STATE OF WISCONSIN

IN SUPREME COURT

No. 2014AP304-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

RICHARD L. WEBER,

Defendant-Appellant.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV, REVERSING AN ORDER DENYING A MOTION TO SUPPRESS EVIDENCE AND REMANDING WITH DIRECTION TO PERMIT PLEA WITHDRAWAL, ENTERED IN WOOD COUNTY CIRCUIT COURT, THE HONORABLE GREGORY J. POTTER, PRESIDING.

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

BRAD D. SCHIMEL
Attorney General

NANCY A. NOET
Assistant Attorney General
State Bar #1023106

Attorneys for Plaintiff-Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-5809/(608)266-9594(Fax)
noetna@doj.state.wi.us

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BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

ISSUES PRESENTED

Under Wisconsin law, an officer's hot pursuit of a suspect who committed a jailable offense justifies a warrantless home entry to apprehend that suspect. Here, a deputy had probable cause to believe that Richard Weber had just

committed two jailable offenses before following Weber into his garage and seizing him there. Was the deputy's entry into Weber's garage lawful?

The circuit court answered "Yes."

The court of appeals answered "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this court has indicated that oral argument and publication are appropriate.

STATEMENT OF THE CASE

In a criminal complaint filed on July 9, 2012, the Wood County District Attorney's Office charged Richard Weber with operating while intoxicated, 10th or subsequent offense, operating with prohibited alcohol concentration, 10th or subsequent offense,[1] possession of tetrahydrocannabinols, possession of drug paraphernalia, and resisting an officer (1). Weber filed a motion to suppress, arguing that Deputy Dorshorst unlawfully entered his garage to detain him (12). The facts pertinent to Weber's claim come from the January 2, 2013 hearing on that motion (34; Pet-Ap. 101-36).

On April 20, 2012, Wood County Deputy Sheriff Calvin Dorshorst observed Weber driving a vehicle with a defective brake light (34:4-5; Pet-Ap. 104-05). Deputy Dorshorst activated his emergency lights in an attempt to stop Weber, but Weber kept driving for approximately 100 feet and turned into his

[1] The operating with a prohibited alcohol concentration charge was later amended to a 9th or subsequent offense (16).

driveway, continuing all the way down the driveway and into his garage (34:5; Pet-Ap. 105). Deputy Dorshorst followed behind Weber and saw Weber park in the garage (34:6; Pet-Ap. 106). Weber immediately got out of his car and started toward the door to his house (34:6; Pet-Ap. 106).

With his emergency lights still on, Deputy Dorshorst parked outside the garage, behind Weber's vehicle (34:6-7; Pet-Ap. 106-07). As he got out of his squad, Deputy Dorshorst lost sight of Weber, so he ran up to the opposite side of the garage door so that he could see him (34:7-8; Pet-Ap. 107-08). At that point, Deputy Dorshorst saw Weber walking up the steps to the house door, and Deputy Dorshorst told Weber that he needed to speak to him (34:8; Pet-Ap. 108). Deputy Dorshorst did not enter the garage before he instructed Weber to stop so that he could talk to him (34:8-9; Pet-Ap. 108-09). Weber, however, continued up the steps (34:8-9; Pet-Ap. 108-09).

Deputy Dorshorst then entered the garage and told Weber again that he needed to speak with him (34:8-9; Pet-Ap. 108-09). Weber did not listen and began opening the door to the house (34:8-9; Pet-Ap. 108-09). Deputy Dorshorst followed Weber up the stairs, secured Weber's arm and explained again that he needed to speak to him about the stop for a defective brake lamp (34:9-11; Pet-Ap. 109-11). Ultimately, Deputy Dorshorst brought Weber back outside to the garage to talk (34:19; Pet-Ap. 119). During the encounter, Deputy Dorshorst observed signs that Weber had been drinking, and Weber even said that he "thought he had too much" (34:11-13; Pet-Ap. 111-13). Weber tried to end the conversation, and he eventually became physical with Deputy Dorshorst (34:13-14; Pet-Ap. 113-14). Nonetheless, Weber gave Deputy Dorshorst permission to

search his vehicle, and that search revealed some marijuana and a pipe (34:14-15; Pet-Ap. 114-15).

