact, at that point it's voluntary, he voluntarily accepts what is occurring as a result of taking the drug. * * * * I'll keep the second [optional instruction], but – (Pause.) Other than that, you both put your position on the record, you have both put your position on record, you're not waiving it, ..." (App. 116-21; 93:123-28).

The circuit court ultimately instructed the jury, in part, that "[a] temporary mental state which is brought into existence by the voluntary taking of drugs or alcohol does not constitute a mental defect." (App. 123; 49:14; 93:139). The jury returned a special verdict which found specifically that Anderson had not had a mental defect at the time that the crimes were committed. (App. 133; 52).

On July 23, 2010, the circuit court sentenced Anderson to a term of 20 years initial confinement plus 20 years extended supervision on Count 2, the attempted homicide offense, and a consecutive term of life imprisonment with eligibility for parole after 40 years on Count 1, the homicide offense. (94:37-40).

Anderson later filed a post-conviction motion which sought to supplement the circuit court record with respect to the judge's original, discussion-draft jury instructions. (67; 69). At a hearing on the motion, the court ultimately concluded that it could not retrospectively re-create the draft jury instructions (95), and the court entered a written order denying post-conviction relief. (73).

Anderson's notice of appeal (96) is taken from the judgment of conviction (58; 59) and the order denying post-conviction relief. (73).

SUMMARY OF THE FACTS[2]

At the trial, evidence was presented in support of the following facts.

On June 9, 2008, Donyil Anderson was a 34-year-old graduate of Beloit High School and an unmarried father of two children, who was employed at the Hormel Foods plant. (74:Exhibit 34:5-6; Exhibit 36:3-4). Anderson went to the Crossroads Counseling Center ("Crossroads") in Janesville on that day for the purpose of obtaining medical services to address problems with his mental concentration, including possible attention deficit hyperactivity disorder ("ADHD"), which problems were affecting him at home and at work. (*id.*). During the intake process, Crossroads was informed that Anderson had previously attempted suicide in 1999. (74:Exhibit 34:7; Exhibit 36:5).

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[2] Some of the documentary trial exhibits are not paginated. Anderson's citations to those documents follow the simple protocol of attaching page numbers such that the first page is 1, the second page is 2, etc.

Two days later, Crossroads administered a psychological test to Anderson, and the psychologist's findings were consistent with attention deficit disorder ("ADD"). (74: Exhibit 36:7-18).

On June 25, 2008, Crossroads physician Dr. Marek Hann, M.D., issued a prescription to Anderson for a medicine known as Strattera. (74:Exhibit 34:11; Exhibit 36:19, 22; 92:28, 54). The dosage was intended to begin at 18 milligrams, and then to increase to 36 milligrams, to 50 milligrams, and to 80 milligrams (*id.*),[3] and the medicine was prescribed to be taken once per day. (92:56). Dr. Hann also gave Anderson a 30-day sample package of Strattera at that time. (74:Exhibit 37; 92:66).

Anderson's patient records at Crossroads display a blank line where Dr. Hann was supposed to acknowledge that he had warned Anderson about the possible side effects of the Strattera medicine on June 25, 2008. (74:Exhibit 34:11; Exhibit 36:22). The records do not contain any specific information about the potential side effects of Strattera.

On July 9, 2008, approximately two weeks after Anderson began using the Strattera medicine, he battered his live-in girlfriend, Stacey Hosey ("Stacey"), for the first time. (92:80). Stacey told the police that she had been arguing with Anderson when he began to strike her with an open hand. (22:2; 74:Exhibit 40:2).

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[3] The written prescription dated June 25, 2008, actually shows a dosage of 80 milligrams. (74:Exhibit 36:19; Exhibit 37).

Dr. Hann was unable to testify as a defense witness at the trial by virtue of his own hospitalization, and the parties stipulated that the Crossroads medical records could be admitted through the testimony of Crossroads' contractual psychologist, Mr. Michael Kaye, Ph.D. (92:6-8, 17-18).

Anderson and Stacey had previously lived together as an unmarried couple for almost five years, together with their infant son, "DJ," and Stacey's daughter by another father, Skylar. (92:78). Anderson and Stacey had been engaged to be married in the fall of 2007, but they separated after Stacey began dating other men, including Brandon Beavers-Jackson ("Brandon"). (22:2; 74:Exhibit 40:2; 92:79). Anderson and Stacey later reconciled for several months until the battery incident on July 9, 2008, after which Anderson moved out of their home in Beloit and went to stay at the residence of a friend. (22:2; 74:Exhibit 40:2; 89:23-24; 92:79-80, 115-17). The friend observed that Anderson took his medicine once per day, three times per week. (92:117-18).

Anderson's second appointment with Dr. Hann occurred on July 23, 2008, and the dosage of the prescribed Strattera medicine was increased to 100 milligrams at that time. (74:Exhibit 34:5; Exhibit 36:3, 19; Exhibit 37; 92:30-31; 92:38-39). Anderson's prescription had recently been filled on July 19, 2008, at a dosage of 80 milligrams. (74:Exhibit 35:2; 92:51, 53). Anderson was not scheduled to return to Crossroads again until October, 2008, three months later. (74:Exhibit 34:5; Exhibit 36:3; 92:39-40).

