STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP2292-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONAVINN D. COFFEE,

Defendant-Appellant-Petitioner.

On Appeal from a Judgment of Conviction
and an Order Denying Postconviction Relief,
Entered in the Milwaukee County Circuit Court,
the Honorable Frederick C. Rosa Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

NICOLE M. MASNICA
Assistant State Public Defender
State Bar No. 1079819

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
masnican@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

ISSUES PRESENTED

1. Does a defendant forfeit his constitutional due process right to be sentenced based only upon accurate information by failing to make a contemporaneous objection at the time of sentencing, when the nature of the inaccuracy could not have been reasonably determined by counsel at the time the misinformation is presented to the court at the sentencing hearing?

   The circuit court did not address this question.

The court of appeals concluded that Mr. Coffee forfeited his constitutional right to be sentenced based on accurate information because neither he, nor trial counsel, made a contemporaneous objection to the State's misrepresentations and material omissions regarding his 2011 arrest, and because he subsequently failed to raise his postconviction challenge as one of ineffective assistance of counsel.

2. Was Mr. Coffee sentenced in violation of his constitutional due process right to be sentenced based only upon accurate information?

While the circuit court agreed that the State presented materially inaccurate information at sentencing by misrepresenting the facts of Mr. Coffee's 2011 arrest and similarly acknowledged that the court relied upon that information, it concluded

that because there were other facts in the record justifying the sentence, the error was harmless and resentencing was not required.

The court of appeals did not address the merits of Mr. Coffee's postconviction claim.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has deemed this case appropriate for both oral argument and publication.

STATEMENT OF THE CASE

Criminal Charges, Plea & Sentencing

On Tuesday, November 10, 2015, police received reports of two armed robberies between North 25th and 28th Streets in the City of Milwaukee. (1). Mr. Coffee and his co-defendant, Antonio Hazelwood, were immediately apprehended as suspects. (1). Mr. Coffee was very cooperative with police. He provided a complete confession to the crimes, and also gave a statement against Mr. Hazelwood. (1). As a result, Mr. Coffee was charged in Milwaukee County Case Number 15-CF-4965 with three counts: armed robbery, party to a crime, contrary to Wis. Stat. §§ 943.32(2) and 939.05; attempted armed robbery as party to a crime, contrary to Wis. Stat. §§ 943.32(2), 939.32 and 939.05; and first-degree recklessly endangering

safety as party to a crime contrary to Wis. Stat. §§ 941.30(1) and 939.05. (1).

On June 6, 2016, Mr. Coffee entered a guilty plea to all three counts in the criminal complaint. (6; 20). On June 23, 2016, the case proceeded to sentencing, the Honorable Frederick C. Rosa presiding. During the sentencing hearing, the State discussed Mr. Coffee's prior criminal record consisting of two misdemeanor convictions. (42:9). The State also told the court that Mr. Coffee had been arrested for an armed robbery in December 2011, noting that it was never formally prosecuted. (42:9). The State argued:

> What's alarming from the State's prospective because of the nature of this offense that's in front of the Court is that December 2011 there was an armed robbery case that was sent to my office. That was a no process.
>
> So what the defendant has shown here with his past criminal conduct, not only is there a weapon's [sic] related offense, but there was something that triggered a law enforcement investigation and reviewed by my office for offenses by a title similar in nature to this.

(42:9).

While pronouncing sentence, the court referenced the State's assertion about Mr. Coffee's prior arrest history and the armed robbery allegation. (42:22-23). The court opined:

> So you have got some misdemeanor cases; one successful probation, one unsuccessful probation. You have got a couple of police contacts; one

> significant concern because it sounds like it was an armed robbery which is what these offenses are.
>
> So you basically are engaging in behavior that is kind of getting more serious. Domestic violence by itself is natured as assaultive behavior, meaning violence against another human being.
>
> But these other things are violence and property crimes, and I don't know what else to call it. So that pattern or your behavior or undesirable behavior is escalating. I don't know what's going on in your head causing you to make these decisions?

(42:22-23).

On that basis, the court issued consecutive prison sentences on each of the three counts for a total of eleven years initial confinement and nine years extended supervision. (20).

Postconviction Motion & Decision

Mr. Coffee filed a postconviction motion[1], which alleged that the State's assertions regarding the 2011 arrest were materially misleading and deprived him his constitutional due process right to a fair sentencing hearing. (27:6-7). He asserted that the

[1] In his postconviction motion, Mr. Coffee requested, in the alternative, that the circuit court modify his sentence to a total of eleven years initial confinement and eleven years extended supervision, which the court denied. (27:8-9). Mr. Coffee did not appeal the court's denial on this issue.

State's reference to his prior arrest implied that he had been responsible for another armed robbery prior to the incident before the court – an assertion that was false. (27:6). Because the information was inaccurate and because the court had relied upon the State's claims, Mr. Coffee argued that due process required resentencing, citing *State v. Tiepelman*, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1.

In its written reply to the motion, the State submitted police reports it argued substantiated its claim that Mr. Coffee had been arrested for a 2011 armed robbery. (31:4-11). Notably, those reports contained two important pieces of information: (1) the 2011 incident was not an "armed robbery," as there was no allegation of a weapon involved in the theft; and (2) that Mr. Coffee was not the perpetrator of the robbery, as the victim and a second witness confirmed to police that he was not involved in the crime. [2] (31:4-11). As a result, Mr. Coffee was released immediately and never charged. (31:4-11).

---

[2] During the initial investigation of the robbery, the responding officer drove the victim and witness around the neighborhood in his squad car, looking for potential suspects who matched the description of the robbers. At that same time, Mr. Coffee and his friend were walking down the street into a nearby home. (31:7-8). From afar, the victim told the officer that the two looked similar to the robbers – young black men with dreadlocks. (31:7-8). Police then went to the house Mr. Coffee had entered and arrested both him and his friend. (31:8).

(continued)

The circuit court denied Mr. Coffee's postconviction motion for resentencing without a hearing. (35). The court concluded that while Mr. Coffee had successfully established both that the State presented inaccurate information and that the court relied upon this information during the sentencing hearing, the error was harmless. (35:4). The court stated:

> Even without information about the December 2011 police contact, the fact that the defendant *used* a weapon in the commission of the offenses in this case *and that he shot one of his victims* would have led the court to the same conclusion that he was "engaging in behavior that is getting more serious" and that his "pattern…of undesirable behavior is escalating.