On February 21, 2013, the circuit court orally denied Weber's motion to suppress based on his allegation that his arrest was unlawful:

> Here I disagree with the defendant for the following reasons: First, the deputy observed a high mounted brake light that wasn't working properly. Additionally, he observed the defendant weaving over the fog line, thus he had a basis or probable cause to stop the defendant. Next, when the deputy activated his emergency lights, rather than pulling over, the defendant drove not only into his driveway but all the way into his garage. Once inside the garage, the defendant did not wait for the deputy to approach. He instead attempted to flee the deputy, even after obtaining verbal commands. It was also at this time that the deputy observed the defendant was walking slowly and staggering. Based upon the defendant's noncompliance, he was obstructing the deputy's attempt to stop him. In other words, now there was probable cause that a crime was being committed and it was being committed by the defendant. Because of the defendant's actions, the deputy took pursuit of the defendant. In this case, the deputy was able to stop the defendant as he was attempting to enter -- attempting to enter or entering into his home. This leads to the issue of whether there w[ere] exigent circumstances to perform a warrantless search.
>
> In this case I believe there are. The US Supreme Court has recognized that exigent circumstances may be present in a number of different situations. One of those situations is hot or fresh pursuit. Here Deputy Dorshorst had the authority to stop and detain the defendant not only for the traffic violation but also had the probable cause to arrest the defendant for obstructing based upon his noncompliance with the deputy's visual and verbal commands. The facts also reflect that the defendant was fleeing the deputy in order to avoid the stop. In a case like this, the defendant cannot be rewarded because he is faster

> on foot than the deputy and get inside his house, thus avoiding the stop. Lastly, the facts show that the deputy's pursuit was promptly made and maintained. Thus, I find that the deputy had probable cause and authority to stop the defendant; that when the defendant failed to comply, the basis of a crime occurred giving the deputy probable cause that a crime was being committed and that resulted in exigent circumstances arising to hot and fresh pursuit which allowed the deputy to perform a warrantless search. Therefore, the motion to suppress is denied.

(35:9-11; Pet-Ap. 145-47) Weber later pleaded no contest to operating with a prohibited alcohol concentration as a 9th or subsequent offense, resisting an officer, and possession of marijuana (17; 20; 27; 36:3). Weber appealed and challenged the circuit court's denial of his motion to suppress evidence.

On October 8, 2015, the court of appeals reversed the circuit court's decision based on its determination that "the exigent circumstances requirement means that there must be a potential for danger to life, risk of evidence destruction, or likelihood of escape." *State v. Weber*, No. 2014AP304-CR, slip op. ¶ 7 (Wis. Ct. App. October 8, 2015) (Pet-Ap. 150-54). Noting the State's reliance on this court's opinion in *State v. Richter*, 2000 WI 58, ¶ 32, 235 Wis. 2d 524, 612 N.W.2d 29, the court of appeals concluded that "*Richter* also includes a requirement that the officer reasonably believes the delay in obtaining a warrant would endanger life, risk destruction of evidence, or greatly enhance the likelihood of the person's escape." *Id*. (citing *Richter*, 235 Wis. 2d 524, ¶ 30) (Pet-Ap. 152-53). Even accepting the State's argument that Deputy Dorshorst had probable cause to arrest Weber for resisting or obstructing an officer (a jailable offense that Weber committed in Deputy Dorshorst's presence), the court of appeals found that the entry

into Weber's garage was unlawful because "[t]here would be no physical evidence of obstructing for Weber to destroy in the house. Weber could not readily flee with the officer parked in the driveway. And there was no indication of a threat to safety." *Id*. ¶ 9 (Pet-Ap. 153).

The State petitioned for review with this court.

ARGUMENT

I. THIS COURT SHOULD CLARIFY AND HOLD THAT UNDER WISCONSIN LAW, HOT PURSUIT OF A SUSPECT BASED ON PROBABLE CAUSE FOR A JAILABLE OFFENSE IS A STAND-ALONE JUSTIFICATION FOR A WARRANTLESS HOME ENTRY AND ARREST.