ShopKo pharmacy records associated with the filling of Anderson's prescription on July 19, 2008, warned that "[t]his medicine may increase the risk of suicidal thoughts or actions in children and teenagers" with ADHD. (74:Exhibit 35:4). The records also cautioned that such risks may affect adults, especially persons who have a history of suicidal thoughts or actions. (74:Exhibit 35:5). The pharmacy records advised Anderson to "contact your doctor immediately" if you experience "mental or mood changes" or "new and worsening behavior changes (eg, aggression, hostility, restlessness)." (*id.*).

On August 7 and the morning of August 8, 2008, Anderson and Stacey engaged in a series of telephone calls and text messages with each other. (74:Exhibit 31; Exhibit 32; 90:67-68, 76-77). Anderson's text messages to Stacey reflected aggressiveness and hostility, including a statement that "Im with someone and I don't need ur shit" [*sic*], and statements advising her that Anderson had been having sexual relations with other women and that he hadn't touched Stacey for two months because she was "a dead fuck" [*sic*]. (74:Exhibit 32; 90:80-86). One of Stacey's text messages to Anderson responded that "throwing another female in my face is whateva, just makes me feel better about branden." [*sic*] (id.).

On August, 9, 2008, at approximately 2:15 a.m., Anderson was placed under arrest by a Janesville police officer for alleged battery as the result of a punching incident at a tavern. (93:38-40). Anderson was transported to the police station for booking, and he told the officer that he had a right to defend himself and that he had done nothing wrong. (93:40-41). Anderson was released from custody at approximately 3:00 a.m. with a summons because he presented himself as coherent and alert and he did not appear to be under the influence of intoxicants. (93:42-43).

Stacey's next-door neighbor was awakened during the night by a very loud noise of banging on wood, which stopped and re-started again. (89:46-49). The neighbor saw Anderson, whom she recognized as Stacey's former boyfriend, walk down the steps from the front porch and go to the back porch where he kicked in the door. (89:49-51, 58). Stacey's neighbor called "9-1-1." (89:51). She then heard Stacey say "get out, get out," followed by screaming, after which Stacey said "I love you" and Anderson said "you lying bitch." (89:52). When the police arrived at the scene, the

neighbor found Stacey sitting in the driveway, bleeding, and Stacey stated that Anderson had done this to her. (89:54-58). The neighbor had never seen Anderson act violently before. (89:59).

At approximately 3:00 a.m., a police officer arrived at the scene and he was initially stopped in the street by Brandon, who was wearing only bloody undershorts and appeared to have suffered abdominal stab wounds. (89:23-25, 43-45). The officer called an ambulance and proceeded to Stacey's house, where he saw Stacey sitting in the driveway in a silky nightgown, covered in blood. (89:26-27, 45). The officer also saw Anderson lying facedown in the driveway and he shouted at Anderson, who then stood up holding a knife overhead. (89:27-30). Anderson refused to comply with the officer's orders to put down the knife, and Anderson stumbled toward the officer while repeatedly asking to be killed. (89:30-32). The officer eventually subdued Anderson by employing an electrical shock device known as a Taser three separate times (89:32-36), after which Anderson was handcuffed. (89:40). The officer observed that both of Anderson's wrists had been cut. (89:40, 43).

Brandon had previously dated Stacey for a few months during the fall of 2007, while she was still living with Anderson, and he resumed his relationship with her only a week before this incident. (89:78-80, 89-90). Brandon had arrived at Stacy's home at approximately 12:00 a.m. on August 9, 2008, and he fell asleep in Stacey's bed. (89:80-81, 91-92). He was awakened to the sounds of Stacey's screaming and a man's voice. (89:81, 92). Brandon went to investigate and it appeared to him that Anderson was striking and kicking at Stacey. (89:82, 92-93).

Brandon pushed Anderson and ran back into the bedroom, where he unsuccessfully tried to call "9-1-1" on his cellphone. (89:83, 93). Brandon heard Anderson say "I'm going to kill you," and Anderson began looking for Brandon. (89:84, 94-95, 98-99). Anderson seemed to be acting out of control. (89:95). Brandon then struck Anderson in the head with a glass candleholder, and Brandon was stabbed as the two men fought. (89:85, 96-97; 90:10). Brandon ran outside to look for help just as a police officer was arriving at the scene. (89:86).

After the police secured the area, a search of the premises revealed a horrific story. Outside, Brandon's parked automobile had broken windows on both sides, and a serrated knife and a large amount of spilled blood were visible in Stacey's driveway. (89:104-05, 108, 110-14, 132-35). Inside the house, broken kitchen knives and bloodstains were located almost everywhere, and even the couch showed signs that it had been slashed or stabbed with a knife. (89:115-32; 90:3-11, 16-25).

Stacey was transported to a hospital for medical treatment, but her life could not be saved. (90:50-51). An autopsy examination disclosed numerous "sharp force" or bladed-weapon injuries to Stacey's head and neck, legs, arms and hands, as well as several penetrating wounds to her chest which resulted in death. (90:49-61, 64-65).

Anderson was also transported to a hospital for medical treatment, and he gave two recorded statements to police detectives. (74:Exhibit 27, Exhibit 28, Exhibit 29, Exhibit 30; 90: 68-75).

