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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2015AP2183-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs

Sabrina Marie Hebert,
Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

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On appeal from the Circuit Court
of Brown County, Hon. Donald R. Zuidmulder,
Circuit Judge, presiding.

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication.

STATEMENT OF FACTS

On October 9th, 2014, a two-count criminal complaint was filed charging Sabrina M. Hebert, appellant, with Operating While Intoxicated – Second Offense and Operating With a Prohibited Alcohol Concentration – Second Offense. *See* 1 (criminal complaint).

On January 7th, 2015, the appellant filed a motion to suppress evidence, alleging "a Warrantless Detention, Restriction of Freedom of Movement and/or Arrest for Which There Was not the Requisite Probable Cause for Arrest." *See* 18 (notice of motion and motion for suppression of evidence). Despite the motion's title, the body of the motion indicated "This is a Stop motion, [sic] the officer indicated that the defendant touched rather than crossed the centerline; however the video does not show either, it shows the officer simply following the defendant. Therefore, there was no cause to stop the defendant…." *Id*.

On February 12, 2015 a motion hearing was held in Brown County Circuit Court Branch I in front of The Honorable Donald R. Zuidmulder. *See* 20 (minutes of deputy clerk); 50 (transcript of motion hearing, plea & sentencing). At the hearing, Brown County Sheriff's Deputy Marc Shield testified, the video in question was played, and the appellant also testified. *See* 50 (transcript of motion hearing, plea & sentencing). Deputy Shield testified that he has been employed as a Brown County Deputy Sheriff for the last two years, holds a bachelor's degree in criminal justice, and completed the Northeast Wisconsin Technical College law enforcement academy. *Id*. at 4:8-21. Deputy Shield testified that he was trained on how to investigate operating while intoxicated offenses. *Id*. at 4:22-25. He indicated that he was on duty during the early morning hours of July 6th, and was assigned to a 11:00 pm through 7:00 am nightshift patrol in the Village of Allouez. *Id*. at 5:1-11. Around 2:30 am, Deputy Shield was southbound on Riverside Drive, which goes through Allouez into DePere and is a four-lane thoroughfare (two lanes in each direction). *Id*. at 5:12-23. At that time, he observed a Jeep SUV. *Id*. at 6:2. Deputy Shield testified that his "attention was drawn to the vehicle when its left tires began to touch the centerline, at which time [he] activated [his] squad camera and continued to observe the vehicle." *Id*. at 6:2-6. Deputy Shield indicated he was in the right lane, and the subject vehicle was in the left lane. *Id*. at 6:7-14. Deputy Shield specifically indicated that he observed that the left tires on the vehicle either partially or completely touched the centerline, which drew his attention to a possibly intoxicated driver. *Id*. 6:21-23. Deputy Shield testified he documented and recalled the vehicle touching the centerline at least three times in a short period of time. *Id*. at 7:5-11. Deputy Shield initiated a traffic stop on the vehicle and had crossed into DePere. *Id*. at 16-25. He identified the driver as the appellant, Sabrina Hebert. *Id*. at 8:7-18. Deputy Shield testified that he activated his squad camera when he began making the observations, which captured a portion of what he observed. *Id*. 8:22-5, 9:1-5. The parties then watched the video. *Id*. at 9:23, 10:1-4; *also see* 24 (exhibit 1 dated 2/12/15 – dash cam video).

The State notes that the video footage captured by Deputy Shield's squad video is blurry, and it is difficult given the streetlights and darkness to clearly see the yellow line in relation to the appellant's tires. However, it is consistent with Deputy Shield's testimony in that it depicts his squad car in the right lane behind the appellant's vehicle, which is in the left lane. Given the quality of the video, it is difficult to discern whether the appellant's left side tires touch or cross over the centerline. However, it is apparent that the appellant's vehicle consistently hugs the left side of the lane. A number of oncoming cars are observed driving past the appellant's vehicle in the opposite direction. Around 00:43 seconds, it appears that the vehicle crosses over the centerline and makes a fairly quick and generous correction to the right when approached by an oncoming car. *See* 24 (exhibit 1 dated 2/12/15 – dash cam video).

