STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT II

Appeal No. 2015AP2162-CR
Circuit Court Case NO. 12CF552

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARCOS ROSAS VILLEGAS,

Defendant-Appellant.

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ON APPEAL FROM ORDERS DENYING
POSTCONVICTION MOTIONS AND
FROM JUDGMENT OF CONVICTION
ENTERED IN WALWORTH COUNTY CIRCUIT COURT,
THE HON.DAVID M. REDDY PRESIDING, AND FROM
ORDER WAIVING JUVENILE JURISDICTION IN
WALWORTH COUNTY CASE NO 2012JV110

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# REPLY BRIEF
# OF DEFENDANT-APPELLANT

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## ARGUMENT I
## INEFFECTIVENESS DURING WAIVER PROCEEDINGS

### A. Reasonable counsel would investigate, discover, and present *any information potentially helpful* in preventing waiver.

The State asserts that counsel "could hardly have tried any harder to keep his client in juvenile court" (State's Brief 8.), and sees no "deficient" failure to investigate, discover, and present to the court Marcos' mental health/substance abuse diagnoses, etc., as weighing against waiver. (State's Brief 2-4.) These claims fail.

*Reasonable* counsel would investigate, discover, and present *any and all information* potentially helpful in preventing waiver.[1] Inadvertently not doing so made waiver more likely, thus was not reasonable or strategic but "deficient." *See State v. Thiel*, 2003 WI 111, PP 40, 44, 665 N.W.2d 305 (Wis. 2003).[2]

Marcos had *never* been evaluated and had no record of mental health diagnoses or history. (42:3; 65:33, 35.) Nothing justified counsel's acceptance of this data gap, when the record contained indicia indicating that Marcos had had substance abuse/mental health issues. Id.(without reasons to believe investigation would be fruitless, not investigating is neither reasonable nor strategic, but deficient). [3]

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[1] Both Marcos and counsel consistently testified in postconviction court that the primary goal was to avoid waiver and stay in juvenile court.

[2] S*ee also Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (counsel ineffective for failing to investigate when some evidence in the file suggested a defense existed and client knew much of such evidence, but did not volunteer it).

[3] See infra for a more detailed discussion of such indicia.

*Reasonable* counsel could and *would* have "tried harder" (State's Brief 8) to stay in juvenile court by:

- *investigating* and *discovering* that Marcos had suffered from depression, anxiety, and severe (self-medicating) marijuana dependency, which had substantially impacted his transgressive behaviors; effective treatments and juvenile programming would improve Marcos' conduct (hereafter "Information").

- *presenting such Information* to the court to show that Marcos' conduct was not "beyond-the-pale serious" (65:90), that juvenile system would effectively punish/rehabilitate Marcos and protect the public, so retaining jurisdiction was not contrary to anyone's best interests.

B. The State conceded that the record before counsel contained "indicia" of Marcos' mental health/substance abuse issues.

The State claims that failure to investigate, discover, and present this Information was not deficient "given the absence of indicia of any significant issues." (State's Brief 4.)

But "indicia" of Marcos's substance abuse/mental health issues were in the record before counsel, as Marcos argued in postconviction court.[4]

[4] Those indicia were found mostly -- but *not only* -- in the Investigation Waiver Report, which is not part of the appellate record before this Court, but on which Marcos relied in postconviction court. (Marcos' Brief 10.) (citing examples of repeated reliance on Investigation Waiver Report in postconviction court). Counsel will hereafter refer and cite to Marcos' Brief as "Brief."

In postconviction court the State did not deny/rebut the existence of such indicia, nor object to Marcos' reliance on the Waiver Investigation Report as evidence of their existence. [5]

The State now asks this Court (at p. 3) to "ignore" Marcos' references to such indicia.

Because the State in postconviction court neither objected not denied the existence of these indicia -- in the Investigation Waiver Report or elsewhere -- it may not now do so here, under the doctrines of judicial estoppel and waiver by failure to object. *State v. Ryan*. 2012 WI 16, ¶32, 809 N.W. 2d 37 (judicial estoppel protects courts against litigants asserting inconsistent positions in different legal proceedings).[6] *State v. Davis*, 199 Wis. 2d 513, 517-18, 545 N.W.2d 244 (Ct. App. 1996) (unobjected-to matters considered waived).