In his first hospital statement, Anderson said that earlier on August 8, 2008, Stacey had invited him to come over to her house at a later time. (74:Exhibit 28:6). Anderson

complied, and when he arrived he was surprised to find that Brandon was also present. (74:Exhibit 28:7). Anderson said that Stacey and Brandon taunted him at that time, whereupon he "just like snapped and like blacked out." (74:Exhibit 28:8-9). Anderson stated that "I didn't go over there to hurt nobody," but Stacey and Brandon "barely had any clothes on" and he didn't think that Brandon was the person that Stacey should have. (74:Exhibit 28:11-12). Anderson concluded that he loved Stacey, and he said "I'd rather have killed nobody, man." (74:Exhibit 28:17-18).

In his second hospital statement, Anderson repeated that "it wasn't my intention to go there and, to hurt nobody." (74:Exhibit 30:1). Anderson said that he was in a "jealous rage" when Stacey and Brandon taunted him, and he "just snapped." (74:Exhibit 30:2-3). According to Anderson, Stacey was "just ranting and raving and down on me." (74:Exhibit 30:6). Anderson stated that his actions with the knives happened "all so fucking fast," "just zoom, zoom, zoom," that he didn't even realize he was still holding a knife while he was punching Brandon. (74:4, 9-10). Anderson asserted that he had not been intoxicated from drinking beer earlier that night, but that the Strattera medicine that he was taking "made me real edgy." (74:Exhibit 30:12, 17-18).

Dr. Hugh Johnston, M.D., conducted a psychiatric examination of Anderson, and he testified at the trial as an expert witness on behalf of the defense. (92:127-243). Dr. Johnston is a psychiatrist and an associate professor at the University of Wisconsin Hospitals and Clinics who has a sub-specialty in psychopharmacology, which is the study of psychiatric drugs. (74:Exhibit 39; 92:127-30).

By way of background information, Dr. Johnston said that he had found Anderson to be a "substantially average"

person of "typical intelligence." (92:139). However, Anderson had had "at least two and probably more episodes of major depression" in his life which "plagued" him. (92:140, 187-89). Dr. Johnston also noted that Anderson had a "conflicted romantic relationship" with Stacey, and Dr. Johnston was informed that Anderson's previous suicide attempt corresponded to a failed romantic relationship with the mother of Anderson's first child when that woman had also begun dating other men. (App. 126; 74:Exhibit 40:2; 92:141-42, 173-74).

In Dr. Johnston's opinion, the Crossroads clinic had erroneously diagnosed Anderson's mental health issue as ADD, rather than depression. (92:142-44, 156). Dr. Johnston also criticized the Crossroads regimen of Strattera medicine as a "third line" course of treatment to be adopted only after safer alternatives had been exhausted. (92:145-46, 156). Dr. Johnston explained that relevant scientific studies showed "in a small but regularly occurring percentage of people who take Strattera, what emerges is a propensity toward intense emotionality, a propensity. And then part of that intense emotionality is also a loss of impulse control. And in a smaller percentage, it's been associated with homicidal behavior and actual homicide, and to a larger extent, suicidal behavior and suicide." (App. 132; 74:Exhibit 40:8; 92:152).

Applying these considerations to the known facts, Dr. Johnston concluded that Anderson had likely been able to appreciate the wrongfulness of his acts at the time of the incident with Stacey and Brandon on August 9, 2008. (App. 130; 74:Exhibit 40:6; 92:160-61).

However, in Dr. Johnston's opinion, Anderson was unable to conform his conduct to the requirements of the law as "a direct result of a mental disease or defect caused by a

combination of factors." (App. 130; 74:Exhibit 40:6; 92:161). Those factors were: first, that "Anderson's ability to exert self-control in emotionally provocative settings has been mildly impaired throughout his adult life"; second, that Anderson "was suffering from his second episode of major depressive disorder which was not appropriately treated"; third, that Anderson's self-control was additionally impaired by the impact of Strattera on his brain functioning"; and fourth, these factors "were all further compounded by his ingestion of alcohol." (App. 130; 74:Exhibit 40:6; 92:161-62).[4]

Dr. Johnston emphasized that Anderson had a "profound mental defect" by virtue of changes in his brain which had lasted longer in time than the homicidal acts, themselves. (App. 130-31; 74:Exhibit 40:6-7; 92:162-64,

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[4] Anderson told the detectives that he only "drank a few beers" at the tavern in Janesville because he had to go to work that morning. (74:Exhibit 30:12-13). Anderson's hospital records were not received into evidence, but a forensic toxicologist who tested Anderson's blood specimen at a later time reported a blood alcohol concentration of 0.15%. (93:25).

The toxicologist also testified that Anderson's blood specimen was "negative" for the presence of Strattera, by which he meant that it was less than the limit of his ability to detect that medication, namely 10 nanograms per milliliter. (93:23-28). He conceded that a blood specimen that had been taken at an earlier time might produce a different result, however. (93:27).

Dr. Johnston testified that the "duration of action" of a drug, or its clinical effect on a person, is a different concept than the physical presence of the drug in the blood stream. (92:166). He explained that he "would expect that at the time it became possible to draw blood and measure Strattera blood levels in [Anderson's] body, that they would be zero or very close to it. But it's important to understand that that does not mean the drug effect would be absent. . . ." (92:167).

217).[5] Dr. Johnston further opined that the Strattera medicine played "a very important role" in those brain changes, and that it was "highly unlikely" that Stacey would have been killed if the Strattera medicine had not been involved. (92:165-66).