After the parties watched the video footage, Deputy Shield testified that the video that was played reflects what he observed *after* he turned the squad camera on. *See* 50:10:5-8 (transcript of motion hearing, plea & sentencing) (emphasis added). On cross examination, Deputy Shield testified that he saw

> two occasions where it was straddling the line and then touched the line, and then on the third occasion right before [he] activated his lights [he] saw the vehicle jerk into – both tires were completely touching the centerline, which in [his] opinion [is] more dangerous to touch the centerline than, say, another line divider because of a potential head-on collision, which was [his] concern and why he initiated the traffic stop at that point.

Id. at 11:2-11. At that point, the defense attorney wanted to re-watch the video and have the deputy point out the occasions where he saw the vehicle touch the centerline. *Id*. 11: 19-24. The trial court made a thorough record as to why it did not think re-watching the video would be helpful to its fact-finding function, as the court believed the video evidence was consistent with the deputy's testimony. *Id*. at 12: 2-25, 13:1-25, 14:1-25, 15:1-10.

The appellant also testified. *Id*. at 15:20-25. She indicated she did not see on the video where she touched the centerline. *Id*. at 16:14-15. She testified that it was her "opinion" that she did not think she violated a traffic law. *Id*. 16:21-25, 17:1-3. The State notes the record is totally devoid of testimony about the appellant's knowledge, training, or experience regarding the traffic laws of the State of Wisconsin. *See* 50 (transcript of motion hearing, plea & sentencing) On cross, the appellant testified she had no independent recollection of crossing over the centerline. *Id*. 17: 6-14. The trial court conducted its own examination of the appellant and asked whether, in response to being confronted about her driving behavior, she stated to the deputy that she was on her cell phone. *Id*. at 17:17-21 She first stated to the court that she had her GPS going and just had her phone in her hand. *Id*. 17:19-21. She then admitted that she indicated to Deputy Shield she was on her cell phone when he confronted her on touching the centerline. *Id*. 17:22-25, 18:1-24.

In ruling on the motion, the trial court stated

> we employ as a community and as a state highly trained professional police officers who with their training and experience [sic] are asked to enforce the traffic laws and other laws of this state. Then when they engage in that responsibility, the court looks at whether or not . . . the testimony the officer gives to the court is credible.

Id. at 20:13-19. The court indicated it specifically relied on Deputy Shield's training and experience with OWI investigation, and "that part of the signals…of an impaired driver would be this question of deviating within the lane or approaching the centerline." *Id*. 20:20-25. The court also indicated the time of the stop, 2:30 am, was a significant factor. *Id*. When discussing the video, the court indicated it was

> clear to the court that the defendant in this case . . . was touching the centerline or coming very close to the centerline. In at least one point in the video when there was an approaching vehicle her vehicle clearly went from the left to the right. It's a very clear movement that she perceived that she was close to the centerline because . . . although the officer . . . described it as jerking, I would simply describe it as a quick . . . movement which is simply in response to being confronted by the headlights of the vehicle in front of her. Because . . . Wisconsin has a . . . strong public policy with regard to the enforcement of our operating-while-intoxicated statutes and that we put an emphasis on . . . this enforcement feature, I'm satisfied that the officer exercised good judgement and that there was probable cause for him to believe that based upon the operation of the vehicle that he was confronted at that time of the evening and in . . . the early morning hours and in those circumstances with somebody who could be operating impaired. So I'm satisfied that he made a reasonable traffic stop because of that suspicion . . . .

Id. at 21:1-24. The trial court later clarified that "it's a traffic violation to cross or touch the centerline" and made the affirmative finding that the appellant "did touch the centerline." *Id*. at 22:8-17.

Following the court's ruling, the appellant entered a plea to Operating with a Prohibited Alcohol Concentration – Second Offense, and the Operating While Intoxicated – Second Offense charge was dismissed. *Id*. at 22:19-25, 23-33.

