IN THE WISCONSIN SUPREME COURT

Case No. 2015AP001083CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARY L. WAYERSKI,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT III, AFFIRMING A JUDGEMENT OF CONVICTION AND AN ORDER DENYING A POST CONVICTION MOTION ENTERED IN THE CIRCUIT COURT FOR DUNN COUNTY, HONORABLE MAUREEN BOYLE, BARRON COUNTY CIRCUIT COURT, PRESIDING.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUES PRESENTED

I. Was trial counsel ineffective where he did not ask the testifying defendant during surrebuttal testimony about the purported confession he gave to John Clark, a jail inmate and rebuttal witness, and the defendant would have denied the conversation occured?

Both the circuit court and the court of appeals answered no.

II. Did the state violate **Brady**, **Giglio**, and **Kyles** when it did not inform the defense that John Clark, a jail inmate and rebuttal witness, had pending child-sex charges at the time of his testimony?

Both the circuit court and the court of appeals answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Given the court's grant of review, oral argument and publication are warranted.

STATEMENT OF THE CASE AND FACTS

By summons and criminal complaint filed on July, 28 2011, the State charged Gary L. Wayerski in a criminal complaint in Dunn County Case No.11 CF 186 with seven felony counts involving sexual misconduct with two

juvenile victims, J.P. and J.H. from March through the middle of July, 2011. (1:1-5) An initial appearance was held on the same day. (98:1-8; 2:1).

Following a preliminary hearing on August 9, 2009, probable cause was found. Wayerski was bound over for arraignment. (101:17). On August 16, 2011, an Information was filed charging Wayerski with fourteen felony charges involving sexual misconduct and assaults of two juvenile victims, J.P. and J.H., from March through the middle of July, 2011. (102:1-11). Wayerski filed a standard discovery demand pursuant to Wisconsin Statutes § 971.23(1). (4)

An Amended Information was filed on March 26, 2012, charging Wayerski with a total of 16 felony offenses. The charges may be summarized as follows in the order listed in the amended information. The first count charges Wayerski with Child Enticement, a Class D felony, contrary to Wis. Stats. § 948.07(3)(a), on or about March of 2011 naming , J.H., a child as the victim; the second count charges Wayerski with Child Enticement, , a Class D felony, contrary to Wis. Stats. § 948.07(3)(a), on or about March of 2011 naming J.P., a child, as the victim; the third count charges Wayerski with Exposing Genitals or Pubic Area, a Class I felony, contrary to Wis. Stats. § 948.10 (1)&(1)(a), by causing, J.H., a child toexpose his genitals for purposes of sexual arousal or gratification on or about July 2011; the fourth count charges Wayerski with Exposing Genitals or Pubic Area, a Class I felony, contrary to Wis. Stats. § 948.10(1)&(1)(a), by causing, J.P., a child to expose his genitals for purposes of sexual arousal or

gratification on or about March of 2011 to July 15, 2011; the fifth count charges Wayerski with Exposing a Child to Harmful Material, a Class I felony, contrary to Wis. Stats. § 948.11(2)(a), on or about March of 2011 to July 15, 2011 naming, J.H., a child as the victim; the sixth count charges Wayerski with Exposing a Child to Harmful Material, a Class I felony, contrary to Wis. Stats. § 948.11(2)(a), on or about March of 2011 to July 15, 2011 naming , J.P., a child as the victim; the seventh count charges Wayerski with Causing Child Older than 13 to View/Listen to Sexual Activity, a Class H felony, contrary to Wis. Stats. § 948.055(1)&(2)(b), on or about March of 2011 to July 15, 2011 naming, JHM, a child as the victim; the eighth count charges Wayerski with Causing Child Older than 13 to View/Listen to Sexual Activity, a Class H felony, contrary to Wis. Stats. § 948.055(1)&(2)(b), on or about March, 2011 to July 15, 2011 naming, J.P., a child as the victim; the ninth count charges Wayerski with Sexual Assault of a Child by a Person Who Works or Volunteers With Children (Masturbation on futon with J.H. present), a Class H felony, contrary to Wis. Stats. § 948.095(3)(a), on or about March, 2011 to July of 2011 naming, J.H., a child as the victim; the tenth count charges Wayerski with Sexual Assault of a Child by a Person Who Works or Volunteers With Children (Masturbation with ejaculation onto plate), a Class H felony, contrary to Wis. Stats. § 948.095(3)(a) on or about March, 2011 to July 15, 2011 naming, J.P., as the victim; the eleventh count charges Wayerski with Sexual Assault of a Child by a Person Who Works or Volunteers With Children (Masturbation while kneeling on table), a Class H felony, contrary to Wis. Stats. § 948.095(3)(a), on or about March, 2011 to July 15, 2011 naming, J.H., a child

as the victim; the twelfth count charges Wayerski with Sexual Assault of a Child by a Person Who Works or Volunteers With Children (Felatio) , a Class H felony, contrary to Wis. Stats. § 948.095(3)(a), on or about March, 2011 to July 15, 2011 naming, J.P., a child as the victim; the thirteenth count charges Wayerski with Sexual Assault of a Child by a Person, Who Works or Volunteers With Children (Masturbation on futon with J.H. present), a Class H felony, contrary to Wis. Stats. § 948.095(3)(a) on or about March, 2011 to July 15, 2011 naming, J.P., a child as the victim; count fourteen charges Wayerski with Sexual Assault of a Child by a Person Who Works or Volunteers With Children (Touching testicles and penis during workout), a Class H felony, contrary to Wis. Stats. § 948.095(3)(a) on or about March, 2011 to July 15, 2011 naming, J.P., a child as the victim; count fifteen charging Wayerski with Sexual Assault of a Child by a Person Who Works or Volunteers With Children (Spanking buttocks with with metal spoon), a Class H felony, contrary to Wis. Stats. § 948.095(3)(a) on or about March 2011 to July 15, 2011 naming, J.H., a child as a victim; count sixteen charging Wayerski with Sexual Assault of a Child by a Person Who Works or Volunteers With Children (Spanking buttocks while J.P. was laying on defendant's lap), a Class H felony, contrary to Wis. Stats. § 948.095(3)(a) on or about March, 2011 to July 15, 2011 naming, J.P., a child as the victim. (16:1-5).

