STATE OF WISCONSIN

IN SUPREME COURT

Case Nos. 2011AP001770-CR & 2011AP001771-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

BRANDON M. MELTON

Defendant-Appellant.

RESPONSE BRIEF OF DEFENDANT-APPELLANT BRANDON M. MELTON

ON APPEAL FROM A DECISION OF THE COURT OF APPEALS REVERSING AN ORDER ENTERED IN CIRCUIT COURT, WAUKESHA COUNTY, THE HONORABLE MARK D. GUNDRUM PRESIDING

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QUESTION PRESENTED

The State asserts that the question presented is: Where the circuit court ordered the preparation of a second PSI report, did the circuit court have the inherent authority to destroy the first PSI report after judgment was entered in the case? (Pet. Brief at 1).

While Melton agrees with the State's recitation of the trial court and court of appeals' decisions, he respectfully disagrees with the question presented by the State and

submits that the issue is whether the circuit court has the inherent authority, prior to sentencing, to order a new PSI report to be prepared and order the destruction of the erroneous PSI report after the appellate time limits have expired?

Melton maintains that this court should affirm the decision of the court of appeals.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Melton agrees with the State that publication is appropriate, but believes the briefs fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost to the litigants.

SUPPLEMENTAL STATEMENT OF THE CASE

Any response to the factual issues presented by plaintiff-respondent-petitioner‘s brief will be set out in the argument section.

ARGUMENT

I. UNDER THE DOCTRINE OF JUDICIAL ESTOPPEL, THE STATE SHOULD BE ESTOPPED FROM ARGUING THAT THE PSI REPORT MUST NOT BE DESTROYED AFTER SENTENCING.

Because the State agreed with Melton's motion to destroy the "wrong" PSI report, and specifically requested that the PSI be retained in the file until the appellate time limits expired, the State should be judicially estopped from now arguing that the circuit court lacks authority to destroy the PSI after the original sentencing.

Judicial estoppel is aimed at preventing a party from manipulating the courts by asserting one position in judicial proceedings and then asserting an inconsistent position. *State v. Miller*, 2004 WI App 117, ¶ 31, 274 Wis. 2d 471, 683 N.W.2d 485; *see also State v. English-Lancaster*, 2002 WI App 74, ¶¶ 18-19, 252 Wis. 2d 388, 642 N.W.2d 627 (judicial estoppel is an equitable rule applied at the discretion of the court to prevent a party from adopting inconsistent positions in legal proceedings). A party will be judicially estopped from asserting a position when: 1) that position is clearly inconsistent with a previous position; 2)

the facts and issues are the same; and 3) the party convinced the court to adopt its previous position. *State v. White*, 2008 WI App 96, ¶ 15, 312 Wis. 2d 799, 754 N.W.2d 214. Whether these elements are met is a question of law. *Miller*, 274 Wis. 2d at 492.

All of the requirements for judicial estoppel are present here. First, the State's contention that the circuit court does not have the authority to destroy a PSI after sentencing is clearly inconsistent with the position the State took at the motion hearing. When deciding to destroy the PSI following the passing of the appellate time limits, the following exchange occurred:

> Mr. Keane [Counsel for Defendant]: I would ask that the P.S.I.s be stricken and destroyed. If it's sealed in the file, it's going to become available at some point. I think the thing should be redone – that's the Court's position – without reference to this event.
>
> The Court: Do I have authority to ask Mr. Centinario to return his existing one to me, or is that a moot point because that would not be going on and be available to the Department of Corrections?
>
> Mr. Centinario [The State]: Your Honor, just to insure that the Defendant is not prejudiced in any way, I am voluntarily returning the P.S.I. to the Court.
>
> The Court: That would be appreciated. Then Mr. Keane, would you do the same thing?
>
> Mr. Keane: I'll do the same.
>
> The Court: And then, Mr. Centinario –

> Mr. Keane: Can I keep it just so I can make reference to the appropriate paragraphs in my order?
>
> The Court: Yes, you may.
>
> Mr. Keane: I will return the copy next time we're in court or however the Court wishes me to do that.
>
> The Court: Mr. Centinario, do we need anything to protect your appellate rights on this issue because we could seal it and have it destroyed later?
>
> Mr. Centinario: I would ask that you do that, Judge, until this matter's appeal time has run out.
>
> The Court: I don't wish to jeopardize –
>
> Mr. Centinario: I appreciate that.
>
> The Court: All right. We'll turn those all in. They will be resealed, not to be open without permission of the Court, and then, Mr. Keane, I will leave it up to you to make the appropriate motion at the appropriate time when the appeal order – the appeal rights have been or the State's appeal rights have expired to make a motion to have these destroyed.

