STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Appeal No. 2015AP1366-CR
(Lafayette County Cir. Ct. Case No. 2012CF74)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ARMIN G. WAND, III,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN LAFAYETTE COUNTY CIRCUIT COURT, THE HONORABLE THOMAS J. VALE PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

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QUESTIONS PRESENTED

1. Did the circuit court properly exercise discretion when the court denied the motion of defendant-appellant Armin G. Wand, III, to suppress incriminating statements he made after receiving ***Miranda***[2] warnings during an interview with special agents of the Division of Criminal Investigation of the Wisconsin Department of Justice?

[1] To facilitate online reading, the electronically filed version of this brief includes hyperlinked bookmarks.

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

- By its decision, the circuit court implicitly answered "Yes."
- This court should answer "Yes."

2. Under the "manifest injustice" standard for post-sentencing plea withdrawal, did the circuit court properly exercise discretion when the court denied Wand's postconviction plea-withdrawal motion that alleged the unreliability of Wand's incriminating statements (an issue Wand did not raise during the suppression proceeding) and that alleged the existence of newly discovered evidence (opinions of postconviction experts who took different views of evidence existing at the time of the suppression proceeding)?

   - By its decision, the circuit court implicitly answered "Yes."
   - This court should answer "Yes."

POSITION ON ORAL ARGUMENT AND PUBLICATION OF THE COURT'S OPINION

Oral argument. The State does not request oral argument.

Publication. The State does not request publication of the court's opinion.

STATEMENT OF THE CASE: FACTS AND PROCEDURAL HISTORY

As respondent, the State opts not to present a full statement of the case. Wis. Stat. § (Rule)

809.19(3)(a)2.[3] Instead, the State will present additional facts in the "Argument" portion of its brief.

STANDARDS OF REVIEW

A. Exercise Of Discretion.

When an appellate court reviews a circuit court's discretionary decision, the appellate court asks whether the circuit court exercised discretion, not whether another judge might have exercised discretion differently. ***State v. Prineas***, 2009 WI App 28, ¶ 34, 316 Wis. 2d 414, 766 N.W.2d 206.

> The term "discretion" contemplates a process of reasoning which depends on facts in the record or reasonably derived by inference from the record that yield a conclusion based on logic and founded on proper legal standards. The record on appeal must reflect the circuit court's reasoned application of the appropriate legal standard to the relevant facts of the case.

State v. Delgado, 223 Wis. 2d 270, 280-81, 588 N.W.2d 1 (1999) (citations omitted).

> Under this standard, the circuit court's determination will be upheld on appeal if it is a reasonable conclusion, based upon a consideration of the appropriate law and facts of record. . . . While the basis for an exercise of discretion should be set forth in the record, it will be upheld if the appellate court can find facts of record which would support the circuit court's decision.

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[3] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2013-14 edition.

Peplinski v. Fobe's Roofing, Inc., 193 Wis. 2d 6, 20, 531 N.W.2d 597 (1995) (citations omitted).

B. Credibility.

> It is the function of the trier of fact, and not [an appellate] court, to resolve questions as to the weight of testimony and the credibility of witnesses. This principle recognizes the trial court's ability to assess each witness's demeanor and the overall persuasiveness of his or her testimony in a way that an appellate court, relying solely on a written transcript, cannot. Thus, we consider the trial judge to be the "ultimate arbiter of the credibility of a witness," and will uphold a trial court's determination of credibility unless that determination goes against the great weight and clear preponderance of the evidence.

State v. Hughes, 2000 WI 24, ¶ 2 n.1, 233 Wis. 2d 280, 607 N.W.2d 621 (citations omitted).

When reviewing a suppression motion, an appellate court defers to the circuit court's credibility determinations and upholds its findings of fact unless the circuit court clearly erred in making those findings. *See* ***State v. Flynn***, 92 Wis. 2d 427, 437, 285 N.W.2d 710 (1979); ***State v. Pires***, 55 Wis. 2d 597, 602-03, 201 N.W.2d 153 (1972); ***State v. Eckert,*** 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996); *cf.* Wis. Stat. § 805.17(2) ("In all actions tried upon the facts without a jury or with an advisory jury, . . . [f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."). *See also* ***State v. Jenkins***, 2007 WI 96, ¶ 33, 303 Wis. 2d 157, 736 N.W.2d 24 ("On review of the circuit court's decision, we apply a deferential, clearly erroneous standard to the court's findings of eviden-

tiary or historical fact. The standard also applies to credibility determinations." (citation omitted)); ***State v. Owens***, 148 Wis. 2d 922, 929-30, 436 N.W.2d 869 (1989) (when an appellate court reviews a circuit court's decision on a suppression motion, the appellate court defers to the circuit court's credibility determinations); ***Sanders v. State***, 69 Wis. 2d 242, 253, 230 N.W.2d 845 (1975) ("the credibility of witnesses testifying at a hearing outside of the presence of the jury, such as a suppression hearing, is a question to be resolved by the trial judge"); ***State v. Herro***, 53 Wis. 2d 211, 215, 191 N.W.2d 889 (1971) (circuit court's credibility determination upheld "unless they are against the great weight and clear preponderance of the evidence").

"The trial court makes the credibility determinations when a defendant seeks to withdraw a guilty plea. Any conflicts or contradictions in the testimony are exclusively for the trial court, not this court." ***State v. Hoppe***, 2008 WI App 89, ¶ 34, 312 Wis. 2d 765, 754 N.W.2d 203 (citations omitted), *aff'd*, 2009 WI 41, 317 Wis. 2d 161, 765 N.W.2d 794. This standard applies regardless of whether a defendant seeking to withdraw a plea must establish a fair and just reason or must establish a manifest injustice. *See, e.g.*, ***State v. Garcia***, 192 Wis. 2d 845, 863, 532 N.W.2d 111 (1995) ("if the circuit court does not believe the defendant's asserted reasons for withdrawal of the plea, there is no fair and just reason to allow withdrawal of the plea"); ***Hoppe***, 312 Wis. 2d 765, ¶ 34 (in post-sentencing plea-withdrawal hearing, where circuit court does not believe defendant's testimony, defendant "has not shown by clear and convincing evidence that he did not know or un-

derstand the information necessary to make his plea knowing and voluntary, such that it resulted in a manifest injustice").