(35:4).

The Appeal & Decision

On appeal, Mr. Coffee sought review of the circuit court's denial of his request for resentencing. He argued out that while the circuit court correctly concluded that the information presented at the sentencing hearing by the State was inaccurate and that it had actually relied upon the misinformation at the time of sentencing, the court misapplied the

---

When police returned to speak with the victim that same day, the victim and witness both stated upon seeing the young men closer, they knew they had not committed the robbery. (31:9-10).

harmless error standard, improperly pointing to other facts in the record that supported the prison sentence ordered by the court. Opening Brief of the Defendant-Appellant at 9-12, *Coffee*, 2017AP2292-CR.

In its response brief, the State argued for the first time that Mr. Coffee had forfeited his right to appellate review, as neither he nor trial counsel objected to the State's presentation at the sentencing hearing, and because Mr. Coffee did not raise the claim in the context of ineffective assistance of counsel. Brief of the Plaintiff-Respondent at 6-8, *Coffee*, 2017AP2292-CR.

In his reply brief, Mr. Coffee argued that contrary to the State's new claim that the forfeiture rule was applicable to due process challenges to a sentence based on inaccurate information, there was no rule or binding precedent requiring these claims to be raised under rubric of ineffective assistance of counsel. Reply Brief of the Defendant-Appellant at 1-2, *Coffee*, 2017AP2292-CR. Notably, he pointed out that not one of the cases cited by the State in support of its position involved a constitutional due process challenge to a sentence based upon the presentation of inaccurate information. Reply Brief of the Defendant-Appellant at 2, *Coffee*, 2017AP2292-CR.

Likewise, not one Wisconsin case setting forth the rubric for assessing resentencing requests based upon reliance on inaccurate information mandated or even mentioned the need for trial counsel to object to

the inaccurate information in order to preserve the claim. Reply Brief of the Defendant-Appellant at 2-3, *Coffee*, 2017AP2292-CR.

Instead, the binding law under *Tiepelman* and progeny guiding review of these claims require only that a defendant establish by clear and convincing evidence (1) that inaccurate information was presented at sentencing, and (2) that the court relied upon that information when ordering sentence. If a defendant has satisfied that burden, the State must prove the error was harmless or resentencing is required. Reply Brief of the Defendant-Appellant at 3-4, *Coffee*, 2017AP2292-CR.

Mr. Coffee also noted that this court's *Tiepelman* ruling specifically addressed the lower courts' practice of conflating the analysis of due process sentencing challenges with the rubric guiding ineffective claims.[3] The *Tiepelman* holding made it clear that a defendant need not prove *prejudicial* reliance on inaccurate information. Reply Brief of the Defendant-Appellant at 3-4, *Coffee*, 2017AP2292-CR. As such, he argued, the Wisconsin Supreme Court had already expressed disfavor in applying the ineffective assistance of counsel rubric to due process

[3] The *Tiepelman* court concluded that the court of appeals had come "perilously close to conflating its analysis of the due process challenge with the claim of ineffective assistance of counsel" in *State v. Anderson*, 222 Wis. 2d 403, 588 N.W.2d 75 (Ct. App. 1998). 2006 WI 66, ¶23.

claims like Mr. Coffee's. Reply Brief of the Defendant-Appellant at 3-4, *Coffee*, 2017AP2292-CR.

On November 6, 2018, the court of appeals issued a per curiam opinion affirming the circuit court's denial of Mr. Coffee's resentencing claim.[4]

[4] Notably, on the same day the decision of the court of appeals was issued in this case, District III of the court of appeals released an opinion applying the forfeiture rule to a similar due process sentencing challenge in *State v. Carrie E. Counihan,* 2017AP2265-CR, 385 Wis. 2d 211, 923 N.W.2d 180 (Ct. App. 2018). Counihan petitioned this court for review, and the request was granted. The case is set to be argued the same day as this matter.

While the *Counihan* case invokes the principles considered in *Tiepelman* and a due process challenge to the appellant's sentencing procedure, Counihan did not assert that the court relied upon false information at sentencing. *Counihan* at ¶14. Counihan entered a plea to five misdemeanor counts of theft from the Door County Humane Society. At the time of sentencing, the court informed the parties it had reviewed sentences imposed in other Door County court cases involving theft in a business setting to prepare for the proceeding. Trial counsel did not object at the time of the hearing or request an adjournment to conduct its own review of the cases.

On appeal, Counihan pointed to *Tiepelman* to support her contention that the court of appeals should directly address the alleged due process violation in her case. The court of appeals rejected that request, concluding that because *Tiepelman* never addressed the applicability of the forfeiture rule in due process sentencing challenges, it was "inapposite," (continued)

State v. Coffee, 2017AP2292-CR, 385 Wis. 2d 211, 923 N.W.2d 181 (Ct. App. 2018). The court of appeals adopted the State's position, concluding that because Mr. Coffee failed to object to the inaccurate information the State presented at sentencing and because he did not raise his claim as one of ineffective assistance of counsel in postconviction proceedings, "he forfeited his right to have this court review his claim that the circuit court relied on inaccurate information about the 2011 arrest." *Coffee*, 2017AP2292-CR, ¶8.

The court of appeals held as a general matter that when "trial counsel does not object to the information provided by the State or to the trial court's findings, the defendant has forfeited his right to review other than in the context of ineffective assistance of counsel." *Id.* at ¶7.

---

and thus, not instructive. *Counihan,* 2017AP2265-CR, ¶11. Therefore, the matter could only be reviewed under the rubric of ineffective assistance of counsel.

The court of appeals addressed only the prejudice prong of the *Strickland* analysis. *Id.* at ¶¶13-14, citing *Strickland v. Washington*, 466 U.S.668, 687. The court opined that "Counihan could have reviewed [the cases cited by the sentencing court] and provided either the circuit court at her post-conviction motion hearing, or this court on appeal, with any inaccurate information she believed the circuit court relied upon at sentencing." *Id.* at ¶17. She did not, and the court therefore concluded that her claim of prejudice was speculative at best. *Id.*

The court of appeals disagreed with Mr. Coffee that the *Tiepelman* court did not intend that this category of claims be brought under the ineffective assistance of counsel rubric. *Id.* at ¶11. The court concluded that because the State had not argued forfeiture in that case, it "was not convinced that *Tiepelman* contradicts the application of the forfeiture rule." *Id.* at ¶11.