(49:14-16; Pet.-AP. 125-27).[1]

Second, the facts and issues on appeal are the same as they were at the time of the motion hearing; neither the facts nor the law governing PSI's has changed since the State requested that the circuit court delay the destruction of the PSI until after the appellate time limits had expired.

Third, the State convinced the court to adopt their position (49:15; Pet.-AP. 126). Originally, Melton requested that the PSI be "stricken and destroyed." (49:14;

[1] References in the record in this consolidated appeal of Nos. 2011AP1770 and 2011AP1771 are to the file in No. 2011AP1770.

Pet.-Ap. 125). The court then inquired as to preserving any of the State's appellate rights; the State then requested that the PSI be sealed and destroyed after "this matter's appeal time has run out." (49:15; Pet.-Ap. 126). Clearly, the State's request convinced the trial court to wait to destroy the PSI until the appeal time had run out. Because all three requirements of judicial estoppel are present, this court should find that the State is judicially estopped from now arguing that the court lacks the authority to destroy the PSI report. This kind of "fast and loose" game-playing is exactly what judicial estoppel is designed to prevent. *English-Lancaster*, 252 Wis. 2d at 398.

II. THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE CIRCUIT COURT HAS THE INHERENT AUTHORITY TO DESTROY THE 'WRONG' PSI REPORT.

One of the circuit court's necessary powers involves ensuring that "true and correct information" is presented at sentencing. *State v. Anderson*, 222 Wis. 2d 403, 408, 588 N.W.2d 75 (Ct. App. 1998). Since the purpose of the PSI is to assist the circuit court at sentencing, it is only logical that the circuit court would have the authority to strike or entirely destroy incorrect information in a PSI report. *See*

Wis. Admin Code § DOC 328.27(1). In Melton's case the circuit court appropriately exercised their authority. The court of appeals agreed that destroying the PSI report to prevent confusion as to which PSI report to use at sentencing is within the inherent authority of the circuit court. *State v. Melton*, 2012 WI App 95, ¶22, 343 Wis. 2d 784, 820 N.W.2d 487 (Pet-Ap. 110). Melton agrees, and the arguments of the State fail for the reasons stated below.

A. Destruction of the PSI Report Would Not Conflict With This Court's Rules Pertaining to the Retention and Destruction of Court Documents After Entry of Judgment.

In its brief, the State asserts that its main argument against the first PSI report being destroyed is that if the circuit court had the inherent power to destroy the 'wrong' PSI report that "power would conflict with this court's mandate on all state courts in SCR 72.01 that 'all papers' be retained in felony case files for at least '50 years after entry of final judgment' SCR 72.01(15)." (Pet. Brief at 23). The court of appeals rejected this argument as does Melton.

The State's argument that the destruction of the PSI is prevented by SCR 72.01 contradicts its earlier argument

to the court of appeals that the PSI can be destroyed prior to sentencing. (*See* Pet. court of appeals brief at 8-9). In fact by this argument, the State already has conceded that under Wisconsin case law interpreting Wis. Stat. § 972.15 (2009-10)[2] that a court does have the authority to "destroy" a PSI to bar its use at sentencing. (Pet. court of appeals brief at 8-9). With this Melton agrees; the destruction of erroneous portions of a PSI report implicates a defendant's due process right to be sentenced on the basis of "true and correct" information. *See Bruneau v. State*, 77 Wis. 2d 166, 174-75, 252 N.W.2d 347, 351 (1977). In fact, a court may "strike" an entire PSI within its discretion to bar its use at sentencing. *See State v. Suchocki*, 208 Wis. 2d 509, 520, 561 N.W.2d 332 (Ct. App. 1997) (the court found that the circuit court erred in failing to strike the PSI report).

