STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2018AP001639-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PATRICK D. ZOLLIECOFFER,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in Milwaukee County Circuit Court, the Honorable William S. Pocan Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Did the circuit court erroneously exercise its discretion in denying Mr. Zolliecoffer's request to proceed with retained counsel of choice and for an adjournment of his trial?

   The circuit court denied the request.

2. Did the State unlawfully strike two potential jurors on the basis of their race?

   The circuit court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Zolliecoffer takes no position on publication.

While Mr. Zolliecoffer does not request oral argument, he welcomes the opportunity to discuss the case should the Court believe that oral argument would be of assistance to its resolution of the matter.

STATEMENT OF THE CASE

The information charged Mr. Zolliecoffer with disorderly conduct contrary to Wis. Stat. § 947.01(1); battery to a law enforcement officer contrary to Wis. Stat. § 940.203(2); and attempted disarming of a peace officer contrary to Wis. Stat. §§ 941.21 and 939.32. (5:1).

Mr. Zolliecoffer was convicted of all charges following a jury trial. (41:1); (App. 104). The circuit court, the Honorable William S. Pocan presiding, imposed and stayed a prison sentence and placed Mr. Zolliecoffer on probation for three years. (41:1); (App. 104).

Mr. Zolliecoffer filed a notice of intent to pursue postconviction relief. (42). This appeal follows. (48).

STATEMENT OF RELEVANT FACTS

Underlying Offense

According to the criminal complaint, law enforcement was summoned to a courtroom at the Milwaukee County Courthouse following an alleged disturbance at a family court hearing. (1:2). Upon arrival, Deputy Adam Frick of the Milwaukee County Sheriff's Office claimed that Mr. Zolliecoffer was "arguing" with Commissioner Susan Callies. (1:2). Deputy Frick remained in the courtroom throughout the remainder of the hearing. (60:87).

After the hearing concluded, Mr. Zolliecoffer made a comment which Attorney Ann Hetzel of the Milwaukee Child Support Agency perceived as a threat. (1:2). She would later claim that Mr. Zolliecoffer stated he was "coming for" her. (60:71). Mr. Zolliecoffer, who had appeared *pro se* at the hearing, claimed that he had only stated he was "coming back with a lawyer." (61:97). Mr. Zolliecoffer left the courtroom. (60:95). On his way out the door,

Attorney Hetzel "yelled" to Deputy Frick and asked him if he was "going to do anything about that." (60:95).

As Mr. Zolliecoffer continued on his way, Deputy Frick signaled to another officer, Deputy Michael Johnson. (60:104). The two officers approached Mr. Zolliecoffer from behind and "grab[bed]" him. (60:106). A scuffle ensued. (1:2). According to Deputy Frick, Mr. Zolliecoffer was "pulling" at his Taser during the scuffle. (1:2). Mr. Zolliecoffer was eventually arrested and placed in custody. (1:2).

Pretrial Proceedings

Mr. Zolliecoffer was initially represented by State Public Defender staff counsel at his initial appearance held on September 16, 2016. (51:3). Thereafter, Attorney Anthony Procaccio was appointed and appeared on Mr. Zolliecoffer's behalf at a hearing held on September 23, 2016. (52:2). On November 14, 2016, Attorney Procaccio moved to withdraw, citing new employment as his reason for being unable to continue representing Mr. Zolliecoffer. (8:1).[1]

Thereafter, Attorney Kevin Gaertner was appointed as counsel for Mr. Zolliecoffer. (53:2).

[1] The circuit court did not explicitly address Attorney Procaccio's withdrawal on the record but appears to have granted the motion without further proceedings.

Attorney Gaertner made his first court appearance on December 19, 2016—roughly one month before the jury trial was scheduled to commence. (53:1). Counsel requested a new trial date, as he had not yet received discovery material from prior counsel. (53:2). The circuit court therefore rescheduled Mr. Zolliecoffer's trial to March 1, 2017. (53:4; 54:10).

On February 17, 2017, Attorney Gaertner filed a motion to adjourn the March 1st trial date. (10:1l; 54:10). As grounds, Attorney Gaertner indicated that he needed "additional time to locate and question additional witnesses." (10:1). According to Attorney Gaertner's averments in the motion, his investigation had been impeded by employees of the Milwaukee County Circuit Court. (10:1). While Attorney Gaertner wished to identify who else might have been present in court when the incident allegedly occurred, counsel indicated that he had been informed that Chief Judge Maxine White's approval was necessary in order to access the otherwise confidential family court calendar. (10:1). According to Attorney Gaertner, his request was still awaiting approval from Judge White's office. (10:1).

On February 22, 2017, the parties appeared for a final pretrial. (54:10). Although Mr. Zolliecoffer initially indicated that he might wish to plead guilty on that date, he ultimately withdrew that request during the course of the hearing. (54:9).

The circuit court then addressed the defense motion for an adjournment. (54:10). Attorney

Gaertner explained the ongoing problems he was having in getting access to witnesses given the unique circumstances involved. (54:11). For example, Attorney Gaertner indicated that at least one witness—apparently a member of the court staff—had not cooperated with the defense investigation. (54:12). Attorney Gaertner was also seeking to identify who else might have been present for court that day, which would necessitate access to the otherwise confidential family court calendar. (54:13). Both parties, in conjunction with Judge White's office, were still working together to resolve that investigatory issue. (54:13).

Thus, the State did not object to the request for an adjournment. (54:15). Specifically, Assistant District Attorney James Griffin stated:

> I think they're going to have to do this investigation. I don't see how we can go to trial, later find out this investigation wasn't done. My guess we'd be doing it again, I don't know all the issues. I know [the assigned prosecutor] had mentioned to me this meeting with the chief judge, people had court that day. That sounds to me like it would have been a matter of public record, but again with that said I don't know how we could do this without Mr. Gaertner at least assuring the Court he's done reasonable —taken the reasonable steps necessary to investigate the case.

(54:14). The circuit court did not "necessarily disagree." (54:14). It was therefore "inclined to grant some reasonable period of time" for defense counsel to

complete his investigation. (54:14). The circuit court rescheduled the trial to commence on April 26, 2017. (54:17).