C. Grant Or Denial Of Suppression Motion.

Whether to grant or deny a motion to suppress evidence lies within the discretion of the circuit court. ***State v. Keith***, 216 Wis. 2d 61, 68, 573 N.W.2d 888 (Ct. App. 1997). Therefore, an appellate court will overturn an evidentiary decision of the circuit court only if that court erroneously exercised its discretion. ***Id.*** at 69.

> When we review a discretionary decision, we examine the record to determine if the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. In considering whether the proper legal standard was applied, however, no deference is due. This court's function is to correct legal errors. Therefore, we review *de novo* whether the evidence before the circuit court was legally sufficient to support its rulings. Furthermore, if evidence has been erroneously admitted or excluded, we will independently determine whether that error was harmless or prejudicial.

Id. (citations omitted). *See also* ***State v. Eason***, 2001 WI 98, ¶ 9, 245 Wis. 2d 206, 629 N.W.2d 625.

> On review of a motion to suppress, [an appellate] court employs a two-step analysis. First, [the court] review[s] the circuit court's findings of fact. [The court] will uphold these findings unless they are against the great weight and clear preponderance of the evidence. "In reviewing an order suppressing evidence, appellate courts will uphold findings of evidentiary or historical fact unless they are clearly erroneous." Next, [the court] must review inde-

> pendently the application of relevant constitutional principles to those facts. Such a review presents a question of law, which [the court] review[s] de novo, but with the benefit of analyses of the circuit court . . . .

State v. Dubose, 2005 WI 126, ¶ 16, 285 Wis. 2d 143, 699 N.W.2d 582 (citations omitted). *See also* ***State v. Poellinger***, 153 Wis. 2d 493, 506-07, 451 N.W.2d 752 (1990) ("[W]hen faced with a record of historical facts which supports more than one inference, an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law.");[4] ***Owens***, 148 Wis. 2d at 929-30 (when an appellate court reviews a circuit court's decision on a suppression motion, the appellate court defers to the circuit court's credibility determinations); ***State v. Turner***, 136 Wis. 2d 333, 343-44, 401 N.W.2d 827 (1987) (appellate court will sustain "the trial court's findings of historical or evidentiary fact unless they are contrary to the great weight and clear preponderance of the evidence. This is basically a 'clearly erroneous' standard of review.").

Moreover, when reviewing the circuit court's decision on a suppression motion, an appellate court may rely on facts adduced in proceedings other than the suppression hearing: "When re-

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[4] "[']Incredible as a matter of law['] means inherently incredible, such as in conflict with the uniform course of nature or with fully established or conceded facts." ***State v. King***, 187 Wis. 2d 548, 562, 523 N.W.2d 159 (Ct. App. 1994) (citations omitted).

viewing a suppression order, an appellate court is not limited to examination of the suppression hearing record. It may also examine the trial evidence and the evidence at the preliminary hearing. We add to the list the record supporting issuance of a warrant." ***State v. Gaines***, 197 Wis. 2d 102, 106-07 n.1, 539 N.W.2d 723 (Ct. App. 1995) (citations omitted). *See also* ***State v. Begicevic***, 2004 WI App 57, ¶ 3 n.2, 270 Wis. 2d 675, 678 N.W.2d 293 (citing *Gaines*).

An appellate court does not reweigh the suppression-hearing testimony. "Confronted with the conflict of testimony, it [is] the trial court's obligation to resolve it." ***Owens***, 148 Wis. 2d at 930. When an appellate court reviews a circuit court's decision on a suppression motion, the appellate court defers to the circuit court's credibility determinations. ***Id.*** at 929-30. *See also* ***Sanders***, 69 Wis. 2d at 253 ("the credibility of witnesses testifying at a hearing outside of the presence of the jury, such as a suppression hearing, is a question to be resolved by the trial judge"). "Any [unresolved] conflicts in testimony will be resolved in favor of the trial court's finding. The credibility of [witnesses] testifying at a suppression hearing outside the presence of the jury is a question for determination by the trial court." ***Flynn***, 92 Wis. 2d at 437 (citations omitted).

D. Grant Or Denial Of Suppression Motion Claiming The Defendant Did Not Make Statements Voluntarily.

Where a defendant raises a voluntariness challenge, the State must prove by a preponderance of the evidence that the statements made by the defendant were voluntary. *Jerrell C.J.,* 283 Wis. 2d

145, ¶ 17. . . . "A defendant's statements are voluntary if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist." *Hoppe,* 261 Wis. 2d 294, ¶ 36 (citations omitted).

We make the determination in light of all of the facts surrounding the interview and decided under the totality of the circumstances, balancing the defendant's relevant personal characteristics with the pressures imposed by the police. *Id.,* ¶ 38. This Court described the test in detail in *Hoppe*.

> The relevant personal characteristics of the defendant include the defendant's age, education and intelligence, physical and emotional condition, and prior experience with law enforcement. The personal characteristics are balanced against the police pressures and tactics which were used to induce the statements, such as: the length of the questioning, any delay in arraignment, the general conditions under which the statements took place, any excessive physical or psychological pressure brought to bear on the defendant, any inducements, threats, methods or strategies used by the police to compel a response, and whether the defendant was informed of the right to counsel and right against self-incrimination.

Id., ¶ 39 (citations omitted).

State v. Lemoine, 2013 WI 5, ¶¶ 17-18, 345 Wis. 2d 171, 827 N.W.2d 589.

E. Plea Withdrawal Generally.

The rationales for plea withdrawal in Wisconsin derive from two lines of cases, one flowing from ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), the other flowing from ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), and ***State v.***

Bentley, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). *See* ***State v. Howell***, 2007 WI 75, ¶¶ 73-74, 301 Wis. 2d 350, 734 N.W.2d 48 (discussing dual-purpose *Bangert* and *Nelson/Bentley* motions); ***State v. Brown***, 2006 WI 100, ¶ 42, 293 Wis. 2d 594, 716 N.W.2d 906 (same). *See also* ***State v. Hoppe***, 2009 WI 41, ¶ 3 & n.3, 317 Wis. 2d 161, 765 N.W.2d 794, *aff'g* 2008 WI App 89, 312 Wis. 2d 765, 754 N.W.2d 203. The ***Bangert*** analysis addresses defects in the plea colloquy, while ***Nelson/Bentley*** applies where the defendant alleges that "factors extrinsic to the plea colloquy" rendered his or her plea infirm. *See* ***Hoppe***, 317 Wis. 2d 161, ¶ 3.

