STATE OF WISCONSIN
IN SUPREME COURT

Appellate Case No. 2013AP1531-CR

STATE OF WISCONSIN,

Plaintiff-Appellant

v.

BRIAN S. KEMPAINEN,

Defendant-Respondent-Petitioner

BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT-PETITIONER

ON PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT II, REVERSING AN ORDER DISMISSING TWO CRIMINAL COUNTS ENTERED IN THE CIRCUIT COURT FOR SHEBOYGAN COUNTY, THE HONORABLE TERENCE T. BOURKE, PRESIDING

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Consistent with this Court's practice, oral argument and publication are warranted.

STATEMENT OF THE ISSUES

I. Whether the Court of Appeals erred when it determined that the complaint provided constitutionally sufficient notice of the charges against Kempainen.

The court of appeals reversed the circuit court decision dismissing the complaint. (Ct. App. Op. 1, Appendix 101)

STATEMENT OF FACTS AND CASE

On December 21, 2012, the State filed a complaint charging Kempainen with two counts of Sexual Assault of a Child Under 13 Years of Age, in violation of Wis. Stat. §948.02(1). (R1 at1, Appendix 115). The first count alleged that Kempainen used LRT's hand to touch his penis and performed oral

sex on LRT sometime between August 1, 1997, to December 1, 1997, and the second court alleged that Kempainen fondled LRT's breasts on one occasion sometime between March 1, 2001, to June 15, 2001. Id. At the time of Count 1, LRT was eight years old and at the time of Count 2, LRT was either 11 or 12 years old. Id.

There was some confusion about LRT's age in Count 1. According to the complaint, she reported that she was in approximately second grade and believed to be six or seven years of age when the first alleged incident occurred. (R1 at 2, Appendix at 116). But LRT later told the Sheboygan Police Department Detective Brian Retzer that she believed it was at the beginning of the school year and she was in second grade at a new school. Id.

According to LRT, the second incident took place when she was in sixth grade and it was warm outside (R1 at 2, Appendix at 116).

Prior to trial, Kempainen filed a motion to dismiss the complaint, alleging that it was not sufficiently definite to provide adequate notice of the charges against him. (R11 at 1). Specifically, Kempainen argued that the four-month time span in count one and the three-and-a-half month time span in count two, along with the respective twelve and fifteen year gaps between the alleged incidents and the charges were too indefinite and violating his due process rights. (R11 at 2).

At a motion hearing on May 21, 2013, the circuit court applied the test laid out in in State v. Fawcett, 145 Wis. 2d 244, 253, 426 N.W.2d 91 (Ct. App. 1988). It explained:

> The Court looks at, and again I'm referring now to footnote number two in the Fawcett decision, and they cite Morris at that time. And essentially what footnote two says is that if there is no allegation that the State could have obtained a more definite statement through diligent efforts then there's no need to go into the first three factors and you just skip right to the fourth factor.

> And as I read the motion by Mr. Kempainen, there is no allegation that the State could have obtained a more definite statement through diligent efforts, so I will not consider the first three factors as I will assume that the most definite statement was obtained through diligent efforts.

(R32 at 12, Appendix at 136). The circuit court concluded that based on the remaining four factors, the complaint was not sufficiently definite as to either count and dismissed the case. (R29). The state appealed and the court of appeals reversed, noting, in part:

> To the extent R.A.R. suggests courts may not consider the first three Fawcett factors unless a defendant claims a lack of prosecutorial diligence, we cannot follow it. Such a reading would conflict with our earlier holding in Fawcett and "only the supreme court...has the power to overrule, modify or withdraw language from a published opinion of the court of appeals." Cook v. Cook, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Thus, we must follow Fawcett. (Ct. App. Op. at ¶14, Appendix 108).
>
> The ultimate question is whether the Holesome test has been met. The seven Fawcett factors are tools to assist-not limitations upon-courts in answering this question. A court may consider all of these factors, and others, if it deems them helpful in determining whether the requirements of

Holesome are satisfied. (Ct. App. Op. ¶15, Appendix at 108,109).

ARGUMENT

I. THE COURT OF APPEALS ERRED WHEN IT DETERMINED THAT THE COMPLAINT PROVIDED CONSTITUTIONALLY SUFFICIENT NOTICE OF THE CHARGES AGAINST KEMPAINEN.