Two days later, Attorney Gaertner filed a motion to withdraw. (15:1). As grounds, Attorney Gaertner indicated that there was "a breakdown in communications" and that Mr. Zolliecoffer had requested new counsel. (15:1).

The circuit court held a hearing on the motion on March 3, 2017. (55); (App. 107). It stated that it was treating Attorney Gaertner as the "first attorney in this matter." (55:2); (App. 108). It then addressed the motion as follows:

> Mr. Zolliecoffer, I tend to, when it is the first attorney, and as I indicated, I treat Mr. Gaertner sort of as the first attorney, because of the reason why your original attorney left, but I always have this conversation with you:
>
> We are fairly early on in the case and this is your first attorney, substantive attorney.
>
> So, I am inclined to grant your request.
>
> But I want to be clear, and I always give people what I call my, be careful what you ask for, you just might get it speech.
>
> Because I don't allow multiple change of attorneys.
>
> So, the state public defender's officer will, if I remove Mr. Gaertner, appoint somebody else for you.

> However, that attorney, whether you like them or not or get along with them or not, is going to be your last attorney in this case short of something very unusual occurring.
>
> Because I don't allow multiple switching of attorneys that at that point, I am either going to determine you're one (1) of those people that is just not going to be happy with whomever is appointed, or it is just simply for the purpose of delay.
>
> I'm not saying that is what is occurring now.
>
> But I just want to warn you, because Mr. Gaertner is a good attorney.
>
> I realize even with good attorneys, sometimes there's, for whatever reason, a particular attorney and client don't mesh well.
>
> But I just want to make sure we had this discussion.
>
> Because if this issue comes with your next attorney, if I grant your request, most likely, my answer next time will be, no.
>
> You are going to be stuck with whomever the state public defender's office appoints next.

(55:3-5); (App. 109-111). Mr. Zolliecoffer indicated that he understood and was asking the circuit court to appoint new counsel. (55:5); (App. 111). The circuit court granted the motion. (55:5); (App. 111). The matter remained scheduled for a trial on April 26, 2017. (56:3).

On March 20, 2017, Attorney Jeremy Evans appeared on behalf of Mr. Zolliecoffer. (56:2). Attorney Evans asked for an adjournment as he had not received discovery from prior counsel. (56:2). The State did not object. (56:3). The circuit court granted the adjournment. (56:3). The case was eventually calendared for a jury trial to commence on May 22, 2017. (57).

However, the parties appeared for a status conference on May 19, 2017 to address the issue of counsel, as Mr. Zolliecoffer was now requesting to substitute retained counsel. (58); (App. 115).[2] The circuit court made extensive prefatory remarks:

> And the parties requested that this be put on our calendar today. We have a jury trial starting Monday.
>
> And my understanding is that Mr. Zolliecoffer is interested in retaining private counsel. And that is Mr. Flanagan.
>
> But the problem is, is that Mr. Flanagan is, apparently, not able to handle the trial on Monday.
>
> And that, of course, from the Court's perspective is a problem because Mr. Evans is not the first attorney for Mr. Zolliecoffer. He is actually the third.

[2] CCAP indicates that new counsel, Thomas Flanagan, contacted the court on May 18, 2017, to schedule the hearing.

> But I don't count against Mr. Zolliecoffer the first attorney, because the first attorney, Mr. Procaccio, left employment with the State Public Defender's Office, and that's why he received Mr. Gaertner.
>
> But I know Mr. Gaertner, apparently, they had some personality or other issues, and he asked for a new attorney. And at the time, I appointed Mr. Gaertner.
>
> I, of course, explained, as I always do, to Mr. Zolliecoffer that if I granted that request, whoever the State Public Defender's Officer appointed next would be the final attorney; because we couldn't have any further delays. He couldn't constantly swap out attorneys.

(58:2-3); (App. 116-117).

Attorney Thomas Flanagan was given an opportunity to address the court and explained that Mr. Zolliecoffer had retained his services on May 17, 2017. (58:4); (App. 118). When he was retained, Attorney Flanagan believed that the hearing on May 22nd was a final pretrial. (58:4); (App. 118). He subsequently learned that it was, in fact, the date of the scheduled jury trial. (58:4); (App. 118). While Attorney Flanagan indicated at one point in his remarks that he "could step in" and "would be ready to hit the ground running," he ultimately concluded that "Monday is a little bit soon." (58:4); (App. 118). He therefore sought an adjournment. (58:2); (App. 116).

Attorney Flanagan further explained that he believed there had been communication problems between Mr. Zolliecoffer and Attorney Evans. (58:4); (App. 118). Based on his initial review of the file, he also believed that there were uncompleted investigative tasks. (58:6); (App. 120). Specifically, Attorney Flanagan was interested in obtaining records from family court which related to the hearing at which Mr. Zolliecoffer was allegedly disorderly. (58:6); (App. 120). Based on his understanding of the investigative picture, Attorney Flanagan averred that an adjournment would likely be necessary "even if [he] had been handling this case from the very beginning." (58:6); (App. 120). Attorney Flanagan also stated that Mr. Zolliecoffer had been trying for some time to raise the funds for private counsel. (58:5); (App. 119). Finally, Attorney Flanagan informed the court that the State might have reason to ask for an adjournment—specifically, he recently learned that the State also had uncompleted investigative tasks. (58:5); (App. 119).

In response, counsel for the State indicated that they had only just been informed about a potential witness by Attorney Evans and that they were interested in taking that witness's statement. (58:7); (App. 121). However, while the State would benefit from an adjournment, it still believed it could proceed to trial without completing that investigative task. (58:7); (App. 121). Thus, the State was "not joining in the request to adjourn just because of that." (58:8); (App. 122). While it conceded that the defense may want to conduct further investigation regarding

the family court case, it did not believe this information was essential to the State's case. (58:8); (App. 122). It left the decision to the circuit court. (58:8); (App. 122).

