STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP867-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES RICHARD COLEMAN,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE DENNIS R. CIMPL AND THE HONORABLE STEPHANIE ROTHSTEIN PRESIDING.

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication, however, may be warranted to make clear that trial counsel's performance is not per se deficient where the defendant does not testify after counsel informed the jury that the defendant would do so.

STATEMENT OF THE CASE

As respondent, the State exercises its option not to present a full statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a)2.[1] Instead, relevant facts will be set forth in the Argument section.

ARGUMENT

TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE.

A. Introduction.

Defendant-respondent James Richard Coleman stands convicted of two counts of second-degree sexual assault of a child, contrary to Wis. Stat. § 948.02(2) (21:1). The charges arose from two separate sexual assaults Coleman committed against C.B., a thirteen-year-old girl whose father was friends with Coleman and had allowed Coleman to live with them after he was released from prison (*see* 61:29-32). Coleman was found guilty at a jury trial, and the circuit court sentenced him to two terms of five years' confinement and ten years' extended supervision, to be served consecutively (21:1).

Following sentencing, Coleman brought a postconviction motion asserting multiple claims of ineffective assistance of counsel (*see generally* 35). After holding a *Machner* hearing,[2] the circuit court

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[1]Unless otherwise indicated, all references to the Wisconsin Statutes are to the 2011-12 edition.

[2]*State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (1979).

denied Coleman's motion, and concluded that trial counsel had had valid strategic reasons for each decision that Coleman challenged as deficient (62:117-27). As pertains to Coleman's current appeal, the circuit court found that Coleman's trial attorney (Robert Taylor) expressed clear, well-founded strategic bases for (1) telling the jury that Coleman would testify, even though at the time of opening statements, it was an open question; (2); informing the jury during voir dire and opening statement that Coleman had a prior criminal history; and (3) not impeaching the victim regarding (a) the time she went to bed on the night following one of the assaults, and (b) whether there had actually been a "sticky, wet substance" on her leg following one of the assaults, notwithstanding the lack of male DNA evidence (*see id.*).

On appeal, Coleman asks this court to ignore those clear findings and conclude that either (a) counsel was not credible when he stated the various strategic reasons for taking the actions he did; or (b) that, as a matter of law, counsel's strategic bases for his actions were objectively unreasonable—that is, unsupportable within the wide range of professionally competent performance. Coleman's attempts to second guess Taylor's strategic decisions should be rejected because each decision was within the broad range of professionally competent representation. Further, Coleman has failed to demonstrate that a different result would be "reasonably probable" in the absence of the alleged errors. Accordingly, Coleman is not entitled to relief on his claims of ineffective assistance of counsel.

B. Coleman's "broken promise" argument fails as a matter of law.

Before even addressing Coleman's "broken promise" argument in terms of ineffective assistance of counsel, this court could reject that argument as a matter of law, based as it is on the premise that Attorney Taylor's statement to the jury damaged Coleman's credibility. Because Coleman did not testify and in fact the defense presented no evidence, Coleman's credibility was never actually before the jury, and therefore he could not suffer any damage to his credibility by counsel's statement that he would testify.

Instead, Coleman's discussion of the "credibility of the defense" in this context actually refers to the credibility of *defense counsel*. Indeed, the cases Coleman relies upon are based on the idea that when defense counsel fails to deliver promised testimony, counsel loses credibility in the eyes of the jurors and that loss of credibility is then transferred to the defendant (*see* Coleman's brief at 12-14 (citing, *e.g.*, *Saesee v. McDonald*, 725 F.3d 1045, 1049-50 (9th Cir. 2013); *State v. Moeck*, 2005 WI 57, ¶ 78, 280 Wis. 2d 277, 695 N.W.2d 783) (both discussing counsel's loss of credibility before the jury)). Such lost credibility, however, must necessarily assume that the defense presents the jury with some evidence or testimony to substantiate the defense's theory. Without any such evidence or testimony, the jury has no basis upon which to evaluate the credibility of the defendant or his story.

