STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP0039

STATE OF WISCONSIN
ex rel. GREGORY S. GORAK,

Petitioner-Appellant,

v.

MICHAEL MEISNER, Warden,

Respondent-Respondent.

APPEAL FROM ORDERS DENYING A PETITION FOR A WRIT OF HABEAS CORPUS, DENYING RECONSIDERATION, AND DENYING A MOTION TO VACATE, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE STEPHANIE G. ROTHSTEIN, PRESIDING

BRIEF OF RESPONDENT-RESPONDENT

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INTRODUCTION

Five years ago, Petitioner-Appellant Gregory Gorak brought a habeas petition in this Court, raising claims about his allegedly illegal or improper sentence structure. In his petition, he acknowledged that the claims raised had been previously presented to Wisconsin courts in some form or another. This Court declined to address Gorak's claims then, on the ground that they were procedurally barred.

Last year, Gorak again raised claims in this Court regarding his allegedly "illegal sentence structure/ administration." Those claims, framed as a "motion for sentence modification," were virtually identical to those he raises in his current petition. Last year, this Court held that those claims were procedurally barred.

This year, the Court should do the same. Although Gorak now styles his claims as being against Respondent Michael Meisner and as being focused solely on the *administration* of his sentence (rather than its legality), such "artful pleading" is insufficient to overcome Wisconsin's procedural bar against repetitive postconviction litigation.

Gorak has already raised his claims in multiple rounds of postconviction litigation, and he has already received multiple rounds of review of these claims. All of his current claims are therefore procedurally barred, either because they were already litigated, or, if they are somehow deemed "new" claims, because they should have been raised in one of his many previous postconviction motions. The circuit court thus properly dismissed Gorak's habeas petition, and this Court should affirm that dismissal.

ISSUE PRESENTED

A criminal defendant is procedurally barred from bringing successive postconviction motions, except in limited circumstances. To pursue successive claims, a criminal

defendant must establish a "sufficient reason" for not raising a claim previously. This, however, does not allow the defendant to relitigate claims that have already been adjudicated, no matter how they may be repackaged.

Here, Gorak reasserts claims about his sentence structure, which have already been litigated. He also purports to assert "new" claims about how his sentence is being illegally administered by the Department of Corrections (DOC), although those claims simply repackage his previously litigated claims about his sentence structure. Gorak has not proffered any viable reason why he did not raise these "new" claims in his previous postconviction motions, including as recently as last year.

Are the previously litigated claims barred? Likewise, are any "new" claims barred as a result of Gorak's failure to provide a sufficient reason for not previously raising them?

> The circuit court held that Gorak's claims were procedurally barred, and therefore dismissed his habeas petition. The court did not distinguish between those claims already adjudicated and any "new" theories.
>
> This Court should hold that Gorak's current claims are barred as having been previously litigated, or because any allegedly new claims could have been raised previously, and that Gorak has not presented a sufficient reason to address those claims now.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Respondent Meisner does not request oral argument or publication. This case may be resolved by application of established legal principles to the facts of

record. *See* Wis. Stat. §§ (Rules) 809.22, 809.23.[1] This case may be appropriate for summary disposition under Wis. Stat. § 809.21(1).

SUPPLEMENTAL STATEMENT OF THE CASE

I. Factual background.

Gorak was convicted in 2007 on charges arising from a burglary and attempted cover-up. (*See* R. 4:223.) Gorak broke into a home and stole numerous items, including a credit card. (*See* R. 4:223.) He then used the stolen credit card at a bar, and returned later with four Molotov cocktails, intending to burn the surveillance tapes. (*See* R. 4:223.) Gorak was armed with a firearm at the time of the offense. (*See* R. 4:223.)

Gorak was convicted of three offenses in state court: burglary, possession of a Molotov cocktail, and carrying a concealed weapon. (*See* R. 4:27–28.) He was also convicted in federal court on one count of being a felon in possession of a firearm. (*See* R. 4:9.)