The circuit court then ruled:

> All right.
>
> Well, if Mr. Flanagan was able to proceed with the trial on Monday, I would be inclined to grant the request, because it doesn't really matter to me who tries this case.
>
> What matters to me is that the case is tried.
>
> And we specifically had the discussion regarding change of counsel back when Mr. Gaertner left this case.
>
> This is not the first time that matter was scheduled for trial.
>
> This matter has been pending for now over eight (8) months, and it does need to be tried.
>
> Normally, I would be able to give you a little bit of hope at this point and say, there's always a possibility with an out-of-custody that you will be bumped, because we usually have set four (4) every Monday and every Wednesday.
>
> But you are the only one (1) left for Monday, so, you will go on Monday.
>
> So, under these circumstances, it does concern me that this appears to, perhaps, be for the purpose of delay.

> But even if not, it certainly would cause a delay which would not be appropriate given where we are in this case and based on everything that has transpired thus far.
>
> And, quite frankly, the fact that I have granted an adjournment at the defense's request previously in this case and I've granted a change of counsel previously in this case.
>
> So, at this point, I am going to deny, because you cannot do the trial on Monday, Mr. Flanagan, I'm going to deny the request at this time.
>
> If for some reason unforeseen to us all today the trial gets bumped for some other reason, I can't imagine, quite frankly, what that would be sitting here today, but stranger things have occurred.
>
> At that point, I would be happy to have you renew your request.
>
> Because, honestly, I really don't care who tries the case for Mr. Zolliecoffer. I just want the case tried.
>
> So, at this point, because you can't make Monday, I'm going to have to deny the request.
>
> Mr. Flanagan, if for some reason Monday's trial doesn't go, you certainly can renew that, because I would certainly have no problem with you subbing in, just not at this eleventh hour that causes a delay of the trial.

(58:10-12); (App. 124-126).

The matter proceeded to trial. (59). Attorney Evans remained counsel of record. (59:4). The circuit court permitted Attorney Flanagan to "silently" assist Attorney Evans. (59:4).[3]

Jury Selection

During jury selection, thirty potential jurors were called to the courtroom. (66). One juror, #18, was struck for cause due to medical incapacity. (60:41). Each party was given five peremptory challenges. (66). The State utilized two of its five strikes to remove the only two remaining African-American jurors from the panel. (60:44); (App. 130).

Defense counsel objected and cited *Batson v. Kentucky*, 476 U.S. 79 (1986). (60:44); (App. 130).

The circuit court responded to the objection:

> I don't think you are using it correctly. Batson is a challenge to the voir dire in general. And, quite frankly, I don't even have the details how the people magically occurred in our courtroom. That's done in Room 106. It is really not a Batson challenge. The basis of your concern, and I know sometimes when we get to this point sometimes the prosecutors wish to make a record as to why they struck one or more of the jurors, but it is not really a Batson challenge.

[3]Based on an overall review of the trial transcripts, it would appear that Attorney Flanagan was only sporadically in the courtroom.

(60:44-45); (App. 130-131). The prosecutor, Brandon Wigley, was then given the opportunity to justify his peremptory challenges. (60:45); (App. 131). Attorney Wigley agreed with the circuit court's legal analysis, claiming to have never encountered such a challenge previously. (60:45); (App. 131). Attorney Wigley stated that "race doesn't matter" but, if necessary, he could "give reasons as to the other two if there were two." (60:45); (App. 131).

Attorney Evans clarified that he was focusing on the elimination of Jurors #1 and #21. (60:45); (App. 131). Attorney Wigley explained:

> As far as Juror No. 1, I had concerns about her ability to understand. Perhaps communicate, but that was one of my weaker strikes. Then No. 21 that came down to having zero children and maybe not understanding, you know, the things that go into child support hearings all of that being a parent. Plus she had no jury experience. Plus a factor was that she indicated she knew people in law enforcement, and she had no criminal justice--she had no criminal justice contacts. So definitely with respect to those two it had nothing to do with their race.

(60:45-46); (App. 131-132).

Attorney Evans pushed back on these explanations:

> Jurors No. 6, Juror No. 12, Juror No. 14 and I believe No. 1, 16, and 17. They all had no kids and therefore no experience. Many of them had no experience with a jury. I don't see why that

> particularly disqualifies No. 21. I don't see how No. 1 is particularly disqualified. The State said it was one of his weaker strikes.

(60:46); (App. 132). The circuit court asked for legal authority and asserted that "It is not the Batson that would be to the panel." (60:46); (App. 132). Attorney Evans indicated that he had no further arguments. (60:46); (App. 132).

The circuit then issued its ruling:

> All right. Thank you. Then no legal arguments have been made why the striking of Jurors 1 and 21 was in any way improper. So then there is nothing no action for the Court to take.

(60:47); (App. 133). After denying the defense motion, the jury was empaneled and the evidentiary phase of the trial commenced.

Trial and Sentence

After two days of testimony, the jury convicted Mr. Zolliecoffer of all three offenses. (62:88-89). At sentencing, counsel for Mr. Zolliecoffer requested a probation disposition. (63:20). The State asked for three years of initial confinement followed by three years of extended supervision. (63:3). However, the circuit court elected not to follow that recommendation. (63:39). Instead, it imposed and stayed a prison sentence and placed Mr. Zolliecoffer on probation. (63:39).

This appeal follows. (48).

SUMMARY OF ARGUMENT

This Court should reverse and remand for a new trial on two grounds. First, the circuit court created a structural error when it unreasonably and arbitrarily denied Mr. Zolliecoffer's motion for substitution of retained counsel and for a continuance. In evaluating the circuit court's discretionary decision, the record demonstrates that the circuit court failed to consider proper factors and failed to honor the presumption in favor of Mr. Zolliecoffer's counsel of choice.

Second, the prosecutor acted unlawfully in removing two jurors on the basis of race. A careful review of the record discloses that the prosecutor's race-neutral explanations were pretextual. Accordingly, this Court should reverse and remand for a new trial.

ARGUMENT

I. The circuit court erred in denying Mr. Zolliecoffer's motion for substitution of counsel and an adjournment of the scheduled jury trial.

A. Legal principles and standard of review.

In this case, Mr. Zolliecoffer asked the circuit court to substitute retained counsel of choice. Retained counsel stated, however, that he would not be able to represent Mr. Zolliecoffer unless the circuit

court also adjourned the scheduled jury trial date. This situation therefore involves the interplay of two important constitutional rights.