Mr. Christopher Tyre, Ph.D., is a psychologist in private practice who works for the state Department of Corrections, and he testified as an expert witness in behalf of the prosecution. (93:44-101). Mr. Tyre's evaluation was based largely upon his review of written records and a "clinical interview" of Anderson at the jail. (74:Exhibit 49:1-2; 93:51-63).

Mr. Tyre concluded that Anderson had been able to appreciate the wrongfulness of his behavior and to conform his conduct to the requirements of the law. (74:Exhibit 49:5; 93:67). Mr. Tyre reported that he had consulted with a psychiatrist and a pharmacist about Strattera medicine, specifically, and he "could find no information" suggesting that Anderson's use of Strattera had rendered him unable to conform his behavior to the requirements of the law. (74:Exhibit 49:4-5; 93:71, 74, 80-82, 85-88).

Mr. Tyre conceded that his conversations with the psychiatrist and the pharmacist had not been "about what the potential side effects of Strattera were." (93:87). He also said that he understands Wisconsin law to dictate that "voluntary intoxication, which can include a psychiatric medication, does not qualify as a mental disease or defect." (93:95, 99).

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[5] Hospital records that Dr. Johnston had reviewed indicated that Anderson had been "combative" at the first hospital he was taken to, and that several police officers were required to physically control him. (App. 128; 74:Exhibit 40:4).

Such additional facts as may be relevant to this appeal will be set forth, and cited to the trial court record, in the Argument below.

ARGUMENT

I. The Circuit Court Erred at the Trial in Instructing the Jury that a Mental Responsibility Defense, Wis. Stat. § 971.15(1), Cannot Be Sustained by Evidence that Anderson's Temporary Mental State Was Brought Into Existence, in Part, by His Lawful Use of Prescribed Medicine.

A. The relevant statute, the applicable general principles of law and the standards of appellate review.

Wisconsin Statute § 971.15 provides[6] as follows:

> **971.15 Mental responsibility of defendant. (1)** A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law.
>
> **(2)** As used in this chapter, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.
>
> **(3)** Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish to a reasonable certainty by the greater weight of the credible evidence.

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[6] All statutory citations refer to the 2009-2010 edition unless noted differently.

The correct interpretation and application of a statute such as Wis. Stat. § 971.15 is a question of law, which is reviewed independently on appeal. ***State v. Duychak***, 133 Wis. 2d 307, 316, 395 N.W.2d 795 (Ct. App. 1986).

The term "mental disease or defect" is not defined in Wis. Stat. § 971.15 or in the American Law Institute's *Model Penal Code* provision from which Section 971.15 was adopted. ***Sprague v. State***, 52 Wis. 2d 89, 100, 187 N.W.2d 784 (1971); ***Wis. J.I. – Criminal: No. 605***, Comment 6. Instead, only a negative exception to the term is given: "the terms 'mental disease or defect' [*sic*] does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct." Wis. Stat. § 971.15(2); ***Simpson v. State***, 62 Wis. 2d 605, 612, 215 N.W.2d 435 (1974).

Consequently, the Jury Instructions Committee created a definition that is "intentionally broad." ***Wis. J.I. – Criminal: No. 605***, Comment 6. The basic definition, without any of the additional, optional statements, reads as follows:

> Mental disease or defect is an abnormal condition of the mind which substantially affects mental or emotional processes.
>
> The term "mental disease or defect" identifies a legal standard that may not exactly match the medical terms used by mental health professionals. You are not bound by medical labels, definitions, or conclusions as to what is or is not a mental disease or defect to which the witnesses may have referred.
>
> You should not find that a person is suffering from a mental disease or defect merely because the person committed a criminal act, or because of the unnaturalness or enormity of the act, or because a motive for the act may be lacking.

Wis. J.I. – Criminal: No. 605, at 2.

Historically, the supreme court had previously announced that the question is "not a definition of mental illness or medical insanity." ***State v. Esser***, 16 Wis. 2d 567, 586, 115 N.W.2d 505 (1962). *Accord*, ***State v. Werlein***, 136 Wis. 2d 445, 453-54, 401 N.W.2d 848 (1987). *Cf. also* ***Simecek v. State***, 243 Wis. 439, 447, 10 N.W.2d 161 (1943)("One may be medically insane and yet be criminally responsible for his acts.").

Instead, the matter is a "policy question," ***Gibson v. State***, 55 Wis. 2d 110, 116, 197 N.W.2d 813 (1972), or a "moral issue," ***Brook v. State***, 21 Wis. 2d 32, 47, 123 N.W.2d 535 (1963), ***State v. Esser***, *supra*, at 609 (Currie, J., dissenting in part), as to whether "society cannot, in good conscience, hold [the accused] responsible for the conduct as a crime." ***State v. Shoffner***, 31 Wis. 2d 413, 419, 143 N.W.2d 458 (1966); ***State v. Esser***, *supra*, at 585.

Thus, even a mental condition which may be medically considered to be physical, rather than mental, in origin, can be legally classified as a "mental disease or defect" for purposes of determining criminal responsibility if it "affects the mental processes of the person afflicted." ***Sprague v. State***, 52 Wis. 2d 89, 100, 187 N.W.2d 784 (1971)(psycho-motor epilepsy).

Further, the supreme court has said that the jury will be best able to perform its function in dealing with this perplexing question if it is given all of the available information, "even if such information does not fit nicely into the definition which the law has codified." ***State v. Esser***, *supra*, at 593. Conflicts between medical disorders and legal requirements are to be reconciled by the citizens selected for jury duty, ***State v. Werlein***, 136 Wis. 2d 445, 454, 401

N.W.2d 848 (1987), and juries should have "some latitude" in doing so. ***Brook v. State***, 21 Wis. 2d 32, 47, 123 N.W.2d 535 (1963).

