STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plaintiff-Respondent,

Case No. 2017 AP 280 CR

v.

KAITLIN C. SUMNICHT,
Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

ON NOTICE OF APPEAL FROM THE JUDGMENT OF CONVICTION AND ORDER DENYING MOTION TO SUPPRESS ENTERED IN THE WINNEBAGO COUNTY CIRCUIT COURT BRANCH ONE

The Honorable Thomas J. Gritton, Presiding

Christian A. Gossett
District Attorney
State Bar No. 1040212

Attorneys for Plaintiff-Appellant

Margaret J. Struve
Assistant District Attorney
State Bar No. 1096218

Winnebago County District Atty's Office
448 Algoma Boulevard
Oshkosh, WI 54901
(920) 236-4977

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State is requesting neither oral argument nor publication as this matter involves application of well-settled law to the facts of this case.

STATEMENT OF THE CASE

As respondent, the State exercises its option to not present a full statement of the case. See *Wis. Stat. § 809.19(3)(a)2.* Instead, for this appeal to be appropriately considered, the State will present additional facts in the argument portion of its brief, when necessary, for this appeal to be appropriately considered.

ARGUMENT

This Court should uphold the trial court's findings that Sumnicht freely and voluntarily consented to an evidentiary chemical test of her blood. Deputy Glasel's uncontested testimony corroborated by the executed Informing the Accused form established clear and convincing evidence that Sumnicht consented freely and voluntarily.

Furthermore, this Court should affirm the trial court's finding that Sumnicht's attorney's letter to the Wisconsin State Laboratory of Hygiene did not withdraw Sumnicht's implied or voluntary consent to submit to an evidentiary chemical test of her blood. Sumnicht was given the opportunity to revoke her consent on July 9, 2016, and she chose not to. The Search for Fourth Amendment purposes had already concluded, and Sumnicht's ability to revoke her consent had already passed.

Standard of Review

An order granting or denying a motion to suppress evidence is a question of constitutional fact. *State v. Robinson*, 2010 WI 80, ¶ 22, 327 Wis. 2d 302, 786 N.W.2d 463. A circuit court's findings of evidentiary or historic fact are not to be overturned unless they are clearly erroneous. *State v. Richter*, 2000 WI 58, ¶ 26, 235 Wis. 2d 524, 612 N.W.2d 29; Wis. Stat. §

805.17(2). The application of these facts to constitutional principles are reviewed de novo. *State v. Williams*, 2001 WI 21, ¶¶18-19, 241 Wis. 2d 631, 623 N.W.2d 106.

The determination of whether a person gives consent is a matter of historical fact, and thus this Court will uphold the trial court's finding on the issue, unless it is against the great weight and clear preponderance of the evidence. *State v. Phillips*, 218 Wis. 2d 180, 196-97, 577 N.W.2d 794 (1998). The application of facts to the implied consent statute, Wis. Stat. § 343.305, is a question of law that is reviewed de novo. *State v. Rydeski*, 214 Wis. 2d 101, 106, 571 N.W.2d 417 (Ct. App. 1997).

Once the Informing the Accused form has been properly read to the subject, the subject must promptly submit or refuse to submit to the requested step. *Id*. at 109. After the reading of the Informing the Accused form, the obligation is on the accused to take the test promptly or to refuse it promptly. *State v. Neitzel*, 95 Wis. 2d 191, 193, 289 N.W.2d 828 (1980).

I. THIS COURT SHOULD UPHOLD THE TRIAL COURT'S FINDINGS OF FACT THAT SUMNICHT VOLUNTARILY CONSENTED TO AN EVIDENTIARY CHEMICAL TEST OF HER BLOOD.

Sumnicht consented to the blood test prior to entering Deputy Glasel's squad to be read the Informing the Accused form. Sumnicht first

gave implied consent by choosing to drive her vehicle on the public highways of Wisconsin. Second, Sumnicht gave voluntary consent to submit after she not only chose to drive her vehicle on the public highways of Wisconsin, but also after Deputy Glasel read her the Informing the Accused form verbatim and in response to the question whether she would submit to an evidentiary chemical test of her blood, "she said she would." (R43:9.) She freely and voluntarily made the decision to consent to submit to the blood test.

