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**STATE OF WISCONSIN  
COURT OF APPEALS**

**DISTRICT III**

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Case No. 2017 AP 871-CR  
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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TANYA LYNN SCHMIT,

Defendant-Appellant.  
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**DEFENDANT-APPELLANT'S REPLY BRIEF**  
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On appeal from the Circuit Court  
of St. Croix County, Hon. R. Michael Waterman,  
Circuit Judge, presiding.

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## **CASES CITED**

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**ARGUMENT**

**I. TRIAL COUNSEL WAS CONSTITUTIONALLY  
INEFFECTIVE WHEN HE FAILED TO INVESTIGATE  
EXCULPATORY WITNESSES NAMED BY SCHMIT.**

The State’s brief does little more than summarize the circuit court’s postconviction decision. As the circuit court’s postconviction decision was fully addressed in Schmit’s Brief-in-Chief, her response will not be repeated here. Rather, Schmit writes this reply to point out several of the arguments the State did not address, and therefore concedes.

First, the circuit court held that Schmit was not prejudiced by trial counsel's failure to investigate the witnesses because they would not have been allowed to testify on procedural grounds. As the witnesses were disclosed shortly before trial, trial counsel would have presumably needed a continuance to investigate them and secure their attendance. The circuit court would have refused a continuance request, however, and even if counsel had timely subpoenaed them for trial, they would have been excluded for being "untimely" named and "prejudicial" to the State. In her Brief-in-Chief, Schmit argued the circuit court's reasoning was erroneous. The circuit court did not acknowledge or apply: a) Schmit's due process right to present witnesses in her defense or b) the applicable legal standards for granting a continuance. Had it done so, the witnesses should have been allowed to testify. Further, the circuit court did not articulate how the State would have been prejudiced by these witnesses and in fact, there is no basis for that finding. In addition, the circuit court based its holding on a number of factual assumptions unsupported or contradicted by the record. (See Schmit's Brief-in-Chief, pp. 17-19). The State does not address any of these arguments and therefore concedes them. See *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

Second, the circuit court held that Schmit was not prejudiced by trial counsel's failure to investigate Chad Schmit because his testimony would have been excluded as hearsay. In response, Schmit argued Aumer's admission to Chad Schmit that she was the driver would have been admissible for at least two reasons: a) as an excited utterance; or b) as a prior inconsistent statement. (See Schmit's Brief-in-Chief, pp. 15-16). The State does not address either of these arguments and therefore concedes them. See *Charolais Breeding Ranches, Ltd.*, 90 Wis. 2d 97 at 109.

Third, the State does not address Schmit's argument that trial counsel had no strategic basis for failing to investigate or present these witnesses. As trial counsel himself pointed out, he could not have made a strategic decision without first having investigated what evidence the witnesses had to offer. (See Schmit's Brief-in-Chief, pp.

9, 19-20). The State does not address this argument and therefore concedes it. See *Charolais Breeding Ranches, Ltd.*, 90 Wis. 2d 97 at 109.

### **CONCLUSION**

This Court should reverse the conviction for OWI 3<sup>rd</sup> and remand for a new trial.

Respectfully submitted this 23<sup>rd</sup> day of October, 2017.

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**CERTIFICATION OF COMPLIANCE WITH RULE  
809.19(8)(b)&(c)**

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b)&(c), as modified by the Court's Order, and that the text is:

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This brief contains 1214 words.

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~~I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.~~

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Dated this 23<sup>rd</sup> day of October, 2017.

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I certify that this brief or appendix was deposited in the United States Mail for delivery to the Clerk of the Court of Appeals by First Class Mail on 23<sup>rd</sup> day of October, 2017. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

Dated this 23<sup>rd</sup> day of October, 2017.

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