STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal No. 2015AP000993 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HEATHER L. STEINHARDT,

Defendant-Appellant.

ON REVIEW OF A DENIAL OF A MOTION FOR POSTCONVICTION RELIEF ENTERED ON APRIL 30, 2015, AND A JUDGMENT OF CONVICTION ENTERED ON JUNE 23, 2015, IN THE CIRCUIT COURT FOR OZAUKEE COUNTY, HON. SANDY A. WILLIAMS PRESIDING.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Was Steinhardt's right to be free from double jeopardy violated when she was convicted of Failure to Act and First Degree Sexual Assault of a Child (Party to a Crime) on the basis of the same course of conduct?

   The circuit court ruled that Steinhardt's convictions for Failure to Act and 1st Degree Sexual Assault of a Child

did not violate the protections of the Double Jeopardy Clause.

2. Did Steinhardt relinquish her right to raise the double jeopardy issue by pleading no contest to the charges?

   The circuit court did not reach this issue because it held that the convictions did not violate double jeopardy.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Steinhardt welcomes oral argument to clarify any questions regarding this appeal. The first issue in this case is a matter of first impression in Wisconsin. Therefore, publication may be warranted.

STATEMENT OF THE CASE AND FACTS

On April 1, 2013, Walter Steinhardt ("Walter") sexually assaulted F.G. in the presence of the defendant in this case, Heather Steinhardt ("Steinhardt"). At the time of the assault, F.G. was twelve-years-old, and the daughter of Steinhardt (1:1). Steinhardt and Walter were married, but Walter was F.G.'s stepfather (1:1).

According to Steinhardt, the Walter was severely abusive to Steinhardt (29:8). She reported that Walter stalked her, drank a case of beer on a daily basis, and verbally abused her (29:8). She stated that on two occasions, he threatened her, and held a gun to her head (29:8). She stated that for the previous three years, Walter had been pressuring her to arrange a sexual encounter with both of her daughters. (1:1) (Criminal Complaint Attached as App. D).

Finally, on April 1, Steinhardt submitted to Walter's demands. Walter had been asking her to arrange the assault

throughout that day (1:1). As a result, she went into the room where F.G. was at the time. (1:1-2). Steinhardt retrieved F.G. and brought her into Steinhardt's and Walter's bedroom (1:2). Steinhardt sat on the bed while Walter told F.G. to get undressed (1:2). Walter proceeded to sexually assault F.G. (1:2). Afterwards, Steinhardt followed F.G. into the bathroom for F.G. to take a shower to get clean (1:2).

Over two months later, F.B. disclosed to authorities the details of the April 1 assault (29:2). Besides the occurrence on April 1, there were no allegations of any other assaults on F.G. or her sister.

The State originally charged Steinhardt with two felonies, but two weeks later, an Information was filed charging the following three offenses:

Count 1: Failure to Protect a child, Wis. Stat. §§ 948.02(3).

Count 2: First Degree Sexual Assault of a Child under Age 13 as a Party to a Crime, Wis. Stats. §§ 948.02(1)(e) and 939.05.[1]

Count 3: Child Enticement, Wis. Stat. § 948.07.

On May 13, 2014, the circuit court accepted Steinhardt's no-contest pleas to all three counts in the Information (66:10). The court found that the facts in the Complaint provided a sufficient factual basis for the pleas (66: 11).

[1] The Criminal Complaint did not specify the theory of liability under the party-to-a-crime statute, § 939.05 (direct commission, aiding and abetting, or conspiracy).

Subsequently, on June 19, 2014, the court sentenced Steinhardt to prison terms totaling 22.5 years initial incarceration (IC) followed by 15 years extended supervision (ES) as follows:

Count 1: 12.5 years (7.5 years IC, 5 years ES)

Count 2: 25 years (15 years IC, 10 years ES)

Count 3: 25 years (15 years IC, 10 years ES)

Counts 2 and 3 were ordered to run concurrent to each other, but consecutive to Count 1 (67:42-43) (Attached as Appendix A).

Steinhardt subsequently filed a postconviction motion, raising two claims. First, she alleged that when the circuit court convicted her of Count 1 and Count 2, it violated her right to be free from double jeopardy because these counts were multiplicitous (44).