The burden of proof for these two types of challenges differs. "Once the defendant files a *Bangert* motion entitling him to an evidentiary hearing, the burden shifts to the State to prove by clear and convincing evidence that the defendant's plea was knowing, intelligent, and voluntary despite the identified defects in the plea colloquy." ***Id.*** ¶ 44.

Conversely, "[t]he burden at a *Nelson/Bentley* evidentiary hearing is on the defendant," who "must prove by clear and convincing evidence that withdrawal of the guilty plea is necessary to avoid a manifest injustice." ***Id.*** ¶ 60. One way that "[a] defendant may demonstrate a manifest injustice [is] by showing that his guilty plea was not made knowingly, intelligently, and voluntarily." ***Id.***

"A decision to grant or deny a motion to withdraw [a plea] is within the discretion of the trial court." ***State v. Rhodes***, 2008 WI App 32, ¶ 7, 307 Wis. 2d 350, 746 N.W.2d 599. "[E]ven if the circuit

court misapplies the law or inadequately explains the reasons for its decision, the reviewing court must independently review the record to find support for the circuit court's decision if the justification is there." ***Jenkins***, 303 Wis. 2d 157, ¶ 46.

In determining whether plea withdrawal is warranted, an appellate court "accept[s] the circuit court's findings of historical and evidentiary facts unless they are clearly erroneous but . . . determine[s] independently whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary." ***Brown***, 293 Wis. 2d 594, ¶ 19.

F. Plea Withdrawal After Sentencing.

> A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence. Accordingly, when the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary.

United States v. Broce, 488 U.S. 563, 569 (1989).

> After sentencing, a defendant who seeks to withdraw a guilty or no contest plea carries the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice. The withdrawal of a plea under the manifest injustice standard rests in the circuit court's discretion. We will only reverse if the circuit court has failed to properly exercise its discretion. An exercise of discretion based on an erroneous application of the law is an erroneous exercise of discretion.

State v. McCallum, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997) (citations omitted). *See also,*

e.g., ***State v. Cain***, 2012 WI 68, ¶ 20, 342 Wis. 2d 1, 816 N.W.2d 177; ***State v. Straszkowski***, 2008 WI 65, ¶ 28, 310 Wis. 2d 259, 750 N.W.2d 835.

> The higher standard of proof is used after sentencing, because once the guilty plea is finalized, the presumption of innocence no longer exists. "'Once the defendant waives his [or her] constitutional rights and enters a guilty plea, the state's interest in finality of convictions requires a high standard of proof to disturb that plea.'" The "manifest injustice" test requires a defendant to show "a serious flaw in the fundamental integrity of the plea."

State v. Thomas, 2000 WI 13, ¶ 16, 232 Wis. 2d 714, 605 N.W.2d 836 (citations omitted). A defendant can satisfy this burden by showing that he did not knowingly, intelligently, and voluntarily enter the plea. *See, e.g.*, ***State v. Trochinski***, 2002 WI 56, ¶ 15, 253 Wis. 2d 38, 644 N.W.2d 891; ***State v. Merten***, 2003 WI App 171, ¶ 6, 266 Wis. 2d 588, 668 N.W.2d 750; ***State v. Giebel***, 198 Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995).

"Whether a defendant has met the manifest injustice standard is a matter within the sound discretion of the trial court. We will affirm the trial court's determination 'if the record shows that the court correctly applied the legal standards to the facts and reached a reasoned conclusion.'" ***State v. Barney***, 213 Wis. 2d 344, 355-56, 570 N.W.2d 731 (Ct. App. 1997) (citations omitted). *See also* ***Morones v. State***, 61 Wis. 2d 544, 553, 213 N.W.2d 31 (1973) ("upon review of denial of a motion to withdraw a plea of guilty, [an appellate court is] required to find that such withdrawal of plea is necessary to correct a manifest injustice"); ***State v. Reppin***, 35 Wis. 2d 377, 385–86, 151 N.W.2d 9 (1967); ***State v. Booth***, 142 Wis. 2d 232, 235, 418 N.W.2d 20 (Ct. App. 1987). "The trial court does

not abuse its discretion when the defendant fails to carry his burden." ***Id.*** at 237.

> [W]hen a reviewing court applies the manifest injustice test, "the issue is no longer whether the . . . plea should have been accepted," but rather whether the plea should be withdrawn. Therefore, when applying the manifest injustice test, it is our role not to determine whether the circuit court should have accepted the plea in the first instance, but rather to determine whether the defendant should be permitted *to withdraw* the plea. This is so because while the plea may have been invalid at the time it was entered, it may be inappropriate, in light of later events, to allow withdrawal of the plea.

Cain, 342 Wis. 2d 1, ¶ 30 (footnote omitted) (citations omitted).

ARGUMENT

I. THE CIRCUIT COURT PROPERLY EXERCISED DISCRETION WHEN THE COURT, FOLLOWING AN EVIDENTIARY HEARING, DENIED WAND'S SUPPRESSION MOTION AFTER DETERMINING THAT WAND MADE INCRIMINATING STATEMENTS VOLUNTARILY.

A. Facts Relating To Wand's Claim Of Involuntariness.

Law enforcement officers conducted three interviews of Wand:

- one beginning at 9:38 p.m. on September 7, 2012, in the UW Hospital burn unit conference room (100:Ex. 1 (video); 100:Ex. 2 (transcript); *see also* 197:39-40 (DCI Special Agent James Sielehr identifying Exhibits 1 and 2));

- one beginning at 6:30 p.m. on September 8, 2012, in the UW Hospital burn unit conference room (100:Ex. 3 (video); 100:Ex. 4 (transcript); *see also* 197:44-45 (Agent Sielehr identifying Exhibits 3 and 4)); and
- one beginning at 2:22 p.m. on September 9, 2012, in the Lafayette County jail (100:Ex. 10 (video); 100:Ex. 11 (transcript); *see also* 197:121 (DCI Special Agent Lourdes Fernandez identifying Exhibits 10 and 11); 197:122 (Agent Fernandez stating that interview began at 2:22 p.m.)).

