STATE OF WISCONSIN
IN THE SUPREME COURT
Case No. 2014AP002701 CR
Circuit Court Case No. 2012CF000093

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT JOSEPH STIETZ,

Defendant-Appellant-Petitioner

ON REVIEW FROM AN UNPUBLISHED DECISION OF THE COURT OF APPEALS AFFIRMING THE JUDGMENT OF CONVICTION AND SENTENCE ENTERED ON MAY 28, 2014 BY THE CIRCUIT COURT FOR LAFAYETTE COUNTY, THE HONORABLE JUDGE JAMES R. BEER PRESIDING

BRIEF OF DEFENDANT-APPELLANT-PETITIONER ROBERT J. STIETZ

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STATEMENT OF ISSUES

1. Did the trial court err and deny Robert Stietz's federal and state constitutional rights to present a complete defense when it entirely ignored controlling precedent of this Court in State v. Mendoza, 80 Wis. 2d 122, 258 N.W.2d 260 (1977), and denied Stietz's request for a self-defense jury instruction?

   The trial court and the Court of Appeals answered in the negative.

2. Did the trial court err and contradict this Court's controlling decision in State v. Hobson, 218 Wis. 2d 350, 577 N.W.2d 825 (1998), when it precluded Robert Stietz from presenting any evidence or argument that he acted in self-defense, solely because the antagonists in the confrontation were DNR wardens?

   The trial court and the Court of Appeals answered in the negative.

3. Did the trial court err and deny Robert Stietz's federal and state constitutional rights to present a complete defense by denying a jury instruction and forbidding any argument that Stietz was defending himself proportionately against two men he

reasonably believed were armed trespassers?

The trial court and the Court of Appeals answered in the negative.

STATEMENT OF THE CASE

Following a confrontation with two conservation wardens on his private property, Robert Stietz was charged with the following six criminal offenses: (1) First-degree recklessly endangering safety; (2) Resisting or obstructing an officer; (3) Resisting or obstructing an officer; (4) Endanger safety/use of a dangerous weapon; (5) Intentionally point firearm at a law enforcement officer; (6) Intentionally point a firearm at a law enforcement officer. (R.7a)

The case was tried to a jury, which acquitted Stietz on four of the counts (Counts 1, 2, 4, and 5) (R.59; R.60; R.62; R.63) and convicted him on Counts 3 and 6 (R.61; R.64), resisting or obstructing an officer, and intentionally pointing a firearm at a law enforcement officer. (R.78a; R.92; App. 12-14)

At trial, Robert Stietz testified that he was walking along his fenced-in property during gun deer season looking for trespassers when he encountered two strangers clad in blaze orange on his property. (R.113:92; App. 49) The encounter occurred after sunset when it was "fairly dark" (R.112:29), and Stietz testified that he did not know or recognize the two strangers. (R.113:92; App. 49) The strangers approached him and demanded his rifle. They did not show any

credentials. (R.113:141; App. 98) When Stietz refused to give his rifle to them, they forcibly wrested it away from him. One of the two strangers then drew a pistol on Stietz and Stietz responded by drawing his pistol on that person. (R.102:35-36; R.113:98-99; App. 55-56) Stietz maintained that he was fearful for his life and acting in self-defense to protect himself. (R113:99; App.56)

Based on that testimony and Stietz's assertion of his right to self-defense, his counsel requested that the jury be instructed on self-defense, either WIS JI-CRIMINAL 800, 810 or an adaptation of those. (R.42; R.107:49-58; App. 15-20) The trial court refused the requested self-defense instructions, precluding Stietz's trial counsel from arguing to the jury that he was acting in self-defense and precluding the jury from even considering that defense. (R.107:49-58) The Court of Appeals affirmed the trial court's order denying any instruction to the jury or any argument regarding Stietz having acted in self-defense against persons he thought were trespassing on his property and who forcibly took his rifle from him. (App. 1-11)

Following the verdict, Stietz filed a Motion for Acquittal or a New Trial and supporting brief (R.67; R.70; App. 21-41). The trial court denied that motion and imposed a bifurcated sentence that

included one year of initial confinement and three years of extended supervision on the felony (Count 6), and two years of consecutive probation on the misdemeanor (Count 3). (R.76; R.78a; R.92; App. 12-14, 42) Stietz has completed serving the prison portion of his sentence but remains subject to extended supervision and probation, and continues to suffer a loss of his civil rights.

On November 20, 2014, Stietz filed a timely Notice of Appeal from the Judgment of Conviction and Sentence entered on May 28, 2014. (R.94) On April 14, 2016, the Court of Appeals, in a per curiam decision, affirmed the trial court's judgment. (App. 1-11)

This Court granted Robert Stietz's Petition for Review by its Order dated October 11, 2016.

STANDARD OF REVIEW

The trial court's refusal to give Robert Stietz's requested jury instructions on self-defense and trespassing denied Stietz his Sixth Amendment right to present a defense, which is a question of constitutional fact which this Court reviews *de novo*. State v. Dodson, 219 Wis. 2d 65, 69-70, 580 N.W.2d 181 (1998); citing State v. Pulizzano, 155 Wis. 2d 633, 648, 456 N.W.2d 325 (1990). The Court of Appeals applied a *de novo* standard of review based on its view that

the issues presented were questions of law. (App. 5)

STATEMENT OF FACTS

Robert Stietz was a 64-year old lifelong beef farmer with no prior criminal history. (R.81:2; R.113:101-102; App. 58-59) Together with his wife of 42 years, he owned and farmed a 40 acre parcel outside Gratiot and another 25 acre parcel approximately 12 miles away outside Lamont, in Lafayette County. (R.111:65-66) The latter parcel was completely enclosed by fence and used by Stietz and his wife for pasturing cattle and hunting. That parcel is north of Highway 81 and connected to that highway by an easement from the highway to the parcel's gate. (R.113:69-70, 73).