First, Mr. Zolliecoffer's right to the assistance of counsel under the Sixth Amendment includes the right to be represented by retained counsel of choice. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144, (2006).[4] Under this constitutional framework, "trial courts must recognize a presumption in favor of a defendant's counsel of choice." *Carlson v. Jess*, 526 F.3d 1018, 1024 (7th Cir. 2008). "Accordingly, the Sixth Amendment bars a court from denying a defendant the right to retain counsel of his choice arbitrarily or unreasonably." *Carlson*, 526 F.3d at 1024. Denial of that right constitutes structural error and automatically entitles the defendant to a new trial. *State v. Nelson*, 2014 WI 70, ¶¶ 30, 34, 355 Wis. 2d 722, 849 N.W.2d 317.

Second, "the Fourteenth Amendment prevents a court from arbitrarily or unreasonably denying a defendant the right to obtain a continuance." *State v. Prineas*, 2009 WI App 28, ¶ 15, 316 Wis. 2d 414, 766 N.W.2d 206. Thus, when the defendant alleges that a motion for substitution of counsel and a continuance has been erroneously denied, this Court must ask

[4] "The scope, extent, and, thus, interpretation of the right to the assistance of counsel is identical under the Wisconsin Constitution and the United States Constitution." *State v. Klessig*, 211 Wis. 2d 194, 202–03, 564 N.W.2d 716 (1997).

"whether the circuit court's denial of [the] motion for substitution and a continuance was arbitrary or unreasonable and therefore violated [the defendant's] constitutional rights." *Id*. "Because trial courts have broad discretion on matters of continuances, only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel." *Carlson*, 526 F. 3d at 1025 (quotations and citation omitted).

In examining whether the circuit court properly exercised its discretionary authority in determining whether to permit a defendant's request to substitute counsel of his choice, this Court examines the circuit court's reasoning for evidence that it properly considered relevant factors such as "the length of the delay requested; whether competent counsel is presently available and prepared to try the case; whether prior continuances have been requested and received by the defendant; the inconvenience to the parties, witnesses, and the court; and whether the delay seems to be for legitimate reasons or whether its purpose is dilatory." *Prineas*, 2009 WI App 28, ¶ 13.

B. The circuit court acted "arbitrarily and unreasonably" in denying Mr. Zolliecoffer's motion for substitution of counsel and a continuance.

Here, Mr. Zolliecoffer—who is indigent—was not able to immediately raise the necessary funds to

retain counsel. (58:5); (App. 119). However, he was ultimately able to retain Attorney Thomas Flanagan a little less than one week before the calendared trial date. (58:4); (App. 118). It appears that Attorney Flanagan acted diligently in informing the court that he had been hired, swiftly arranging for a status conference on the last business day before the scheduled trial date.

At that hearing, counsel offered essentially three justifications for adjourning the scheduled trial so that he could represent Mr. Zolliecoffer. First, Attorney Flanagan told the court that he believed there were communication issues between Mr. Zolliecoffer and Attorney Evans. (58:4); (App. 118). Attorney Evans did not contradict this assertion. (58:8); (App. 122). Second, Attorney Flanagan told the circuit court there were "a couple of things [he wanted] to do" before the trial commenced. (58:6); (App. 120). Attorney Flanagan explained that he needed to explore whether there were additional records related to the hearing at which Mr. Zolliecoffer was allegedly disorderly. (58:6); (App. 120). Attorney Flanagan felt that this investigation was essential to an adequate defense of Mr. Zolliecoffer, telling the circuit court that this investigative need independently merited an adjournment of the trial. (58:6); (App. 120). Finally, Attorney Flanagan suggested that while he could "step in" and "hit the ground running" he believed that the scheduled date was simply "too soon" for him to be adequately prepared. (58:4); (App. 118).

These reasons were "facially valid." *See Carlson*, 526 F. 3d 1018, 1026. (Breakdown in communication, inadequate investigation, and disagreement in defense strategy are "facially valid" reasons justifying a substitution of counsel.) Accordingly, the circuit court "needed to explore them and […] balance them against the reasons for not granting [the defendant's] motion." *Id*.

As in *Carlson,* here the circuit court also failed to address any of counsel's proffered explanations justifying the need for an adjournment of the trial. Instead, the court's remarks show that it inflexibly applied a rigid and unyielding policy which deprived Mr. Zolliecoffer of his constitutional rights.

In assessing the circuit court's decision, it is helpful to begin with its comments from the March 3, 2017 hearing, as they were later incorporated and referenced into the oral ruling at issue here. During that hearing, the circuit court made lengthy remarks about its judicial policies, flatly stating that it did not "allow multiple change of attorneys." (55:3); (App. 109). It also stated that Mr. Zolliecoffer was not going to be allowed new counsel "short of something very unusual occurring." (55:4); (App. 110). More problematically, the circuit court also asserted that it would automatically draw an unfavorable inference from such a request, telling Mr. Zolliecoffer that any further requests for substitution would be treated as evidence of dilatory tactics on his part. (55:4); (App. 110). It told Mr. Zolliecoffer that any future requests

for substitution would likely be denied. (55:4); (App. 110).

While those comments were made in context of a request for new appointed counsel, the circuit court returned to the same themes in its discussion of Mr. Zolliecoffer's request to substitute retained counsel. Thus, the circuit court not only failed to appreciate the legal distinction between the two types of requests—and the accompanying "presumption in favor of […] counsel of choice," *Carlson*, 526 F. 3d at 1027—it also endorsed an inflexible policy precluding substitution which punished Mr. Zolliecoffer for even making the request.

To that end, the circuit court opened the hearing by reminding Mr. Zolliecoffer that he had already been told that his current attorney "would be the final attorney." (58:3); (App. 117). The circuit court also referenced its earlier comments in its oral ruling, reminding the parties of the earlier discussion and its outcome—that Mr. Zolliecoffer had already been "granted a change of counsel previously in this case." (58:10-11); (App. 124-125). It also followed through on its previous statement that it would infer intent to delay from any future request for substitution, telling Mr. Zolliecoffer that the court believed he may have been making the motion "for the purpose of delay." (58:11); (App. 125). Thus, instead of honoring the presumption in favor of Mr. Zolliecoffer's right to counsel of choice, the circuit court appears to have instead applied its own procedural rule forbidding further substitution. That

is inconsistent with an adequate exercise of discretion under this legal standard.