The appellant now appeals. The appellant's motion condenses and obscures the issues, as the appellant's argument section is titled "In Light of the Video Evidence, The Trial Court's Finding That Hebert Violated A Traffic Law Is Clearly Erroneous, And Therefore, The Stop of Her Vehicle was Unconstitutional." Hebert's brief-in-chief at 6. However, the argument made in the body of the motion deals solely with reasonable suspicion. *Id*. at 6-8. The appellant's conclusion then cites to the probable cause standard. *Id*. at 8-9. The respondent deals with each of these standards, in turn.

STANDARD OF REVIEW

Whether there is probable cause or reasonable suspicion to conduct a stop of a vehicle is a question of constitutional fact. State v. Mitchell, 167 Wis.2d 672, 684, 482 N.W.2d 364, 368 (1992); State v. Williams, 2001 WI 21, ¶ 18, 241 Wis. 2d 631, 641-42, 623 N.W.2d 106, 111. When reviewing questions of constitutional fact, the Court applies a two-step standard of review. Williams, 2001 WI at ¶18, 482 Wis.2d at 642, 623 N.W.2d at 111. A trial court's findings of historical fact will be upheld unless they are clearly erroneous. *Id.* The application of the historical facts to constitutional principles is reviewed de novo. *Id*.

STATEMENT OF THE ISSUE

In finding probable cause and/or reasonable suspicion to believe the appellant was committing a traffic violation and/or operating while intoxicated, did the trial court erroneously exercise its discretion by relying on the deputy's testimony and the video evidence and failing to give the appellant's self-serving testimony the weight and significance the appellant believes it deserved?

ARGUMENT

The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution provide that "[t]he right of the people to be secure in their persons… against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause…." *See* U.S. CONST. amend. IV; Wis. Const. art. I, § 11. Although investigative traffic stops are seizures within the meaning of the Fourth Amendment, in some circumstances officers may conduct such stops even where there is no probable cause to make an arrest. Terry v. Ohio, 392 U.S. 1, 22, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889 (1968). Investigative stops must be based on more than an officer's "inchoate and unparticularized suspicion or 'hunch.'" *Id*. at 27, 88 S. Ct. at 1883. Rather, the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the stop. *Id*. at 21, 88 S. Ct. at 1880. The Wisconsin Supreme Court adopted the *Terry* standard in State v. Chambers, 55 Wis.2d 289, 198 N.W.2d 377 (1972) and the Wisconsin Legislature codified the standard in Wis. Stat. § 968.24. The fundamental focus is on reasonableness. State v. Anderson, 155 Wis.2d 77, 83-84, 454 N.W.2d 763, 766 (1990). "The determination of reasonableness is a common sense test." State v. Post, 2007 WI 60, ¶ 13, 301 Wis. 2d 1, 9, 733 N.W.2d 634, 638. The critical question is whether the totality of the circumstances would warrant a reasonable officer, in light of his training and experience, to suspect that the subject "has committed, was committing, or is about to commit a crime." *Id*. "A traffic stop is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred or have grounds to reasonably suspect a violation has been or will be committed." State v. Gaulrapp, 207 Wis. 2d 600, 605, 558 N.W.2d 696, 698-99 (Ct. App. 1996) (internal citation omitted).

1. Deputy Shield Had Probable Cause To Believe The Appellant Committed A Traffic Violation.

The appellant's motion uses the probable cause and reasonable suspicion standards interchangeably, thereby obscuring the issues=. It is unclear whether the appellant is specifically challenging probable cause to believe a traffic violation had occurred or whether she is challenging the deputy's reasonable suspicion to believe she was operating while impaired. However, the State asserts that given the testimony of Deputy Shield and the video evidence, Deputy Shield had the requisite level of probable cause to believe the appellant committed a traffic violation. An officer may conduct a traffic stop when he has probable cause to believe a violation of a crime or traffic law has occurred. Gaulrapp, 207 Wis.2d at 605, 558 N.W.2d at 698-699; *see also* State v. Whren, 517 U.S. 806, 809-810,116 S. Ct. 1769, 1772, 135 L. Ed. 2d 89 (1996). "In other words, probable cause exists when the officer has reasonable grounds to believe that the person is committing

or has committed a crime." State v. Popke, 2009 WI 37, ¶ 14, 317 Wis. 2d 118, 128, 765 N.W.2d 569, 574 (quotation omitted).

