STATE OF WISCONSIN :: COURT OF APPEALS :: DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent

-vs-

JOE BONDS TURNEY,

Defendant-Appellant

Case numbers:
2015AP001651 CR
(L.C. 2013CF003941)

2015AP001652 CR
(L.C. 2013CF004535)

BRIEF OF JOE BONDS TURNEY, DEFENDANT-APPELLANT

Consolidated appeals from judgments of conviction and a denial of a post-conviction motion, the Honorable Rebecca F. Dallet, Milwaukee County Circuit Court Judge, presiding

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ISSUES PRESENTED FOR REVIEW

1. Whether the two cases should have been consolidated for trial.

Trial court granted the government's joinder motion.

2. Whether the trial court should have granted Mr. Turney's substitution of judge request that came after one trial court joined the cases for trial, thus causing the removal of the second case from another court.

Trial court denied the substitution request.

3. Whether the trial court erred in denying Mr. Turney's motion to hold a hearing on his claim that counsel was ineffective for allowing admission of Mr. Turney's post-arrest silence.

Trial court denied the request for a hearing in a written order.

STATEMENT ON ORAL ARGUMENT

This is not necessary.

STATEMENT ON PUBLICATION

The court of appeals should publish this case to answer the substitution question asked in this appeal.

RECORD NUMBERING IN THIS BRIEF

Numbers to each record will be used, where different, followed by "51" or "52," the last two and only distinguishing digits of the appellate case numbers. For convenience, here are the numbers corresponding to the transcripts:

Initial Appearance, October 3, 2013 (4535):	44(52)
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CAST OF CHARACTERS

All victims from acts charged or not have been given pseudonyms. The persons in the brief are as follows:

Lillie, a twin sister of Mr. Turney's girlfriend, Tillie
Tillie, Lillie's twin sister and mother of Mr. Turney's child
Lucy, a car owner
Mark, Lucy's brother
Isaac, Mark's friend
Stanley, Lucy's incarcerated boyfriend
Ivan, a locksmith
Isaiah, the locksmith's friend

STATEMENT OF THE CASE

I. The nature of the case.

This consolidated appeal comes from jointly tried cases in which a jury convicted Mr. Turney of multiple felony counts.

II. Procedural status leading up to the appeal.

Two felony cases were issued against Joe Bonds Turney. (44(51)/47(52): 2). On December 13, 2013, before the Honorable Rebecca Dallet, the cases were joined for trial, over the defense objection. (44(51)/47(52): 12). Judge Dallet's decision caused one case, 2013CF004535 (2015AP001652 CR), to leave Judge J.D. Watts' court. (46 (52); 44(51)/47(52): 12). Shortly after Judge Dallet announced that she was trying both cases, Mr. Turney attempted to substitute her on the case that just moved out of Judge Watts' court, meaning 2013CF004535 (2015AP001652 CR). (44(51)/47(52): 16-17). Judge Dallet denied the request. (44(51)/47(52): 20).

The cases then proceeded to trial, beginning with pretrial issues on January 6, 2014. (45(51)/48(52)). At

the close of its case, the government moved to dismiss Count 3, a misdemeanor endangering safety count from 2013CF003941 (2015AP001651 CR), for lack of evidence, and the trial court dismissed the count with prejudice. (51(51)/53(52): 27-28). The judge then renumbered the remaining counts. (51(51)/53(52): 28).

On January 13, 2014, the jury convicted Mr. Turney on all remaining counts. (53(51)/55(52)). These counts were from 2013CF003941 (2015AP001651 CR): count one, felon in possession of firearm; and count two: endangering safety by use of a dangerous weapon, discharged into a building. For 2013CF004535 (2015AP001652 CR), the counts were: count three: first degree recklessly endangering safety, while using a dangerous weapon, victim, Isaiah; count four: first degree recklessly endangering safety, with using a dangerous weapon, victim, Ivan; count five: first degree recklessly endangering safety, by use of a dangerous weapon, victim, Lucy; count six: felon in possession of firearm; count seven: endangering safety by use of a

dangerous weapon, discharge into vehicle; and finally count eight: armed robbery, party to a crime. (53(51)/55(52): 3-6).

On July 21, 2015, Judge Dallet denied a post-conviction motion alleging that trial counsel was ineffective for not objecting to evidence of Mr. Turney's post-arrest silence. (40: 2, 6).

III. Disposition in the trial court.

The trial court found that repeater allegations applied. (53(51)/55(52): 10). The trial court sentenced Mr. Turney as follows:

Case:	Count:	Initial Confinement:	Extended Supervision:	Cons/Conc
3941	1	5 years	2 years	cc to 1
	2	5 years	2 years	cc to 2
4535	6	7 years, 6 months	2 years	cc to 7, 8
	7	7 years, 6 months	2 years	cc to 6, 8
	8	7 years, 6 months	2 years	cc to 6, 7

(The three endangering safety counts). All are consecutive to 3941.

9	3 years	1 year	consec.

(Count 9 is Possession of Firearm by Felon)

10	5 years	5 years	cc to 6, 7, 8

(Count 10 is for discharging the weapon into a vehicle).

11	3 years	2 years	consec.

(Count 11 is armed robbery).

Judge Dallet added the total as 18 years, 6 months initial confinement and 7 years of extended supervision. (54(51)/56(52): 34-38).

On July 21, 2015, Judge Dallet vacated all the DNA surcharges. (39). That order is not appealed.

IV. Facts relevant to the issues presented for appeal.

Lillie testified that on August 22, 2013, she picked up her twin sister, Tillie, from work. (48(51)/50(52): 74-76). Joe Turney shared a child with Tillie, and when the sisters got to Tillie's house, Mr. Turney and Tillie began

to argue. (48(51)/50(52): 76-78). Lillie said that Mr. Turney lived with Tillie. (48(51)/50(52): 79). While Lillie, Tillie, a child, and Mr. Turney were in the living room, Lillie saw Mr. Turney pull out a gun and fire into the wall. (48(51)/50(52): 84). Lillie watched as a grey-primed car, possibly an Acura, pulled up in front of Tillie's house, picking up Mr. Turney and taking him away from the scene. (48(51)/50(52): 88). This case formed the basis of 2013CF003941 (2015AP001651 CR). (40: 2).