Second, Steinhardt argued that she received ineffective assistance of counsel when her attorney failed to warn her of this double jeopardy violation before she pled no contest to all charges (44). Steinhardt alleged that if she had known, she would not have pled no-contest to both Count 1 and Count 2. As a result, she asked the circuit court to vacate the Failure to Act conviction and sentence.

The circuit court denied Steinhardt's motion for postconviction relief, ruling that Counts 1 and 2 were not multiplicitous (51) (68:28) (Attached as Appendices B and C). The court denied the claim of ineffective assistance of counsel since it found that the charges were not multiplicitous. However, the court accepted an offer of proof that Steinhardt's trial attorney had not recognized the

multiplicity issue and therefore had no strategic reasons for advising Steinhardt about that issue, or objecting on that ground (68:30). The offer of proof also set forth that Steinhardt would testify that she would not have pled to the charges if she had known there was a multiplicity challenge (68:30).

ARGUMENT

I. Steinhardt's Convictions for Failure to Act and 1st Degree Sexual Assault of a Child are Multiplicitous.

A. Legal Standards

Both the state and federal constitutions protect a defendant from being punished twice for the same offense.[2] The Double Jeopardy Clause offers three protections: protection against a second prosecution for the same offense after acquittal, protection against a second prosecution after conviction, and protection against multiple punishments for the same offense. *State v. Sauceda*, 168 Wis. 2d 486, 492, 485 N.W.2d 1 (1992). It is this third protection that is at issue in the present case.

Whether multiple punishments are constitutional depends on whether the Wisconsin "legislature intended that the violations constitute a single offense or two offenses, that

[2] The double jeopardy language in the United States and Wisconsin Constitutions is almost identical. *State v. Sauceda*, 168 Wis. 2d 486, 492, 485 N.W.2d 1 (1992). The Fifth Amendment to the United States Constitution states "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." Article I, section 8 of the Wisconsin Constitution states "no person for the same offense may be put twice in jeopardy of punishment."

is whether the legislature intended one punishment or multiple punishment." *State v. Gordon*, 111 Wis. 2d 133, 137, 330 N.W.2d 554, 565 (1983). Multiple charges arising from a single criminal offense "are impermissible because they violate the double jeopardy provisions of the Wisconsin and United States Constitutions." *State v. Grayson*, 172 Wis. 2d 156, 159, 493 N.W.2d 23 (1992).

Wisconsin has traditionally analyzed multiplicity claims using a two-prong test: (1) whether the charged offenses are identical in law and fact; and (2) if the offenses are not identical in law and fact, whether the legislature intended the multiple offenses to be brought as a single count, rather than as multiple counts. *State v. Anderson*, 219 Wis. 2d 739, 746, 580 N.W.2d 329, 333 (1998). The first component involves the application of the *Blockburger*[3] elements-only test under which an offense is a lesser included one only if all of its statutory elements can be demonstrated without proof of any fact or element in addition to those which must be proved for the greater offense. This is also codified in Wis. Stat. § 939.65, which states that "if an act forms the basis for a crime punishable under more than one statutory provision, prosecution may proceed under any or all such provision."

If each charged offense is not considered a lesser included offense of the other, then courts presume that the legislature intended to permit cumulative punishments for both offenses. *State v. Kuntz*, 160 Wis. 2d 722, 755, 467 N.W.2d 531 (1991).

However, the presumption of cumulative punishments is only a presumption, and does not end the inquiry. Questions of multiplicity "must be resolved as a question of

[3] *Blockburger v. United States*, 284 U.S. 299 (1932).

statutory interpretation…If the legislature did not intend multiple punishments, the convictions are constitutionally barred." *Church*, 223 Wis. 2d 641. 642, 589 N.W.2d 638 (Ct. App. 1998). To determine legislative intent, courts analyze the following four factors: the statutory language; the legislative history and context; the nature of the proscribed conduct; and the appropriateness of multiple punishments. *Anderson*, 219 Wis. 2d at 751-52.

Whether Steinhardt's convictions violated her right to be free from double jeopardy under both the United States Constitution and Article 1, Section 8 of the Wisconsin Constitution is a question of law. Thus, this court owes no deference to the lower court's decision. *Sauceda*, 168 Wis. 2d at 492.

