

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal No. 2017AP001416-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MATTHEW C. HINKLE,

Defendant-Appellant.

On Appeal from the Judgment of Conviction and Order
Denying Postconviction Relief, Entered in the Circuit Court
for Fond du Lac County, the Honorable Robert J. Wirtz,
Presiding

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Did the Fond du Lac County adult court lack competency to proceed on counts 5 through 18?

The postconviction court found that the adult court had proper jurisdiction over Hinkle. (85:30-31; App.130-31).

2. Did trial counsel provide ineffective assistance?

The postconviction court found that trial counsel interpreted the law correctly and therefore her performance was not deficient. (85:31; App.131).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. Publication may be warranted, as different circuit courts may be interpreting Wis. Stat. § 938.183(1)(b) in different ways, based on counsel's discussions with an attorney who practices juvenile law.

STATEMENT OF THE CASE AND FACTS

This is a review of the final judgment of conviction entered on September 16, 2016 and order denying postconviction relief entered on July 7, 2017 in the Circuit Court for Fond du Lac County, the Honorable Robert J. Wirtz presiding. (37;38;69).

Hinkle was born on February 7, 1999. (37:1). Thus, he was sixteen years old in July 2015 when, as alleged by the respective complaints: police found Hinkle driving a vehicle in Fond du Lac County that had been stolen out of Milwaukee. (2;10;56). The officer gave orders for all occupants to exit the vehicle. (2:2; App.136). The other occupants exited the vehicle, but Hinkle remained in the car and drove away at high speeds. (2:2-3; App.136-37). In doing so, Hinkle struck other vehicles and drove across residential

lawns. (2:2-4;App.136-38). Hinkle eventually lost control of the vehicle and then started running away. (2:3;App.137). The chase ended when a K-9 was deployed and apprehended him. (2:3;App.137).

This series of events led to two Milwaukee County cases (adult court case number 15-CF-5011 and juvenile court case number 15-JV-248B) and two Fond du Lac County cases (adult court case number 15-CF-418 and juvenile court case number 15-JV-89).

Milwaukee County Cases

In Milwaukee County, the state filed a delinquency petition on July 17, 2015 in case number 15-JV-248B, along with a petition for waiver of juvenile jurisdiction. (57). On October 28, 2015, Milwaukee County juvenile court held a waiver hearing and Hinkle was subsequently waived into Milwaukee County adult criminal court on those counts pursuant to Wis. Stat. § 938.18. (56:2-3;57). On November 19, 2015, a criminal complaint was filed in Milwaukee County case number 15-CF-5011 charging Hinkle with the two counts waived by the Milwaukee County juvenile court. (56:1).

Fond du Lac County Cases

Fond du Lac County adult court case number 15-CF-418 was commenced on July 28, 2015 when the state filed a criminal complaint in adult court alleging four traffic-related counts, consisting of one count of Attempt Flee or Elude a Traffic Officer, contrary to Wis. Stat. § 346.04(3) and three counts of hit and run – attended vehicle, contrary to Wis. Stat. § 346.67(1). (2:1). The adult criminal court had jurisdiction over these counts pursuant to Wis. Stat. § 938.17, as they were traffic-related offenses contained within chs. 341 to 351.

The state also filed a delinquency petition in Fond du Lac County juvenile court case number 15-JV-89 for the counts that did not qualify for adult court under Wis. Stat. § 938.17. (57). The delinquency petition alleged fourteen counts, consisting of seven counts of 2nd Degree Recklessly Endangering Safety, one count of Operating Motor Vehicle

without Consent, three counts of Resisting or Obstructing an Officer, and three counts of Criminal Damage to Property. (57). Along with the delinquency petition, the state filed a petition for waiver of juvenile jurisdiction. (57). On August 26, 2015, the Fond du Lac juvenile court held a hearing on the State's petition for waiver. (62). At that hearing, trial counsel stated that Hinkle will contest the waiver and asked the court to schedule a contested waiver hearing. (62:3).

The Fond du Lac juvenile court held another hearing on November 18, 2015. (64). At that hearing, the court stated that on November 17th the court received a copy of a Milwaukee County order waiving juvenile jurisdiction. (64:2). The court then directed the parties to Wis. Stat. § 938.183(1)(b), which allows for exclusive original adult court jurisdiction if the court assigned to exercise jurisdiction under ch. 938 and ch. 48 has waived its jurisdiction over the juvenile for a previous violation and criminal proceedings on that previous violation are still pending. (64:3). The parties anticipated that the Fond du Lac adult court would attain jurisdiction pursuant to Wis. Stat. § 938.183(1)(b) as soon as the Milwaukee County charges were formally transferred to adult court. (64:2-8). The parties determined that – even though Milwaukee County juvenile court had already waived jurisdiction over Hinkle – the Milwaukee criminal proceedings were not yet “pending,” as required by Wis. Stat. § 938.183(1)(b), since a criminal complaint had not yet been filed there. (64:4-8). As a result, the Fond du Lac juvenile court adjourned the hearing until after it received proof that the Milwaukee complaint was filed. (64).