Wand filed a suppression motion seeking an order "excluding as evidence all statements, oral or written, allegedly made by the defendant to law-enforcement officers or any other governmental officials or their agents" (72:1).

On January 17, 2013, The court held a suppression hearing (197) at which the court heard from these witnesses:

- Wisconsin Department of Justice Division of Criminal Investigation (DCI) Special Agent Jesse Crowe (197:23-56);
- DCI Special Agent James Sielehr (197:56-96);
- DCI Special Agent Brad Montgomery (197:97-114);
- DCI Special Agent Lourdes Fernandez (197:117-39);
- Village of Argyle Police Chief Hayley Saalsaa (197:140-50);

- Lafayette County Deputy Sheriff John Jacobson (197:151-65);
- Lafayette County Jail Sergeant Mary Paisley (197:166-71);
- Kent Berney, Ph.D. (197:173-219); and
- Armin G. Wand, III (197:225-60).

After hearing the testimony, after considering briefs filed by the State (93; 114) and Wand (107), and after hearing argument by defense counsel (146:5-10, 34-36) and the prosecutor (146:16-34, 36-39), the court issued an oral ruling (146:39-53) that granted the motion in part and denied it in part. The court noted that "[t]he September 7th interview is not in question or contested, the admissibility here" (146:40; *see also* 107:1 (Wand's suppression-motion brief arguing for suppression of only the statements on September 8 and September 9); 146:6 (defense counsel stating that "[w]e did not raise any suppression issues on the statements from September 7th"), 146:53 (court reiterating that "the statement or interview as of September 7th was not at issue")). The court suppressed the statements on September 8: "[G]iven the totality of the circumstances, the condition of the Defendant, the nature of the questions, of the continued questions by the agents on the September 8th date, I will find that that conduct was coercive, given the totality of the circumstances, and that those statements were not voluntary" (146:51; *see also* 146:53 ("The September 8th issue will be suppressed for the reasons stated by the Court.")). The court denied suppression of the statements made on September 9:

> Now, the next issue is September 9th, and I note in reading those questions, the nature of the ques-

tions were entirely different. I did not find any of those similar type questions that might be considered coercive or a promise of leniency in those statements. And without going into a great deal of detail on that issue, I find that those statements were voluntary.

Now on September 9th, were those statements the product of an improper *Miranda* warning or a continuation of questioning after he, the Defendant, exercised his *Miranda* rights on September 8th, the date of the prior interview in Madison? The Court finds on this issue that there was sufficient attenuation, division, separation, ending of one session; beginning of another.

That September 8th, it's clear he was given his *Miranda* rights twice. He was given them on September 8th. Agent said, "Okay. We're done." They made a couple of comments. They were not questions. They made comments. They gave him their card. And I would agree with Mr. Korte on that count that that's proper. "You want to call us, then we'll talk to you."

He was taken to the jail, and it was, depending upon what exact time, at least 16 hours later that he had contact again, contact that was initiated by the Defendant. Certainly he had time to think about it. He was in jail. He was fed. He was allowed to rest. Whether he was sleeping that whole time, he was certainly allowed to rest. Nobody was questioning him.

He asked specifically to have the phone to make the call to initiate that contact with the agents. The agents were not available, so two different agents came to make that contact. He was read his rights. He was asked if he understood them. He understood them. Again, I think that was a separate interview and appropriately done after the *Miranda* rights were given to him. So, the Court will find those statements on September 9th were freely and voluntarily given and that they were done so after the Defendant was read his *Miranda* rights and after he indicated he understood them, and that he wished to proceed with those, with those statements.

(146:51-53.) The court declared that "[t]he September 9th statement is not [suppressed]" (146:53).

Consequently, on appeal, the only voluntariness issue concerns the statements made by Wand during the interview on September 9, 2012.

B. In Light Of The Totality Of The Evidence At The Suppression Hearing, The Circuit Court Properly Exercised Discretion When The Court Denied Suppression Of The Statements Made By Wand On September 9. Under The Standards For Reviewing A Circuit Court's Decision On A Suppression Motion, This Court Should Affirm The Circuit Court's Order.

Before beginning the September 9 interview, DCI Special Agent Reimer read Wand his ***Miranda*** rights (100:Ex. 11, at 2-3), after which Wand, "in his own words" (100:Ex. 11, at 3), told Agent Reimer his understanding of those rights (100:Ex. 11, at 3-4). Wand waived his ***Miranda*** rights (100:Ex. 11, at 4).

Throughout the interview, the agents urged Wand to tell the truth (100:Ex. 11, at 17, 18, 19, 44, 46, 55, 72, 93, 94, 101, 102, 103, 104, 107, 118, 121, 125, 136, 139, 143, 155, 158). Moreover, the agents told Wand they wanted him to tell the truth, not just what he thought they wanted him to say. For example:

- "I don't want you to tell things that you think – tell me things that you think are going to make me happy. The only thing that makes me happy is the truth. I don't want you to say anything but the truth, okay?" (100:Ex. 11, at 102).
- "I don't want you to make things up because you think that's what I want to hear. All I want to hear is what the truth is. Okay? Is there anything else that you told me that is not true here today?" (100:Ex. 11, at 103).
- "We're not going to tell you what to say because you're the one that knows truly how things happened" (100:Ex. 11, at 46).

Wand argues that he "is a vulnerable and unsophisticated individual not equal to police tactics." Wand's Brief at 18 (typography modified). But he performs a sleight in his argument. At the suppression hearing, he presented just one expert witness — Dr. Berney — to testify on the voluntariness issue. In his argument, however, he relies primarily on written opinions by Dr. Lawrence T. White (168:Ex. 4) and Dr. David W. Thompson (168:Ex. 3) presented more than two years later, at the hearing on his postconviction plea-withdrawal motion (191).

When a circuit court assesses voluntariness, only the evidence and argument in the suppression proceeding matters, not evidence and argument presented two years later: a circuit court deciding a suppression motion can only exercise discretion based on the evidence and argument at hand, not by magically foreseeing an expert's opinion and a defendant's argument offered two years hence. Here, as evidence offered in support of the

plea-withdrawal motion rather than the suppression motion, Dr. White's and Dr. Thompson's opinions matter (if at all) on the issue of whether Wand demonstrated that a manifest injustice would occur if he could not withdraw his plea, not on the issue raised more than two years earlier of whether Wand made his statements voluntarily.