At a jury trial held from October 8, 2012 to October 12, 2012 in the Circuit Court of Dunn County, the testimony and evidence recounted below was heard and received into evidence.

In the fall of 2010, when J.P. was 16, he met Gary Wayerski, police chief for the town of Wheeler. Sometime after they met, J.P. committed a theft at a local church. Although J.P. was never formally adjudicated guilty of the theft, a probation officer was involved. J.P.'s supervision was informal. Wayerski knew his probation officer. Wayerski acted as a mentor during his period of supervision. Wayerski spoke to J.P. and his parents about mentoring J.P. at this time. Everyone agreed to this arrangement. (116:5-13).

Between March and July 16, 2011, J.P., a juvenile, claimed that Wayerski had sexual contact with him on multiple occasions at Wayerski's apartment in Menomonie, Wisconsin, often masturbating him to the point of ejaculation, spanking him at Wayerski's apartment and spanking him while on a long distance road trip when he accompanied Wayerski driving a semi truck. J.P. further claimed that Wayerski performed oral sex on him during this same period of time in Wayerski's apartment. Wayerski and J.P. also watched pornography on multiple occasions during the same time period in Wayerski's apartment. Finally, J.P. related that there were times he and his friend J.H., another juvenile, would both watch pornography with Wayerski and Wayerski would grab their penises and masturbate both of them. On one occasion, J.P. said the Wayerski asked him to ejaculate onto a plate. At that time, Wayerski masturbated J.P. and J.P. masturbated himself until he ejaculated onto the plate.. During this entire period, Wayerski was employed as a police officer. J.P.'s testimony is completely lacking in any specifics as to time and dates of all these occurrences. J.P. never reported

any of these occurrences to law enforcement until July 16, 2011. (116: 5-66).

In March 2011, J.H., at age 17, committed a theft from a church. Wayerski issued a disorderly conduct ticket to him. However, J.H. stated he worked it out with Wayerski and he was required to perform ten hours of community service. J.H. was on a "probation type deal for about six month" and was to "keep himself out of trouble". Wayerski was to supervise him on probation. Wayerski told J.H. "if I did what I was told with the community service and the six month of staying out of trouble, that it would be off my record completely". Wayerski was the Chief of Police in Wheeler, Wisconsin. (116: 127-134).

Between March and July 2011, J.H. spent time with Wayerski at Wayerski's apartment. During this period, J.H. claimed Wayerski had sexual contact with him and masturbated him. On one occasion, J.H. accompanied Wayerski on a road trip while Wayerski drove a semi truck. At some point, Wayerski pulled the semi truck over and parked at a rest stop. There J.H. claimed Wayerski masturbated him and rubbed his testicles. Wayerski on other occasions spanked him with a spoon. During the spankings, J.H. was bent over a chair. Wayerski also had J.H. get up on a table on his arms and legs, "doggy style". Wayerski would then place Vaseline on his hand and masturbate J.H.. Wayerski called these events "milking me out". Wayerski and J.H. also watched pornography at Wayerski's apartment. J.H. described the pornography as "woman on man or man on woman". In the pornography, people were engaged in sexual acts with each other. J.H.

recalled that he and Wayerski watched pornography on a website called "Porn Hub". At times, while they were viewing pornography, J.H. claimed Wayerski masturbated him. J.H. also claimed that Wayerski provided alcohol to him and his friend J.P. while at Wayerski's apartment. Wayerski's sexual contact with J.H. occurred on multiple occasions. Additionally, J.H. claimed that Wayerski masturbated J.H. and J.P. at the same time as he sat between both of them. J.H. believed this last incident occurred the night before J.H. and J.P. reported Wayerski's sexual acts to his parents and law enforcements. J.H. and J.P. got into an argument with Wayerski at his apartment during their last visit at the apartment. J.H.'s testimony is completely lacking in any specifics as to time and dates of all these occurrences. J.H. never reported any of these occurrences to law enforcement until July 16, 2011. (116: 134-182).

In order to avoid a conflict of interest, investigation of the case was assigned to Eau Claire County Sheriff's Office rather than any Dunn County Law Enforcement in light of Wayerski's position as police officer and police chief in towns in Dunn County. On July 16, 2011, Detective Kuehn interviewed separately J.P. and J.H. regarding their allegations against Wayerski. Eventually he obtained a search warrant to search Wayerski's apartment and executed the search warrant. Recovered from Wayerski's residence were, among other items, a bottle of Vaseline, dog leashes, and a plate. The plate contained "a milky substance consistent with the cracking of an egg". The plate was found on the top of a clothes basket that was next to the kitchen table. He also observed a half-pint of

alcohol. (116:201-237). Detective Kuehn also seized a computer from Wayerski's apartment and another computer which was taken apart in various pieces on the floor in Wayerski's\ master bedroom. He also recovered a copy of a Charter bill. The bill indicated that Wayerski was the account holder related to on-demand or pay-perview matters. This same bill indicated the dates and names of pornography accessed. (116:201-237).

Extensive evidence of homosexual pornographic photos, homosexual sadomasochistic bondage pornography searches and website visits, photos of Wayerski's penis, and homosexual sadomasochistic texts from Wayerski's computers and his cell phone were admitted into evidence, seen by the jury and described to the jury. (97; 117: 101-117, 109; 117: 89-101).

Sarah Zastrow-Arkens, a DNA analysist with the Wisconsin State Crime Laboratory, examined bucal swabs from Wayerski, J.P. and J.H.. She was able to obtain a male profile from non-sperm and sperm fractions from two separate swabbings of the plate recovered from Wayerski's apartment. Wayerski and J.H. were excluded as being the possible source of the profile detected from the plate. That DNA profile matched J.P.. The statistical likelihood that anyone else could have contributed that DNA was one in 28 quintillion. (97;116:212-215,: 117: 75-85).