The existence in counsel's file of indicia of mental health/substance abuse issues, and their sufficient proof, should be deemed admitted. *See State v. Chu*, 2002 WI App 98, P41, 253 Wis.2d 666, 643 N.W.2d 878 (argument admitted when not rebutted or responded to).[7]

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[5] The postconviction court did expressly not rule that such indicia did *not* exist in the record before Mr. Kennedy.

[6] "The doctrine [of judicial estoppel] precludes a party from asserting a position in a legal proceeding and then subsequently asserting an inconsistent position . . . [J]udicial estoppel is not directed to the relationship between the parties, but is intended to protect the judiciary as an institution from the perversion of judicial machinery." *State v. Petty*, 201 Wis.2d 337, 346-47, 548 N.W.2d 817 (1996).

[7] See also *Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 90 Wis. 2d 97, 108-109, 279 N.W.2d 493, 499 (Wis. Ct. App. 1979); *State v. Delebreau*, 2014 WI App 21, Fn. 3, 352 Wis.2d 647, 843 N.W.2d 441 (in a criminal case ruling that a party conceded a claim by

C. Prejudicial was presenting to the court a *false*, pro-*waiver-weighing* picture of Marcos, the "seriousness" of his conduct, and his rehabilitation prospects.

The State's claim, that failure to discover and present such Information was not prejudicial, fails. (State's Brief 4.)

Facts about Marcos' mental health/substance abuse conditions (including treatability) would shape the court's assessment of the "seriousness" of Marcos' conduct. The court would know that Marcos' misbehaviors were caused by depression/substance abuse, and would understand Marcos' (in)ability to evaluate situations and control impulses, and his good treatment/rehabilitation prospects in the juvenile system.

With such knowledge, it is "reasonably probable" that the court would *not* have found Marcos' conduct extremely serious, or correctable only through waiver. (65:87-90.) *Strickland*, 466 U.S at 694. With such knowledge the court would "have something" *short of waiver* to "get to" Marcos: depression/dependency treatments in juvenile corrections. (C.f. 65:88) (court stating: "I have nothing now that indicates that anything would get to him.") The court "reasonably probably" would *not* waive Marcos if it knew that juvenile programming could sufficiently correct Marcos's conduct, rehabilitate him, punish him, and protect the public.

Nothing in the State's Brief rebuts Marcos' arguments: that this Information (withheld from the court by counsel' failures) was relevant to the court's waiver analysis and

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not replying to it; citing *Charolais* as governing and controlling authority). Marcos here, passim, cites to the *Chu* case because it is a criminal case, like this one. But a citation to *Charolais*, supra, could be substituted for every citation to *Chu*, as a citable source of the "admitted by failure to object or rebut" rule.

would change the court's take on the "seriousness" of Marcos' conduct and the public's best interests, thereby preventing waiver.

D. The State downplays the import of Dr. Glassman's report.

The State downplays the import of Dr. Glassman's findings and their usefulness in supporting this ineffectiveness claim. (State's Brief 6.)

Dr. Glassman concluded that during the robbery Marcos was suffering from untreated, self-medicated depression, anxiety, and substance abuse, which substantially affected his misbehaviors. This indicates that such issues contributed to, and arguably caused, the robbery.

Dr. Glassman's failure to use certain narrow wording[8] does *not* indicate that substance abuse/mental illness were *not* "significant factors" in causing the crime, or that Marcos' conduct was *not* less serious or more treatable in the juvenile system than the waiver court believed (based on misinformation about Marcos).