Trespassers on the uninhabited parcel were a common problem. (R.113:110-111, 138-139; App. 67-68, 95-96) On the last day of gun deer season, Sunday, November 25, 2012, Stietz was walking his property to check for trespassers, and to check the fence lines since he was planning on pasturing a bull in that field after the close of hunting season. (R.113:136, 142-143; App. 93, 99-100) He was carrying a Weatherby rifle in the safe position and with the safety on (R.111:193; R.112:36-37; R.113:92; App. 49), and also was carrying a .357 revolver (R.113:99, 107; App. 56, 64). The revolver was partially loaded but did

not have a bullet in the cylinder in front of the barrel for safety reasons. (R.113:113; App. 70) He was wearing a camouflage coat and hat. He was not wearing blaze orange because he was not hunting and was on his own private property. (R.113:110; App. 67)

Sunset that day was at 4:25 p.m. (R.112:9) The official end of hunting season was twenty minutes after sunset, or 4:45 p.m. (R.112:10) Around 4:58 p.m., two Department of Natural Resources (DNR) conservation wardens, Frost and Webster, noticed a car sitting along a fence line approximately a quarter mile up into the field from where they were positioned on the highway. (R.111:165) The wardens drove the quarter mile onto the property and stopped at the vehicle. The wardens did not know if the car had been abandoned or if it belonged to someone who might be hunting in the area. (R.111:166-167) One of the wardens peered into the car and saw an empty rifle case, some buck lure and a tree seat. (R.111:134-135, 166-167) The other warden checked the registration of the vehicle and learned that the Chevy sedan was registered to Bob and Sue Stietz. (R.111:169)

Curious, the wardens then decided to walk north onto Stietz's private land. They walked through a cattle gate at approximately 5:03 p.m. and continued walking 100 yards or more north into Stietz's land.

(R.111:173-174; R.112:13, 95) Some time after the wardens walked through the cattle gate and entered his land, Stietz spied blaze orange in the woods on his land and proceeded to walk toward the cattle gates at the southwest corner of the parcel. (R.113:92; App. 49) The wardens heard a stick snap and turned to see Stietz walking slowly, pausing every few steps. (R.112:175) By then, it was at least 45 minutes after sunset. In Webster's words, when they saw Stietz, it was "very nearly completely dark." (R.111:177; R.112-145) Warden Frost testified that they were separated from Stietz by brush about twenty yards away. (R.111:177) Frost testified that he shined his flashlight on Stietz and announced from that distance that he was a conservation warden. (R.111:177)

Stietz testified at the trial that there had been problems with trespassers on his land which he had reported to the sheriff numerous times. (R.113:110, 139; App. 67, 96) The property was posted with "no trespassing signs." (R.113:78-79) He was walking his property checking for such trespassers. (R:113:93-94, 110, 139, App. 50-51, 67, 96) He did not hear the wardens identify themselves (R.113:122; App. 79) and, after the initial glimpse of blaze orange he had seen from 100 yards or so away, he did not notice them again until they shined a

flashlight in his eyes from a distance of twenty or thirty yards. (R.113:125, 141; App. 82, 98) He did not know who they were and assumed they were more trespassing hunters. (R.113:92, 123; App. 49, 80) That assumption was consistent with the wardens' blaze orange jackets and their initial conversation upon approaching Stietz; the first thing the wardens brought up was deer in the area. Webster asked Stietz if he had seen any deer around and Stietz replied he had seen seven doe. (R.111:179) Stietz also told the men he was not hunting. (R.113:92; App. 49) At that point, Stietz and the two wardens were standing within arm's reach of each other. (R.111:179) Webster then asked Stietz if the rifle he was carrying was loaded and Stietz answered that it was. (R.111:180) Frost asked to see the rifle and Stietz refused.

Frost asked again if he could see the firearm and stepped toward Stietz, grabbed Stietz by the shirt and reached for Stietz's rifle. (R.111:180) Frost immediately grabbed the rifle and drove his body towards Stietz trying to take the firearm away from Stietz. (R.111:181) The other warden joined the struggle and also grabbed Stietz's rifle, with the barrel swinging around while they wrested it away from him. (R.113:97; App. 54) Frost took the rifle away from Stietz and ended up with it in his hands, falling away to the ground. (R.111:182) Frost then

heard Webster yell something and saw him draw his firearm on Stietz. (R.102:35-36; R.111:183) In close succession after Webster drew his handgun, Stietz and Frost also drew their handguns at "about the same time." (R.111:184) At that point, Webster had his handgun pointed at Stietz's upper body with his arms extended at chin height in a two handed grip and a ready stance, as did Frost. (R.111:187) Stietz had his revolver pointed at Webster's upper torso, holding it in his right hand with his right elbow bent. (R.113:17-18, 99; App.56) Stietz testified that at that point he still did not know who these two people who had accosted him were. (R.113:114; App. 71) Neither warden informed Stietz that they were wardens after approaching him or after becoming close enough to engage in conversation.

A tense but polite standoff followed. (R.111:64-66; R.112:110; R.113:116; App. 73) The still unidentified wardens told Stietz to drop his gun. Stietz answered by saying that they had drawn on him and he would drop his gun only after they dropped theirs. (R.113:116; App. 73) All persons present at the time agreed that Stietz said to the wardens that he was exercising his right to defend himself and his property. (R.112:111, 138; R.113:99; App. 56) Stietz and the wardens also agreed that Stietz never raised his voice or made any threats or

used any profanity during this standoff. (R.111:64-65; R.112:110; R.113:116; App. 73)

After a minute or two of the mutual entreaties for the others to put their weapons down, Webster used the microphone on his collar to call Lafayette County dispatch for assistance. (R.111:189; R.112:109; R.113:114; App. 71) All agreed that Stietz made no effort to prevent that. (R.112:67; R.113:114; App. 71) Relieved that witnesses and assistance in the form of sheriff's deputies soon would arrive, Stietz testified at trial that this was the first point in time when he thought the men who were pointing their guns at him were officers of some sort or another. (R.113:114; App. 71)

Deputy Sheriff Broge arrived shortly at the scene in his squad car and shined his squad car's headlights on Stietz, Frost and Webster. (R.111:189; R.112:167) Deputy Broge initially walked to the area where the wardens were but then returned to his squad car for cover. The two DNR wardens followed him. (R.112:168) Stietz did nothing to obstruct their movement to safe cover and, because the lights from the squad were shining on him, he was blinded and could no longer even see the wardens. (R.111:190) Shortly after the wardens retreated to the vehicle, Stietz lowered his gun hand, pointing it at the ground,

and emptied the cartridges onto the ground. (R.111:193; R.112:169) Other deputies arrived and spoke with Stietz and assured him he would not be gang tackled. (R.112:160-161) Stietz then placed his firearm on the ground and walked out to a squad car, where he was arrested and placed in handcuffs by the deputies. (R.111:193) The standoff ended peaceably; no shots were fired by any party.