Kay Detar testified that the boys were drinking and using Wayerski's computer without Wayerski's knowledge. Moreover J.P. admitted to Detar after Wayerski's arrest that "what they said to the cops was a

lie". (118: 10-18). Tiffany Mullan testified that J.P. told her that all of the allegations against Wayerski were a "joke" and a "misunderstanding". (118: 33-37). Allan Meyer recounted how the boys told him that "We set him up. We got him". In particular, J.P. told Meyer that "[W]e got him. We ended up setting him up.". Wayerski was " too nosy". The boys did what they did because of drugs. (118: 45-49).

Wayerski, Village of Wheeler Police Chief and Part Time Police Officer for the Village of Boyceville, maintains he is innocent of all charges and all of the accusations of spanking, sexual assault, and showing the boys pornography. J.H. and J.P. had set him up and others had set him up. He also denied providing the boys with alcohol. Wayerski admits poor judgement for allowing the victims, J.P. and J.H., to consume alcohol at his residence, but denies ever engaging in sexual conduct with them. (118:77-201).

On rebuttal, a jail inmate, John Clark testified that Wayerski had confided in him, and Wayerski had confessed to committing sexual assaults of J.P. and J.H.. Clark also stated that Wayerski admitted he was aware of the viewing of pornography in his home by J.P. and J.H.. Clark was asked if he came forward to obtain some benefit for his testimony. He denied wanting any benefit. He seemed to suggest his motivation was outrage that the victims were kids. Clark said, "They're kids. I think that says it all." (118: 215-226, 224, 226).

Wayerski was the last witness called at trial. He was recalled to the stand after Clark had testified. Trial counsel

never asked him whether he confided and confessed to Clark that he had sexually assaulted the boys, J.P. and J.H., and allow them to view pornography. Trial counsel failed to ask Wayerski whether he had told Clark any of the matters about which Clark testified.
(118:233-234).

Following the jury trial held from October 8, 2012 to October 12, 2012, the jury returned guilty verdicts on all sixteen counts in the 2nd Amended Information. (97; 119:123-128). On January 9, 2013, the Dunn County Circuit Court, Honorable William C. Stewart, presiding, sentenced Wayerski to a total of 14 years initial confinement and 16 years of extended supervision. As to count one, the defendant was sentenced to 7 years initial confinement and 8 years extended supervision. As to count two, the defendant was sentenced to 7 years initial confinement and 8 years extended supervision, to be served consecutively to count one. As to counts three and four, the defendant was sentenced to 1 year of initial confinement for each count and 2 years of extended supervision for each count, to be served concurrent with count one. As to counts five and six, the defendant was sentenced to 1 year of initial confinement for each count and 2 years of extended supervision for each count, to be served concurrent with count one. As to counts seven and eight, the defendant was sentenced to 3 years of initial confinement for each count and 1 year of extended supervision for each count, to be served concurrent with count one. As to counts nine through sixteen, the defendant was sentenced to 3 years of initial confinement for each count and 3 years of extended supervision for each count, to be served concurrent with

count one. The Judgement of Conviction was entered by the Dunn County Clerk of Circuit Court on January 9, 2013. (38:1-8; 120:1- 75 App. 1: 1-8).

On May 28, 2014, Wayerski filed a motion for post-conviction relief requesting a new trial, pursuant to § 809.30, Wis. Stats, and affidavit in support of the post-conviction motion. (56: 1-4; 57:17). The Honorable Maureen D. Boyle, Circuit Court Judge for Barron County, presided over all three post -conviction motion hearings. (121: 1-162; 122:1-84; 123:1-144). The first post-conviction motion hearing was held on December 29, 2014. Attorney Lester Liptak, Wayerski's trial counsel, and Wayerski testified. (121: 1-162).

On February 2, 2015, Wayerski filed a Post-Hearing Brief . (86:1-6). On February 23, 2015, the State's Response Brief was filed . (88:1-24). On March, 6, 2015, the second postconviction motion hearing was held. Eau Claire County Sheriff Department Deputy Scott Kuehn testified. (122:1-84). On May 4, 2015, at the final hearing on the post-conviction motion, the court denied the motion for new trial. (123:1-144; App. 2: 1-5; App. 3:1-11). On May 14, 2015, a written Order denying the motion for post-conviction relief, signed by the Honorable Maureen D. Boyle, Barron County Circuit Court, was entered in the Dunn County Circuit Court. (94:1-4; App. 4:1-4). On May 22, 2015, Wayerski timely filed a Notice of Appeal from the Judgement of Conviction and Order denying his post-conviction motion. (95:1-5).

On October 31, 2017, the Wisconsin Court of

Appeals issued a decision affirming the Judgement of Conviction and the Order Denying the Motion for Post-Conviction Relief. **(**State v. Gary Lee Wayerski, 2015AP1083, Slip Opinion at 1-31; App. 5:1-31). Wayerski continues to serve his sentence of imprisonment. Further facts will be discussed where necessary below.

ARGUMENT

I. TRIAL COUNSEL WAS INEFFECTIVE WHERE HE DID NOT ASK THE TESTIFYING DEFENDANT DURING SURREBUTTAL TESTIMONY ABOUT THE PURPORTED CONFESSION HE GAVE TO JOHN CLARK, A JAIL INMATE AND REBUTTAL WITNESS, AND DEFENDANT WOULD HAVE DENIED THE CONVERSATION OCCURRED.

A. The Standard of Review.

Ineffective assistance of counsel claims present mixed questions of fact and law. *State v. Pitsch*, 124 Wis.2d 628, 633-34, 369 N.W.2d 711 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. *State v. Harvey*, 139 Wis.2d 353, 376, 407 N.W.2d 235 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law, which an appellate court reviews *de novo*. *Pitsch*, 124 Wis.2d at 634, 639 N.W.2d 711.