Further, the State argues that Judge Congdon's order directing the destruction of the PSI prior to sentencing was contrary to SCR 72.01(15). As stated above, this is clearly not the situation and the circuit court is permitted to strike a PSI to prevent its use at sentencing. It is undisputed that

[2] All references to the Wisconsin Statutes are to the 2009-10 version.

Judge Congdon ordered the destruction of the PSI to prevent any confusion over which PSI in the court file was the correct one, and that his decision was made before Melton was sentenced.

Also, in its argument the State confuses expunction with the circuit court's ability to strike a PSI report. (Pet. Brief at 24-25). The state details the rules for the expunction of court records, but Melton has never asked for expunction. Melton requested that he be sentenced on true and correct information, and Judge Congdon agreed.[3] The State uses a great deal of prose to describe the importance of record retention. As to the destruction of documents, the State writes, "[i]t prevents the public from assessing the performance of judges, prosecutors, and public defenders, and is subject to abuse by public officers seeking to hide their own misconduct or that of friends and associates. (Pet. Brief at 25). The reverse is true here; the PSI writer exceeded the scope of his authority when preparing the PSI. Rather than let Melton be punished by the PSI writer's mistake, Judge Congdon ordered the destruction of the

[3] The district attorney also agreed and stipulated to the destruction of their copy of the stricken PSI report. (49:9, 15; Pet.-Ap. 120, 126).

"wrong" PSI. In this case, there would be no abuse in the destruction of the first PSI, as the corrected PSI remains for any authorized official to review. On the contrary, it is *abuse* to not destroy erroneous documents that have been corrected and replaced; to leave them in the court file will cause the harm the State seems so intent on preventing.

Therefore, the circuit court has the authority to order the destruction of a PSI. Even so, the new PSI will be retained in the court file pursuant to SCR 72.01.

B. The Circuit Court Has the Inherent Authority to Order the Destruction of the "Wrong" PSI Report.

As recognized by the court of appeals, there are three areas where courts have exercised their inherent authority: "'(1) to guard against actions that would impair the powers or efficacy of the courts or judicial system; (2) to regulate the bench and bar; and (3) to ensure the efficient and effective functioning of the court, and to fairly administer justice.'" *State v. Melton*, 2012 WI App 95, ¶13; *quoting State v. Henley*, 2010 WI 97, ¶73, 328 Wis. 2d 544, 787 N.W.2d 350 (citation omitted).

It has long been said that "[t]he general control of the judicial business before it is essential to the court if it is to function. 'Every court has inherent power, exercisable in its sound discretion, consistent within the Constitution and statutes, to control disposition of causes on its docket with economy of time and effort.'" *Latham v. Casey & King Corp.*, 23 Wis. 2d 311, 314-15, 127 N.W.2d 225 (1964) (internal citations omitted). This principle holds true today as this court restated in *Henley*, "A power is inherent when it 'is one without which a court cannot properly function.'" *Henley*, 328 Wis. 2d 544, ¶ 73 (internal citation omitted).

The State argues that there are three invalid justifications in support of the claim that the power to destroy the PSI report is necessary to the circuit court's existence and orderly functioning. (Pet. Brief at 27). These will be discussed in order below.

1. The PSI Statute Does Not Deny The Circuit Court The Power to Destroy The Erroneous PSI Report.

While there is no statutory language granting the Court the authority to destroy a PSI report, there is also no statutory language in Wis. Stats. § 972.15 prohibiting the

circuit court from exercising its inherent authority to strike or destroy an entire PSI report. *See Suchocki*, 208 Wis. 2d at 520. In fact, one of the purposes of Wis. Stats. § 972.15, is to prevent public disclosure of the information in a PSI, both to protect informants and the defendant, and to encourage the defendant and other sources to cooperate candidly in providing information. *State v. Comstock*, 168 Wis. 2d 915, 924-925, 485 N.W.2d 354, 356-57 (1992). In its brief the State acknowledges Melton's position, that destroying the PSI Report would accomplish the statute's purpose of keeping the PSI report confidential, thus preventing the disclosure of sensitive information to the public. (Pet. Brief at 27).