The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause." A warrantless search is presumptively unreasonable, "[b]ut there are certain 'specifically established and well-delineated' exceptions to the Fourth Amendment's warrant requirement." *State v. Williams*, 2002 WI 94, ¶ 18, 255 Wis.2d 1, 646 N.W.2d 834. A search conducted pursuant to consent is one of the well-established exceptions to the warrant requirement of the Fourth Amendment. *Phillips*, 218 Wis.2d at 196, 577 N.W.2d 794. Hence, "it is no

doubt reasonable for the police to conduct a search once they have been permitted to do so." *Shneckloth v. Bustamante*, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

Recently in *State v. Brar*, the Supreme Court of Wisconsin found that "[c]onsent can manifest itself in a number of ways, including through conduct." 2017 WI 73, ¶ 20. One manifestation of consent by conduct is implied consent. Implied consent is an individual's consent given by virtue of driving on Wisconsin's roads. Section 343.305(2) of the Wisconsin Statutes provides that an individual who "drives or operates a motor vehicle upon the public highways of this state ... is deemed to have given consent to one or more tests of his or her breath, blood, or urine." *Id.* "By reason of the implied consent law, a driver ... consents to submit to the prescribed chemical tests." *State v. Neitzel*, 95 Wis.2d 191, 193, 289 N.W.2d 828 (1980).

In *Brar* the Court further held that "[i]mplied consent to search is not a lesser or second-tier form of consent" and it is "constitutionally sufficient consent under the Fourth Amendment." *Id.*, 2017 WI 73, ¶ 23. Furthermore, in *Brar*, the Supreme Court of Wisconsin considered the reasoning of the Court of Appeals in *Padley*, specifically, that consent that arises under

Wisconsin's implied consent law is different from consent that is sufficient in and of itself under the Fourth Amendment. *State v. Padley*, 2014 WI App 65, ¶ 25, 354 Wis.2d 545, 849 N.W.2d 867. The Court of Appeals in *Padley* reasoned that: "actual consent to a blood draw is not 'implied consent,' but rather a possible result of requiring the driver to choose whether to consent under the implied consent law." *Id*. The Supreme Court in *Brar* disagreed with this distinction:

> "This reasoning implies a distinction between implied consent and consent that is sufficient under the Fourth Amendment. Such a distinction is incorrect as a matter of law... Stated more fully, and contrary to the court of appeals' reasoning in *Padley*, consent can manifest itself in a number of ways, including through conduct."

Id, 2017 WI 73, ¶¶ 19-20.

Nonetheless, the State has the burden of proving that consent was freely and voluntarily given. *Shneckloth*, 412 U.S. 218, 222. Though the State need not demonstrate that consent was given knowingly or intelligently. *Id.* at 241. In determining whether consent was voluntarily given, there is no single fact that determines whether consent was voluntarily given. *Id.* at 226. The determination of whether consent was voluntarily given must be examined based on the totality of the circumstances of each individual case. *Id.* at 233. Even in implied consent cases, "[the Court] consider[s] the totality of the circumstances at the time

of the blood draw to determine if an individual's previously-given consent continues to be voluntary at that time." *Brar*, 2017 WI 73, ¶ 25.

Sumnicht first consented under Wisconsin's implied consent law. She previously voluntarily consented to the evidentiary chemical test when she applied for her license and when she decided to drive. Relevant to this case, Sumnicht availed herself of the roads of Wisconsin on July 9, 2016. Specifically, Sumnicht availed herself to Indian Trail Road in the Town of Winneconne, Winnebago County, Wisconsin. (R43:5-6.) As a result, she consented through her conduct to a blood test. *Brar*, 2017 WI 17, ¶ 29. See also Wis. Stat. § 343.305(2). After Sumnicht was arrested on July 9, 2016, she was advised by Deputy Glasel that she could submit to the test, or refuse and be punished for the refusal. (R43:6-8; R21:1.) See also Wis. Stat. § 343.305(4). Sumnicht's previously given consent was voluntary at the time "she stated she would" submit to an evidentiary chemical test of her blood. (R43:7.)