B. The Constitional Right to Effective Assistance of Counsel.

"In all criminal prosecutions, the accused shall enjoy the right to ... have the Assistance of Counsel for his defence." U.S. CONST. Amend. VI (applicable to the States by U.S. CONST. Amend. XIV; *See State v. Doe*, 78 Wis. 2d 161, 254 N.W.2d 210 (1977)); See *Strickland v. Washington*, 466 U.S. 668 (1984); WIS. CONST. Art. 1, Sec 7. Assistance of counsel must be "effective" to satisfy the Sixth Amendment. *State v Felton*, 110 Wis, 2d 485, 499, 329 N.W.2d 161, 167 (1983); *State ex.rel. Seibert v Macht*, 244 Wis.2d 378, 389, 627 N.W.2d 881, 886 (2001).

To establish a claim for inefffective assistance of counsel in violation of the United States and Wisconsin Consitutions, a defendant must show: 1) that counsel's peformance was deficient and 2) the deficient performance prejudiced the defense. *State v Smith*, 207 Wis. 2d 258, 274, 558 N.W.2d 379, 386 (1997); *Pitsch*, 124 Wis. 2d at 633, 369 N.W.2d at 714; *Seibert***,** 244 Wis.2d at 391-92, 627 N.W.2d at 887.

1. Prong one of an ineffective assistance of counsel claim: deficient performance.

"To prove deficient performance [prong one] a defendant must establish that counsel 'made errors so serious that counsel was not functioning as the 'counsel' guaranteed the Defendant by the Sixth Amendment. '" *Smith*, 207 Wis. 2d at 274, 558 N.W.2d at 386 (citation omitted). The standard for deficient performance is if the

"counsel's representation fell below an objective standard of reasonableness."*Strickland*, 466 U.S. at 688; *State v Ambuehl*, 145 Wis. 2d 343, 351, 425 N.W.2d 649, 652 (Ct.App.1988). In assessing the reasonableness of counsel's conduct, the court "should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690.

2. Prong two of an ineffective assistance of counsel claim: prejudice to the defense.

The second prong under *Strickland* requires counsel's performance to be prejudicial. "The defendant is not required [under *Strickland*] to show 'that counsel's deficient conduct more likely than not altered the outcome of the case.'" *State v. Moffet*, 147 Wis.2d 343, 354, 433 N.W.2d 572, 576 (1989) (quoting *Strickland***,** 466 U.S. at 693). Instead, a defendant only needs to demonstrate that if not for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. *Strickland*, 466 U.S. at 694: "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland* , 466 U.S. at 694: *Smith* 207 Wis, 3d at 276, 558 N.W.2d at 387. All that is required is that "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins v. Smith* 539 U.S. 510, 537 (2003). "Even if the odds that the defendant would have been acquitted had he received effective representation appear to be less than fifty percent, prejudice has been established so long as the chances of acquittal are better than negligible. '" *U.S. v. Leibach*, 347

F. 3d 219, 246 (7th Cir. 2003) (quoting *Miller v Anderson*, 255 F.3d 455, 459 (7th Cir.2001)). This court should not make an inquiry into the "reliability" or "fundamental fairness" of the proceedings. See *Goodman v. Bertrand* 467 F.3d 1022, 1028-29 (7th Cir.2006); *Washington v Smith*, 219 F. 3d 620, 632-33 (7th Cir. 2000).

C. Wayerski Was Denied His Right To Effective Assistance of Counsel Where Trial Counsel Did Not Ask The Testifying Defendant During Surrebuttal Testimony About The Purported Confession He Gave To John Clark, A Jail Inmate And Rebuttal Witness, And The Defendant Would Have Denied The Conversation Occured.

Trial Counsel was deficient in failing to ask Wayerski about the purported confession to John Clark, and Wayerski would have denied the conversation occured. Such deficient performance prejudiced Wayerski defense's. Thus Wayerski's constiutional right to effective assistance of counsel was violated.

The State called a jail inmate, John Clark, on rebuttal. Clark testified Wayerski had confided in him, and Wayerski had confessed to committing sexual assaults of J.P. and J.H.. Clark also claimed that Wayerski admitted he was aware of the viewing of pornography in his home by J.P. and J.H..The state asked Clark if he came forward to obtain some benefit for his testimony. He denied wanting any benefit. Clark left the jury with the impression that his motivation for testifying against Wayerski was outrage that the victims were kids. Clark told the jury, “They’re kids. I think that says it all.” (118: 215-226).

Wayerski was the last witness called at trial. He was called on surrebutal right after the testimony of Clark. But trial counsel never asked him the most important question. Did you confide and confess to Clark you had sexually assaulted the boys, J.P. and J.H., and allowed them to view pornography? Put another way, Did you confide anything about your case to Clark? (118:233-234).

Trial counsel's forthright testimony at the post-conviction motion hearing compellingly confirms the argument that his performance was deficient and Wayerski was prejudiced. (121: 6-126). He could think of no reason why he did not ask such questions. (121: 6-22,79-90, 117-126). Trial counsel failed to ask questions of Gary Wayerski on surrebuttal that would have rebutted the false claims of John R. Clark in his rebuttal testimony. (118:215-234; 56:1-4). Trial counsel admitted that he should have asked questions that allowed Wayerski to rebut the allegation by Clark. (121:108). Wayerski was never asked if he confided in Clark and confessed to having committed the sexual crimes against J.P. and J.H. The jury was left with the impression that Clark's testimony must be true. (121:126-128)

Wayerski testified at the post-conviction motion hearing that he never confessed committing the crimes against J.H. and J.P. to John Clark when they were housed together in the Chippewa County jail. He would have told the jury that he never confided or confessed to John Clark that he committed the crimes if he had only been asked by trial counsel when he testified on surrebuttal. Trial counsel failed to ask him these questions. (121:126-128).

Wayerski's counsel was ineffective for failing to ask Wayerski, a police chief and law enforcement officer, on surrebuttal testimony whether he confessed unspeakable and heinous sexual crimes to John Clark, a career criminal and jailhouse snitch. The victims of these crimes were two underage boys, J.P. and J.H.. (56: 1-4; 118: 77-201, 215-226, 224, 226, 2, 233-234; 121: 6-22, 79-90, 108, 117-126, 6-128).