In arguing his vulnerability and lack of sophistication, Wand points to his low IQ, his alleged lack of sleep, the "emotional trauma of the loss of his home and three of his children and his wife's severe injury" resulting from his criminal act, Wand's Brief at 18, his lack of "any prior experience with an intense police interrogation," *id.*, and the letter and testimony of Kent M. Berney, Ph.D. (100:Ex. 19 (letter); 197:173-219 (testimony)). Wand's Brief at 18-20.[5] The circuit court, however, had full knowledge of relevant facts and Wand's allegations by the time the court made its decision on the suppression motion:

> There are two issues or two ways we have to look at these statements. One is a question of voluntariness as we've discussed here. The statement must be the product of the free will of the individual and not as a result of any coercion, and we have to look at those individual circumstances to determine that.
>
> Among the circumstances to consider, those relevant factors include the age, intelligence, experience,

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[5] As already noted, Wand also relies extensively on the opinions of Dr. Lawrence T. White (168:Ex. 4) and Dr. David W. Thompson (168:Ex. 3). Wand's Brief at 18-19. Because those opinions became known only two years after the suppression hearing, the State ignores those views as irrelevant to the circuit court's exercise of discretion in denying the suppression motion.

physical and emotional condition of the individual being questioned. In this particular case, it has been noted in terms of the condition of the Defendant, he has, by Dr. Berney's account who testified, does have a full scale IQ, I guess is how they term it, of 67, which is low-range functioning, borderline mentally handicapped. The Court cannot ignore that fact in these discussions and determination here, and I'll get to those issues of how that relates to the voluntariness at least in the Court's mind in a moment.

The Defendant does have some life experience. He's had prior contact with the legal system.[6] He's made statements to police officers before. This is not the first time he's talked to law enforcement personnel.

He maintains a household, and by testimony it's stated that he takes care of the finances for the family, makes other decisions, too. He's 32 or was 32, I believe, at the time of the interviews. As noted, he had four children, participated in family life. In addition, he has a problem with stuttering, which affects his ability to communicate. That does not necessarily correlate to IQ, but it does affect his ability to communicate. The Court has listened to the tapes and listened to the Defendant when he testified, also.

He does have poor eyesight. He wears glasses normally. He is legally blind, apparently, without those. But he is, as pointed out, able to navigate at least in terms of walking around a building and could do so up at the hospital in Madison. The doctor indicated he felt that this -- Dr. Berney felt that that would be a type of sensory depravation that would also relate to the voluntariness of the statement.

Now, the doctor had evaluated the Defendant. He had not listened to the interviews, and when

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6 100:Ex. 8 (list of Wand's legal-system contacts); 197:81-82 (DCI Special Agent James Sielehr testifying about Exhibit 8).

> questioned, he indicated he could not pass on whether it was -- it's not a medical determination whether this statement or statements are voluntary or not. It was his opinion that because of his physical and mental limitations, it would be more probable that the Defendant was affected by the circumstances and more probable that it was an involuntary statement. But again, that is a determination to be made by the Court.

(146:41-43 (footnote added).) After reviewing the September 8 interview and finding those statement involuntary (146:46-51), the court turned to the September 9 interview:

> [T]he next issue is September 9th, and I note in reading those questions, the nature of the questions were entirely different [from the questions on September 8]. I did not find any of those similar type questions that might be considered coercive or a promise of leniency in those statements. And without going into a great deal of detail on that issue, I find that those statements were voluntary.

(146:51.)

In arguing that the DCI agents coerced his inculpating statements on September 9, Wand again relies on Dr. White's assessment — and only Dr. White's assessment. Wand's Brief at 20-22. Again, that assessment lacked relevance to the circuit court's determination that the agents did not coerce Wand on September 9. In any event, the court and Dr. White reviewed the same videos. By denying suppression, the court essentially rejected Dr. White's opinion on coerciveness.

Moreover, the videos fully support the court's decision. In his brief, Wand writes that "[b]y the end of September 9th interrogation, [he] appeared exhausted and confused. He became extremely

compliant and answered investigators' questions almost mechanically." Wand's Brief 20. The videos refute that characterization.[7] The State urges the court to view them. The videos also show that the DCI agents did not engage in any coercive or other impermissible behavior to induce Wand to clear his conscience and confess.

Wand contends that his inculpatory statements on September 9 flowed from the conduct that

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[7] The videos also refute Dr. White's characterization of Wand as "'look[ing] wobbly when he left the room [at the end of the September 9 interview] and a police officer took his arm.'" Wand's Brief at 26 n.4 (quoting l68:Ex. 4, at 15). The end of the interview to which Dr. White refers occurs between 3 hours 5 minutes and 3 hours 6 minutes in the second video file (100:Ex. 10). The video does not show Wand exhibiting any wobbliness. Nor does the "police officer [taking] his arm" signify any wobbliness: the officer takes Wand's arm as he begins escorting Wand back to his cell. At the time, Wand did not have his glasses. In light of his subscription to Dr. Berney's claim that his lack of glasses would result in "'substantial sensory deprivation,'" Wand's Brief at 20 (quoting Dr. Berney's report), Wand presumably did not have any objection to the officer taking his arm in order to guide him safely to his cell.