On the felon/firearm charge, the federal court sentenced Gorak to 118 months' confinement and three years' supervised release (*See* R. 4:11–13.)

The next day, the state court sentenced Gorak to ten years on the burglary charge (bifurcated as five years' initial confinement (IC) and five years' extended supervision (ES)); six years on the Molotov cocktail charge (three years each, IC and ES)), and nine months on the concealed weapon charge. (*See* R. 4:27–28; *see also* R. 4:9.) In the original judgment of conviction, the sentences for the burglary and

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[1] Any references to the Wisconsin Statutes are to the 2015–16 edition unless otherwise noted.

Molotov cocktail charges were ordered "[c]onsecutive to any other sentence." (*See* R. 4:27.)

II. Procedural background.

A. Litigation clarifying the structure of sentences.

In the years that followed his conviction, Gorak pursued multiple rounds of litigation regarding the legality of his sentence, its structure (consecutive vs. concurrent), and whether he was entitled to either pre- or post-sentence credit.[2] (*See generally* R. 4.) Over the course of the litigation, it was clarified that Gorak was first serving the confinement time on the burglary charge ("Count Four"), after which he

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[2] For an in-depth examination of the procedural history of Gorak's postconviction claims, Respondent includes the decision from Gorak's federal habeas case. *See Gorak v. Attorney General of the State of Wisconsin, et al.*, Case No. 14-CV-1411 (E.D. Wis. Sept. 1, 2015), Dkt. 40:1–22; (R-Supp. App. 120–41). In addition to providing a more comprehensive picture of the procedural history, the federal habeas decision further illustrates that Gorak has had numerous opportunities to litigate his current claims relating to the "structure or service" of his sentence. *See also State v. Gorak*, Case No. 2015AP1636-CR, Appellant Br. 29 (Gorak's most recent state case, in which he argued that his "sentence structure or service violates Wisconsin Statutes §§ 973.01(2), 973.15(1), 973.15(2m)(b)1., 973.15(5), 302.113(4) and/or Wisconsin Administrative Code [DOC] 302.21(3)(c)(1))" (case page available at https://goo.gl/q7QeeR).

Respondent asks this Court to take judicial notice of the existence of Gorak's publically available previous filings. *See* Wis. Stat. § 902.01(2)(b) (providing that a court may take judicial notice of any fact "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"); *see also State v. Bullock*, 2014 WI App 29, ¶ 20 n.3, 353 Wis. 2d 202, 844 N.W.2d 429 (reaffirming propriety of court's taking judicial notice of certain records available on CCAP).

would be transferred to federal custody to serve the confinement time on his federal sentence.[3] (*See* R. 4:63.)

Most notable for current purposes, in 2011 the sentencing court (Judge Cimpl as successor to Judge Sosnay) clarified the structure of Gorak's sentences:

> The sentence on count four was ordered to run concurrently with the defendant's federal sentence and concurrent with count two. Count two was ordered to run consecutive to the defendant's federal sentence. Because the federal sentence is much longer than the sentence imposed in count four, count four will never run concurrently with count two. The court will remedy the situation by removing the language "concurrent with count two" from the sentence imposed in count four so that it will only run concurrent with the federal sentence. When the federal sentence is over, count two will commence to run.

(*See* R. 4:82.)

In accordance with the circuit court's 2011 order, Gorak served the confinement time on Count Four in state custody, after which he was transferred to federal custody. While in federal confinement, Gorak was also serving the extended supervision portion of his sentence on Count Four. (*See* R. 4:5, 211–12, 214.)

Also in accordance with the 2011 order, Gorak was returned to state custody in 2015, after serving his federal confinement, to begin serving confinement on Count Two (Molotov cocktail charge). (*See* 4:221.) During that time, his supervision time on Count Four continued to run, and

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[3] Also during Gorak's state confinement, federal officials retroactively approved Gorak's service of his federal sentence concurrent with his Count Four confinement, whereby he would receive credit against his federal sentence for time served in state custody on Count Four. (*See* R. 4:62, 63.)

expired on July 20, 2016. (*See* R. 4:211–13.) Currently, Gorak is confined on Count Two, with an extended supervision date of February 17, 2018. (*See* R. 4:213.)

