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OF WISCONSIN

STATE OF WISCONSIN

C O U R T OF A P P E A L S

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. No. 2014AP702-CR

MIGUEL MUNIZ-MUNOZ,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF
THE MILWAUKEE COUNTY CIRCUIT COURT
HONORABLE RICHARD J.SANKOVITZ, PRESIDING

APPELLANT'S BRIEF

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STATE OF WISCONSIN

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ISSUES PRESENTED

1. Whether sleeping jurors deprived Mr. Muniz-Munoz of his basic constitutional rights to a fair trial and an impartial jury as guaranteed by the Sixth Amendment and Article I, §7, Wis. Const.

The court below repeatedly refused to voir dire jurors seen sleeping by counsel for both parties.

2. Whether Mr. Muniz-Munoz basic Sixth Amendment right to confrontation was violated when the State did not produce the doctor who actually performed the autopsy for cross-examination.

After extensive pretrial consideration, the court below ruled over objection a surrogate doctor could state his opinion on a victim's cause of death.

3. Whether basic Due Process was violated when the court below refused a jury instruction on unrecorded interrogations.

The court below refused an instruction on unrecorded interrogation requested by the defense.

4. Whether, in order to protect his basic human rights, Mr. Muniz-Munoz discovery motion seeking evidence to support his claim of torture should have been granted.

The court below denied the discovery motion seeking this evidence.

STATEMENT ON ORAL ARGUMENT

Oral argument is not requested.

STATEMENT ON PUBLICATION

Counsel requests publication because the opinion here is likely to apply established rules of law to a factual situation significantly different from those in previous opinions and therefore will clarify those rules. The third issue is one of first impression.

STATEMENT OF THE CASE

1. Nature of the Case

This is a review of Mr. Muniz-Munoz' criminal conviction by a jury of 1st degree murder and 1st degree recklessly endangering safety.

2. Proceedings Below

On June 30, 2004, complaint number 04-CF-3425 was filed in Milwaukee County Circuit Court charging Mr. Muniz-Munoz with violating §§ 940.01(1)(a)(1st Degree Intentional Homicide) and 940.01(1)(a) together with 939.32, *Wis. Stats.*(Attempted 1st Degree Intentional Homicide). (2).

On July 2, 2004, Mr. Muniz-Munoz appeared with

appointed counsel. (80). Bail was set at $100,000 and preliminary hearing was set. (80:3-4).

On July 9, 2004, Mr. Muniz-Munoz waived preliminary hearing. (3)(81:4-5). An information, making the identical charges as in the complaint was filed (4) and Mr. Muniz-Munoz entered a not guilty plea by counsel. (81:5).

On August 10, 2004, the State's motion for a protective order was granted without objection. (7)(82:3).

On November 3, 2004, trial counsel's motions in limine, for *Brady* discovery, to suppress statements and to exclude statements violating *Crawford* were filed. (8)(9)(10)(11).

On December 21, 2004, bail was posted for Mr. Muniz-Munoz. (15).

On February 25, 2005, Mr. Muniz-Munoz failed to appear for final pretrial and the court ordered the bond forfeited, issuing an arrest warrant for Mr. Muniz-Munoz. (16)(86:3).

On August 3, 2010, appointed counsel reported Mr. Muniz-Munoz was in custody. (87:2). The court set bail at $2.5 million. (87:6-7).

On April 1, 2011, defense filed a motion to suppress statements. (18).

On April 6. 2011 the State filed motions to join case No. 05-CF-1249, charging bail jumping (19)(20), and to introduce *Whitty* and gang expert evidence. (21)(22).

On July 11, 2011, defense filed a motion to disclose identity of an informer. (23).

On July 18, 2011 defense filed motions for discovery of exculpatory evidence and to adjourn. (24)(25).

On July 19, 2011, the court granted the motion to adjourn. (26)(91:33-34).

On August 23, 2011, defense filed an additional motion to

compel discovery (27) and on August 29, 2011, the State filed its opposition brief. (28).

On September 9, 2011 (92) and October 14, 2011 (93), the court heard the special discovery motion, denying it. (93:14-15).