In general, the circuit court is granted wide discretion to instruct the jury based on the facts of a case. ***State v. Ferguson***, 2009 WI 50, ¶ 9, 317 Wis. 2d 586, 598, 767 N.W.2d 187; ***State v. Hubbard***, 2008 WI 92, ¶¶ 22, 29, 313 Wis. 2d 1, 12, 14-15, 752 N.W.2d 839.

The court must exercise its discretion so as to fully and fairly inform the jury of the applicable rules of law. ***State v. Ferguson***, 2009 WI 50, ¶ 9, 317 Wis. 2d 586, 598, 767 N.W.2d 187; ***State v. Hubbard***, 2008 WI 92, ¶ 26, 313 Wis. 2d 1, 13, 752 N.W.2d 839. Proper jury instruction is a crucial component of the fact-finding process. ***State v. Perkins***, 2001 WI 46, ¶ 40, 243 Wis. 2d 141, 164, 626 N.W.2d 762; ***State v. Howard***, 211 Wis. 2d 269, 290, 564 N.W.2d 763 (1997). The validity of the jury's verdict depends on the correctness and completeness of the instructions. ***State v. Fonte***, 2005 WI 77, ¶ 15, 281 Wis. 2d 654, 666, 698 N.W.2d 594; ***State v. Perkins***, *supra*.

A court errs if it gives an instruction that is not an accurate statement of the applicable law, ***State v. Ferguson***, 2009 WI 50, ¶ 9, 317 Wis. 2d 586, 598, 767 N.W.2d 187, or if it fails to give an instruction on an issue that is properly raised by the evidence. ***State v. Head***, 2002 WI 99, ¶ 44, 255 Wis. 2d 194, 219, 648 N.W.2d 413.

An instructional error is prejudicial unless it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. ***State v. Harvey***, 2002 WI 93, ¶ 46, 254 Wis. 2d 442, 465-66, 647 N.W.2d 189.

On appeal, the question whether the jury instructions fully and correctly informed the jury of the applicable law, including the meaning of any statutory terms, is a question of law that is reviewed independently. ***State v. Ferguson***, 2009 WI 50, ¶ 9, 317 Wis. 2d 586, 598, 767 N.W.2d 187; ***State v. Hubbard***, 2008 WI 92, ¶ 22, 313 Wis. 2d 1, 12, 752 N.W.2d 839; ***State v. Lesik***, 2010 WI App 12, ¶ 6, 322 Wis. 2d 753, 759-60, 780 N.W.2d 210. The question whether there are sufficient facts in evidence to allow the giving of a jury instruction is reviewed independently. ***State v. Head***, 2002 WI 99, ¶ 44, 255 Wis. 2d 194, 219, 648 N.W.2d 413; ***State v. Gomaz***, 141 Wis. 2d 302, 307, 414 N.W.2d 626 (1987). The question whether a jury instruction error is prejudicial and requires a new trial is also reviewed independently. ***State v. Ferguson***, 2009 WI 50, ¶ 9, 317 Wis. 2d 586, 598, 767 N.W.2d 187.

B. The jury instructions failed to distinguish between the lawful use of prescribed medicine and the use of illegal drugs, and failed to distinguish between the reasonable consumption of alcohol and the excessive consumption of alcohol in combination with prescribed medicine.

At first impression, the trial evidence in this case might plausibly be characterized as raising an issue of "intoxication" by the use of prescribed medicine.[7] *Cf.*

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[7] Wis. Stat. § 939.42 provides as follows:

"**939.42 Intoxication.** An intoxicated or a drugged condition of the actor is a defense only if such condition:

(1) Is involuntarily produced and renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time that the act is committed; or

Robinson, ***Criminal Law Defenses***, § 176(d) (West Publishing Co., 1984)("Intoxication may be defined broadly as 'a disturbance of mental or physical capacities resulting from introduction of substances into the body.' It is not limited to instances of alcohol ingestion. The substances may range from alcohol or narcotics to prescribed medicine."); ***Loveday v. State***, 74 Wis. 2d 503, 509, 247 N.W.2d 116 (1976)(". . .the defense of intoxication is equated with the defense of drugged condition.").

However, Anderson emphasizes that the legal issue on appeal relates to the "mental responsibility" defense under Wis. Stat. § 971.15, rather than the intoxication defense under Wis. Stat. § 939.42. The two defenses share certain legal similarities and might, sometimes, be proven by similar facts, but the defenses are not co-terminous. ***People v. Garcia***, 113 P. 3d 775, 777,782-83 (Colo. Sup. Ct. 2005); ***Barrett v. State***, 2 So. 3d 370, 371 (Fla. Ct. App. 2008).

Anderson contends that the circuit court's decision to incorporate the optional statement from ***Wis. J.I. – Criminal: No. 605***, "[a] temporary mental state which is brought into existence by the voluntary taking of drugs or alcohol does not constitute a mental defect" (App. 123; 49:14; 93:139), was fundamentally erroneous under the particular facts at bar.