Officer Kevin Zimmerman responded to the sisters' location, finding a bullet hole in Tillie's wall and a casing on her floor. (48(51)/50(52): 108-113). He collected the casing, which became Exhibit 8 at trial. (48(51)/50(52): 118).

Lucy said that in 2013, she owned two cars, a 2009 Chevy Malibu and a 2000 Honda Accord. (51(52): 4). She bought the Honda Accord around 2013 and was at that time dating Stanley. (51(52): 5). Stanley sometimes drove the car, and one night he got arrested and lost the vehicle. (51(52): 6). Somehow, Stanley's friends,

including Mr. Turney, wound up with the Honda Accord. (51(52): 7). At first, Lucy allowed Mr. Turney to use the car, but then she wanted it back. (51(52): 8). She talked to him about getting the car back; she tried telephoning; she even left a note at Tillie's house, but somehow the car did not come back. (51(52): 8-10).

On September 19, 2013, Lucy decided to drive her Malibu around after work until she found the Honda. (51(52): 10-11). She had picked up her brother, Mark, and his friend, Isaac, promising that if they found the car, Mark could drive it. (51(52): 11). Lucy found her Honda on North Avenue and Garfield in Milwaukee. (51(52): 12). While Lucy saw her car parked outside a house, she could not get anyone in the neighborhood to come out and admit he or she had the keys. (51(52): 14). Lucy flagged down a police vehicle she saw in the area and asked police to stay while a locksmith came to make new keys for her Honda. (51(52): 15-17).

Police stayed for a while but then left Lucy, who continued to wait for the locksmith. (51(52): 18-19). As Lucy waited, a few men paced back and forth near her

Honda. (51(52): 21). As the locksmith came and began work on the car, Lucy noticed Mr. Turney and a man named "Savage" on the scene. (51(52): 22). Lucy reported that Mr. Turney said, as he shut the Honda's door, "What you all doing in this car; ain't nobody taking this car." (51(52): 23). Lucy noticed that as the locksmith went back and forth between his car and the Honda, "guys [were] coming out of everywhere." (51(52): 25). Savage and Mr. Turney had guns. (51(52): 25). Lucy related that Mr. Turney then said that "this" was his hood and wanted to know why she brought "these niggas" to his hood. (51(52): 27).

Lucy then saw Mr. Turney raise the gun, heard shots, and she began to run. (51(52): 36-37). Mark and his friend got in the Malibu and left, after failing to convince Lucy to get in the car. (51(52): 32, 38). Mr. Turney, according to Lucy, told a teenager to drive Lucy's Honda away, and she saw it leaving the scene. (51(52): 39). She called police again and ended up somewhere on North Avenue and 33rd Street, after running and cutting through yards. (51(52): 30, 66).

The incident took place around midnight, and into the early morning hours of September 20, 2013, when police rescued Lucy, hiding on North Avenue. (49(51)/52(52): 28-31). Police also went to the crime scene and collected nine 9mm casings, which at trial became Exhibit 23. (49(51)/52(52): 11-15).

Mark Simonson, the firearms and toolmark examiner, stated that the nine fired cartridges in Exhibit 23 were fired from the same 9mm firearm, but that the cartridge in Exhibit 8 was fired from a different 9mm firearm. (49(51)/52(52): 51, 60-61).

Ivan testified that he was the locksmith who responded to Lucy's call, which had come around ten at night. (50(51): 4-6). His friend, Isaiah, had come along with Ivan. (50(51): 5). As Ivan was making a key for Lucy, he saw someone take off in Lucy's Honda. (50(51): 5, 12). Ivan tried to leave in his car as six or seven shots were fired, but before they could escape, Isaiah got hit by a flying bullet. (50(51): 13-17). Ivan took Isaiah to the hospital. (50(51): 20-21). Fortunately, Isaiah survived his wound. (50(51): 24).

Detective Jeffrey Sullivan testified that on September 24, 2013, he responded to the 2100 block of North 35th Street, Milwaukee, after a citizen called to report that Mr. Turney, armed with a gun, was walking down the street by a stolen car. (49(51)/52(52): 39-40). During a search of Mr. Turney's person, Detective Sullivan found no gun but did find in Mr. Turney's pocket a vehicle registration for Lucy's Honda. (49(51)/52(52): 41). The detective arrested Mr. Turney several blocks from where Lucy's Honda was parked in the 2200 block of North 36th Street. (49(51)/52(52): 42). Detective Sullivan testified, without objection, that Mr. Turney would not give his address and that he "wouldn't answer any of the questions" the detective asked him. (49(51)/52(52): 44). Due to the arrest, Detective Sullivan did not ask Mr. Turney how he obtained Lucy's car registration, but again stated that "Questions I asked him—I knew his name—his address, and he didn't answer any of those questions." (49(51)/52(52): 48). Again no objection came forth.

Tarrance Jenkins, Mr. Turney's brother, testified that on August 22, 2013, Mr. Turney had worked on fixing a building all day, thus providing an alibi defense. (51(51)/53(52): 33-38). Mr. Jenkins believed his brother was there all day but admitted that he himself had stepped out for short periods to run errands. (51(51)/53(52): 38).

On October 28, 2013, Judge J. D. Watts held a scheduling conference on 2013CF004535 (2015AP001652 CR). (46(52)). Mr. Turney had made a speedy trial demand, and the court found it could accommodate this request by putting the trial on January 6, 2014, the same day Mr. Turney had another trial pending in another court. (46(52): 3-4). The court set a final pretrial for December 13, 2013. (46(52): 4).

On December 13, 2013, both cases were called before Judge Dallet because the government had filed a joinder request. (44(51)/47(52): 2). The government also filed a new information on 2013CF004535 ((2015AP001652 CR), adding more counts. (44(51)/47(52): 3). Judge Dallet said she would deal

with it after making a decision on joinder. (44(51)/47(52): 3-4). She joined the cases because she saw them as of similar character—both involved possession of a firearm by a felon and pointing a gun at a female, the gun ultimately fired in both cases. (44(51)/47(52): 6, 12). The court noted that the time frame between the two cases was short—one occurred August 22 and the other occurred about a month later on September 20. (44(51)/47(52): 7). The same car played some role. (44(51)/47(52): 7). The prosecutor informed the court that the 9mm type casings were at both scenes but that the gun used in each crime was not the same. (44(51)/47(52): 7). The court found that the crimes showed the way Mr. Turney conducts himself to get his own way. (44(51)/47(52): 8-9).