At the same time, the circuit court's reasons for denying the motion are also superficially unpersuasive. Overall the circuit court appears to have placed a great deal of emphasis on a desire to have the case resolved simply because the matter had been pending for eight months. (58:10); (App. 124). However, the circuit court did not articulate *why* further delay would be problematic. It also did not identify any administrative concerns—such as the production of witnesses—which would counsel against rescheduling the trial. While the circuit court has an obvious interest in an efficient docket, the circuit court is not permitted to inflexibly privilege its calendar over the defendant's "interest in having his counsel of choice properly prepared to defend him against such serious charges." *Carlson*, 526 F.3d at 1026.

The arbitrariness of the circuit court's decision is further demonstrated by its remarks openly acknowledging that, but-for branch-specific scheduling considerations, Mr. Zolliecoffer's case may have otherwise been "bumped" on the scheduled trial date. (58:11); (App. 125). Mr. Zolliecoffer was not in custody and his case therefore had lower priority in the court's scheduling rubric but, due simply to a quirk in the schedule, no other jury trials were on the court's calendar that day. (58:11); (App. 125). It was because Mr. Zolliecoffer was "the only one (1) left for

Monday" that his case "need[ed] to be tried." (58:10-11); (App. 124-125).

The court's remarks are incompatible with a reasoned consideration of the facts and circumstances present in this case. Instead, they display a rigid—and highly arbitrary—adherence to external scheduling considerations that fail to properly account for a defendant's constitutional rights. Meanwhile, the circuit court never asked how much time Attorney Flanagan would need to prepare for the trial, instead suggesting that *any* further delay would be unacceptable. "That sort of rigidity can only be characterized as arbitrary." *Id*. at 1026.[5]

A careful review of the record discloses no other reasoned justification for the circuit court's actions. The State took no position on the motion and never made any arguments that its case would be harmed by further delay. (58:8); (App. 122). In fact, the State conceded that an adjournment would allow them to finalize investigation that, while not crucial to their case, was nonetheless useful and potentially important. (58:7); (App. 121).

There was also no evidence that a delay would unduly burden victims. *See Prineas*, 2009 WI App 28, ¶ 20 (Victim's desire to have case proceed was important consideration for circuit court). Here, the

[5] In fact, Attorney Flanagan suggested that there would only be minimal delay, asking the circuit court to "set the matter as soon as possible." (58:5); (App. 119).

case involved professional witnesses—Milwaukee County Sheriff's Deputies and court staff. In a case of this nature, concerns of witness inconvenience would presumably be very minimal.

And, while there had been prior adjournments in this case, a careful review of the record discloses that those adjournments were consistently necessary in order to safeguard Mr. Zolliecoffer's right to a fair trial. Two of the adjournments were sought because prior counsel apparently failed to timely transfer the case file to successor counsel. (53:2; 56:2). One other adjournment was sought so that counsel could complete his investigation—and the State conceded that an adjournment was necessary under the circumstances. (54:14). These adjournments should be not be heavily weighted against Mr. Zolliecoffer.

With respect to prior requests for new counsel, the circuit court granted Attorney Gaertner's motion alleging a breakdown in communication, thereby implicitly asserting that substitution was appropriate under the circumstances. *See United States v. Harris*, 394 F. 3d 543, 552 (7th Cir. 2005) (Total breakdown in communication justified appointment of new counsel for appointed defendant). This legitimate request for new counsel—which was accepted by the circuit court—should not be used to bar Mr. Zolliecoffer from later retaining counsel of his choice. Finally, the circuit court's comment about delay is unsupported by any record evidence and may have been based on an unsupported—and unreasonable—blanket assumption.

At the end of the day, this was a relatively straightforward and uncomplicated case. *See Carlson*, 536 F.3d at 1025-1026. (Relative simplicity of case factor that counseled in favor of granting defense motion.) Notwithstanding that fact, the case also posed significant risk for Mr. Zolliecoffer: up to 12 years and 90 days of imprisonment as well $21,000 in potential fines. (1:1). Accordingly, the circuit court erred in not allowing Mr. Zolliecoffer the opportunity to substitute counsel and adjourn the scheduled trial date so that he could defend himself against these serious allegations with his counsel of choice.

Because the circuit court unreasonably and arbitrarily denied Mr. Zolliecoffer's request to substitute retained counsel of choice and adjourn the jury trial, structural error resulted. *Nelson*, 2014 WI 70, ¶¶ 30, 34. This Court should therefore reverse and remand for a new trial.

II. The prosecutor's failure to articulate a legitimate race-neutral reason for striking the only two black jurors from Mr. Zolliecoffer's jury panel requires a new trial.

A. Case background.

This was a case with undeniable racial overtones. Mr. Zolliecoffer is an indigent black male with a tendency to speak loudly, even when not angry. (62:68; 61:102). While leaving court, he was tackled to the ground by two non-African-American Milwaukee County Sheriff's deputies. (62:70). They

did so at the apparent request of Attorney Ann Hetzel, the white attorney whom Mr. Zolliecoffer claimed had been disrespectful to him during the actual hearing. (61:96-97).

Milwaukee is a notoriously segregated community, with a long history of tensions between communities of color and law enforcement.[6]

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[6] As an example, Mr. Zolliecoffer was arrested on September 12, 2016. (1:1). One month earlier, the city of Milwaukee was convulsed with violence when a young black man was fatally shot by police in a mostly African-American neighborhood. Two days of rioting followed, causing roughly six million dollars in property damage. *See* https://en.wikipedia.org/wiki/2016_Milwaukee_riots. As the article points out, this was not the first time that relations between police and African-American citizens became strained. According to the Wikipedia entry,

> In 2014, community protests followed the fatal shooting of Dontre Hamilton, a mentally ill black man, in Milwaukee. The officer who shot and killed Hamilton was fired from the police force for not following protocol, but he was not criminally charged. In December 2014, the U.S. Department of Justice announced that it would work with the Milwaukee Police Department on reforms. Milwaukee police previously attracted controversy for two incidents involving the deaths of black suspects while in police custody—one in 2010 and the other in 2011—as well as a scandal involving illegal strip searches and body cavity searches of 74 black people, for which a $5 million settlement was approved by the

(continued)

Moreover, this police contact occurred in context of an ongoing national conversation regarding alleged police bias against African-Americans, with massive protests and other unrest occurring throughout the United States during 2016 and 2017.[7]

> Milwaukee Common Council. Residents have criticized policing methods in predominantly black neighborhoods, which they say often involve a lack of respect towards suspects and use of force.