The circuit court correctly applied the four factors from Fawcett, as Kempainen did not allege that the State could have obtained a more definite statement through diligent efforts. Accordingly, the circuit court correctly dismissed the complaint.

A. Standard of Review

The criminal complaint is a self-contained charge which must set forth facts that are sufficient, in themselves or together with reasonable inferences to which they give rise, to allow a reasonable person to conclude that a crime was probably committed and that the defendant is probably culpable. State v. Hoffman, 106 Wis. 2d 185, 197, 316 N.W.2d 143,

151 (Ct. App. 1982). The sufficiency of a pleading is a question of law that this court reviews independently. Fawcett, 145 Wis. 2d at 250. Whether a deprivation of a constitutional right has occurred is a question of constitutional fact that also is independently reviewed. Id. Whether a period of time alleged in a complaint and information is too indefinite to allow the defendant to prepare an adequate defense is an issue of constitutional fact that is reviewed independently of the circuit court's determination. Id at 249.

B. Fawcett Identifies Factors that May be Considered in Evaluating the Sufficiency of a Complaint

A criminal charge must be sufficiently stated to allow the defendant to plead and prepare a defense. Blenski v. State, 73 Wis. 2d 685, 695, 245 N.W.2d 906, 912 (1976). It is the Complaint that establishes the subject matter and personal jurisdiction of the trial court. State v. Moats, 156

Wis. 2d at 90, 457 N.W.2d at 306. In contrast, "[o]ne of the essential functions of the Information [and Complaint] is to provide the defendant with sufficient details regarding the nature of the crime and the conduct which underlies the accusation to allow him or her to prepare or conduct a defense." State v. Stark, 162 Wis. 2d 537, 470 N.W.2d 317, 320 (Ct. App. 1991).

Kempainen's due process rights under both the Wisconsin and United States Constitution guarantee the right to be informed of the nature and cause for the accusation so a defendant may prepare a defense. Wis. Con. Art. I §7. U.S. Const. Amend. 6. See also Stark, 162 Wis. 2d at 537; R.A.R., 148 Wis. 2d 317; Fawcett, 145 Wis. 2d 244; State v. Sorenson, 143 Wis. 2d 226, 421 N.W.2d 77 (1988); Thomas v. State, 92 Wis. 2d 372, 284 N.W.2d 917 (1979); and State v. George, 69 Wis. 2d 92, 96-97, 230 N.W.2d 253 (1975).

Where the date of the commission of the crime is not a material element of the offense charged, it need not be precisely alleged. See Hoffman, 106 Wis. 2d at 198, 316 N.W.2d at 152. Time is not of the essence in sexual assault cases. Id. However, the State, when charging someone, has the duty of establishing the "6 W's"; who, what, when, where, why, and who says so. State ex. Rel. Evanow v. Seraphim, 40 Wis. 2d 223, 161 N.W.2d 369 (1968). The questions that the complaint should answer are: "Who was charged? When and Where is the offense alleged to have taken place?, Why is this particular person being charged, and Who says so?" Id.

Applying that test to the complaint in this case leaves many unanswered questions. In Count 1, the charging period spans a period from before the typical school session begins, through the end of summer, the majority of the falls season, and

concluding during the holiday season. LRT also failed to specify whether the incident occurred on a weekday or weekend. In Count 2, LRT unable to articulate the month and could only specify that it was "warm outside". (R1 at 2). ""Warm" can an refer to any date of the year, relative to the surrounding dates or for that season. This lack of specificity significantly impairs Kempainen's ability to adequately prepare a defense.

The test adopted by the Wisconsin Supreme Court regarding the sufficiency of the charge requires that the court consider two main factors: (1) whether the accusation is such that the defendant can determine whether it states an offense to which he or she is able to plead and prepare a defense; and (2) whether the conviction or acquittal is a bar to another prosecution for the same offense. Holesome v. State, 40 Wis. 2d 95, 161 N.W.2d 283 (1968).

Another, more specific 'reasonableness test' that other states have adopted has been incorporated by Fawcett. In People v. Morris, 461 N.E.2d 1256, 61 N.Y.2d 290 (1984), the New York Court of Appeals set out a "reasonableness test." The "reasonableness test" depends upon the nature of the challenge asserted. Id. In Fawcett, the court explained that the Morris court determined "reasonableness by first examining whether the defendant contends that the prosecution engaged in a lack of diligent investigatory efforts. Morris, 473 N.E.2d at 1260. This inquiry embraces good faith. Id.