The State fails to rebut Marcos' argument that mental health/substance abuse information (from medical professionals like Dr. Glassman) was relevant to the waiver

[8] The State observes at p. 6: "Conspicuously absent [from Dr. Glassman's report] is the opinion that marijuana use *alone* 'caused' [Marcos] to commit crimes." (emphasis added). Dr. Glassman clearly did not conclude that marijuana use "alone" single-handedly "caused" such behavior. Rather, the report indicates that "severe" substance abuse (self-medicating in nature) together with other factors (immaturity, anxiety, depression included) jointly caused criminal conduct, each being a "significant factor."

decision and would "reasonably probably" cause retention of jurisdiction (e.g. by allowing the court correctly to understand the "seriousness" of Marcos' conduct). [9]

E. Marcos' argument is not "mere speculation."

The State calls "mere speculation" (State's Brief 7.) this argument:

1. This Information was relevant under the statutory factors for waiver and the court would have considered it. (Brief 9-10.)

2. This Information was necessary for the court's *correct* understanding of the *seriousness* of the Marcos' conduct (the sole ground for waiver) and would significantly shape that understanding; (Brief 12.)

3. This Information was necessary for the court's *correct* understanding of *what (short of waiver) could be done* to correct Marcos' behavior, rehabilitate him, and protect the public (e.g. treating substance abuse/mental health conditions); (Brief 11-12.)

[9] Marcos wishes to restate that he could have and would have fleshed out Dr. Glassman's opinions for the postconviction court and the State, but was not given the opportunity to do so. In postconviction court, on motion for reconsideration, Marcos proffered Dr. Glassman's testimony to address the court's and/or the State's questions and clarify Dr. Glassman's opinions, but the court did not give Marcos the opportunity to put such testimony on the record. R.43:4, n. 2; see Brief at p. 11, n.2.

4. Therefore, this Information would "reasonably probably" cause retention of jurisdiction, as not "contrary to" anyone's "best interests." (Brief 12; 23-24.)

The State errs in calling this argument "speculation" and arguing that counsel was effective in failing to investigate, discover, and present this Information to the court.

F. Counsel ineffectively failed to advise Marcos and the court about the clear, automatic, and immediate immigration consequences: inadmissibility and DACA ineligibility.

Marcos argues that his "childhood arrival"/illegal alien status and prospects of lawfully staying in the U.S. under DACA vs. *two* automatic, immediate immigration consequences of waiver-cum-felony conviction are *all* relevant statutory waiver factors, falling under "pattern or living," "prior record," and "potential for responding" to programming in Section 938.18(5). (Brief 13-17.)[10]

The State (7-9) *mis*casts this argument as:

(1) concerning "*potential," "possible," or* "risky" effects of criminal conviction, when Marcos addresses automatic, unavoidable, immediate consequences, and

(2) addressing *only* immigration consequences, when Marcos argued *all were* relevant waiver considerations, including a "pattern of living" and "prior record" as a DACA-eligible undocumented alien strongly motivated (by the immediacy and severity of the two immigration

[10] At p. 9 of its Brief the State states that it does not see this argument or its "basis:" "…nor is it apparent to the state…".

consequences) to rehabilitate and likely to "respond to future treatment" with a DACA-preserving juvenile disposition. (Brief 13-16.)

The State does not deny or rebut that being a "childhood arrival" and living in Wisconsin as an undocumented but DACA-eligible alien, vulnerable to the *immediate, automatic, unavoidable* consequences of inadmissibility and DACA-*in*eligibility (if waived and felony-convicted), involves a "pattern of living," or that such living -- as a federal felon – involves "prior record," in Section 938.18(5); or that a person with that "pattern of living" and that "record" -- motivated to preserve DACA eligibility by cooperating with treatments and corrections – would have good "potential for responding" to programming in the juvenile system. Thus, these claims should be deemed admitted. *Chu*, 2002 WI App P41.

The State does not deny or rebut that *all* those factors – the "pattern of living" and "prior record" of felonious living as an undocumented "childhood arrival," but DACA-eligible, and motivated to preserve DACA-eligibility by cooperating with programming, thus with good "potential for responding" -- were statutory factors in Section 938.18(5) relevant to the waiver decision; and that they *would* all be considered by the waiver court, and together would "reasonably probably" result in retention of jurisdiction (so counsel was ineffective on this ground). This argument should be considered conceded. *Chu*, 2002 WI App P41.