Further facts will be set forth as necessary below.

INTRODUCTION

The right to present a defense is a fundamental constitutional right. Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The United States Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). Robert Stietz was unconstitutionally precluded by the trial court from exercising this right in two major regards.

ARGUMENT

I. ROBERT STIETZ'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WAS DENIED WHEN THE TRIAL COURT REFUSED TO INSTRUCT THE JURY ON SELF-DEFENSE

Summary of Argument

The United States Supreme Court has noted that:

> "The right to self-defense is the first law of nature."

McDonald v. City of Chicago, 561 U.S. 742, 744, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010). A person is entitled to assert the privilege of self-defense when he reasonably believes that another person is unlawfully interfering with his person and in response he uses such force as he reasonably believes necessary to prevent or terminate that interference. Section 939.48(1), Stats.; WIS JI- CRIMINAL 800; State v. Head, 2002 WI 99, ¶¶ 64-66, 255 Wis. 2d 194, 228-229, 648 N.W.2d 413.

Merits

A. There Was An Abundance of Testimony That Robert Stietz Was in Fear for His Life Because of the Actions of Two Armed Strangers Trespassing on His Land.

Wisconsin law establishes a bare minimal, low threshold at which an accused is entitled to a theory of self-defense jury instruction. The defendant need only produce "some" evidence in support of his privilege of self-defense. State v. Peters, 2002 WI App 243, ¶¶ 27-28 and n.4, 258 Wis. 2d 148, 163-164, 653 N.W.2d 300. When determining whether the defendant has presented "some" evidence in support of self-defense, the trial court must consider the evidence in the light most favorable to the defendant. State v. Head, supra, at 113. Wisconsin cases allow a self-defense theory instruction even if the

supporting evidence is "weak, insufficient, inconsistent or of doubtful credibility." The right to present a self-defense theory is so important in the eyes of the law that the accused is entitled to a jury instruction on his theory of defense even if the supporting evidence is "slight." State v. Schuman, 226 Wis. 2d 398, 404 and n.3, 595 N.W.2d 86 (Ct. App. 1999).

The evidence in this case was on the opposite end of the spectrum from "slight"; there was *abundant* evidence presented at trial to support a self-defense theory. Stietz himself testified that he had had ongoing problems with trespassers on his fenced-in farmland, especially during deer hunting season. (R.113:92-104, 110-111, 136, 142-143; App. 49-61, 67-68, 93, 99-100) Stietz had even contacted the sheriff "numerous times" about trouble with trespassers in the recent past. (R.113:139; App. 96) This was an ongoing problem for him and he had a heightened sensitivity to it at the time of the incident at the heart of this case.

On the afternoon of that confrontation, he was walking his land to check for trespassers and also checking his fence line in anticipation of pasturing cattle there after deer season. (R.113:136, 142-144; App. 93, 99-101) While walking, Stietz observed two strangers dressed in

blaze orange trespassing on his land. (R.113:92; App. 49) The three met up by the cattle gate between Stietz's easement to the property and his farm property itself. It was thirty-five minutes after sundown and "nearly completely dark." (R.113:145; App. 102) As they approached each other, the strangers shined a flashlight into Stietz's eyes so he could not clearly see them. (R.111:177; R.113:125, 141; App. 82, 98)

One of the two asked Stietz if he had seen any deer, to which he replied "seven." (R.111:179) Stietz testified that the strangers demanded his rifle and he refused to give it to them. (R.111:180; R.113:95; App. 52) From Stietz's perspective at that point, the only information he had was that there were two strangers, dressed in hunter's blaze orange, walking on his property uninvited asking if there were any deer around; it was reasonable for him to infer these were illegally trespassing hunters.

The two strangers grabbed Stietz's jacket, then his rifle and forcibly wrestled it away from him, with one of the men falling to the ground and the other pulling a handgun and pointing it at Stietz. (R.111:180-183; R.113:96-97; App. 53-54) Stietz testified that at that moment he was fearful for his life and safety and drew his own pistol in response. (R.113:99; App. 56) A standoff ensued, with Stietz asking

the two strangers to put down their handguns because they had drawn first, telling them that he would follow and put his down. (R.111:64-66; R.112:110; R.113:116; App. 73) Stietz testified at trial, and both DNR wardens present admitted, that Stietz said he was doing what he felt necessary to protect himself. (R.112:111, 138; R.113:99; App. 56) Stietz testified, and both DNR wardens acknowledged, that Stietz never made verbal threats to shoot them, never tried to prevent them from calling for help, and never tried to prevent or discourage their retreat. (R.111:64-65; R.112:110; R.113:116; App. 73) That Stietz was acting in self-defense and that he reasonably believed his safety was in danger was the very issue that the jury should have been permitted to decide. That was the real controversy in question. Insofar as it hinged on Stietz's credibility, that too was a question that should have properly been resolved by the jury rather than the trial court or the Court of Appeals. State v. Coleman, 206 Wis. 2d 198, 213-214, 556 N.W.2d 701 (1996).

The fact that the jury acquitted Stietz on four of the six charged counts, where his testimony was at times in conflict with that of the wardens, strongly suggests that the jury did believe and did credit much or all of Stietz's testimony. Evidence presented at trial, including

Stietz's testimony that he was in fear for his life, went far beyond the "slight" or "some evidence" level necessary to establish a defendant's right to an instruction on self-defense.