"[N]ot all warrantless home entries are unlawful. . . . For example, a home entry, though unaccompanied by a warrant, is lawful if 'exigent circumstances' are present." *State v. Ferguson*, 2009 WI 50, ¶ 19, 317 Wis. 2d 586, 767 N.W.2d 187 (citations omitted). "Exigent circumstances exist when 'it would be unreasonable and contrary to public policy to bar law enforcement officers at the door.'" *Id*. (citations omitted).

The exigent circumstance of "hot pursuit" is established "where there is an immediate or continuous pursuit of [a suspect] from the scene of a crime." *State v. Richter*, 2000 WI 58, ¶ 32, 235 Wis. 2d 524, 612 N.W.2d 29 (alteration in original) (citations omitted) (internal quotation marks omitted). When determining whether a warrantless entry is justified by exigent circumstances, courts also should consider whether the underlying offense is a jailable or nonjailable offense. *Ferguson*,

317 Wis. 2d 586, ¶ 29.[2] As Weber acknowledged in his court of appeals brief, the issue in this case "is whether Deputy Dorshorst's warrantless entry can be justified due to exigent circumstances related to a jailable offense." (Weber Ct. App. Br. 13).

In *Richter*, a deputy responded to a burglary in progress complaint from a trailer park. When he arrived, the victim flagged the deputy down and told him that someone had broken into her trailer and that she had seen him run from her trailer to another one across the street. The deputy went over to the second trailer where he saw signs of forced entry. Then, when the deputy shined his flashlight inside, he could see two people sleeping on the floor. They woke up, opened the door and identified Richter, who was sleeping on the couch, as the owner of the trailer. The deputy went in, woke Richter and got permission to search the trailer. That search revealed a marijuana plant in plain view. Richter moved to suppress the physical evidence and his related statements, claiming that the deputy's entry was unlawful.

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[2] In *Ferguson*, this court held that "because the disorderly conduct with which Ferguson was charged was a jailable offense, the jury could have been permitted to decide whether exigent circumstances justified the police's warrantless entry into her home." *Ferguson*, 317 Wis. 2d 586, ¶ 30. The "jailable offense" requirement stems from the United States Supreme Court's decision in *Welsh v. Wisconsin*, 466 U.S. 740, 753 -54 (1984), which, although not a hot pursuit case, held that nonjailable offenses (in that case, a first drunk driving offense subject only to civil forfeiture) are insufficient to justify warrantless entry into a private residence.

This court held that the deputy's entry was justified by exigent circumstances. *Richter*, 235 Wis. 2d 524, ¶ 2. In doing so, the court accepted each of the State's two alternative arguments for exigency: hot pursuit and the need to protect the safety of the people inside the trailer. *Id*., ¶¶ 2, 31. The primary issue regarding application of the hot pursuit doctrine in *Richter* was whether the law required the deputy himself to witness the crime at issue or the suspect fleeing. *See id*., ¶¶ 32-36. Concluding that there was no need for the deputy to personally observe the crime and pursue the suspect, the court held that the deputy's entry "was justified by the exigent circumstances of hot pursuit." *Id*. ¶ 36.

Contrary to the court of appeals' opinion in this case, however, *Richter* did *not* hold that the doctrine of hot pursuit does not justify a warrantless entry and arrest unless the pursuing officer also "reasonably believes the delay in obtaining a warrant would endanger life, risk destruction of evidence, or greatly enhance the likelihood of the person's escape" *State v. Weber*, No. 2014AP304-CR, slip op. ¶ 7 (Wis. Ct. App. October 8, 2015) (Pet-Ap. 150-54). This court attempted to clear up any confusion about that in two decisions that came down after *Richter*: *State v. Sanders*, 2008 WI 85, 311 Wis. 2d 257, 752 N.W. 2d 713, and *State v. Ferguson*, 2009 WI 50, ¶ 27, 317 Wis. 2d 586, 767 N.W. 2d 187.