Only Wayerski could have told the jury he never confided in Clark and he most certainly never confessed to committing the crimes againt J.P. and J.H. to Clark. Trial counsel's failure to ask him questions to rebut Clark's falsehoods irreparably deprived Wayerski of a fair trial. The absence of Wayerski's denial of Clark's confession story was tantamount to an admission of guilt. Clearly Wayerski's right to a fair trial was prejudiced by his trial counsel's error.

Black's Law Dictionary, Sixth Edition, defines rebuttal evidence:

> Evidence given to explain, repel, counteract, or disprove facts given in evidence by the opposing party. That which tends to explain or contradict or disprove evidence offered by the adverse party. *Layton v. State*, 261 Ind. 251, 301 N.E.2d 633, 636. Rebuttal occurs during the trial stage where evidence is given by one party to refute evidence introduced by the other party. Evidence which is

> offered by a party after he has rested his case and after the opponent has rested in order to contradict the opponent's evidence.

Id. at 1267

"Surrebuttal is merited where (1) the government's rebuttal testimony raises a new issue, which broadens the scope of the government's case, and (2) the defense's proffered surrebuttal testimony is not tangential, but capable of discrediting the essence of the government's rebuttal testimony." *United States v. Moody,* 903 F.2d 321, 331 (5th Cir. 1990); *see also United States v. Wilson,* 134 F.3d 855, 867 (7th Cir. 1998); *United States v. King*, 879 F.2d 137, 138 (4th Cir. 1989). It is worth noting that in *United States v. Murray*, 736 F. 3d 652, 657 (2d Cir. 2013), the United States Court of Appeals for the Second Circuit applied the above paradigm and found reversible error in the district court's denial of surrebuttal evidence.

Clark's testimony that Wayerski confessed to sexually assaulting the boys , J.P. and J.H., must be scrutinized in the context of the final moments of Wayerski's trial. In these final moments , the state landed the most devastating blow against Wayerski and Wayerski's chance for acquittal on any of the charges against him. (56: 1-4; 118: 77-201, 215-226, 224, 226, 233-234; 121: 6-22, 79-90, 108, 117-126, 6-128).

Trial counsel is a man who admits his mistakes. And honorable men, one would expect, do so without hesitation and without excuses and without specious claims that their

errors were "tactical and strategic." Wayerski's counsel is just such a man. He in not so many words said that his performance was deficient and Wayerski was prejudiced because he failed to ask questions of Wayerski that he should have asked. To put a fine point on all of the above, he failed to ask Wayerski, did you confess to Clark that you had sexually assaulted J.P. and J.H.? Did you confide to Clark that you had allowed J.P. and J.H. to view pornography? To be sure, there were countless moments in this trial that profoundly ensured that Wayerski's trial was not a search for the truth, but a miscarriage of justice. And tragically, this moment was the pinnacle error which also ensured that Wayerski would be convicted. Wayerski was never given the opportunity to repel Clark's claim that Wayerski confessed. And the jury was deprived of the most important opportunity to search for the truth and find it. A contest of purported facts that became no contest at all. A confession that was never denied. A rebuttal without a surrebuttal. (118: 215-226, 224, 226; 121: 6-22, 79-90, 117-126, 6-126, 126-128).

In ruling on the defendant's motion for a new trial, the circuit court said that the only error on trial counsel's part that "caused me to pause" was this one. Nevertheless the court denied Wayerski's motion on this point because the court found the evidence against Wayerski to be overwhelming. Even if Mr. Wayerski had been allowed to deny confiding and confessing to John Clark, the circuit court concluded that the outcome would not have been different. (123: 80-84; App. 2:1-5). The court of appeals adopts this erroneous reasoning in its decision. (State v. Gary Lee Wayerski, 2015AP1083, Slip Opinion at 21-22,

¶ 47;App. 5:1-31).

Wayerski disagrees with the trial court and court of appeals conclusion that the evidence of guilt was overwhelming. In fact, the evidence of guilt was not overwhelming. The prosecution case was not strong and could be explained away. The possession of pornography was not direct evidence of guilt. The accusers could have accessed pornography on their own without Wayerski's knowledge and approval. The plate containing J.P.'s semen could have been put there by J.P. solely to set Wayerski up. The ride alongs and visits prove nothing other than J.P. and J.H. spent time with Wayerski. This was a credibility contest between two juveniles who were troubled law breakers and a police chief and law enforcement officer. Additionally defense witnesses cast doubt on the credibility of JP and JH and opined that JP and JH had set Wayerski up. Kay Detar testified that the boys were drinking and using Wayerski's computer without Wayerski's knowledge. Moreover J.P. admitted to Detar after Wayerski's arrest that "what they said to the cops was a lie". (118: 10-18). Tiffany Mullan testified that J.P. told her that all of the allegations against Wayerski were a "joke" and a "misunderstanding". (118: 33-37). Allan Meyer recounted how the boys told him that "We set him up. We got him". In particular, J.P. told Meyer that "[W]e got him. We ended up setting him up.". Wayerski was " too nosy". The boys did what they did because of drugs. (118: 45-49) The missing piece in this case was the absence of an admission, a statement, and a confession by Wayerski to the crimes charged. But when John Clark, jail house snitch, testified as to a confession purportedly made by

Wayerski that hole in the State's case was plugged. But that hole could have been unplugged if Wayerski on surrebuttal was asked the most important questions to contradict Clark. And thus create a credibility contest between Wayerski and Clark. (116: 5-13, 5-66, 127-134, 134-182, 201-237, 212-215; 97; 117: 75-85, 101-117, 109; 117: 89-101; 118: 45-49, 77-201, 215-226, 224, 226, 233-234; 118: 215-226, 224, 226; 121: 6-22, 79-90, 117-126, 6-126, 126-128).

