STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Appellant,

v. Case No. 2014AP2432-CR

JAMA I. JAMA,

Defendant-Respondent.

APPEAL OF ORDER OF THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE ELLEN BERZ, PRESIDING

BRIEF OF DEFENDANT-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The respondent does not request oral argument, but is fully willing to provide oral argument if the court deems it helpful in addressing the merits of the appellant's claims.

The respondent believes publication is warranted because this case identifies multiple issues of first impression, including the following:

(1) Whether 3rd degree sexual assault, which requires proof of intercourse without the person's consent, incorporates the definition of consent in Wis. Stat. sec. 940.225(4) as "words or overt actions by a person who is competent to give informed consent," such that the charge is inapplicable in cases where the victim is rendered incapable of giving consent due to intoxication or unconsciousness;

(2) Whether 2nd degree sexual assault of a person who is under the influence of an intoxicant to a degree which renders that person incapable of giving consent is mutually exclusive of a charge of 3rd degree sexual assault, which is committed without the person's consent;

(3) If those charges are not mutually exclusive, whether a conviction for both based on a single act of sexual intercourse violates the defendant's right to be free from double jeopardy; and

(4) Whether 2nd degree sexual assault of a person who is under the influence of an intoxicant to a degree which renders that person incapable of giving consent is mutually exclusive of burglary, which requires proof of entry without the person's consent.

No published Wisconsin case has addressed these issues. Thus publication is appropriate pursuant to Wis. Stat. sec. 809.32(1)(a)2.

STATEMENT OF THE CASE

Given the nature of the arguments raised in the State's brief in chief, the respondent exercises his option not to present a statement of the case. See Wis. Stat. sec. 809.19(3)(a). The relevant facts and procedural history will be discussed in the argument section of this brief.

ARGUMENT

I. The Circuit Court Properly Rejected Jama's Guilty Verdict For 3rd Degree Sexual Assault Because It Is Mutually Exclusive With 2nd Degree Sexual Assault Of A Person Incapable Of Consenting Due To Intoxication And There Was Insufficient Evidence To Prove That HH Was Competent To Give Consent. Alternatively, The Court's Decision Should Be Upheld Because Convictions For Both 2nd Degree For 3rd Degree Sexual Assault Based On A Single Act Of Intercourse Violate Double Jeopardy

A. Summary of arguments

The State of Wisconsin charged Jama Jama with two counts of sexual assault based on a single act of intercourse against the same victim, HH – 2nd degree sexual assault of a person who is under the influence of an intoxicant to a degree which renders that person incapable of giving consent, in violation of Wis. Stat. sec. 940.225(2)(cm), and 3rd degree sexual assault of a person who did not consent, in violation of Wis. Stat. sec. 940.225(3) (25:1). The jury found Jama guilty of both, but the circuit court rejected the guilty verdict on 3rd degree sexual assault after concluding both that the charges are mutually exclusive and there was insufficient evidence that HH was competent to consent, which is required by Wis. Stat. sec. 940.225(4) (76:12).

Jama argues the circuit court properly construed the applicable law on consent and acquitting him of 3rd degree sexual assault based on insufficient evidence. Jama also agrees with the circuit court that 2nd degree sexual assault of a person incapable of giving consent due to intoxication is mutually exclusive of a charge of 3rd degree sexual assault of a person who does not consent, and therefore Jama could not be convicted of both even had the evidence been legally sufficient. Finally, even if the charges are not mutually exclusive and the evidence is sufficient to prove 3rd degree sexual assault, the circuit court's ruling should be affirmed on the alternate ground that convictions for both 2nd degree and 3rd degree sexual assault under these factual circumstances violate Jama's right to be free of double jeopardy.