A challenge such as Coleman's, then, amounts to a challenge to the sufficiency of the evidence. And Coleman has failed to show that the evidence, viewed most favorably to the State and

the conviction, is so insufficient that no reasonable jury could have found guilt beyond a reasonable doubt. *See State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

Moreover, Wisconsin law presumes that counsel's credibility had no impact on a properly instructed jury's verdict, and that the verdict was instead based on the evidence presented and the instructions provided by the court. *See State v. Chambers*, 173 Wis. 2d 237, 259, 496 N.W.2d 191 (Ct. App. 1992); *see also State v. Hunt*, 2014 WI 102, ¶ 48, __ Wis. 2d __, 851 N.W.2d 434. Applying this presumption here, there is no basis to conclude that the jury's verdict was based on anything other than the evidence presented, namely, C.B.'s account of the assaults, and the corroborating testimony submitted as part of the State's case. To suggest that defense counsel's opening statement impacted the jurors' finding of guilt necessarily assumes that the jurors ignored instructions about the weight to be given counsels' arguments, the State's burden of proof, and the defendant's decision not to testify (*see* 58:6-8, 10, 11, 12-13). Because Coleman has provided no reason to assume that the jury's verdict was based on improper considerations, his "broken promise" argument fails.

C. Legal principles governing ineffective assistance of counsel claims.

The benchmark for an ineffective assistance of counsel claim is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied

on as having produced a just result."[3] *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Under *Strickland*'s familiar two-pronged standard, a defendant must show both that his counsel's performance was deficient and that that deficient performance resulted in prejudice to the defendant. *See State v. Domke*, 2011 WI 95, ¶ 36, 337 Wis. 2d 268, 805 N.W.2d 364.

To establish deficient performance, a defendant must show that counsel's representation fell below an objective standard of "reasonably effective assistance." *Id.* (quoting *Strickland*, 466 U.S. at 687-88). On review of a claim of ineffective assistance, courts should be "highly deferential" to trial counsel's strategic decisions, and should make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *State v. Carter*, 2010 WI 40, ¶ 22, 324 Wis. 2d 640, 782 N.W.2d 695 (quoting *Strickland*, 466 U.S. at 689) (internal quotation omitted). There is a "'strong presumption' that counsel's conduct 'falls within the wide range of reasonable professional assistance.'" *Id.* (quoting *Strickland*, 466 U.S. at 689).

If a defendant can show that counsel's performance was outside the wide range of competent assistance, the defendant must also

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[3]The standard of review for a claim of ineffective assistance of counsel is mixed: a circuit court's findings of fact should be sustained unless those findings are clearly erroneous; whether counsel's performance was prejudicially deficient, however, is a question of law, reviewed de novo. *State v. Weed*, 2003 WI 85, ¶ 11, 263 Wis. 2d 434, 666 N.W.2d 485.

establish that the deficient performance caused prejudice. To establish prejudice, a defendant must show that the attorney's error was "of such magnitude that there is a reasonable probability that, absent the error, 'the result of the proceeding would have been different.'" *State v. Erickson*, 227 Wis. 2d 758, 769, 596 N.W.2d 749 (1999) (citations omitted).

If the defendant fails to make either showing—deficient performance or prejudice—the ineffective assistance claim fails: "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697.

D. Counsel's decision to tell the jury that Coleman would testify was based on a reasonable trial strategy.

Coleman's primary claim of ineffective assistance is his "promise" argument: that by telling the jury during opening statement that Coleman would testify—when it had not been established whether Coleman would actually do so—counsel's performance was per se deficient (*see, e.g.*, Coleman's brief at 12 ("There is simply no reasonable strategic reason to promise the jury that the defendant will testify when it is not known whether that promise will be kept.")). To support this argument, Coleman relies on a handful of non-Wisconsin cases for the proposition that such a "broken promise" is so damaging to the defense's credibility that counsel performs deficiently any time he or she tells the jury that

the defendant will testify, regardless of any strategic reason counsel might set forth.

This court recently rejected such a per se approach to deficiency in *State v. Krancki*, 2014 WI App 80, ¶ 10, __ Wis. 2d __, 851 N.W.2d 824. Without such a per se rule, the decision to tell the jury that the defendant will testify should be analyzed under *Strickland*'s familiar inquiry into the totality of the circumstances of the case. Under that inquiry, Attorney Taylor's decision to tell the jury Coleman would testify was strategically based, and was reasonably calculated to address the specific circumstances presented in the case. Moreover, because Coleman ultimately did not testify and presented no evidence, his "damaged credibility" argument is inapt in the context of this case, since the jury must be presumed to have reached its verdict based on the evidence actually presented, without ever having been asked to evaluate Coleman's credibility.

1. *Krancki* rejected a per se rule of deficient performance when trial counsel informs the jury that the defendant will testify.

This court, in *Krancki*, 2014 WI App 80, ¶ 10, recently rejected the same per se deficiency argument that Coleman now asserts. In *Krancki*, the court emphasized that in telling the jury that the defendant would testify, counsel had simply relied on the defendant's insistence that he would take the stand. *See Krancki*, 2014 WI App 80, ¶ 10. The court held that in such a circumstance, Krancki would not be heard to complain that

counsel's statement to the jury constituted deficient performance because counsel had simply adhered to his client's directive, as required under the rules of professional conduct. *See id.* (citing Wisconsin Supreme Court Rule 20:1.2(a)).