The State argues that "§ 972.15(4) also envisions preservation of the PSI report…" (Pet. Brief at 27). The State is correct that Wis. Stats. §§ 972.15(4), (5) and (6), provide for other individuals to have access to and use the PSI report. However, the statute envisions the use of an accurate, properly prepared PSI report, and not a defective report that the circuit court has ordered stricken and destroyed.

The State maintains that sealing the report achieves the goal of keeping the PSI confidential. (Pet. Brief at 28). The State goes on to argue that destroying the PSI report would prevent other parties authorized under Wis. Stat. § 972.15 from ever accessing the PSI report. (Pet. Brief at 28). To this Melton asks: who would ever seek or receive authorization to view the "wrong" PSI report? To answer this rhetorical question, nobody. Not even the State has filed the requisite motion required to cite the "wrong" PSI report in its briefs.[4]

The State is naïve in believing that simply sealing the PSI will keep it confidential. The court of appeals correctly recognizes this stating that the "existence of two PSI reports in a file presents an opportunity for confusion and injustice. Even if clearly labeled, the possibility exists that at resentencing the 'wrong' PSI report would be used." *Melton*, 343 Wis. 2d at ¶23; (Pet-Ap. 110).

Further, the State never addresses what purpose is accomplished by keeping the "wrong" PSI report in the

[4] "The State did not file a motion in the circuit court to cite the first PSI report in its court of appeals' brief, and has not filed such a motion for purposes of this brief. *See State v. Parent*, 2006 WI 132, ¶ 49, 298 Wis. 2d 63, 725 N.W.2d 915." (Pet. Brief at 3 n.2).

court file when a valid PSI report remains intact. Simply put, there is no logical reason to keep the first PSI report in the file. The first report is the equivalent of a rough draft that deserves to be tossed in the trash. Having the second, valid, PSI report in the court file is what accomplishes the goal of keeping the PSI confidential and available to the DOC and other parties when authorized by the court. *See* Wis. Stat. § 972.15(4), (5) and (6).

2. The Power to Destroy an Erroneous PSI Report Is Essential to the Court's Existence and Functioning.

The State argues that the circuit court lacks the inherent authority to destroy the PSI report for three reasons: "(1) The DOC and these other parties have the statutory right to access and use the PSI report for purposes specified in Wis. Stat. § 972.15; (2) DOC's and other authorized parties' use of the PSI report does not interfere with the court's existence or functioning, and thus courts may alter PSI reports only for purposes related to sentencing; and (3) Melton has never challenged the accuracy of the information contained in the first PSI report." (Pet. Brief at 29). Melton disagrees with the State's reasoning as expounded on below.

First, the State misrepresents Melton's intentions in destroying the original, "wrong", PSI report. They indicate that Melton seeks destruction of the PSI report "…to prevent DOC and other parties who are exempted from the confidentiality requirement by Wis. Stat. §§ 972.15(5) and (6) from accessing and using the report for their own legitimate statutory purposes." (Pet. Brief at 28). Melton has absolutely no reason to block access to authorized use of the PSI report. He simply means to ensure that the "wrong" PSI report is not used in any prejudicial manner. The corrected PSI report will always be available as authorized by Wis. Stat. §§ 972.15(5) and (6), and Melton has not requested the court prevent the use of the corrected report in any authorized manner. Melton actually agrees with the State in that the circuit court lacks the inherent authority to prevent the legitimate use of the corrected PSI report by the DOC and other authorized parties. However, in Melton's case the PSI is not being destroyed and the DOC and other authorized parties will not be denied access to the PSI report. They will simply be denied access to the "wrong" PSI report. Even if the original PSI were not destroyed, the

order of the court would seemingly prevent access to the "wrong" PSI report. Of course, workers at the Department of Corrections often deviate from written instructions. (49:7-9; Pet.-Ap. 118-20). Thus, as long as there are two PSI's in the file there is always the risk of a mix-up.