B. Gorak's recent challenges to his sentence structure.

1. 2011–12 state filings.

In 2011, Gorak filed, among other things, a motion to vacate the circuit court's order clarifying his sentence structure. (*See* R. 4:88–90 (decision denying motion).) There, the sentencing court noted that Gorak had not appealed the sentence-clarification order, and that if there was to be any remedy for his claim about the administration of Count Two, it was by a petition for writ of habeas corpus. (*See* R. 4:89.) Following that decision, Gorak filed a state habeas petition, which this Court denied on September 7, 2012.[4]

2. 2015 federal habeas petition.

Soon thereafter, Gorak filed a federal habeas petition. In that petition, Gorak argued that he was incorrectly being required to re-serve his Count Two sentence after having already served that sentence along with his Count Four sentence (he couched this claim in terms of multiple constitutional protections). (*See* R-Supp. App. 141.) The United States District Court for the Eastern District of Wisconsin dismissed Gorak's petition, based on procedural default of his claims. (*See id.* at 143–54.)

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[4] *See Gorak v. Clements*, Case No. 2011AP2308-W (case page available at https://goo.gl/iooKrf). A copy of Gorak's petition and his motion for reconsideration, as well as this Court's original order and its order denying reconsideration, are included in Respondent's appendix. (*See* R-Supp. App. 101–19.)

3. 2015–16 state postconviction filings.

Gorak eventually filed the "motion for sentence modification" that was the subject of his most recent appeal in this Court. (*See* Appellant App. 14–21.) The circuit court denied the motion, noting that his motion was "an apparent effort to reinstate a specific order that count four is concurrent to count two so that he can argue that he already served his confinement on count two before he was placed in federal custody." (*See id.* at 17.)

On appeal, this Court rejected all of Gorak's arguments, including that his sentence was illegally split, that his sentence structure violates statutes or code, and that his sentence violated multiple constitutional provisions. (*See id.* at 18–20.) Notably, this Court held that Gorak's claims about his sentence structure were procedurally barred because he failed to explain why those claims had not been raised previously, as required under *Escalona*. (*See id.* at 19.) The Court also suggested that "[t]o the extent that Gorak is actually challenging the manner in which the Department of Corrections is implementing his sentences, his remedy is an action against the Department, not a motion for sentence modification." (*Id.* at 20.)

4. Current petition.

In October 2016, Gorak filed the instant petition against Warden Meisner. As the basis for his petition, Gorak asserted "contrary to multiple statutory provisions, case laws, and constitutional protections, [he has] been made to . . . simultaneously serve[ ] a period of extended supervision . . . while at the same time been made to illegally re-serve a period of incarceration on the same single case. (R. 2:1 (petition) (footnote omitted); *see also* R. 3 (memorandum in support).)

Although Gorak framed his arguments in terms of how DOC is *administering* his sentence, his petition relied almost entirely on the same legal theories raised in his previous "motion for sentence modification." In particular, Gorak's argument in his current petition—like those in his earlier challenge—focus on whether his sentence is illegal because of the interplay between his terms of confinement and supervision. (*Compare* Appellant Br. 17 (listing claims in current petition), *with State v. Gorak*, Case No. 2015AP1636-CR, Appellant Br. 1, 7–16, 30–37 (case page available at https://goo.gl/q7QeeR).)

The circuit court denied his petition on the ground that his claims are procedurally barred. (*See* Appellant App. 12.) The court recognized that Gorak "is making the same allegations he made in his 2008 direct appeal . . . in addition to other postconviction motions." (*Id.* at 12.)

The circuit court also denied Gorak's motion for reconsideration. (*See id.* at 10–11.) The court concluded that its decision applying the procedural bar was not based on a manifest error of law or fact, and that Gorak did not present any newly discovered evidence. (*Id.* at 10.) The court also concluded that the "underlying issue" of whether Gorak is "re-serving" his Count Two confinement time "has already been addressed multiple times and finally adjudicated." (*Id.*) Despite Gorak's artful pleading, the court determined that his duplicative arguments did not provide a basis for reconsideration, or habeas relief. (*See id.* at 10–11.)