In this case, the failure to ask Wayerski questions affording him the chance to deny a confession to Clark not only denied his right to effective assistance of counsel, but also denied him his right to present a defense. The right to present a defense is grounded in the confrontation and compulsory clauses of the United States Constitution and Article I, Section 7 of the Wisconsin Constitution and includes the right to present testimony of favorable witnesses. *See State v. Pulizzano,* 155 Wis. 2d 633, 645-66, 456 N.W.2d 325 (1990).

Did Wayerski confide in Clark? Did Wayerski confess to Clark that he had sexually assaulted J.P. and J.H. and allowed J.P. and J.H. to view pornography? Wayerski wanted to answer these questions. He would have answered these questions by telling the jury he did not confide in Clark and he did not confess the crimes to Clark. But Wayerski never had the chance to do so. His trial counsel neglected to ask him the most important questions in the entire trial. (118: 215-226, 224, 226; 121: 6-22, 79-90, 117-126, 6-126, 126-128).

The evidence against Wayerski did not reach any irreparable tipping point until John Clark's testimony of a confession by Wayerski. This testimony went unrebutted because of trial counsel's deficient performance in failing to elicit testimony on surrebuttal that Wayerski had never confessed anyting to Clark. This error by trial counsel establishes a reasonable probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Wayerski argues that this court should conclude that "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537.

II. THE STATE VIOLATED BRADY, GIGLIO, AND KYLES WHEN IT DID NOT INFORM THE DEFENSE THAT JOHN CLARK, A JAIL INMATE AND REBUTTAL WITNESS, HAD PENDING CHILD-SEX CHARGES AT THE TIME OF HIS TESTIMONY.

A. Standard of Review

A trial court does not erroneously exercise its discretion if it considers the pertinent facts, applies the correct law and reaches a reasonable decision. *See State v. Evans*, 187 Wis.2d 66, 77, 522 N.W.2d 554, 557 (Ct. App. 1994). Further, the defense has a constitutional right to material exculpatory evidence in the hands of the prosecutor. *See Brady v. Maryland*, 373 U.S. 83, 86 (1963). Exculpatory evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *See United States v. Bagley*, 473 U.S. 667, 682 (1985); *State v. Garrity*, 161 Wis.2d 842, 847-48, 469 N.W.2d 219, 221 (Ct. App. 1991). This court independently applies the *Bagley* constitutional standard to the undisputed facts of the case. *See State v. Woods*, 117 Wis.2d 701, 715-16, 345 N.W.2d 457, 465 (1984). Impeachment evidence casting doubt on a witness's credibility is material and subject to disclosure. *See State v. Nerison*, 136 Wis.2d 37, 54, 401 N.W.sd 1, 8 (1987).

Government disclosure of material exculpatory and

impeachment evidence is part of the constitutional guarantee to a fair trial. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972). The law requires the disclosure of exculpatory and impeachment evidence when such evidence is material to guilt or punishment. *Brady*, 373 U.S. at 87; *Giglio*, 405 U.S. at 154. Because they are constitutional obligations, *Brady* and *Giglio* evidence must be disclosed regardless of whether the defendant makes a request for exculpatory or impeachment evidence. *Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995).

A *Brady* violation may be found under three circumstances: 1) if the prosecutor fails to disclose that the defendant was convicted on the basis of perjured testimony; 2) if the defendant makes no *Brady* request and the prosecutor fails to disclose evidence that is favorable to the defendant; 3) if the defense makes a specific *Brady* request and the prosecutor fails to disclose the requested material. *Bagley*, 473 U.S. at 678-81.

In order to prove a *Brady* violation, a defendant is obligated, in addition to showing that the withheld evidence is favorable to him, to prove that the withheld evidence is "material" *Giglio v. United States*, 405 U.S. 150, 154 (1972).

"The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the

outcome." *Bagley,* 473 U.S. at 682.

Under this test, "[T]he reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding that course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response." *Bagley*, 473 U.S. at 683.

Recognizing that it is sometimes difficult to assess the materiality of evidence before trial, prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence. *Kyles*, 514 U.S. at 439.

Bias means "the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party." Bias may be induced by the witness' "like, dislike, or fear of a party, or by the witness's self-interest." Proof of bias is "almost always relevant" and extrinsic evidence of it is admissible. *U.S. v. Abel*, 469 U.S. 45, 51-52 (1984). The Confrontation Clause "requires a defendant to have some opportunity to show bias on the part of a prosecution witness" (citing *Davis v. Alaska* 415 U.S. 308, 316 (1974)) and, under the Rules of Evidence, bias falls under Fed. Rule Evid. 611(b) and Wis. Stats. Section

906.11. Exploration of possible biases, prejudices, or ulterior motives of the witness...is a particular means to attack the witness's credibility, and...is admissible. *Davis v. Alaska*, 415 U.S. 308, 316 (1974); *U.S. v. Turner*, 198 F.3d 425, 429 n. 2 (4th Cir. 1999). It was error to prevent the defendant from asking a snitch about "her perceived exposure to criminal liability and penalties" to her pending criminal charges. *U.S. v. Turner*, 198 F.3d 425, 429-430 (4th Cir. 1999) (but error was harmless). "A witness's understanding of the potential penalties faced prior to entering into a plea agreement may demonstrate bias and prejudice, as well as motive of the witness for falsifying against the defendant and for the prosecution." *Id.* at 430.

When a witness' credibility is an important issue in the case, evidence of any understanding or agreements about a future prosecution would be relevant to his or her credibility, and the jury would be entitled to know it. *Giglio v. U.S.*, 405 U.S. 150, 154-155 (1972). The fact that one of the witness's "possible concern that he might be a suspect in [an] investigation" could have motivated him to falsely implicate the defendant. Such information was within the scope of fair cross-examination. *Davis v. Alaska*, 415 U.S. 308, 317-318 (1974). Witness's "vulnerable status as a probationer" could have provided a possible motive to assist the police and could have led to the witness's cooperation and testimony. *Davis v. Alaska*, 415 U.S. 308, 317-318 (1974).

