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STATE OF WISCONSIN **11-02-2016**

IN SUPREME COURT **CLERK OF SUPREME COURT
OF WISCONSIN**

No. 2015AP1292-CR & 2015AP1293-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EDWARD J. ZIMBAL,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION FROM
THE COURT OF APPEALS, DISTRICT III,
AFFIRMING A JUDGMENT OF CONVICTION
AND DECISION TO DENY SUBSTITUTION OF JUDGE,
ENTERED IN THE BROWN COUNTY CIRCUIT COURT,
THE HONORABLE WILLIAM M. ATKINSON, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Wisconsin Attorney General

NANCY A. NOET
Assistant Attorney General
State Bar #1023106

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-5809
(608) 266-9594 (Fax)
noetna@doj.state.wi.us

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ISSUE PRESENTED

Wisconsin requires strict adherence to the requirements of its judicial substitution statute, Wis. Stat. § 971.20. The statute mandates that a defendant who wishes to make a substitution request after an appellate court orders a new trial or sentencing proceeding must do so by filing a written request within twenty days of remittitur. Wis. Stat. § 971.20(7). In this case, the defendant made an oral request that the trial judge “recuse” himself, but he did not file a written substitution request until after the statutory deadline passed. Was the request untimely?

Both the circuit court and the court of appeals answered “yes.”

This Court should answer “yes.”

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has indicated that oral argument and publication are appropriate.

SUPPLEMENTAL STATEMENT OF THE CASE AND STATEMENT OF FACTS

On September 4, 2013, the court of appeals reversed Edward Zimbal’s convictions in two cases consolidated for appeal and remanded the cases to the circuit court with instructions that Zimbal be allowed to withdraw his no contest pleas. (91.)¹ The cases were remitted to the circuit court on October 8, 2013. (96.)

¹ The cases remain consolidated for this appeal, and the record citations in this brief are to the record for 2015AP1292-CR unless otherwise noted.

Four days earlier, the circuit court held a status conference. (173.) Attorney Jeffrey J. Cano appeared in court on Zimbal's behalf, with Zimbal appearing by telephone. (173:2-5.) The circuit court adjourned that conference until October 7, 2013, to determine whether the State intended to seek review of the court of appeals' decision. (173:5.)

At the adjourned status conference, the circuit court permitted Zimbal to withdraw his pleas, reinstated cash bail and ordered Zimbal's transfer to the jail to await trial. (174:2, 4.) Attorney Cano asked that the cases be set for a status conference to determine who would be Zimbal's attorney going forward. (174:2-3.) After the court denied Zimbal's request for a signature bond (174:4), Zimbal asked the judge to recuse himself based on his belief that the judge was unable to be fair and impartial:

MR. ZIMBAL: I'm also asking that you recuse yourself because there is no way you can be impartial and/or bias (sic).

THE COURT: Since you probably haven't done any research, I'll let your attorney do research on that issue and you can address that at the status conference. I'll deny your request at this time.

MR. ZIMBAL: I spoke to Attorney Hirsch² this morning, and she said absolutely you can't do that. The Judge must recuse himself.

THE COURT: All right. He can provide his authority for that at the status conference, and

² It appears that both Zimbal and Attorney Cano thought that Assistant State Public Defender Eileen A. Hirsch would be representing Zimbal in further circuit court proceedings. (See 173:2; 174:5.) Attorney Hirsch handled Zimbal's prior appeal and served as his postconviction and appellate attorney in these cases.

he can send it by letter beforehand, by the way, if you want it addressed beforehand.

(174:5 (footnote added).)

When Zimbal was not produced for a status conference on October 15, 2013, the circuit court rescheduled the hearing for October 29, 2013. (175.)

On October 17, 2013, the Clerk of the Court of Appeals responded to a letter the court received from Zimbal, in which Zimbal relayed his request for Judge Atkinson to recuse himself from the case. (100.) The clerk's response was addressed to Zimbal, with copies to the circuit court, the clerk of circuit court, the local prosecutor, Zimbal's appellate attorney and the Department of Justice. (100.) The response read:

The court has asked me to respond to your October 7, 2013 letter regarding substitution or recusal of Judge Atkinson. The record in these cases has been remitted to the circuit court and this Court has no jurisdiction after remittitur. Therefore, the court will take no action on your letter. We suggest that you consult with your trial counsel about how to proceed.