Although the court acknowledged that the armed robbery that occurred in the second crime could seem to make the crimes different, but because robbing an establishment was not involved, the crimes were similar because the armed robbery concerned another instance of using a firearm to intimidate a woman. (44(51)/47(52):

8-9). The court also noted that one case involved a girlfriend and the other did not but did not find the difference significant because both victims were women. (44(51)/47(52): 6-7). The court further noticed that each case could come in as other acts evidence if the cases were tried separately because each act showed plan and modus operandi. (44(51)/47(52): 10-11). Finally the court found there was no prejudice. (44(51)/47(52): 12).

After deciding the joinder motion, Judge Dallet announced that she would try both cases. (44(51)/47(52): 12). Although defense counsel said he reviewed the new counts in the amended information with Mr. Turney, when the court asked, Mr. Turney said he was not aware of the new charges. (44(51)/47(52): 13). The court then reviewed them with Mr. Turney. (44(51)/47(52): 13-14). Defense counsel entered pleas of "not guilty." (44(51)/47(52): 15). At first, Mr. Turney said nothing; however, shortly afterwards, he began trying to get his attorney's attention. (44(51)/47(52): 15-16). Defense counsel then tried to substitute Judge Dallet on the case that had come from Judge Watts' court. (44(51)/47(52):

16). Judge Dallet denied the substitution request because the defense had enough notice that the case would be sent to her to make a decision on the joinder motion, but they let her decide it anyway. (44(51)/47(52): 20). She also denied it because she had arraigned Mr. Turney on the new charges in 2013CF004535 (2015AP001652 CR). (44(51)/47(52): 20). Finding substitution of a judge is not a constitutional right, she could find nothing in the statute that would allow this action. (44(51)/47(52): 20).

Judge Dallet denied Mr. Turney's post-conviction motion in which claimed trial counsel was ineffective for allowing in evidence of Mr. Turney's post-arrest silence. (40: 2; 6). The trial court found no error because the testimony that Mr. Turney would not tell Detective Sullivan where he lived was not solicited to comment on the defendant's silence. (40: 5). The court also found there was no reasonable probability of a different result. (40: 5).

ARGUMENT

I. Joinder of the dissimilar offenses was improper,

The trial court improperly joined two offenses that were dissimilar. Improper character evidence formed the common thread that joined two violent crimes together for trial and the theme that Mr. Turney shoots his gun against women to get his own way is propensity evidence. Differences between the offenses and their motives outweigh any similarities.

The standard of review on joinder issues is as follows: whether crimes are properly joined in a complaint is a question of law, but the law favors joinder. State v. Hoffman, 106 Wis. 2d 185, 208, 316 N.W. 2d 143 (1982). The appellate courts review the trial court's determination as to whether prejudice would result due to joined charges for error in exercising discretion. State v. Hoffman, 106 Wis. 2d 185, 209, 316 N.W. 2d 143 (1982). In exercising its discretion, the trial court weighs the prejudice to the defendant against the public's interest in conducting one trial for multiple counts. State v. Hoffman, 106 Wis. 2d 185, 209, 316 N.W. 2d 143 (1982).

The relevant portions of Wis. Stat. §971.12 are as follows:

> **(1)** JOINDER OF CRIMES. Two or more crimes may be charged in the same complaint, information or indictment in a separate count for each crime if the crimes charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> **(3)** RELIEF FROM PREJUDICIAL JOINDER. If it appears that a defendant or the state is prejudiced by a joinder of crimes or of defendants in a complaint, information or indictment or by such joinder for trial together, the court may order separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.
>
> **(4)** TRIAL TOGETHER OF SEPARATE CHARGES. The court may order 2 or more complaints, informations or indictments to be tried together if the crimes and the defendants, if there is more than one, could have been joined in a single complaint, information or indictment. The procedure shall be the same as if the prosecution were under such single complaint, information or indictment.

Mr. Turney's cases fit none of the criteria in Wis. Stat. §971.12.

The offenses are not of the same or similar character. Wis. Stat. §971.12(1). To be the same or similar character, the crimes must be the same type of

offenses occurring over a relatively short period of time, and the evidence of each must overlap. State v. Davis, 2006 WI App 23, ¶13, 289 Wis. 2d 398, 710 N.W. 2d 514. It is not sufficient that the offenses involve merely the same type of criminal charge. State v. Davis, 2006 WI App 23, ¶13, 289 Wis. 2d 398, 710 N.W. 2d 514.

The trial court found the cases to be similar because both involved a felon possessing, pointing, and shooting a firearm. (44(51)/47(52): 6). But this is no more than saying the offenses involve the same type of criminal charge. They involve illegal possession of firearm by a felon. The guns were fired, which is what guns do. There is nothing unique about this.

Next the trial court found that the victims were females, which is true in the case of the sisters, Lillie and Tillie, and true in the case of Lucy, but Lucy's brother, Mark, and Mark's friend, Isaac, as well as the locksmith, Ivan, and his friend, Isaiah, were also in the line of fire as Lucy tried unsuccessfully to retrieve her car, and the only person injured, Isaiah, was a man. (44(51)/47(52): 6; 48(51)/50(52): 84; 51(52): 27, 32-38, 50(51): 13-17). All

four men are listed in the complaint, so the trial evidence of their being victims was no surprise to the court. (3 (2015AP001652CR, hereafter "52": 4-5).

The trial court noted that the offenses involve the same car, meaning Lucy's Honda, which proved identity. ((44(51)/47(52): 11). However, the defense to the domestic violence case involving the sisters would be fabrication or frame-up. Obviously Tillie and Lillie knew Mr. Turney, as he had fathered a child with Tillie. (48(51)/50(52): 104, 99). Lillie even said Mr. Turney actually lived with Tillie. (48(51)/50(52): 79). The sisters would not mistake him for someone else.

In addition, Mr. Turney did not dispute that he was driving Lucy's car, rather the disagreement involved his feelings that he was entitled to the car. Lucy said when she showed up, Mr. Turney stated, "What you all doing in this car; ain't nobody taking this car!" (51(52): 23). Before venturing out to collect the car herself, Lucy tried to contact Mr. Turney and probably thought he was avoiding her. (51(52): 8-10). In closing argument,

defense counsel conceded that Mr. Turney had been driving the vehicle:

> But Mr. Turney had consent to drive the vehicle. That is why he drove it. That is why he had the vehicle registration on him, that is why he was making changes in the car from green to gray. And [Lucy] didn't do anything about it.