Deputy Shield testified to his OWI-specific training and experience as a two-year deputy with the Brown County Sheriff's Office. *See* 50:4:8-21, 4:22-25 (transcript of motion hearing, plea & sentencing). He observed the appellant's Jeep southbound on Riverside Drive in Allouez around 2:30 am on July 6th, 2015. *Id*. at 5:12-23, 6:2. His attention was drawn to the vehicle when its left tires touched the centerline. *Id*. at 6:2-6. He then activated his squad camera and captured additional driving behavior beyond what he initially observed. *Id*. Deputy Shield testified he observed the vehicle touching the centerline at least three times in a short period of time. *Id*. at 7:5-11. The video depicts the appellant's vehicle consistently hugging the centerline, and around 00:43 seconds, the vehicle seems to touch, if not cross over, the left centerline and then makes a generous correction to the right. *See* 24 (exhibit 1 dated 2/12/15 – dash cam video). Deputy Shield indicated at that point he observed both tires completely touching the centerline. *See* 50:11:2-11 (transcript of motion hearing, plea & sentencing).

The trial court, as the fact finder, specifically gave deference to Deputy Shield's testimony and perception about the driving behavior, and indicated that the video was consistent with his testimony. *Id*. at 12:3-25, 13:1-5. In issuing its ruling, the court specifically stated it construed the driving behavior as a violation of encroaching on the other lane. *Id*. 22:2-12. Although no testimony was elicited regarding Deputy Shield's perception that specific law violations had been committed, the State asserts that the appellant's driving behavior could fall as proscribed conduct under either Brown County Ordinance § 340.0011, Disorderly Conduct With A Motor Vehicle,[1] or Wis. Stat. § 346.13(3), Deviation From Designated Lane.[2] With respect to Disorderly Conduct with a Motor Vehicle, the appellant's driving behavior was clearly conduct that was dangerous to other persons or property on the roadway early that morning, as she was driving on and even possibly across the centerline. Similarly, such evidence also demonstrates the appellant was not driving within the designated lane of travel as contemplated by Wis. Stat. § 346.13(3).

The appellant's testimony was not consistent with the video evidence. Although the blurriness of the video, the streetlamps in the darkness of the early

[1] Brown County Ordinance § 340.0011(2) states "[d]isorderly conduct with a motor vehicle shall mean, while operating or in control of a motor vehicle, to engage in conduct or activities which are violent, unreasonably loud, dangerous to persons or property, or otherwise against the public peace, welfare, and safety, including but not limited to unnecessary, deliberate, or intentional spinning of the wheels, squealing of the tires, revving or racing of the engine, blowing of the horn, causing the engine to backfire, or causing the vehicle, while commencing to move or while in motion, to raise one or more wheels off the ground. Specifically excluded from this definition are legitimate, scheduled racing events."

[2] Wis. Stat. § 346.13(3) provides "when lanes have been marked or posted for traffic moving in a particular direction or at designated speeds, the operator of a vehicle shall drive in the lane designated."