(100.)³

On October 29, 2013, Zimbal appeared for his status conference without counsel. (176:2.) At that hearing, Zimbal shared a letter he had received from Attorney Hirsch, informing him that a local trial attorney was to be appointed

³ Although the clerk sent a copy of her response to the circuit court, she did not send a copy of Zimbal's letter. On Zimbal's motion, his letter to the court of appeals was eventually added to the appellate record. (190.)

to his case. (176:2-3.) The court set another status date on the following Friday, which was November 1, 2013. (102; 176:3.) Zimbal did not revisit the issue of Judge Atkinson's recusal, but he did move and argue for a bail reduction. (176:4-6.)

The record includes an order appointing Attorney Ben Hanes as Zimbal's trial counsel. (103.) That order is dated October 29, 2013, and it shows the next court date as October 29, 2013. (103.) The order was filed on November 1, 2013. (103.) Attorney Hanes appeared with Zimbal on November 1, 2013. (104.) There is no transcript of that hearing, but the court minutes indicate that Attorney Hanes made a motion to modify Zimbal's bail to a signature bond. (104:2.) The minutes do not reflect a motion for Judge Atkinson's recusal or substitution of judge. (103.) The case was set for a final conference on December 2, 2013. (104:1.)

On November 18, 2013, Zimbal filed a written request for substitution of judge. (105.) The request acknowledged that the statutory deadline had passed, but asked the circuit court to find it was timely for two reasons: (1) Zimbal's earlier letter to the court of appeals, although sent to the wrong court, constituted a timely written request for substitution,⁴ and (2) Zimbal's new trial counsel had not been appointed until after the deadline passed.⁵ (105.) The

⁴ The letter to the court of appeals makes no reference to substitution. (190.) Instead, it recounts Zimbal's discussion with Attorney Hirsch about whether he could ask Judge Atkinson to "recuse" himself from the case because he was "biased" and could not be "impartial." (190:3.)

⁵ Zimbal's request for substitution of judge also alleges that he was not represented by counsel until Attorney Ben Hanes was appointed on or about November 1, 2015. (105.) The record

circuit court denied Zimbal's request for substitution of judge for failure to comply with Wis. Stat. § 971.20(7). (106.)⁶

The cases proceeded to trial, and Zimbal was convicted of six charges: two counts of stalking (separate victims), disorderly conduct, computer message-threaten/obscenity, and two counts of felony bail jumping. (126.) Zimbal was sentenced to a total of nine and one-half years of initial confinement and ten years of extended supervision. (2015AP1292-CR:130; 131; 2015AP1293-CR:69.)

Attorney Hanes filed a notice of intent to pursue postconviction relief, and Attorney Hirsch represented Zimbal in postconviction proceedings. (132; 133; 134.) On April 29, 2015, Attorney Hirsch filed a motion for new trial based on allegations regarding the evidence presented. (142:1-14; 181.) Attorney Hirsch also argued that Zimbal's trial attorney had been ineffective in several respects. (142:14-15; 181.) The motion did not include a claim that any of Zimbal's attorneys, including herself, had been ineffective

demonstrates that Attorney Jeffrey Cano appeared on Zimbal's behalf at two hearings leading up to Attorney Hanes's appointment. (*See* 173; 174.) The record also indicates that Zimbal was consulting with Attorney Hirsch during that time period. (*See* 100; 173:2; 174:5; 176:2-3.)

⁶ That provision reads:

(7) Substitution of Judge Following Appeal. If an appellate court orders a new trial or sentencing proceeding, a request under this section may be filed within 20 days after the filing of the remittitur by the appellate court, whether or not a request for substitution was made prior to the time the appeal was taken.

Wis. Stat. § 971.20(7).

for failing to file a timely request for substitution on judge. (142; 181.) Following an evidentiary hearing, the circuit court issued an order denying the motion. (154.)

On appeal, Zimbal raised only one issue: the propriety of the circuit court's rejection of his request for substitution of judge.