Id. The involvement of the Milwaukee County Sheriff's Department in this case is also noteworthy. At the time this case was tried, the Department was led by Sheriff David Clarke, whose highly controversial comments about race—alleging, for example, that Black Lives Matter would be joining with ISIS in order to "being [sic] down our legal constituted republic"—and notorious record of mistreating individuals in the Milwaukee County Jail were national news stories. *See for example* Radley Balko, *A David Clarke dossier*, WASHINGTON POST, May 18, 2017 (available online at https://www.washingtonpost.com/news/the-watch/wp/2017/05/18/a-david-clarke-dossier/?utm_term=.8f4817843d37); Tina Nguyen, *David Clarke, America's Second Worst Sheriff, May Be Joining the Trump Administration*, VANITY FAIR, September 1, 2017 (available online at https://www.vanityfair.com/news/2017/09/david-clarke-trump-administration-reports); *see also* https://en.wikipedia.org/wiki/David_Clarke_(sheriff).

[7] As examples, in 2016, there were major protests following the deaths of Alton Sterling in Baton Rouge, Louisiana and Philando Castile in St. Anthony, Minnesota (a suburb of St. Paul). One of these protests turned violent when an African-American military veteran opened fire on law (continued)

Both lawyers therefore acknowledged the obvious racial overtones in their voir dire. (60:5; 60:19). Defense counsel spoke to the jury about race at length in his voir dire, telling the jury that "given a lot of recent events race has become a highly sensitive topic." (60:19). While counsel wanted to believe "that law enforcement officers don't treat people unfairly because of race" he also acknowledged "a lot of media events" which called that idea into question. (60:19-20). Counsel asked a number of questions probing at racial attitudes, exploring whether the jury believed "black people" were treated unfairly in the criminal justice system. (60:20-24).

Race was also implicitly referenced in defense counsel's opening statement, when he told the jury that the evidence would prove that Mr. Zolliecoffer had been wrongly arrested and physically abused by law enforcement for no other reason "than he was a black man asserting his legal rights in a courtroom." (60:63). Later, during closing arguments, defense counsel openly argued that racial bias had infected the case. He invited the jury to consider the racial composition of the witnesses in deciding whom to believe, urging them to take the word of two black men (Mr. Zolliecoffer and his son, both of whom denied that Mr. Zolliecoffer had done anything wrong) over the word of the remaining white witnesses. (62:70).

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enforcement. *See* https://en.wikipedia.org/wiki/Black_Lives_Matter#2016.

The prosecutor vehemently attacked these themes in his closing argument, telling the jury it was "unfortunate" that the defense had played their "race cards" in the course of the trial. (62:41). In so doing, the prosecutor argued that Mr. Zolliecoffer had "ruin[ed] it for people who have a legitimate claim about discrimination based on race." (62:41). The prosecutor returned to this theme in rebuttal and claimed that the defense was appealing to the jury's "white guilt" in order to obtain an unjust acquittal. (62:71). The prosecutor personally assured the jury that they would not be "racist" if they voted to convict Mr. Zolliecoffer. (62:71).

Following these racially charged arguments, Mr. Zolliecoffer was convicted by an all-white jury, as the State had used its peremptory challenges to remove black jurors from the panel.

B. Legal and historical background.

The exclusion of racial minorities from jury panels—particularly panels deciding the fate of black defendants in racially charged cases—has a long, and unfortunate, historical pedigree. Prior to the civil war, "jury service was almost universally restricted to white men."[8] While Reconstruction-era legal

[8] *See* "Illegal Racial Discrimination in Jury Selection: A Continuing Legacy," issued by the Equal Justice Initiative in 2010 at 9. (Available online at https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf)

developments were intended to bring an end to such blatant discrimination—the Supreme Court condemned the practice in *Strauder v. West Virginia*, 100 U.S. 303 (1880)—those legal efforts met with little success in the face of entrenched racism and outright evasion of constitutional duty. And, while incremental legal reforms gradually dismantled official forms of state-sponsored discrimination, it was not until 1986 that the United States Supreme Court definitively confronted the widespread problem of racially-motivated use of peremptory challenges in *Batson v. Kentucky*, 476 US 79 (1986).[9]

In that case, the United States Supreme Court held that racially-motivated use of peremptory challenges violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Id.* at 86. Not only are the defendant's rights violated by such a practice, "denying a person participation in jury service on account of his race" also violates that juror's rights. *Id.* And that is not all:

> The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that

[9] While the Court had attacked the discriminatory usage of peremptory strikes in *Swain v. Alabama*, 380 U.S. 202 (1965), the Court ultimately rejected the "crippling burden of proof" imposed by that decision and admitted that the reform had been wholly ineffective. *Batson*, 476 U.S. at 92.

> purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.

Id. at 87.

Accordingly, the United States Supreme Court outlined a three-step process that must be used when a defendant believes that racial discrimination has infected the voir dire process. *Id*. at 97-98. The Wisconsin Supreme Court has adopted and discussed this test. *State v. Lamon*, 2003 WI 78, 262 Wis. 2d 747, 664 N.W.2d 607. Under that test, the defendant bears the initial burden of proof:

> First, in order to establish a prima facie case of discriminatory intent, a defendant must show that: (1) he or she is a member of a cognizable group and that the prosecutor has exercised peremptory strikes to remove members of the defendant's race from the venire, and (2) the facts and relevant circumstances raise an inference that the prosecutor used peremptory strikes to exclude venirepersons on account of their race.

Id., ¶ 28. Once a defendant makes their prima facie showing, the State must "come forward with a neutral explanation" for its strikes. *Id*., ¶ 29 (quoting *Batson*, 476 U.S. at 97. That explanation must be "a clear and reasonably specific explanation of legitimate reasons, related to the particular case." *Id*., ¶ 31. The prosecutor "must offer something more than a bald, but otherwise credible, statement that other nonprohibited factors were considered." *State v.*

Jagodinsky, 209 Wis. 2d 577, 585, 563 N.W.2d 188, (Ct. App. 1997). Instead, the prosecutor "must demonstrate how there is a nexus between these legitimate factors and the juror who was struck." *Id*.