B. Charges for both 2nd degree and 3rd degree sexual assault are mutually exclusive because 2nd degree requires proof that the victim is incapable of consenting, while 3rd degree requires proof that the victim was competent to consent but did not consent

The State argues that no Wisconsin appellate court has ever adopted a rule regarding mutual exclusivity of convictions (State's brief: 19). Perhaps not, but the United States Supreme Court has on multiple occasions. For example, in ***Heflin v. United States***, the court concluded that

"it is plain error to allow a jury to convict an accused of taking and possessing the same money obtained in the same bank robbery." ***Id,*** 358 U.S. 415, 419-20 (1959). Subsequently, addressing a similar issue in ***United States v. Gaddis***, the court noted that "there can be no impropriety for a grand jury to return an indictment or for a prosecutor to file an information" on two crimes that are mutually exclusive, but convictions for both cannot stand. ***Id.,*** 424 U.S. 544, 550 (1976). The court reasoned that when evidence could support either charge, the proper approach was for the judge to instruct the members of the jury that they may not convict the defendant both for robbing a bank and for receiving the proceeds of the robbery, and that they could consider the charge for receiving the proceeds only if the evidence was insufficient to convict for robbery. ***Gaddis, id.*** at 550***.***

When two convictions are mutually exclusive but evidence was sufficient to convict on both, the proper remedy is reversal and a new trial on both charges. ***Id.*** at 549-50. When the evidence presented is insufficient to sustain one of the convictions, as the circuit court found here, the proper remedy is to simply vacate the charge which lacked sufficient evidence. ***Id.***

A plain reading of the statutes involved in this case shows that the circuit court correctly determined that 2nd degree sexual assault of a person incapable of consenting due to intoxication and 3rd degree sexual assault, which requires proof that the person did not consent, are mutually exclusive.

3rd degree sexual assault requires proof of sexual intercourse with a person without that person's consent. Wis. Stat. sec. 940.225(3). Sec. 940.225(4) defines "consent" as used in sexual assault cases to mean "words or overt actions by a person who is competent to give informed consent…" (emphasis added). Reading the statutes together, 3rd degree sexual assault would therefore require intercourse with a person competent to give informed consent, but without that person's consent. As the circuit court correctly found, the fact that the person is competent to give informed consent is a condition precedent for proving 3rd degree sexual assault (76:10).

The State's argument is essentially that the statute does not mean what it says, that the language defining consent as being given "by a person who is competent" is mere surplusage to be ignored. As the circuit court correctly noted, the phrases "incapable to consent" and "no consent" are not synonymous, and courts must read statutes "in such a way as to avoid surplusage" (76:9).

The State reasons that the "no consent" element of 3rd degree sexual assault is established automatically when the person is incapable of consenting (State's brief: 13) ("So if a person is not competent to consent, there cannot be any consent"). Again, a plain reading of the statutes shows otherwise. The legislature considered situations where a person is "incapable of giving consent" to be separate from a situation where the person does not consent in fact. Language from Wis. Stat. sec. 940.225(4) – ignored by the State's argument – specifically states that "Consent is not an issue in alleged violations of sub. (2) (c), (cm), (d), (g), (h), and (i)." Subsection (2)(cm) is the 2nd degree charge at issue here, when a defendant has sexual intercourse "with a person who is under the influence of an intoxicant to a degree which renders that person incapable of giving consent." Wis. Stat. sec. 940.225(2)(cm).

Thus the legislature specifically stated that in cases involving a victim incapable of giving consent, consent is not an issue, not that "there is presumptively no consent," as argued by the State (State's brief: 13). In other words, cases involving victims who did not consent are factually distinctive situations from cases involving victims who were rendered incapable of consenting due to intoxication. Convictions for both based on a single act are legally inconsistent and mutually exclusive.

The State argues this case is controlled by ***State v. Grunke***, 2008 WI 82, where the supreme court held that sec. 940.225(4) does not require the State to prove the victim affirmatively withheld consent (State's brief: 13-14). Jama has made no argument that proof of affirmative withholding of consent is required, and neither did the circuit court. The focus of the court's reasoning was not on the victim's decisions, but on the victim's competence (76:10). The court

essentially concluded that the 2nd degree sexual assault applied when the victim is not competent to consent, while 3rd degree sexual assault applied when the victim was competent to consent but made an informed decision not to consent (76:10). That is perfectly consistent with sec. 940.225(4), which requires defines consent as involving a person "competent to give informed consent."

The State's argument that the language in 940.225(4)(c) stating "a person who is unconscious is presumed to be incapable of consenting" means there is presumptively no consent is also unconvincing. The language is ambiguous, because an equally plausible interpretation of that sentence is that it clarifies that such situations are more appropriately charged under sec. 940.225(2)(d) rather than sec. 940.225(3). The language of the provision supports this interpretation, because it says an unconscious person is "incapable of consenting," not that the person is presumed not to have consented.