The court of appeals affirmed the circuit court's ruling:

Zimbal did not properly invoke Wis. Stat. § 971.20(7). Although his oral request was made within the time set by that statute, the statute requires the request to be "filed," which would require a written document. Any doubt about the requirement for filing a written request is clarified by § 971.20(10), which provides an example of the form a request for substitution should take, and requires the request to be signed by the defendant or his attorney.

The written request filed by Zimbal's attorney on November 18, 2013, was not filed within twenty days of the October 8, 201[3] remittitur. Therefore, the request was not timely filed under Wis. Stat. § 971.20(7). While Zimbal's letter to this Court mentioning substitution or recusal of Judge Atkinson was a writing, there is no indication it was filed with the clerk of the circuit court or Judge Atkinson.

State v. Zimbal, No. 2015AP1292-CR & 2015AP1293-CR, 2016 WL 3606930, ¶¶ 5-6 (Wis. Ct. App. July 6, 2013) (unpublished).

Zimbal argued that his substitution request should be deemed timely pursuant to the equitable tolling rule because the delay in appointing his trial counsel caused the late filing. The court of appeals rejected that argument:

[F]iling a timely written request for substitution was not beyond Zimbal's control. Indeed, as mentioned above, Wis. Stat. § 971.20(10) expressly provided Zimbal an example of the form a request for substitution should take. Furthermore, nothing in the record suggests his ability to file a written request was impeded by the court or by prison or jail restrictions.

Citing *Baldwin v. State*, 62 Wis. 2d 521, 530, 215 N.W.2d 541 (1974), Zimbal argues strict construction of Wis. Stat. § 971.20 is inappropriate because that would make it "impossible to obtain the objective of this section and would frustrate the objective of the statute." In *Baldwin*, compliance with the timing restrictions was literally impossible because the request for substitution was due before the judge was assigned. While Judge Atkinson's comments coupled with delays in the appointment of counsel for Zimbal may have lead Zimbal to conclude the court would not grant his request within twenty days of remittitur, nothing prevented Zimbal from complying with the requirement for filing a written request within twenty days of remittitur. Compliance with the statute was not impossible.

Zimbal, 2016 WL 3606930, ¶¶ 7-8.

Zimbal petitioned for review of that decision with this Court.

ARGUMENT

I. The statutory language of Wis. Stat. § 971.20 requires strict adherence.

Generally, Wis. Stat. § 971.20 affords a criminal defendant the statutory right to a single substitution of judge, provided the request is timely. See *State v. Harrison*, 2015 WI 5, ¶ 2, 360 Wis. 2d 246, 858 N.W.2d 372. When an appellate court orders a new trial or sentencing proceeding, however, a defendant may request a substitution of trial

judge within twenty days of the remittitur, regardless of whether he made a request for substitution prior to the appeal. Wis. Stat. § 971.20(7).

The interpretation of that provision presents a question of law, subject to *de novo* review. *State v. Bohannon*, 2013 WI App 87, ¶ 18, 349 Wis. 2d 368, 835 N.W.2d 262 (citation omitted). On review, courts start by examining the language of the statute, and if the meaning of the statute is plain, the inquiry ordinarily ends. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citations omitted). When statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, including legislative history. *Id.* ¶ 46 (citations omitted).

“Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.” *Kalal*, 271 Wis. 2d 633, ¶ 45 (citation omitted). The meaning of statutory language is also based on the context and structure of the statute in which the operative language appears. *Kalal*, 271 Wis. 2d 633, ¶ 46. So, courts interpret statutory language as part of the whole statute and in relation to surrounding or similar provisions. *Id.* (citations omitted). “In construing or ‘interpreting’ a statute the court is not at liberty to disregard the plain, clear words of the statute.” *State v. Pratt*, 36 Wis. 2d 312, 317, 153 N.W.2d 18 (1967).