Less there be any misunderstanding, Wayerski also claims that he was entitled to full disclosure by the prosecution of the impeachment information regarding

pending child sex crimes against John Clark not only under *Brady*, *Giglio* and *Kyles*. Wayerski also claims he was entitled to this impeachment information by virtue of 971.23 of the Wisconsin Statutes. To that effect, Wayerski's trial counsel filed a written discovery demand pursuant to Wis. Stat. § 971.23 on or about August 2011 which invoked his rights under this statue. (4) And so, Wayerski is claiming that the state's witholding of impeachment information was not only a *Brady* violation violating his right to Due Process but also a discovery statue violation. Wayerski made a statutory demand for exculpatory evdence under Wis. Stat. § 971.23 (1), which requires the prosecutor to disclose certain materials to the defendant within a reasonable time before trial. Wayerski argues that the State violated § 971.23 (1) (h). This section provides:

> (1) What a district attorney must disclose to a defendant. Upon demand, the district attorney shall *within a reasonable time before trial*, disclose to the defendant or his or her attorney and permit the defedant or his or her attorney to inspect and copy or photograph all of the following materials and information, if it within the possession, custody or control of the state:
>
> . . . .
>
> (h) Any exculpatory evidence.

Wis. Stat. § 971.23 (1) (h) (emphasis added).

In his inital brief in the court of appeals, Wayerski cited to the state's statutory responsiblity imposed under

Wis. Stat. § 971.23 (See Wayerski opening brief at 34). The court of appeals seems to suggest in a foot note in its decision that Wayerski had not developed this argument. (App. 5:25) Wayerski believes there is not much to say when not only the Consitution requires the disclosure of impeachment information, but Wis. Stat. § 971.23 imposes a statutory obligation on the state as well to disclose such exculpatory information within a reasonable time before trial. Here since Clark was charged within the month immediately preceding the commencement of Wayerski's trial, the State was obligated to inform the defense immediately that Clark had been charged with child sex crimes. To put a heavy burden on Wayerski in the month before the trial to go looking for charges when previously no charges would have been on CCAP is intolerable when the State should have known charges were going to be filed against Clark well in advance of any CCAP filing.

On rebuttal, the State called a jail inmate, John R. Clark. He testified that Wayerski had confided in him, and Wayerski had confessed to committing sexual assaults of J.P. and J.H.. Clark also stated that Wayerski admitted he was aware of the viewing of pornography in his home by J.P. and J.H.. Clark was asked if he came forward to obtain some benefit for his testimony. He denied wanting any benefit. He seemed to suggest his motivation was outrage that the victims were kids. Clark said, “They’re kids. I think that says it all.” (118: 215-226,219, 224, 226).

The *Brady* violation here was based on the knowing failure by the prosecution to disclose to trial counsel prior to trial that Clark was being prosecuted by the State in

another county for sex crimes and other crimes. Wayerski's trial counsel was deprived of a valuable opportunity to impeach the credibility of Clark and illustrate through cross examination Clark's desire to curry favor with the prosecution. (84:1- 5; 85:1-4; 86:1-6; 88: 1-24; 118: 215-231; 121: 6-22, 79-90, 87-89, 117-126,126-128; 122:18-43).

To be even more specific, Clark, the jail house snitch, unbeknownst to Wayerski's lawyer, had pending charges against him in Chippewa County Circuit Court for the following offenses: one count of Causing a Child 13-18 to View Sexual Activity, a class H Felony, contrary to Wis. Stats. Section 948.055(1), and two counts of Sex with a Child Age 16 or Older, a class A Misdemeanor, contrary to Wis. Stats. Section 948.09 in Chippewa County Circuit Court Case Number 2012CF000399. Interestingly enough, the State charged Clark with the three child sex offense charges on September 7, 2012, a month prior to the commencement on October 8, 2012 of Wayerski's jury trial. The State was aware of the pending charges against Clark before Wayerski's trial commenced. (84:1- 5; 85:1-4; 86:1-6; 88: 1-24; 118: 215-231; 121: 6-22, 79-90, 87-89, 117-126,126-128; 122:18-43).

Wayerski's trial commenced October 8, 2012. Clark was called as a witness for the prosecution in Wayerski's case on October 11, 2012. Clark had ample reason to curry favor with the authorities. If Wayerski's counsel had been made aware of the pending charges brought by the State of Wisconsin in a neighboring county, then Wayerski would have been able to devastate Clark's credibility by

demonstrating his actual bias and his incentive to lie in order to curry favor with the authorities. Because the defense was disarmed, Clark's credibility was not destroyed. And sadly, Wayerski's fate was sunk by a lying jail house snitch. (84:1- 5; 85:1-4; 86:1-6; 88: 1-24;115: 118: 215-231; 121: 6-22, 79-90, 87-89, 117-126,126-128; 122:18-43).

The prosecution never disclosed the pending charges against Clark in Chippewa County Case Number 2012CF000399. The prosecution had a duty to disclose to the defense that Clark was facing prosecution for sexual offenses against children, and had ample reason to please the prosecution in Wayerski's case by falsely testifying so that he would look better by the time his own charges were resolved. Clark was not just any witness. Clark was a jail house snitch who testified that Wayerski had confided in him and had confessed to committing the crimes charged and sought Clark's advice on how to game the system. (84:1- 5; 85:1-4; 86:1-6; 88: 1-24; 118: 215-231; 121: 6-22, 79-90, 87-89, 117-126,126-128; 122:18-43).The impeachment information about Clark's pending charges was clearly relevant and clearly material.

Clark appeared in court on September 18, 2012 for an initial appearance on his child sexual offense charges in Case Number 2012CF000399 in Chippewa County Circuit Court. Clark was definitely aware at the time of his testimony against Wayerski that he was facing prosecution for felony sex crimes against children. Again, the prosecution in Wayerski's case fails to make any disclosure to Wayerski's trial counsel of any of these matters. Trial

counsel was not aware of any of this information regarding pending charges against John R. Clark. This impeachment information was not disclosed to him. It should have been disclosed to him. The prosecution was under an obligation to disclose it to him. But the impeachment information was not disclosed to him. The prosecution was aware of this information about Clark. The prosecution gained a strategic advantage over Wayerski. The jury never learned that Clark had reason to curry favor with the prosecution because he had pending child sex charges and drug charges. The jury was unaware of how biased Clark actually was. The jury was misled into believing that Clark had no interest in the outcome. (84:1- 5; 85:1-4; 86:1-6; 88: 1-24; 118: 215-231; 121: 6-22, 79-90, 87-89, 117-126,126-128; 122:18-43).

