STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP1799-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ANTHONY R. PICO,

Defendant-Respondent.

ON APPEAL FROM AN ORDER GRANTING A POSTCONVICTION MOTION FOR A NEW TRIAL, ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE MICHAEL O. BOHREN, PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

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Anthony Pico's "throw everything against the wall and see if something sticks" approach may have worked with the postconviction court, but it cannot work here. Pico presents nothing to allow this Court to conclude that the circuit court reasonably applied *Strickland* when it deemed Attorney Jonathan LaVoy—who gave reasoned strategic explanations for every decision he made in this case (96:8-96)—ineffective. This Court must reverse.

ARGUMENT

I. LaVoy acted reasonably when he declined to seek records to potentially support a defense that Pico touched D.T. in 2012 because he suffered a brain injury in 1992 that never manifested in symptoms before or since.

The postconviction court misapplied *Strickland* when it concluded that LaVoy was deficient (State Br. 19-22). It failed to defer to LaVoy's reasonable inquiry into Pico's injury, his numerous discussions with Pico and his family, and the circumstances of the case. *Strickland v. Washington*, 466 U.S. 668, 689 (1984) ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]"). The court improperly relied on Waring Fincke's "*Strickland* expert" testimony that he would have sought the medical records based on Pico's eye patch and double vision. (98:13; A-Ap. 113.) As discussed in Part V *infra*, Fincke's testimony as to what he would have done was irrelevant and could not provide a basis for the court's conclusion that LaVoy was deficient.[1]

[1] Pico uses Fincke's testimony to support his ineffective assistance arguments. (Pico Br. 33-34, 44, 53, 59-60, 62, 64.) The State responds to those arguments by maintaining that all of Fincke's

(continued on next page)

Moreover, Pico failed to demonstrate prejudice based on LaVoy's not obtaining the medical records. (State Br. 23-28.) He did not establish that an NGI defense was available; there is no evidence that a doctor examined and diagnosed Pico with a mental disorder, or that Pico could not appreciate the wrongfulness of his conduct. Nor did Pico establish that a different result was substantially likely if the jury had heard an expert testify that Pico's injury could have caused Pico to believe that his touching D.T.'s leg was acceptable. Pico clearly understood that his touching D.T. in any manner was inappropriate.

A. Pico fails to identify support for the court's deficiency holding in light of Lavoy's explanation of his reasonable investigation and strategic decisions.

Pico suggests that LaVoy was aware that Pico had a past injury that could be pertinent, but just did not bother to educate himself or follow up. (Pico Br. 22-23, 28-30, 35-36.) But the clues that Pico believes LaVoy should have followed did not exist.

Pico's family's remark to LaVoy that Pico "ha[d] a different kind of sense of humor than most people" (Pico Br. 29) is not one that would reasonably compel anyone to suspect that Pico had brain damage. Further, Pico's family related this comment to LaVoy in the context of their telling him how great Pico was. No one told LaVoy that Pico was impulsive, told long boring stories, or showed any other cognitive effects from his brain injury. (96:11-12, 17.)

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testimony is irrelevant for the reasons stated in its briefs. *See* part V *infra*; State Br. 16-17.

Pico thinks that his confused responses during the police interview should have alerted LaVoy that Pico's brain injury was the cause. (Pico Br. 31). But LaVoy considered that possibility and talked to Pico "quite a bit" about it, and Pico offered a different explanation: he "always told [LaVoy] that when the police initially arrived at his house, he was very confused as to why they were there" and frightened that there was an emergency involving his family. (96:15.) LaVoy reasonably accepted Pico's explanation and inferred that Pico remained nervous—as anyone would—when Rich told him about the serious allegations.

Nor is there evidence that LaVoy should have seen signs of frontal lobe syndrome himself. Pico relies on Michelle Pico's testimony that Pico is a person who is boisterous, happy, and fun; who shuts down easily when frustrated; who tells long, boring stories; and who could be impulsive, such as when he once moved a woman's running car a few feet to fit his van in a spot behind hers. (Pico Br. 34-35; 96:202-03.) But those characteristics could easily be understood to be the set of quirks that makes Pico a unique human being. Even if they could have led LaVoy to suspect that they were symptoms of brain damage, Michelle never claimed that she told LaVoy about these quirks. And Pico offers nothing to counter LaVoy's testimony that the Picos never raised those concerns with him. (96:17.)