Apart from Sumnicht's consent under the implied consent law, the trial court found that Sumnicht freely and voluntarily gave consent to the blood draw. (R44:3-4.) The trial court found that the right to test that blood follows. *Id*. Testimony was taken during an evidentiary hearing on

Sumnicht's motion to suppress on October 7, 2016. (R43.) At that hearing, Deputy Glasel testified that after arresting Sumnicht for Operating While Intoxicated, he transported Sumnicht to Aurora Hospital to complete OWI processing, which included a blood draw and going over the Informing the Accused form. (R43:6-7.) The Informing the Accused form incorporates language from section 343.305(4) of the Wisconsin Statute. The relevant sections of the Informing the Accused form are as follows:

> Under Wisconsin's Implied Consent Law, I am required to read this notice to you:
>
> You have either been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs, or both . . .
>
> This law enforcement agency now wants to test one or more samples of your breath, blood, or urine to determine the concentration of alcohol or drugs in your system. If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. If you refuse to tae any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.
>
> Will you submit to an evidentiary chemical test of your blood?

Wis. Stat. § 343.305(4); See also (R21:1.).

Deputy Glasel testified that he read Sumnicht the Informing the Accused form verbatim. (R43:7.) In viewing the Informing the Accused form, the first sentence Deputy Glasel read to Sumnicht began with the phrase, "Under Wisconsin's Implied Consent Law." (R21:1.) Deputy

Glasel further testified that after reading the entire form to her verbatim, he asked Sumnicht if she would submit to an evidentiary chemical test of her blood. (R43:7.) Deputy Glasel was unable to recall Sumnicht's exact words in response to that question, but was able to recall that "she stated she would," and "she didn't say no." (*Id.*; R43:9.) Deputy Glasel further testified that after asking Sumnicht that specific question, he checked the box marked "yes" on the form. (R43:8; 21:1.) Deputy Glasel was unable to recall whether Sumnicht had any questions when he went through the form with her. (R43:8.) He said it was possible that Sumnicht had some questions. (R43:10.) However, Deputy Glasel further testified that he "would have reread certain paragraphs as [he] was trained to do if she had a question about the form." (R43:10.)

The trial court ordered briefing and an oral decision was scheduled. However, prior to ordering briefing, during the argument phase of the October 7, 2016, motion hearing, the trial court addressed Sumnicht's position regarding sufficiency of evidence presented. In response, the Court stated that "[t]he only thing right now that we have in the record as far as the original blood draw is that she said they could take it." (R43:19.) The trial court further found:

> "[Sumnicht's] argument loses just because of this [Informing the Accused] form in and of itself as far as whether or not she consented. If she gets up and testifies during the course of this hearing that there was something that happened during the course of her discussion with the officer and she is saying I'm not going to do this test, I don't want to do this test, those types of things, and then it becomes a credibility issue obviously, but under the circumstances here I don't find how in my sitting here as judge here, I don't find out how I would find this isn't a voluntary consent."

(R43:20-21.) Accordingly, on November 18, 2016, the trial court found that "there was consent freely and voluntarily given through the arrest process and the Informing the Accused form and the statements by Ms. Sumnicht at the time of her arrest." (R44:3.)