As a general proposition, *Krancki* thus demonstrates that there is no per se rule against telling the jury that the defendant will testify, and that each case should be analyzed individually to determine whether counsel's performance was objectively unreasonable under the particular circumstances of the case. *Cf. Turner v. Williams*, 35 F.3d 872, 903-04 (4th Cir. 1994), *overruled on other grounds by O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1996). Indeed, the *Strickland* Court emphasized this very principle:

> No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

Strickland, 466 U.S. at 688-89.

Thus, under *Krancki*, as well as *Strickland*'s prevailing case-specific inquiry, it is not enough for a defendant to simply point to a "promise" in opening statement to establish deficient performance. Instead, a defendant must show by clear and convincing evidence that, in light of all the circumstances of the case, counsel's decision to make such a statement was "'outside the wide range of professionally competent assistance.'" *State v. Oswald*, 2000 WI App 2, ¶ 49, 232 Wis. 2d

62, 606 N.W.2d 207 (quoting *State v. Guck*, 170 Wis. 2d 661, 669, 490 N.W.2d 34 (Ct. App. 1992)).

2. Counsel had a reasonable strategic rationale for telling the jury Coleman would testify.

At the *Machner* hearing, Taylor testified to his rationale for telling the jury that Coleman would testify, stating that his decision "was more strategic" (62:16):

> You don't want to start the jury off by saying "My guy's not going to testify" or something like that. I wanted to try to give Mr. Coleman some sort of credibility in the face of these horrendous allegations. So we start off by saying: ["]Oh, we're gonna testify. It's his right to testify and we've got something to say.["]

(62:16-17.) After hearing both Taylor's and Coleman's testimony, the court found Taylor's account more credible, and concluded that he expressed a reasonable strategic basis for informing the jury that Coleman would testify (62:117-20).

The record in Coleman's case shows that there were competing understandings regarding whether Coleman intended to testify at trial. Attorney Taylor told the postconviction court that he was never certain whether Coleman would testify until Coleman informed the court that he would not testify (*see* 62:14-17), whereas Coleman insisted that he had made it clear from the outset that he intended to testify (*see* 62:73). In either case, however, Attorney Taylor was justified in his

decision to tell the jury Coleman would testify, as the circuit court concluded (*see* 62:120-21).

If Attorney Taylor's explanation of the situation is adopted, his strategic appraisal demonstrated that he believed he needed to convey to the jury that Coleman's denial was plausible, thereby undercutting the State's case (*see* 62:16, 62-63). Taylor's strategic decision can be viewed as a calculated attempt to foster doubt in the jurors' minds as they prepared to hear the State's presentation of evidence. Given the nature of the case and the limited accounts of the assaults, Taylor's calculated approach cannot be said to have been objectively unreasonable.

And under Coleman's account of whether he would testify, Attorney Taylor's statement to the jury is even more defensible as a reasonable trial approach. If Coleman's account is accepted, his current ineffective-assistance claim is identical to that presented in *Krancki*, 2014 WI App 80, ¶ 10, in that Coleman, like Krancki, made it clear to his attorney that he intended to testify, so that his attorney was merely adhering to his client's directives when he told the jury that his client would testify. Thus, under his own account of his decision to testify, Coleman cannot now maintain that Taylor was ineffective for simply giving voice to Coleman's own "promise" to testify. *See id.*; *see also State v. Pitsch*, 124 Wis. 2d 628, 637, 369 N.W.2d 711 (1985) (noting that the reasonableness of counsel's decisions turns in large part on the defendant's own statements and actions).

At the *Machner* hearing, the circuit court found that, according to Attorney Taylor, it was never absolutely certain whether Coleman would testify until he formally waived that right at the

end of the defense's case (*see* 62:118-20). In light of that finding, the circuit court held that Taylor's strategy was a reasonable method to attempt to soften the blow of the "horrendous" charges against his client, and to give the jurors something to ponder as they listened to the State's case (*see* 62:17, 119-20). Because Colman has not shown that the circuit court's finding was clearly erroneous, and Taylor's strategic reason demonstrates that his approach was within the wide range of professionally competent representation, this court should affirm the circuit court's conclusion that counsel was not deficient in telling the jury that Coleman would testify.

Finally, even assuming that Coleman demonstrated deficient performance, he has failed to demonstrate that counsel's statement to the jury caused him prejudice. Rather, given the weight of evidence against him (particularly the testimony of his victim, C.B.), Coleman cannot establish that a different result would be "reasonably probable" had counsel not told the jury Coleman would testify. Without such a showing, Coleman's ineffective-assistance claim fails.