(52(51)/54(52): 19-20).

Likewise, Lucy also knew Mr. Turney and would have not mistaken him for someone else. Lucy bought the car in May 2013. (51(52): 6). After buying it, Stanley, whom Lucy had met in about February 2013, drove the car until he was arrested in July. (51(52): 6, 8). Lucy knew Mr. Turney was Stanley's friend, and she identified Mr. Turney in court. (51(52): 7). She said she knew Mr. Turney for at least a month. (51(52): 8). So this defense would not be about mistaken identity but would likewise involve that Lucy either lied or framed Mr. Turney or both.

One might argue that the evidence overlaps because Mr. Turney could direct others to use Lucy's Honda to extricate himself from crimes. Lucy said he

directed a young male to drive the car away as she was trying to retrieve it. (51(52): 39). The car also showed up, giving Mr. Turney an escape after he supposedly shot into Tillie's wall, but Lillie did not see Mr. Turney call for the car and did not even think that was possible. (48(51)/50(52): 103). "The car just showed up," said Lillie. (48(51)/50(52): 103). She did not say Savage drove it nor anyone else who might have been at the house where Lucy was trying to get her car. (48(51)/50(52): 103). Lillie also admitted that she had never seen this sort of domestic violence from Mr. Turney before. (48(51)/50(52): 103). Therefore, it does not seem as though Mr. Turney went from place to place, committing crimes, using the grey car to escape. Its appearance at Tillie's seemed to be a coincidence. Lillie had also seen the car many times and thought Mr. Turney owned it. (48(51)/50(52): 93).

The court conceded that the defense made a strong point about the armed robbery distinguishing between the two cases. (44(51)/47(52): 9). The court stated that if Mr. Turney had robbed an establishment, the cases would

be separate and not joinable. (44(51)/47(52): 9). This might mean that even if Mr. Turney had robbed a bank, driving Lucy's car, possessing any sort of 9mm gun, shooting it, towards female tellers, close in time to when he shot into Tillie's wall, the court would have found the crimes dissimilar. This decision, however, should not be different because a private citizen, not a corporation, owns the property. Plus, the locksmith, a business man, was attempting to perform a service when Mr. Turney supposedly took the car as Ivan worked on it. (50(51): 5, 12). The court's distinction is not convincing.

The court is correct that the offenses occurred about a month apart, but this alone would not allow joinder. (44(51)/47(52): 7).

The crimes are not based on the same act or transaction. Wis. Stat. §971.12(1). These crimes would not constitute the same act or transaction. The court did not rely on this ground. (44(51)/47(52): 4-12).

The crimes are not two or more transactions connected together that constitute part of a common scheme or plan. Wis. Stat. §971.12(1). See: Francis v

State, 273 Wis. 2d 554, 560, 273 N.W. 2d 310 (1979): acts or transactions are connected together or constitute a common scheme or plan if the crimes charged have a common factor or factors of substantial factual importance, e.g. time, place, or modus operandi, so that the evidence of each crime is relevant to establish a common scheme or plan that tends to establish the identity of the perpetrator.

In this case the court stated that the defendant's pattern is to use a firearm to get what he wants. (44(51)/47(52): 8). The court further stated that the crimes show "the way in which the defendant conducts himself and the way in which he goes about dealing with these people in his life, in this short time period." (44(51)/47(52): 8-9). The court continued to say that the evidence was not impermissible character evidence but could show "motive, intent, context, plan … lack of mistake and potentially identity," but mostly "plan" and "modus operandi." (44(51)/47(52): 10-11). The court finally stated that it would allow each case to be used as another act in the other. (44(51)/47(52): 11).

But such reasoning could apply to any crime and any defendant. Crimes by definition employ unfair or illegal means to obtain what one wants. The theme of joining the two cases advocates that Mr. Turney is a violent bully, quick to anger, and that he fires guns at or around people who stand up to him; this is nothing more than inadmissible character evidence that shows Mr. Turney did it again—acted violently. Wis. Stat. §904.04 prohibits character evidence to show the defendant acted in conformity with a certain trait, usually something negative.

Joinder is proper if the evidence of each crime would be admissible at separate trials for the other crime. Francis v State, 273 Wis. 2d 554, 561, 273 N.W. 2d 310 (1979). For the reasons presented earlier—that the shootings are not a plan or modus operandi but more indicative of Mr. Turney's alleged character for violence and bullying, these acts should not be admitted into the trials of each other. Each case as an "other wrong" does not prove motive, opportunity, intent, preparation, plan,

knowledge, identity, absence of mistake or accident or anything else. Wis. Stat. §904.04(2)(a).

That one of these acts involves domestic violence makes joining them seem even more inappropriate. If Mr. Turney were not on trial for the crime involving Lucy's car, a court allowing that entire story into a trial for domestic violence would seem unlikely. Lillie indicated that when the sisters got to Tillie's, children in tow, Mr. Turney came out of the house and an argument between the couple began immediately. (48(51)/50(52): 77). Tillie and Mr. Turney called each other names and "cussed" over doing household chores. (48(51)/50(52): 78-83). Lillie felt Mr. Turney was so disrespectful that she jumped into the argument on the side of her sister, until Tillie then had to break up Lillie and Mr. Turney who were now in a heated dispute. (48(51)/50(52): 82-84). Suddenly Mr. Turney pulled out a gun and shot into the wall. (48(51)/50(52): 84). "That's the first time he ever snap, with the gun," said Lillie, and she thought there was something wrong with Mr. Turney. (48(51)/50(52): 87, 107).

If the incident involving Lucy had not been on the trial table, it is hard to imagine any court at all allowing Lucy, the locksmith, and anyone else involved to tell that story to show that Mr. Turney had a scheme, plan or motive to shoot in Tillie's house. That would complicate a simple story—they argued over household responsibilities, and he lost it—with extremely prejudicial, confusing, and unnecessary evidence. If the Lucy incident were not charged, arguing that any prosecutor would place this complicated story in a domestic violence trial is simply not credible. The car has an insignificant role in the offense, and evidence that a month later, he shot at many people with a different gun would not get past Wis. Stat. §904.03, which allows the judge to exclude evidence that is relevant but its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. It is difficult to imagine any court with a calendar not obligated to actually try the Lucy case adding all that to a

simple domestic violence case. This would be a waste of time and seem merely like a slam on Mr. Turney's character as a bad man.