Second, as to altering the PSI report for purposes related to sentencing, the State has again overlooked the facts in Melton's case. In this case the circuit court already ordered the "wrong" PSI report to be destroyed prior to sentencing, and a new PSI report was prepared. The timing of Melton's request is important, he has not asked for the PSI to be destroyed after sentencing or after the appellate time limits have run. Melton simply requests the destruction of the "wrong" PSI as it was ordered prior to his sentencing hearing. In fact, the State stipulated to the destruction of the "wrong" PSI report, but requested that the circuit court keep it under seal until the time limits on appeal expired. (49:15; Pet.-Ap. 126). The court granted this request, and now the State turns around and argues that because the PSI was not destroyed prior to sentencing, at their request, the circuit court is no longer authorized to destroy the PSI report. As

argued in section I. above, the State should be judicially estopped from now arguing that the circuit court lacks authority to destroy the PSI report after sentencing.

Further, the State relies on *Bush* for its argument that the court should not correct an allegedly inaccurate PSI report for purposes related to DOC administration. *State v. Bush*, 185 Wis. 2d 716, 722-24, 519 N.W.2d 645 (Ct. App. 1994). The State overstates the similarities between *Bush's* request to alter the PSI report for its use with the DOC and Melton's motion to strike the erroneous PSI prior to sentencing. As the court of appeals noted, *Bush* specifically requested modification of the PSI report for the purpose of DOC programing while Melton's request was done for sentencing. *Melton*, 343 Wis. 2d at ¶18; *citing Bush*, 185 Wis. 2d at 720-21. Melton's case is clearly distinguishable in that he is not seeking to correct information in the original PSI report, since the new PSI was already prepared and used at sentencing. The issue here is not whether the court has authority to make changes to the PSI report; *that has already been done*. Thus, Melton never asked the court of appeals to correct the PSI report.

Despite the State's argument to the contrary, the court of appeals explicitly stated in *Bush* that they "were not reaching the issue of whether the court had the inherent authority to [strike the PSI report]." *Melton*, 343 Wis. 2d at ¶18; *citing Bush, 185 Wis. 2d* at 724. Additionally, the court of appeals indicated that *Bush* was decided on "the circuit court's proper exercise of discretion to refuse jurisdiction on public policy grounds." *Melton*, 343 Wis. 2d at ¶18; *citing Bush, 185 Wis. 2d* at 722-23. Therefore, *Bush* is not controlling in Melton's case.

Next the State indicates that the case of *In Interest of E.C.*, 130 Wis. 2d 376, 387 N.W.2d 72 (1986), is instructive in the court's inherent authority analysis. (Pet. Brief at 31). *In Interest of E.C.* is a case dealing with a circuit court ordering the expungement of police records, and is not the same as the circuit court ordering the destruction of a PSI report for sentencing. *Id*. The number one glaring difference between these cases is that police reports, by their very nature, are not in the control of or dictated by the circuit court, while PSI reports are exclusively ordered by

the court. *See* Wis. Stat. § 972.15(1). Therefore, *In Interest of E.C.* is not instructive at all.

The final argument the State makes is that Melton never challenged the accuracy of the excluded information in the first PSI report. (Pet. Brief at 29, 32). As already stated, this is completely incorrect and unsupported by the record.

The State continues to argue that the stricken information should be allowed despite waiving this argument in the circuit court. *See Melton*, 343 Wis. 2d at 5 n.2. Of course, Melton brought a motion challenging the inclusion of the information in the PSI report. (20:1-3). At the hearing trial counsel argued:

> The Court: Okay. Mr. Keane, do you believe that this information would have been appropriate under a different category such as "Sexual Behavior"?
>
> Mr. Keane [Melton's Attorney]: I think "Sexual Behavior" which is in the – which is included in the Department of Corrections, their manual, but is not included in the Administrative Code section which requires what content should be in there, I guess is a question as to whether or not it would fit in there or not. I guess my belief is that if it's –
>
> I guess I have to step back for one second. I have not had – I have asked Ms. Blasius in a letter dated March 5th to provide –
>
> First of all, I asked Mr. Drankiewicz to provide me with this police report that was the basis of these statements, and he says he doesn't have them. He told me he found them in the D.A.'s file. I talked or I sent a letter to Ms. Blasius on March 5th asking for a copy of those documents out of the