B. Steinhardt's conduct represented one continuous course of conduct that did not require separate volitional acts.

As a threshold matter, it is necessary to view the nature of allegations against Steinhardt. The allegations focused on the events that occurred over a short span of time on April 1, 2013. But if these events had been repeated on April 2, the State could have properly charged Steinhardt with two offenses. The offense on April 1 could have been charged as Failure to Protect or it could have been charged as a Sexual Assault of a Child (party-to-a-crime). The same could be said for an offense on April 2. But since the allegations only concerned one relatively short time frame, a legitimate question is posed as to whether Steinhardt's conduct constituted one continuous act, the components of which were significantly different in their nature and represented separate volitional acts. *See State v. Eisch*, 96 Wis. 2d 26, 291 N.W.2d 800 (1980).

In this case, the allegations are relatively simple and straight-forward. There was no trial. The only description of the conduct alleged by the State was set forth in the criminal complaint (1) (Attached as App. D). The probable cause section of the complaint is short, comprising of a total of six sentences, alleging the following events of April 1, 2013:

1. Steinhardt knew that Walter was interested in having sexual intercourse with F.G.
2. Steinhardt brought F.G. into the bedroom where Walter was lying under the covers.
3. Steinhardt heard Walter tell F.G. to take her clothes off.
4. While Walter engaged in digital penetration with F.G., Steinhardt remained on the bed.
5. Steinhardt remained on the bed while Walter engaged in oral sex and then penis to vagina intercourse with F.G.
6. When Walter was finished, F.G. left the room to take a shower. Steinhardt following her into the bathroom.

The criminal complaint did not make any distinctions as to which of the above acts/omissions formed a basis for Failure to Protect (Count 1), and which formed a basis for Sexual Assault as party to a crime (Count 2). At no time during the plea or any other court hearings was there a discussion regarding any distinction between conduct as it applied to the two counts. During the plea hearing, the court found that a factual basis existed based solely on the facts set forth in the complaint (66:11).

It is apparent that each of the six items on the above list can be equally applied to both counts. That is, all six items demonstrate a failure to protect F.G. And all six items assisted Walter in committing the sexual assault. Therefore,

the circumstances surrounding the two crimes are identical in fact.

It is also apparent that the above acts constitute one continuing course of conduct. A continuing course of conduct can still be properly separated into multiple counts. For example, in *Eisch,* the defendant was convicted of four counts of second degree sexual assault stemming from a two and one-half hour time span. *Eisch,* 96 Wis. 2d at 27. The assault consisted of four different actions: genital and anal intercourse, fellatio and inserting an object into the victim's genitals. *Id.* at 27-28. Eisch argued that the counts were multiplicitous because all of the acts arose out of one incident. *Id.* at 29. In its decision, the Wisconsin Supreme Court stated that:

> A defendant ought not be charged, tried, or convicted for offenses that are substantially alike when they are a part of the same general transaction or episode. To do so would impose jeopardy of multiple trials or convictions for a single offense.

Id. at 34. However, the court held that the charges against Eisch were not multiplicitous, stating that: "the crimes are significantly different in their nature." *Id.* at 36. The court emphasized that each act required a "separate volitional act." *Id.* at 37.

The principle followed in *Eisch* is reflected in many other cases. *See State v. Ziegler,* 2012 WI 73, ¶73, 342 Wis. 2d 256, 816 N.W. 238 (denying the defendant's claim that five sexual assault counts were multiplicitous when the five acts—fellatio, digital penetration of the victim's vagina, touching of the victim's breasts, the victim's touching of the defendant's penis, and the stroking of the victim's buttocks—were "significantly different in nature", and "required a new volitional departure in the course of conduct"); *State v.*

Cleveland, 2000 WI App. 142, 237 Wis. 2d 558, 614 N.W.2d 543 (multiple charges permitted arising from two distinct acts of fondling a child's breasts committed during a relatively brief period of time); *State v. Kruzycki,* 192 Wis. 2d 509, 531 N.W.2d 429 (Ct. App. 1995) (multiple charges permitted arising from various forms of sexual assault occurring over one hour).

