STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP2480-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARTEZ C. FENNELL,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. CONEN, PRESDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did the trial court erroneously exercise its discretion when it denied Defendant-Appellant Martez C. Fennell's ineffective assistance of trial counsel challenge without an evidentiary hearing?

The trial court summarily denied Fennell's claim that counsel was ineffective for not presenting the testimony of a police officer, whose report contained the victim's supposed statement that she did not see the gunman's face, because the record conclusively showed there was no reasonable probability of a different outcome had the officer testified.

This Court should affirm because the trial court properly exercised its discretion.

2. Did Fennell forfeit, by not timely objecting, his claim that the armed robbery and car-jacking charges were multiplicitous?

The trial court addressed the merits and held that armed robbery of the victim's personal items and car-jacking were different offenses in law and fact.

This Court should affirm.

3. Did Fennell forfeit, by not timely objecting, his claim that the trial court erred when it gave the approved pattern "reasonable doubt" jury instruction?

The trial court gave the time-honored pattern instruction on the "beyond-a-reasonable-doubt" standard of proof, Wis. JI–Criminal 140. Fennell did not object or offer an alternative instruction.

This Court should affirm.

4. Did the trial court erroneously exercise its sentencing discretion?

The trial court imposed concurrent prison sentences thirty-one years short of the statutory maximum based primarily on the gravity of the offenses and the need to protect the public.

This Court should affirm because the trial court properly exercised its discretion.

5. Has Fennell proven that he is entitled to discretionary reversal in the interest of justice?

The trial court held that the real controversy, whether Fennell committed the armed robbery and car-jacking as party-to-the-crime, was fully tried. Fennell failed to prove any other grounds for discretionary reversal. Fennell now invokes this Court's discretionary reversal authority under Wis. Stat. § 752.35.

This Court should deny discretionary reversal.

POSITION ON ORAL ARGUMENT AND PUBLICATION

This case does not merit oral argument or publication. It may be appropriate for summary affirmance. Wis. Stat. § (Rule) 809.21.

INTRODUCTION

1. The trial court properly exercised its discretion in denying Fennell an evidentiary hearing to substantiate his ineffective assistance challenge. The record conclusively shows that there is no reasonable probability of a different result had the police officer who took the victim's statement testified. There was no dispute that the officer's report contained the victim's supposed statement that she did not see the gunman's face, but the victim denied making that statement under oath at trial and she believed the officer misunderstood what she said. Had the officer testified and recounted his report of what the victim supposedly said, she

still would have denied making the statement and insisted that she saw the gunman's face. She still would have explained that the officer must have misunderstood what she said. She still would have positively identified Fennell at trial as the gunman whom she also earlier picked out of a police photo array. The result would be the same.

2. Fennell forfeited any right to appellate review of his claim that armed robbery and car-jacking are multiplicitous offenses by not objecting to the dual charges before or at trial. The claim is, alternatively, utterly devoid of merit, as these offenses plainly are not the same in law or in fact. One can commit armed robbery without stealing a car. One can steal a car and the victim's personal property inside of it without displaying a firearm.

3. Fennell forfeited any right to appellate review of his constitutional challenge to Wis. JI–Criminal 140 by not objecting to the pattern instruction before or at trial. The claim is, alternatively, utterly devoid of merit. Moreover, this Court lacks the authority to overturn the established Wisconsin Supreme Court precedent upholding the constitutionality of Wis. JI–Criminal 140.

4. The trial court properly exercised its discretion by imposing concurrent prison sentences that were thirty-one years short of the statutory maximum. It relied on relevant factors, giving great weight to the seriousness of these offenses and the need to protect the public.

5. This Court should not grant discretionary reversal because the real controversy, whether Fennell participated in the car-jacking and armed robbery, was fully and fairly tried. Fennell offers only the same forfeited and otherwise meritless claims for relief in asking this Court to award him a new trial in the interest of justice. It would be an erroneous exercise of discretion and a miscarriage of

justice for this Court to grant discretionary reversal based only on those failed claims.

STATEMENT OF THE CASE

Just before midnight on June 21, 2014, A.R. was parked in her car near an alley on 22nd Street just off of Hampton Avenue in the City of Milwaukee. She was about to visit her boyfriend who lived nearby, and she was sending him a text message.

A black car pulled up, and two men got out. One approached the passenger side of her car, trying the locked doors, and the other approached the driver's side where she was seated. (R. 67:92–94.) The man on the driver's side pointed the barrel of a gun at A.R.'s head through the partially open window and ordered her out of the car. (R. 67:95, 97.)

A.R. unlocked the door and got out. The man with the gun knocked her cell phone to the ground and "snatched" it. (R. 67:99, 127–28.) A.R. ran to her boyfriend's house. As she fled, A.R. saw the man who held the gun climb into the driver's seat of her car. (R. 67:101–02.) As she ran to her boyfriend's house, A.R. saw both her car and the black car flee through the alley. (R. 67:102–03.)

Along with her car, the thieves took A.R.'s cell phone and personal items inside the car, including her purse that contained her wallet with debit cards and another cell phone, and her key chain that contained not only the ignition key, but also her house keys and several cash rewards cards. (R. 67:99, 104–05, 111–13.) A.R. twice dialed her stolen cell phone's number, and both times a male voice answered. When she demanded that her property be returned in the first call, the person hung up. (R. 67:107.) When she demanded that her property be returned in the second call, the person with a male voice who answered told

her: "Fuck you, bitch, you're not getting your items back." (R. 67:107–08.)

Four days later, on June 25, 2014, police recovered several of the victim's personal items from the home of Fennell's grandmother on East Burleigh Street, where Fennell was staying at least part of the time while his grandmother was out of town for much of June 2014. (R. 68:84–86, 89–90, 92–93; 69:10, 13–14, 16–17, 21.)

A.R. insisted that she got a good look at the face of the man who pointed the gun at her head, both from inside the car and even closer up after she got out of the car and he knocked the cell phone out of her hand. (R. 67:96–97, 99–100, 106, 115–16.) A.R. did not see the face of the man on the passenger side because she was intently focused on the man immediately facing her with the gun. (R. 67:98, 106.)