On November 19, 2015, the Fond du Lac juvenile court received a certified copy of the Milwaukee criminal complaint, and the parties reconvened. (61:2). When asked whether Hinkle was contesting waiver, trial counsel stated she believed adult court jurisdiction would now be automatic (pursuant to § 938.183), and added that Hinkle was not agreeing to a waiver (pursuant to § 938.18). (61:3;App.133). The court determined that as a result of the Milwaukee County waiver and pending criminal proceeding, the Fond du Lac adult criminal court would have exclusive original jurisdiction over this matter pursuant to Wis. Stat. §

938.183(1)(b), in lieu of the formal waiver process under § 938.18. (61:2-3;App.133).

Nevertheless, the juvenile court signed an order on that same date waiving juvenile jurisdiction under § 938.18. (57;App.134). The order states that a waiver hearing was held on November 19, 2015, and a box is checked stating: “The petition for waiver was not contested. The juvenile’s decision to not contest is a knowing, intelligent and voluntary decision.” (57;App.134).

The state then filed an amended information in Fond du Lac County case number 15-CF-418. (10). The amended information contained the original four traffic-related counts, but also added the fourteen non-traffic counts that were previously filed in juvenile court case number 15-JV-89 (which appear as counts 5-18 on the amended information). (10). Hinkle subsequently pled no contest to counts 1, 2, 5, 12, 13, 16, and 17, and the remaining counts were dismissed and read in. (25). On counts 1, 5, and 12, the court sentenced Hinkle to a total of 9 years imprisonment (6 in, 3 out).¹ (25). On counts 2, 13, 16 and 17, the court withheld sentence and ordered two years probation. (25).

Postconviction Proceedings

Hinkle filed a postconviction motion arguing that the adult court lacked competency to proceed on counts 5 through 18, and that trial counsel provided ineffective assistance for failing to object to the addition of those counts. (44). In preparation for the motion, counsel consulted with trial counsel, who stated that Hinkle was never waived into adult court through Wis. Stat. § 938.18. (84:4-5). However, at the scheduled postconviction motion hearing on April 28, 2017, the State presented an order indicating that Hinkle had been waived into adult court pursuant to § 938.18. (49). The hearing was adjourned so counsel could determine what had happened. (84:7).

¹ The breakdown is as follows – count 1: 2 years imprisonment (1 in, 1 out); count 5: 5 years imprisonment (4 in, 1 out); and count 12: 2 years imprisonment (1 in, 1 out), all consecutive to each other. (25;App.143-45).

After filing extension motions in the court of appeals, counsel filed an amended postconviction motion renewing his other arguments, but adding that the waiver order the State had presented was not valid and that Hinkle was never properly waived into adult court through 938.18. (51;52;59).

A hearing on the motion was held on July 6, 2017. (85). Hinkle called trial counsel and Hinkle to testify. (85). Regarding § 938.18 waiver, trial counsel testified that Hinkle was never waived into adult court and the waiver order does not reflect what actually happened. (85:7;App.107). Regarding § 938.183, trial counsel testified that she never filed a motion arguing that the Milwaukee County waiver was not sufficient to give the Fond du Lac County adult court original jurisdiction over counts 5 through 18, because she did not believe the argument had legal grounds. (85:5-6,9;App.105-06,109). When asked whether she specifically considered that argument and rejected it, or whether she did not consider it at all, she responded that she never considered filing a motion because she believed that a juvenile is always waived after any prior waiver. (85:9;App.109).

Hinkle testified that he never told the juvenile court that he agreed to waive jurisdiction. (85). He also testified that he did not know counts 5-18 belonged in juvenile court and that, if he had known that, he would have wanted his attorney to file a motion fighting those counts and would not have accepted the plea bargain. (85:15;App.115).

The court denied the motion. Regarding the § 938.183 claim, the court found that the statute does not specifically say it must be the same county, and that the court assigned to exercise jurisdiction under chs. 48 and 938 is any court that handles juvenile matters. (85:30-31;App.130-31). Regarding the ineffective assistance of counsel claim, the court found that trial counsel correctly interpreted the law and was therefore not ineffective. (85:31;App.131).