This is so notwithstanding the fact that a jury instruction which utilized similar language has previously been affirmed as "not erroneous" in a case that presented different circumstances. ***State v. Kolisnitschenko***, 84 Wis. 2d 492, 495, 503, 267 N.W.2d 321 (1978)(the instruction provided, in relevant part, that "[a] mental disease which is the product of a voluntarily induced state of intoxication by

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(2) Negatives the existence of a state of mind essential to the crime, except as provided in s. 939.24(3)."

drugs or alcohol or both does not constitute a mental disease which is recognized as a defense by the law."). *See also* ***Loveday v. State***, 74 Wis. 2d 503, 509, 247 N.W.2d 116 (1976)("the defense of intoxication is equated with the defense of a drugged condition. . . .no matter how irresistible the compulsion may be."); ***Gibson v. State***, 55 Wis. 2d 110, 116, 197 N.W.2d 813 (1972)("We do not consider that a voluntarily drugged condition is a form or insanity which under the American Law Institute test of insanity can constitute a mental defect or disease.").

There are multiple reasons why the optional jury instruction language was not properly applicable in this case.

First, the decision in ***Kolisnitschenko*** did not establish a bright-line rule to be applied in every case involving some use of any drugs and some consumption of alcohol by the accused. Instead, the supreme court expressed its approval of a legal course that does not "adopt [a] broad rule applicable to all cases" but instead favors a "case-by-case" determination. ***State v. Kolisnitschenko***, 84 Wis. 2d 492, 500, 267 N.W.2d 321 (1978). The high court further announced that its ultimate ruling rested on "the facts of this case." ***Id***., at 503.

This interpretation of Wisconsin insanity law has been reaffirmed at least twice, thereafter. ***State v. Repp***, 122 Wis. 2d 246, 260, 362 N.W.2d 415 (1985)("the court found that under the circumstances of *Kolisnitschenko*, ..."); ***State v. Werlein***, 136 Wis. 2d 445, 453, 401 N.W.2d 848 (Ct. App. 1987)("In enacting sec. 971.15, the legislature. . .permitted a case-by-case determination to be made as to whether a specific disorder rose to the level of a mental disease or defect.").

Second, the lawful use of prescribed medicine is qualitatively different than the use of illegal drugs. *Compare*

City of Minneapolis v. Altimus, 238 N.W.2d 851, 854, 856-58 (Minn. 1976)(prescription medicine Valium), *and* ***Sluyter v. State***, 941 So. 2d 1178, 1180-81 (Fla. Ct. App. 2006)(prescription medicine Halotestin), *with* ***State v. Kolisnitschenko***, 84 Wis. 2d 492, 494, 267 N.W.2d 321 (1973)(amphetamine tablets and marijuana), *and* ***Gibson v. State***, 55 Wis. 2d 110, 112, 197 N.W.2d 813 (1972)(amphetamine capsules).

One of the basic differences between prescribed medicine and illegal drugs is that the lawful use of prescribed medicine does not raise any moral objection which could tilt the good conscience of society against an individual. ***Brook v. State***, 21 Wis. 2d 32, 47, 123 N.W.2d 535 (1963)("the insanity defense presents a moral issue to juries"); ***State v. Esser***, 16 Wis. 2d 567, 585, 115 N.W.2d 505 (1962)("When a mentally ill person engages in offensive conduct made punishable by law, society is faced with the question whether . . .[it] cannot, in good conscience, hold him responsible for the conduct as a crime, *i.e*. punish him.").

More importantly, the lawful use of prescribed medicine is simply not "voluntary" in the same sense as the use of illegal drugs. *See* ***State v. Gardner***, 230 Wis. 2d 32, 41, 601 N.W.2d 670 (Ct. App. 1999). When faced with a medical condition requiring drug treatment, the patient hardly has a choice but to follow the doctor's orders. ***Id.*** Indeed, intoxication or unfavorable side effects resulting from a patient's compliance with a physician's prescription should not be deemed voluntary even if the patient was aware of potential adverse side effects. ***Id.***

Therefore, the optional jury instruction language was misleading and erroneous because it left the jury free to conclude that Anderson's lawful use of prescribed Strattera

medicine was equivalent to "the voluntary taking of drugs," which could not constitute a mental defect.

Third, a person's mere voluntary use of some alcohol, even in conjunction with the use of prescribed medicine, does not necessarily cause a state of "intoxication." It is only unreasonable and excessive drinking which might result in the unavailability of an otherwise-meritorious mental responsibility defense. *See* ***State v. Kolisnitschenko***, 84 Wis. 2d 492, 494, 498-99 at n. 4, 267 N.W.2d 321 (1978)(Kolisnitschenko had consumed beer, Champale and 10 mixed drinks in addition to illegal drugs); ***Loveday v. State***, 74 Wis. 2d 503, 506, 247 N.W.2d 116 (1976)(Loveday told that police that he had consumed a large amount of beer and wine in addition to illegal drugs). After all, it is neither unlawful nor immoral for a person who is 21 years or more of age to consume a moderate amount of alcoholic beverages. Wis. Stat. § 125.02(8m), (20m).

For example, if a person voluntarily drank only a small amount of wine during religious communion ceremonies at church and then committed a criminal act pursuant to a mental disease or defect, it would be unreasonable for society to say in good conscience that the mental responsibility defense was morally unavailable to that person.