G. <u>The postconviction court erroneously ruled that *Kraemer* barred Marcos from challenging errors in the waiver.</u>

The State accuses Marcos of not supporting the argument that the postconviction court erroneously applied

*Kraemer*, and asks this Court to not consider it. (State's Brief 10-11.) The State misses the mark.

Contrary to the State's Brief (10), the postconviction court's terse ruling requires "guesswork" from Marcos. The court's failure to state its reasoning forces Marcos to guess at the court's reasonings and rationales. (Brief 17-18.)

The State neither denies nor rebuts that the postconviction court withheld rationales for its *Kraemer* ruling and its (implicit) ruling that Marcos' plea was "valid;" or that no authority-supported analysis of *Kraemer* vs. the facts of this case appears in the record; or that the factual findings undergirding the ruling were clearly erroneous in light of the record; (C.f. Brief 18 (citing *Balliette*)); or that the above failures resulted in error. Thus, all above claims should be deemed admitted. *Chu*, 2002 WI App P41.

## ARGUMENT II
## ERRONEOUS WAIVER OF JUVENILE JURISDICTION UNRELATED TO INEFFECTIVENESS.

### A. This Court should deem admitted Marcos' claim that the waiver court's factual findings were not reasonably supported by the facts.

The State neither denies nor rebuts that the waiver court's factual findings were not reasonably supported by the facts of record. This claim -- of erroneous waiver, based on unsupported factual findings -- should be deemed admitted. *Chu*, 2002 WI App P41.

Marcos re-asserts his remaining erroneous waiver claims (Brief 19-25), which the State fails to rebut, but instead only *selectively* summarizes (State's Brief 12-13) the waiver court's actions during the hearing. These erroneous

waiver claims should be deemed admitted. *Chu*, 2002 WI App P41.

## ARGUMENT III
## INEFFECTIVENESS DURING PLEA NEGOTIATIONS AND THE PLEA

### A. "Prejudice" resulted from counsel's three failures to advise Marcos pre-plea.

The State claims (14 et seq.) that counsel was not ineffective before or at the plea for lack of "prejudice."

Marcos hereby clarifies that he would not have pled, but gone trial, if he had received any of these *three* bits of advice: (1) that the plea waived his ability to challenge waiver to criminal court post-plea; and (2) that the plea would automatically, immediately, unavoidably (a) terminate his DACA eligibility, and (b) make him inadmissible. (Brief 26-31.)

Marcos' testimony supports that he would not have pled had he known that would bar post-plea appeals of waiver to criminal court. Five times Marcos re-stated that he always wanted to be adjudicated in juvenile court. (R.61:31, 32, 33). He testified that, had he known appealing waiver was an option, he would have appealed, (61:33.); that he would have certainly asked counsel to try and return to juvenile court, id.; that if he had known of *any* paths back to juvenile court, he would have taken them. (61:50.) He testified he had been told that signing the plea forms would ensure counsel's continued fight on his behalf (not excluding efforts to return to juvenile court). (61:53.) This testimony supports that Marcos would have done *nothing* jeopardizing potential juvenile adjudication -- not even a plea (if he had known that pleading foreclosed seeking return to juvenile court).

B. Failure to advise about the automatic, immediate, unavoidable consequences of inadmissibility and DACA ineligibility was ineffective.

The State admits that a waiver-cum-felony conviction made Marcos automatically and immediately inadmissible and DACA ineligible. (State's Brief 18 et seq.)

The State notes that inadmissibility is not "irreversible," as the law "appears" to allow applications for re-admission after 5 years. (State's Brief 19.)

But this option to seek re-admission is available years *after* the immediate, automatic, unavoidable consequence of inadmissibility has kicked in. Such option still left Marcos, pre-plea, exposed to the automatic, immediate, unavoidable inadmissibility consequence. And the plea still effected -- immediately, automatically, unavoidably -- his inadmissibility. This option leaves intact Marcos' argument about counsel's ineffectiveness for failing to advise about this consequence of pleading.

The State fails to rebut Marcos' claim of ineffectiveness for failing to advise about *two* clear, automatic, and unavoidable immigration consequences of pleading. See *Padilla*, 559 U.S. at 368.