On October 14, 2011, the court found sufficient cause for an *in camera* inspection of evidence the confidential informer could provide. (93:2-3).

On November 11, 2011, the court began hearing the defense motion to suppress statements. (94).

On November 14, 2011, defense filed amendments to its suppression motion and a supporting brief (30). The court continued hearing the motion on that date (95) and on November 16 and 22, 2011. (96)(97).

On December 2, 2011, defense filed a motion in limine with a supporting brief, asking, *inter alia*, for exclusion on confrontation grounds of expert testimony as to the cause of death of victim Lara. (32)(33).

On December 8, 2011 the court filed its written decision denying the motion to suppress statements. (35).

On December 12, 2011, the court ruled it would give a jury instruction limiting the use of gang evidence and defense agreed to fashion such an instruction. (100:42, 57).

On December 13, 2011, the court adjourned the trial date for detailed consideration of the *Crawford* issue. (101:10).

On December 21, 2011, the State filed a motion and supporting brief, arguing a surrogate doctor could, consistent with *Crawford*, give his opinion on victim Lara's cause of death. (41).

On December 28, 2011, the court ruled the surrogate doctor could testify to his opinion on victim Lara's cause of death. (102:14-21).

On February 13, 2012, jury trial began with *voir dire*. (103).

On February 14, 2012, a jury was selected and sworn. (105:48, 55). The State began presenting its case. (105:82).

On February 15, 2012, a juror was seen nodding off during the morning session and the court denied the defense motion to dismiss the juror or in the alternative he be *voir dired*. (107:69-73). During the afternoon session, an additional juror was seen sleeping and the court denied the defense motion to *voir dire* both jurors. (108:73-76).

On February 16, 2012, the surrogate doctor testified to his opinion on victim Lara's cause of death. (109:15-18). The State rested. (110:39). Mr. Muniz-Munoz waived his right to testify. (110: 75-80). The defense rested. (110:86). At the instruction conference, the court refused defense's special instruction #2. (45)(110:89-91).

On February 17, 2012, the jury returned its verdicts, finding Mr. Muniz-Munoz guilty of the murder charged in Count 1 (48) and guilt of the lesser included offense of 1st degree recklessly endangering safety. (49)(111:91-92).

(Before sentencing, in exchange for the State's recommendation for time served to run concurrent, Mr, Muniz-Munoz entered a plea of guilty to the bail jumping charge in No. 05-CF-1249. (112:4-9).)

On March 10, 2012, the court sentenced Mr. Muniz-Munoz to life imprisonment with eligibility for release in 35 years on the murder charge. (112:4-9) and to a concurrent sentence of 5 years confinement and 5 years of extended supervision on the recklessly endangering safety conviction. (112:61). (The court's sentence on the bail jumping charge was a year in county jail, granting 365 days time served. (112:62).)

Notice of Intent was filed April 4, 2012 (55) and Notice of Appeal was filed March 26, 2014. (78).

3. Facts of the Offenses

Testifying pursuant to an agreement with the State for a reduced sentence (107:21-22, 49-52), Lionel Diaz-Luna swore he participated in a shooting with Mr. Muniz-Munoz, (107:10-26). He saw a gun in Mr. Muniz-Munoz hand and saw him shoot it. *Id*. Adrian Lara died as a result of this shooting. (106:88)(108:94)(109:18).

Argument

I. MR. MUNIZ-MUNOZ BASIC CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND AN IMPARTIAL JURY WERE VIOLATED BY SLEEPING JURORS.

A. Additional Facts

During the morning trial session on February 15, 2012, the court reported a sidebar about a sleeping juror. (107:69-73). Both court and trial counsel observed the juror closing his eyes repeatedly. *Id*. Trial counsel reported, "he looked like he was asleep to me . . ." (107:72 [lines 1-2]). Counsel requested the juror be replaced and repeatedly asked he be *voir dired*. (107:71-72). The court denied the motion. (107:73 [lines 7-8 "He wasn't snoozing very much at all to begin with."]).