"Finally, the third step of *Batson* requires that when the prosecutor offers a race-neutral explanation, the circuit court has the duty to weigh the credibility of the testimony and determine whether purposeful discrimination has been established." *Lamon*, 2003 WI 78, ¶ 32. A defendant prevails at the third step if they are able to prove that "the prosecutor purposefully discriminated or that the prosecutor's explanations were a pretext for intentional discrimination." *Id*.

The circuit court's decision to deny a *Batson* motion is reviewed under the clearly erroneous standard. *Id*., ¶ 36. However, when the circuit court fails to appropriately conduct the *"Batson* inquiry," this Court reviews that decision de novo. *United States v. McMath*, 559 F.3d 657, 663 (7th Cir. 2009). If the Court is satisfied that a *Batson* error occurred, it must remand for a new trial, as "intentional discrimination on the basis of race in jury selection is a structural error." *Winston v. Boatwright*, 649 F.3d 618, 628 (7th Cir. 2011).

C. Independent review of this record reveals a clear *Batson* violation.

1. De novo review is warranted.

Here, the circuit court's inquiry in response to defense counsel's assertion of a *Batson* violation during jury selection was superficially insufficient. The circuit court appeared unfamiliar with the controlling case law, flatly stating that defense counsel had erred by citing *Batson* in challenging the prosecutor's racially-motivated use of peremptory challenges. (60:44-45); (App. 130-131). It then denied the motion in a summary fashion, alleging that defense counsel had failed to make any legal arguments in support of his position. (60:47); (App. 133). It did not evaluate the prosecutor's credibility or assess the sufficiency of the proffered reasons. Overall, the record shows that the circuit court failed to take counsel's objection seriously. Accordingly, no deference is warranted. *See Jordan v. Lefevre*, 206 F.3d 196, 201 (2nd Cir. 2000) ("But the limited record developed in the present case casts doubt on the trial court's ability to make the required finding regarding the prosecutor's intent, thereby undermining the deference due its conclusion.")

2. Defense counsel made a sufficient prima facie showing of discrimination.

In this case, defense counsel properly challenged the State's use of peremptory challenges by asserting that the prosecutor had improperly

removed both black jurors using peremptory challenges. (60:44); (App. 130). While Mr. Zolliecoffer's race was not mentioned in the objection, he was present in the courtroom and his racial identity would have been self-evident to the circuit court. Moreover, defense counsel directly cited *Batson* as grounds for his objection, thereby satisfying his prima facie burden.[10]

3. The prosecutor offered facially neutral reasons for his strikes; however, closer scrutiny reveals that they were mere pretexts for discrimination.

The prosecutor justified his strikes as follows. With respect to Juror #1, the prosecutor acknowledged "that was one of my weaker strikes." (60:45); (App. 131). He stated that he had "concerns about her ability to understand." (60:45); (App. 131). With respect to Juror #21, the prosecutor claimed that she was struck because she lacked children, had

[10] And an objection as to the sufficiency of counsel's prima facie showing would not defeat Mr. Zolliecoffer's claim at this stage, as the State has already been given an opportunity to give a race-neutral explanation for their peremptory challenges. *See Hernandez v. New York*, 500 U.S. 352, 359 (1991). ("Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.")

no jury experience, knew people in law enforcement, and had no contacts with the criminal justice system. (60:46); (App. 132).

On their face, the prosecutor offered ostensibly race-neutral justifications. The central question, however, is whether these explanations were legitimate, or were instead mere pretexts for discrimination in a case which the prosecutor knew to have racial overtones. Here, the record is clear that they were the latter.

Juror #1

Juror #1 was an older black female who lived on Milwaukee's North Side. (59:50). While the prosecutor later claimed that she had difficulties understanding or communicating, the record does not support that assertion. Instead, the record shows that she complied with the circuit court's instructions by clearly stating her name, juror number, marital status, employment, number of children, residential neighborhood, and prior jury service. (59:49-50). She also clearly answered the circuit court's follow-up question about criminal justice contacts, informing the circuit court that she had no criminal justice contacts and had never been the victim of a crime. (59:50). She was also asked to clarify her employment prior to retirement and described her job title and duties to the court. (59:51). She listed the ages of her children and recalled that her prior jury service involved a criminal trial in which the jury found the defendant guilty. (59:51-52).

Juror #1 stayed engaged throughout the two-day jury selection process. For example, on the second day of voir dire, defense counsel posed a lengthy question intended to discover whether any members of the panel had "been accused of doing something they didn't do." (60:11). Juror #1 volunteered and described an incident at her church (60:12). She told defense counsel that she had offered a bulletin to a member of the congregation, who apparently did not hear the question. (60:12). Later, the individual faulted Juror #1 for not giving her a bulletin. (60:12). She participated in several follow-up questions, and explained how she had handled the situation and how it had made her feel. (60:13). Her responses were appropriate and the story coherently told.

Juror #1 also showed her engagement by raising her hand in response to another question later that morning as to whether "black people are regarded as more suspicious by society than other people." (60:20). While she was not the only person to raise her hand, she was the only person to be called on. (60:20). When asked if she had "anything to say about that" she answered "no." (60:20).

Here, the record discloses absolutely no basis for an inference that Juror #1 lacked any ability to understand. Instead, it appears that she consistently followed the court's instructions, voluntarily engaged with defense counsel's voir dire, and appropriately answered follow-up questions. Despite his alleged concerns, the prosecutor did not ask Juror #1 any

follow-up questions intended to probe at her understanding or ability to communicate which would contradict the available record evidence. In addition, the parties stipulated to remove one other juror—#18—for possible cognitive issues. (60:41). Thus, while the parties clearly discussed jurors who they believed to have difficulty understanding, there was no concern voiced regarding Juror #1 until the prosecutor was forced to justify his use of a peremptory challenge to strike her.