morning hours, and the vantage point of the squad camera do not allow for clear viewing of the yellow centerline, the appellant's testimony that she did not touch the centerline or weave within her lane is not corroborated by the video evidence or Deputy Shield's testimony. Deputy Shield was on scene and observed in person the driving behavior. He was in a different position to observe the behavior than the squad camera. The video, albeit not terribly clear, still depicts at 00:43 seconds a deviation from the lane. *See* 24 (exhibit 1 dated 2/12/15 – dash cam video). The trial court as fact finder is entitled to draw reasonable inferences from the testimony and evidence.[3] Given the appellant was ultimately arrested for Operating While Intoxicated – Second Offense, it was clearly not erroneous for the trial court to rely on Deputy Shield's testimony and disbelieve the appellant. The court confronted the appellant on her conflicting testimony, pointing to her statements to the deputy that she was on her GPS when confronted about touching the centerline. The court could have reasonably inferred that the appellant's testimony was self-serving and/or biased, as she had a significant interest in the outcome of the hearing. There was also a reasonable inference that the appellant's ability to recall the event was not credible, as she was intoxicated at the time. Given Deputy Shield's testimony and the corroborating video evidence regarding the driving behavior, the trial court's finding that there was probable cause to believe the appellant had committed a traffic violation was not clearly erroneous.

2. Deputy Shield Had Reasonable Suspicion To Believe The Appellant Was Operating While Impaired.

Even where no probable cause exists to believe a traffic violation occurred, an officer may still initiate a stop when, under the totality of the circumstances, he "reasonably suspects that a crime or traffic violation has been or will be committed." Popke, 2009 WI at ¶ 23, 317 Wis. 2d at 132, 765 N.W.2d at 576 (citation omitted). "An investigative traffic stop may be supported by reasonable suspicion, even when the officer did not observe the driver violate any law." In re Refusal of Anagnos, 2012 WI 64, ¶ 47, 341 Wis. 2d 576, 598, 815 N.W.2d 675, 686 (citing Post, 301 Wis.2d 1, ¶ 24, 733 N.W.2d 634 ("[I]t is clear that driving need not be illegal in order to give rise to reasonable suspicion" because such a standard "would allow investigatory stops only when there was probable cause to make an arrest."); State v. Waldner, 206 Wis.2d 51, 57, 556 N.W.2d 681 (1996) ("The law allows a police officer to make an investigatory stop based on

[3] *See* State v. Walli, 2011 WI App 86, ¶ 14, 334 Wis. 2d 402, 411-12, 799 N.W.2d 898, 902-03, stating "[t]he parties disagreed as to what the video in fact showed. Where the underlying facts are in dispute, the trial court resolves that dispute by exercising its fact-finding function, and its findings are subject to the clearly erroneous standard of review . . . . and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Here, the trial court's ruling involved not simply the review of the video, the court also evaluated the credibility of the officer and weighed all of the evidence.

observations of lawful conduct so long as the reasonable inferences drawn from the lawful conduct are that criminal activity is afoot.")).

The appellant tries to cast the facts in this case within the ambit of the holding expounded in *Post* – "that weaving within a single traffic lane does not alone give rise to the reasonable suspicion necessary to conduct an investigative stop of a vehicle." Post, 2007 WI at ¶ 38, 301 Wis. 2d at 22, 733 N.W.2d at 644. The appellant attempts to stuff its square peg of misconstrued facts into the proverbial round hole. The testimony and evidence at issue in this case do not deal with simply "weaving within a single lane." The *Post* court actually upheld the "weaving" behavior based on a consideration of the totality of the circumstances – namely, because the behavior was more specifically described as S-curve weaving in and out of the parking and traffic lanes around 9:30 at night. The court specifically stated, when considering those circumstances, that the officer "presented specific and articulable facts, which taken together with rational inferences from those facts, give rise to the reasonable suspicion necessary for an investigative stop." *Id*.

Similarly, the *Waldner* court considered the following facts: at 12:30 am, the officer saw Waldner's car traveling at a slow rate of speed, stop briefly at an intersection where there was no stop sign or light, and turn onto a cross street and accelerate at a high rate of speed (although not breaking the traffic limit). Waldner, 206 Wis. 2d at 53, 556 N.W.2d at 683 (1996). The officer then saw the driver pull into a street-side parking space and dump a mixture of liquid and ice out of a glass onto the roadway. *Id*. The *Waldner* Court upheld the stop, stating that the number of lawful acts, when taken in combination with each other, formed a reasonable basis for the officer to suspect that the driver was impaired. *Id*. at 58-59, 556 N.W.2d at 685.