By itself, the substantial mischaracterization of Wand's condition at the end of the September 9 interview would have justified disregarding Dr. White's opinions altogether. *Cf*. ***In re Commitment of Brown***, 2005 WI 29, ¶¶ 88-89, 279 Wis. 2d 102, 693 N.W.2d 715 ("[C]ourts are not rubber stamps for expert testimony. Neither a circuit court nor a reviewing court is required to accept an expert's ultimate conclusion. The circuit court may accept or reject expert testimony . . . ."); ***First Nat'l Bank v. Wernhart***, 204 Wis. 2d 361, 369, 555 N.W.2d 819 (Ct. App. 1996) (factfinder not bound by the opinion — even uncontradicted opinion — of any expert witness).

prompted the circuit court to suppress his September 8 statements. Wand's Brief at 22-23. The circuit court rejected that contention:

> Now on September 9th, were those statements the product of an improper *Miranda* warning or a continuation of questioning after he, the Defendant, exercised his *Miranda* rights on September 8th, the date of the prior interview in Madison? The Court finds on this issue that there was sufficient attenuation, division, separation, ending of one session; beginning of another.
>
> That September 8th, it's clear he was given his *Miranda* rights twice. He was given them on September 8th.[8] Agent said, "Okay. We're done." They made a couple of comments. They were not questions. They made comments. They gave him their card. And I would agree with Mr. Korte on that count that that's proper. "You want to call us, then we'll talk to you."[9]
>
> He was taken to the jail, and it was, depending upon what exact time, at least 16 hours later that he had contact again, contact that was initiated by the Defendant. Certainly he had time to think about it. He was in jail. He was fed. He was allowed to rest.[10] Whether he was sleeping that whole time, he was certainly allowed to rest. Nobody was questioning him.
>
> He asked specifically to have the phone to make the call to initiate that contact with the agents.[11]

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8 100:Ex. 6, at DOJ 001894-95.

9 197:75-76.

10 The Lafayette County jail's "special care sheet" for Wand (100:Ex. 18) shows the periods during which Wand slept the night before his September 9 interview, which began at 2:22 p.m. *See also* 197:157-63 (testimony of Lafayette County Deputy Sheriff John Jacobson about the "special care sheet").

11 197:119-20; 100:Ex. 11, at 1-2, 163-64

> The agents were not available, so two different agents came to make that contact. He was read his rights. He was asked if he understood them. He understood them. Again, I think that was a separate interview and appropriately done after the *Miranda* rights were given to him.[12] So, the Court will find those statements on September 9th were freely and voluntarily given and that they were done so after the Defendant was read his *Miranda* rights and after he indicated he understood them, and that he wished to proceed with those, with those statements.

(146:51-53 (footnotes added).)

In further support of his claim that his September 9 statements resulted from coercion flowing from the September 8 interview, Wand writes that he "testified at the suppression hearing that he believed [t]he promises made to him, that if he talked he wouldn't go to prison, and that belief continued as motivation for [him] to talk the next day. (197:233-234, 239)." Wand's Brief at 23. Pure nonsense. Neither the pages cited by Wand nor any other pages in the September 9 transcript (nor the video files themselves) show Wand even hinting that the September 8 interview coerced or induced him in any way into making incriminating statements during the September 9 interview.

Likewise, the notion that the DCI agents' references during the September 9 interview to stress as the underlying factor in setting the fire somehow created an implied promise of leniency, *see* Wand's Brief at 23, does not find any support in the transcript and video files. Beyond that, Wand's

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[12] 100:Ex. 11, at 2-4.

contention amounts to an inexplicable non sequitur.

Wand asserts that the DCI agents did not scrupulously honor his invocation of his right to silence. *Id.* at 23-24. Nonsense again. As the circuit court noted, when Wand on September 8 invoked his right to silence, the DCI agents stopped questioning him, made a couple of comments that did not qualify as breaches of Wand's invocation, and gave him a business card in case he wanted to talk again (146:45-46). DCI Special Agent James Sielehr testified about those circumstances:

> Q [by AAG Korte] . . . Between the time you returned to the room at around 9:30 and the time you arrested Mr. Wand, did you read him any *Miranda* rights?
> A Yes.
> Q And how did you do that?
> A I read him his *Miranda* rights utilizing my Department issued *Miranda* card.
> Q And did -- after reading those rights, did you ask Mr. Wand whether he understood them?
> A Yes.
> Q What was his response?
> A Yes.
> Q And did he agree to answer questions?
> A He didn't want to talk anymore.
> Q Did he specifically tell you that?
> A Yes.
> Q Did you cease questioning of him at that point in time?
> A Yes.
> Q From the time the recording was terminated and Mr. Wand is being transported to the Lafayette County Sheriff's Department or waiting during that time period, did you and Agent Montgomery have any other discussions with Mr. Wand?
> A Yes.

> Q What were those?
> A There were no questions being asked of Mr. Wand, but we made statements to Mr. Wand to clarify things for him. We both provided business cards, and wrote our phone numbers, and made sure that he understood that if he wanted to have any further conversations with us, that he would have to be the one to initiate that contact. And we talked about that in detail so that he fully understood that we were going to honor his wishes and that we weren't going to reach out to him again unless he wanted us to.
>
> So when the deputy arrived, the personal items were bagged up, and included inside the bag were my business card and [DCI Special Agent] Brad[Montgomery]'s business card, and that was all turned over to the deputy that was going to transport Armin.

(197:74-76.) At the suppression hearing, Wand confirmed that he understood the ***Miranda*** rights read to him on September 8 (197:252-53); that of his own accord the next morning, he had repeatedly asked to contact DCI Special Agents Sielehr and Montgomery (197:253-54); and that he did not find it surprising either that different DCI agents showed up or that they asked him questions (197:255-56).[13]

In short, the DCI agents scrupulously honored Wand's invocation of his right to silence: they contacted him again after he requested a meeting with them, and they further questioned him after

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[13] Wand testified that he did not remember having ***Miranda*** rights read to him on September 9, but the video files and transcript show DCI Special Agent Michael T. Reimer reading those rights (100:Ex. 11, at 2-4; *see also* 100:Ex. 12 (*Miranda* warning of rights signed by Wand)).

reading him his ***Miranda*** rights for a second time, ensured that he understood them, and obtained his permission to ask him more questions. If Wand had not wanted the DCI agents to question him on September 9, he knew that he could stop them at any time, and he knew how to do so, as he had shown the day before.

Wand also argues that the circuit court should have suppressed the September 9 statements as unreliable. Wand's Brief at 24-31. His argument suffers from three flaws. First, during the suppression proceeding, Wand did not argue the unreliability of those statements. In his suppression motion, he asserted that he "did not believe he was free to leave and therefore not in custody when he made his initial statements to law enforcement at the University of Wisconsin Hospital conference room and subsequent statements made in custody were not voluntary under the totality of the circumstances" (72:1). In his post-hearing brief (107), Wand did not argue unreliability. Rather, he argued that the court should suppress the statements as "involuntary" (107:1) and as obtained in violation of his right to remain silent (107:1); the brief did not contain any reference to an unreliability inquiry. At the oral-ruling hearing on the suppression motion (146), Wand's counsel made three perfunctory references to reliability (146:8-9) — but only in relation to the September 8 statements (146:6 ("begin with the [interrogation] that occurred at the UW Hospital on September 8th"), 146:9 ("For those reasons, your Honor, we do feel that the statements of September 8th were a product of coercion and should be found to be involuntary.")). In short, Wand either waived or forfeited his unreliability argument as to the Sep-

tember 9 statements. ***State v. Ndina***, 2009 WI 21, ¶¶ 28-31, 315 Wis. 2d 653, 761 NW 2d 612 (explaining difference between forfeiture and waiver).