Mr. Coffee filed a petition for review, which this court granted on May 14, 2019.

ARGUMENT

I. A defendant's right to be sentenced based only upon accurate information is rooted in the due process clause of the U.S. and Wisconsin Constitutions, and is not subject to forfeiture.

The court of appeals incorrectly concluded that failure to wage a contemporaneous objection to inaccurate information presented by the State at a sentencing hearing constitutes forfeiture of the right to appellate review "other than in the context of ineffective assistance of counsel." *Coffee*, 2017AP2292-CR, ¶7. This holding is contrary to the principles that serve as a foundation to a fair criminal justice system, and undermines the intended outcomes of equity and efficiency that the forfeiture rule aims to protect.

Mr. Coffee offers two primary arguments in support of his position. First, he points to the breadth of long-standing federal and Wisconsin appellate cases spanning decades that has developed and clarified the rubric under which due process challenges to a criminal sentence based on inaccurate information be decided. Not one case imposes a requirement that this type of postconviction claim be raised as ineffective assistance of counsel absent a contemporaneous objection at sentencing. A holding to the contrary would be a significant departure from current law, and one that this court should decline to undertake. That courts have employed the forfeiture rule in other types of sentencing challenges is irrelevant to the due process issue in this case.

Second, the broad application of the forfeiture rule in this context will not promote the fair administration of justice or judicial efficiency. Employing the forfeiture doctrine here will have the unintended consequence of unnecessarily grinding countless sentencing proceedings in this state to a halt, as defense counsel will now be required to object to the presentation of any information trial counsel did not have an opportunity to independently and thoroughly vet prior to sentencing, regardless of its potential relevance to the sentencing court or the negative consequences doing so will have on defendants and victims alike.

For these reasons, Mr. Coffee asks this court to reverse the decision of the court of appeals, and to conclude that a defendant has a constitutional due

process right to be sentenced based only upon accurate information, and that this right is so fundamental to a fair justice system that it is not subject to forfeiture.

A. A defendant has a constitutional due process right to be sentenced based upon accurate information.

An individual subject to a criminal penalty has a constitutionally-protected due process right to be sentenced based only upon accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1, citing *State v. Johnson*, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990) (citation omitted)). This principle was first recognized by the U.S. Supreme Court seventy years ago in *Townsend v. Burke*, 334 U.S. 736 (1948), and has been the basis for appellate relief in federal and Wisconsin courts alike for decades. A fair sentencing process in "one in which the court goes through a rational procedure of selecting a sentence based on relevant considerations and accurate information." *Tiepelman,* 2006 WI 66, ¶26 (quoting *U.S. ex rel. Welch v. Lane*, 738 F.2d 863, 864-865 (7th Cir. 1984)). When the sentencing proceeding is tainted with false or misleading information,[5] causing an individual to be sentenced

[5] Both this Court and federal courts have addressed the importance of a fair and transparent sentencing process in other contexts. *See Brady v. Maryland*. 373 U.S. 83 (1963); *State v. Wayerski*, 2019 WI 11, 385 Wis. 2d 344, 922 N.W.2d 468. In *Brady*, the U.S. Supreme Court noted that a prosecutor (continued)

based on assumptions that are "materially untrue…[, it] is inconsistent with due process of law, and such a conviction cannot stand." *Tiepelman*, 2006 WI 66, ¶10 (quoting *Townsend*, 334 U.S. 736, 741).

The U.S. Supreme Court laid the foundation for modern appellate review of these types of claims in *U.S. v. Tucker*, 404 U.S. 443 (1972). There, the court concluded that when inaccurate information material to a sentencing proceeding is presented, the question that concerns the reviewing court is whether the outcome of the case – the ultimate sentence ordered – might have been different. *Tiepelman*, 2006 WI 66, ¶12, citing *Tucker*, 404 U.S. 443, 448. If that answer is yes, resentencing is required.

The standard for assessing these claims was further developed in *U.S. ex rel. Welch v. Lane*, 738 F.2d 863. In *Welch,* the Seventh Circuit concluded that a sentence must be set aside and resentencing held where a defendant has established "that false information was part of the basis for the sentence." *Welch*, 738 F.2d at 865. To make such a showing, a defendant must prove that: (1) the information before the sentencing court was inaccurate; and (2) that the sentencing court actually relied upon the inaccurate information in imposing sentence. *Id.* Reliance on inaccurate information is established where the

---

who withholds evidence that would tend to exculpate a defendant or reduce his penalty is cast "in the role of an architect of a proceeding that does not comport with standards of justice." *Id.* at 87-88.

record reflects that the sentencing judge gave "specific consideration" or "explicit attention" to the information, such that the misinformation "formed part of the basis for the sentence." *Welch*, 738 F.2d at 866 (citing *U.S. v. Hubbard*, 618 F.2d 422, 425 (7th Cir. 1979)). The Seventh Circuit found that "the fact that other information *might* have justified the sentence, independent of the inaccurate information, is irrelevant when the court has relied on inaccurate information as *part* of the basis for the sentence." *Id.* (emphasis in original).

In *Tiepelman*, this Court clarified that a defendant who claims that his sentence was based upon inaccurate information need not prove the outcome would have been different absent the misinformation because the "prejudicial reliance" test was not the proper standard of review.[6] Instead, a

[6] *Tiepelman*, 2006 WI 66, ¶2 ("We hold that in a motion for resentencing based on a circuit court's alleged reliance on inaccurate information, a defendant must establish that there was information before the sentencing court that was inaccurate, and that the circuit court actually relied on the inaccurate information. Here, the court of appeals applied the wrong test—prejudicial reliance—when it affirmed the circuit court. We must, therefore, reverse that affirmance, and withdraw any language in *State v. Montroy*, 2005 WI App. 230, 287 Wis.2d 430, 706 N.W.2d 145, *State v. Groth,* 2002 WI App 299, 258 Wis.2d 889, 655 N.W.2d 163, *State v. Suchocki*, 208 Wis.2d 509, 516, 561 N.W.2d 332 (Ct.App.1997), *State v. Coolidge*, 173 Wis.2d 783, 496 N.W.2d 701 (Ct.App.1993), and *State v. Littrup*, 164 Wis.2d 120, 473 N.W.2d 164 (Ct.App.1991), to the contrary.")

defendant seeking a new sentencing hearing need only demonstrate by clear and convincing evidence that the information was inaccurate and that the court actually relied upon it at the time of sentencing. *Tiepelman*, 2006 WI 66, ¶¶ 26-27.