However, Wisconsin courts have also decided that multiple counts are multiplicitous when there is insufficient evidence that the defendant engaged in separate volitional acts. For example, in *State v. Hirsch,* 140 Wis. 2d 468, 474, 410 N.W.2d 638 (Ct. App. 1987), the Court of Appeals agreed with the defendant that a sexual assault was multiplicitous when it spanned "no more than a few minutes" and involved the defendant moving his hand from the victim's vagina to her anus and back again).

In *Church,* 223 Wis. 2d at 645-46, the defendant committed acts that led to charges of two charges of child enticement. One of the charges was based on Church's intent to cause a child to expose a sex organ. The other charge was based on his intent to give a controlled substance to a child. The Court of Appeals held that despite the fact that Church simultaneously intended two subsequent wrongful acts, the offenses were not supported by different and new volitional acts, and were therefore identical in fact and multiplicitous. *Id.* 223 Wis. 2d at 658-59.

Steinhardt's actions and omissions are very different from those found in *Eisch,* and more like the acts in *Hirsch* and *Church.* The complaint gives no indication of the amount of time involved in the assault, but since it is not mentioned, it is reasonable to assume that it did not take anywhere near the two and one-half hours found in *Eisch.* More importantly, there is no evidence of separate volition. Again, each of the

six conducts listed in the complaint flowed from one misguided decision by Steinhardt allowing her husband to assault F.G. Her actions in assisting Walter in the sexual assault were precisely the same as her actions in failing to protect F.G.

Consequently, the conduct of Steinhardt is identical in fact as to both charges. The State cannot prevail in the appeal on an argument that Steinhardt's conduct represented two separate volitional acts.

C. The legislature did not intend to allow the same course of conduct to form the basis for both sexual assault (PTAC) and Failure to Protect.

The conclusion that Steinhardt's conduct was identical in fact as to both charges does not end the analysis. Under *Blockburger*, an offense is a lesser included one only when all facts and all *elements* are identical. Here, the elements of First Degree Sexual assault of a Child are different from the elements of Failure to Protect.

However, that does not end the inquiry. It merely requires further analysis of the legislative intent. *Church*, 223 Wis. 2d at 642.

There are no prior published Wisconsin cases that discuss whether a defendant may be charged with *both* Sexual Assault of a Child as a party-to-a-crime, *and* Failure to Protect for a continuous course of conduct. However, there are sound reasons to conclude that the legislature did not intend such a result. This can be determined by analyzing the statutory language, legislative history and context, the nature of the proscribed conduct, and the appropriateness of multiple punishments. *Anderson*, 219 Wis. 2d at 751-52. Each of these is considered below.

1. Statutory language

The two offenses involved in this case—First Degree Sexual Assault of a Child and Failure to Protect—both are proscribed in Wis. Stat. § 948.02.[4] The first three subsections of that statute set forth the alternate ways one can be convicted of sexual assault of a child.

There is nothing in the text of § 948.02 addressing whether an acceptable unit of prosecution includes both 1st Degree Sexual Assault of a Child and Failure to Act. However, Wis. Stat. § 939.66 relates directly to this question. That statute prohibits multiple prosecutions under § 948.02. It states:

> **939.66. Conviction of included crime permitted.** Upon prosecution for a crime, the actor may be convicted of *either the crime charged or an included crime, but not both*. An included crime may be any of the following:
>
> ….

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[4] The relevant sections of Wis. Stat. sec. 940.02 provide:

(1) First degree sexual assault.

….

(e) Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony.

….

(3) Failure to act. A person responsible for the welfare of a child who has not attained the age of 16 years is guilty of a Class F felony if that person has knowledge that another person intends to have, is having or has had sexual intercourse or sexual contact with the child, is physically and emotionally capable of taking action which will prevent the intercourse or contact from taking place or being repeated, fails to take that action and the failure to act exposes the child to an unreasonable risk that intercourse or contact may occur between the child and the other person or facilitates the intercourse or contact that does occur between the child and the other person.

> **(2p)** A crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged.

(emphasis added).