The circuit court's analysis was correct. The two charges are mutually exclusive. The appropriate remedy is a new trial on both counts, unless this court agrees that the evidence was insufficient to prove one of the counts.

C. The State presented no evidence that HH was competent to give informed consent for sexual intercourse, or that she did not consent in fact, and the court properly acquitted Jama of 3rd degree sexual assault

The circuit court found that, consistent with Wis. Stat. sec. 940.225(4), the competence of HH to give informed consent was a condition precedent to proving a 3rd degree sexual assault, because this was statutorily necessary to show non-consent (76:10). The court then reviewed the testimony and found "absolutely no valid evidence" to support the non-consent element (76: 11). Instead, as the court noted, the only evidence presented by the State showed that HH had no memory of giving consent to sexual intercourse; in fact, she had virtually no memory of anything between arriving at her apartment to waking up on the floor, naked from the waist down (76:12).

The State did not dispute the court's claim; instead, the State argued that "the fact that HH had no memory of giving consent … proves beyond a reasonable doubt that HH did not consent because she could not consent" (State's brief: 18). The State further argued, "No means no. But the absence of yes also means no" (State's brief: 19). But the "absence of yes" does not accurately characterize the evidence; absence of memory of yes more accurately describes HH's testimony.[1]

No memory of consenting is not nearly the same thing as not consenting in fact. Nothing demonstrates this principle more clearly than HH's trial testimony about entry to the apartment building. When asked if she had no memory of arriving at the building, getting inside to the lobby, or going up to her own apartment door, HH answered, "Yes, that's fair" (88:209-10). Further, HH testified she couldn't recall consenting to anyone entering her apartment (89:18). Yet the surveillance video clearly showed HH letting Jama into the building, even giving him her purse to hold while she opened the door (62:ex.41, 88:181). Those events occurred despite her lack of memory, and the video clearly showed her consensually allowing Jama entry into the building. By analogy, HH's lack of memory regarding consent for sexual intercourse is not proof of non-consent.

The circuit court correctly ruled that insufficient evidence was presented establishing HH's competence to give informed consent, or that she did not consent in fact. Lack of memory is not enough. The court properly acquitted Jama of this charge.

D. Alternatively, if the two charges are not mutually exclusive, the court's entry of acquittal

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[1] For example, see this exchange:

Atty. Barnett: And then if I may, regarding the question of consent, do you have a specific memory of giving anyone consent to having either sexual contact or sexual intercourse with you the early morning hours of September - - I'm sorry - - January 28, 2012?

HH: No.

(88: 31) (emphasis added).

on 3rd degree sexual assault should be affirmed because convictions for both sexual assault charges violate Jama's right to be free from double jeopardy

If this court determines that the two sexual assault charges are not mutually exclusive because a person unable to consent necessarily does not consent, the court's order acquitting Jama of 3rd degree sexual assault must be affirmed on an alternative ground – convictions for both charges violate double jeopardy principles of the 5th amendment. See ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) (appellate courts may affirm on grounds different than those relied on by the circuit court).

The circuit court requested briefing on this issue below (66). The defense submitted a letter brief arguing that the charges violated double jeopardy because they were based on a single act of intercourse, count 1 alleged non-consent based on HH being intoxicated to point of unable to give consent, while count 2 alleged non-consent based on HH not actually consenting (67). The State submitted a brief arguing the charges did not violate double jeopardy because the two charges have different elements; count 1 required proof that HH was incapable of consenting due to intoxication, while count 2 required proof of lack of consent (68). The court's order dismissing counts 2-4 did not address whether counts 1 and 2 violated double jeopardy.