A.R. picked Fennell out of a police photo array on August 15, 2014. (R. 67:115–16, 118–19, 130–31; R. 68:36–37, 40–42.) She was "sure" (R. 68:39), and "certain" the man in photograph number two was the man who pointed the gun at her (R. 68:44). She said he had the same facial features and complexion as the gunman, and his hair was a little longer. (R. 68:44–45.)[1]

A.R. positively identified Fennell at trial as the man who pointed the gun at her, ordered her out of the car, and knocked her cell phone out of her hand, all at close range. She was "sure" it was Fennell. (R. 67:132.) The jury found Fennell guilty of both counts. (R. 19; 69:63.)

The trial court sentenced Fennell to nine years of initial confinement in prison followed by six years of extended supervision on the armed robbery count, and to a

[1] Police showed another photo array to A.R. before the August 15 array that did not include Fennell's photo. She did not identify anyone in that array. (R. 67:121.)

concurrent term of three years of initial confinement followed by three years of extended supervision on the car-jacking count. (R. 70:15.) The judgment of conviction was entered on January 20, 2016. (R. 25.)

Fennell filed a motion for direct postconviction relief on July 28, 2017, raising the same issues he presents here. (R. 39.) The trial court denied the motion in a decision and order issued on November 1, 2017. (R. 53, A-App. 2–7.) It also denied Fennell's motion for reconsideration on November 27, 2017. (R. 55, A-App. 1.)

The court ruled as follows: the two charges were not multiplicitous because they were not the same in law or in fact (R. 53:1–2, A-App. 2–3); the pattern jury instruction on "reasonable doubt" to which Fennell did not object, Wis. JI–Criminal 140, did not misstate the law (R. 53:2–3, A-App. 3–4); Fennell failed to prove that trial counsel was ineffective for not obtaining the testimony of a police officer to the effect that the victim supposedly told the officer she did not see the gunman's face (R. 53:3–4, A-App. 4–5); the trial court did not erroneously exercise sentencing discretion because it relied on proper factors (R. 53:5, A-App. 6); and the real controversy was fully tried (R. 53:3, A-App. 4).

Fennell sought reconsideration on only the ineffective assistance claim. In denying reconsideration, the court once again held that Fennell failed to show there was a reasonable probability the verdict would have changed had the officer testified that, according to the officer's report, the victim supposedly stated she did not see the gunman's face. (R. 55, A-App. 1.)

Fennell appeals from the judgment and order. (R. 56.)

STANDARD OF REVIEW

Review of the trial court's denial of a postconviction motion without an evidentiary hearing. The trial court may in its discretion summarily deny a postconviction motion without an evidentiary hearing if the motion fails to allege sufficient facts, presents only conclusory allegations, or the record conclusively shows that the movant is not entitled to relief. Its decision is reviewed for an erroneous exercise of discretion. *State v. Balliette*, 2011 WI 79, ¶¶ 50, 56–59, 336 Wis. 2d 358, 805 N.W.2d 334; *State v. Bentley*, 201 Wis. 2d 303, 309–11, 548 N.W.2d 50 (1996); *Nelson v. State*, 54 Wis. 2d 489, 497–98, 195 N.W.2d 629 (1972).

Review of Fennell's challenge to the effective assistance of trial counsel. On review of an ineffective assistance of counsel challenge, this Court is presented with a mixed question of fact and law. The trial court's findings of historical fact and credibility determinations will not be disturbed unless they are clearly erroneous. *See* Wis. Stat. § 805.17(2). The ultimate determinations based upon those findings of fact and credibility determinations—whether counsel's performance was deficient and prejudicial—are questions of law subject to independent review in this Court. *State v. Trawitzki*, 2001 WI 77, ¶ 19, 244 Wis. 2d 523, 628 N.W.2d 801; *State v. Johnson*, 153 Wis. 2d 121, 127–28, 449 N.W.2d 845 (1990).

Review of Fennell's double jeopardy challenge based on alleged multiplicitous charges. The issue whether there has been a double jeopardy violation based on multiplicitous charges is one of law, reviewable *de novo*. *State v. Steinhardt*, 2017 WI 62, ¶ 11, 375 Wis. 2d 712, 896 N.W.2d 700.

Review of Fennell's challenge to the jury instruction on "reasonable doubt," Wis. JI–Criminal 140. This Court independently reviews the jury instructions as a whole to

determine whether there is a reasonable likelihood the jury was misled by the objected-to language to such a degree that it convicted on less than proof beyond a reasonable doubt. *State v. Avila*, 192 Wis. 2d 870, 889, 532 N.W.2d 423 (1995), *overruled on other grounds by State v. Gordon*, 2003 WI 69, ¶ 5, 262 Wis. 2d 380, 663 N.W.2d 765.

Review of the sentence imposed. This Court reviews the sentence imposed by the trial court for an erroneous exercise of discretion. *E.g., State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197.

This Court's discretionary reversal authority. This Court may, in its discretion, reverse in the interest of justice either because the real controversy was not tried or there was a miscarriage of justice. Wis. Stat. § 752.35. *E.g., Vollmer v. Luety*, 156 Wis. 2d 1, 17–21, 456 N.W.2d 797 (1990).

ARGUMENT

I. The trial court properly exercised its discretion when it denied Fennell's ineffective assistance challenge without an evidentiary hearing.

The theory of defense presented at trial was misidentification: Fennell was not the gunman, and he did not take part in the robbery and car-jacking at all. (R. 69:47–52.)

Milwaukee Police Officer Paloma Winkelmann took a statement from A.R. shortly after the police responded to her call. In it, A.R. supposedly told the officer that she did not see the gunman's face. A.R. denied making that statement and insisted that she got a good look at the gunman's face. (R. 67:128.) When defense counsel confronted A.R. with Winkelmann's report containing her statement that she did not see the gunman's face, she denied making it and said the officer "took it down wrong." (R. 67:128.)