If the defendant satisfies both prongs, the burden shifts to the State to establish that the error was harmless. *Id.*, 2006 WI 66, ¶¶27-28. To show that the court's reliance on inaccurate information was harmless, the State must prove beyond a reasonable doubt that the sentence would have been the same absent the error. *See State v. Travis*, 2013 WI 38, ¶¶73, 86, 347 Wis. 2d 142, 832 N.W.2d 491.

Whether a defendant has been sentenced based on inaccurate information contrary to his due process rights is a constitutional issue that an appellate court reviews de novo.[7] *Tiepelman*, 2006 WI 66, ¶9 (citations omitted).

B. The forfeiture rule does not apply to due process claims challenging a court's consideration of inaccurate information at sentencing.

State v. Tiepelman sets forth the appropriate analysis for assessing a due process challenge to a

[7] In Section II of this brief, Mr. Coffee asks this court to review this matter de novo and to conclude that under the *Tiepelman* test, resentencing is required.

sentence based upon inaccurate information. For decades, Wisconsin and federal courts alike have applied the two-prong test to determine whether a defendant seeking resentencing on grounds that the sentencing court considered inaccurate information is entitled to relief. Many published and unpublished cases have addressed sentencing challenges based on consideration of inaccurate information outside of the scope of the ineffective assistance of counsel analysis and absent a contemporaneous objection at sentencing. *See, e.g., U.S. v. Oliver*, 873 F.3d 601 (7th Cir. 2017)[8]; *Tiepelman*, 2006 WI 66; *State v. Travis*,

[8] The appellant in *Oliver* asserted that the district court had committed a procedural error on three different grounds, one of which was that the court relied upon inaccurate information when selecting the sentence. *Oliver*, 873 F.3d 601, 608-610. The government argued that Oliver knowingly waived his right to challenge the procedural sentencing errors generally because trial counsel had declined to supplement its sentencing argument when generally invited by the court to do so. *Id.* at 607.

The Seventh Circuit disagreed with this argument, concluding that this was not a knowing waiver, remarking that if anything, this is a forfeiture issue and thus, the proper standard of review is "plain error." The court went on to address one of Oliver's three sentencing claims under the "plain-error" standard. *Id.* at 610-612. The inaccurate information sentencing challenge was notably reviewed under the same two-prong analysis utilized in *Tiepelman*, and not as a matter of ineffective assistance of counsel or "plain-error." *Id.* at 608-609, citing *Lechner v. Frank*, 341 F.3d 635, 639 (7th Cir. 2003) and *U.S. v. Jones*, 454 F.3d 642, 652 (7th Cir. 2006).

(continued)

2013 WI 38, 347 Wis. 2d 142, 832 N.W.2d 491; *State v. Greenwood,* 2015 WI App 58, 364 Wis. 2d 528, 868 N.W.2d 199 (unpublished, but citable for persuasive value under Rule 809.23(3)); *State v. Bunch*, 296 Wis. 2d 419, 722 N.W.2d 400 (Ct. App. 2006) (unpublished, but citable for persuasive value under Rule 809.23(3)). Instead, courts have relied upon the criteria outlined by this court in *Tiepelman* to address these claims.

In this case, the court of appeals adopted a new approach at the State's request, and concluded that as a general matter, "[w]here trial counsel does not object to the inaccuracies[9], the defendant has

---

[9] The court of appeals holding assumes that Mr. Coffee and defense counsel were in a position to effectively object to the presentation of the 2011 arrest at the sentencing hearing. First, it would be unreasonable to conclude that trial counsel should have been aware of the facts underlying Mr. Coffee's previous arrest prior to the hearing and prepared to address them at sentencing. The arrest was not noted on Mr. Coffee's Criminal Information Bureau Arrest Report, and as it was never charged, there is no corresponding CCAP entry. (27:10-38). Thus, reviewing his client's official record would not have provided any hint that this matter would be an issue at sentencing and due diligence does not require a defense attorney to inquire with a client about every former arrest and investigate each one in detail, regardless of the outcome.

Further, it is likewise unreasonable to find that Mr. Coffee forfeited his right to review because he did not object at the time of sentencing. While Mr. Coffee would have known

(continued)

forfeited his right to review other than in the context of ineffective assistance of counsel," citing *State v. Carprue*, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31. *Coffee*, 2017AP2292-CR, ¶7.[10]

---

that he had been arrested at some point in 2011, he cannot have been expected to know the potential relevance this arrest would have at sentencing. It is entirely reasonable that Mr. Coffee would not have known the details of why he was arrested or even why he was released. The police reports detailing the arrest reveal that Mr. Coffee was held for only a short period of time, and there is no indication in the reports that Mr. Coffee was interviewed and told about the details of the crime. (31:4-11). In fact, shortly after his apprehension, officers went to the victim's home to conduct a photo array, and it was at that time, outside of Mr. Coffee's presence, that the victim, upon closer inspection, told police that the two men arrested did not commit the robbery. (31:4-11).

[10] Citing *State v. Carprue*, 2004 WI 111, ¶47, 374 Wis. 2d 656, 683 N.W.2d 31, both the court of appeals and State asserted that Wisconsin courts have long applied the forfeiture rule to criminal cases and held that forfeited claims must be raised in the context of ineffective assistance of counsel. Forfeiture, they argue, therefore applies to inaccurate information at sentencing cases, and by extension, to Mr. Coffee's case.