To claim, as Pico does, that LaVoy unilaterally made decisions without consulting Pico and his family (Pico Br. 30-32) is nonsense. Pico, who had the burden of proof at the postconviction hearing, never asked LaVoy or Michelle if LaVoy discussed the possibility of NGI. Even if LaVoy did not discuss an NGI defense, that does not make him deficient. LaVoy had no reason to believe that NGI would be an option, given Pico's consistent admissions that he knew touching D.T. was wrong.

Further, LaVoy thoroughly consulted with Pico and his family. Perhaps recognizing that there is no evidence to the contrary, Pico builds a straw-man argument that "[t]he State somehow faults Pico for not fully explaining to LaVoy how the brain injury could help the case" and that it is absurdly requiring "a person with brain damage sufficient to rise to the level of NGI to raise the issue with his attorney, and put no onus on the attorney." (Pico Br. 31-32.)

What the State actually argued (State Br. 18, 21-22)—is that *Strickland* considers the reasonableness of counsel's decisions in light of the information provided by the defendant: "[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." 466 U.S. at 691. If Pico had symptoms that he or his family suspected could have prompted his actions with D.T., the Picos would have said so in one of their many discussions with LaVoy. They never did.

Finally, *State v. Felton*, 110 Wis. 2d 485, 329 N.W.2d 161 (1983), does not assist Pico. (Pico Br. 36-37.) There, counsel was deemed ineffective for making a "perfunctory at best" investigation before submitting and withdrawing what was a viable NGI defense, all without consulting Felton. *Id.* at 515-16. Here, LaVoy's investigation was thorough, there is no evidence that he failed to consult with Pico, and, unlike the defendant in *Felton*, Pico failed to demonstrate that an NGI defense was viable.

B. Pico failed to demonstrate prejudice from LaVoy's failure to seek the records.

For Pico to have shown prejudice based on the lost potential of an NGI defense, he needed to show a substantial likelihood of a different result. *Harrington v. Richter*, 562

U.S. 86, 111-12 (2011). He failed to do that, and presents no persuasive argument otherwise in his response.

There is no substantial likelihood that a reasonable factfinder would have found a viable NGI defense. For the reasons in its brief (State's Br. 23-25), Pico's 1992 brain injury, without more, does not necessarily qualify as a mental disease or defect that "substantially affects mental or emotional processes" under Wis. Stat. § 971.15. *See* Wis. JI—Criminal 605.

Pico mischaracterizes Dr. Schoenecker as largely agreeing with Dr. Capote. (Pico Br. 26-27.) But Schoenecker's agreement that the medical records identified a brain injury in Pico is not the same as his agreeing that Pico could be diagnosed with frontal lobe syndrome or a similar disorder. Schoenecker saw nothing in Pico's records or life supporting a diagnosis of a brain disorder. Further, when pressed, Capote could not identify any examples of impulsive behavior in Pico supporting his diagnosis other than "some changes going from job-to-job, moving back to Hawaii, sort of going around a bit"; on that point, Capote agreed that that behavior could have other, non-medical explanations. (97:29-30.)

Even assuming Pico has a mental disease or defect as contemplated under Wis. Stat. § 971.15(1), Pico never explained how a reasonable jury in the NGI portion of a trial could find that the disease or defect caused him to "lack[] substantial capacity either to appreciate the wrongfulness of his . . . conduct or conform his . . . conduct to the requirements of law." Pico does not explain how a reasonable jury could overlook his many acknowledgements that he

knew that touching D.T. was wrong.[2] Nor does Pico explain how, despite his unblemished history of conforming his conduct to the requirements of the law, a reasonable jury could find that a latent brain disorder caused him to not be able to conform his conduct in a single instance with D.T. in 2012.