Defense counsel did not call Officer Winkelmann to recount A.R.'s statement in her report and rebut A.R.'s testimony that she saw the gunman's face. Counsel intended to call the officer as a defense witness, but he wrongly assumed that she would be subpoenaed by the State. Defense counsel unsuccessfully tried to subpoena the officer during the lunch break on the last day of trial after realizing that the State had not subpoenaed Winkelmann. (R. 69:3–4.)

Fennell alleged in his postconviction motion that trial counsel was ineffective for not issuing a defense subpoena before trial to make sure that Winkelmann was available to testify for the defense. The trial court summarily rejected this claim without an evidentiary hearing. It held that, even assuming deficient performance, Fennell failed to prove prejudice. The substance of the victim's statement in Winkelmann's report was presented to the jury when counsel cross-examined A.R. about her statement that she did not see the gunman's face. (R. 53:3–4.) The court rejected the same argument on reconsideration. (R. 55.)

A. The law applicable to an ineffective assistance challenge

Fennell bore the burden of proving that the performance of his trial counsel was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Johnson*, 153 Wis. 2d at 127.

Regarding deficient performance, Fennell had to overcome a strong presumption that counsel acted reasonably within professional norms. *Strickland*, 466 U.S. at 690; *Trawitzki*, 244 Wis. 2d 523, ¶ 40; *Johnson*, 153 Wis. 2d at 127. There is a strong presumption that counsel exercised reasonable professional judgment, and that counsel's decisions were based on sound trial strategy. *State v. Maloney*, 2005 WI 74, ¶ 43, 281 Wis. 2d 595, 698 N.W.2d

583. *See Eckstein v. Kingston*, 460 F.3d 844, 848–49 (7th Cir. 2006) (same).

The reviewing court is not to evaluate counsel's conduct in hindsight, but must make every effort to evaluate counsel's conduct from counsel's perspective at the time. *McAfee v. Thurmer*, 589 F.3d 353, 356 (7th Cir. 2009). Fennell was not entitled to error-free representation. Trial counsel need not even be very good to be deemed constitutionally adequate. *Id.* at 355–56. *See State v. Wright*, 2003 WI 252, ¶ 28, 268 Wis. 2d 694, 673 N.W.2d 386 (same). Ordinarily, a defendant does not prevail unless he proves that counsel's performance sunk to the level of professional malpractice. *Maloney*, 281 Wis. 2d 595, ¶ 23 n.11.

Regarding prejudice, Fennell bore the burden of proving that counsel's errors were so serious they deprived him of a fair trial, a trial whose result is reliable. *Johnson*, 153 Wis. 2d at 127. He had to prove a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome. *Trawitzki*, 244 Wis. 2d 523, ¶ 40; *Johnson*, 153 Wis. 2d at 129; *McAfee*, 589 F.3d at 357. Fennell could not speculate. He had to affirmatively prove prejudice. *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433. "The likelihood of a different outcome 'must be substantial, not just conceivable.' [*Harrington v.*] *Richter*, 131 S. Ct. at 792." *Campbell v. Smith*, 770 F.3d 540, 549 (7th Cir. 2014).

The reviewing court need not address both the deficient performance and prejudice components if Fennell failed to make a sufficient showing as to either one of them. *State v. Mayo*, 2007 WI 78, ¶ 61, 301 Wis. 2d 642, 734 N.W.2d 115.

B. The record conclusively shows that Fennell could not prove deficient performance and prejudice at an evidentiary hearing.

1. Fennell failed to sufficiently allege deficient performance.

Officer Paloma Winkelmann was on the State's witness list. (R. 13:1). The witness list provided by defense counsel named Fennell and "[a]ny person named on the State's Witness List." (R. 12:1). Defense counsel assumed that the State would subpoena Officer Winkelmann. The State did not. This caused defense counsel to try to subpoena the officer over the noon hour on the second (and last) day of trial. (R. 69:3–4.) Those efforts did not produce Officer Winkelmann.

Fennell has not proven that counsel's performance sunk to the level of professional malpractice. *Maloney*, 281 Wis. 2d 595, ¶ 23 n.11. He failed to show in his motion that no reasonably competent defense attorney would have assumed that the State would subpoena the officer whose name appeared on both witness lists and who took the victim's statement shortly after she reported the car-jacking and armed robbery. Fennell does not explain why it is unreasonable for a defense attorney to assume that the State will subpoena the witnesses on its own witness list. Moreover, when defense counsel learned on the second day of trial that the State would not call Winkelmann and had not subpoenaed her, he immediately set out to contact and subpoena Winkelmann, but without success.

In hindsight, counsel should have subpoenaed Winkelmann before trial, but hindsight is not the test. Counsel was guilty of a false but reasonable assumption. Though Fennell proved that defense counsel failed to produce Officer Winkelmann, he failed to prove that

counsel's efforts were not those of a reasonably competent defense attorney under the circumstances presented.

2. Fennell failed to sufficiently allege prejudice.

Fennell received a fair trial. He failed to prove a reasonable probability of a different verdict had Officer Winkelmann responded to the mid-trial defense subpoena and testified in the defense case.

When defense counsel confronted A.R. with her supposed statement in Winkelmann's report that she did not see the gunman's face because she was so focused on the gun, she insisted that the officer "took it down wrong." (R. 67:128.) In other words, A.R. did not deny that the statement was in Winkelmann's report; she denied making that statement. In all reasonable probability, had Winkelmann testified for the defense that A.R. said she did not see the gunman's face, she would have in rebuttal again denied making the statement, and again insisted that Winkelmann "took it down wrong."

Moreover, it is reasonable to believe that the officer indeed "took it down wrong." A.R. explained that she did not see the face of the man on the passenger side of the car because she was so focused on the man who pointed the gun in her face on the driver's side. She got a good look at the gunman from inside and outside the car. (R. 67:94–98, 100, 106.) Despite what Officer Winkelmann wrote in her report, it is obvious that police learned then or shortly thereafter that A.R. told them she saw the gunman's face; otherwise, why did they have her view two photo arrays thereafter?