Wisconsin uses a two-prong test to analyze problems of multiplicity. ***State v. Selmon***, 175 Wis. 2d 155, 161, 877 N.W.2d 498 (Ct. App. 1993). First, courts apply the "elements-only" test from ***Blockburger v. United States,*** 284 U.S. 299 (1932). Under this test, the lesser offense must be statutorily included in the greater offense and contain no element in addition to the elements constituting the greater offense. ***Selmon,*** 175 Wis. 2d at 161-62. It must be "utterly impossible" to commit the greater crime without committing the lesser. ***Id.*** at 162. The inquiry is a purely legal analysis of the statutes involved with no deference given to the facts of the specific case. ***Id.***

If the statutes meet that test, a presumption arises that

the legislature intended to permit cumulative convictions in accordance with those statutes, unless other factors clearly indicate otherwise. ***Id.*** at 161. Under the second prong of the test, the court reviews the legislative intent to learn whether contrary factors exist. ***Id.***

If the State's arguments are correct, it is impossible to commit 2nd degree sexual assault of a person incapable of consenting due to intoxication without committing 3rd degree sexual assault. 3rd degree sexual assault has only two elements—(1) that the defendant had sexual intercourse with HH, and (2) that HH did not consent to the sexual intercourse. The first element is identical to the first element of 2nd degree sexual assault. Therefore, the only question is whether a defendant can have sexual intercourse with a person incapable of consenting due to intoxication without also having sexual intercourse without the person's consent. The State argues that you cannot:

> [W]hen a person is unconscious, and therefore incapable of consenting, there is presumptively no consent, as defined to require the words or acts of a person who is competent to consent. If there is no competence, one of the component parts of the definition that must all come together for there to be consent is missing. So if a person is not competent to consent, there cannot be any consent as that term is defined

(State's brief: 13) (emphasis added).

Simply put, according to the State, if a person is incapable of consenting due to intoxication, there cannot be consent, thus the element of non-consent is established. Assuming *arguendo* this argument is correct, then a defendant cannot commit 2nd degree sexual assault (sexual intercourse with a victim incapable of consenting due to intoxication) without committing 3rd degree sexual assault (intercourse without the victim's consent). There is no fact or additional element to be proven. Thus 3rd degree sexual assault would be a lesser-included offense of 2nd degree sexual assault of a person incapable of consenting due to intoxication. Convictions for both based on a single act of intercourse violates double jeopardy.

The circuit court's decision to enter a not guilty verdict on count 2 should be affirmed, either because (1) the evidence was insufficient, (2) the two sexual assault charges are legally inconsistent and mutually exclusive, or, in the alternative, (3) the two sexual assault convictions violate double jeopardy.

II. The Circuit Court Properly Rejected Jama's Guilty Verdicts For Burglary Because No Evidence Was Presented To Show That Jama Entered Without HH's Consent. Alternatively, The Burglary Convictions Were Mutually Exclusive With The 2nd Degree Sexual Assault Charge Because No Evidence Was Presented To Show HH Was Competent To Give Informed Consent

A. Summary of arguments

No evidence was presented at trial to show that Jama entered HH's dwelling without her consent, or that he knew there was no consent. The video surveillance showed affirmatively that she let Jama into the building, and he helped her upstairs to her apartment. HH told an officer that she consented to Jama's entry. At trial, HH testified that she did not recall anything from meeting Jama on the street to the point where she was inside her apartment. For these reasons, the court concluded no evidence existed to support the burglary charges, and rejected the guilty verdicts.

The State's brief on appeal, just like the prosecutor at trial, attempts to evade this evidentiary deficiency by conflating the "without consent" element, arguing that HH did not consent for Jama to enter her apartment for the purpose of sexually assaulting or stealing from her (State's brief: 20). But as the jury instructions make clear, entry without consent is a separate element from the defendant's mental purpose at the time of entry. WI JI CRIM 1424. There may have been evidence to support the latter, but there was no evidence to prove the former.

B. Entry without consent is a separate element from the defendant's mental purpose in entering the premises, no matter how many times the State attempts to conflate the two

The offense of burglary has four elements:

1. The defendant intentionally entered a dwelling
2. The defendant entered the dwelling without the consent of the person in lawful possession
3. The defendant knew that the entry was without consent
4. The defendant entered the dwelling with intent to commit (sexual assault/a felony); that is, the defendant intended to commit (sexual assault/a felony) at the time the defendant entered the dwelling

WI JI CRIM 1424.