> D.A.'s file and haven't received them, so I'm in a position where I don't think it affects this motion so much from my perspective other than I don't know what the basis of Mr. Melton making these statements to the Waukesha Police Department on November 18th was.
>
> I don't know whether he was in custody at that time. It looks like he was because it – the sentence before the paragraph – before – in the presentence indicates that he was charged on November 17th with the other – with a different event, but I don't know whether he was advised of his rights or how this all came about or what the circumstances was that he made these statements, and I think to simply throw these into a presentence report – there's been a competency issue regarding Mr. Melton. The rest of the presentence report talks about his past.
>
> You know, I don't know what was said to him before he made these statements, and I think that under those circumstances, I don't think it should be included anywhere in this report.

(49:10-11; Pet.-Ap. 121-22).

So, it is clear that Melton was still attempting to gather information about what, if any, statements were made, or whether statements were taken out of context in the PSI report. Nowhere did Melton concede that any of the challenged statements were true and correct.

Apparently the State wishes to encourage injustice in our system by letting "the bomb go off," as they put it. (Pet. Brief at 32). While the State's views are wrong on many levels, in this case, the State is arguing a moot point, the DOC and any other authorized party has access to an accurate PSI report that is not in dispute.

3. The Power to Destroy the PSI Report to Prevent "Confusion" and "Misuse" of the "Wrong" PSI Report At Sentencing is a Power Essential to the Court's Existence and Functioning.

The State argues that the court of appeals decision is wrong for two reasons: (1) the fact that the "wrong" PSI was clearly marked in the court file makes it impossible to confuse with the new PSI report; (2) a resentencing court would be allowed to rely on the original, "wrong", PSI report in passing sentence. (Pet. Brief 33-34). The State's reasoning is invariably flawed on all accounts.

First, arguing that having the envelope marked with the "wrong" PSI report in it is an incredibly weak argument, because mistakes are inevitable regardless of how hard we try to prevent them. Having a sealed, marked envelope makes little difference. More importantly, why take the chance that the two sealed envelopes get mixed up, or that the PSI reports get inserted into the wrong sealed envelope? The "wrong" PSI report has no purpose existing in the first place, and it can only cause confusion. The court of appeals agrees when it comes to the circuit court's authority to destroy a PSI report to prevent confusion at sentencing

stating, "[c]ourts exercise inherent authority 'to ensure the efficient and effective functioning of the court, and to fairly administer justice.'" *Melton*, 343 Wis. 2d at ¶22; *citing Henley*, 328 Wis. 2d 544, ¶73.

The State goes on to tell this court that other judges will not mistake the two PSI reports. Maybe this is true in a perfect world. Unfortunately, in real life files are lost, incorrect envelopes are opened by judges or their support staff, and countless other slip-ups occur on a regular basis. The original order of the circuit court was intended to stop such a needless error, and the circuit court properly exercised their inherent authority in doing so.

Second, the State incorrectly argues that the resentencing court could rely on the "wrong" PSI report at sentencing. As argued above, Melton has never conceded that the information in the first PSI report is accurate. Now, for the first time, the State maintains that the second PSI report should not be needed. Of course, that ship has already sailed. The State conceded that the first PSI report

was invalid.[5] Thus, they should be precluded from now arguing that the sentencing court should have considered some unknown information contained in the original PSI report.

Accordingly, the court of appeals was correct in determining that the circuit court had the authority to destroy the "wrong" PSI report to prevent misuse, and that this action was within their inherent powers. *Melton*, 343 Wis. 2d at ¶23; *citing Henley*, 328 Wis. 2d 544, ¶73.

CONCLUSION

As indicated in the above discussion, this court must reject the State's arguments, and affirm the court of appeals' decision.

Dated: January 3, 2013

Respectfully submitted,

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[5] The court of appeals found that the State had forfeited any appeal of the circuit court's order to strike the first PSI report because they failed to object to it at the time it was entered. *See Melton*, 343 Wis. 2d at 5 n.2; *citing State v. Ndina*, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612.

FORM AND LENGTH CERTIFICATION

I hereby certify that this report conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,546 words.

Dated: January 3, 2013

Respectfully submitted,

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

I hereby certify that:

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

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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: January 3, 2013

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