The record sufficiently establishes that Sumnicht consented to the blood test. First, by conduct, Sumnicht chose to drive on the public highways of Wisconsin pursuant to the implied consent law. Wis. Stat. § 343.305(2). Furthermore, the trial court's statements acknowledge Deputy Glasel's uncontested testimony that Sumnicht "stated she would" submit to an evidentiary chemical test of her blood. (R43:7.) Deputy Glasel's testimony is corroborated by the Informing the Accused form that he executed with Sumnicht on July 9, 2016, marking the box checked "yes." (R43:7-8; R21:1.) Deputy Glasel's uncontested testimony corroborated by the executed Informing the Accused form established clear and convincing evidence that Sumnicht voluntarily consented to an evidentiary chemical

test of her blood. Therefore, this Court should uphold the trial court's factual findings and affirm the trial court's ruling that Sumnicht freely and voluntarily consented to an evidentiary chemical test of her blood. (R43:7, 17-20; 44:3.)

II. SUMNICHT'S ATTORNEY'S LETTER TO THE WISCONSIN STATE LABORATORY OF HYGIENE DID NOT WITHDRAW HER PREVIOUS VOLUNTARY AND IMPLIED CONSENT TO THE EVIDENTIARY CHEMICAL TEST OF HER BLOOD.

The letter that Sumnicht's attorneys sent to the Wisconsin State Laboratory of Hygiene on July 12, 2016, three days after she voluntarily decided to consent to the blood test, did not effectively revoke that consent to the evidentiary chemical test of her blood. Sumnicht was given the opportunity to revoke her consent on July 9, 2016, and she chose not to. The Search for Fourth Amendment purposes had already concluded, and Sumnicht's ability to revoke her consent had already passed.

It is clear, and the defendant concedes, that under current Wisconsin case law, the analysis of evidence is "an essential part of the seizure" and does not require independent legal justification. The court in *State v. Riedel*, found:

> "This court has concluded that *United States v. Snyder*, 852 F.2d 471, (9th Cir. 1988) and *State v. Petrone*, 161 Wis. 2d 530, 468 N.W.2d 676

> (1991) stand for the proposition that the examination of evidence seized pursuant to the warrant requirement or an exception to the warrant requirement is an essential part of the seizure and does not require a judicially authorized warrant. Both decisions refuse to permit a defendant to parse the lawful seizure of a blood sample into multiple components. *VanLaarhoven*, 2001 WI App 275 at ¶ 16. We find the reasoning of *Snyder*, *Petrone*, and *VanLaarhoven* persuasive, and we adopt their holdings here. We therefore conclude that the police were not required to obtain a warrant prior to submitting Riedel's blood for analysis."

State v. Riedel, 2003 WI App 18, ¶ 16, 259 Wis. 2d 921, 656 N.W.2d 789 (citing *State v. VanLaarhoven*, 2001 WI App 275, ¶ 16, 248 Wis. 2d 881, 637 N.W.2d 411); see also *id*., ¶ 17 (concluding that "analysis of Riedel's blood was simply the examination of evidence obtained pursuant to a valid search.").

Sumnicht further concedes that a person who consents after being read the Informing the Accused form is explicitly providing consent to both the blood draw and subsequent testing. Sumnicht claims that because the analysis of the blood is within the scope of the initial consent and search, the search is not completed until the analysis is conducted. Sumnicht goes on to argue that because the search is not completed until the analysis is complete, she can revoke her consent at any time prior to the analysis of the blood. This argument is flawed because the "search" that matters is the actual blood draw, not the analysis of the blood. It is the taking of the blood from an individual that the courts have consistently ruled is the

"search" that implicates the Fourth Amendment. The United States Supreme Court made this clear in both *McNeely v. Missouri*, 133 S.Ct. 1552, (2013), and *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2178 (2016).

> "The Fourth Amendment provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." Our cases have held that a warrantless search of the person is reasonable only if it falls within a recognized exception. See, e.g., *United States v. Robinson*, 414 U.S. 218, 224, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). That principle applies to the type of search at issue in this case, which involved a compelled physical intrusion beneath McNeely's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's "most personal and deep-rooted expectations of privacy." *Winston v. Lee*, 470 U.S. 753, 760, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985); see also *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989).

McNeely, 133 S. Ct. at 1558.