During the afternoon session that day, the court reported another sidebar about a second sleeping juror. (108:73-76). See (108:74 [line 16: DA reports, "purple was sleeping"]). Trial counsel's request for *voir dire* of both jurors was denied. (108:16).

B. Standard of Review

Whether the right to a fair trial has been violated by an inattentive juror is an issue of law reviewed *de novo*. *State v. Turner*, 186 Wis.2d 277, 284, 521 N.W.2d 148, 151 (Ct.App.1984)(hearing impaired jurors).

C. Discussion

It is settled the federal and state constitutions "require

that a criminal not be tried by a juror who cannot comprehend the testimony." *State v. Hampton*, 201 Wis.2d 662, 668, 549 N.W.2d 756 (Ct.App.1996) following *Turner*, *supra*, *id*. and followed in *State v. Novy*, 2013 WI 23, ¶47, 346 Wis.2d 289, 312, 827 N.W.2d 610, 621. If jurors have not heard all of the material testimony, "due to . . . a state of semi-consciousness, [this] could imperil the guarantees of impartiality and due process." 201 Wis.2d at 668; *Novy*, *supra*, *id*.

Hampton, the leading case by virtue of its approval in *Novy*, sets up requirements for determining this issue. First there must be "timely" objections. 201 Wis.2d at 670. Secondly, there must be "specificity" to the objections. *Id*. at 670-671. Then, the trial court must use its "informed discretion" to decide if there was prejudice. *Id*. at 670.

As with any issue involving a juror's potential discharge, "the court must approach the issue with extreme caution," *State v. Lehman*, 108 Wis.2d 291, 300, 321 N.W.2d 212 (1982), "mak[ing] careful inquiry into the substance of the request . . . *Id*.

Here, there could be no dispute there were timely and specific objections, see (107:69-73; 108:73-76), so the issue is whether the court below's response was sufficient. Examining this issue, trial counsel reported a juror "looked like he was asleep to me" (107:72 [lines 1-2]) and the State reported a juror was asleep. (108:74 [line 16 "purple was asleep"]). Based on the court's own observations, it concluded the juror "wasn't snoozing very much at all to begin with" (107:73 [lines 7-8]) and denied both the request to replace one juror and to *voir dire* both jurors. (107:71)(108:76).

In *Hampton*, the trial court observed the juror was "dozing." 201 Wis.2d 668, n.1. Since the dictionary definition of "dozing" is "a light sleep," *id*., the *Hampton* court found "it is conceded a juror was sleeping . . ." 201 Wis.2d at 673. In such circumstances, the *Hampton* court found an erroneous exercise of discretion and remanded for a fact finding hearing on the issue. *Id*.

Here, Merriam Webster's Collegiate Dictionary (11th

ed.2009) at 1181 defines "snoozing" as "to take a nap" so counsel submits the court's comments here, as in *Hampton*, are a concession the juror was sleeping and it was error justifying remand for the court below to refuse trial counsel's requests for juror *voir dire*.

Therefore, there should be a remand to determine (1) "the length of time of the attentiveness" (2) "the importance of the testimony missed" and (3) "whether such inattention prejudiced" Mr. Muniz-Munoz. 201 Wis.2d at 673.

II. MR. MUNIZ-MUNOZ RIGHT TO CONFRONTATION WAS VIOLATED WHEN THE STATE PRODUCED ONLY A SURROGATE AUTOPSY DOCTOR TO TESTIFY TO THE CAUSE OF DEATH OF VICTIM LARA.

A. Additional Facts

On December 2, 2011, trial counsel filed a motion *in limine*, asking, among other things, to exclude expert testimony on the cause of death on confrontation grounds because the State planned to produce only a surrogate autopsy doctor. (32:1, ¶3)(33).

On December 21, 2011, the State filed its motion on this *Crawford* issue, arguing a surrogate doctor should be allowed to state his expert opinion on the cause of death of victim Lara. (41)

On December 28, 2011, the court below decided a surrogate autopsy doctor could testify to his opinion on the cause of death of victim Lara. (102:14-21).