The trial court properly exercised its discretion when it denied Fennell an evidentiary hearing to: (1) have trial counsel repeat what he admitted to at trial; he wrongly assumed the state would subpoena Officer Winkelmann, and he unsuccessfully tried to subpoena the officer mid-trial

(R. 69:3–4); and (2) have Officer Winkelmann testify that, according to her report, A.R. said she did not see the gunman's face; but also admit on cross-examination that she might have misunderstood A.R. when she actually said she did not see the *other man's* face because she was so focused on the man pointing the gun in her face.

What purpose would this evidentiary hearing have served? Fennell does not explain. Fennell does not make any offer of what he would prove at the hearing. A.R. testified unequivocally at trial that she saw the gunman's face, and she positively identified Fennell as the gunman in a photo array and again at trial. Her testimony would have been unshaken by Winkelmann's testimony. In all reasonable probability, A.R. would not have recanted after hearing the officer recount her statement.

Fennell, apparently, wants an evidentiary hearing to prove that A.R. committed perjury when she testified that she saw the gunman's face and when she positively identified Fennell as the gunman at trial. The defense theory at trial was not, however, perjury. The defense theory was that A.R. misidentified Fennell because the lighting was poor, she was focused on the gun, the description she gave to police was inaccurate, the photo array was unreliable, and there was no DNA or fingerprint evidence linking Fennell to the crime. (R. 69:47–52.)

There is no reasonable probability that A.R. committed perjury because the man she positively identified in the photo array and at trial just happened to be staying in his vacationing grandmother's house where A.R.'s stolen personal items were found four days after the car-jacking and robbery. In light of the overwhelming evidence of Fennell's guilt, and the extreme unlikelihood that A.R. committed perjury, the trial court properly decided against holding a needless evidentiary hearing. The record conclusively shows that Fennell would not have proven

prejudice had there been a hearing because there is no reasonable probability of a different outcome had Officer Winkelmann testified at trial.

II. Fennell forfeited any claim that car-jacking and armed robbery are multiplicitous.

Fennell insists that car-jacking and armed robbery are multiplicitous; that is, they are the "same offense" for purposes of the Double Jeopardy Clause of the United States Constitution. Fennell did not object at trial.

A. Fennell forfeited his multiplicity challenge by not objecting at trial.

Failure to object at trial generally precludes appellate review of a claim, even a claim of constitutional dimension. *E.g.*, *State v. Huebner*, 2000 WI 59, ¶¶ 10–11, 235 Wis. 2d 486, 611 N.W.2d 727. *See State v. Pinno*, 2014 WI 74, ¶¶ 56–66, 356 Wis. 2d 106, 850 N.W.2d 207, *cert. denied*, *Pinno v. Wisconsin*, 135 S. Ct. 870 (2014) (claimed denial of the structural public trial right at voir dire was forfeited by failure to timely object). This includes double jeopardy challenges. The United States Supreme Court has long held that appellate review of alleged double jeopardy violations may be waived. *United States v. Broce*, 488 U.S. 563, 570–74 (1989). S*ee State v. Kelty*, 2006 WI 101, ¶¶ 2, 19–26, 28–30, 34, 38–42, 52, 294 Wis. 2d 62, 716 N.W.2d 886 (a guilty plea waives any double jeopardy challenge in a case where further fact-finding is needed). A multiplicity challenge is waived by the failure to timely object. *State v. Koller*, 2001 WI App 253, ¶¶ 41–44, 248 Wis. 2d 259, 635 N.W.2d 838.

To properly preserve an objection for review, the litigant must "[A]rticulate the specific grounds for the objection unless its basis is obvious from its context. . . . so that both parties and courts have notice of the disputed issues as well as a fair opportunity to prepare and address them in a

way that most efficiently uses judicial resources." *State v. Agnello*, 226 Wis. 2d 164, 172–73, 593 N.W.2d 427 (1999) (citations omitted).

This Court may only address waived or forfeited errors under its discretionary reversal authority set out at Wis. Stat. § 752.35, *State v. Beasley*, 2004 WI App 42, ¶ 17 n.4, 271 Wis. 2d 469, 678 N.W.2d 600; or in the form of a challenge to the effectiveness of trial counsel for not objecting, with the burden of proving both deficient performance and actual prejudice squarely on the defendant. *Pinno*, 356 Wis. 2d 106, ¶¶ 81–86; *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986).

Fennell does not seek discretionary reversal on the ground that the charges were multiplicitous or claim that trial counsel was ineffective for not arguing that the charges were multiplicitous. He has forfeited the claim.

B. The law applicable to a claim that charges are multiplicitous

The Double Jeopardy Clause proscribes putting a defendant twice in jeopardy "for the same offence." U.S. Const. amend. V. The protection against being twice put in jeopardy applies both to successive prosecutions for the same criminal offense and multiple punishments for the same offense. *United States v. Dixon*, 509 U.S. 688, 695–96 (1993); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989); *State v. Steinhardt*, 375 Wis. 2d 712, ¶ 13; *State v. Kurzawa*, 180 Wis. 2d 502, 515–16, 509 N.W.2d 712 (1994); *State v. Johnson*, 178 Wis. 2d 42, 48–49, 503 N.W.2d 575 (Ct. App. 1993).