In *Sanders*, the court was presented with a home entry much like the one in this case. Officers responded to an animal cruelty complaint. When they arrived, they found a group of people in the back yard, along with several unharmed dogs. An officer explained the complaint to the defendant and made several requests for the defendant's identification. The

defendant refused, and when the officer tried to detain him, the defendant turned and ran into his home while carrying a canister. The officers followed, took the defendant into custody and then searched both the defendant's room and the canister he had been holding earlier.

The *Sanders* majority "[assumed] without deciding that the warrantless entry into the defendant's home was justified under the Fourth Amendment," *Sanders*, 311 Wis. 2d 257, ¶ 25, and then went on to hold that the searches for the canister and its contents were unlawful. *Id*. ¶¶ 42, 59. Justice Prosser wrote a concurring opinion to address the unanswered question: "whether warrantless police entry into a home under the exigency of 'hot pursuit' to arrest a person for a misdemeanor violates the Fourth Amendment, as stated in *State v. Mikkelson*, 2002 WI App 152, 256 Wis. 2d 132, 647 N.W. 2d 421." *Id*. ¶ 62 (J. Prosser, concurring). A year later, the court overruled *Mikkelson* and adopted Justice Prosser's concurrence in *Sanders*. *Ferguson*, 317 Wis. 2d 586, ¶ 27.

As Justice Prosser explained in *Sanders*:

> Historically, the distinct exigency of hot pursuit has been sufficient to justify the warrantless entry of a dwelling to arrest a person for a misdemeanor such as obstructing an officer. Abandoning this principle creates a perverse incentive for misdemeanor defendants to flee from police officers into their homes to prevent their lawful seizure.

Sanders, 311 Wis. 2d 257, ¶ 72 (J. Prosser, concurring).

A detailed discussion of Wisconsin law regarding hot pursuit followed, including reference to *Richter* and the language that the court of appeals has now interpreted as an additional "requirement that the officer reasonably believes the

delay in obtaining a warrant would endanger life, risk destruction of evidence, or greatly enhance the likelihood of the person's escape." *Weber*, slip op. ¶ 7 (citing *Richter*, 235 Wis. 2d 524, ¶ 30) (Pet-Ap. 152-53). That discussion explains that no such requirement exists and demonstrates that the court of appeals has misinterpreted *Richter*:

> An officer in "hot pursuit" does not need to make a split-second determination about the availability of "hot pursuit" as an exigency justifying a warrantless entry. The officer has to make a determination whether there is probable cause to make an arrest for a jailable crime. Presuming probable cause, pursuit of the suspect is justified. As long as the officer has probable cause to arrest for a jailable criminal offense, the only remaining important question is whether a chase or pursuit satisfies the hot pursuit definition in *Welsh* – "immediate or continuous pursuit of the [defendant] from the scene of the crime." Whether the officer reasonably believes he was in "hot pursuit" is not necessary. Thus, it is hardly surprising that this exigency is not part of the objective test set forth in *Smith*[3] and *Richter*.[4]
>
> There is no implication in our case law that "hot pursuit" cannot stand alone as an exigent circumstance justifying a warrantless home entry and arrest. On the contrary, our cases explicitly recognize that hot pursuit is a sufficient justification for a warrantless entry and arrest.

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[3] *State v. Smith*, 131 Wis. 2d 220, 388 N.W. 2d 601 (1986).

[4] This "objective test," as discussed in both cases, provides that exigent circumstances support a warrantless entry when "a police officer under the circumstances known to the officer at the time [of entry] reasonably believes that delay in procuring a warrant would gravely endanger life or risk destruction of evidence or greatly enhance the likelihood of the suspect's escape." *Richter*, 235 Wis. 2d 524, ¶ 30 (quoting *Smith*, 131 Wis. 2d at 230, 388 N.W.2d 601).

> *Smith*, 131 Wis. 2d at 229, 388 N.W.2d 601; *Richter*, 235 Wis. 2d 524, ¶ 29, 612 N.W.2d 29.