In this case, one reasonable (but disputed) interpretation of the trial evidence was that Anderson had only drunk "a few" beers (74:Exhibit 30:12-13) and he did not appear to be under the influence of intoxicants to an experienced police officer shortly before the fatal episode. (93:42-43). Under this factual view, Anderson's voluntary consumption of some alcohol may have played a minor role in producing a mental defect, as Dr. Johnston concluded

(App. 130; 74:Exhibit 40:6; 92:161-62), but his moderate consumption could not reasonably be described as immoral.

Therefore, the submission of the optional jury instruction language, "the voluntary taking of. . .alcohol does not constitute a mental defect," was misleading and erroneous because it left the jury free to conclude that Anderson's use of any alcohol, at all, was sufficient to defeat his mental responsibility defense.

Fourth, even if a person's voluntary use of alcohol in combination with prescribed medicine does produce a state of intoxication, a moral objection is not reasonably raised in good conscience against the person's lack of mental responsibility unless he or she knew or had reason to know about the synergistic effect of the substances.[8] *E.g.*, ***People v. Hari***, 843 N.E.2d 349, 359-60 (Ill. Sup. Ct. 2006).

In this case, Anderson's patient records at the Crossroads Counseling Center support a reasonable inference that Dr. Hann had not warned him about any potential side effects of the Strattera medication, either alone or in combination with alcohol. (74:Exhibit 34:11; Exhibit 36:22). The ShopKo pharmacy records that were associated with the filling of Anderson's prescription on July 19, 2008, cautioned only that the use of alcohol with Strattera medicine could

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[8] The court of appeals' suggested dictum to the contrary, ***State v. Gardner***, 230 Wis. 2d 32, 42, 601 N.W.2d 670 (Ct. App. 1999), is unconvincing because it reflects undeveloped legal analysis. The court of appeals is not bound by its own dictum in previous cases. *Compare* ***State v. Harvey***, 2006 WI App 26, ¶ 19, 289 Wis. 2d 222, 237, 710 N.W.2d 482 (court of appeals' dictum may be disregarded), *with* ***Zarder v. Acuity***, 2010 WI 35, ¶¶ 57-58, 324 Wis. 2d 325, 350, 782 N.W.2d 682 (court of appeals may not disregard supreme court's dictum).

increase possible aftereffects of "dizziness, drowsiness, lightheadedness or fainting." (74:Exhibit 35:5). Consequently, the jury had no rational basis in the evidence to find that Anderson was on fair notice that his use of alcohol with Strattera medicine could actually intensify his emotions toward suicidal or homicidal acts.[9]

On the other hand, Anderson's statement to police detectives at the hospital that his Strattera medicine "made me real edgy" (74:Exhibit 30:12, 17-18) related only to the medicine, itself, and made no reference to alcohol. Such limited awareness about a prescription medicine's adverse side effects does not affect Anderson's legal defense. ***State v. Gardner***, 230 Wis. 2d 32, 41, 601 N.W.2d 670 (Ct. App. 1999).

Fifth, under one reasonable (but disputed) view of the trial evidence, the primary factor which contributed to Anderson's mental defect at the time of the incident was the prescribed Strattera medicine, not his voluntary ingestion of alcohol, even if the alcohol had been consumed excessively to a state of intoxication. *Compare* ***State v. Kolisnitschenko***, 84 Wis. 2d 492, 502, 267 N.W.2d 321 (1978)("the evidence clearly demonstrates that intoxication [by use of illegal drugs and excessive alcohol] was a significant precipitating factor, thus distinguishing the situation from that. . .where the testimony was that intoxication was one possible precipitating factor among various possibilities."), *with* ***State v. Maik***, 287 A. 2d 715, 722 (N.J. Sup. Ct. 1972), *overruled in part on other grounds in* ***State v. Krol***, 344 A. 2d 305 (N.J. 1975), ***Sluyter v. State***, 941 So. 2d 1178, 1181 (Fla. Ct. App.

[9] The circuit court erroneously speculated that Anderson's voluntary consumption of alcohol "might exacerbate" the effects of the Strattera medicine. (App. 116; 93:123).

2006)("because the drugs ingested here were prescription drugs prescribed by a physician and because Halotestin, not alcohol, caused the intoxication, Sluyter's intoxication must be considered involuntary."), *and* ***People v. Caulley***, 494 N.W.2d 853, 860 (Mich. Ct. App. 1992)("it is for the jury to decide, based upon the evidence. . . what effect, if any, the intoxication [by use of prescription medicine Halcion] had upon defendant's mental condition.").

Thus, Dr. Johnston testified that the Strattera medicine played "a very important role" in changing Anderson's brain, and that it was "highly unlikely" that Stacey would have been killed if the Strattera medicine had not been involved. (92:165-66). On the other hand, Dr. Johnston referred to Anderson's ingestion of alcohol as but one of three minor factors in the result, together with Anderson's impaired "ability to exert self-control. . .throughout his adult life" and his "second episode of major depressive disorder which was not appropriately treated." (App. 130; 74:Exhibit 40:6; 92:161-62).

Additionally, under one reasonable (but disputed) view of the trial evidence, Anderson's mental defect did not exist only during the time period corresponding to his voluntary consumption of alcohol. *Compare* ***State v. Kolisnitschenko***, 84 Wis. 2d 492, 501, 503, 267 N.W.2d 321 (1978)("Kolisnitschenko was psychotic only during the period of intoxication. There was no evidence that Kolisnitschenko's mental disease existed before consuming the intoxicants or persisted after the effects of the intoxicants had worn off. * * * Under these circumstances, we are not willing to hold in this case that a temporary psychotic state which lasts only for the period of intoxication and which is brought into existence by the interaction of a stormy

personality and voluntary intoxication constitutes a mental disease which is a defense to the crime charged.").