A double jeopardy challenge based on a claim that charges are multiplicitous is analyzed under a two-part test. The first part, derived from *Blockburger v. United States*, 284 U.S. 299 (1932), requires the court to determine whether

the two offenses are identical in law and in fact. *State v. Derango*, 2000 WI 89, ¶ 29, 236 Wis. 2d 721, 613 N.W.2d 833. If they are, then the charges are multiplicitous. *Id.*

If they are not, then the court proceeds to the second part of the test and determines whether the state legislature intended to permit separate charges for the defendant's separate acts. *See Derango*, 236 Wis. 2d 721, ¶ 29. If the charges are not identical in law or in fact, there is a presumption that the state legislature intended to permit multiple charges and cumulative punishment for both offenses absent clear evidence of a contrary intent sufficient to overcome that presumption. *Id.* ¶ 30; *State v. Swinson*, 2003 WI App 45, ¶ 28, 261 Wis. 2d 633, 660 N.W.2d 12. This is consistent with federal double jeopardy law as determined by the United States Supreme Court. *Garrett v. United States*, 471 U.S. 773, 779 (1985); *Missouri v. Hunter*, 459 U.S. 359, 368 (1983); *Albernaz v. United States*, 450 U.S. 333, 340 (1981).

The court must determine (1) whether the charged offenses are identical in law and fact, and (2) if not identical in law and fact, whether the Legislature intended that multiple offenses be brought only as a single count. *Steinhardt*, 375 Wis. 2d 712, ¶ 14; *Derango*, 236 Wis. 2d 721, ¶ 29; *State v. Anderson*, 219 Wis. 2d 739, 746, 580 N.W.2d 329 (1998).

Charged offenses are not identical in fact if the facts supporting each charge are either separate in time or of a significantly different nature. *Steinhardt*, 375 Wis. 2d 712, ¶ 19; *State v. Nommensen*, 2007 WI App 224, ¶ 8, 305 Wis. 2d 695, 741 N.W.2d 481. They are of a significantly different nature if each requires proof of a fact that the other does not. *Swinson*, 261 Wis. 2d 633, ¶ 31. They are significantly different in nature if each requires a "new volitional departure in the defendant's course of conduct." *Anderson*, 219 Wis. 2d at 750 (citation omitted).

C. Armed robbery and car-jacking are not the same in law or in fact.

1. Car-jacking and armed robbery are not the same in law.

Fennell's argument jumps the tracks when it begins with the false premise that the stolen "property" in question was only A.R.'s car. (Fennell's Br. 14.) That is not how the case was charged or tried. The stolen "property" included A.R.'s car *and all of her personal property inside of it.* It also included her cell phone.

Car-jacking and armed robbery have entirely different statutory elements. Armed robbery under Wis. Stat. § 943.32(2) has the following elements:

(1) A.R. was the owner of property, meaning that she possessed it;

(2) Fennell took and carried away property from the person or presence of A.R.;

(3) Fennell took the property with the intent to steal, meaning that he had the intent and purpose to take and carry away the property without the owner's consent with the intent to deprive her permanently of possession;

(4) Fennell acted forcibly, meaning that he threatened the imminent use of force against A.R. with the intent to compel her to submit to the taking and carrying away of her property;

(5) Fennell used or threatened to use a dangerous weapon, including a firearm, at the time he took and carried away A.R.'s property. (R. 14:3–5; 69:31–34.) Wis. JI–Criminal 1480.

Taking and driving away a vehicle without the owner's consent under Wis. Stat. § 943.23(2) has the following elements:

(1) Fennell intentionally took a vehicle without the owner's consent;

(2) Fennell intentionally drove the vehicle without the owner's consent;

(3) Fennell knew that the owner did not consent to the taking and carrying away of the vehicle. (R. 14:6–7; 69:34–35.) Wis. JI–Criminal 1464.

Obviously, one need not take and drive a "vehicle" to commit an armed robbery. The "property" taken in a robbery could be a vehicle, but it could also be anything else possessed by the victim. One can take and drive a vehicle without acting forcibly by threatening the imminent use of force against the owner. One can take and drive a vehicle without using a dangerous weapon. One can take and drive a vehicle without intending to permanently deprive the owner of its possession. These two crimes are, obviously, not the same in law.

2. Car-jacking and armed robbery are not the same in fact.

Fennell did not need to steal a car to commit armed robbery. Fennell intentionally took and drove A.R.'s car without her consent. He knew that A.R. did not consent to the taking and driving away of her car. That made him guilty of violating Wis. Stat. § 943.23(2). He did not need to use or threaten force, or point a gun, to commit this offense.

Fennell took and carried away "property" possessed by A.R. That included her car, but also all of her personal items inside the car, including her purse and everything inside of it. It also included A.R.'s cell phone that Fennell forcibly snatched out of her hand and carried away. It even included the keys to the ignition. *See State v. Johnson*, 207 Wis. 2d 239, 242, 558 N.W.2d 375 (1997) (emphasis added) (the State failed to prove the "asportation" (carrying away) element of

armed robbery when it failed to prove "that either [the victim's] automobile *or its keys* were ever moved, even slightly"). Fennell threatened the use of force at gunpoint with the intent to permanently deprive A.R. of the possession of all of her property. He did so to compel A.R. to submit to the taking and carrying away of her property. That made Fennell guilty of armed robbery in violation of Wis. Stat. § 943.32(2).

There is no doubt that Fennell intended to permanently deprive A.R. of her personal possessions that Fennell intentionally took and carried away. When A.R. called the cell phone that Fennell intentionally and forcibly took from her hand, demanding that the thieves return all of her stolen property, the male voice on the other end responded: "Fuck you, bitch, you're not getting your items back." (R. 67:108.) Fennell was guilty of armed robbery once he snatched A.R.'s cell phone from her hand at gunpoint and then took the rest of her personal property inside the car without her consent and with the later-expressed intent never to return it.

Fennell could have, for example, told A.R. to take everything out of her car that she wanted to keep before he drove off. He could have let A.R. keep her cell phone and handed A.R. her purse from the backseat before taking her car. Or, he could have dumped A.R.'s personal items on the street a block away in the belief that she or someone else would find them. Instead, Fennell (or someone acting on his behalf) later answered A.R.'s call on the stolen cell phone and told her that she would never get her personal property back.