B. The Denial of Robert Stietz's Request For a Self-Defense Instruction Deprived Him of His Right to Present a Defense.

Every person charged with a criminal offense has a fundamental constitutional right to present a complete defense under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, §§ 7 and 8 of the Wisconsin Constitution. The United States Supreme Court has repeatedly observed that few rights are more fundamental than that of an accused to present a defense. Chambers v. Mississippi, supra at 302. The Supreme Court of Wisconsin has also frequently recognized the importance of the defendant's constitutional rights to present a defense, and that those rights trump even legislative enactments. State v. Dodson, supra at ¶¶ 35-36.

Stietz's defense, including his testimony and his counsel's trial preparation, were predicated in large part on the theory of self-defense. Stietz's counsel requested WIS JI-CRIMINAL 800, as well as two alternative self-defense formulations. (R. 42; R.107:49-58; App. 15-20) The trial court rejected all of those requests. (R.107:49-58) Consequently, in his closing argument to the jury, defense counsel was

precluded from even discussing or arguing that Stietz's conduct was privileged under the law of self-defense. That denial of Stietz's right to present a defense requires a reversal of his convictions.

C. The Court of Appeals Erred When It Impermissibly Weighed the Evidence and the Credibility of Robert Stietz Regarding His Assertion of Self-Defense.

The Court of Appeals ruled that it was not persuaded by Stietz's testimony because of possible conflicting interpretations. (Court of Appeals Decision, ¶ 13; App. 6). The Court of Appeals referred to equivocal testimony that one of the persons "kind of said, Green County" and the other "said something warden." Id. The reference to Green County is confusing at best because the Stietz property is in Lafayette County. The statement "something warden" is likewise ambiguous, especially coming from someone whom Stietz believed was a trespassing hunter. It very well could have been "have you seen a warden?" The Court of Appeals did not consider the evidence in the light most favorable to Stietz, as it must. Head, supra.

1. The Court of Appeals inexplicably entirely ignored State v. Mendoza.

It is telling that the Court of Appeals completely ignored State v. Mendoza, 80 Wis. 2d 122, 258 N.W.2d 260 (1977). That is not surprising though because there is no way that its decision can be

reconciled with Mendoza.

In reaching its decision, the Court of Appeals engaged in precisely the sort of evaluation of evidence and weighing of credibility of arguably conflicting versions of that evidence which this Court has explicitly prohibited when considering a defendant's request for an instruction on self-defense:

> "[N]either the trial court nor this court may, under the law, look to the "totality" of the evidence, as the state invites us to do, in determining whether the instruction was warranted. To do so would require the court to weigh the evidence - accepting one version of facts, rejecting another - and thus invade the province of the jury."

Mendoza, supra at 152. Mendoza went on to note that a judge may "not weigh the evidence, but determine only whether evidence existed in the record, viewed favorably to the defendant, to warrant the [a self-defense] instruction." Id. "Under these tests, the evidence is to be viewed in the most favorable light it will 'reasonably admit of from the standpoint of the accused.'" Id. The test *does not permit* a "weighing of the evidence by the trial judge." Id. By extension, the appellate court is likewise precluded from attempting to weigh or assess the credibility of the testimony. See also State v. Coleman, 206 Wis. 2d 199, 212-13, 556 N.W.2d 701 (1996).

Where the defendant asserts that he was acting in self-defense, that is a question peculiarly within the province of the jury:

> "[T]he question of reasonableness of a person's actions and beliefs, where a claim of self-defense is asserted, is a question peculiarly within the province of the jury."

Maichle v. Jonovic, 69 Wis. 2d 622, 630, 230 N.W.2d 789 (1975). The Court of Appeals improperly usurped the jury's ability to make that determination regarding Stietz. It also improperly sought to resolve perceived inconsistencies in his testimony – in favor of the State and not as it must in favor of a jury trial on his defense.

Stietz's testimony was direct and emphatic – that he feared for his life and did not see the DNR warden's identifying patches in the darkness that had set in. His exact words to the jury were:

> "I felt like I was being attacked right at that time.
> . . .
> [A]ll of a sudden I seen the pistol coming up. And I figured, my God, he's going to shoot.
> . . .
> I was scared, darn scared.
> . . .
> At that very instant I had the pistol in my right pocket and I drew my pistol at the very - - simultaneously. I said, I have the right to protect myself which I am doing at this time.
> . . .
> [S]omeone else pulled their pistol out and I was fearful for my life so I drew mine so I would not get shot."

(R.113:89, 96, 98-99, 116; App. 46, 53, 55-56, 73) Stietz's testimony was unambiguous that at the time of the confrontation, he did not know the two trespassers were wardens. He testified that he was concerned about the trespassers in blaze orange:

> "I wondered who was trespassing. This is my thought, I was wondering who was trespassing in my land that I did not know."

(R.113:126; App. 83). Stietz testified he did not see the DNR patch on the shoulder of the blaze orange jacket, which is logical because it was dark (a fact ignored by the Court of Appeals), because the men were shining a light directly at him (R.111:177), and because in Stietz's words he was focused on their faces and "I wasn't looking at their shoulders." (R.113:126; App. 83). That Stietz was attempting to protect himself was evident not only from the circumstances but from his exclamation at that point that he was acting to protect himself. Both DNR agents testified that Stietz had made that statement to them. (R.112:111, 138)

Stietz testified that he first suspected these two individuals might be wardens only after one of the strangers called for backup. (R.113:114; App. 71). He only felt safer after the deputy sheriff's arrival. (R.113:119; App. 76)

Stietz's testimony went well beyond the "some evidence in support of self-defense standard" and far surpassed the threshold of the "slight, weak, insufficient, inconsistent or doubtful credibility" standard of State v. Schuman, supra. That testimony entitled Stietz to a jury instruction on self-defense.