ARGUMENT

- I. **The Fond du Lac County adult court lacked competency to proceed on counts 5 through 18. Neither Wis. Stat. §§ 938.18 nor 938.183 entitled the Fond du Lac adult court to attain jurisdiction over those counts.**

- A. **General principles of law**

The juvenile court generally has exclusive jurisdiction over any juvenile 10 years of age or older who is alleged to be delinquent. However, there are three statutory exceptions that allow a juvenile to be charged in adult court. Those exceptions are provided in Wis. Stat. §§ 938.17, 938.18, and 938.183.

Wis. Stat. § 938.17 provides that courts of criminal jurisdiction have exclusive jurisdiction in proceedings against juveniles 16 years of age or older for certain traffic-related violations, including those in chs. 341 to 351.

Wis. Stat. § 938.18 provides a process for the juvenile court – although it has original jurisdiction – to waive its jurisdiction and send a juvenile offender to adult court. If the defendant contests the petition for waiver of juvenile jurisdiction, then a hearing is held at which the district attorney must present relevant testimony and the juvenile has the right to present testimony on his behalf. §§ 938.18(3)(b) & (4)(b). If the defendant does not contest the waiver, then the court must conduct a colloquy with the defendant to ensure that the decision to not contest is made knowingly, intelligently and voluntarily. § 938.18(4)(c). After the appropriate process is complete, the court then must base its decision whether to waive jurisdiction on the criteria specified in § 938.18(5). If, after following the above procedure, the juvenile court determines waiver into adult court is appropriate, then the juvenile court will sign an order waiving juvenile court jurisdiction (Wisconsin Circuit Court Form JD-1723) and the matter is referred to the district attorney for appropriate criminal proceedings.

Finally, Wis. Stat. § 938.183 specifies exceptions in which the adult criminal court has original jurisdiction over a

juvenile for certain crimes and certain conditions. One such exception is provided in § 938.183(1)(b), which states:

Notwithstanding ss. 938.12(1) and 938.18, courts of criminal jurisdiction have exclusive original jurisdiction over ... a juvenile who is alleged to have violated any state criminal law if the juvenile has been convicted of a previous violation following waiver of jurisdiction under s. 48.18, 1993 stats., or s. 938.18 by *the court assigned to exercise jurisdiction under this chapter* and ch. 48 or if *the court assigned to exercise jurisdiction under this chapter* and ch. 48 has waived its jurisdiction over the juvenile for a previous violation and criminal proceedings on that previous violation are still pending.

Wis. Stat. § 938.183(1)(b) (emphasis added).

B. Hinkle was not properly waived into Fond du Lac County adult court under Wis. Stat. § 938.18.

The Fond du Lac County order waiving juvenile court jurisdiction was clearly signed in error, as it directly contradicts what actually happened at the hearing, including the court’s oral ruling. The whole point of adjourning the November 18, 2015 hearing was to allow time for the Milwaukee County adult case to formally be “pending” so they could proceed under Wis. Stat. § 938.183(1)(b) instead of § 938.18. At the November 19th hearing, the court unambiguously stated that “as a consequence” of the Milwaukee waiver, “under Section...938.183(1)(b), the...criminal court would have exclusive original jurisdiction over this matter in lieu of the formal waiver process.” (61:2-3). When a conflict exists between a court’s oral pronouncement and a written order, the oral pronouncement controls. *State v. Perry*, 136 Wis. 2d 92, 114, 401 N.W.2d 748 (1987).

Furthermore, the boxes checked on the order contradict the events at the hearings and Hinkle’s position on waiver. Even though trial counsel explicitly stated that Hinkle was not agreeing to a waiver, and even though no colloquy was performed, the order nevertheless states: “The petition for waiver was not contested. The juvenile’s decision to not contest is a knowing, intelligent and voluntary decision.” (57).

The November 19, 2015 hearing was not a waiver hearing. There was no testimony taken, no colloquy performed, and the court did not consider the statutory criteria in § 938.18(5) as required for a waiver hearing. Based on the parties' discussions on November 18th and 19th, as well as the court's unambiguous pronouncement, counts 5-18 clearly got to adult court solely through 918.183, not 938.18. The juvenile court erroneously exercised its discretion in signing the order and it should not be valid. Jurisdiction should be transferred to the juvenile court so the juvenile court may reverse its order waiving jurisdiction.

C. Counts 5 through 18 were not properly in adult court under Wis. Stat. § 938.183. The plain meaning of Wis. Stat. § 938.183(1)(b) permits original adult court jurisdiction over a juvenile only if the juvenile court in the same county had waived jurisdiction over the juvenile for a previous violation. Because Fond du Lac juvenile court had not waived jurisdiction over Hinkle for a previous violation, the Fond du Lac adult court did not have competency to proceed on counts 5-18.