E. Trial counsel's decision to inform the jury about Coleman's criminal history was a reasonable trial strategy.

During the *Machner* hearing, Attorney Taylor testified that his rationale for informing the jury about Coleman's criminal history in voir dire and during his opening statement was "[t]o sort of take the thunder away from the state. It's going to come out at some point, some way or

another, and I wanted to get it out there first" (62:21). Counsel went on to say that he didn't want the jury to hear for the first time from the State that Coleman had been to prison: "I didn't want them to hear any of that negative stuff for the first time from the state. I wanted to say it to the jury myself. That way I could kind of clothe it in some sort of way that wouldn't be so harsh towards my client" (62:22). The ultimate purpose of his disclosures, counsel testified, was to attempt "to show that [Coleman] had nothing to hide" (62:24).

Additionally, counsel stated that he had considered that the admissibility of Coleman's criminal history might be limited, but also noted that he "didn't want to take that chance. That would have been damaging to him if they heard it from someone other than me first" (62:23; *see id.* at 23-24).

Based on Taylor's stated rationale, the circuit court found that Taylor had a reasonable strategy when he informed the jury about Coleman's criminal past: "it's a very valid question to ask during voir dire and does in fact serve to weed out . . . individuals who have prior preconceived notions about people who have been convicted" (62:124). Further acknowledging the reasonableness of Taylor's approach, the court noted that given the multiple citizen witnesses who would be testifying, Taylor was justified in his concern that, admissibility aside, there was a real risk that someone might mention that Coleman had recently been released from prison (*see* 62:124-25).

On appeal, Coleman argues that the circuit court's decision "makes no sense" (*see* Coleman's

brief at 23-24). His argument, however, amounts to classic second-guessing of trial counsel, and is readily disposed of under *Strickland*'s highly deferential standard for reviewing strategic decisions by trial counsel. *See Hunt*, 2014 WI 102, ¶ 55. The circuit court's disposition of this claim should be affirmed on the ground that counsel was not deficient in informing the jury about Coleman's criminal history.

Alternatively, this court may conclude that the information the jury learned did not prejudice Coleman. Much like in Coleman's primary claim of damaged credibility by defense counsel, finding prejudice here would require ignoring the presumption that juries follow the law given them by the court, and that verdicts are therefore based on the evidence presented rather than the performance of counsel. There is no reason to depart from those established presumptions here, and Coleman's claim was thus properly rejected.

F. Trial counsel's challenged evidentiary decisions were based on reasonable trial strategies.

1. Attorney Taylor provided a reasonable strategic reason for not cross-examining C.B. about the two-hour inconsistency regarding the time she went to bed the evening following the first assault.

Coleman's claim that Attorney Taylor should have cross-examined C.B. more aggressively about the time she went to bed (in

light of the time her father thought she went to bed) is another classic example of second-guessing trial counsel's strategic decisions. As Attorney Taylor stated during the *Machner* hearing, "[i]t's a minor detail. . . . We can beat every little inconsistency all we want to. But my point of view as defense attorney at that time, some of these things just would have drawn out something that I wanted to get away from" (62:31-32). Taylor noted that he had been aware of the inconsistency while preparing for trial but, based on C.B.'s age and the nature of the charges, he determined that it would not be worth quibbling about such a collateral matter, particularly due to the risk of appearing to beat-up on the victim (*see* 62:31-33). Summarizing his rationale for not objecting, Taylor stated that when even contemplating "attacking the victim as a liar, you gotta be very careful about that. Just very careful" (62:33).

The circuit court readily accepted Taylor's strategic explanation (*see* 62:121-22). Further, in response to Coleman's second-guessing of counsel's decision not to press the issue on cross-examination, the court noted that such questioning "could have very likely had the exact opposite [e]ffect which the defense now asserts it would have had," suggesting that rather than hurting C.B.'s credibility, such an attack might have opened the door to other information that would have made Coleman look even worse for the jury (*see* 62:122).

The second-guessing that Coleman now urges this court to undertake cannot support his claim (*see* Coleman's brief at 28-29). Counsel's strategic decision not to raise a certain point on cross-examination is "virtually unchallengeable," *see State v. Balliette*, 2011 WI 79, ¶ 26, 336 Wis.

2d 358, 805 N.W.2d 334, and the circuit court properly rejected Coleman's claim.

2. Attorney Taylor's strategic decision not to question C.B. about her statements regarding a "sticky, wet substance" on her leg following the second assault was based on a reasonable trial strategy.