These two crimes were not, therefore, the same in fact. Fennell had plenty of time to reflect on his actions and change his mind in the four days that passed between taking A.R.'s personal property and deciding to keep it at his grandmother's house even after A.R. demanded that he

return it. On reflection, Fennell decided to keep her personal items, and he did not return or abandon her car. *Swinson*, 261 Wis. 2d 633, ¶ 32.[2]

These offenses required proof of different elements, different facts, and separate volitional departures by Fennell. Because these offenses are not identical either in law or fact, the law presumes that the Legislature intended to permit multiple punishments. *Steinhardt*, 375 Wis. 2d 712, ¶ 24. Fennell has presented nothing to overcome that presumption or to prove that the Legislature did not intend to authorize multiple punishments. *Beasley*, 271 Wis. 2d 469 ¶ 21. He does not even try. (Fennell's Br. 17.)

Fennell makes the absurd argument that he had no idea any of the victim's personal property was inside her car. (Fennell's Br. 16.) Wrong. He at least knew about the key to the ignition and the other personal items on her key chain that he took and kept at his grandmother's house. (R. 67:104–05, 112; 68:86.) He took A.R.'s cell phone right out of her hand. A.R.'s purse was on the backseat presumably in plain view when Fennell took the car. (R. 67:104.) A.R.'s purse and its contents were never recovered. (R. 67:110–11.) No doubt Fennell took anything of value out of it and threw the purse away.

Even if Fennell did not know what specific personal property was inside the car the moment he took it, he learned of it soon thereafter and kept some of her personal property at his grandmother's house. A.R. even gave Fennell the chance to return it, and thereby avoid an armed robbery charge, but he (or whoever answered the cell phone he stole

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[2] Fennell could have reduced his liability for car-jacking from a felony to a misdemeanor had he abandoned the car without damage within 24 hours. Wis. Stat. § 943.23(3m). Instead, he (or a cohort) crashed it, thereby permanently depriving A.R. of its possession. (R. 16:1; 67:108–09.)

from her) told her she would never get her property back; i.e., he intended to permanently deprive her of its possession.

D. Fennell had plenty of notice that he was charged with taking both A.R.'s automobile and her personal property.

Fennell complains that he did not have sufficient notice that the armed robbery charge would encompass A.R.'s personal property. (Fennell's Br. 16.) This claim is utterly meritless because the criminal complaint gave him plain notice that the armed robbery charge encompassed her personal property. The complaint alleged as follows:

> Inside her vehicle was her purse containing her Wisconsin DL and $100 cash [A.R.] stated that she had her government cell phone in her hand at the time of the robbery and the gunman snatched it from her before she ran. She later called her cell phone and a male answered. She asked why he was answering a stolen phone and he stated, "Yeah, what are you going to do about it?" and hung up. [A.R.'s] mother also called the phone and when the male answered she asked where the car was. The subject answered, "It's with me, Bitch" and hung up the phone.
>
> At no time did [A.R.] consent to having her car *and property* taken at gunpoint.

(R. 1:2 (emphasis added)); (R. 1:2–3 (alleging that police recovered from Fennell's grandmother's house, "two of [A.R.'s] credit cards, her Auto Zone card and a CVS discount card").)

Finally, Fennell is in no position to complain that he lacked notice the armed robbery charge would encompass A.R.'s personal property because he never objected after this evidence was presented by the State at trial in much the same form as it was alleged in the complaint.

Moreover, if Fennell erroneously convinced himself that both charges related only to the taking and driving away of A.R.'s car, Fennell did not object to those charges as being the same in law and fact, making them multiplicitous. Had he objected, this all would have been addressed by the trial court in a timely and orderly fashion. Fennell would have been quickly disabused of any misunderstanding. That is why Fennell was required to object and why this Court should hold that he forfeited any right to complain that the charges were multiplicitous when he chose not to object to how the case was either charged or proven at trial. *Agnello*, 226 Wis. 2d at 172–73; *Koller*, 248 Wis. 2d 259, ¶¶ 41–44.

III. Fennell forfeited any right to challenge on appeal the constitutionality of the pattern jury instruction on "reasonable doubt," Wis. JI–Criminal 140.

Fennell complains that the trial court erred when it read Wis. JI–Criminal 140 to the jury. He argues that the instruction's admonition to the jury, "you are not to search for doubt, you are to search for the truth," shifted the burden of proof from the State to him.

Hidden at page 28, footnote 12 of his brief is Fennell's grudging acknowledgment that his trial counsel did not bother to object to the instruction or offer an alternative instruction before or at trial. (R. 69:37, 62.) Fennell does not argue that trial counsel was ineffective for not objecting to the pattern instruction. Fennell argues, nonetheless, that the trial court committed reversible error by not *sua sponte* eschewing this time-honored instruction. This is patently absurd.

A. Fennell forfeited any appellate challenge to Wis. JI–Criminal 140.

As with his multiplicity challenge, Fennell did not see fit to object to Wis. JI–Criminal 140. This deprived the trial court of the opportunity to address the issue and draft an alternative instruction if it was persuaded by Fennell's argument. He forfeited any right to appellate review of this constitutional challenge. *Huebner*, 235 Wis. 2d 486, ¶¶ 10–11; *Agnello*, 226 Wis. 2d at 172–73.

Fennell does not argue that his trial attorney was ineffective for not objecting. Counsel is not ineffective for deciding against objecting to an approved pattern jury instruction. *State v. Traylor*, 170 Wis. 2d 393, 404–05, 489 N.W.2d 626 (Ct. App. 1992); *State v. Teynor*, 141 Wis. 2d 187, 218, 414 N.W.2d 76 (Ct. App. 1987). *Compare State v. Hawthorne*, Nos. 2014AP1566 & 2014AP1567, 2015 WL 2192981, ¶ 32 (Wis. Ct. App. May 12, 2015) (unpublished), R-App. 113 (rejecting ineffective assistance challenge for failure to object to the "search for truth" language in Wis. JI–Criminal 140 because it is "simply not the case" that this language shifted the burden of proof to the defendant). This Court should decline review of this forfeited constitutional claim.