Gorak appeals the dismissal of his petition, the denial of his motion for reconsideration, and the motion to vacate the previous decisions and order.

STANDARD OF REVIEW

The application of a procedural bar is a question of law that this Court reviews independently. *See State v. Tolefree*, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

ARGUMENT

I. Gorak's current petition is procedurally barred because his claims either were raised or could have been raised in previous postconviction proceedings.

A. Governing law.

1. Procedural bars—*Witkowski* and *Escalona*.

A criminal defendant may not relitigate an issue previously litigated in postconviction proceedings. *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). This rule applies "no matter how artfully the defendant may rephrase the issue." *Id.*

Moreover, even for claims not previously litigated, Wisconsin law limits a criminal defendant's ability to raise those claims in successive postconviction proceedings. *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181–85, 517 N.W.2d 157 (1994). *Escalona* recognized a straightforward rule designed to limit successive postconviction motions and appeals in criminal cases. Under *Escalona* and its progeny, where a criminal defendant has pursued a direct appeal, or filed a motion under Wis. Stat. § 974.02 or a previous motion under Wis. Stat. § 974.06, he is barred from asserting a claim that he could have raised previously, "unless he shows a sufficient reason for not making the claim earlier." *State v. Romero-Georgana*, 2014 WI 83, ¶ 35, 360 Wis. 2d 522, 849 N.W.2d 668; *accord Escalona-Naranjo*, 185 Wis. 2d at 181, 185.

The rule's purpose is clear: to promote finality in criminal litigation by requiring defendants to bring all available grounds for relief in a single postconviction motion or appeal, unless there are good and sufficient reasons for not doing so. *Escalona-Naranjo*, 185 Wis. 2d at 185.

Courts are not bound by the label a criminal defendant uses on any postconviction filing: the substance, not the title of the pleading, determines whether the procedural bar applies. *See bin-Rilla v. Israel*, 113 Wis. 2d 514, 521, 335 N.W.2d 384 (1983). Thus, the procedural bar applies regardless of whether the pleading is styled a "postconviction motion" under Wis. Stat. § 974.06(4) or a petition for a writ of habeas corpus. *See Romero-Georgana*, 360 Wis. 2d 522, ¶ 35.

This is because Wis. Stat. § 974.06 was "designed to replace habeas corpus as the primary method in which a defendant can attack his conviction after the time for appeal has expired." *Id.* ¶ 32 (quoting *Escalona–Naranjo*, 185 Wis. 2d at 176). A writ of habeas corpus is therefore not available in postconviction proceedings when (1) the petitioner raises claims that he could have asserted in a prior appeal, without establishing a sufficient reason for not raising the claims then; or (2) the petitioner attempts to re-litigate claims that were decided on a previous appeal or postconviction motion. *See State v. Pozo*, 2002 WI App 279, ¶ 9, 258 Wis. 2d 796, 654 N.W.2d 12.

B. Gorak's current petition was properly dismissed as barred by his previous postconviction motions.[5]

As an initial matter, Gorak acknowledges that at least two of his current claims were previously litigated. (*See* Appellant Br. 17, n.23 (noting that Claims Three and Four in his habeas petition were "previously raised or could have [been] previously raised").) These claims are unquestionably barred under *Witkowski*.

As for his other claims, although Gorak does not concede as much, those claims are barred, too. Looking at the substance of his claims (as the court must, *see bin-Rilla*, 113 Wis. 2d at 521), it is apparent that these claims either have been raised in some form or another, or should have been raised in one of his earlier postconviction proceedings.

Gorak's arguments on appeal focus largely on Claims One, Two, and Five of his habeas petition, with almost no mention of Claim Six. (*See, e.g.*, Appellant Br. 22–30.) Whether this is an implicit recognition that Claim Six is nothing more than a repackaging of the other claims, or that Claim Six should have been raised previously, that claim, like the others, is procedurally barred. In any event, like Gorak, Respondent Meisner will focus on Claims One, Two, and Five.