In evaluating the possibility that a more specific date could have been obtained through diligent efforts, the court may review three factors: (1) the age and intelligence of the victim and other witnesses; (2) the surrounding circumstances; and

(3) the nature of the offense, including whether it is likely to occur at a specific time or is likely to have been discovered immediately. Id.

If, after this exercise, the state is found to have exerted diligent investigatory efforts, the charging document should then be examined to determine whether, under the circumstances, the designated period of time set forth is reasonable. Id. Factors relevant to this determination include, but are not limited to: (4) the length of the alleged period of time in relation to the number of individual criminal acts ; (5) the passage of time between the alleged period of time for the crime and the defendant's arrest; (6) the duration between the date of the indictment and the alleged offense, (7) and the ability of the victim or complaining witness to particularize the date and time of the alleged transaction or offense. Id.

In Fawcett, this Court adopted the seven factors laid out in Morris that are helpful in determining whether the complaint is sufficiently definite and whether the first prong of the Holesome test can be met:

> (1) the age and intelligence of the victim and other witnesses;
>
> (2) the surrounding circumstances;
>
> (3) the nature of the offense, including whether it is likely to occur at a specific time or is likely to have been discovered immediately;
>
> (4) the length of the alleged period of time in relation to the number of individual criminal acts alleged;
>
> (5) the passage of time between the alleged period for the crime and the defendant's arrest;
>
> (6) the duration between the date of the indictment and the alleged offense; and
>
> (7) the ability of the victim or complaining witness to particularize the date and time of the alleged transaction or offense.

Fawcett, 145 Wis. 2d at 253. By adopting the factors as explained in Morris, this Court signified that it

wanted lower courts to apply the factors in the same manner.

Shortly after it Fawcett, the Court of Appeals held in State v. R.A.R. that the first three factors only apply when the defendant claims that the state could have obtained a more definite date through diligent efforts. R.A.R., 148 Wis. 2d 408, 411, 435 N.W.2d 315 (1988).

The allegations in this case involve two distinct acts of sexual assault of a child that occurred over 15 years ago. (R1 at 1, Appendix at 101). In Fawcett, this court acknowledged the inherent difficulties of prosecuting sexual assaults of children, but also recognized that allegations may not outweigh an individual's constitutionally protected rights when it stated, "[N]o matter how abhorrent the conduct may be, a defendant's due process and sixth amendment rights to fair notice of

the charges and fair opportunity to defend may not be ignored or trivialized. Fawcett, 145 Wis. 2d at 250.

C. The R.A.R. Court Correctly Interpreted Fawcett to Limit Courts Consideration of Factors Depending on the Defendant's Allegations

The R.A.R. Court held that the first three factors only apply when the defendant claims that the State could have obtained a more definite date through diligent efforts. 148. Wis. 2d at 411.

The circuit court correctly noted that, in this case, there is no allegation that the State could have obtained a more definite statement through diligent efforts, so it correctly refused to apply the first three factors. (R32 at 12, Appendix at 113). In applying the four remaining factors, the circuit court correctly found that the complaint failed to provide Kempainen with sufficient notice.

1. The R.A.R. Court's Interpretation of the Application of Certain Factors is Consistent with Fawcett

This court, in R.A.R. correctly read footnote two in Fawcett to limit the consideration of its seven factors to only the final four unless the defendant alleges that the State was not diligent in obtaining a more definite date. R.A.R., 148 Wis. 2d at 411. In Kempainen's view, the R.A.R. court correctly interpreted Fawcett, and in that way R.A.R. was correctly decided.

In order to properly respond to the State's assertion that R.A.R. was wrongly decided, Kempainen sets forth the following reasons as to why R.A.R. was correctly decided.

The first three Fawcett factors are (1) the age and intelligence of the victim and other witnesses; (2) the surrounding circumstances; and (3) the

nature of the offense, including whether it is likely to occur at a specific time or is likely to have been discovered immediately. Fawcett, 145 Wis. 2d at 253. The first three factors will often favor the State. An automatic application of the first three factors in every case would undoubtedly ease the prosecution of individuals, but that does not mean that it is in compliance with due process requirements. The Fawcett court considered this when it held that a court may look to the first three factors to determine whether a more specific date could have been alleged. Fawcett, 145 Wis. 2d at 251, n. 2.

