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STATE OF WISCONSIN  
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DISTRICT I

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STATE OF WISCONSIN,

Plaintiff-Respondent,

V

Appeal No. 2017AP002323-CR  
Circuit Court Case No. 2013CF003283

MICKY MILLER,

Defendant-Appellant.

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ON APPEAL FROM A NON-FINAL ORDER  
ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT,  
HON. JEFFREY A. CONEN PRESIDING,  
DENYING A MOTION TO DISMISS

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REPLY BRIEF OF DEFENDANT-APPELLANT

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Scott F. Anderson  
State Bar No. 1013911  
Attorney for Defendant-Appellant  
207 E Buffalo Ste 514  
Milwaukee WI 53202  
(414) 271-6040; Fax (414) 271-9840

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## ARGUMENT

### **THE STATE DOWNPLAYS THE EGREGIOUS NATURE OF THE PROSECUTORS' ACTIONS IN NOT TIMELY DISCLOSING THE EXISTENCE OF THE SECOND ARRAY.**

The State in its brief ignores the fact that the prosecutors here may never have disclosed the existence of the second array to the defense. Its brief implies that the prosecutors asked for a sidebar with the judge when they felt the defense was on the verge of discussing the lack of an identification procedure regarding a second suspect. Not so.

The sequence of events leading up to the delayed disclosure was this. The defense asked witness RH whether police ever told her that an officer had looked at the video connected to the crime and recognized the man in the video as someone other than Mickey Miller. The state objected on hearsay ground and in order to hear arguments on the objection, the court excused the jury. A lengthy argument then took place on the issue, and a recess was ultimately taken. Not once did either prosecutor step in and announce the existence of a second photo array. The prosecution's only concern was to preclude the question posed. (R. 70: 31-35)

Prosecutor McNutt obviously had to admit to the above sequence of events. (R. 73: 22-26) McNutt attributed her failure to disclose, as she is arguing a hearsay objection pertaining to the very identification issue at hand, as “waiting for her (direct supervisor’s) direction about what we needed to do next. (R: 70: 25)

As such, the State in its brief, while admitting prosecutorial error, downplays the seriousness of that error. This court can conclude from this sequence of events leading up to the disclosure of this key evidence that “there was a presumptive intent to thus prejudice the defendant.” State v. Copening, 100 Wis.2d 700, 718, 303 N.W.2d 821 (1981). The state’s concern during the defense cross-examination was clear: keep out certain evidence, not the revealing of key evidence it was under a duty to timely disclose. Only when forced to did the state disclose.

This is evidence of an intent to “harass (Miller) by retrial.” Id. at 21. The prejudice to Miller is apparent: the anxiety and stress of a new trial not before the original jury.

CONCLUSION

For reasons set forth in his original brief and now in his reply, Mr. Miller respectfully requests the court to reverse the decision of the Circuit Court.

Dated at Milwaukee WI this 24th day of August, 2018.

LAW OFFICE OF SCOTT F ANDERSON

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By: SCOTT F ANDERSON  
State Bar No. 1013911  
Attorney for Mickey Miller  
207 E Buffalo Ste 514  
Milwaukee WI 53202

CERTIFICATION OF CONFORMITY WITH 809.19(8)(b)

I, Scott F. Anderson, hereby certify that this brief conforms to the rules in accordance with s. 809.19(8)(b) for a brief and appendix produced with proportional serif font. The length of this brief is 908 words, according to the word count function of the word processor available in Microsoft Word.

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SCOTT F ANDERSON  
State Bar No. 1013911

CERTIFICATION OF COMPLIANCE WITH S. 809.19(12)

I, Scott F. Anderson, hereby certify that I have submitted an electronic copy of the brief, excluding the appendix, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

Dated this \_\_\_\_\_ day of August, 2018.

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SCOTT F ANDERSON  
State Bar No. 1013911