Notably, this court decided *Carprue* just two years before *Tiepelman*, and was undeniably well-versed with the issue of forfeiture when *Tiepelman* was heard. Even still, this court declined to mention or consider the application of the forfeiture rule in the *Tiepelman* holding. *Tiepelman*, 2006 WI 66.

1. Legal principles surrounding the application of the forfeiture doctrine.

Failure to object to an error at the time it occurs may result in forfeiture of a party's right to challenge that error on appeal. *State v. Pinno*, 2014 WI 74, ¶56, 356 Wis. 2d 106, 850 N.W.2d 207; *See also State v. Leitner*, 2001 WI App 172, ¶41, 247 Wis. 2d 195, 633 N.W.2d 207, aff'd, 2002 WI 77, 253 Wis. 2d 449, 646 N.W.2d 341. "In contrast, some rights are not lost by a counsel's or a litigant's mere failure to register an objection" at the trial level, as the "Constitution requires that every effort be made to see to it that a defendant in a criminal case has not unknowingly relinquished the basic protections that the Framers thought indispensable." *State v. Ndina*, 2009 WI 21, ¶¶31-32, 315 Wis. 2d 653, 761 N.W.2d 612, citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 241 (1973).

Application of the forfeiture doctrine by appellate courts is intended to "facilitate[] fair and orderly administration of justice and encourages parties to be vigilant lest they lose a right by failing to object to its denial." *Pinno*, 2014 WI 74, ¶56. A timely objection can, in some circumstances, permit the circuit court "to avoid or correct any error with minimal disruption of the judicial process," potentially eliminating the need for a future appeal, and acts to prevent attorneys from "'sandbagging' opposing counsel". *Ndina*, 2009 WI 21, ¶30. The forfeiture rule should be applied only in

circumstances in which employment of that rule promotes its intended values. *See Id.* at ¶38.

2. The forfeiture rule does not apply to constitutional due process challenges to inaccurate information at sentencing.

In reviewing Mr. Coffee's sentencing challenge, the court of appeals held that the forfeiture rule applies to all claims involving the circuit court's consideration of improper material at sentencing, regardless of whether the rights implicated are rooted in the constitution or by statutory authority. *Coffee*, 2017AP2292-CR, ¶¶9-10. The court of appeals relied on *State v. Leitner*, 2001 WI App 172, 247 Wis. 2d 195, 633 N.W.2d 2017, to support this position. Though *Leitner* dealt with the interpretation of Wisconsin's statutory expunction law, the court of appeals applied the forfeiture rule broadly to bar any postconviction challenge to a sentence if a contemporaneous objection is not made by the defendant or trial counsel. *Id.*

The court of appeals cited *State v. Benson*, 2012 WI App 101, 344 Wis. 2d 126, 822 N.W.2d 484, as its only example to support this proposition that *Leitner* applies as a general matter to inaccurate information sentencing claims. *Benson* neither cited, nor created such a rule.

The State likewise pointed to *Benson* and several other cases to support its general argument that "[t]he forfeiture rule applies to claims that the

court relied on inaccurate information at sentencing." Petitioner-Respondent's Response to the PFR at 3, *Coffee*, 2017AP2292-CR. Not one of those cases, however, stands for such a principle. With the exception of *Benson,* every case cited by the State predated this court's holding in *Tiepelman*, and involved a due process challenge to sentencing on procedural or statutory grounds, rather than a constitutional challenge to the use of inaccurate information at sentencing. *See State v. Leitner*, 2001 WI App 172, ¶41 (consideration of expunged convictions at sentencing); *State v. Samuel*, 2001 WI App 25, 240 Wis. 2d 756, 623 N.W.2d 565 (Ct. App. 2000) (consideration of confidential documents from juvenile proceeding to which the defense had no access); *State v. Mosley*, 201 Wis. 2d 36, 45, 547 N.W.2d 806 (Ct. App. 1996) (consideration of unproven allegations where truthfulness not in dispute); *State v. Johnson*, 158 Wis. 2d 458, 463 N.W.2d 352 (Ct. App. 1990) (case decided by *Tiepelman* test – information was neither inaccurate nor relied upon at sentencing); *Handel v. State*, 74 Wis. 2d 699, 247 N.W.2d 711 (1976) (predated *Welch* ; "[t]he sole challenge to the sentence imposed [was] that the trial court took into consideration…a pending criminal charge," and accuracy of other act not in dispute).

The court of appeals' and State's reliance on *Benson* is misplaced. In *Benson,* the defendant argued he was entitled to resentencing because the court improperly considered inaccurate information regarding the implications of the level of Ambien in

his system at the time of the crash at sentencing – information offered in a defense submission from a pharmacologist. *Benson*, 2012 WI App 10, ¶¶16-17.

The court of appeals in *Benson* held that "[b]ecause *Benson's counsel himself submitted Gengo's report to the court* and failed to correct or object to Ambien-related information prior to Benson's sentencing, Benson cannot now claim his due process rights were violated by the court's consideration of that same information." *Id.* at ¶17 (emphasis added). Benson's complaint was not that *the court* violated his due process rights by improperly considering the inaccurate information, but rather that *his attorney* had erred by asking the court to consider information at sentencing that was not correct. *Id.*

Unlike in *Benson*, here, the State was the source of the inaccurate information provided to the court and the circuit court acknowledged in postconviction proceedings that it actually relied upon the inaccurate information at the time it imposed Mr. Coffee's sentence. (42:9). Thus, the *Benson* case does not stand for the principle that counsel must make a contemporaneous objection to inaccurate information at sentencing as a general matter, and is far from analogous to Mr. Coffee's. Therefore, it is not instructive and should not be relied upon here.

Next, the court of appeals challenged Mr. Coffee's reliance upon this court's language in

Tiepelman as not anticipating these challenges as being subject to the forfeiture rule, writing:

> In this court's decision in *Tiepelman*, which was later reversed on other grounds, we explained that the State did not argue forfeiture and the issue was not addressed in the decision. *See State v. Tiepelman*, 2005 WI App 179, ¶6 n.1, 286 Wis. 2d 464, 703 N.W.2d 683, *rev'd*, 291 Wis. 2d 179, ¶2. The Wisconsin Supreme Court likewise did not address forfeiture. Thus, we are not convinced that *Tiepelman* contradicts application of the forfeiture rule. [11]

Coffee, 2017AP2292-CR, ¶11.