B. This Court has no authority to overrule the Wisconsin Supreme Court precedent upholding Wis. JI–Criminal 140.

The Wisconsin Supreme Court has held that the pattern instruction on reasonable doubt, Wis. JI–Criminal 140, is constitutional. *Avila,* 192 Wis. 2d at 887–890. *See State v. Cooper,* 117 Wis. 2d 30, 34–37, 344 N.W.2d 194 (Ct. App. 1983); *State v. Bembenek,* 111 Wis. 2d 617, 641–42, 331 N.W.2d 616 (Ct. App. 1983). *See also Manna v. State*, 179 Wis. 384, 192 N.W. 160, 166 (1923) (no error in instructing the jury not to search for doubt but to search for the truth,

because "[i]t is undoubtedly true that the aim of the jury should be to ascertain the truth."). This Court has no authority to overrule binding Wisconsin Supreme Court precedent. *Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997).[3]

IV. The trial court properly exercised its sentencing discretion.

Fennell challenges the trial court's exercise of sentencing discretion. This challenge is utterly meritless because the trial court relied on relevant factors before imposing concurrent sentences that were thirty-one years short of the statutory maximum for these extremely serious offenses.

A. The applicable law and standard for review of a challenge to the trial court's exercise of sentencing discretion

This Court's review is limited to determining whether the trial court erroneously exercised its sentencing discretion. There is an erroneous exercise of discretion if the sentence was based on irrelevant or improper factors. *State v. Harris*, 2010 WI 79, ¶ 30, 326 Wis. 2d 685, 786 N.W.2d 409; *Gallion*, 270 Wis. 2d 535, ¶ 17. If discretion was

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[3] To get around his obvious procedural default, Fennell asks this Court to take "judicial notice" of all sorts of disputed facts and studies of dubious validity. (Fennell's Br. 25–28.) This Court is not a fact-finding court. A proper and timely objection would have allowed for development of the facts in the trial court where facts are properly found, and for orderly appellate review thereafter based on those findings.

Fennell alternatively asks this Court to certify this issue to the Wisconsin Supreme Court. (Fennell's Br. 28.) This Court should not do so. It should wait for a case where the issue was properly preserved and the factual record fully developed in the trial court.

exercised, there is a strong policy against appellate court interference with the sentence. *Id.* ¶ 18.

This Court's duty is to affirm if, from the facts of record, the sentence is sustainable as a proper discretionary act. *State v. Berggren*, 2009 WI App 82, ¶ 44, 320 Wis. 2d 209, 769 N.W.2d 110. There is a strong presumption that the exercise of sentencing discretion was reasonable because the sentencing court is best suited to consider relevant factors as well as the demeanor of the defendant. *Id.* Appellate courts are not to substitute their preferences for a particular sentence simply because, had they been in the sentencing court's position, they would have imposed a different sentence. *Id. See McCleary v. State*, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971).

The sentencing court is presumed to have acted reasonably, and Fennell bears the burden of proving an unreasonable or unjustifiable basis on the record for the sentence imposed. *State v. Davis*, 2005 WI App 98, ¶ 12, 281 Wis. 2d 118, 698 N.W.2d 823. Due to this presumption of reasonableness, the burden imposed on him to prove an erroneous exercise of sentencing discretion is a "heavy" one. *Harris*, 326 Wis. 2d 685, ¶ 30. Fennell must prove by clear and convincing evidence that the court relied on improper factors. *Id.* ¶¶ 34–35, 60.

There are a variety of relevant factors a sentencing court may consider when exercising discretion. They include: the defendant's criminal record and history of undesirable behavior patterns; his personality, character, and social traits; the results of a presentence investigation; the aggravated nature of the crime; the defendant's degree of culpability; his age, educational background, and employment record; his remorse and cooperativeness; the need for close rehabilitative control; and the rights of the public. The three primary factors to be considered are the gravity of the offense, the defendant's character, and the need to protect

the public. *Id.* ¶ 28; *Gallion*, 270 Wis. 2d 535, ¶¶ 43–44. *See* Wis. JI–Criminal SM-34 (2009).

The sentencing court is not required to address all relevant sentencing factors on the record. *State v. Echols*, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993). Moreover, the court has considerable discretion in deciding what weight to give each factor it considers. *Harris*, 326 Wis. 2d 685, ¶ 28. The court also has considerable discretion to determine the length of the sentence within the permissible statutory range. *Hanson v. State*, 48 Wis. 2d 203, 207, 179 N.W.2d 909 (1970). "The trial court exhibits the essential discretion if it considers the nature of the particular crime (the degree of culpability) and the personality of the defendant and, in the process, weighs the interests of both society and the individual." *State v. Daniels*, 117 Wis. 2d 9, 21, 343 N.W.2d 411 (Ct. App. 1983).

The sentencing court is to identify the most relevant factors and explain how the sentence imposed furthers its sentencing objectives. *Harris*, 326 Wis. 2d 685, ¶ 29. The court need only, however, provide an explanation for the "general range" of the sentence imposed within the statutory range, not for the precise number of years chosen, and it need not explain why it decided against imposing a lesser sentence. *Davis*, 281 Wis. 2d 118, ¶ 26 (citing *Gallion*, 270 Wis. 2d 535, ¶¶ 49–50, 54–55).

B. The trial court properly gave great weight to the seriousness of these offenses and the need to protect the public.

In his sentencing remarks (R. 70:5–11), the prosecutor emphasized the gravity of these offenses and the severe impact they had on the victim. (*See* R. 20 (the victim impact statement).) He noted that Fennell held the gun on A.R. and was involved in other recent car-jackings. (*See* R. 17:2–3 (where Fennell described in his statement to police his

knowledge of and involvement in other car-jackings).) Fennell took no responsibility for his actions. (R. 70:6–9.) The prosecutor recommended ten years of initial confinement in prison and six years of extended supervision. (R. 70:9.)

In his sentencing remarks, Fennell's attorney emphasized Fennell's minimal criminal record and his denial of wrongdoing. He recognized that a prison sentence was appropriate and recommended five years of initial confinement followed by five years of extended supervision. (R. 70:11–12.)