For one thing, Gorak has already raised these claims in previous litigation. Simply repackaging them to name Meisner or DOC does not change their substance.

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[5] Gorak did not present any substantively new arguments or evidence in his motion for reconsideration or his motion to vacate previous orders. Accordingly, Respondent does not separately address these additional, repetitive motions, and instead simply asks this Court to affirm the dismissal of all orders now on appeal.

Alternatively, even if these claims were not raised previously, Gorak has not demonstrated any sufficient reason why, after so many rounds of sentence-related litigation, he should be allowed to pursue them now.

1. Gorak has previously raised Claims One, Two, and Five.

a. Claim One: All periods of extended supervision should be served after all periods of confinement.

Gorak's first claim relies on Wis. Stat. §§ 973.01(2) and 302.113, and *State v. Larson*, 2003 WI App 235, 268 Wis. 2d 162, 672 N.W.2d 322, as "prohibiting *any* portion of an E.S. term from being served in prison and require *all* E.S. terms to be served *after* all confinement." (Appellant Br. 17.)

In his opening brief last year, Gorak relied on *Larson* and Wis. Stat. § 973.01(2) to argue that "[s]tate E.S. must be served **after** state incarceration." *State v. Gorak*, Case No. 2015AP1636-CR, Appellant Br. 31 (case page available at https://goo.gl/q7QeeR).

This was one of the claims that this Court disposed of last year, on the ground that Gorak was procedurally barred from raising it then. (*See* Appellant App. 17–21.) Gorak's change of respondent does not change the substance of his claim, which is otherwise phrased to state the same claim he asserted last year. As it was last year, this claim is barred. *See Witkowski*, 163 Wis. 2d at 990.

b. Claim Two: All periods of confinement must be served before any period of supervision, regardless of whether the sentences are consecutive or concurrent.

For this claim, Gorak relies on Wis. Stat. § 973.15(2m)(b)1. and a citation from the dissent in *State ex rel. Thomas v. Schwarz*, 2007 WI 57, ¶ 61, 300 Wis. 2d 381, 732 N.W.2d 1, as "mandating that all periods of confinement be served *prior* to any period of E.S. regardless of whether sentences are run [concurrent] or [consecutive]." (Appellant Br. 17.)

Almost identically, last year his claim relied on Wis. Stat. §§ 973.15(2m)(b)1. and 2., 302.113(1) and (4), and *Thomas* as "mandat[ing] that any and all periods of confinement must be served either [concurrent] or [consecutive] before any and all periods of E.S. are served." *State v. Gorak*, Case No. 2015AP1636-CR, Appellant Br. 32–33 (case page available at https://goo.gl/q7QeeR).

Last year this Court disposed of this claim as procedurally barred. Like Claim One, Claim Two is barred under *Witkowski*.

c. Claim Five: Gorak's extended supervision on Count Two will impermissibly run concurrent with his federal supervision, by operation of Wisconsin and federal law.

In his current petition and brief to this Court, Gorak argues that his "sentence administration by the DOC cannot be reconciled with" 18 U.S.C. § 3624(e), and governing Wisconsin Statutes, because "his three-year term of Federal supervision will automatically commence upon his release from WI custody." (Appellant Br. 17.) This creates an

impermissible conflict between the statutes and his sentence, Gorak asserts, because while his sentence on Count Two is intended to run consecutive to his federal sentence, the statutes will have the effect of making the periods of supervision concurrent. (*See id.*)

This Court resolved this claim, too, last year.

Last year, Gorak argued that "pursuant to [18 U.S.C. § 3624(e)], his three-year term of federal supervision cannot commence until he is released from the custody of the State," and therefore, "his three-year term of WI extended supervision will actually be served concurrently with the federal term of supervision." This, he argued, demonstrated the unenforceability of the state sentence, which is intended to run "wholly consecutive to the federal sentence." *State v. Gorak*, Case No. 2015AP1636-CR, Appellant Br. 10 (footnote omitted) (citation omitted) (case page available at https://goo.gl/q7QeeR).