Likewise, if telling the story of Lucy and her car, and the Tillie and Lillie story were not on the trial table, it seems unlikely that a boyfriend/girlfriend spat would clutter that trial for any reason except to show Mr. Turney's propensity for violence. How would domestic violence show a common scheme or plan to do anything? Again, Wis. Stat. §904.03 would seem to find the probative value of a defendant's fight with his girlfriend outweighed by the danger of unfair prejudice when stuck in an armed robbery trial where multiple shots were fired at multiple people. Again, it seems not credible to find that courts routinely allow evidence of domestic spats into trials that involve unrelated violent crimes.

As neither act belongs in the trial of the other, the danger of prejudice is not minimized. State v. Hoffman, 106 Wis. 2d 185, 210, 316 N.W. 2d 143 (Ct. App. 1981). The trial court found no prejudice other than that which comes from being charged with a crime. (44(51)/47(52):

12). The court will not find an erroneous exercise of discretion for the the failure to sever the counts, pursuant to Wis. Stat. §971.12(3), unless the defendant can establish that failure to sever the counts caused "substantial prejudice" to his defense. State v. Hoffman, 106 Wis. 2d 185, 210, 316 N.W. 2d 143 (Ct. App. 1981).

Possibly intertwined with this concept and difficult to separate is the doctrine of harmless error. Misjoinder is subject to the harmless error rule. State v Davis, 2006 WI App 23, ¶21 289 Wis. 2d 398, 710 N.W. 2d 514. This joinder was an error, and it was not harmless. One reason the jury may have rejected the testimony of Mr. Turney's brother, who presented an alibi that they were rehabbing a building that day, is the overall presentation that Mr. Turney was a violent man. (51(51)/53(52): 33-38). This is also prejudicial—Mr. Turney presented an alibi, suggesting that Lillie and Tillie had fabricated, but with all the violence shown by the car incident, where Isaiah actually went to the hospital, the jury was unlikely to believe Mr. Jenkins. (50(51): 20-21). Tillie did not testify.

This joinder was error and not harmless, as the overall impression that the jury would have had is that Mr. Turney was a bad, violent man, acting true to character. The joinder made for an unfair trial.

II. The trial court should have allowed the substitution.

Resolving this issue is a challenge because several of the various provisions of Wis. Stat. §971.20 may apply with no clear right answer and is further muddled by case law on the statute. Mr. Turney's intent is clear: as soon as he found out due to the joinder that his case moved out of Judge Watts' court and into Judge Dallet's, who held a domestic violence case, he wanted her off the case involving Lucy's car. (44(51)/47(52): 17). The judge, however, implied that Mr. Turney, who just lost on the joinder motion, was gaming the system; "You don't like my decision is what the outcome here is." (44(51)/47(52): 17).

The trial court then suggested sending both cases to Judge Watts, which would have preserved the

government's successfully litigated joinder. (44(51)/47(52): 17-18). The clerk piped up, "He can't take it." (44(51)/47(52): 18). Judge Watts, on October 28, 2013, announced that he was prepared to try the case involving Lucy's car. (46(52): 4). As it turned out, the domestic violence case added only two more witnesses to the trial involving Lucy's car. (48(51)/50(52): 74-128). The court made one more mention of sending the cases to Judge Watts, but dropped it after taking some time to review the issue in which she found Mr. Turney had no right to substitute her. (44(51)/47(52): 19-20).

The standard of review for substitution issues is that the court of appeals reviews the trial court's decision *de novo*. State v Bohannon, 2013 WI App 87, ¶18, 349 Wis. 2d 368, 835 N.W. 2d 262.

These provisions from Wis. Stat. §971.20 provide possible answers to whether or not Mr. Turney had the right to substitute Judge Dallet:

(1) Wis. Stat. §971.20(5) provides that if a new judge is assigned to the trial of any action and the

defendant has not exercised the right to substitute an assigned judge, a written request for the substitution of the new judge may be filed with the clerk within 15 days …

Under this theory, Judge Dallet was new to the trial of the action of 2013CF004535 ((2015AP001652 CR), Mr. Turney filed the substitution timely, minutes after he heard she would now take the case, and therefore should have been allowed to substitute Judge Dallet—as long as she was "new" to the case. (44(51)/47(52): 16-17). Whether she is "new" to the case will be addressed later.

(2) Wis. Stat. §971.20(4) provides that a written request for the substitution of a different judge for the judge originally assigned to the trial of the action may be filed with the clerk before making any motions to the trial court and before arraignment.

While not citing to this provision, Judge Dallet seemed to reference it when she said that Mr. Turney

should have substituted her before she made the decision on the joinder motion, which brought the case from Judge Watts' court to hers. (44(51)/47(52): 20). This is not quite what the statute says, however, because Mr. Turney did not make a motion before the trial court, the government did. (44(51)/47(52): 2). If the government's motion was denied, Mr. Turney's second case would stay with Judge Watts. Until Mr. Turney knew the decision on the joinder, he could not possibly know that Judge Dallet would take the case currently assigned to Judge Watts.

In addition, the state added charges that day to 2013CF004535 (2015AP001652 CR), involving Lucy's car, the new charges being the endangering safety, discharging a firearm into a vehicle or building, and the armed robbery counts. (44(51)/47(52): 13-15). Mr. Turney, through his attorney, entered pleas of not guilty. (44(51)/45(52): 15). Then Mr. Turney filed the substitution. (44(51)/45(52): 16-17). A second reason the judge denied Mr. Turney's request was that she had just arraigned him on two new counts. (44(51)/45(52):

20). However, in deciding whether Mr. Turney's request came too late due to the arraignment, the issue is further complicated by Wis. Stat. §971.20(9).

(3) Wis. Stat. §971.20(9) gives a substituted judge the authority to conduct the initial appearance, accept pleas and set bail.

This provision suggests that Judge Dallet had the authority to accept the not guilty pleas to the amended information. No logical nor significant difference can be attached to that he pleaded first and then immediately substituted her or whether he filed the substitution and then pleaded. As a substituted judge, she had the authority to accept the pleas.