The controversy arose because the actual autopsy doctor was deceased. (109:15). The autopsy report was never offered nor admitted in evidence. Nevertheless, after reviewing it and the other contents of the autopsy file, including investigative reports, the surrogate, Dr. Peterson, testified to his opinion on the cause of victim Lara's death. (109:15-17).

B. Standard of Review

Whether admission of evidence violates an accused's right to confrontation is reviewed *de novo*. *State v. Hale*, 2005 WI 7, ¶41, 277 Wis.2d 593, 691 N.W.2d 637.

C. Discussion

"[A] new day dawned [ ] for Confrontation Clause jurisprudence" with the decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). *Hale, supra,* ¶57. Under *Crawford, supra,* the "threshold question," *Hale* at ¶53, in any Confrontation Clause issue is whether the State has used "testimonial" evidence against the accused without showing unavailability of the source witness and a prior opportunity for the accused to cross-examine that witness. 541 U.S. at 68.

The thorniest aspect of this threshold question, and perhaps the hottest issue today in constitutional criminal law is the application of *Crawford* to forensic analysis. See generally, Richard D. Friedman, *Confrontation and Forensic Laboratory Reports, Round Four*, 45 Tex. Tech. L.R. 51, 52-53. (2012) (NOTE: The issue presented here is now being reviewed by the state supreme court in *State v. Griep*, 2014 WI App 25 rev. granted 8/5/14.)

Two years before *Crawford*, the state supreme court, following the decisions of other jurisdictions, found no confrontation error when the State failed to produce the crime lab analyst who had analyzed the drugs involved there and found them to be cocaine. *State v. Williams*, 2002 WI 58, ¶9-¶26, 253 Wis.2d 99, 644 N.W.2d 919.

Since *Crawford*, the highest Court has made rulings questioning, if not abrogating, the *Williams, supra,* rule.

First, in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305. 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), the Court found certificates of state crime lab analysts attesting to their analysis of drugs were "testimonial" and reversed because the certificates were admitted absent the testimony of the analysts

themselves. As the dissenters recognized, the Court had made it clear "it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second . . ." 557 U.S. at 334 (dis. opn. per Kennnedy, J.).

Next in *Bullcoming v. New Mexico*, 564 U.S. ___, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011), the Court found the report of a blood alcohol analyst, though not sworn, was "testimonial" and so could not be introduced through the testimony of an analyst who neither participated in nor observed the actual analysis. 131 S.Ct. 2715-2718. The Court reversed and remanded, holding "surrogate testimony of that order does not meet the constitutional requirement." 131 S.Ct. at 2710.

But, as a Justice there recognized, *Bullcoming, supra,* did not resolve the question presented here: "the constitutionality of allowing an expert witness to discuss other's testimonial statements if the testimonial statements were not admitted as evidence." 131 S.Ct. at 2272. (conc. opn. per Sotomayor). Put another way: Does *State v. Williams, supra*, survive *Crawford*?

Returning to the "threshold question," were the autopsy report and other investigative reports the surrogate doctor used to support his opinion "testimonial evidence?"

While no Wisconsin case addresses this issue, other jurisdictions easily find an autopsy report is testimonial, applying the *Bullcoming* definition: "A document created solely for 'an evidentiary purpose,' *Melendez-Diaz* clarified, made in aid of a police investigation ranks as testimonial." 131 S.Ct. at 2717. See, *e.g., U.S. v. Ignasiak*, 667 F.3d 1217, 1230, 1233 (11th Cir.2012)(at 1230: "Forensic reports are testimonial evidence." and at 1233: "Autopsy reports are like many other types of forensic evidence used in criminal prosecutions."). As in *State v. Navarette*, 2013-NMSC-003, ¶17, ___ N.M. ___, 294 P.3d 435, so here "there is no reason that [Dr. Teggatz], aware of his statutory duties to report, should not have anticipated that criminal litigation would result from [his] autopsy findings of death by a bullet wound . . ."

Counsel submits such autopsy reports are testimonial. The fact Dr. Teggatz' report was not admitted in evidence is immaterial to the analysis. See *U.S. v. Turner*, 709 F.3d 1187, 1191-1194 (7th Cir.2013)("notes, test results and written report not admitted into evidence" but confrontation analysis is the same).