The State claims, without argument or supporting authorities, that this case is like *Ortiz-Mondragon*, and counsel sufficiently advised Marcos about DACA ineligibility and inadmissibility because neither was a "certainty" or "automatic." (State's Brief 20.) This fails to rebut Marcos's arguments that each consequence is automatic, immediate,

and unavoidable, thus requiring clear pre-plea advice. (Brief 6-8 12-17.) [11]

The State correctly observes that Marcos sometimes mis-characterizes DACA as federal "law" making legal "residency" or status in the U.S. "available" to Marcos. [12]

Marcos apologizes for imprecisely or incorrectly describing DACA. But Marcos' DACA-based ineffectiveness arguments stand unscathed by the State's valid correction.

To clarify, this is how Marcos understands DACA:

1. DACA is a federal agency policy, as the State correctly notes. (State's Brief 21-22; R-App. 103.)
2. DACA opens a path to lawfully remain/reside in the United States for years, by allowing discretionary deferral of deportation for qualifying "childhood arrivals." (R-App. 101-103.)
3. One of DACA's (non-discretionary) eligibility criteria for (discretionary) deferral of deportation is not having a felony or "significant misdemeanor" conviction. (R-App. 101.)
4. Pre-conviction Marcos was DACA-eligible and began seeking DACA benefits. [13]

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[11] Moreover, as stated supra, elsewhere in its Brief the State *admits* that Marcos became inadmissible and lost DACA eligibility automatically and immediately upon pleading.

[12] Marcos does not believe that he described DACA as "conferring a substantive right, immigration status, or pathways to citizenship," as the State asserts at p. 21, citing R-App. 103. If Marcos has done so, he wishes to clarify that he intended to present DACA as an option for lawfully remaining/residing in the United States, by way of deferring deportation, perhaps for many years (of consecutive 2-year deferrals).

[13] The State in lower courts and before this Court does not deny or rebut that Marcos was DACA-eligible until he received this felony

5. The felony conviction ended Marcos's eligibility for DACA immediately and automatically, so he cannot/could not "*be considered"* for DACA. (R-App. 101.) (criteria to "be satisfied before an individual is considered for" DACA).

The State does not rebut the above claims, but asserts that *loss of eligibility* for a *temporary* deferral of deportation (i.e. staying lawfully in the U.S for 2 years, with options to re-obtain deferral for additional 2 year periods) is not "a sufficiently momentous collateral consequence" to require duty to warn about it. (State's Brief 22) (citing *State v. LeMere,* 2016 WI 41)

This argument fails. *LeMere* is inapposite because:

1. the adverse consequence at issue in *LeMere* was possible or potential, while the loss of DACA eligibility WAS/IS automatic and immediate. *LeMere*, 2016 WI P15, P18 (LeMere not advised that he "*might* be subject to civil commitment"), P19 ("possible consequence"), P58 et seq. (civil commitment not an "automatic" consequence).

2. the adverse consequence in *LeMere* is typically temporary (commitment under Chapter 980), while the loss of DACA eligibility is permanent and irreversible: a felony conviction permanently

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conviction and that DACA opened to him an *option* (not a guaranteed path) to lawfully stay and reside in the United States by deferring deportation, as long as he had no felony conviction and met other pre-qualifications for consideration. Thus these claims should be considered admitted. *Chu,* 2002 WI App P41.

terminates consideration under DACA. The State does not state otherwise.[14]

Marcos re-asserts that failure to advise him was ineffective under *Padilla, Shata, and Ortiz-Mondragon* because it concerned advice about *two* certain, automatic, immediate, and severe immigration consequences. *See Shata*, 364 Wis. 2d 63, ¶5 (advice that a "guilty plea carried a 'strong chance' of deportation" was effective assistance because "deportation was not an absolute certainty"); *Ortiz-Mondragon*, 364 Wis. 2d 1, ¶5 (advice that plea carried "risk" of adverse immigration consequences sufficient where federal law was not "succinct, clear, and explicit" that the charge disqualified from immigration benefits) (quoting *Padilla*, 559 U.S. at 368)). Failure to advise about *either* of them was ineffective. The State fails to show otherwise.