The circuit court recognized that there was no evidence presented to show HH did not consent to Jama's entry, or that Jama knew he entered without consent (76:15). Regarding entry into the dwelling, HH testified only that couldn't recall consenting to anyone entering her apartment (89:18). She also couldn't recall arriving at the building, getting inside to the lobby, or going up to her own apartment door (88:209-10). But the video surveillance showed each of those things happened, that HH handed Jama her purse while she located her key card and let them both into the building, and that Jama physically assisted HH in walking up to her apartment (62:ex.41, 88:181). And HH had previously told an officer she consented to, and did not try to stop, the suspect from entering her apartment (91:46).

At trial, the prosecutor asked improper, compound questions in an attempt to shore up this problem (76:15). The prosecutor never asked HH whether she consented to the suspect entering into the apartment. Instead, he asked whether she gave anyone consent to enter to take the property of Sonny Torres (88:232-33). In response to the defendant's motions for directed verdict, the State argued its theory on consent to enter was HH did not give consent for anyone to enter the apartment and steal, and did not consent for anyone to enter with intent to commit sexual assault (92:73-74). The State again blurred the line in closing arguments, arguing, "So when he gets to [HH's] apartment door, the defendant has already finalized his plan to sexually assault her, and it's with that intent that he enters the apartment without her consent, because [HH] already told you she did not consent to anyone

entering her apartment to sexually assault her or to steal from her" (93:48).

After the verdicts, the circuit court noted that there was no evidence on the issue of consent to enter, and that although the State asked if she consented for anyone to enter and sexually assault her, the charge did not include that (93:113-14). The court's decision finding Jama not guilty of the burglary charges emphasized this point, that "no legally acceptable, clear answer" was adduced on the question of consent to enter (76:15). The court noted that HH could only testify to lack of memory on this point, and that HH had told an investigating officer she had affirmatively consented to letting Jama into her apartment (76:15). The court's ruling is also supported by the video surveillance showing HH letting Jama into her building.

On appeal, the State still points to no evidence that Jama entered without HH's consent. Instead, the State continues the attempt to conflate the 2nd and 4th elements of burglary, arguing "Although HH may have given Jama consent to come into her apartment for the purpose of helping her get inside, she did not consent to his entry for the purposes of raping and robbing her" (State's brief: 21-22). The trial court properly rejected that argument, as it is not consistent with the jury instructions defining the elements of burglary.

The State argues that law provides that consent to enter premises may be limited to place and purpose, and that HH didn't give consent to Jama entering for the purpose of sexually assaulting or burglarizing her, so the evidence is sufficient to support non-consent (State's brief: 21-22). While the prosecutor argued that to the jury, the jury was never instructed on the "scope of consent" concept. A challenge to the sufficiency of the evidence is evaluated in light of the jury instructions. *See* ***D.L. Anderson's Lakeside Leisure Co. v. Anderson,*** 2008 WI 126, 314 Wis.2d 560, 757 N.W.2d 803; *see also* ***Best Price Plumbing, Inc. v. Erie Insurance Exchange,*** 2012 WI 44, ¶3, 340 Wis.2d 307, 814 N.W.2d 419 (sufficiency must be reviewed "in the context of the instructions that were given the jury"). As the United States Supreme Court observed in ***Chiarella v. United States***, 445

U.S. 222, 236 (1980), reviewing courts "cannot affirm a criminal conviction on the basis of a theory not presented to the jury."

In this case, the court instructed the jury only that the 2nd element of the burglary charges required proof that "the defendant entered the dwelling without the consent of the person in lawful possession," and the 3rd elements required that "the defendant knew that the entry was without consent" (93:24-26). No further definition of consent was requested by the State to support its "limited scope" argument. The State offered no objection to the jury instructions given (93:6).

If the State wanted the jury to convict based on an expanded definition of "consent," it needed to request a jury instruction providing the necessary legal framework. "[W]hen a cause is submitted to the jury under an instruction, not patently incorrect or internally inconsistent, to which no timely objection has been lodged, the instruction becomes the law of the case." ***United States v. Gomes***, 969 F.2d 1290, 1294 (1st Cir. 1992). In such situations, courts review for whether there was "evidence sufficient to support [the] convictions under the law of the case," that is, evidence sufficient to establish the elements required by the actual instructions given. ***Id.*** The law of this case was silent as to any limitations on consent.