On October 14, 2013, following a preliminary hearing, Mr. Turney entered pleas of not guilty to the charges in 2013CF004535 (2015AP001652 CR). (45(52): 11). The case was sent to Judge Watts' court. (45(52): 15). The amended information did no more than charge additional counts from the same fact situation

involved in the events of September 20, 2103 (with Lucy's car). (8(52)). In State v. Whitaker, 83 Wis. 2d 368, 374, 265 N.W. 2d 575 (1978), the court of appeals stated that Wis. Stat. §971.29(1) permits the amendment of the information before trial and within a reasonable time after arraignment, with leave of the court, provided the defendant's rights are not prejudiced, including the right to notice, speedy trial and the opportunity to defend.

Given the notice requirements of an amended information, whether another arraignment even has to occur under Wis. Stat. §971.05 is not entirely clear, but it does seem to be the practice to conduct arraignments under such circumstances. See: State v Bohannon, 2013 WI App 87, ¶5, 349 Wis. 2d 368, 835 N.W. 2d 262. Certainly that Mr. Turney pleaded not guilty to two charges which might have been filed all along, should not be found to defeat his substitution request. Wis. Stat. §971.20(9) appears to give the substituted judge the authority to accept the pleas anyway.

In looking at Wis. Stat. §971.20, the best answer is that Judge Dallet should have granted the substitution

and sent the entire matter, both joined cases, to Judge Watts or to some other judge. Mr. Turney could not know in advance whether Judge Dallet would have the second case until she decided the *government's* joinder motion. He did not ask Judge Dallet to decide a motion; the government did. His pleas of not guilty to two additional counts are insignificant and should not be used as a technicality to defeat the substitution request. However, before the issue can be decided, case law needs to be examined.

The first question is whether Judge Dallet is a "new" judge within the meaning of §971.20(5). He did not substitute her on the domestic violence case. (1(51)). So the question becomes whether Mr. Turney can do what he wanted to do—substitute the judge handling one of his cases when the new case came in. Or did he have to substitute the judge on the first case in order to prevent that judge from taking every other case filed against him? Again, there seems to be no answer to this question. In State v Bohannon, 2013 WI App 87, ¶3, 349 Wis. 2d 368, 835 N.W. 2d 262, Judge Dallet had Bohannon's

case in February 2010, and he did nothing to substitute her after the preliminary hearing, instead allowing the case to proceed until in August 2010, the case transferred to Judge Dennis Cimpl. A few months later, the parties learned the case would return to Judge Dallet in August 2011. State v Bohannon, 2013 WI App 87, ¶4, 349 Wis. 2d 368, 835 N.W. 2d 262. In May 2011, when the government filed an amended information, Bohannon filed a substitution against Judge Dallet. State v Bohannon, 2013 WI App 87, ¶5, 349 Wis. 2d 368, 835 N.W. 2d 262. The request was denied, and on August 1, 2011, Judge Dallet took the case, with trial going on in September. State v Bohannon, 2013 WI App 87, ¶5, 349 Wis. 2d 368, 835 N.W. 2d 262.

The court of appeals agreed that Judge Dallet was not a "new" judge under Wis. Stat. §971.20(5) because she was the judge originally assigned to the case. State v Bohannon, 2013 WI App 87, ¶22, 349 Wis. 2d 368, 835 N.W. 2d 262. After the Bohannon case, the message to the defense is: file the substitution before the

arraignment even if the judge is rotating, for the undesired judge might just come back.

But Judge Dallet was *not* the judge originally assigned to 2013CF004535 ((2015AP001652 CR); instead, Judge Watts was assigned to that case. (45(52): 15). The statute clearly provides that the new judge is new to *the trial of the action*. §971.20(5). Judge Dallet was new to the trial of the action, either to 2013CF004535 ((2015AP001652 CR) or to the newly joined trial of the cases she created that day. Until December 13, 2013, when she created that joint case, the action did not exist. (44(51)/47(52): 16). The error that Judge Dallet made in her analysis was to read the statute as though it read that the judge is new *to the defendant*. But Wis. Stat. §971.20(5) clearly states that the judge is new to the case or the action.

Therefore, it seems that if the state's joinder motion brings a case to a new judge, the defendant should be able to substitute. The joined case is a new action and certainly the second judge is *not* the original judge. This interpretation would follow the spirit of the

statute: if a defendant is in a court facing a minor criminal traffic offense or misdemeanor, he or she might not want that same judge to try a first degree intentional homicide case. The defendant has the right to substitute a judge without providing a reason. State v. Harrison, 2015 WI 5, ¶39, 360 Wis. 2d 246, 858 N.W. 2d 372. The statute seems to contemplate that the defendant have that right on each "trial of the action" that comes in, not that the defendant gets one substitution for all pending cases in that county.

The remedy for the judge's refusal to honor the substitution should be a new trial. State v. Harrison, 2015 WI 5, ¶76, 360 Wis. 2d 246, 858 N.W. 2d 372. Mr. Turney also went to trial before Judge Dallet, giving him the right to challenge this issue on appeal. State v. Damaske, 212 Wis. 2d 169, 186-187, 567 N.W. 2d 905 (Ct. App. 1997).

The final issue the court of appeals should consider is: what is the default position when substitution issues come up and the law is unclear? Should the judge err on the side of granting the substitution or on denying it?

Given that the remedy may be a new trial, the judge should err on the side of granting the request. In Milwaukee County, in particular, there are many courts and spin-off possibilities; there are courts handling only certain types of cases and August rotations. Countering that system are defendants with several charges of various types. Why hang on to a case when some other judge could try it and eliminate the problem?

In this case, Judge Watts should have been able to try the joined cases, even if it meant two additional witnesses for the trial set January 6, 2014 in his court. (46(52): 4; (48(51)/50(52): 74-128). Whether Judge Dallet ever called Judge Watts, as she indicated she might, is not known, and no record of Judge Watts' position exists. (44(51)/47(52): 19). In the end, this procedure was unnecessarily and unreasonably rigid. Mr. Turney tried to substitute after his Judge Watts case formally moved, by way of joinder, to Judge Dallet's court, and while Judge Watts still had his calendar open to try the armed robbery and assorted charges involved with Lucy's car. Furthermore, getting tangled up in

technical knots, such as whether plea on the new counts defeated the substitution, makes a simple statute inaccessible. This is why the court of appeals should provide some guidance on the default position when trial courts face uncertainty about the propriety of a substitution request.