## ARGUMENT IV
## MARCOS' PLEA WAS NOT KNOWING, INTELLIGENT, AND FREE

The State fails to address or rebut, thus admits, *Chu*, 2002 WI App P41, these invalid plea claims:

(1) the plea hearing transcript proves Marcos' failure sometimes to understand what was being said,

(2) the plea hearing and postconviction record prove that Marcos neither understood nor adopted the posture of a sovereign decision-maker vs. the judge and counsel, and entered the plea *falsely believing* that the judge

[14] Indeed, *LeMere*'s reasoning and analysis, *passim*, support Marcos' claim that counsel was ineffective for failing to advise about the automatic (upon conviction), immediate, severely penalizing consequences of DACA ineligibility and inadmissibility.

expected him to plead that day; that the judge and counsel would get angry if Marcos did not plead as directed, or asked questions, or spoke his mind.

(3) postconviction record proves that the plea was not entered freely because Marcos signed plea papers and answered plea colloquy questions untruthfully, out of child-like compliance, intimidation, and fear (of judicial anger and abandonment by counsel, if not compliant with plea).

The State offers nothing to rebut these plea arguments, thus admits them. *Chu*, 2002 WI App P41.

In trying to rebut the invalid plea argument the State relies solely on Macros' answers in the plea colloquy. (State's Brief 24-27.) But uncontroverted postconviction testimony shows those answers to be unreliable, false, made out of fear, intimidation, and child-like, timid compliance.[15] This rebuttal effort thus fails.

No valid rebuttal comes from the State's conclusory, unsupported, and undeveloped assertion that the postconviction court "reasonably rejected" this claim. (State's Brief 27.)

The State fails to address, deny, or rebut Marcos' argument (36-37) that the postconviction court's denial of this claim rested on an incorrect, invalid ground: the finding of "no prejudice" on the sole illogical ground that Marcos would *not* have sought to appeal the waiver post-plea, after not

[15] In his testimony Attorney Kennedy did not contradict or deny Marcos' accounts that Kennedy had threatened judge's anger and counsel's withdrawal of (or lesser) advocacy, unless Marcos pled compliantly.

appealing it pre-plea.[16] By failing to address or rebut this argument, the State admits it. *Chu*, 2002 WI App P41.

The State also fails to address, deny, or rebut (thus admits, *Chu*, *supra*) Marcos' argument (35), that the plea was not intelligent or knowing when made without knowing it effected waiver of the right to appeal waiver to criminal court, and the state failed to meet its burden of proof on this claim. The State believes it rebutted this claim while addressing Marcos' ineffective assistance of counsel claims. (State's Brief 27.)

Marcos disagrees that his invalid plea (for reasons stated in the Brief and supra) claim is addressed by discussing ineffectiveness issues. The State fails to show that this can be done, or was done. This too is an unrebutted claim, thus admitted. *Chu*, 2002 WI App P41.

## CONCLUSION

Based on the arguments and authorities stated above and in his Brief of Defendant-Appellant, Marcos asks this Court to reject the State's claims and arguments, reverse or vacate the order waiving juvenile jurisdiction, and vacate his judgment of conviction, so Marcos may return to juvenile court where his juvenile adjudication would proceed according to law and due process.

Dated this 25th$^{th}$ day of June, 2016.

Respectfully submitted,

[16] Notably, Marcos testified that he had no idea – until after his conviction – that the waiver was appealable, as counsel never advised him that it was. This explains Marcos' failure to seek reversal of the waiver into criminal court, both before the plea and after. The postconviction court did not address, but ignored, this evidence of Marcos' rational reason for not appealing the waiver pre-plea (or post).

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## CERTIFICATION AS TO FORM/LENGTH

I certify that this reply brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: 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 and maximum of 60 characters per line of body text. The length of the reply brief is 2985 words.

Dated this 25th day of June, 2016.

Signed:

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# CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 25th day of June, 2016.

Signed:

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