Opportunities were lost by virtue of the State's failure to disclose Clark's pending charges. If he had been made aware in advance of trial, trial counsel could have pursued leads, requested copies of police reports in the pending cases, and learned of witnesses, including the victims in and investigating officers in Clark's pending charges, who could have testified as to their opinion of Clark's character for untruthfulness and sexual morality. Trial counsel could also have asked for an adjournment to further investigate Clark and the pending charges.

The failure to disclose this information deprived Wayerski of a fair trial. Clark had more than ample reason to testify falsely against Wayerski. The jury was left with the false impression that Clark was a completely disinterested witness who was coming forward because the offense was reprehensible to him and he simply reported

this out of some moral outrage because the offense involved "kids." Clark claimed that he expected nothing in return. (118: 215-231).

The jury that decided Wayerski's case never found out that Clark, the jail house snitch, was facing a felony sex offense charge involving children. They were never exposed to his hypocrisy. Clark was never subject to cross-examination on what type of sentence he expected, even if he didn't have a deal, at the time of sentencing on his own child sex offenses. Clark had major reasons to lie against Wayerski. Wayerski's jury never learned this.

The impeachment information concerning Clark's pending child sex offenses and other charges would have demonstrated that he was not neutral and disinterested. (118: 215-231; 88: 1-24; 118: 215-231; 121: 6-22, 79-90, 87-89, 117-126,126-128; 122:18-43; 123: 4-144). *United States v. Kohring*, 637 F.3d 895 (9th Cir. 2011) (reversing conviction where prosecution failed to disclose that key witness to alleged extortion and bribery scheme was under investigation for sexual exploitation of minors which shed light on his incentive to cooperate with law enforcement). The State conceded that it was aware of the pending charges against Clark before calling him to testify. Clark was the only witness who testified as to a confession by

Wayerski. A confession that Wayerski contends was completely fabricated and false. (84:1- 5; 85:1-4; 86:1-6; 88: 1-24;118: 215-231; 121: 6-22, 79-90, 87-89, 117-126,126-128; 122:18-43; 123: 4-143) Wayerski's trial counsel would have used the information pertaining to Clark's pending charges to impeach Clark for bias and credibility if the State had disclosed the Brady information to him. (56:1-4;57: 1-17;121:6-126; 122: 1-83; 123: 4-143). Nevertheless the circuit court at the final post-conviction hearing was unpersuaded the failure to disclose the pending charges against Clark justified granting Wayerski's motion for a new trial. (123:13-143; App.3: 1-11).

It is important to note that the prosecution called Clark at the very end of the case during rebuttal. Additionally the state stressed the value of Clark as a witness in its closing argument as well as the rebuttal closing argument. (118: 215-231; 119:46-47, 102-104). The circuit court's decision to deny Wayerski a new trial because of the *Brady* violation was clearly erroneous because Wayerski was prejudiced by the failure of the state to disclose the pending charges against Clark. Prejudice means that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. The non-disclosure of *Brady* impeachment information in Wayerski's case was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. *See State v. Harris*, 2008 WI 15, ¶¶15, 41-42, 61, 307 Wis. 2d 555, 745 N.W.2d 397.

This court in *State v. Harris*, 2004 WI 64, 272 Wis. 2d 80, 680 N.W.2d 737 recognized the Supreme Court's direction on how a reviewing court should evaluate a prosecutors pretrial decision to not disclose evidence:

> The reviewing court should assess the possibility that such [prejudicial] effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response.

Bagley, 473 U.S. at 683.

The court of appeals decision is wrong and contrary to law as stated above because the court of appeals puts the blame on counsel for not searching out CCAP records to discover that John Clark had pending child sex crimes prosecutions in a different county. Although the law is quite clear that the defense is not required to search for *Brady* information, nevertheless the court of appeals here concludes "there was no *Brady* violation because it was not 'an intolerable burden on the defense' to search CCAP for state witness's available pending charges, *see State v. Randall*, 197 Wis. 2d 29, 38, 539 N.W.2d 708 (Ct. App. 1995) . . ." (App. 5:22-27).

In doing so, the court of appeals creates a new and unprecedented burden on the defense to search for *Brady* material. This court should reject the court of appeals reasoning that could lead to a whole scale withering of the state's obligation to disclose *Brady* material. Therefore this court should overturn the conviction here because *Brady*

and it's progeny demand as much. Otherwise a door will be open for prosecutors to ignore *Brady* at will. **(**State v. Gary Lee Wayerski, 2015AP1083, Slip Opinion at 21-22, ¶ 47; App. 5:1-31;App. 3: 1-11).

"There is an epidemic of *Brady* violations abroad in this land. Only judges can put a stop to it." *United States v. Olsen,* 737 F.3d 625 (9th Cir. 2013) (Kozinski, (former) C.J., dissenting from order denying the petition from rehearing en banc). Wayerski asks this court to make clear that *Brady* violations will not be tolerated and reverse his conviction.

CONCLUSION

For all the reasons set forth in this brief, Wayerski asks this court to reverse the judgment of conviction and grant him a new trial.

Dated at Milwaukee, Wisconsin, this 12th day of April, 2018.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(b) and (c) for a brief produced using the following font:

Times New Roman: 14 characters per inch; 2 inch margin on the left and right; 1 inch margins on the top and bottom. The petition's word count is 8673 words.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated at Milwaukee, Wisconsin, this 12th day of April, 2018.

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CERTIFICATION OF 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 Wis.Stat. 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;
(2) relevant trial court record entries;
(3) the findings or opinions of the trial court;
(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.
(5) and a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b).

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.
Dated at Milwaukee, Wisconsin, this 12th day of April, 2018.

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