Instead, Pico asserts that he established prejudice because the competing experts could have confused and distracted the jury into reaching a different result: "When a trial comes down to a battle of experts, there if oftentimes reasonable doubt," Pico writes. (Pico Br. 28.) Even if that was a sensible assertion (and it's not), it is a far cry from establishing a substantial likelihood of a different result. *See Harrington,* 562 U.S. at 105.

Pico also did not establish that an expert could have persuasively explained why Pico made certain concessions during the police interview or why he touched D.T.'s leg. Moreover, Pico does not explain how those explanations by an expert would have been either consistent with—or more persuasive than—evidence that Pico understood that touching D.T.'s leg was inappropriate, and that Pico did not confess, despite pressure, to touching D.T.'s vagina. *See* State's Br. at 26-27.

Instead, as to the police interview, Pico makes conclusory assertions that the jury relied on Pico's "inculpatory" interview statements, i.e., when he agreed that he felt bad after he left the classroom, and agreed that he "felt sick to his stomach." (Pico Br. 40-45.) Pico made both statements to Rich in the context of lamenting that he

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[2] Pico likewise ignores Michelle's testimony that Pico "certainly" understood that his touching D.T.'s vagina was wrong (96:213), and LaVoy's remarks that Pico consistently told him that he knew touching D.T. at all was wrong (96:39, 70).

should not have made D.T. uncomfortable by touching her leg. There is nothing to indicate that the jury recontextualized, as Pico does, those statements when it found Pico guilty. Nor does Pico acknowledge that an expert's attempts to explain away those remarks could have harmed Pico by causing the jury to pay more attention to—and question the benign nature of—those remarks.

Finally, Pico attempts to argue that he was prejudiced because the jury needed an explanation for why Pico touched D.T.'s leg. (Pico Br. 39.) But instead of explaining why it was substantially likely that the jury would have reached a different result if it had heard such expert testimony, Pico instead constructs a scenario where LaVoy would have done *everything* differently, including filing a motion to suppress the police interview and introducing the leg-massage evidence, in addition to presenting expert testimony. (Pico Br. 39.) Yet Pico offers nothing to support a conclusion that LaVoy could have, or should have, done any of those things. Given that, Pico's prejudice argument is simply wishful thinking, not a persuasive legal argument.

In all, the circuit court second-guessed Attorney LaVoy's reasonable decision not to further investigate Pico's brain injury and medical records. Pico failed to show both deficient performance and prejudice.

II. LaVoy was not ineffective for not challenging non-existent deficiencies in Sarah Flayter's CARE interview and for not further challenging her correct testimony regarding suggestibility.

Pico offers no comprehensible response to the State's position that the postconviction court erred in concluding that LaVoy was ineffective based on alleged errors involving Flayter. (State Br. 28-32.) Flayter followed the Step-Wise protocol. The video speaks for itself: Flayter asked non-leading questions to get D.T. to clarify that by "down there,"

she meant that Pico reached into her pants, under her underwear, and touched where she "went potty." (83:Exh. 2 at 10:07:01-10:08:19). LaVoy, who was familiar with the protocol, reasonably concluded that he did not have grounds to challenge the interview. (96:26.) LaVoy also clarified Flayter's testimony regarding suggestibility and brought out that it was an issue for all children (90:227.) Those decisions were reasonable and not deficient.

And Pico was not prejudiced. Pico highlights Yuille's testimony regarding "multiple hypotheses testing" and his initial remarks that Flayter did not clarify D.T.'s "down there" remark. (Pico Br. 47-51). He complains that LaVoy could not have known that D.T. would be so suggestible on the stand and should have had an expert at the ready in case she wasn't. (Pico Br. 52.)

But Pico never explains how it was substantially likely that the jury could reach a different result after hearing Yuille's select criticisms of an interview that he deemed Flayter to conduct well. *See* 96:146, 151 (stating that Flayter conducted the interview well, that she followed the Step-Wise protocol, that she ultimately had D.T. to clarify what she meant by "down there," that she asked no leading questions, and that at no point was a suggestibility check needed).