Second, as before, Wand's suppression argument relies almost exclusively on the opinions of Dr. Thompson and Dr. White — opinions created more than two years after the suppression hearing. Wand's Brief at 25, 26, 27 (citing Dr. White's report (168:4:7)), 28, 29. Those opinions do not have any relevance to the circuit court's exercise of discretion in denying the motion in February 2013.

Third, in asserting that the September 9 statements did not meet reliability criteria, Wand cites a law-review article, *see* Wand's Brief at 28-29, and a self-serving excerpt from his postconviction plea-withdrawal motion filed January 15, 2015 (almost two years to the day after the suppression hearing), *see id.* at 29-31 (citing 165:12-14 (omitted footnote)). The motion long postdates the suppression hearing and decision and, again, presents arguments to this court not presented in connection with the suppression hearing.

In the end, for all his rhetoric, Wand fails to show that the circuit court erroneously exercised discretion when the court suppressed the September 9 statements. The court held an evidentiary hearing at which nine witnesses testified, including Wand and a defense expert who did not view the video files or transcripts of the interviews, and at which the court received exhibits. The court correctly identified the applicable legal standards, fully examined the record (including reviewing the transcript and video files of the September 9 in-

terview), and set forth a "reasoned application of the appropriate legal standard to the relevant facts," ***Delgado***, 223 Wis. 2d at 281, for refusing to suppress the September 9 statements. In the end, Wand's argument amounts to nothing more than an invitation to this court to act as a circuit court second-guessing another circuit court's assessment of the evidence (including the credibility of witnesses). This court should — must — refuse that invitation.

Under the standards for a circuit court's exercise of discretion (pp. 3-4, above) and for appellate review of an order denying a suppression motion (pp. 6-9, above), this court should affirm the circuit court's decision denying suppression of Wand's September 9 statements.

II. UNDER THE "MANIFEST INJUSTICE" STANDARD FOR POST-SENTENCING PLEA WITHDRAWAL, THE CIRCUIT COURT PROPERLY EXERCISED DISCRETION WHEN THE COURT DENIED WAND'S POSTCONVICTION PLEA-WITHDRAWAL MOTION AFTER DETERMINING THAT THE OPINIONS OF WAND'S POSTCONVICTION EXPERTS DID NOT QUALIFY AS NEWLY DISCOVERED EVIDENCE. IN ADDITION, THE PLEA-WITHDRAWAL MOTION AMOUNTED TO NOTHING MORE THAN AN ATTEMPT TO RELITIGATE THE PREVIOUSLY DENIED SUPPRESSION MOTION.

Wand contends that he "alleged sufficient basis for withdrawal of his guilty pleas." Wand's Brief at 31 (typography modified). Under the standards for reviewing an order denying a post-sentencing motion for plea withdrawal (pp. 9-13, above), this court should affirm the circuit court's order deny-

ing Wand's motion. He failed to "carr[y] the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice." ***McCallum***, 208 Wis. 2d at 473.

Wand's plea-withdrawal motion (165) rested on an assumption of the unreliability of Wand's statements (165:3-14) and on a claim of newly discovered evidence (165:14). The motion did not request an evidentiary hearing. In his supporting brief filed before the circuit court's motion hearing (180), Wand argued that the alleged unreliability and coercion of his incriminating statements (180:3-5) and the existence of newly discovered evidence (180:5-6) justified plea withdrawal.

At the hearing (191), the argument focused almost exclusively on the issue of newly discovered evidence. Wand's postconviction counsel made one conclusory reference to reliability: "I believe we can show that the confession is not -- it's not a reliable confession" (191:6). The circuit court denied the motion, declaring that Wand "ha[d] not raised . . . new evidence that would entitle him to further hearing on these issues" (191:22).

During the hearing, the court summarized for Wand's counsel its understanding of Wand's argument:

> [A]s I'm sure you're aware, we had a lengthy evidentiary hearing, motion to suppress those statements. The Court in fact suppressed one of those statements, and you're saying then based on the, the new psychologist testimony and findings, statement then, that that would suggest the court should come to a different conclusion?

(191:9.) Wand's lawyer replied:

> Yes. As far as the second statement when Armin was in custody, that's the real statement where he really claimed that he was involved. And that statement, that statement was given -- I think he was questioned for something like six hours. He hadn't had sleep. He was exhausted. And as Dr. White points out, toward the end he was just saying yes to whatever they were saying.

(191:9.) Counsel's response prompted the court to ask the critical question:

> All right. And the question is how is this not simply a second expert opinion based on facts already known, and we had an evaluation of Mr. Wand prior to that hearing, facts known or knowable, rather than newly discovered evidence?

(191:9.) Counsel responded with this acknowledgment:

> Well, your Honor, I believe certainly Dr. White, nobody considered the false confession opinion evidence at the time. I think the original doctor -- I can't remember what his name was, but he also thought that, that Armin was very compliant. But Dr. Thompson points out specifically he tested him for the -- for compliance. And Dr. White, I think his opinion is new, a new opinion. I mean, it's, it's evidence that was, was not presented to the court, you know, earlier. And whether it was knowable, I don't, I don't believe it was something that was considered in any, in any case.

(191:9-10.)

In this court, Wand argues the alleged unreliability of his confession as the rationale for plea withdrawal and ignores the claim of newly discovered evidence. This shift does not gain him anything, however. He invokes secondary sources that set out theoretical bases for finding a confession

false or otherwise unreliable. Wand's Brief at 32-35. None of those sources, however, establish by clear and convincing evidence any actual unreliability in Wand's statements. Equally important, none of those sources establish any legal standard for assessing the reliability of incriminating statements by a defendant when a defendant bears the burden of proving by clear and convincing evidence that a manifest injustice would occur in the absence of plea withdrawal.