Under the clear language of § 939.66, Steinhardt cannot be convicted of a crime "which is a less serious or equally serious violation under s. 948.02 than the one charged." The Failure to Protect offense under § 948.02(3) is a less serious type of violation under s. 940.02 than First Degree Sexual Assault under. *See* § 939.66 (2p). Therefore, under the clear language of § 939.66, conviction of both offenses is not permitted, at least when the acts or omissions occurred at the same time and are of the same nature, as argued above.[5]

2. Legislative history and context

Wis. Stat. § 948.02 was enacted in 1987 through 1987 Act 332, when the legislature created a new chapter 948 that addressed a wide variety of crimes against children. *State v. Rundle*, 176 Wis. 2d 985, 996-97, 500 N.W.2d 916 (1993). The Failure to Protect portion of § 948.02, found in subsection (3), was new—the previous statute did not recognize such an offense.

[5] Subsection (2p) of § 948.02, was enacted through 2005 Wisconsin Act 430, which imposed mandatory minimum penalties for child sex offenders. The drafting record relating to § 939.66 gives no indication that that this section was to apply only to the versions of the statute specifying First and Second Degree Sexual Assault (subsections (1) and (2)). It therefore must be concluded that (2p) was also meant to apply to (3), Failure to Act.

The Comment accompanying 1987 Act 332, which created the new statute merely states that the Failure to Protect subsection:

> Creates a provision not contained in the current sexual assault statute recognizing that a parent or other "person responsible for the child's welfare" is responsible for protecting the child from assault by others. Under this provision, a parent or other responsible person is guilty of a Class C felony if that person is aware of a possible assault on the child and, although capable of doing so, fails to prevent it. The phrase "person responsible for the child's welfare" is defined in s. 948.01(3), which is created by this bill, to include a child's parent and any person legally responsible for the child's welfare in a residential setting.

There is nothing in the legislative history of § 948.02 indicating that a person could be found guilty under both subsections (1), (2), or (3) when the conduct was the same.

3. Nature of the proscribed conduct

The third factor—the nature of the proscribed conduct—also mitigates in favor of Steinhardt. As indicated above, Steinhardt's conviction of Failure to Protect does not rest on any different or additional conduct from that underlying her conviction of First Degree Sexual Assault. The offense was based on a continuing course of conduct that occurred on a single occasion. *See Church*, 223 Wis. 2d at 663 (in considering the nature of the proscribed conduct, the defendant enticed one child, one time, into one hotel room, which "does not indicate a legislative intent to impose multiple punishment.").

4. Appropriateness of multiple punishments

There is no indication the legislature intended to impose multiple punishment. To the contrary, as argued above, § 939.66 indicates that there cannot be multiple punishments for violations of equal or lesser included offenses under §948.02. Furthermore, the sole goal of § 948.02 is to prevent sexual abuse of children, a goal which is accomplished by applying either theory of liability.

Both First Degree Sexual Assault of a Child and Second Degree Sexual Assault of a Child carry severe penalties. First Degree Sexual Assault of a Child can be a Class A felony, allowing a life sentence. Wis. Stats. § 939.50 (3)(a). Or as in Steinhardt's case, it can be a Class B felony, allowing imprisonment up to 60 years. Wis. Stats. § 939.50(3)(b). Second Degree Sexual Assault of a Child is a Class C felony, allowing imprisonment up to 40 years. Wis. Stat. § 939.50(3)(c). It is hard to imagine that the legislature could have intended to allow additional penalties on top of these when the acts or omissions revolve around the same set of facts and circumstances. There is nothing in the legislative history indicating such an intent.

II. Steinhardt did not relinquish her right to assert a multiplicity claim by pleading no contest.

Steinhardt did not waive her double jeopardy claim by pleading no contest to all three charges. The "general rule is that a guilty, no contest, or *Alford* plea 'waives all nonjurisdictional defects, including constitutional claims.'" *State v. Multaler*, 2002 WI 35, ¶54, 252 Wis. 2d 54, 643 N.W.2d 437. However, in *State v. Kelty*, 2006 WI 101, ¶39, 294 Wis. 2d 62, 716 N.W.2d 886, the Supreme Court held that "if a double jeopardy challenge can be resolved without any need to venture beyond the record, the court should

decide the claim on its merits."