Coleman's final individual claim of deficient performance is based on Attorney Taylor's decision not to question C.B. about her statements to investigators that Coleman had left a "sticky, wet substance" on C.B.'s leg during the second assault. Coleman claims that, in light of the lack of DNA evidence, C.B.'s statements to investigators would have made her account seem less credible (*see* Coleman's brief at 29-33). In support of his argument, Coleman asserts that "[i]t is hard to imagine that, if Coleman had ejaculated, there would be no DNA found anywhere on the clothing or sheets" because "surely the substance would have touched the clothing or sheets, and then been identified by the crime lab analyst (*id.* at 32-33).

Like all Coleman's other claims, this claim is subject to the deferential review accorded strategic decisions, and Attorney Taylor set forth two very persuasive bases for not pursuing this line of questioning. For one, he noted that the State's expert had already testified that there was no DNA evidence to support C.B.'s claims—that is, the defense had already obtained an evidentiary benefit from the State's case (*see* 62:37). Perhaps even more persuasive, though, was Taylor's second

rationale, that, given the "horrendous" charges against his client, any discussion about a "sticky, wet substance" with a thirteen-year-old victim might do more harm than good in the eyes of the jurors (*see* 62:16, 37, 45-46).

Attorney Taylor's strategic decision not to raise this point with C.B. is due substantial deference. Counsel testified to a reasonable strategic basis for not raising the point, and Coleman's disagreement with the ultimate result is insufficient to show that counsel was deficient.

Moreover, as with Coleman's other claims, prejudice is also lacking. The prejudice inquiry asks if there is a reasonable probability of a different result if Taylor had pursued questioning C.B. about the "sticky, wet substance." As noted above, the jury had already heard that there was no DNA evidence linking Coleman to the assault (*see* 57:42-43). The jury had also heard C.B.'s detailed account of the assaults (*see* 54:122-26; 55:6-24). The evidence before the jury therefore already established the apparent inconsistency that Coleman now claims counsel should have emphasized; that is, if the assaults actually happened the way C.B. testified that they did, why was there no physical evidence that Coleman had assaulted her?

Thus, because the jury had already been presented with this apparent inconsistency, there is not a reasonable probability that the jury would have reached a different result. Perhaps most important in the prejudice inquiry, however, is the possibility that any questioning about the "sticky, wet substance" on C.B.'s leg would have done more harm than good for the defense's case. While Coleman now assumes that any such questioning

would merely have emphasized the apparent inconsistency in the evidence, his argument ignores the very real possibility that C.B. could have testified in graphic detail about the substance that Coleman deposited on her leg during the second assault. This possibility further undercuts the likelihood of a different result, and thus demonstrates that, even if the decision not to question C.B. was in error, no prejudice flowed from that decision.

G. Coleman's multiple claims of ineffective assistance do not establish cumulative prejudice.

In *State v. Thiel*, 2003 WI 111, ¶¶ 59-60, 264 Wis. 2d 571, 665 N.W.2d 305, the supreme court adopted the doctrine of "cumulative prejudice," whereby a defendant who suffered multiple instances of deficient performance can rely on the aggregate effect of those deficiencies to establish the prejudice necessary to sustain a claim of ineffective assistance of counsel. Crucial to a claim of cumulative prejudice, however, is the ability to show that each individual instance of challenged performance constituted deficient performance. *See Thiel*, 264 Wis. 2d 571, ¶ 61. Thus, if none of the challenged decisions constituted deficient performance, the cumulative prejudice claim fails.

As set forth in the preceding pages, each of Coleman's claims of ineffectiveness fails on the deficient-performance prong. Accordingly, his cumulative prejudice claim also fails.

Finally, even assuming that Coleman's claims demonstrated deficient performance, the

combined effect of those claims is as unavailing as each individual claim in establishing ineffective assistance. "[A] convicted defendant may not simply present a laundry list of mistakes by counsel and expect to be awarded a new trial." *Thiel*, 264 Wis. 2d 571, ¶ 61. Likewise, Coleman cannot aggregate his otherwise unpersuasive claims of ineffective assistance to create a meaningful claim. The circuit court properly rejected Coleman's claims of ineffective assistance of counsel, and this court should affirm that decision.

CONCLUSION

Based on the facts and legal principles discussed, the State respectfully asks this court to affirm the judgment of conviction and the order denying Coleman's postconviction motion.

Dated this 19th day of September, 2014.

Respectfully submitted,

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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 4,292 words.

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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 19th day of September, 2014.

_____

Gabe Johnson-Karp
Assistant Attorney General