Statutory interpretation begins with the language of the statute. *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 663, 681 N.W.2d 110. If the meaning of the statute is plain, then the court ordinarily stops the inquiry and applies the plain meaning. *Id.*; *State v. Obriecht*, 2014 WI App 42, ¶ 8, 353 Wis. 2d 542, 846 N.W.2d 479. Statutory language is given its common, ordinary and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning. *Bruno v. Milwaukee County*, 2003 WI 28, ¶¶ 8, 20, 260 Wis. 2d 633, 660 N.W.2d 656. *Kalal*, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110. If this process of analyzing statutory language yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning. *Bruno*, 2003 WI 28, ¶ 20. "In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute." *State v. Pratt*, 36 Wis. 2d 312, 317, 153 N.W.2d 18; *Kalal*, 2004 WI 58.

Wis. Stat. § 938.183 requires exclusive adult court jurisdiction over a juvenile “who is alleged to have violated any state criminal law ... if *the court assigned to exercise jurisdiction under this chapter* and ch. 48 has waived its jurisdiction over the juvenile for a previous violation and criminal proceedings on that previous violation are still pending.” Wis. Stat. § 938.183(1)(b)(emphasis added).

The language of Wis. Stat. § 938.183(1)(b) is clear and unambiguous. To assign is “to set apart or mark for a specific purpose; designate; to place at some task or duty; to appoint.” (*Assign*, *Webster’s New World College Dictionary* (4th ed. 2002) p. 85). To “exercise” is “to carry out duties; to put into action.” (*Exercise*, *Webster’s New World College Dictionary* (4th ed. 2002) p. 497). Under the common sense meaning, *the court assigned to exercise* jurisdiction under the juvenile code refers to the specific court designated to handle the case and carry out the duties associated with it. The court that handles a case and performs the duties associated with it is based on the county in which the offense occurred. In the instant case, the court assigned to exercise jurisdiction under chapter 938 was the Fond du Lac County juvenile court – not the Milwaukee County juvenile court.

The statute states that the adult court has jurisdiction if “*the court*” – not ‘*any court*,’ not ‘*a court*’ – assigned to exercise jurisdiction under this chapter and ch. 48 has waived its jurisdiction over the juvenile for a previous violation. (§ 938.183, emphasis added). Context is important to meaning. *Kalal*, 2004 WI 58, ¶ 46. Therefore, statutory language is interpreted in the context in which it is used – not in isolation but as part of a whole, in relation to the language of surrounding or closely-related statutes, and reasonably, to avoid absurd or unreasonable results. *Id.* ¶ 46.

There are occasions when the legislature saw fit to include “*any court assigned to exercise jurisdiction*” under ch. 938 and ch. 48, but § 938.183(1)(b) is not one of them.

For instance, § 938.35(1)(b) states that “*any court*” assigned to exercise jurisdiction under chs. 48 and 938 may consider a juvenile disposition.

The legislature distinguishes between “the court” and “any court” assigned to exercise jurisdiction under chs. 48 and 938. For instance, § 938.396(2g)(gm) states that upon request of “*any court assigned to exercise jurisdiction*” under chs. 48 and 938, ...or a district attorney, corporation counsel, or city, village, or town attorney to review court records for the purpose of any proceeding in *that court*... “*the court assigned to exercise jurisdiction*” under chs. 48 and 938...shall open for inspection by any authorized representative of the requester its records relating to any juvenile who has been the subject of a proceeding under this chapter.” “Any court” refers to courts from any county assigned to exercise jurisdiction under ch. 48 and 938, whereas “the court” constitutes the court assigned to exercise jurisdiction under chs. 48 and 938 in the instant county.

The legislature also distinguishes between “the court” and “any other court,” such as in § 938.396(2m)(b)1. That statute requires the court assigned to exercise jurisdiction under chs. 48 and 938 to make electronic records of the court available to “any other court assigned to exercise jurisdiction under this chapter and ch. 48...”

There are also times when the legislature saw fit to the use “*a court assigned to exercise jurisdiction*” under chs. 48 and 938. For instance, § 938.396(4) states that a finding by “a court assigned to exercise jurisdiction under chs. 48 and 938 of a violation of chs. 341 to 349...constitutes a conviction.

Given that the legislature differentiates between these terms, if the legislature wanted § 938.183(1)(b) to include the waiver of any court throughout the state that had previously been assigned to exercise juvenile jurisdiction in another county, it would have stated that a juvenile belongs in adult court if “any court” or “a court” assigned to exercise jurisdiction under this chapter has waived its jurisdiction over the juvenile for a previous violation.