In exercising its discretion on the record, the trial court properly emphasized the extremely serious nature of these offenses and the need to protect the public from car-jackings. The Court could not give Fennell credit for accepting responsibility because he denied committing these offenses. (R. 70:13–15.) The Court imposed bifurcated fifteen-year concurrent sentences consisting of nine years of initial confinement and six years of extended supervision for armed robbery, and three years of initial confinement and three years of extended supervision for car-jacking. (R. 70:15.) This was thirty-one years short of the statutory maximum consecutive sentences that the court could have imposed for these offenses. (R. 6.)

Fennell's sentence did not, "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The trial court properly exercised its discretion.

V. Fennell is not entitled to discretionary reversal in the interest of justice.

Having failed to convince this Court that any of his claims has merit standing on its own, Fennell nonetheless asks it to award him a new trial in the exercise of its

discretionary reversal authority under Wis. Stat. § 752.35. This Court should decline that invitation.

A. The limited discretionary reversal authority

The trial and appellate courts of this state share the authority to grant discretionary reversal of a conviction in the interest of justice. *See* Wis. Stat. § 751.06 (supreme court); § 752.35 (court of appeals); §§ 974.02 and 809.30 (trial court). *State v. Henley*, 2010 WI 97, ¶¶ 58–66, 328 Wis. 2d 544, 787 N.W.2d 350. The courts may do so on two separate grounds: (1) the real controversy was not fully tried, or (2) there was a miscarriage of justice. *Vollmer*, 156 Wis. 2d at 17–21. *See also State v. Harp*, 161 Wis. 2d 773, 779–82, 469 N.W.2d 210 (Ct. App. 1991), earlier opinion at *State v. Harp*, 150 Wis. 2d 861, 443 N.W.2d 38 (Ct. App. 1989).

Fennell bears the burden of proving by clear and convincing evidence that justice miscarried. *State v. Williams*, 2000 WI App 123, ¶ 17, 237 Wis. 2d 591, 614 N.W.2d 11.

One who seeks discretionary reversal on the ground that the real controversy was not fully tried does not have to prove a new trial would likely produce a different outcome. *State v. Williams*, 2006 WI App 212, ¶ 36, 296 Wis. 2d 834, 723 N.W.2d 719. The court looks to the "totality of circumstances and determine[s] whether a new trial is required to accomplish the ends of justice." *State v. McGuire*, 2010 WI 91, ¶ 59, 328 Wis. 2d 289, 786 N.W.2d 227 (quoting *State v. Wyss*, 124 Wis. 2d 681, 735–36, 370 N.W.2d 745 (1985)). *See State v. Hicks*, 202 Wis. 2d 150, 161, 549 N.W.2d 435 (1996).

The discretionary reversal power is, however, formidable and should only be exercised in "exceptional cases." *State v. Avery*, 2013 WI 13, ¶ 38, 345 Wis. 2d 407,

826 N.W.2d 60 (citation omitted). A court may not even consider whether to grant discretionary reversal until after it has determined that all other challenges to the conviction are without merit and, even without any other meritorious ground for relief, this is the rare "exceptional case" that warrants discretionary reversal. *State v. McKellips*, 2016 WI 51, ¶ 52, 369 Wis. 2d 437, 881 N.W.2d 258.

A court also may not grant discretionary reversal until after it has balanced the compelling state interests in the finality of convictions and proper procedural mechanisms against any factors favoring discretionary reversal. *Henley*, 328 Wis. 2d 544, ¶ 75.

B. Fennell has not presented clear and convincing evidence that justice miscarried.

Rather than put forth clear and convincing evidence of a miscarriage of justice, Fennell simply rehashes the same forfeited and meritless arguments in a last gasp hope to obtain relief where none is warranted. (Fennell's Br. 35–40.)

The real controversy, whether Fennell was a party to the car-jacking and armed robbery, was fully and fairly tried. Fennell aggressively challenged A.R.'s ability to positively identify him as the gunman. There was no dispute at trial that Officer Winkelmann's report included a statement supposedly made by A.R. that she did not see the gunman's face. Had Officer Winkelmann testified that A.R. said she did not see the gunman's face, the outcome would not have changed. A.R. still would have denied making that statement, and she still would have testified that Winkelmann misunderstood her; she did not see *the other man's* face because she was so focused on the gunman standing right in front of her. (R. 67:128–29.) The jury still would have learned that A.R. positively identified Fennell in the photo array. The jury still would have seen A.R.

positively identify Fennell in court as the gunman. She would not have recanted in the face of Winkelmann's testimony. The jury still would have found Fennell guilty because it would learn that the man A.R. positively identified in court just so happened to be staying at his grandmother's house where police found some of A.R.'s stolen personal property four days later.

The jury instructions on reasonable doubt did not shift the burden of proof to Fennell. *Avila*, 192 Wis. 2d at 887–90. His attorney saw it that way because he saw no reason to object to Wis. JI–Criminal 140. Fennell's overblown burden-shifting argument simply ignores the crystal clear instructions on the presumption of innocence and the State's burden of proving every element of both offenses beyond a reasonable doubt that the jury presumably followed. (R. 69:31–37, 40.) In that context, the jury was properly told to "search for the truth" while holding the State to its high burden. There was nothing misleading or confusing at all. (Fennell's Br. 37.)

"Zero plus zero equals zero." *Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976). It would be an erroneous exercise of discretion, indeed a gross miscarriage of justice, for this Court to award Fennell a new trial for the flimsy reasons put forth in his postconviction motion and in his brief on appeal.

CONCLUSION

This Court should affirm the judgment of conviction and the order denying postconviction relief.

Dated this 31st day of August, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,447 words.

Dated this 31st day of August, 2018.

_____
DANIEL J. O'BRIEN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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.

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 31st day of August, 2018.

_____
DANIEL J. O'BRIEN
Assistant Attorney General

SUPPLEMENTAL APPENDIX TO
BRIEF OF PLAINTIFF-RESPONDENT

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

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 first names and last initials 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.

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Assistant Attorney General

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