III. Admitting post-arrest silence at trial violated Mr. Turney's rights.

With the exceptions of trial mistakes, no witness nor attorney puts in evidence unless it is seen as assisting that party's position. Following his arrest by Detective Sullivan on September 24, 2013, a few blocks away from where Lucy's car was parked, Mr. Turney refused to give his address and did not answer some other unspecified questions. (49(51)/52(52): 39-44). Not answering questions asked by police looks evasive. Evasions look like guilt. No other reason exists to introduce this evidence. Thus the trial court's decision that the state did not mean to impugn Mr. Turney's choice to remain silent is wrong. (40: 5). Detective Sullivan was the state's

witness. (49(51)/52(52): 39). Attorneys should be aware of what their witnesses are likely to say.

At trial, the prosecutor asked whether Joe Turney lived at the address where he was stopped, which was 2151 North 35th Street, near Lucy's car. (49(51)/52(52): 44). While the trial court in its post-conviction decision quickly forgives the state for stepping unwittingly into the landmine of Detective Sullivan's response to the seemingly innocuous "yes" or "no" question, this is not an acceptable analysis. (40: 5). The court of appeals should require more from prosecutors' trial preparation than this.

At any rate, the jury knew that Mr. Turney did not answer questions regarding his address, and he did not answer some unspecified other questions:

> When I stopped, when myself and the officers stopped him, we already knew his name. So as a procedural thing, we ask people their name and address, he wouldn't give me his address.
>
> Q Okay.

> A So we had no idea where he actually listed his address was. He wouldn't answer any questions I asked him.

(49(51)/52(52): 44). After hearing "okay" from the prosecutor, Detective Sullivan felt encouraged to continue reporting on Mr. Turney's silence.

Mr. Turney was arrested due to the warrant for a domestic violence incident. (49(51)/52(52): 46). Later Detective Sullivan established that Mr. Turney was under arrest at the time of the questioning. Defense counsel asked whether Mr. Turney told him how he obtained the vehicle registration, drawing yet another comment on Mr. Turney's silence:

> No, I didn't. Not at that time he was not asked, he was under arrest. Questions I asked him—I knew his name—his address, and he didn't answer any of those questions.

(49(51)/52(52): 48). Twice now at trial, the detective determinedly put before the jury that Mr. Turney simply

was hiding something about his address and possibly other things from police.

Crimes were committed at residences associated with Mr. Turney. He lived with or was associated with Tillie's address, where a shot had been fired into the wall. (48(51)/50(52): 74, 79, 84, 108-109, 113). Lucy was drawn to an address on Garfield, where she found her car, encountering a violent confrontation allegedly with Mr. Turney and his friends, with devastating consequences to her and those with her. (51(52): 36-37, 12). Admissions to living at either address connect him to recent crime scenes. Silence suggests guilty knowledge of those violent crimes.

Thus, sometimes there are no "routine" or "innocent questions." Residences can be crime sites or houses of suspicious activity. Admissions to living at or being associated with such places can be incriminating.

Mr. Turney did not testify at trial. (51(51)/53(52); 29-31).

Due to no objection, Mr. Turney requested a hearing on whether counsel was ineffective. (30(51)).

That meant Mr. Turney had to prove that trial counsel's performance was deficient and that it prejudiced the defense. State v. Mayo. 2007 WI 78, ¶33, 301 Wis. 2d 642, 734 N.W. 2d 115, citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80- L. Ed. 2d 674 (1984).

It is a violation for the prosecutor to use at trial a nontestifying defendant's right to remain silent after an arrest. State v. Mayo. 2007 WI 78, ¶46, 301 Wis. 2d 642, 734 N.W. 2d 115. Mr. Turney retained his right to remain silent under the Fifth Amendment to the U.S. Constitution and under Article I, Section 8 of the Wisconsin Constitution. State v. Mayo. 2007 WI 78, ¶46, 301 Wis. 2d 642, 734 N.W. 2d 115.

In State v. Mayo. 2007 WI 78, ¶46, 301 Wis. 2d 642, 734 N.W. 2d 115, the Court stated:

> We have held that it is a 'violation of the right to remain silent for the State to present testimony in its case-in-chief on the defendant's election to remain silent during a custodial investigation, after arrest.' *Brecht*, 143 Wis. 2d at 310-11, 421 N.W. 2d 96 (citation omitted). When a defendant testifies, 'references by the State during cross

> examination, on redirect and in closing arguments to defendant's pre-*Miranda* silence do not violate the defendant's right to remain silent."

When deciding Mr. Turney's case, the court tried to make distinctions, but the rule *Mayo* cites is not fact oriented but a rule of law. (40: 4)). If the defendant does not testify, the State does not get to put in evidence that the defendant remained silent following his arrest. If the defendant does testify, he waives that privilege and can be asked about why he would not talk to police.

The trial court further stated that State v. Brecht, 143 Wis. 2d 297, 421 N.W. 2d 96 (1988); (aff'd on other grounds in Brecht v Abrahamson, 507 U.S. 619 (1993)), does not apply. (40: 4, fn 2). The Wisconsin Supreme Court, however, cites *Brecht* in *Mayo* for its proposition that it is a violation of the right to remain silent for the State to present testimony of the defendant's post-arrest silence in its case-in-chief. State v. Mayo. 2007 WI 78, ¶46, 301 Wis. 2d 642, 734 N.W. 2d 115. In State v. Brecht, 143 Wis. 2d 297, 310-311, 421 N.W. 2d 96

(1988); (aff'd on other grounds in Brecht v Abrahamson, 507 U.S. 619 (1993), the Court stated:

> Consistent with precedent, this court has held that it is a violation of the right to remain silent for the State to present testimony in its case-in-chief on the defendant's election to remain silent during a custodial investigation, after arrest … [cites omitted] …we acknowledged that the right to silence attaches at the time of a defendant's arrest, even though no police interrogation or questioning occurs … we held that it was constitutional error for the State to elicit testimony during its case-in-chief on the defendant's silence upon arrest. Such testimony included statements from an arresting officer that the defendant 'just put his wrists out … for the handcuffs and never said a word.'