The only reference to actual evidence offered to establish a manifest injustice consists of a citation to the declaration of certified fire and explosion investigator (CFEI) R. Paul Bieber, one of Wand's postconviction experts. Wand's Brief at 36. But Bieber's declaration amounts to nothing more than a newly created opinion based on evidence existing at the time of the suppression hearing. That declaration does not come close to satisfying the clear-and-convincing-evidence standard for establishing a manifest injustice warranting plea withdrawal. *Cf.* ***State v. Sobonya***, 2015 WI App 86, ¶ 8, 365 Wis. 2d 559, 872 N.W.2d 134 ("A postsentencing report that expresses an opinion different from that of the trial court regarding the objectives of sentencing (protection, punishment, rehabilitation, and deterrence) is nothing more than a challenge to the trial court's discretion and does not constitute a 'new factor' for sentence modification purposes."); ***State v. Fosnow***, 2001 WI App 2, ¶ 9, 240 Wis. 2d 699, 624 N.W.2d 883 (2000) ("Newly discovered evidence, however, does not include the 'new appreciation of the importance of evidence previously known but not used.'").

In effect, Wand's postconviction plea-withdrawal motion amounted to an improper effort to relitigate the suppression motion. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue."). All the facts underlying the opinions of Wand's postconviction experts existed before the court held the suppression hearing. Likewise for the secondary sources on which Wand relied for the theoretical foundation of his postconviction motion.

The circuit court's denial of Wand's postconviction plea-withdrawal motion rested on a sound analysis of the facts and on a correct legal standard. The circuit court properly exercised discretion when the court denied the motion. This court should affirm that decision.

III. A FEW WORDS FROM ADAM SMITH.

The State does not dispute that the DCI agents encouraged Wand to tell the truth and clear his conscience about the fire that killed his three sons and nearly killed his wife. As DCI Special Agent Lourdes Fernandez advised Wand as his various versions of events unraveled, "Armin, you need to be honest with us. I know it's hard, but you need to clear your conscience" (100:Ex. 11, at 139).

Contrary to Wand's belief, the agents' encouragements do not amount to coercion or result in involuntary or unreliable statements, especially when a defendant's versions of events become increasingly implausible or untenable in light of known facts. Instead, where a suspect has re-

ceived and understood ***Miranda*** warnings (in this instance, more than once), the State does not know of any doctrine or principle that precludes law enforcement officers from noncoercively cultivating a person's long-recognized impulse to confess wrongdoing. As moral philosopher Adam Smith wrote in a treatise first published in 1759:

> The consciousness, or even the suspicion, of having done wrong, is a load upon every mind, and is accompanied with anxiety and terror in all those who are not hardened by long habits of iniquity. Men, in this, as in all other distresses, are naturally eager to disburthen themselves of the oppression which they feel upon their thoughts, by unbosoming the agony of their mind to some person whose secrecy and discretion they can confide in. The shame, which they suffer from this acknowledgment, is fully compensated by that alleviation of their uneasiness which the sympathy of their confidant seldom fails to occasion. It relieves them to find that they are not altogether unworthy of regard, and that however their past conduct maybe censured, their present disposition is at least approved of, and is perhaps sufficient to compensate the other, at least to maintain them in some degree of esteem with their friend.

ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 393-94 (Penguin Classics 2009) (6th ed. 1790) (orig. pub. 1759 by A. Millar, London, and A. Kincaid & J. Bell, Edinburgh). Here, the transcript (100:Ex. 11) and video files (100:Ex. 10)[14] of the

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[14] The video recording of the September 9 interview consists of two files, the first running 3 hours 28 minutes 48 seconds, the other running 3 hours 11 minutes 12 seconds, for a total of 6 hours 40 minutes. Because the videos include opening and ending periods without Wand present, the interview itself runs 6 hours 32 minutes 13 seconds.

(footnote continues on next page)

interview on September 9 show that the agents did not coerce, threaten, or any other way impermissibly induce Wand to confess. Rather, Wand voluntarily "disburthen[ed]" himself even knowing that his confession of wrongdoing would not remain secret.

(footnote continues from previous page)

A crude synchronization of the transcript and video results from searching the transcript for the word "unclear": some of the references to "unclear" include the timing marker where the indecipherable speech occurred (*e.g.* 100:Ex. 11, at 28, 30, 33). A search for "[break" yields additional synchronization time markers (100:Ex. 11, at 83, 109).

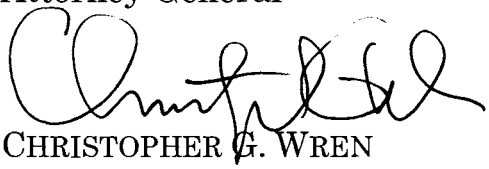
CONCLUSION

For the reasons offered in this brief, this court should affirm the circuit court's decision and order denying Wand's postconviction plea-withdrawal motion and should affirm the judgment of conviction. The circuit court properly exercised discretion when the court denied suppression of Wand's September 9 statements and when the court later denied Wand's postconviction plea-withdrawal motion, which amounted to nothing more than an effort to relitigate the suppression motion.

Date: February 26, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General



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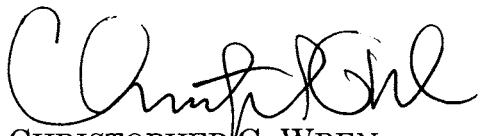
CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(8): FORM AND LENGTH REQUIREMENTS

In accord with Wis. Stat. § (Rule) 809.19(8)(d), I certify that this brief satisfies the form and length requirements for a brief and appendix prepared using a proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per line, and a length of 8,781 words.



CHRISTOPHER G. WREN

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12): ELECTRONIC BRIEF

In accord with Wis. Stat. § (Rule) 809.19(12)(f), I certify that I have submitted an electronic copy of this brief (excluding the appendix, if any) via the Wisconsin Appellate Courts' eFiling System and that the electronic copy complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

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

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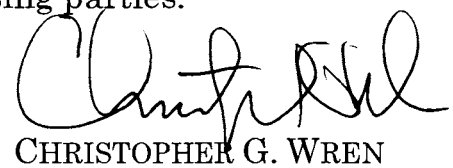

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