A defendant challenging the sufficiency of a complaint generally is practically different from a defendant challenging the sufficiency of a complaint alleging that the State was not diligent in obtaining a more definite date. The former challenge can only

succeed when the State has narrowed down the designated period of charging time to that supported by diligent investigatory efforts and is still found to be insufficiently definite.

2. The Fawcett Court Applied all Seven Factors Because Fawcett Alleged Lack of Diligence

In Fawcett, the court notes that Fawcett was originally charged with one count of first-degree sexual assault contrary to sec. 940.225(1)(d), Stats. with an allegation that the assault took place on December 7, 1985. Fawcett, 145 Wis. 2d at 248, n. 1. An amended complaint charged Fawcett with two counts of first-degree sexual assault and one count of enticing a child for immoral purposes, contrary to sec. 944.12, Stats., during "the six months preceding December of 1985." Id. The amended complaint also charged Fawcett with additional counts of sexual assault and enticing a child for immoral purposes

(both later dismissed). Id. These latter offenses were alleged to have occurred in late November or early December of 1985. Id. An information was filed charging Fawcett with two counts of first-degree sexual assault and two counts of enticing a child. An amended information was then filed charging Fawcett with only two counts of first-degree sexual assault occurring in the six months preceding December, 1985. Id.

Fawcett argued that the six-month period of time alleged in the complaint and information was too expansive to allow him to prepare an adequate defense. Fawcett was originally charged with one count of first-degree sexual assault on a specific date and ultimately charged with two counts of first-degree sexual assault, with the time span changing from one day to six months. It may have been reasonable for the State to increase the time span

when the additional counts of enticing a child were charged. However, it is unreasonable to expand the charging period to six months for two counts of first-degree sexual assault when one incident is alleged to have occurred on a specific date. Although the court does not mention whether Fawcett specifically alleged lack of investigatory diligence, it is reasonable to infer that the State failed to obtain more specific information for the charging document. Given that reasonable inference, it logically follows that the court in Fawcett evaluated all seven factors in its "reasonableness test".

The second footnote in Fawcett was not meant to simply provide background information for the origin of the seven factors. In Fawcett, the court originally certified the case to the Wisconsin Supreme Court inquiring whether the reasonableness test should be adopted as the law of

this state. Fawcett, 145 Wis. 2d at 252. A part of that reasonableness test, included in footnote two, is the inquiry into the defendant's specific allegation that the State failed to obtain more specific information due to a lack of diligent investigatory efforts. Fawcett, 145 Wis. 253 at n. 2. The court's certification demonstrates its appreciation for the reasonableness test asserted in Morris. It is erroneous to read Fawcett as adopting and applying all seven factors in every case. The court's opinion in R.A.R., along with the circuit court's reliance on R.A.R. when it dismissed the case against Kempainen for insufficient definitiveness in the complaint, stem directly from an accurate reading of Fawcett.

3. Several Courts Have Applied the Factors in a Manner Consistent with Both Fawcett and R.A.R.

In Miller, 247 Wis. 2d 124, this court applied all seven factors from Fawcett after Miller challenged a four-year long charging period on notice grounds. Specifically, the State was aware of the expansive time frame and offered to amend the information to allege two narrower charging periods. This court rejected the State's argument, holding that amending the information to allege two charges covering shorter time periods would have exposed Miller to the risk of multiple convictions. Miller, 257 Wis. 2d at ¶ 16.

In essence, Miller did allege that the State was aware of the expansive charging period and, exerting more diligent investigatory efforts, could have made the designated charging period more

reasonable. Given this allegation by the defendant, it comports with both Fawcett and R.A.R. when it applied all seven factors. This allegation by the defendant in Miller is distinguishable from both R.A.R. and the decision from the circuit court.

In State v. Dettloff, an unpublished opinion, the defendant challenged the sufficiency of the complaint when he was charged with one count repeated sexual assault of a child. State v. Dettloff, No. 2012AP2202-CR, slip. Op.at ¶2 (Wis. Ct. App. June 11, 2013)(Appendix at 142). The complaint alleged Dettloff "raped" a child with whom he lived thirty to forty times "between 2004 and 2006". Id. In Dettloff, the Court noted, "Dettloff concedes that the first three Fawcett factors, which apply when a more specific date could have been obtained through diligent efforts, do not support his challenge to the sufficiency of the complaint." Id at ¶5. In that case,

the Court very clearly stated that the first three Fawcett factors apply when the defendant alleges that a more specific charging period could have been obtained through diligent efforts.