Sanders, 311 Wis. 2d 257, ¶¶ 117-18 (J. Prosser, concurring).[5]

The court of appeals' decision to the contrary cannot and should not stand:

> Law enforcement is not a child's game of prisoner[']s base, or a contest, with apprehension and conviction depending upon whether the officer or defendant is the fleetest of foot. A police officer in continuous pursuit of a perpetrator of a crime committed in the officer's presence, be it felony or a misdemeanor, must be allowed to follow the suspect into a private place, or the suspect's home if he chooses to flee there, and effect the arrest without a warrant.

Sanders, 311 Wis. 2d 257, ¶ 133 (quoting *State v. Blake*, 468 N.E. 2d 548, 553 (Ind. Ct. App. 1984) (J. Prosser, concurring)).

This court should reverse the court of appeals' decision in this case and clarify that under Wisconsin law, hot pursuit of a suspect based on probable cause for a jailable offense is a stand-alone justification for a warrantless home entry and arrest. *Smith*, 131 Wis. 2d at 229; *Richter*, 235 Wis. 2d 524, ¶ 29; *Sanders*, 311 Wis. 2d 257, ¶ 134 (J. Prosser, concurring); *Ferguson*, 317 Wis. 2d 586, ¶ 27.

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[5] As Justice Prosser noted, a number of other jurisdictions recognize hot pursuit of a suspect based on probable cause for a jailable offense as a stand-alone justification for a warrantless home entry and arrest. *Sanders*, 311 Wis. 2d 257, ¶¶ 119-34, n.12; *see also*, *Gasset v. State*, 490 So.2d 97, 98-99 (1986); *Commonwealth v. Jewett*, 471 Mass. 624, 31 N.E.2d 1079, 1089 n.8 (2015); *Rosembert v. Borough of East Lansdowne*, 14 F.Supp.3d 631, 641-42 (E.D. Penn. 2014); *Stutte v. Arkansas*, 2014 Ark. App. 139, 432 S.W.2d 661, 664-65 (2014); *State v. Keenan*, 50 Kan.App.2d 358, 325 P.3d 1192, 1202 (2014).

II. DEPUTY DORHORST'S ENTRY INTO WEBER'S GARAGE WAS JUSTIFIED BECAUSE HE HAD PROBABLE CAUSE TO BELIEVE THAT WEBER HAD COMMITTED TWO JAILABLE OFFENSES.

In the court of appeals, Weber argued that Deputy Dorshorst's entry into his garage was unlawful because the deputy "pursued [him] because of a defective brake light, a nonjailable offense" (Weber Ct. App. Br. 6). That is not the case. By the time Deputy Dorshorst set foot into the garage, he had probable cause to believe that Weber had committed two criminal offenses, and he was in immediate and continuous pursuit of Weber throughout their entire encounter.

Driving behind Weber on a public road, Deputy Dorshorst activated his emergency lights and tried to stop Weber because of a non-working brake light[6] (34:4-5; Pet-Ap. 104-05). Instead of stopping, Weber kept driving another 100 feet, turned into his driveway and continued all the way down the driveway and into his garage (34:5; Pet-Ap. 105). That alone was a jailable offense. Wisconsin Stat. § 346.04(2t) states that "[n]o operator of a vehicle, after having received a visible or audible signal to stop his or her vehicle from a traffic officer or marked police vehicle, shall knowingly resist the traffic officer by failing to stop his or her vehicle as promptly as safety

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[6] *See* Wis. Stat. §§ 347.06 and 347.14. *See also* Wis. Admin. Code § Trans 305.15(5)(a) (2014) ("The high-mounted stop lamp of every motor vehicle originally manufactured with a high-mounted stop lamp shall be maintained in proper working condition and may not be covered or obscured by any object or material."). Deputy Dorshorst's testimony that the brake lamp was not working is undisputed, and Weber has not argued that the defective light did not provide a lawful basis to stop him.