There was no prejudice because any testimony from Yuille about D.T.'s suggestibility was weak compared to LaVoy's cross-examination demonstrating D.T.'s suggestibility. Likewise, there was no prejudice based on how Yuille could have potentially countered Flayter's remark that suggestibility often lessens with age. Yuille agreed that suggestibility decreased with age and that preschoolers generally are more suggestible than older children. (96:151.) Flayter made clear that suggestibility was an issue for all ages. (96:186.) There's no reason LaVoy

should have had Yuille on deck to testify in case Flayter said something controversial at trial. And again, the jury saw firsthand that D.T. was suggestible.

Finally, there was no prejudice based on LaVoy's failure to use Yuille to discuss the increase in disclosures after children learn about good and bad touching. (Pico Br. 49, 52-53.) Pico's assertion that Yuille "would have pointed out that false allegations of sexual assault are common after the teaching of good touch/bad touch in school" (Pico Br. 53) does not reflect Yuille's testimony. Yuille testified that *all* reporting, true and false, increases after those lessons. (96:133.) He never said that false reports increase disproportionately compared to true reports after such lessons, or that false reports are normally rare but become common after such lessons.[3]

Thus, had LaVoy presented Yuille for any of those purposes, the State would have easily pointed out that Flayter ensured that D.T. understood the importance of telling the truth, that she received D.T.'s promise to tell the truth, and that she confirmed with D.T. at the interview's end that everything she said was true. (83:Exh. 2:09:57:45-09:59:27, 10:16:28-32.). It would have also pointed out the obvious: there is always a risk of false disclosures and that that's the point of having police investigations, CARE interviews, and trials.

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[3] The circuit court's finding that Yuille testified that after such lessons "the incidence of false reporting of sexual assault incidents does increase" (98:18-19) is technically true (i.e., the gross number of false reports increases, as does the number of true reports). But the court erred to the extent it used that finding to conclude that LaVoy was ineffective, given that Pico presented no evidence that false reports increase disproportionately (or are simply more likely) after such lessons.

III. LaVoy was not ineffective for failing to challenge Detective Rich's testimony or statement in his interview.

Pico offers nothing to support the court's conclusion that LaVoy was ineffective based on failures to challenge Rich's testimony and interview statements.

LaVoy was not ineffective for not challenging Rich's remark during trial that Flayter is "among the best in the state." (State Br. 32-34.) Pico offers the absurd notion that LaVoy should have filed a generic motion in limine to bar any witnesses from commenting on credibility (Pico Br. 54). He then cites several cases and declares, without analysis, that Rich's remark violated *Haseltine*, and claims that the remark was prejudicial, simply because the jury heard it. (Pico Br. 55-56.) Pico's arguments are conclusory and undeveloped, and this Court need not address them. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

And LaVoy could not have successfully challenged Rich's statement to Pico during the interview that he thought D.T. was credible. That remark is not challengeable under *State v. Miller*, 2012 WI App 68, ¶ 11, 341 Wis. 2d 737, 816 N.W.2d 331. (State Br. 34-35.) Pico fails to distinguish *Miller* or explain how LaVoy could have done so.[4]

[4] Pico summarily deems essentially any argument, case, or proposition that the State uses on appeal that did not appear in the State's brief below—and often arguments that did—forfeited. *See, e.g.*, Pico's Br. at 16, 18, 28, 32, 38, 60. The State disagrees that any of its arguments on appeal are new, let alone forfeited such that they "would 'blindside' the circuit court." *In re Guardianship of Willa L.*, 2011 WI App 160, ¶ 25, 338 Wis. 2d 114, 808 N.W.2d 155. In any event, nothing prevents an appellate court from addressing new arguments. *Id.* ¶ 24.

LaVoy was not ineffective for failing to challenge under *Daubert* Rich's telling Pico during the interview that he thought he was lying. (State Br. 35.) Pico offers no analysis under *Daubert* or otherwise sensible response to the State's brief.