II. THE COURT OF APPEALS ERRED BY RULING THAT A PERSON HAS NO RIGHT TO SELF-DEFENSE WHEN ACCOSTED BY A LAW ENFORCEMENT AGENT AND MISINTERPRETED THIS COURT'S CONTROLLING OPINION IN STATE V. HOBSON

Summary of Argument

Robert Stietz had a right to defend himself against a sudden, unprovoked and forceful seizure of his person and belongings by two men who appeared to be illegal trespassers approaching him on his private land, notwithstanding that they were DNR wardens, and had the right to such an instruction from the trial court.

Merits

A. The Court of Appeals Misinterpreted Hobson, and Its Opinion is in Direct Conflict With That Precedent.

The Court of Appeals predicated its denial of a self-defense instruction on State v. Hobson, 218 Wis. 2d 350, 380, 577 N.W.2d 825 (1998) (App. 6, ¶ 14). The Court of Appeals confused and combined the concepts of resisting an arrest with the right to self-defense, while

ignoring the clear language of Hobson distinguishing those doctrines.

The narrow and *only* issue decided by Hobson was whether to abrogate the common law privilege to forcibly resist an unlawful arrest in the absence of unreasonable force by the arresting officer. Id. at ¶ 2. Hobson went to great lengths to limit its decision to that issue alone, and answered just two questions: 1) "[w]hether a common law privilege to forcibly resist unlawful arrest, in the absence of unreasonable force, has existed in Wisconsin until now"; and 2) "if that privilege exists, whether it should continue to be recognized or should be abrogated." Id. at ¶ 11. Hobson explicitly limited its holding to those two questions and "underscore[d] the unusual procedural history" of the case, emphasizing that its "conclusion in this case *is limited to the narrow and peculiar procedural facts presented*." Id. at ¶ 10, fn7 (emphasis added). Those facts involved a peaceable arrest where the defendant *knew* that she was dealing with a recognizably uniformed police officer. The Court of Appeals decision rests on a misinterpretation of Hobson and the unsupportable contention that it controls here. (App. 6, ¶ 14) That reliance is misplaced and the court conflated two separate and distinct legal doctrines: The common law privilege to forcibly resist a peaceable arrest, and the right to self-defense. Only the former was

abrogated in Hobson.

The right to self-defense on the other hand retains unquestionable vitality, remaining not only "the first law of nature," but a basic right enshrined in law from ancient times to the present. District of Columbia v. Heller, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008); McDonald v. City of Chicago, 561 U.S. 742, 744, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010). Hobson emphasized that the common law privilege to resist an unlawful arrest and the right of self-defense now embodied in Section 939.48, Stats., have no bearing on each other. "[T]he legislature codified a right to self-defense distinguishable from the right to resist an unlawful arrest." Hobson, supra, at fn17; State v. Reinwand, 147 Wis. 2d 192, 199-200, 433 N.W.2d 27 (Ct. App. 1988) ("self-defense codified in Section 939.48 is separate from the common law right to forcibly resist an unlawful arrest"). The Court of Appeals in this case in effect invalidated the statutory right to self-defense, at least when armed strangers later turn out to be law enforcement officers. That goes well beyond Hobson and squarely conflicts with it. Hobson, supra, at n17.

Other circumstances of the instant case render it factually distinguishable from Hobson. Hobson knew she was dealing with a uniformed police officer. In contrast, when Stietz encountered the wardens, he absolutely did not know who they were because it was dark out (R.111:177; R.112:29), they were a distance away (R.111:177; R.113:125, 141; App. 82, 98), they shined a flashlight in his eyes (R.111:177, 179; R.113:125, 141; App. 82, 98), and he did not hear them ever identify themselves. (R.113:122; App. 79) Rather, the first information he got from them was an inquiry regarding any deer being in the area, a question commonly posed by hunters. (R.113:94; App. 51) The two men were not wearing military style uniforms, but blaze orange jackets (R.113:92; App. 49) typical of what every hunter wears. Their jackets ended up being adorned with a shoulder patch, but those presumably would not be visible to someone they were facing. Their blaze orange caps with a logo were also not readable by Stietz in the dark who was looking towards them but with a light being shined into his eyes. Stietz testified that he first suspected they were officers of some sort only *after* the confrontation, when Webster radioed for backup. (R.111.189; R.112:109; R.113:114; App. 71)

Neither of the two linchpins of Hobson, an arrest and an absence of unreasonable force, were present here. Hobson involved the arrest of the defendant, whereas the wardens here admittedly were not attempting to arrest Stietz. They only went onto Stietz's land out of curiosity and had no reasonable suspicion, much less probable cause, to think that any crime had been committed when they confronted and forcibly disarmed Stietz. At most, the DNR wardens in this case were investigating the possibility of a DNR Administrative Code violation of after-hours hunting, which is a civil forfeiture. That hunch was uncorroborated and unsubstantiated by their observations when they circumnavigated the property, heard no shots and saw no hunting, and was refuted by Stietz's immediate statement to them that he was not hunting but merely looking for trespassers. (R.113:92; App. 49) The fact that hunting equipment was in the car *decreased* any reasons for suspicion, not increased them. One cannot utilize hunting supplies if they are not with them on their person (or within reasonable reach). Stietz was nowhere near his vehicle.

The other major distinction between Hobson and this case is the fact that Hobson dealt with a peaceable arrest, quite different from this case, where wardens acted first, physically assaulting Stietz by grabbing

him by his shirt and forcibly taking his gun. (R.102:35-36; R.113:98-99; App. 55-56) Hobson did not abrogate a person's common law right to use force when resisting an arrest where an officer uses unreasonable force. Hobson, supra, at ¶¶ 46, 60-61, fn17 ("The majority opinion does not abrogate a person's common law right to use force when resisting an arrest in which a law enforcement officer uses unreasonable force"). The Court of Appeals decision in this case is in direct conflict with Hobson.

B. The DNR Wardens Had No Legal Justification to Seize Robert Stietz or to Forcibly Disarm Him.

The DNR wardens had not received any complaints or information regarding any persons violating any hunting or conservation laws in the area. As they passed Stietz's property they gathered no information to give any reasonable suspicion that anyone on Stietz's property had been unlawfully hunting. The DNR wardens had zero justification for entering Stietz's land to investigate an unoccupied vehicle out of pure curiosity.

