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STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT III

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Appellate Case No. 2015AP000586-CR

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STATE OF WISCONSIN,  
Plaintiff-Appellant,  
v.  
JOSEPH C. RISSE,  
Defendant-Respondent.

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ON APPEAL FROM THE JUDGMENT OF CONVICTION AND  
SENTENCE, ENTERED IN BROWN COUNTY  
CIRCUIT COURT CASE NO. 13CT1592,  
THE HONORABLE MARC A. HAMMER PRESIDING

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PLAINTIFF-APPELLANT'S REPLY BRIEF

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REPLY BRIEF OF PLAINTIFF-APPELLANT

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**ARGUMENT**

**I. THE STATE’S ARGUMENT REGARDING  
THE CONNECTICUT LETTER WAS  
PROPER BASED ON THE RECORD.**

The State’s arguments regarding the Connecticut Superior Court letter dated September 13, 2013, App., p. 63, were proper because it was part of the record and was incorporated by reference during the oral arguments addressing Risse’s prior OWI convictions. During the February 4, 2015, continued court trial, the State

repeatedly referenced the arguments included in its brief addressing the number of prior convictions. App. p. 16. Consequently, the brief was incorporated in the State's position at the hearing, and the oral comments were simply to supplement the arguments that had already been developed in briefing. The State's September 29, 2014, brief specifically addressed the Connecticut Superior Court letter, App. p. 77-78, because Risse argued in his brief that the letter demonstrates that the Connecticut records do not reflect that he had any prior countable convictions. App., 82-83, 88. Consequently, these records were part of the record at the time of the circuit court's determination on prior OWI convictions.

Moreover, the Connecticut Superior Court letter supplements the Connecticut DMV response, App. p. 60, because it provides information, such as the disposition date, that is essential to assessing the meaning of the DMV response.

**II. THE RULES OF EVIDENCE APPLY TO  
THE DETERMINATION OF A  
DEFENDANT'S PRIOR OWI  
CONVICTIONS.**

The State disputes that the court's finding as to prior convictions occurred during sentencing. *See* Def. Br. p. 3. Defendant Risse pled to the OWI during the middle of a court trial with the

understanding that the number of prior convictions would be tried to the court. App., p. 7. Furthermore, after the court's ruling, the State requested a different date for sentencing. *Id.* at p. 43-44. The court then denied the State's request and proceeded to the sentencing phase. *Id.* at 44. As such, the rules of evidence applied because the determination did not occur during sentencing. *See State v. Van Riper*, 2003 WI App 237, ¶ 17, 267 Wis. 2d 759, ¶ 17, 672 N.W.2d 156, ¶ 17.

Risse refers to *State v. McAllister*, which also indicates that the prior conviction determination occurs prior to the sentencing proceeding. (Def. Resp. Br. p. 5). In *McAllister*, the Wisconsin Supreme Court stated, "The defendant does have an opportunity to challenge the existence of the previous penalty-enhancing convictions before the judge *prior* to sentencing. However, the convictions may be proven by certified copies of conviction or other competent proof offered by the state *before* sentencing." *State v. McAllister*, 107 Wis. 2d 532, 539, 319 N.W.2d 865, 869 (1982) (emphasis added).

Nonetheless, even if the determination occurred during sentencing, the rules of evidence still apply to evidence proffered to

prove a defendant's prior OWI convictions. *See Van Riper*, 2003 WI App at ¶ 17, 267 Wis. 2d at ¶ 17, 672 N.W.2d at ¶ 17. In holding that a Wisconsin Certified Driving Record is admissible to prove prior OWI convictions, the *Van Riper* court explicitly stated, "our holding is consistent with the Wisconsin rules of evidence." *Id.* at ¶¶ 2, 17. Furthermore, the court further stated that "a defendant's driving record is a public record and is admissible as an exception to the hearsay rule...." *Id.* at ¶ 17. The court then concluded its analysis with a discussion of authentication. *Id.* If the rules of evidence did not apply to proof of OWI priors, there would have been no need for the court's findings or discussion.

### **III. RISSE'S DOCUMENTS WERE NOT SELF-AUTHENTICATING.**

Risse's documents were not self-authenticating because they were not properly certified. The *Van Riper* court stated, "[A] record is authenticated by a *certificate* which properly and sufficiently *identifies the record to which it is attached...*," and a "driving record is self-authenticating by virtue of a *certificate attached to the record* bearing the State of Wisconsin DOT *seal and a signature* of the Administrator of the...DMV *attesting to the record's authenticity.*" *Id.* (quoting reference omitted) (emphasis added). The

case law clearly indicates that a document is self-authenticating if there is an attached certificate or provision confirming the authenticity of the document. Risse's documents did not contain a certificate, nor did they contain any endorsement verifying their authenticity. Consequently, the documents were inadmissible under the rules of evidence and should have been excluded.

**IV. RISSE'S CONNECTICUT ONLINE COURT RECORDS ARE NOT SUFFICIENTLY RELIABLE TO REBUT THE STATE'S CDR.**

The fact that Risse submitted his Connecticut online court records with other documents does not change the unreliable nature of his online records. The Wisconsin Supreme Court's concern in *State v. Bonds* was with the reliability of the CCAP document. *State v. Bonds*, 2006 WI 83, ¶ 49, 292 Wis. 2d 344, ¶ 49, 717 N.W.2d 133, ¶ 49. Due to the fact that CCAP records "do not purport to be identical to the court records" and CCAP's disclaimer about accuracy, the court concluded that "we cannot, under those circumstances, consider the contents of a CCAP report to rise to the level of reliability sufficient to establish prima facie proof that a defendant has a prior qualifying conviction." *Id.*



Additionally, Risse's other records do not lend reliability or accuracy to the Connecticut online court records because, as stated in the State's Appellate Brief, those records have their own evidentiary or reliability concerns. Moreover, some of the records do not support the information for which they were proffered<sup>1</sup>.

### **CONCLUSION**

For the foregoing reasons, the State respectfully requests that the Court reverse the circuit court's finding convicting Risse of a first offense OWI and remand for entry of an amended judgment reflecting a second offense conviction.

Respectfully submitted this 14<sup>th</sup> day of September, 2015.

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<sup>1</sup> This refers to claims that the Connecticut documents demonstrate that Risse's prior offense "never occurred", App. p. 33, when the records relate to a separate offense and simply reflect that there are no records and that the records were destroyed.

### **CERTIFICATION AS TO FORM/LENGTH**

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 972 words, including footnotes.

### **CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)**

I certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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.

### **CERTIFICATION OF MAILING**

I certify that this brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on September 14, 2015. I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this 14<sup>th</sup> day of September, 2015.

Signed:

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