> "Blood tests are a different matter. They "require piercing the skin" and extract a part of the subject's body. *Skinner*, *supra*, at 625, 109 S.Ct. 1402; see also *McNeely*, 569 U.S., at ——, 133 S.Ct., at 1558 (opinion of the Court) (blood draws are "a compelled physical intrusion beneath [the defendant's] skin and into his veins"); *id.*, at ——, 133 S.Ct. at 1573 (opinion of ROBERTS, C.J.) (blood draws are "significant bodily intrusions"). And while humans exhale air from their lungs many times per minute, humans do not continually shed blood. It is true, of course, that people voluntarily submit to the taking of blood samples as part of a physical examination, and the process involves little pain or risk. See *id.*, at ——, 133 S.Ct., at 1563–1564 (plurality opinion) (citing *Schmerber*, 384 U.S., at 771, 86 S.Ct. 1826). Nevertheless, for many, the process is not one they relish. It is significantly more intrusive than blowing into a tube."

Birchfield, 136 S. Ct. at 2178.

The Supreme Court made no mention of the analysis of the blood, but instead focused on the actual extraction of the blood in its Fourth Amendment analysis. The concern, for Fourth Amendment purposes is with the intrusion posed by the actual blood draw, not the subsequent analysis of the blood. Once Sumnicht's blood was legally drawn, she no longer had a privacy interest in her extracted blood. She did not have a privacy interest in her blood once it was out of her body. That the courts have consistently been concerned with the Fourth Amendment privacy implications of a blood draw makes sense. The Fourth Amendment is designed to protect our personal privacy, not our criminal activity. Once Sumnicht's blood was legally drawn from her, as it was in this case, the Fourth Amendment was satisfied and no longer afforded her any protections. Nothing that the lab did during the analysis of Sumnicht's blood implicated her Fourth Amendment rights.

While Sumnicht is correct that under the Fourth Amendment, a search can be terminated by a clear and unequivocal withdrawal of consent, her claim that she withdrew her implied and actual consent in this case must fail. Sumnicht, like every defendant arrested for an OWI in Wisconsin, was given the opportunity to withdraw her consent to an

evidentiary blood draw. The implied consent law, as it is written, provides every defendant the opportunity the revoke his or her implied consent. In that sense, it can be said that the implied consent law affords individuals arrested for OWI greater Fourth Amendment protections than other individuals subject to consensual searches. Even though a person who has been arrested for OWI has already given consent to one or more tests of their breath, blood or urine, officers are required to read the informing the accused form prior to conducting a chemical test, which specifically provides individuals with the opportunity to withdraw their consent. Individuals subject to other Fourth Amendment searches are not afforded that specific statutory opportunity to withdraw their consent. Officers do not read a similar form prior to searching an individual's car or home.

Sumnicht here, like every other individual arrested for OWI in Wisconsin, was given the opportunity to withdraw her consent before the blood draw. (R21:1.) She did not avail herself of that opportunity when it was presented to her, nor did she revoke her consent at any time after the form was read and her blood was drawn. Once her blood was drawn, her opportunity to withdraw her consent expired. As the Court of Appeals said in *State v. Rydeski*, 214 Wis. 2d 101, 109 (Ct. App. 1997), "once a person

has been properly informed of the implied consent statute, that person must promptly submit or refuse to submit to the requested test." Sumnicht was properly advised that she was consenting to both a blood draw and chemical testing of her blood. Sumnicht was given the opportunity to revoke her consent, and she chose not to. Sumnicht's opportunity to withdraw her consent passed once her blood was drawn.

Sumnicht's attempts to compare her situation to that of a search of a home whereby the owner initially consents to a search of his home, but later revokes consent must fail. If officers begin a consensual search of an individual's home, and the individual decides to revoke consent, the officers would obviously have to discontinue the search and return with a warrant. However, if during the time the officers were consensually in the home (before the owner revoked consent) the officers discovered drugs, they would not simply put the drugs back and leave the home. That would be absurd and no court would expect the officers to simply put the drugs back. Furthermore, a court would be hard pressed to require those officers to go get a warrant before they sent those drugs to be tested at a lab. That is because the officers were conducting a lawful search at the point they discovered the drugs. It is the initial entry into the home that implicated the