The plain language of Wis. Stat. § 971.20 requires that “[t]he right of substitution shall be exercised as provided in this section.” Wis. Stat. § 971.20(2). Accordingly, our courts have held that the statute demands *strict adherence* to its terms. *State v. Austin*, 171 Wis. 2d 251, 257, 490 N.W.2d 780

(Ct. App. 1992) (“deviation from the requirements [of § 971.20] would allow for substantial problems that are prevented by strict adherence to the statute”). And, in cases where strict adherence to a rule is mandated, the argument that such adherence will result in harsh consequences is unavailing. *See e.g., Sorenson v. Batchelder*, 2016 WI 34, ¶ 32, 368 Wis. 2d 140, 885 N.W.2d 362; *Bergstrom v. Polk Cty.*, 2011 WI App 20, ¶ 12, 331 Wis. 2d 678, 795 N.W.2d 482; *Mech v. Borowski*, 116 Wis. 2d 683, 686, 342 N.W.2d 759 (Ct. App. 1983).

The only exception to the rule of strict adherence to the filing deadlines of Wis. Stat. § 971.20 is where a criminal defendant is arraigned⁷ before he receives notice of which judge will hear the case. *See, e.g., State v. Baldwin*, 62 Wis. 2d 521, 530, 215 N.W.2d 541 (1974); *State ex rel. Tessmer v. Circuit Court Branch III, In and For Racine Cnty.*, 123 Wis. 2d 439, 443, 367 N.W.2d 235 (Ct. App. 1985); *State ex rel. Tinti v. Circuit Court for Waukesha Cnty., Branch 2*, 159 Wis. 2d 783, 788, 464 N.W.2d 853 (Ct. App. 1990).⁸

⁷ To substitute an originally assigned trial judge, a defendant must file a written request “before making any motions to the trial court and before arraignment.” Wis. Stat. § 971.20(4).

⁸ In *Clark v. State*, 92 Wis. 2d 617, 625-26, 286 N.W.2d 344 (1979), the defendant improperly filed his substitution request after filing a motion to quash the information. Wis. Stat. § 971.20(1) (1975). Clark’s substitution request came just five days after the motion to quash, but the record did not show whether Clark was aware of which judge had been assigned to his case when he filed the motion to quash. Although the Court indicated that recognizing the substitution request as timely might comport with the purpose of the statute given the circumstances of the case, it did not make that finding. (Footnote continued on next page.)

As the court of appeals explained in *Tinti*:

In both *Tessmer* and *Baldwin*, the filing deadline of the substitution statute was relaxed where the judicial assignment system did not adequately advise, *prior to arraignment*, of the judge to whom the case was to be assigned for trial.

....

We construe the law under *Tessmer* and *Baldwin* to be this: where the initial appearance is conducted before the judge assigned to hear the matter, a strict application of the substitution statute's filing deadline is appropriate. However, where an intake system does not provide adequate notice of the assigned judge in advance of arraignment, the statute's filing deadlines are relaxed in order to allow a defendant to intelligently exercise the right of substitution.

Tinti, 159 Wis. 2d at 789-90 (citations omitted, emphasis in original).

This Court explained the purpose of Wis. Stat. § 971.20 as follows:

Our prior cases have attempted to apply the statutory time limit in sec. 971.20 in a way that will inhibit a defendant's use of the request to disrupt orderly calendaring or to delay the scheduled trial and at the same time, in a way that will give a defendant *a reasonable period of time to request a substitution after he or she learns which judge is assigned to the case. We have viewed the key to the statutory right of substitution as the defendant's ability to exercise his right of substitution intelligently.*

Clark, 92 Wis. 2d at 627-28 (emphasis added).

This single exception to the strict adherence rule for Wis. Stat. § 971.20 does not apply in this case where there was no issue regarding advance notice of the assigned judge. Strict application of the statute’s deadlines is required.

II. Zimbal did not comply with Wis. Stat. § 971.20(7).

To exercise the right to judicial substitution after an appellate court has ordered a new trial or sentencing proceeding, “a request under this section must be *filed* within 20 days after the filing of the remittitur by the appellate court . . .” Wis. Stat. § 971.20(7). The requirement that the request be “filed” plainly means that it must be in writing. This comports with several other subsections of the same statute, which explicitly state that requests for substitution have to be “written.” *See* Wis. Stat. § 971.20(3)(b), 971.20(4), 971.20(5). The statute also provides an example form for every substitution request. Wis. Stat. § 971.20(10).⁹

Zimbal’s deadline for filing a written request for substitution of judge was twenty days from the October 8, 2013 remittitur in these cases. (96.) *See* Wis. Stat. § 971.20(7). The request he filed on November 18, 2015, was unquestionably late.