In *Anagnos*, the stop was similarly upheld. The *Anagnos* court considered that at 1:15 am, the officer observed a vehicle pull out of a parking lot and make a left turn by crossing an elevated median. Anagnos, 2012 WI at ¶ 6, 341 Wis.2d at 581, 815 N.W.2d at 677-78. The vehicle accelerated rapidly to a stoplight, made a second left turn without signaling, and accelerated rapidly. *Id.* The defendant testified that he did not exceed the speed limit, he had activated his turn signal, and the height of the median was less than what the officer estimated. *Id*. at ¶ 15, 341 Wis.2d at 584, 815 N.W.2d at 679. The *Anagnos* Court upheld the stop, indicating that although there was no specific law violation, the totality of the circumstances "lead to a reasonable suspicion that the driver of the vehicle made a series of unusual and impulsive driving choices, suggestive of impairment. *Id*. at ¶ 54, 341 Wis.2d at 600, 815 N.W.2d at 687.

The testimony and evidence offered by the State does not assert merely that the appellant was "weaving within a single lane." The evidence demonstrated that, during what can be considered "bar close" at 2:30 am on July 6th (close to a major holiday), the appellant was observed by the deputy touching and almost crossing the centerline on a number of occasions within a short period of time with

a number of cars passing by in the opposite direction. *See* 50 (transcript of motion hearing, plea & sentencing). The video demonstrates the appellant's vehicle hugging the centerline and, at least near the 00:43 second mark, touching and/or crossing over the yellow centerline and quickly correcting to the right side of the lane due to an oncoming car. *See* 24 (exhibit 1 dated 2/12/15 – dash cam video). Almost driving into oncoming traffic on several occasions at 2:30 am on a major holiday weekend is MUCH different driving behavior than merely weaving within a single lane. Officers cannot let violations accumulate – they have to act to preserve the safety of other drivers on the road. There were multiple cars observable on the video that the appellant passed while touching the centerline. Deputy Shield was also approaching and passing the limits of his jurisdiction and could likely not travel much farther into DePere to continue to observe whatever additional number of traffic violations the appellant believes is appropriate. Deputy Shield testified that the driving behavior and time of night indicated to him a possibly impaired motorist, and given the deviations, he was concerned about the risk of a head on collision and the safety of the other drivers on the road. *See* 50:11:2-11 (transcript of motion hearing, plea & sentencing). Deputy Shield was entirely reasonable in freezing the situation at that time. "The essence of good police work under these circumstances is to briefly stop the individual in order to maintain the status quo temporarily while obtaining more information. Waldner, 206 Wis. 2d at 61, 556 N.W.2d at 686 (1996) (citation omitted). Under these circumstances, it would have been poor police work for Deputy Shield to fail to take action. "He would have been remiss in his duty to have acted otherwise." *Id*.

"[D]ue regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Here, the trial court's ruling involved not simply the review of the video, the court also evaluated the credibility of the officer and weighed all of the evidence." Walli, 2011 WI App at ¶14, 334 Wis.2d at 412, 799 N.W.2d at 903. Based on the totality of the circumstances presented at the motion hearing, and the reasonable inferences that could be drawn therefrom, the trial court's finding that there was reasonable suspicion to believe the appellant was operating while impaired was not clearly erroneous.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court affirm the findings of the trial court.

Respectfully submitted this 4th day of May, 2016.

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CERTIFICATION
As To Form And Length

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and that the text is Times New Roman proportional serif font, 13 point body text, and 11 point text for quotes and footnotes. The Statement of Facts, Statement of the Issue, Standard of Review, Argument, and Conclusion Sections (including footnotes) of this brief are ten pages and 4,364 words.

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 4th day of May, 2016.

_____

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CERTIFICATION OF MAILING

I hereby certify that this brief was deposited in the United States Mail for delivery to the Clerk of the Court of Appeals by First Class Mail on the 4th day of May, 2016. I further certify that the brief was correctly addressed and postage was prepaid.

Dated this 4th day of May, 2016.

_____

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