Fourth Amendment, not the seizure of the drugs. Playing the revocation of consent in the home search scenario out to its logical conclusion illustrates that a defendant cannot simply choose to revoke consent at any point in a search and expect that the fruits of the search will not be used against him or her. So, it may be said that a defendant can revoke consent to search at any time, but in any search, there will come a time when the revocation will not help the defendant. Here, the officer already had already lawfully obtained Sumnicht's blood from her after she consented to the draw and analysis of her blood. Sumnicht was given the opportunity to revoke her consent, and she chose not to. The search for Fourth Amendment purposes had already concluded, and Sumnicht's ability to revoke her consent had already passed.

The approach the defendant is encouraging this court to take in this case would have significant ramifications in OWI cases, and is in contrast to the public policy behind the implied consent law. The implied consent law is designed to make it easier to obtain evidence from impaired drivers, not make it harder. If this court adopts the Sumnicht's approach to implied consent, it will encourage all individuals arrested for OWI to revoke their consent after their blood is drawn, but before it is tested. This would mean

that officers would have to obtain warrants before the lab could test the samples. If an officer has to obtain a warrant to test the blood, why would they even bother with trying to take blood under the implied consent law? If they are going to have to get a warrant to test the blood, why not just get a warrant in the first place? This is clearly in stark contrast to what the United States Supreme Court contemplated in *McNeely*. The *McNeely* court did not hold that a warrant was required in all cases; instead the court explicitly endorsed implied consent laws.

> "As an initial matter, States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense."

McNeely at 1556.

Furthermore, Sumnicht cannot present a single case directly supporting her position, which is likely reflective of the fact that her position is extreme and has immense ramifications. If adopted, this approach would not be limited to the circumstances presented here, but would extend to many other scenarios. Essentially, it would mean that a defendant could withdraw his or her consent any time after an item had been seized subsequent to a lawful search, but before it had been tested at a

lab. While in the OWI context, the window between seizure of the blood and testing is only a few days or weeks, in other instances, the lag between seizure and testing is more significant. Does this mean that if an individual consents to providing a DNA sample, and the lab does not test the sample for six months or a year, the defendant can revoke his or her consent at any time up until the testing, thereby requiring law enforcement to obtain a warrant? The scenarios are endless and the constraints placed on law enforcement and on the apprehension of criminals would be immeasurable. That Sumnicht has presented no authority for her novel approach to the Fourth Amendment also makes these burdens wholly unjustified under our federal and state constitutions.

Therefore, this Court should affirm the trial court's finding that Sumnicht's attorney's letter to the Wisconsin State Laboratory of Hygiene did not withdraw her consent to submit to an evidentiary chemical test of her blood. Sumnicht was given the opportunity to revoke her consent on July 9, 2016, and she chose not to. The Search for Fourth Amendment purposes had already concluded, and Sumnicht's ability to revoke her consent had already passed.

CONCLUSION

For the reasons set forth above, this Court should uphold the factual findings of the trial court and affirm its order denying Sumnicht's motion to suppress.

Dated at Oshkosh, Wisconsin, this 5th day of September, 2017.

_____

Margaret Jeanne Struve
State Bar No. 1096218
Assistant District Attorney
Winnebago, County
Attorney for the Respondent

CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4,352 words.

I further certify pursuant to Wis. Stat. § 809.19(b)(12)(f) that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

I further certify that on the date of signature I routed the enclosed briefs to our office station for first class US Mail Postage to be affixed and mailed to:

Wisconsin Court of Appeals (ten copies)
Officer of the Clerk
110 East Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

Attorneys Adam M. Welch (three copies)
Tracey Wood & Associates
One South Pinckney Street, Suite 950
Madison, WI 53703

Dated at Oshkosh, Wisconsin, this 5th day of September, 2017.

_____

Margaret Jeanne Struve, State Bar No. 1096218
Assistant District Attorney
Winnebago County, Wisconsin