The trial court also found that State v. Wedgeworth, 100 Wis. 2d 514, 302 N.W. 2d 810 (1981) governs the case. (40: 4-5). It does not because in State v. Wedgeworth, 100 Wis. 2d at 523-524, 302 N.W. at ___, the defendant, accompanied by his attorney, was advised of his rights, and began answering questions but stopped in mid-stream, giving his address as "4220."

The court allowed the detective to complete the story by allowing him to testify that the defendant had said "4220 and stopped." State v. Wedgeworth, 100 Wis. 2d at 527, 302 N.W. at ___. Wedgeworth had let the cat out of the bag, by saying "4220" and could not put in back in. He had given half an answer. This case does not stand for the proposition that the arrested defendant's failure to provide his address is admissible.

Admitting this testimony is error. The state elicited it, doing nothing to stop it, and defense counsel likely missed the objection. Whether police did anything wrong asking questions following the arrest is not the issue—the evidence simply does not get used at trial.

Mr. Turney must show that counsel's error was so serious as to deprive him of a fair trial, a trial whose result is reliable and that there is a reasonable probability that the result would have been different. State v. Mayo. 2007 WI 78, ¶64, 301 Wis. 2d 642, 734 N.W. 2d 115. When stopped by police, Mr. Turney's refusal to answer unspecified questions seemed evasive and guilty, directing attention away from more favorable evidence

for him. The jury may have based the verdict on improperly admitted evidence that demonstrated Mr. Turney's attitude.

Mr. Turney's brother testified that Mr. Turney had worked on a house on 19th and Vine with him on August 22, 2013. (51(51)/53(52): 34). The brothers had worked on it for ten or twelve hours that day, starting at 10 a.m. and ending around 8:45 p.m., and Tarrance could hear or see his brother, Joe, working on the building. (51(51)/53(52): 35-40). He believed that from 4 to 5 in the afternoon, his brother, Joe, was working outside, finishing some painting. (51(51)/53(52): 39). While Mr. Jenkins ran some errands, he never saw his brother leave. (51(51)/53(52): 40).

Tarrance Jenkins did not notice any facts that would lead him to believe that Joe Turney came armed with a gun to the job site, found it necessary to sneak off to Tillie's house, involve himself in a domestic dispute, somehow arrange for another person to collect him in the grey primed car, and come back calmly before Tarrance even noticed him missing. (51(51)/53(52): 33-43). In

addition, another younger brother, Prince Turney, was assisting as well, and Mr. Jenkins made no report that Prince came to tell him Joe had taken off. (51(51)/53(52): 49). Making such a report would be what a younger brother might do, if he thought Joe had abandoned the job site.

Tillie, the girlfriend, never testified at all. (48(51)/50(52)). Lillie stated that the sisters came home around 5:30, and Mr. Turney was already there. (48(51)/50(52): 95). This would suggest he improbably spent a long time away from that job site without Tarrance ever noticing. Lillie said she saw a black gun, but Officer Zimmerman recalled that Lillie had said the gun was silver. (48(51)/50(52): 102, 108, 125). Officer Zimmerman merely responded to the call and saw no one running away from the scene and certainly did not find Joe Turney there. (48(51)/50(52): 108-119). He did not see who fired the shot.

Lucy and Joe Turney seemed to be in a dispute as to who had the right to possess her car. (51/52: 23). For whatever reason, Mr. Turney seemed to think the car was

his and was found carrying Lucy's car registration when he was arrested. (49(51/52(52): 41). Lucy admitted that she did not honor a subpoena and was testifying because the state required her to do so, even though it was her car she said was taken, her brother who was endangered by the shots, her locksmith who was shot at and who might never again respond to her call, and she herself who was calling frantically for help. (51(52): 41, 11).

Lucy showed up at the bizarre hour of ten at night to collect the car, expecting the Milwaukee Police Department to stand guard while a locksmith did his work. (51(52): 10-19). What brought on this urgency to reclaim the car was never really explained, but Lucy was upset by earlier reports from Stanley's mother, who had said some girl was driving the car. (51(52): 45) She indicated that Joe Turney was furious at her arrival and seemed mistrustful of Mark and Isaac. (51(52): 23, 27). It was, after all, late at night, and a car Mr. Turney had openly driven since Stanley's arrest was suddenly being reclaimed. (51(52): 44). Four or five men came out, at least three with guns. (51(52): 25, 46). While Lucy saw

Mr. Turney raise his gun, she said at trial, "I didn't see where the gunfire was coming from … I heard it, boom." (51(52): 37, 62). Lucy heard Mr. Turney tell a young male to drive her car away. (51(52): 37).

But for the presence and firing of the guns, what transpired between Lucy and Mr. Turney was a dispute over the right to possess the car, with Lucy having title. The nine fired cartridge cases came from only one gun, but Lucy saw as many as three guns. (51(52): 25, 46; 49(51)/52(52): 60). The gun was not the same as the one fired at Tillie's house, and the best the government could do was note they were from the same caliber gun, not particularly helpful when several guns were in the mix at the scene involving Lucy's car. (49(51)/52(52): 61). Joe Turney was not charged as party to a crime for the shooting counts, which meant the jury had to find that he had fired those shots, as opposed to Savage or any other man out there. (53(51)/55(52): 4-5).

There is a reasonable probability of a different result, as there were enough questions raised by the

evidence presented that a mistake may have caused the verdicts to go against Mr. Turney.

Sufficiency of a motion is a matter of law which the court reviews de novo. State v Balliette, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W. 2d 334. Mr. Turney has demonstrated that allowing in evidence of his post-arrest silence violates existing law and that it was prejudicial, as it made him seem evasive and guilty, tipping the scales towards conviction.

CONCLUSION:

Mr. Turney seeks a new trial or two for the reasons stated in this brief and/or seeks an evidentiary hearing his ineffective assistance of counsel motion.

Dated at Milwaukee, Wisconsin, this 9th day of November, 2015.

Respectfully submitted by:

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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stats. Secs. 809.19(8)(b) and (c) for a brief with a proportional serif font. The brief has 9772 words.

/s/ _____

Dianne M. Erickson

ELECTRONIC CERTIFICATION

I certify that the text of the electronic copy of this brief is the same as the paper copy.

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Dianne M. Erickson