While the court of appeals is correct that this court did not address the applicability of forfeiture in *Tiepelman,* this court specifically considered and disclaimed the notion that a defendant must prove prejudicial reliance in order to obtain resentencing after it has been established that inaccurate information permeated the sentencing process. *Tiepelman,* 2006 WI 66, ¶15. The *Tiepelman* holding asserted that "[a]n examination of case law in

---

[11] Contrary to its intent, by pointing out that this court's holding in *Tiepelman* did not mention the applicability of forfeiture to these claims, the court of appeals has acknowledged that at minimum, the law on forfeiture and its use in inaccurate information claims was unsettled, and any holding concluding that forfeiture applies constitutes a change in the law.

Wisconsin reveals that, although the actual reliance standard was properly formulated, initially, the court of appeals began to stray from that standard in some cases by requiring the proof of prejudicial, rather than actual reliance." *Id.*

Additionally, the court of appeals ignored that in its *Tiepelman* ruling, it appeared to support the same conclusion as Mr. Coffee – that the forfeiture rule should not apply in cases where a defendant was sentenced based in part on consideration of inaccurate information. In its *Tiepelman* decision, the court of appeals wrote:

> Waiver is not an issue we address in this decision. At sentencing, neither Tiepelman nor his counsel pointed out the judge's mistaken references to "convictions." However, the State does not argue waiver. In one recent case we suggested, without deciding, that a defendant's due process challenge to sentencing based on inaccurate information might not be amenable to waiver. *See State v. Groth*, 2002 WI App 299, ¶¶25-26, 258 Wis. 2d 889, 655 N.W.2d 163.

Tiepelman, 2005 WI App 179, ¶6 n.1.

In *Groth*, the defendant asserted that he was sentenced on the basis of inaccurate information when the State presented the false claim that he had a habit of "beating pregnant women." 2002 WI App 299, ¶¶25-26, 258 Wis. 2d 889, 655 N.W.2d 163. Neither the defendant nor defense counsel objected to the inflammatory comments at sentencing. *Id.*

On appeal, the State argued in briefing that Groth forfeited[12] his challenge to the sentencing court's consideration of these remarks because he did not object at sentencing. Reply Brief of Plaintiff-Respondent at 2-3, *State v. Groth,* 2002 WI App 299.

The court of appeals declined the State's request to apply forfeiture. The court of appeals noted that while it was not deciding the applicability of forfeiture, it raised the question of whether, "given the paramount importance of the 'integrity of the sentencing process,'" one can ever forfeit his right to challenge a sentence based on inaccurate information. *Groth*, 2002 WI App 299, ¶25 (citation omitted), *abrogated by State v. Tiepelman*, 2006 WI 66 (as to prejudicial reliance).

Additionally, when again addressing the appropriate rubric under which to assess inaccurate information claims in *Tiepelman*, this court held that the proper standard for review of these claims was "set forth by this court in *Lechner*." *Tiepelman*, 2006 WI 66, ¶¶26-27, citing *State v. Lechner*, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998).

In *Lechner*, where the inaccurate information at issue came in the presentence report, the State argued in its briefs that because the defendant had

---

[12] In *Groth*, the State uses the terms "waiver" and "forfeiture" interchangeably, but it is clear that the State's request was that the forfeiture rule by employed. *See State v. Ndina*, 2009 WI 21, 29, 315 Wis. 2d 653, 761 N.W. 612.

an opportunity to review the presentence report and declined to object to the inaccuracies in that report, that the error was his, and therefore, the court did not erroneously exercised its discretion[13] for considering the inaccuracies at sentencing. Brief of the Plaintiff-Respondent at 39, *Lechner*, 217 Wis. 2d 392.

While the State did not specifically use the term "forfeiture," its point was that a defendant should not be able to claim a due process violation when he declined to object to the consideration of inaccurate information when given the opportunity. This court again declined the State's invitation to apply forfeiture and find the defendant at fault for failing to object. *See Lechner*, 217 Wis. 2d 392.

The courts were on the right track in *Tiepelman*, *Groth* and *Lechner*. The constitutional right to be sentenced free from consideration of inaccurate information is one so fundamental to the integrity of criminal process that it is contrary to the general principles of fairness and justice to uphold

[13] "Sentencing is a decision within the discretion of the circuit court and appellate review will set aside a sentence only when there has been an erroneous exercise of discretion." *Tiepelman*, 2006 WI 66, ¶41, citing *State v. Patino*, 177 Wis. 2d 348, 384, 502 N.W.2d 601 (Ct. App. 1993). It is an erroneous exercise of discretion, "as a matter of law, when [a court] sentences in contravention of a defendant's due process rights. *Id*., citing *State v. Coolidge*, 173 Wis. 2d 783, 788-89, 496 N.W.2d 701 (Ct. App. 1993).

sentences based on material inaccuracies simply because no objection was made during sentencing. This court reinforced in *Tiepelman* that when a defendant is sentenced on the basis of assumptions that are "materially untrue…[w]hether caused by carelessness or design, [it] is inconsistent with due process of law, and such a conviction cannot stand." *Tiepelman,* 2006 WI 66, ¶10 (quoting *Townsend*, 334 U.S. at 741). This Court should hold that inaccurate information at sentencing claims are not subject to forfeiture, and reaffirm that the appropriate analysis is set forth in *Tiepelman*.

If this Court affirms the court of appeals decision, and imposes a new requirement that inaccurate information at sentencing claims must be raised through ineffective assistance of counsel where no contemporaneous objection was made, Mr. Coffee asks that the court remand this matter to the circuit court and grant leave to supplement the postconviction motion, as such a holding would be a change in controlling law.

3. Application of the forfeiture rule to inaccurate information at sentencing challenges fails to promote the fair and orderly administration of justice.

When declining to decide the merits of Mr. Coffee's appeal, the court of appeals opined that the forfeiture rule and its application "facilitates [the] fair and orderly administration of justice and

encourages parties to be vigilant lest they lose a right by failing to object to its denial." *Coffee,* 2017AP2292-CR, ¶12. The court admonished not only trial counsel, but also Mr. Coffee, noting that "[w]hile we may ignore a forfeiture and reach the merits of an issue, we choose not to do so here because Coffee had numerous chances to object to the 2011 arrest information during the sentencing hearing and failed to do so." *Coffee,* 2017AP2292-CR, ¶12.