For the sake of argument, while it was "possible" that the person connected to the car the DNR wardens saw from the roadway (and later saw had hunting gear inside of it) was hunting, there was no law against being out after dark or hunting other game other than deer after dark.

Section 29.337, Stats. At the same time, the wardens had no way of knowing how much of a trek this "possible" deer hunter had to complete before returning to his car. It is common and perfectly lawful for hunters to remain in their hunting stands until the close of hunting, and then walk out of the woods after the close of hunting itself. It is also common for hunters to stay out after dark tracking an animal that was shot or cleaning and moving an animal killed during a hunt; the field dressing, cleaning and removal process can take hours if a hunter is working alone.

The wardens never heard any gunshots though, so had no reason to develop even an unsupported 'hunch' that anyone was out hunting post-hunting-hours. (R.27:17; R.103:20-21, 26) Further, upon sighting Stietz walking his land, it was clear that he was not carrying a deer carcass or in possession of a drag rope. (R.27:17; R.103:26; R.110:26) Stietz was not even wearing blaze orange, as a deer hunter would. (R.103:13; R.113:108-109; App. 65-66) At the time they encountered Stietz, he had a lawful right to possess his weapon, hunt small critters, and to scout for trespassers. Importantly, he denied hunting deer. (R.27:17; R.103:13-14; R.113:94, App. 51) Most damningly, the wardens observed Stietz behaving in a manner inconsistent with deer

hunting but consistent with his stated purpose – checking for trespassers. (R.103:12-15)

On the basis of these facts, there can be no serious argument that there were "specific, articulable facts and reasonable inferences from those facts" that Stietz had committed or was about to commit a crime or otherwise violate the hunting regulations. State v. Guzy, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987) (citations omitted). At best, the wardens had a mere hunch that Stietz could have been hunting, and that alone is legally insufficient. Id. Lacking reasonable suspicion, there certainly was nothing remotely resembling probable cause to arrest Stietz at the time the DNR wardens made contact with him. See Section 968.07(1)(d), Stats.; Molina v. State, 53 Wis. 2d 662, 670, 193 N.W.2d 874 (1972); Virginia v. Moore, 553 U.S. 164, 173, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008). Neither warden ever stated that they were placing him under arrest. There was therefore no legal justification for the wardens to attempt to forcibly disarm Stietz.

C. Robert Stietz Had The Right to Resist The Unlawful Attempts of Trespassing DNR Agents to Forcibly Disarm Him in Denial of His Second Amendment Rights.

The Second Amendment confers a right on every American citizen to peaceably bear arms. Stietz was lawfully and peaceably

carrying a rifle and pistol on his farmstead while checking for trespassers. He was committing no crime and the DNR wardens had no lawful authority to forcibly disarm him. Their actions in doing so violated Stietz's Second Amendment rights and precludes his prosecution. The Second Amendment to the United States Constitution states:

> "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."

The United States Supreme Court has conclusively ruled that this amendment confers a right to individual citizens. District of Columbia v. Heller, supra at 595, 625-26. In other words, the United States Supreme Court has confirmed that the Second Amendment confers robust protections to private citizens wishing to possess and carry arms for the purposes of defending their persons or property. McDonald v. City of Chicago, supra at 767. This rejuvenated conception of the Second Amendment is applicable to the states via the Fourteenth Amendment. Id. "Self-defense is a basic right" and "individual self-defense is the central component of the Second Amendment Right." Id. at 767 (citations omitted). Indeed, both Heller and McDonald, read in tandem, make it clear that an individual's right to defend his property

while bearing arms is "fundamental" and "deeply-rooted" in our nation's legal traditions and history. Id.

Article I, § 25 of the Wisconsin Constitution provides like protections for firearm owners, giving citizens of this state the right to "keep and bear arms for security, defense, hunting, recreation or any other lawful purpose." The Wisconsin Supreme Court has held that this provision is "intended to grant a fundamental individual right." State v. Cole, 2003 WI 112, ¶ 20, 264 Wis. 2d 520, 537, 665 N.W.2d 328.

III. ROBERT STIETZ'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WAS DENIED BY THE TRIAL COURT'S REFUSAL TO GIVE A REQUESTED JURY INSTRUCTION REGARDING TRESPASS BY DNR WARDENS

Summary of Argument

Wisconsin Department of Natural Resource wardens commit an illegal trespass when they enter onto a person's private property without any legally justifiable reason to do so; and even if such reason exists, they must take reasonable efforts to notify the owner of the private property before entering onto private land.

Merits

Robert Stietz attempted to offer evidence and argument that the DNR wardens were trespassing when they walked onto his private land

out of mere curiosity and requested a jury instruction on that trespass, but was rebuffed by the trial court. (R.42; R.111:166-167, 173-174; R.112:13; App. 15-16) The trial court's determination and the Court of Appeals upholding of that determination denied Stietz his right to present a complete defense and to a fair trial, specifically denying him his ability to present evidence and have the jury consider whether or not the DNR agents were acting in their official capacity and within the lawful scope of their authority, which they were not.

The only counts on which the jury convicted Stietz were Count 3, a misdemeanor charge of resisting or obstructing an officer, and Count 6, a felony charge of endangering safety by use of a dangerous weapon: intentionally pointing a firearm at a law enforcement officer. (R.7a) To sustain the charges of resisting an officer (Count 3) and endangering safety by pointing a firearm at a law enforcement officer (Count 6), the State must prove that the DNR wardens were acting in their official capacity and within the lawful scope of their authority. WIS JI-CRIMINAL 1765 (Count 3, elements 2 and 3), and WIS JI-CRIMINAL 1322A (Count 6, element 4). Actions are "unlawful" if tortious or expressly prohibited by criminal law or both. See Section 939.48(6), Stats. The act of trespass and the use of unreasonable force

by the wardens were certainly torts, in addition to very likely being in violation of the Wisconsin Criminal Code. Section 943.13, Stats. (trespass to land), prohibits any person from entering any enclosed, cultivated or undeveloped land of another without the express or implied consent of the owner or occupant. Section 943.13(1m)(a), Stats. A succinct definition of trespasser squarely applicable to the wardens in this case is found in WIS JI-CIVIL 8012:

> "A person who enters or remains upon property in possession of another without express or implied consent is a trespasser."