Importantly, the prosecutor conceded that his removal of Juror #1 was a "weaker strike." (60:45); (App. 131). In light of this record, the State's claim that Juror #1 lacked the ability to understand should be seen as a pretext for racial discrimination. Accordingly, this peremptory challenge was unlawful.

Juror #21

Juror #21 was also black, female, and single with no children. (59:77). Along with four other potential white jurors, she supported the "Black Lives Matter" movement. (59:122). Black Lives Matter is defined as "an international activist movement, originating in the African-American community, that campaigns against violence and systemic racism towards black people."[11] Notwithstanding her support, Juror #21 also made clear that she was able to act as an impartial juror and was not further questioned about any alleged

[11] https://en.wikipedia.org/wiki/Black_Lives_Matter.

bias arising from this affiliation. (59:123). The prosecutor also did not ask to strike her for cause, and assured those members of the panel who supported Black Lives Matter that "there's nothing wrong with you supporting whatever causes to touch your heart." (59:122). When asked to justify his eventual strike, the prosecutor offered a medley of rationales. Those arguments do not stand up to closer scrutiny.

First, the prosecutor asserted that he struck Juror #21 because she lacked children and therefore would have trouble understanding "the things that go into child support hearings all of that being a parent." (60:46); (App. 132). That justification carries with it a potentially racially loaded assumption—that for Juror #21, having children is linked with an understanding of the child support process.[12] Setting this aside, however, it is clear that this case does not require knowledge of parenting or the child support process. Rather, it involves an allegation that Mr. Zolliecoffer shouted in court, threatened an attorney, and engaged in a struggle with law enforcement. Jurors are not required to have special life skills before they are presumed to be competent jurors, and it is difficult to see how or why Juror #21's life experiences made her an undesirable juror for this

[12] The justification is also superficially illogical; as someone could also have children—and be totally absent from their lives—but still be intimately familiar with child support process.

prosecutor—especially when there were multiple members of the pool selected to serve on the panel who also lacked children. (60:46); (App. 132). "A facially neutral reason for striking a juror may show discrimination if that reason is invoked only to eliminate African-American prospective jurors and not others who also have that characteristic […]." *Coulter v. Gilmore*, 155 F.3d 912 (7th Cir. 1998).

This same concern is present with the prosecutor's second justification for his strike of Juror #21 — her lack of prior jury experience. (60:46); (App. 132). However, Jurors #3, #6, #7, #12, #13, #14, #17, #19, #20 and #23 all lacked prior jury experience. (59:54; 59:56; 59:58; 59:66; 59:67; 59:71; 59:75; 59:76; 59:79). In other words, a majority of the jurors selected lacked prior jury experience. Thus, what was disqualifying for Juror #21 was apparently not disqualifying for the white jurors selected. Under *Coulter*, this justification is also inherently suspect.

Finally, the prosecutor asserted that the fact that Juror #21 stated that "she knew people in law enforcement" and that she apparently lacked police contacts was an additional reason for striking her. (60:46); (App. 132). Again, however, that reasoning is facially disingenuous. It makes little sense that the prosecutor—who would naturally wish to have jurors sympathetic to his cause—would strike a juror either because she had relationships with law enforcement or because she lacked a criminal record. To the contrary, those facts would likely be good attributes for a potential juror for the State, especially in a case

involving an alleged battery to law enforcement. At the same time, the prosecutor also left many white individuals on the jury who shared similar characteristics. Jurors #3, #6, #7, #17, #19, and #24 all knew people in law enforcement—roughly half the selected panel. (59:54; 59:57; 59:58; 59:71; 59:75; 59:80). Meanwhile, Jurors #12, #14, #16, #17, #20, and #24 all lacked law enforcement contacts. (59:66; 59:67; 59:70; 59:71; 59:76; 59:80). Thus, the overwhelming evidence is that what was apparently disqualifying for Juror #21 was not disqualifying for white jurors ultimately selected to serve.

Coupled with the prosecutor's other comments—including his attempts to pretend ignorance as to the race of the potential jurors (60:46); (App. 132) and his reliance on race-based arguments at the eventual trial—these justifications should be properly viewed as not credible and therefore pretextual. Accordingly, because the record clearly demonstrates that a *Batson* violation occurred, this Court should reverse and remand for a new trial.

D. Even under the more deferential standard of review, the record still supports Mr. Zolliecoffer's claim.

As Mr. Zolliecoffer has established, the default standard of review is clear error. *Lamon*, 2003 WI 78, ¶ 36. While Mr. Zolliecoffer believes that special circumstances justify a departure from that rule, he will briefly address the alternative standard of

review should this Court not be inclined to exercise de novo review.

Here, the circuit court's finding of non-discrimination is clearly erroneous. A circuit court decision is clearly erroneous when it is either unsupported by, or plainly unreasonable in light of, the record. *Royster-Clark, Inc. v. Olsen's Mill, Inc.,* 2006 WI 46, ¶ 11, 290 Wis. 2d 264, 714 N.W.2d 530; *Reusch v. Roob*, 2000 WI App 76, ¶ 8, 234 Wis. 2d 270, 610 N.W.2d 168; *see also* Black's Law Dictionary (10th. ed. 2014). (Clear error exists when the reviewing court "is left with the firm conviction that an error has been committed.")

As outlined at length above, the prosecutor's race-neutral justifications are inherently questionable in light of this record. The prosecutor conceded that he had weak grounds to strike Juror #1 and offered a transparently false justification—of non-comprehension—which is belied by this record. As to Juror #21, the prosecutor's arguments are simply not credible in light of his decision to not strike numerous white jurors with the same characteristics.

Accordingly, the circuit court's summary finding to the contrary was clearly erroneous. This Court should therefore reverse and remand for a new trial.

CONCLUSION

Mr. Zolliecoffer therefore respectfully requests that this Court reverse and remand for a new trial due to an unreasonable and arbitrary denial of his request to substitute counsel of choice and to obtain a continuance. In addition, the record is clear—under either standard of review—that otherwise qualified jurors were removed from the jury based solely on their racial identity. Accordingly, a new trial is warranted.

Dated this 24th day of October, 2018.

Respectfully submitted,

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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 8,851 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 24th day of October, 2018.

Signed:

_____

Christopher P. August
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 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 24th day of October, 2018.

Signed:

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APPENDIX

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TO
APPENDIX