The application of the forfeiture rule here fails to promote fairness and justice, as the court of appeals posited. Instead, the employment of the forfeiture doctrine results only in denial of a defendant's constitutional due process right to fair sentencing process.

The U.S. Supreme Court concluded, and this Court agreed, that "[a] criminal sentence based upon materially untrue information, whether caused by carelessness or design, is inconsistent with due process of law and cannot stand." *Travis*, 2013 WI 38, ¶17, citing *Townsend*, 334 U.S. 736, 741 (1948); *See also Tucker*, 404 U.S. 443, 447. When sentencing a defendant, "we are dealing 'not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation of constitutional magnitude.'" *Id*., citing *Tucker*, 404 U.S. at 447. Thus, contrary to the court of appeals' determination, application of the forfeiture rule is contrary to the principles of fairness and equity that constitutional due process protections seek to protect.

Moreover, the court of appeals' application of forfeiture in this type of case does nothing to promote efficiency in the criminal process. First, even had Mr. Coffee or his attorney interjected at the sentencing hearing and indicated that even though he was arrested in 2011, he did not commit a robbery, it is unlikely this would have cured the problem. The court certainly could have disbelieved his self-serving proclamation, just as the sentencing court had in *Townsend v. Burke*, the U.S. Supreme Court case that established that a defendant has the right to be sentenced based only upon accurate information. 334 U.S. 736, 739-740.

In *Townsend*, when the court questioned the defendant about prior instances of alleged criminal conduct, the defendant attempted to explain to the court that he was found not guilty at trial and had not committed the previous offenses in question. The court still declined to accept the defendant's version and sentenced him under the false premise that he had several serious prior convictions when he in fact did not. Had Mr. Coffee made a timely objection as the defendant did in *Townsend*, the court very well could have disregarded his denial. Thus, he would have the very same claim on appeal and the process would be no more efficient.

Second, the court of appeals' ruling stands for the proposition that the Sixth Amendment requires that trial counsel must contemporaneously object to any and all potentially inaccurate information presented by any source at the sentencing hearing,

and to request an adjournment of the proceedings to thoroughly vet the information – all without knowing whether the court will even consider the evidence in its sentencing decision. Without such an objection, according to the court of appeals' ruling, a defendant will risk forfeiture of review.

This is an unmanageable application of forfeiture, as it will cause substantial and undue delay in sentencing hearings. The practice will negatively impact criminal defendants and victims alike, and will put a strain on circuit courts throughout this state.

Furthermore, the court of appeals' new approach requires that these matters be argued postconviction under the rubric of ineffective assistance of counsel absent a contemporaneous objection by counsel. Requiring ineffective assistance claims will result in more postconviction evidentiary hearings, as trial counsel (and potentially other witnesses) will be required to testify before the circuit court can resolve the sentencing challenge. *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) ("[W]here a counsel's conduct at trial is questioned, it is the duty and responsibility of subsequent counsel to…require counsel's presence at the hearing in which his conduct is challenged."); *See also State v. Love*, 2005 WI 116, 284 Wis. 2d 111, 700 N.W.2d 62, citing *Honeycrest Farms, Inc. v. A.O. Smith Corp.*, 169 Wis. 2d 596, 604, 486 N.W.2d 539 (Ct. App. 1992) (credibility determinations generally must be resolved by live testimony). This will only

cause further delay and inefficiency in the circuit courts.

Instead of applying forfeiture, this Court should reaffirm the appropriate method of review for inaccurate information at sentencing claims as set forth in *Tiepelman*, and hold that such claims cannot be forfeited based on failure to object. The requirement that criminal defendants present clear and convincing evidence that materially untrue information was presented at sentencing, and that the court actually relied upon that evidence when ordering sentence is no small task. It is only after a defendant makes such a showing, and if the State cannot prove that the sentence would have been the same beyond a reasonable doubt, that resentencing is required. This affects so few cases in practice and the standard of *Tiepelman* is far more efficient than the sentencing practice the application of the forfeiture rule will create.

Therefore, Mr. Coffee asks this court reverse the court of appeals, and hold that inaccurate information at sentencing challenges cannot be forfeited based on a failure to contemporaneously object at sentencing.

II. Mr. Coffee's due process right to a fair sentencing was violated by the circuit court's reliance on materially inaccurate information at sentencing.

At Mr. Coffee's original sentencing hearing, the State argued that his behavior in the instant case

(allegations surrounding two armed robberies) was concerning and aggravated because Mr. Coffee had previously been accused of an armed robbery in 2011. (42:9). The sentencing court echoed the State's claims about Mr. Coffee's prior record, finding that the repeated similar conduct showed a pattern of aggravated conduct, and that his criminal behavior was escalating. (42:22-23).

The State's assertion that Mr. Coffee had been involved in a prior armed robbery, however, was incorrect. While Mr. Coffee was arrested for a robbery in 2011, he was released almost immediately after the victim in the case confirmed that he was not the perpetrator. (31:4-11).

On review of Mr. Coffee's postconviction motion, the circuit court concluded that the State's representation about the 2011 arrest were inaccurate, and agreed with Mr. Coffee that it had relied upon the State's false claims while sentencing him. (35:3-4). However, the circuit court concluded that the error was harmless, because there were other facts in the record supporting the sentence ordered in this case. (35:4).

On appeal, Mr. Coffee argued that the circuit court's conclusion regarding harmlessness reflect a misapplication of the law, as the question of harmlessness is not whether there are other facts that could support the sentence ordered, but whether there is any reasonable probability that the outcome would have been different had the inaccurate

information not been presented. *See State v. Travis*, 2013 WI 38, ¶86, 347 Wis. 2d 142, 832 N.W.2d 491.

Applying the correct standard, it cannot be determined, beyond a reasonable doubt, that the sentence and outcome of the case would have been the same absent the presentation of the inaccurate information regarding Mr. Coffee's involvement in a prior uncharged armed robbery. Therefore, he is entitled to resentencing as a matter of law. *See Tiepelman*, 2006 WI 66, ¶9; *Travis*, 2013 WI 38, ¶86.