Nonetheless, Zimbal argues that his request was timely because: (1) he made an oral request for Judge Atkinson’s recusal at the October 7, 2013 status conference,

⁹ The form should be addressed to the circuit court and state: “Pursuant to s. 971.20 the defendant (or defendants request(s) a substitution for the Hon. . . . as judge in the above entitled action.” Wis. Stat. § 971.20(10). The request must be signed by defendant or the defendant’s attorney. *Id.*

and (2) he sent a related letter to the court of appeals before the statutory deadline passed. (Zimbal's Br. 11-12.)

Even though Zimbal's oral request for Judge Atkinson's *recusal* was made before the statutory deadline, the statute plainly requires *substitution* requests to be written and "filed." Wis. Stat. § 971.20(7) & (10). Zimbal's letter to the court of appeals also discussed Judge Atkinson's *recusal*, but the letter was not in proper form and it was never filed with the clerk of circuit court or Judge Atkinson. *Id.* (See 190.) The same is true for the court of appeals' response to Zimbal's letter. (100.) Neither Zimbal's letter nor the court of appeal's response can be construed as a proper substitution request.

Moreover, both Zimbal's oral request and his letter to the court of appeals were for Judge Atkinson's *recusal*, not substitution of judge. Zimbal suggests that "recusal" is akin to substitution, but it is not.¹⁰ A defendant may assert his

¹⁰ Zimbal incorrectly cites this Court's decision in *State v. Harrison*, 2015 WI 15, 360 Wis. 2d 246, 858 N.W.2d 372 for the proposition that his requests for recusal should be interpreted as requests for substitution. *Harrison* does not stand for that proposition. In that case, it was undisputed that the defendant filed a timely and proper substitution request. *Harrison*, 360 Wis. 2d 246, ¶¶ 43-45. Under the circumstances, this Court found that the defendant's subsequent use of phrases like "change of judge" and "recusal" in certain filings were sufficient to demonstrate that he had not forfeited or waived his right to judicial substitution. *Id.* ¶¶ 26, 76.

Here, Zimbal did not mention judicial substitution prior to the statutory deadline. Instead, he stated his belief that Judge Atkinson should *recuse* himself. (174:5; 190.) He also offered an appropriate legal basis for recusal: Judge Atkinson's alleged inability to be impartial and unbiased. (174:5; 190.) Zimbal's

statutory right to judicial substitution without stating a reason for the request. Wis. Stat. § 971.20(7); *Harrison*, 360 Wis. 2d 246, ¶ 39. Substitution is automatic. *See* Wis. Stat. § 971.20(9). Recusal, or disqualification, is different. A judge is presumed to act fairly, impartially and without prejudice. *State v. Goodson*, 2009 WI App 107, ¶ 8, 320 Wis. 2d 166, 771 N.W.2d 385. A defendant may overcome that presumption by establishing that the appearance of bias shows a great risk of actual bias. *Caperton v. A.T. Massey Coal Co., Inc.* 556 U.S. 868, 885 (2009); *Goodson*, 320 Wis. 2d 166, ¶ 14; *see* Wis. Stat. § 757.19(2)(g). Then, if the defendant meets that standard, the judge must recuse herself. In this case, Zimbal’s request for recusal was not tantamount to a request for substitution.

Zimbal did not properly invoke Wis. Stat. § 971.20(7).

III. The equitable tolling rule does not excuse Zimbal’s failure to comply with the requirements of Wis. Stat. § 971.20(7).

Zimbal argues that this Court should apply the equitable tolling rule to exempt him from the requirements of Wis. Stat. § 971.20(7) because the delay in the appointment of his trial counsel prevented him from filing a timely substitution request. The record in this case demonstrates otherwise.

requests for recusal cannot be interpreted as request for substitution.

Contrary to Zimbal's assertions, he was not unrepresented before Attorney Ben Hanes was assigned to be his trial counsel on October 29, 2013. (103.) On October 4 and 7, 2013, Attorney Jeffrey Cano appeared in court on Zimbal's behalf. (173; 174.) At that time, Zimbal also claimed that he had consulted with his appellate counsel, Eileen Hirsch, about the recusal issue. (174:5.)¹¹ Despite that, Zimbal claims that neither attorney actually represented him because Attorney Cano appeared only in his administrative capacity as the Regional Attorney Manager for the state public defender, and his appellate attorney's representation was "separate and distinct" from his trial representation. (Zimbal's Br. 11 n.3.)