And LaVoy was not ineffective for failing to challenge under *Daubert* Rich's testimony that he "saw deception" in Pico's interview. (State Br. 35-36.) Pico abandons *Daubert* on this point and suggests that LaVoy should have objected under *Haseltine*. *See* Pico Br. 58-61 (discussing *State v. Echols*, 2013 WI App 58, 348 Wis. 2d 81, 831 N.W.2d 768). But the circuit court based its decision on Pico's *Daubert* argument; Pico did not allege a *Haseltine* violation (70:20-22; 98:20-21.) Moreover, *Haseltine* does not bar a detective's testimony that he believed the defendant was lying during an interview when explaining, as Rich did here, why he conducted an interview as he did. *See State v. Snider*, 2003 WI App 172, ¶ 27, 266 Wis. 2d 830, 668 N.W.2d 784 (so holding).

IV. LaVoy was not ineffective for introducing the double-edged swords of the good touch/bad touch curriculum or leg massage evidence.

LaVoy was not ineffective for considering but ultimately deciding against introducing evidence that had potential to harm Pico, namely D.T.'s good touch/bad touch lesson and evidence that Pico routinely massaged his autistic daughter's leg to calm her. (State Br. 61-65.) Pico offers nothing to persuade otherwise. (Pico Br. 61-65.)

Pico does not address his failed responsibility to identify what LaVoy would have discovered in the good touch/bad touch materials. That alone dooms his claim. *State v. Leighton*, 2000 WI App 156, ¶ 38, 237 Wis. 2d 709, 616 N.W.2d 126. He also declines to address LaVoy's testimony

that he considered the issue and ultimately got agreement from Pico's family on the strategy. Rather, Pico argues that the failure was prejudicial because it was more likely that D.T. falsely reported after she had the lesson. (Pico Br. 62.) As discussed in Part II *supra*, there is no evidence that the ratio of false-to-true reports increases disproportionately after such lessons.

And in the absence of support for his claim related to the leg-massage evidence, Pico pretends that the Picos demanded that LaVoy present the leg massage evidence and that Pico told LaVoy that the reason he was rubbing D.T.'s leg was because he did the same thing to his daughter. (Pico Br. 63-64.) Those assertions are baseless; moreover, Pico ignores LaVoy's reasoning that it was a bad idea to focus the jury on Pico's massaging his daughter's leg when the circumstances and context of his touching D.T.'s leg were so dissimilar.

V. The circuit court improperly admitted and relied on *Strickland* expert testimony; that error was not harmless.

The State neither forfeited its objections to Fincke's testimony nor invited the court's error in allowing him to testify. (Pico Br. 15-16, 18.) In its letter objection to Fincke's expert testimony, the State expressly argued that it was inadmissible under *McDowell*. (61:1-2.) That letter preserved the State's objection. The State had no obligation to file another general objection to Fincke's testifying or the scope of the testimony. Contrary to Pico's assertions (Pico Br. 17), the State had no obligation not to cross-examine Fincke; nor did it "attempt[] to use" any of Fincke's testimony to its benefit.

Although the State did not specifically raise a *Daubert* objection, it generally objected that the expert testimony was

inadmissible. *Daubert* and Wis. Stat. § 907.02 (the earlier version of which the *McDowell* court cited in deeming the *Strickland* expert testimony there improper) provide the standards for a court to exercise its discretion in allowing expert testimony and determine that it is relevant. Again, the court's circling a sentence on Pico's response that Fincke would only testify to how LaVoy's actions measured up to a "reasonable attorney" standard was not a relevancy determination and hence, not a sound exercise of discretion.

Pico claims that Fincke's testimony was limited to what steps a "reasonable attorney versed in criminal law should take and whether LaVoy took those steps in accordance with ABA standards." (Pico Br. 17.) But Fincke never addressed the ABA standards or his expertise on them. Although ABA standards may assist courts making deficiency determinations, *State v. Harper*, 57 Wis. 2d 543, 558, 205 N.W.2d 1 (1973) (Hansen, C., concurring), an expert is not needed to help the court understand and apply those standards.

Further, Pico's examples of other cases in which an "expert" attorney testified do not apply. (Pico Br. 20.) The legal malpractice cases are inapplicable because a jury must identify the standard of care and find whether the defendant deviated from it. Thus, expert testimony generally is required to establish that standard in legal malpractice matters beyond general lay knowledge and experience. *See Olfe v. Gordon*, 93 Wis. 2d 173, 181, 286 N.W.2d 573 (1980). In contrast, ineffective assistance claims are tried to a court, which itself is an expert on standard of care.