So while it can't be disputed Dr. Teggatz was unavailable at trial, the State presented no evidence showing a prior opportunity to cross-examine him. Therefore, Mr. Muniz-Munoz right to confrontation was violated when the surrogate, Dr. Peterson, testified to his opinion on the cause of death.

Anticipating a State's response based on *Williams v. Illinois*, 567 U.S. ___, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012) as interpreted in *State v. Deadwiller*, 2013 WI 75, 350 Wis.2d 138, 834 N.W.2d 362, counsel notes these decisions have been confined to their specific facts. *Deadwiller, supra*, ¶32 & ¶36 (*Williams* holding will be applied only to defendants in "a substantially identical position" as Sandy Williams). Mr. Muniz-Munoz is not in a "substantially identical position" as Sandy Williams since the autopsy report was prepared by a state official to aid a criminal investigation.

III. IT WAS FUNDAMENTALLY UNFAIR TO REFUSE A JURY INSTRUCTION ON UNRECORDED INTERROGATION.

A. Additional Facts

The police interrogations of Mr. Muniz-Munoz took place on June 27, 28 & 29 2004. (94:29-30). They were not electronically recorded. (109:26-27, 88-90). Trial counsel requested a special jury instruction on the use of evidence of unrecorded interrogations. (45). The court below refused to give the instruction. (110:89-91). The court gave the jury the standard jury instruction on confessions, Wis JI-Criminal 180, but did not include the paragraph referring to unrecorded interrogations. (47:6)(111:21-22).

B. Standard of Review

Whether jury instructions violate basic Due Process is an issue of law reviewed *de novo. State v Kuntz*, 160 Wis.2d 722, 735, 467 N.W.2d 531 (1991).

C. Discussion

In *State v. Jerrell C.J.*, 2005 WI 105, ¶3, 283 Wis.2d 145, 699 N.W.2d 110, the state supreme court exercised its supervisory authority to require all police interrogations of juveniles be electronically recorded. The high court based this decision on a number of policy considerations including "such a rule will protect the rights of the accused," noting that without such recordings "law enforcement officials invariably win" the credibility contest over whether the interrogation was proper. *Id.* at ¶55. The court also noted New Jersey was considering adopting similar rules. *Id*. at ¶44, n. 10.

With 2005 Act 60, the legislature enacted a number of innocence reforms. See generally Katherine R. Kruse, *Instituting Innocence Reform: etc.*, 2006 Wis. L .Rev. 645, 646-647. Among other things, "[t]his Wisconsin legislation codified and extended" *Jerrell C.J.*, *supra.* 2006 Wis. L. Rev. at 691. Especially pertinent here, it created §972.115, *Wis. Stats.*, which provides where "a statement made by a defendant during a custodial interrogation is admitted into evidence in a trial for a felony before a jury" and no electronic recording is available, then, upon defendant's request "the court shall instruct the jury that it is the policy of this state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony and that the jury may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence relating to the interrogation and the statement in the case" Subsection (2)(a).

Now, counsel cannot dispute either that the special instruction trial counsel requested was more detailed than the statutory language or that it did not specifically include that language. (45). As trial counsel noted, her instruction was modeled on a charge the New Jersey Supreme Court adopted

to implement its Rule Governing Criminal Practice 3.17 which is substantially similar to §972.115, *Wis. Stats.* (110:90).

Nevertheless, the gist of trial counsel's instruction and its purpose was to call the jury's attention to the unrecorded nature of the interrogation which is exactly what the statutory language does. Therefore, counsel submits trial counsel's request substantially complies with the statute and so as a matter of basic fairness the court below should have included in its reading of Wis JI-Criminal 180 the paragraph on unrecorded interrogations.

Counsel further submits the failure to give any instruction on unrecorded interrogations was prejudicial since the theory of defense was "Mr. Muniz-Munoz was not present and did not commit the shooting . . ." (91:40 [lines 14-16]). So it was incumbent on the defense to show the jury every possible reason to doubt the veracity of Mr. Muniz-Munoz confession. The court below's failure to give any instruction on unrecorded interrogation frustrated this effort, thereby prejudicing the defense case.