While the scope of their representation may have been limited, the suggestion that neither attorney served as Zimbal's counsel in any way makes no sense. Attorney Cano appeared with Zimbal at the very hearing where Zimbal asked Judge Atkinson to recuse himself. (174.) And, according to Zimbal, Attorney Hirsch consulted with him about the judge's possible recusal. (174:5.) Had Zimbal informed Attorney Cano or Attorney Hirsch that he wanted to request a substitution of judge, it would have been incumbent on them to file the simple, suggested form. In the alternative, their failure to act on Zimbal's desire to substitute judges would have constituted ineffective assistance of counsel.

While Zimbal expressed some dissatisfaction with the circuit court judge and inquired about the judge's "recusal," the attorneys who represented him at the time did not file a timely, written request for substitution of judge, and Zimbal

¹¹ Zimbal made the same claim in his letter to the court of appeals. (190.)

has *never* claimed that they were ineffective for failing to do so.¹² Under the circumstances, the time it took to appoint Zimbal's successor counsel was irrelevant, and it certainly did not preclude Zimbal from making a timely substitution request.

The cases cited by Zimbal in support of his equitable tolling argument, *State ex rel. Walker v. McCaughtry*, 2001 WI App 110, ¶ 18, 244 Wis. 2d 177, 629 N.W.2d 17; *State ex rel. Nichols v. Litscher*, 2001 WI 119, ¶ 32, 247 Wis. 2d 1013, 635 N.W.2d 292 (2001), are inapposite. Both cases dealt with the tolling of deadlines for prisoner filings. Prisoners are dependent on the proper operation of the prison system (including the processing of mail and inmate trust accounts). Because the prisoners had no control over delays associated with these operations, courts have applied the equitable tolling rule to relieve prisoners of certain filing deadlines where their submissions were late due *exclusively* to the prison system's operations. *Id.*

This case is clearly distinguishable from the prisoner cases. The court of appeals noted:

¹² Attorney Hane's November 18, 2013 request for substitution of judge did not allege that Zimbal had asked either Attorney Cano or Attorney Hirsch to assist him with filing a request for substitution of judge. (105.) In her postconviction motion for a new trial, Attorney Hirsch did not raise an issue of ineffective assistance of counsel for failure to file a timely request for substitution based on Zimbal's wishes. (142; 181.) Even if she had been personally responsible for failing to honor Zimbal's wishes, she would have confessed the error on behalf of her client. Based on the record in these cases, the only reasonable conclusion is that Zimbal did not communicate with any of his attorneys about his desire to file a request for substitution of judge until it was too late.

[F]iling a timely written request for substitution was not beyond Zimbal's control. Indeed, as mentioned above, Wis. Stat. § 971.20(10) expressly provided Zimbal an example of the form a request for substitution should take. Furthermore, nothing in the record suggests his ability to file a written request was impeded by the court or by prison or jail restrictions.

. . . While Judge Atkinson's comments coupled with delays in the appointment of counsel for Zimbal may have lead Zimbal to conclude the court would not grant his request within twenty days of remittitur, nothing prevented Zimbal from complying with the requirement for filing a written request within twenty days of remittitur. Compliance with the statute was not impossible.

Zimbal, 2016 WL 3606930, ¶¶ 7-8.

As discussed above, Wis. Stat. § 971.20(7) requires strict adherence, and Zimbal is not entitled to an exemption for his failure to file a timely request for substitution under that provision.

CONCLUSION

For the foregoing reasons, this Court should affirm the court of appeals' decision that Zimbal did not properly invoke Wis. Stat. § 971.20(7), as well as his related judgment of conviction.

Dated this 2nd day of November, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

NANCY A. NOET
Assistant Attorney General
State Bar #1023106

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-5809/(608) 266-9594 (Fax)
noetna@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 4,127 words.

NANCY A. NOET
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 this 2nd day of November, 2016.

NANCY A. NOET
Assistant Attorney General