In *Kelty,* the defendant pled no contest to two counts of intentionally causing great bodily harm to a child in violation of Wis. Stat. § 948.03(2)(a). *Kelty* at ¶5. The basis for the two counts was the fact that the victim, a baby, suffered two skull fractures. *Id.* In a postconviction motion and then on appeal, Kelty argued that she should be permitted to withdraw her plea because the two counts were multiplicitous. *Id.* at ¶11. The Supreme Court held that Kelty's plea "relinquished her opportunity to have a court determine the merits of her multiplicity challenge." *Id.* at ¶51.

The Supreme Court did not rule that a defendant's plea *always* relinquishes one's right to a double jeopardy challenge. Instead, recognizing the United States Supreme Court decision in *United States v. Broce,* 488 U.S. 563 (1999), the court drew a distinction between cases that can be decided on the already existing record, or whether a further fact-finding is necessary. The court held:

> if a double jeopardy challenge can be resolved without any need to venture beyond the record, the court should decide the claim on its merits. *Broce*, 488 U.S. at 575-76, 109 S. Ct. 757. Otherwise, by entering a guilty plea, a defendant relinquishes the opportunity to receive a fact-finding hearing on a double jeopardy claim.

Applying this standard to the facts in *Kelty*, the Supreme Court found that her guilty plea relinquished her right to mount a double jeopardy challenge. According to the court, further factual development would have been needed to determine whether Kelty struck the baby twice with two separate objects, or whether the skull fractures were caused in such rapid succession that she did not have time for reflection between the acts one blow or two blows. *Id.* at 49-50.

Second, the Court held that:

> a defendant may obtain a postconviction fact-finding hearing when she seeks to withdraw a guilty plea because (1) the plea is not knowing, intelligent, and voluntary; or (2) the defendant received ineffective assistance of counsel in deciding to enter a plea.

Id. at ¶43.

In this case, it is clear that Steinhardt did not relinquish her opportunity to raise her multiplicity claim. First, she has not, and does not contest any of the facts set forth in the criminal complaint. Unlike the situation in *Kelty*, no further factual development is necessary. The question is simply this: based on the facts set forth in the complaint, are Steinhardt's acts and omissions multiplicitous?

Second, in her postconviction motion, Steinhardt included a claim that her trial counsel was ineffective for failing to inform her of the multiplicitous nature of the Failure to Act and First Degree Sexual Assault charges (44:7-8). Obviously, the success of this claim relies on a finding that the counts are multiplicitous. If they are, then counsel was clearly ineffective in allowing failing to advise Steinhardt about this issue, and failing to file a motion to dismiss Count 1.

At the postconviction hearing, Steinhardt put on an offer of proof that trial counsel would testify that he did not have a strategic reason for failing to move to dismiss Count 1 on multiplicity grounds or advise Steinhardt of the possibility that Count 1 was multiplicitous (68:30). The offer of proof added that trial counsel would not have advised Steinhardt to accept the plea offer if he had known that the counts were multiplicitous (68:30).

The offer of proof also included that Steinhardt would testify that prior to pleading no contest to the three charges she had not been informed of a possible multiplicity challenge, and that if she had known that there was a challenge, she would not have pled to the charges. (68:30).

The State accepted the offers of proof as "fair," and did not put on any evidence to counter the offers (68:30). The court, having ruled against the multiplicity argument, also agreed that it was unnecessary to take testimony on the matter of the plea (68:30).

Accordingly, despite her plea, Steinhardt has not relinquished her right to raise her multiplicity claim. Therefore, the court may proceed to the merits of the double jeopardy claim. If the court agrees that Count 1 is multiplicitous with Count 2, it should vacate the conviction and sentence in Count 1. *See State v. Church*, 2003 WI 74, 262 Wis. 2d 678, 665 N.W.2d 141 ("resentencing on convictions that remain intact after one or more counts in a multi-count case is not always required.")

CONCLUSION

For the above reasons, Steinhardt respectfully requests this Court to reverse the circuit court's decision and vacate her conviction and sentence for Failure to Act, § 948.02(3).

Respectfully submitted this 15th day of July, 2015.

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CERTIFICATION AS TO FORM

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 4,471 words.

_____

John A. Pray

ELECTRONIC CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the amended paper copy of the brief.

_____

John A. Pray

CERTIFICATION AS TO APPENDICES

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 § 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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 so reproduced to preserve.

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John A. Pray

TABLE OF APPENDICES