D. The Court of Appeals Erred When It Interpreted Fawcett to Hold that the Nature of the Defendant's Pleading is Irrelevant to the Analysis of the Complaint

In this case, the Court of Appeals held,

> "We do not read our decision in State v. Fawcett, 145 Wis. 2d 244, 426 N.W.2d 91 (Ct. App. 1988), as intending to give one party the ability to control a court's considerations regarding the sufficiency of a charge simply through strategic pleading." (Ct. App. Op. at 8, footnote 2, Appendix 108).

In doing so, the Court of Appeals created a direct conflict between the actual language from Fawcett and the Court's interpretation of it. The plain language from the Fawcett footnote, cited above, mandates that the reasonableness test be dependent upon the nature of the challenge asserted by the defendant. One such challenge to the

complaint is lack of prosecutorial diligence, as found in Fawcett, but missing in both R.A.R. and this case. Specifically, the footnote in Fawcett held that the Court should apply the first three factors only in cases where the defendant asserts a more specific date could have been obtained through diligent efforts. If the decision by the Court of Appeals in Kempainen is not overturned, it will be in direct contradiction to Fawcett.

E. This Court Should Not Stretch the Holding in R.A.R. to Allow Further Prosecution in This Case

In a case such as this, long temporal gaps exist between the alleged conduct and the charges. Although Fawcett does require some flexibility, the State is not entitled to receive unlimited discretion in charging when such charges would trample an individuals's constitutionally protected right to due process. The court maintains an extremely flexible

analysis when it applies the remaining four factors. The seventh factor, the ability of the victim to particularize the date and time of the alleged offense, offers significantly greater flexibility and discretion to the court than the first factor, the age and intelligence of the victim. This court should not be persuaded to believe that all seven factors are necessary for the court to consider when the sufficiency of a complaint is challenged. The court, when correctly applying the four factors, has enough flexibility.

The State elected to charge Kempainen with two criminal counts; the first count alleged offenses committed sometime between August 1, 1997, to December 1, 1997, and the second count alleged offenses committed between March 1, 2001, to June 15, 2001. This type of charging is not acceptable by law as set forth in Section I of this brief and as set

forth below. As noted in Fawcett, there are inherent difficulties of prosecuting sexual assaults of children:

> Sexual abuse and sexual assaults of children are difficult crimes to detect and prosecute. Often there are no witnesses except the victim. The child may have been assaulted by a trusted or friend and may not know who to turn to for assistance and consolation. The child may have been threatened and told not to tell anyone. Even absent a threat, the child might harbor a natural reluctance to reveal information regarding the assault. These circumstances many times serve to deter a child from coming forth immediately. As a result, exactness as to the events fades in memory.

145 Wis. 2d at 249 (citation omitted).

A review of the case law indicates that §948.025 "was enacted to address the problem that often arises in cases where a child is the victim of a pattern of sexual abuse but [the child] is unable to provide the specifics of an individual event of sexual assault. The purpose of the legislation was to facilitate prosecution of offenses under such

conditions." State v. Nommensen, 305 Wis. 2d 695, 705, 741 N.W. 2d 481 (Ct. App. 2007).

In support of that position, the court relied on a letter written by the Walworth County District Attorney's Office to the Chairperson of the State Senate Committee on Judiciary and Insurances on September 13, 1993. The letter became part of the legislative drafting file and highlighted the issues with drafting a child sexual assault complaint prior to the creation of Wis. Stat. §948.025.

In part, the letter stated:

> "When a child reports being abused and the district attorney decides to issue a criminal charge, one of the requirements is that the defendant be put on notice as to when the defendant allegedly committed the crime. Case law in the State of Wisconsin has allowed some leeway to prosecutors in this area, but has required that the timeframe be narrowed down to periods not greater than 90 days. Another requirement is that the defendant be notified as to when the specific sexual act is alleged. This [pending] legislation is intended to address those too-common situations where a child has been abused too many times for the child to know the specific acts of abuse that were committed on specific dates." (Cite in Appendix-either 145 or 146).