The fact that he now—at least nominally—challenges the actions of Respondent Meisner does not change the substance of his claim. That claim was previously raised, previously disposed of, and, like the others, is now barred under *Witkowski*.

2. Even if any claims are deemed "new," Gorak fails to establish a "sufficient reason" for not raising those claims in any of his earlier cases.

None of Gorak's claims are new. He has repeated nearly all of his complaints about his sentence through multiple rounds of litigation, including his state habeas petition in 2011–12, his federal habeas petition, and his "sentence modification" motion last year. (*See, e.g.*, R-Supp. App. 104, 139–40 (2011 state habeas petition 3; federal habeas decision 20–21)); *see also State v. Gorak*, Case No. 2015AP1636-CR, Appellant Br. 32–33 (case page

available at https://goo.gl/q7QeeR). These claims have been raised and addressed, and are now barred under *Witkowski*.

But even if any of his current claims could be deemed "new," *Escalona* requires that Gorak present a "sufficient reason" for not having raised these claims previously. He fails to present any such reason.

As his "sufficient reason," Gorak suggests that "the present asserted illegal sentence computations were not applicable" during any of his previous cases. (Appellant Br. 21.) Therefore, he maintains, he "could not have raised nor did [he] raise his present denial of *post-sentence* confinement credit on count two." (*Id.*)

Gorak's purported reason is patently untrue. In his 2012 motion for reconsideration on the denial of his state habeas petition, Gorak argued that he was then entitled to relief because he had been "denied [the] right to receive post-sentence confinement credit on count two." (R-Supp. App. 111.) As support for his claim then, Gorak argued then that he had "NOT raise[d] the issue of post-sentence confinement credit" earlier. (*Id.*)

Regardless of whether his statement was accurate then, it is not accurate now.

Equally questionable is Gorak's assertion that the "sufficient reason" for not raising current Claims One, Two, and Five is that "the present asserted illegal sentence computations giving rise to those claims were not applicable until his sentence was amended and the DOC had not yet formally rescinded the concurrent count two serve credit at that time." (Appellant Br. 22.)

This assertion is once again belied by his 2012 filing on reconsideration in his state habeas case, in which he argued that "it was only officially upon receipt of the May sentence amendment order that Gorak had the carpet pulled

out from under him and was informed that he was being denied the credit on count two." (R-Supp. App. 114.)

Gorak seems to believe that he states a "sufficient reason" for his current claims by showing that this Court did not address *the merits* of his claims in 2012, instead holding that the claims were procedurally barred. (*See* Appellant Br. 25.) Gorak's reasoning would eviscerate the force of *Escalona*'s procedural bar: Gorak did not present a sufficient reason to raise his claims in 2012 (or 2015, for that matter), and his arguments have not changed. To establish a "sufficient reason," Gorak must do more than show that a court *already* held that the same claims were procedurally barred. *Cf. State v. Allen*, 2010 WI 89, ¶ 62, 328 Wis. 2d 1, 786 N.W.2d 124 (recognizing preclusive force of no-merit proceedings, unless defendant shows procedural irregularity in those proceedings).

As was the case last year, and in 2012, Gorak fails to present a sufficient reason to address any of his claims now. This, combined with the fact that all of his claims were previously litigated, supports the circuit court's conclusion that Gorak's claims are procedurally barred. This Court should therefore affirm the circuit court's orders now on appeal.

CONCLUSION

Based on the foregoing, Respondent Meisner asks this Court to AFFIRM the circuit court's orders dismissing Gorak's habeas petition, denying reconsideration, and denying his motion to vacate.

Dated this 15th day of August, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,137 words.

Dated this 15th day of August, 2017.

GABE JOHNSON-KARP
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 15th day of August, 2017.

GABE JOHNSON-KARP
Assistant Attorney General