On the morning of August 8, 2008, more than 12 hours before Anderson drank beer at a tavern and then committed the criminal acts, his text messages to Stacey displayed a high degree of aggressiveness and hostility. One message said that "Im with someone and I don't need ur shit [*sic*]," and other messages told her that he had been engaging in sexual intercourse with other women because Stacey was "a dead fuck." (74:Exhibit 32; 90:80-86).

After the incident, Anderson was so combative at the first hospital he was transported to that several police officers were required to control him. (App. 128; 74:Exhibit 40:4).

The point is that a person's use of alcohol may sometimes trigger a mental defect, or it may aggravate a mental defect, or it may just be an effect of the mental defect, or it may be entirely irrelevant to the mental defect. As a matter of social conscience, it would be unreasonable to presume that even the excessive consumption of alcohol is necessarily immoral and controlling over the mental defect.

Therefore, the optional jury instruction language was misleading and erroneous because it left the jury free to conclude that one of the minor factors that contributed to Anderson's mental defect, namely his voluntary consumption of alcohol, necessarily outweighed the major causal factor, the Strattera medicine.

The errors in the optional jury instruction language were unquestionably prejudicial. The jury might reasonably have believed Dr. Johnston's expert testimony, but nevertheless concluded from the jury instructions that Anderson's voluntary use of Strattera medicine and his

voluntary consumption of some alcohol prevented a finding that Anderson had the requisite "mental defect."

For all of these reasons, the jury instructions were erroneous as a matter of law, and a new trial should be granted on the issue of mental responsibility. ***State v. Koput***, 142 Wis. 2d 370, 374, 398, 418 N.W.2d 894 (1988)(a reversible error in the mental responsibility phase of trial requires a retrial only on the responsibility issue).

II. In the Alternative, the Real Controversy Was Not Fully Tried and a New Trial Should Be Granted in the Interests of Justice Because the Jury Instructions Were Confusing and Misleading Concerning Anderson's Use of Alcohol.

Anderson respectfully believes that his trial counsel's timely objection to the submission of the fourth optional statement in ***Wis. J.I. – Criminal: No. 605*** during the jury instructions conference at trial was sufficient to preserve all of his arguments for appeal. *Cf.* ***State v. Weber***, 164 Wis. 2d 788, 789, 476 N.W.2d 867 (1991)(the legal issue on review is narrower than all of the arguments that may be made, pro and con, in the disposition of that issue).

Anderson's defense at the trial rested upon expert testimony that Anderson's prescribed medicine, Strattera, had been the primary cause of his mental defect during the criminal acts, acting together with three other less significant factors, including alcohol ingestion. (App. 130; 74:Exhibit 40:6; 92:161-62). Anderson's trial counsel expressly objected to the optional jury instruction language which equated his prescribed medicine with illegal drugs (App. 109-15; 93:116-22), and the circuit court told Anderson's trial counsel that his position was not waived. (App. 116; 93:123). At the post-conviction hearing, the district attorney and the circuit court

both voiced the view that the only relevant issue now is whether the ultimate jury instructions are correct. (95:21-25). Finally, all of Anderson's appellate arguments turn upon the factual significance of his prescribed medicine, including his arguments about the voluntary consumption of alcohol. See *Part I-B*, above.

Nevertheless, Anderson recognizes that the appellate courts might not necessarily agree that his arguments relating to voluntary alcohol consumption were sufficiently preserved for appeal. Anderson also believes that a claim of "ineffective assistance of counsel" would be inappropriate because reasonable, prudent trial counsel was entitled to rely on the circuit court's statement that his legal position was preserved.

Accordingly, Anderson also asserts, in the alternative, that the real controversy was not fully tried because the optional jury instruction language relating to his voluntary consumption of alcohol was confusing and misleading.

The Court of Appeals is vested with broad discretionary power to grant a new trial in order to achieve justice in individual cases. Wis. Stat. § 752.35; ***Vollmer v. Luety***, 156 Wis. 2d 1, 19-20, 456 N.W.2d 797 (1990). The power of discretionary reversal may be exercised where it appears from the record that the real controversy has not been fully tried, or if it is probable that justice has miscarried for any reason. Wis. Stat. § 752.35. If the real controversy was not fully tried, then the court may grant a new trial without finding that a different result would probably occur on re-trial. ***Id.*** This authority may also be invoked without determining that counsel performed deficiently. ***State v. Hicks***, 202 Wis. 2d 150, 152-53, 157-59, 549 N.W.2d 435 (1996); ***State v. Williams***, 2006 WI App 212, ¶ 17, 296 Wis. 2d 834, 847, 723 N.W.2d 719.

In support of this alternative claim, Anderson respectfully renews and incorporates by reference the same legal arguments that are presented in *Part I-B*, above, concerning the optional jury instruction language and Anderson's voluntary consumption of alcohol.

CONCLUSION

For the reasons set forth above, Anderson requests the Court of Appeals to enter an order vacating the judgment of conviction and remanding to the trial court for a new trial on the issue of mental responsibility.

Dated this 8th day of November, 2011.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 7,869 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

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

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 8th day of November, 2011.

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APPENDIX

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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

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

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