reasonably permits." A person who violates that provision "may be fined not more than $10,000 or imprisoned for not more than 9 months or both." Wis. Stat. § 346.17(2t). Weber cannot credibly argue that Deputy Dorshorst did not have probable cause to believe that he had violated Wis. Stat. § 346.04(2t).[7]

In addition, as the circuit court found, Weber's conduct constituted the criminal offense of obstructing an officer (35:9-11; Pet-Ap. 145-47). A person commits a Class A misdemeanor when he or she "knowingly resists or obstructs an officer while such officer is doing any act in an official capacity and with lawful authority[.]" Wis. Stat. § 946.41(1). Class A misdemeanors are punishable by "a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both." Wis. Stat. § 939.51(3)(a). Weber resisted or obstructed Deputy Dorshorst's lawful effort to conduct a valid traffic stop not only by ignoring the deputy's emergency lights and driving into his garage, but by disregarding the deputy's command to stop and speak with him (34:5-9; Pet-Ap. 105-09). So Deputy Dorshorst had probable cause to believe that Weber had committed another jailable, criminal offense before he stepped into Weber's garage (34:9; Pet-Ap. 109).

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[7] Although this specific statute was not addressed in the circuit court, the State, as respondent, was not prohibited from citing it in support of the circuit court's ruling. *State v. Jensen*, 2011 WI App 3, ¶ 75, 331 Wis. 2d 440, 794 N.W.2d 482; *see Blum v. 1st Auto & Cas. Ins. Co.*, 2010 WI 78, ¶ 27 n.4, 326 Wis. 2d 729, 786 N.W.2d 78. It is well-settled that a reviewing court may affirm a circuit court decision for reasons not stated or argued below. *See State v. Milashoski,* 159 Wis. 2d 99, 108-09, 464 N.W.2d 21 (Ct. App. 1990); *Kafka v. Pope*, 186 Wis. 2d 472, 476, 521 N.W.2d 174 (Ct. App. 1994).

As he entered the garage, Deputy Dorshorst had probable cause to believe that Weber had committed two jailable, criminal offenses when he failed to pull over after the deputy activated his emergency lights, drove all the way into his garage instead and then ignored the deputy's instructions to stop and talk. Wis. Stat. §§ 346.04(2t) and 946.41(1). In addition, there is no question that Deputy Dorshorst was in immediate and continuous pursuit of Weber the entire time. *Richter*, 235 Wis. 2d 524, ¶ 32; *U.S. v. Santana*, 427 U.S. 38, 43 (1976) (the fact that pursuit ends almost as soon as it begins does not make any less a hot pursuit that justifies a warrantless home entry).

Police officers are permitted to conduct lawful traffic stops for a variety of reasons, ranging from simple equipment violations to serious felonies. Irrespective of the severity of the violation underlying the stop, however, one thing is clear: When a violation has occurred, the offender cannot refuse to comply with an officer's visual or audible signal to pull over or disregard the officer's further instructions to stop in an effort to take refuge in his home and bar the officer at the door. To do so is criminal, and it permits an officer in hot pursuit to enter without a warrant and detain the individual responsible:

> [I]f the supposed offender fly and take house, and the door will not be opened upon demand of the constable and notification of his business, the constable my break the door, tho[ugh] he have no warrant.

1 M. Hale, Pleas of the Crown 92 (1736), quoted in *Payton v. New York*, 445 U.S. 573, 595 n.41 (1980).

CONCLUSION

For all of the above reasons, the State of Wisconsin asks this court to reverse the court of appeals' decision in this case, clarify that under Wisconsin law, hot pursuit of a suspect based on probable cause for a jailable offense is a stand-alone justification for a warrantless home entry and arrest, and affirm both the circuit court's decision to deny Weber's motion to suppress evidence and Weber's judgment of conviction.

Dated this 4th day of March, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

NANCY A. NOET
Assistant Attorney General
State Bar #1023106

Attorneys for Plaintiff-
Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-5809
(608) 266-9594 (Fax)
noetna@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,894 words.

_____

Nancy A. Noet
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 this 4th day of March, 2016.

_____

Nancy A. Noet
Assistant Attorney General