Finally, the legislature also included language about “*each court assigned to exercise jurisdiction under chs. 48 and 938*” Under § 51.14(2), “[e]ach court assigned to exercise jurisdiction under chs. 48 and 938 shall designate a mental health review officer to review petitions filed under sub. (3).”

Thus, the statute refers to each separate court assigned to exercise jurisdiction in each respective county. If “each” court assigned to exercise jurisdiction under this chapter means each respective court, then “the court” assigned to exercise jurisdiction means the one court assigned to exercise jurisdiction under chs. 48 and 938 in the specific county at hand.

Here, the court assigned to exercise jurisdiction under the juvenile code was the Fond du Lac County juvenile court. Because a previous waiver had not occurred, the adult court lacked competency to proceed on counts 5-18, and Hinkle’s convictions should be vacated and he should be allowed to withdraw his pleas. A manifest injustice is defined as a serious flaw in the fundamental integrity of the plea. *State v. Thomas*, 2000 WI 13, ¶ 16, 232 Wis. 2d 714, 726, 605 N.W.2d 836. Here, a manifest injustice has occurred; Hinkle’s plea was not knowing, intelligent or voluntary because five of the seven counts to which he pled were not properly in adult court. Hinkle would not have accepted the plea bargain had he known this. (85:15;App.115).

II. Trial counsel provided ineffective assistance for failing to object to the addition of counts 5-18 and the Fond du Lac county order waiving juvenile jurisdiction, failing to file a motion to dismiss for lack of competency, and for telling Hinkle that the Milwaukee County waiver would automatically place him in adult court in Fond du Lac.

Both the state and federal constitutions grant the criminal defendant the right to counsel. U.S. CONST. amend. VI, XIV; WIS. CONST. art. I, § 7. The effective assistance of counsel is a well-established part of the right to counsel. *State v. Johnson*, 133 Wis. 2d 207, 216, 395 N.W.2d 176 (1986). A defendant seeking to establish a claim of ineffective assistance of counsel “must show that counsel’s performance was deficient and that it prejudiced the defense.” *State v. Anderson*, 222 Wis. 2d 403, 408, 588 N.W.2d 75 (1998). To show deficiency, a defendant must demonstrate that counsel’s performance fell below an “objective standard of reasonableness.” *Johnson*, 133 Wis. 2d at 217. To prove prejudice, the defendant must show there is a reasonable probability that, but for counsel’s errors, the result of the

proceeding would have been different. *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Counsel's performance was deficient when she did not object to the addition of counts 5-18 and did not file a motion to dismiss for lack of court competency. Hinkle was also prejudiced. In determining whether to accept a plea bargain, a defendant has the right to effective assistance of counsel and correct information about potential defenses and court jurisdiction. Defense counsel told Hinkle that the charges initially filed in Fond du Lac juvenile court would automatically go to adult court pursuant to § 938.183(1)(b), due to the Milwaukee County waiver. (85:13;App.113). If counsel had informed Hinkle that five of the counts of the plea bargain were not properly in adult court, then Hinkle would not have accepted the plea bargain. (85:15;App.115).

Additionally, defense counsel was ineffective for failing to object to the Fond du Lac court order waiving juvenile jurisdiction, as the order did not reflect the defendant's position on waiver or the court's oral pronouncements on November 18 and 19, 2015. Jurisdiction should be transferred to the juvenile court so the juvenile court may reverse its waiver order.

CONCLUSION

WHEREFORE, for the reasons stated above, Mr. Hinkle respectfully asks this court to allow Hinkle to withdraw his pleas, vacate his convictions and transfer counts 5-18 to the juvenile court.

Dated this 25th day of September, 2017.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) for a brief in proportional serif font. The length of the brief is 3,906 words.

Dated this 25th day day of September, 2017.

Signed:

Christina C. Starner

**CERTIFICATION 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 context 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 September, 2017.

Signed:

Christina C. Starner

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the trial court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court’s reasoning regarding those issues.

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.

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 person, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 25th day of September, 2017.

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CERTIFICATION AS TO MAILING

I hereby certify pursuant to Wis. Stat. § 809.80(4) that this brief was deposited in the United States mail for delivery by first class or priority mail on September 28, 2017. Postage has been pre-paid. This brief is addressed to: Gregory Weber, Assistant Attorney General, P.O. Box 7857, Madison, WI 53707-7857 and Diane Fremgen, WI Court of Appeals, P.O. Box 1688, Madison, WI 53701-1688.

Dated this 28th day of September, 2017.

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