Similarly, any force used by the wardens in excess of what is reasonably believed to be needed to accomplish certain lawful ends is "by definition unlawful." State v. Herriges, 155 Wis. 2d 297, 301-302, 455 N.W.2d 635 (Ct. App. 1990). It is beyond dispute that "there are circumstances where a police officer's use of force is unlawful [including] if he uses unnecessary and excessive force." State v. Mendoza, supra at 154.

When Stietz first observed the wardens, they were approximately 100 yards onto his property inside the fenced enclosure. (R.113:92, 125, 141; App. 49, 82, 98) That property was clearly posted with "no trespassing" signs everywhere around it. (R.113:78-79) The wardens

had neither a search warrant nor consent to enter Stietz's fenced farm property or the easement serving it. Webster testified that they "went through the gate" they found after walking along the property's fence line. (R.112:95) Because the wardens were trespassing when they encountered Stietz, they were by definition not acting in an official capacity or within the lawful scope of their authority. The wardens were trespassing on Stietz's private farm property. (R.113:92-94, 123; App. 49-51, 80) Both DNR agents admitted they were on Stietz's land, but neither ever articulated any legally justifiable reason for trespassing onto the property. They only testified that their curiosity prompted them to go on the property because they had observed a car parked in a field. (R.111:166-167, 173-174; R.112:13) By their own admission, they walked through the cattle gate onto Stietz's fully enclosed and fenced pastureland for a distance of some 100 yards. (R.111:173-174; R.112:13)

A. The DNR Wardens Were Not Acting With Lawful Authority When They Trespassed Onto Robert Stietz's Private Land.

An officer engaged in a trespass loses his legal authority. See State v. Gaulke, 177 Wis. 2d 789, 792, 503 N.W.2d 330 (Ct. App. 1993), where the trial court dismissed violations of deer hunting regulations on the grounds that a conservation warden had "committed

an unprivileged trespass on private land to issue the citations." Id. The Court of Appeals reversed, but only because the defendants there could not establish actual possession or good title to the land, therefore lacking the standing required to assert a trespass. That was not an issue with respect to the wardens entering Stietz's own farmland; Stietz owns the property and has standing.

Similarly, in State v. Barrett, 96 Wis. 2d 174, 291 N.W.2d 498 (1980), the court held that a deputy sheriff conducting a traffic stop in a neighboring county was not acting in his official capacity. Barrett held that once the deputy crossed the county line, he was no longer acting in his official capacity:

> "If a deputy sheriff crosses the county line of his employment, and if there are no circumstances of his employment extending his duty to act, then the attempt to exercise his powers as a peace officer outside of his county of employment is not within the scope of his employment."

Id. at 181. By analogy, once the conservation wardens crossed the line and trespassed onto Stietz's fenced in property, they were not acting with lawful authority.

DNR agents do not have *carte blanche* to enter the private property of another simply by virtue of their employment. The controlling statutory section, Chapter 29 of the Wisconsin Statutes,

contains no such provision. The only ostensible authority conferred on wardens to enter onto private land other than in the course of executing a search warrant is set forth in Section 29.924(5), Stats., which allows agents of the department to enter private lands only in certain limited circumstances. None of those circumstances are present here:

> "(5) ACCESS TO PRIVATE LAND. The department may, after making reasonable efforts to notify the owner or occupant, enter private lands to retrieve or diagnose dead or diseased wild animals and take actions reasonably necessary to prevent the spread of contagious disease in the wild animals."

That provision – the only such statute possibly exempting the DNR wardens from trespass – explicitly requires DNR wardens to make "reasonable efforts to notify the owner or occupant" before entering. This is a clear acknowledgment of the individual's superseding privacy right and authority to exclude others, including DNR wardens, if they so choose. State v. Kieffer, 217 Wis. 2d 531, 546, 577 N.W.2d 352 (1998). Here, there were no efforts by the wardens to notify the owner of the land, nor were there dead or diseased animals present. The State has never articulated or presented any legal authority which would have authorized the DNR agents to enter onto Stietz's private property based on the facts in evidence.

Another state Supreme Court that has addressed whether game

wardens can commit trespass when entering onto private property without legal justification is Mississippi, which held that they can. In Davidson v. State, 240 So.2d 463, 464 (1970), a game warden saw a tractor parked on land. The warden did not know who owned the land and had not received any complaints regarding a tractor. Out of curiosity, he stopped his car, walked onto the defendant's land, and inspected the tractor. The Supreme Court held that the warden "committed a trespass when he went upon the appellant's lands, thus making his search of the tractor illegal" and emphasized that the "right to be secure from invasions of privacy by government officials is a basic freedom in our Federal and State constitutional systems." Id.(internal citations omitted).

Lacking any lawful justification for their actions, the DNR wardens in this case should be treated as trespassers who acted outside their authority as a matter of law, a conclusion that is supported by established precedent of this Court:

> "The rule is that where an authority given by law is exceeded, the officer loses the benefit of his justification, and the law holds him a trespasser *ab initio* although to a certain extent he acted under the authority given."

Wallner v. Fidelity & Deposit Co. of Maryland, 253 Wis. 66, 70, 33 N.W.2d 215 (1948). That rule applies to these two DNR wardens

precisely. In entering posted fenced private land, through a gate, without any justification, they exceeded their authority and became trespassers, pure and simple, and lost their cloak of lawful authority.

B. The Wardens' Stop of Stietz Was Not in a Public Place and Not Authorized by § 23.58, Stats.

The Court of Appeals was in error in holding that Sections 23.58 and 23.59, Stats., provided legal justification for the DNR agents' conduct of entering onto Stietz's land and stopping him, then violently disarming him. (Court of Appeals Decision, ¶ 25; App. 10) Game wardens, like all other law enforcement officers, do not have free rein to enter or trespass onto private lands. The sections relied on apply only to a "public place":

> "**23.58 Temporary questioning without arrest.** (1) After having identified himself or herself as an enforcing officer, an enforcing officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a violation . . . Such a stop may be made only where the enforcing officer has proper authority to make an arrest for such a violation . . ."