It is readily evident that the legislature was aware of the inherent difficulties in prosecuting child sexual assault cases when it enacted Wis. Stat. §948.025. With that knowledge, the legislature intentionally crafted the child sexual assault repeater statute to require three or more alleged assaults. The statute grants additional flexibility to the State in prosecuting child sexual assaults in cases where the child may be too young to testify clearly as to the time and details of such activity.

However, in this case, there are only two alleged assaults, each with a different charging period. A significant gap of 12 and 15 years respectively exists between the charging period and the filing of the complaint. It is important to reiterate that "no matter how abhorrent the conduct may be, a defendant's due process and sixth amendment rights to fair notice of the charges and

fair opportunity to defend may not be ignored or trivialized." Fawcett, 145 Wis. 2d at 250. The State has entirely adequate charging authority as the law currently stands. Further expansion of the already flexible notice requirements in child sexual assault cases will deprive individuals of their constitutionally protected due process.

II. IF THE COURT OF APPEALS INTERPRETATION OF FAWCETT WAS CORRECT, IT DIRECTLY CONFLICTS WITH IT'S HOLDING IN R.A.R.

In the alternative, if the Court of Appeals was correct that Fawcett held that all seven factors must be applied, a direct conflict was created between Fawcett and R.A.R. In R.A.R., decided one year after Fawcett, the Court of Appeals held that the first three factors apply "when the defendant claims that the state could have obtained a more definite date through diligent efforts". 148 Wis. 2d at 411.

The R.A.R. Court then declined to apply the first three Fawcett factors in its Holesome test. In doing so, the Court concluded that the charging periods set forth for each of the four counts against R.A.R. are not sufficiently definite and that R.A.R. was not adequately informed of the charges against him.

In it's decision, the Court of Appeals refused to follow R.A.R.'s application of the "reasonableness test" used to determine whether a complaint is sufficiently definite. The Court held:

> "To the extent that R.A.R. suggests courts may not consider the first three Fawcett factors unless a defendant claims a prosecutorial diligence, we cannot follow it. Such a reading would conflict with our earlier holding in Fawcett and "only the supreme court...has the power to overrule, modify or withdraw language from a published opinion of the court of appeals." Cook v. Cook, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Thus, we must follow Fawcett. (Ct. App. Op. at ¶ 14, Appendix at 108).

As this decision stands, R.A.R. and Fawcett are in direct conflict. The latter of the two cases,

R.A.R., is clear that without an assertion by the defendant that the State could have obtained a more specific date, the Court should not apply the first three Fawcett factors. Relying on both Fawcett and R.A.R., the Trial Court in this case completed a thorough analysis of why the first three Fawcett factors were not relevant and the remaining four factors ultimately favored Kempainen. By applying the first three Fawcett factors to Kempainen's case, the Court of Appeals essentially overruled R.A.R. or made the holding null. As noted in Cook v. Cook, the Court of Appeals does not have "the power to overrule, modify, or withdraw language from a published opinion of the Court of Appeals". 208 Wis. 2d at 189-90.

CONCLUSION

In summary, Kempainen respectfully asserts that the Court of Appeals erred when they determined that the trial court must apply all of the Fawcett factors to determine whether a complaint is sufficiently definite in a case involving delayed allegations of sexual assault.

For the foregoing reasons, Kempainen respectfully asks that this court affirm the decision of the circuit court dismissing the complaint.

Dated this 20th day of October, 2014.

Respectfully submitted,

KIRK OBEAR AND ASSOCIATES

By: _____

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APPENDIX

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CERTIFICATION AS TO FORM AND LENGTH

I hereby 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. The text is 13 point type and the length of the brief is 5,768 words.

Dated this 20th day of October, 2014.

Respectfully submitted,

KIRK OBEAR AND ASSOCIATES

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CERTIFICATION AS TO CONTENTS OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;
(2) the findings or opinion of the circuit court; and
(3) 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 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 or 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.

Dated this 20th day of October, 2014.

Respectfully submitted,

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ELECTRONIC FILING CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief, in compliance with WIS. STAT. (RULE) 809.19(12)(f).

Dated this 20th day of October, 2014.

Respectfully submitted,

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CERTIFICATE OF DELIVERY

I hereby certify that this brief and appendix was hand-delivered to the Clerk, Wisconsin Supreme Court, 110 East Main Street, Suite 215, Madison, Wisconsin, October 20, 2014.

Dated this 20th day of October, 2014.

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