IV. THE MOTION SEEKING DISCOVERY OF EVIDENCE OF TORTURE ABROAD SHOULD HAVE BEEN GRANTED.

A. Additional Facts

The court below assumed "these allegations are true for purposes of this motion . . . (93:4)

"[W]hen apprehended in Mexico [Mr. Muniz-Munoz]

[1] was put in a chokehold,

[2] punched repeatedly in the face, his mouth was bleeding and

[3] suffered blows to his jaw that still caused him pain twelve weeks later." *Id*.

Trial counsel filed discovery motions seeking evidence related to these facts. (24:3-4, ¶13)(27). The court below denied the motions.

B. Standard of Review

As there is no guidance from Wisconsin case law, counsel assumes this issue is judged by the erroneous exercise of discretion test.

C. Discussion

Though "[t]he Fifth Amendment privilege prohibited . . . torture . . ." Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective*, 94 Mich. L. Rev. 2625, 2651 & n. 95 (1996), and the Eighth Amendment cruel and unusual punishment, official torture has nonetheless often been a part of American history. See, *e.g.*, Nat'l Comm'n on Law Enforcement and Observance [President Hoover's Wickersham Commission], Report 11 on Lawlessness in Law Enforcement (1931) at 4 ("The third degree – that is, the use of physical brutality, or other forms of cruelty, to obtain involuntary confessions or admissions – is widespread.") Compare *Pollack v. State*, 215 Wis. 200, 216, 253 N.W. 560, 566 (1934)("Few courts have denounced more vigorously than has this court the subjection of defendants to inquisition by the third degree so-called.")

By the mid-20th century, the highest Court declared such methods of obtaining evidence violative of basic Due Process. *Rochin v. California*, 342 U.S. 165, 171-173, 72 S.Ct. 205. 96 L.Ed 2d 183 (1952). Today when government conduct "shocks the conscience" as in *Rochin*, *supra, id.*, it is prohibited as violative of basic substantive Due Process. See, *e.g.*, *State ex rel. Greer v. Wiedenhoeft*, 2014 WI 19, ¶57 & ¶58, 353 Wis.2d 307, 845 N.W.2d 373.

Turning to the specific issue on which trial counsel sought discovery, the relevant case is *U.S. v. Toscanino*, 500 F.2d 267 (2d Cir.1974). There, the defendant alleged he was abducted and tortured, including beatings, by South American authorities before being turned over to U.S. authorities. *Id*. at 269-279. The reviewing court found that if there had been deliberate and unnecessary" lawlessness by the government, this would violate basic Due Process, *id*. at 275, and remanded the case for an evidentiary hearing on Mr.

Toscanino's allegations. *Id*. at 281.

Counsel recognizes there is no constitutional right to discovery but nevertheless submits the court below should have followed *Toscanino* here and allowed the defense to explore the issue of deliberate beating since it involves basic human rights.

Conclusion

Counsel respectfully submits the foregoing demonstrates the Court should reverse and remand the judgment below for a new trial.

March 16, 2015

Respectfully submitted,

_____

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MUNIZ-MUNOZ

STATE OF WISCONSIN

C O U R T OF A P P E A L S

DISTRICT I

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v. No. 2014AP702 CR

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CERTIFICATIONS

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) & (c) for a brief produced with a proportional serif font.

The length of this brief is 3,860 words.

ACCURACY CERTIFICATION

I hereby certify that the electronic copy of this brief conforms to the rule contained §809.19(12)(f) in that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief.

Dated: March 16, 2015 So Certified,

Signature: _____

Timothy A. Provis

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STATE OF WISCONSIN

C O U R T OF A P P E A L S

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Defendant-Appellant.

CERTIFICATE OF MAILING

I certify that this brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first class mail on March 18, 2015. I further certify that the brief was correctly addressed and postage was prepaid.

Dated: March 18, 2015 So Certified,

Signature: _____

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