Section 23.58, Stats. (emphasis added).

Testimony by the wardens themselves acknowledged their stop of Stietz was on private and not public land. Frost admitted that it was not "public land" and that he knew "it wasn't state land." (R.112:23-24)

The other warden, Webster, confirmed that the wardens had to walk along a fence line and go through a gate in order to get onto Stietz's private property. (R.112:95) In fact, the spot where the wardens and Stietz eventually came upon each other was so far off of the public roadway that the responding deputy sheriff stated that he could not even find them. (R.112:166) That this secluded spot was private property was further confirmed by the deputy's testimony that when he turned up into the field lane, he knew he was entering private property. (R.113:28) That it was private property was also clearly evidenced by the posted "no trespassing" signs. (R.113:78-79)

Section 23.58, Stats., also requires reasonable suspicion, not the hunches or curiosity that motivated the wardens here. Stietz denies that the wardens had reasonable suspicion of a violation, as argued in Section II.B above. Regardless, Section 23.58, Stats., specifically limits the DNR wardens to conduct such questioning only "in a public place." Both wardens and the deputy all acknowledged it was private property. The Court of Appeals therefore incorrectly excused the conduct of the wardens' trespass under the purported authority of Section 23.58, Stats., which plainly does not apply to the facts of this case.

C. The Trial Court Erred by Precluding Any Reference to The Wardens' Trespass.

The trial court's decision to preclude any reference to the wardens' trespass denied Stietz his Sixth Amendment right to present a defense. In response to the State's Motion in Limine (R.48), the trial court entered an order forbidding counsel for Stietz from even characterizing the wardens' conduct as trespassing. (R.52:2) The trial court likewise refused to instruct the jury on the issue of trespass despite a wealth of evidence, including the wardens' own admissions that they had trespassed on Stietz's land. (R.42; App. 15-18) These determinations by the trial court denied Stietz his Sixth Amendment right to present a defense insofar as it effectively denied his counsel the opportunity to challenge essential elements of Count 3 and Count 6, and precluded him from arguing that the wardens were not acting in their official capacity or within the lawful scope of their authority. Although precluded by the trial court's rulings, excluding reference to the wardens' trespass further undermined Stietz's ability to establish the reasonableness of his conduct as being self-defense. An encounter with an armed trespasser, as opposed to a mere bypasser, is far more likely to engender fear for one's personal safety. The same authorities set forth in the preceding section regarding the right to present a defense

are applicable with respect to the trial court's failure to instruct on this issue.

D. The Court of Appeals Erroneously Conflated The Two Separate And Distinct Legal Concepts of Trespass And The Open Fields Doctrine.

The Court of Appeals erroneously conflated two separate and distinct legal concepts: 1) a common law trespass onto another's land; and 2) a search in violation of the Fourth Amendment. (Court of Appeals Decision, ¶¶ 15-18; App. 6-7). The former implicates a property right, while the latter is a constitutional right. The "open fields doctrine" is an exception to an exclusionary rule of evidence. The only time the "open fields doctrine" comes into play is in the context of a motion to suppress the fruits of a warrantless search as violative of the Fourth Amendment. Stietz made no such motion and there never was any issue regarding open fields. The Court of Appeals' reliance on that doctrine was without any foundation in the record and clearly erroneous. Oliver v. United States, 466 U.S. 170, 183, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984), made it clear that a trespass onto land is not coextensive with a search in an open field in the constitutional sense. The law of trespass has much wider application than the rights conferred by the Fourth Amendment:

> "The law of trespass, however, forbids intrusions upon land that the Fourth Amendment would not proscribe. For trespass law extends to instances where the exercise of the right to exclude vindicates no legitimate privacy interest. Thus, in the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment."

Id. at 183-184.

In short, the law of trespass confers protections from intrusion by others far broader than those required by Fourth Amendment interests. The import of the fact that the wardens were trespassing on Stietz's land is twofold: 1) it substantiates the reasonableness of Stietz's fear for his safety; and 2) it negates one of the elements of resisting or obstructing an officer, namely that the officer must be doing an act in an official capacity and with lawful authority. Section 946.41(1), Stats. It also would tend to negate the requirement of Section 941.20(1m)(b), Stats., that the officer was acting in an official capacity. See also WIS JI-CRIMINAL 1322A, and WIS JI-CRIMINAL 915; State v. Barrett, supra. The failure to give Stietz's requested instruction on trespass requires reversal of his conviction.

CONCLUSION

The record in this case makes it amply clear that Robert Stietz's fundamental federal and state constitutional rights to present a complete

defense were violated. A jury acquitted on most of the six counts; it well might have acquitted on the remaining two counts had it been allowed to fully consider Stietz's lawful defenses. The Court of Appeals decision affirming the trial court's erroneous rulings conflicts with controlling opinions of the U.S. Supreme Court and this Court, in particular State v. Mendoza, 80 Wis. 2d 122, 258 N.W.2d 260 (1977), and State v. Hobson, 218 Wis. 2d 350, 577 N.W.2d 825 (1998), and is contrary to State v. Schuman, 226 Wis. 2d 398, 595 N.W.2d 86 (Ct. App. 1999), as well. For those reasons, Robert Stietz respectfully requests that this Court enter an order vacating his conviction and remanding this matter to the Circuit Court for further proceedings.

Respectfully submitted this 10th day of November, 2016.

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CERTIFICATION ON FORM

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c), Stats., for a brief produced with a proportional serif font. The length of this brief is 9001 words.

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CERTIFICATION OF COMPLIANCE
WITH RULE 809.19(12), STATS.

I hereby certify that I have submitted an electronic copy of this brief, excluding the Appendix, which complies with the requirements of Section 809.19(12), Stats.

I further certify that the 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.

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CERTIFICATION REGARDING APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Section 809.19(2)(a), Stats., and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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APPENDIX

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