A. Legal principles and standard of review.

A defendant seeking resentencing on the basis that the court considered inaccurate information at sentencing must prove: (1) the information before the sentencing court was inaccurate; and (2) that the sentencing court actually relied upon the inaccurate information in imposing sentence. *Tiepelman*, 2006 WI 66, ¶9, citing *Johnson*, 158 Wis. 2d 458, 468. Reliance on inaccurate information is established where the record reflects that the sentencing judge gave "specific consideration" or "explicit attention" to the information, such that the misinformation "formed part of the basis for the sentence." *Welch*, 738 F.2d at 866 (citation omitted). "[T]he fact that other information *might* have justified the sentence, independent of the inaccurate information, is irrelevant when the court has relied on inaccurate information as *part* of the basis for the sentence." *Id.* (emphasis in original).

If the defendant satisfies both prongs, the burden shifts to the State to establish that the error was harmless. *Id.*, 2006 WI 66, ¶¶27-28. To show that the court's reliance on inaccurate information was harmless, the State must prove beyond a reasonable doubt that the sentence would have been the same absent the error. *See State v. Travis*, 2013 WI 38, ¶¶73, 86, 347 Wis. 2d 142, 832 N.W.2d 491.

Whether a defendant has been sentenced based on inaccurate information contrary to his due process rights is a constitutional issue that an appellate court reviews de novo. *Tiepelman*, 2006 WI 66, ¶9 (citations omitted).

B. The circuit court erred in concluding that its reliance on the State's inaccurate assertions regarding Mr. Coffee's criminal history was harmless.

When denying Mr. Coffee's postconviction motion seeking resentencing, the circuit court concluded that even though Mr. Coffee had proven that the State's presentation of his criminal history was inaccurate and that the court actually relied upon the misrepresentations at sentencing, that the reliance was harmless. (35:4). The circuit court, citing other negative facts in the record surrounding the offense, found that it could have made all of the same conclusions regarding Mr. Coffee's character and the danger he posed to the community without any knowledge of the prior armed robbery allegation, and thus, the error was harmless. (35:4).

The circuit court's conclusion misapplies the law, as the issue of harmless error in the context of a claim of inaccurate information at sentencing is not simply whether there are other facts in the record that support the sentence. Under this view, it would be hard to imagine any scenario in which the court could not point to underlying facts in the record to support the sentence ordered unless the misunderstanding of the sentence was structural in nature. Further, reviewing courts have already considered this question, and concluded that "the fact that other information *might* have justified the sentence, independent of the inaccurate information, is irrelevant when the court has relied on inaccurate information as *part* of the basis of the sentence." *U.S. ex rel. Welch v. Lane*, 739 F.2d 863 (7th Cir. 1984); *See also Tiepelman* 2006 WI 66, ¶14.

Instead, the State must establish and the court must conclude that there is "no reasonable probability that [the inaccurate information] contributed to the outcome." *State v. Payette,* 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423, citing *Groth*, 258 Wis. 2d 889, ¶21. In other words, the court must conclude that it is clear beyond a reasonable doubt that the sentence would have been the same at the time of sentencing without the reliance on inaccurate information. *Id.* at ¶49. This is a different analysis than simply pointing to other facts in the record that might support a similar sentence.

Further, Wisconsin courts have long emphasized the importance of the link between the

facts relevant to a particular defendant and case and the ultimate sentence imposed. Circuit courts are charged with the duty of imposing a sentence which "call[s] for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." *State v. Gallion*, 2004 WI 42, ¶ 44, 270 Wis. 2d 535, 678 N.W.2d 197, citing *McCleary v. State*, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971). In doing so, the court must identify the objectives of the sentence on the record and describe how the facts at issue are relevant to these objectives. *Gallion,* 2004 WI 42, ¶40. "Courts must explain, in light of the facts of the case, why the particular component parts of the sentence imposed advance the specified objectives." *Id.* at ¶42.

This court's holding in *Gallion* mandates that a sentencing court fashion a sentence that is appropriate under the circumstances, supported by the facts in the record at the time of sentencing. *Id.* In this case, the sentencing court did just that – it fashioned a sentence that was supported by facts in the record and one of those key "facts" was false – that Mr. Coffee had previously been involved in a similar crime, an armed robbery.

The sentencing court ordered that Mr. Coffee serve thirteen years initial confinement and nine years extended supervision, a lengthy sentence it supported in part by pointing to Mr. Coffee's criminal

history as incorrectly presented by the State. The court specifically noted:

> You have got a couple of police contacts; one significant concern because it sounds like it was an armed robbery which is what these offenses are.

(42:22). The sentencing court continued its assessment of Mr. Coffee's character and the danger he poses to the community, concluding that Mr. Coffee had established a "pattern" of violence and property crimes. (42:22-23).

The State's misrepresentations about Mr. Coffee's arrest and its relevance to his sentence in this case permeated this sentencing proceeding, making it impossible to reasonably conclude that the sentence would have been identical without presentation of the false information. Therefore, Mr. Coffee is entitled to a new sentencing hearing, and he asks this court to remand this case back to the circuit court accordingly. *See Tiepelman* 2006 WI 66, ¶31. Alternatively, he requests remand to the Court of Appeals for a determination of this issue on the merits.

CONCLUSION

For these reasons, Mr. Coffee respectfully requests that this Court reverse the decision of the court of appeals and hold that the due process right to be sentenced on accurate information is not subject to forfeiture. He also requests that this Court find that he is entitled to resentencing, as the record establishes that he was sentenced on the basis of inaccurate information. Alternatively, he requests that this case be remanded to the Court of Appeals for a determination on the merits.

Dated this 12th day of June, 2019.

Respectfully submitted,

NICOLE M. MASNICA
Assistant State Public Defender
State Bar No. 1079819

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
masnican@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,631 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 12th day of June, 2019.

Signed:

NICOLE M. MASNICA
Assistant State Public Defender

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 circuit 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 circuit 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 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.

Dated this 12th day of June, 2019.

Signed:

NICOLE M. MASNICA
Assistant State Public Defender

APPENDIX

INDE X
TO
APPENDIX

Page