Further, in the ineffective assistance cases that Pico cites, the courts simply noted that the respective lower courts heard *Strickland* expert testimony. (Pico Br. 20.) But none of those courts commented on the propriety of introducing that evidence or relied on that evidence in their

Strickland analyses. In fact, those courts generally discouraged the use of *Strickland* expert testimony and downplayed its relevance. *See, e.g.*, *Earp v. Cullen*, 623 F.3d 1065, 1075 (9th Cir. 2010) ("Expert testimony is not necessary to determine claims of ineffective assistance of counsel." (citation omitted)); *Weddell v. Weber*, 604 N.W.2d 274, 282-83 (S.D. 2000) (stating that to prove ineffectiveness, "'the defendant must show more than that . . . another attorney would have prepared and tried the case in a different manner'" (quoted source omitted)).

And in *Earp*, the *Strickland* expert offered testimony at a hearing in 2002 that was limited to applicable standards of attorney competence in defending capital murder charges in 1991. 623 F.3d at 1073. The postconviction court here was not presented with a situation involving specialized criminal defense knowledge (such as in a capital case) or where the representation occurred a decade earlier when the standards for competence may have been different.

Finally, Pico failed to establish that the court's error in admitting Fincke's testimony was not harmless. "For the error to be deemed harmless, the party that benefited from the error . . . must prove 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *State v. Hunt*, 2014 WI 102, ¶ 26, 360 Wis. 2d 576, 851 N.W.2d 434 (quoted source omitted). Pico claims that the circuit court "simply agreed with many of Fincke's statements about what a reasonable attorney would do" but made its own conclusions. (Pico Br. 21.) But he fails to address the portions of the circuit court's decision where it expressly based its conclusions that LaVoy was deficient on Fincke's testimony, specifically in ground one (98:13 (stating that Fincke's opinion that Pico's eye patch and double vision *"in and of itself, . . . called for the trial attorney to conduct*

further investigation.")) and ground three (98:19-20 (invoking Fincke's testimony that LaVoy could have filed motions without independently assessing whether those motions had merit)). To the court, LaVoy's failure to investigate Pico's head injury—a failure it seemingly deemed deficient based on Fincke's testimony—was the primary basis for its decision. (98:28-29.) The error was not harmless.

VI. Pico's final three claims are not part of this appeal.

Finally, this Court may ignore Pico's challenges to the circuit court's pretrial denial of his motion to present character evidence and its denial of his ineffective assistance claims at sentencing (Pico Br. 66-77.)

Pico is the respondent in this appeal. Matters reviewable on appeal include "all prior nonfinal judgments, orders and rulings *adverse to the appellant or favorable to the respondent* made in the action or proceeding not previously appealed and ruled upon." Wis. Stat. (Rule) § 809.10(4) (emphasis added). Further, "[a] respondent who seeks a modification of the judgment or order appealed from or of another judgment or order entered in the same action or proceeding shall file a notice of cross-appeal within . . . 30 days after the filing of a notice of appeal[.]" Wis. Stat. (Rule) § 809.10(2)(b).

Pico is attempting, contrary to the rules, to obtain modifications of orders adverse to him and favorable to the State without filing a cross-appeal. The State will not address these claims further.

CONCLUSION

Attorney LaVoy provided reasoned and reasonable explanations for every decision he made in this case. (96:8-96.) The circuit court's second-guessing of those strategic decisions violated the *Strickland* standard.

For the reasons in this brief and the State's opening brief, this Court should reverse the decision and order of the circuit court granting Pico's motion for a new trial, and remand with instructions to reinstate his judgment of conviction.

Dated this 12th day of September, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this reply brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font, and with this Court's order dated September 9, 2016, permitting appellant to file a reply brief not exceeding 4500 words. The length of this brief is 4341 words.

_____
SARAH L. BURGUNDY
Assistant Attorney General

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

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 12th day of September, 2016.

_____
SARAH L. BURUGNDY
Assistant Attorney General