The jury was presented with no evidence that Jama entered without HH's consent. In fact, the evidence showed unequivocally that HH consented to Jama's entry. The court correctly rejected the jury's verdicts to the contrary. Likewise, the trial court correctly found no evidence to support the element that the defendant knew that his entry was without consent, since the evidence actually demonstrates that HH consented to Jama's entry. Thus this court should affirm the acquittal on counts 3 and 4.

C. Alternatively, the burglary convictions were mutually exclusive with the 2nd degree sexual assault charge because no evidence was presented to show HH was competent to give informed consent

In the event that the court finds the evidence sufficient to support convictions for burglary, Jama agrees with the circuit court's ruling that the burglary convictions were mutually exclusive with the conviction for 2nd degree sexual assault of a victim incapable of giving consent. The court reasoned the charges were mutually exclusive because of the legal inconsistency between the element of being "incapable of giving consent" in 2nd degree sexual assault and "without consent" to enter in the burglary charges (76:13). Essentially, the court held that because the definition of "consent" in sec. 940.225(4) required that the actor "is competent to give informed consent," and because the evidence showed HH had virtually no memory of anything that happened between walking home and waking up naked from the waist down, she lacked capacity to give consent to enter the premises, and thus the State could not establish a condition precedent to showing non-consent (76:13).

The State argues the court erred for numerous reasons. The State notes that a different statutory definition of "without consent" applies to property crimes, specifically sec. 939.22(48), and this definition does not contain any reference to the victim needing to be capable of giving informed consent (State's brief: 15-16). The State is correct that this definition applies to the "without consent" element of burglary, and that the circuit court did not discuss that definition.

However, Jama agrees with the circuit court that capacity to consent is central to the concept, regardless of the specific definition used, and that the victim's capacity to consent is a condition precedent to proving non-consent. "Consent" means a capable, deliberate and voluntary agreement to act. *See* Webster's Third New Dictionary.

Further, Wisconsin courts have found that lack of capacity has invalidated purported consent in other contexts. For example, see ***Laasch v. State***, where a defendant challenged the constitutionality of a search of her home. ***Id.,*** 84 Wis.2d 587, 593-94, 267 N.W.2d 278 (1978). The State asserted that the defendant's five-year old son provided consent for the officers to enter the home, but the court rejected this argument, asserting, "Here there has been no

showing that the defendant's five-year old son possessed the capacity, the intelligence, or the authority to give constitutionally effective consent to the midnight entry." ***Id.***

The State also argues that capacity to consent is not a relevant consideration because the applicable definition in sec. 939.22(48) – "no consent in fact" – makes capacity a non-issue, and cites a Wisconsin Legislative Council comment for the proposition that "Where the victim had no knowledge of the thing done, he cannot be said to have consented to the doing of that thing," (State's brief: 15-16). But that scenario does not comport with the facts of this case, which is key to the circuit court's finding of mutual exclusivity (finding 2nd degree sexual assault and burglary to be mutually exclusive "under the facts of this case") (73:14).

HH was not unconscious at the time of Jama's entry. This this is not a situation where the victim had no knowledge of the entry, such that the entry was without consent in fact. The surveillance video clearly shows HH was conscious at the time Jama entered, and that HH let him into the building (62:ex.41, 88:181). And HH had told an officer that she allowed Jama inside her apartment and made no attempt to stop him (91:46). HH was fully aware Jama entered the premises. Thus manifestation of consent is an issue under the facts of this case, as is HH's capacity to consent.

By finding guilt on 2nd degree sexual assault, the jury found that HH was legally incapable of giving consent to sexual intercourse. As the circuit court's decision explained, this is legally inconsistent with HH having capacity to consent but not consenting to sexual intercourse. It is also inconsistent with HH having capacity to consent to enter but not consenting to Jama's entry. The verdicts are mutually exclusive, and the court properly entered a judgment acquitting Jama of the burglary charges.

CONCLUSION

For the reasons discussed in this brief, the defendant-respondent respectfully requests that the court affirm the circuit court's order directing judgments of not guilty on counts 2, 3, and 4.

Respectfully submitted: 9/29/2015:

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,534 words.

Signed 9/29/2015:

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CERTIFICATE OF COMPLIANCE WITH 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 s. 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.

Signed 9/29/2015:

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