STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2018 AP 2318

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

ALAN M. JOHNSON,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

ALAN M. JOHNSON,
Defendant-Appellant

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1. The Circuit Court determined that Johnson's testimony presented some evidence supporting the privilege of perfect self-defense and therefore allowed Johnson to present additional evidence in support of the privilege. Did the Circuit Court err in thereafter refusing to allow the jury to determine whether the State met its burden of proving beyond a reasonable doubt that Johnson's use of force was not privileged?

The Court of Appeals answered yes. *See State v. Johnson*, 2020 WI App 50, 393 Wis. 2d 688, 948 N.W.2d 377. It held that Johnson had presented evidence sufficient to allow the jury to "determine that Johnson reasonably believed that K.M. was going to kill him to prevent going to prison for having child pornography and that Johnson reasonably believed it necessary to discharge his handgun at K.M. to defend himself from an imminent danger of death or great bodily harm." *Id.* ¶ 27 (cleaned up). Thus, whether Johnson acted in perfect self-defense was a question for the jury, and the Circuit Court erred in refusing to instruct the jury on the privilege of perfect self-defense. *Id.* ¶ 28.

2. The Circuit Court concluded that a reasonable jury could find that Johnson did not intend to kill KM and could find that Johnson actually believed that he was acting to prevent KM's unlawful use of force. Did the Circuit Court err in nevertheless refusing to allow the jury to determine whether Johnson acted without utter disregard for human life?

The Court of Appeals answered yes. It held that the evidence viewed in the light most favorable to the defendant "demonstrate[d] a regard for the life, safety, and well-being of others." *Id.* ¶ 40. Thus, "[i]t was within the province of the jury to determine whether Johnson's

actions were reckless but devoid of a showing of 'utter disregard for human life.'" *Id.* ¶ 41.

3. Evidence showed that shortly before KM attacked Johnson, Johnson found child pornography on KM's computer. Johnson offered this evidence to prove the reasonableness of his belief that KM's attack was intended to prevent him from reporting the child pornography to the police. Did the Circuit Court err when it deemed this evidence irrelevant and excluded it?

The Court of Appeals answered yes. It held that the evidence was relevant to KM's state of mind and motive for attacking Johnson: "K.M. knew that Johnson had previously found child pornography on his computer years earlier; therefore, when he saw Johnson on his computer that morning K.M. knew what Johnson was looking for. K.M. knew if Johnson reported what he had found to police that he was facing multiple charges for child pornography and a mandatory prison sentence." *Id.* ¶ 47. "[T]he evidence was highly probative to Johnson's theory of defense" and outweighed the risk of unfair prejudice to the State. *Id.* ¶ 50. Thus, the evidence should have been admitted and its exclusion impeded Johnson's constitutional right to present a defense. *Id.* ¶ 51.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Court already has set oral argument. The Court's grant of review also counsels in favor of publication, which rightly is this Court's usual practice.

STATEMENT OF THE CASE

The Nature of the Case. This is an appeal from the judgment of conviction entered in Walworth County Circuit Court by the Honorable Kristine Drettwan, following a nine-day jury trial. The State charged Alan Johnson with first-degree intentional homicide and burglary in connection with the death of Johnson's brother-in-law, KM, on October 25, 2016. The jury acquitted Johnson of those charges. The jury returned a guilty verdict on the least-culpable offense submitted to it: first-degree reckless homicide, by use of a dangerous weapon. The Circuit Court adjudicated Johnson guilty and sentenced him to a total of 35 years (25 years initial confinement and 10 years extended supervision).

Johnson appealed. The Court of Appeals held that the Circuit Court erred by (1) refusing to instruct the jury on perfect self-defense; (2) refusing to instruct the jury on second-degree reckless homicide; and (3) excluding evidence that Johnson found child pornography on KM's computer shortly before KM attacked Johnson. Therefore, it reversed and remanded for a new trial. This Court then granted the State's petition for review.

The Trial Testimony. The testimony presented to the jury established the following. Alan Johnson is the third of four children born to Eric and Cathy Johnson. R218:175–76. He has a younger sister, Nicole, and two older sisters, Christina and Kim. *Id.* Kim is eleven years older than Alan Johnson. *Id.* Kim started dating KM when she was fourteen and KM was about seventeen. R220:97. Kim and KM married years later, when Alan was ten years old. R218:197–98.

Alan Johnson feared KM from the beginning. *Id.* KM was verbally, physically, and sexually abusive. Soon after KM married Kim, Johnson found himself alone with KM: "[H]e grabbed me and he turned me around and he held

me. . . . My back was to his front and he had his arm around me and he held me there with his arm around my torso and then he reached down my pants." *Id.* at 199. KM reached into Johnson's underwear and held his hand there. *Id.* "I was completely powerless. Like I couldn't—couldn't do anything. . . . I was afraid to tell anyone. I—I was, like, I was ashamed of it." *Id.* at 200.

The abuse didn't stop there. For example, on multiple occasions KM would come up behind Johnson and squeeze Johnson's head "like a vice." *Id.* at 203. Alan would try not to cry, but it hurt. *Id.* Alan felt that he couldn't say anything. *Id.* On one occasion, KM "came up behind me and he put his arm around my throat and he pulled my wind pipe shut and he turned me around and shoved me right to Kimberly who was in the kitchen too and he started laughing. And he'd just hold me there. And Kim was just staring at me wide eyed. . . . I couldn't breathe at all. And he just kept holding me there and I felt like I was getting close to passing out and then he let me go." *Id.* at 203–04.

And KM's abuse continued even as Johnson grew into adulthood. "I remember we were on Highway 59 . . . and I was sitting in the back seat. And I don't know why we weren't—nobody was saying anything, there was no argument, no nothing. And [KM] was in the front passenger seat, and he just he turned around and he slammed me right square in the chest with his fist and I didn't know why, and he just laughed. And then he just turned around like nothing happened." *Id.* at 202.

Johnson's oldest sister, Christina, agrees that KM "was a violent person" and "a bully." R220:107. She could tell that Johnson—whom she describes as passive and nonconfrontational—feared KM. *Id.* at 104. She knew that her mother and her younger sister, Nicole, also feared KM. *Id.* at 109.

Nicole also confirms KM's violent nature. *Id.* at 153. For example, at a family gathering, KM "grabbed me around the waist and put his arm around my neck and he choked me until I blacked out." *Id.* at 151. Nicole struggled, but she was powerless to stop him. *Id.* This wasn't an isolated incident:

> He would touch me. Every time I walked past him he would either poke at me or grab at me or pull me into his lap. He would sit next to me on the couch and then rest his head on my chest. He would wrestle with me to the ground and not let me up. He would pull me onto the couch and basically be on top of me and not let me up. He would tickle me and his hand would go up my shirt.

Id. at 151–52. Johnson witnessed similar incidents of KM abusing Nicole: "[H]e would typically walk up behind her, he would do a lot of the same things he would do to me—press her head in between his hands. He would put his hands on [her] shoulder and he would squeeze really hard and I could see her wince. He would—he'd come up to her from behind her and he'd put his arms around her and I could tell she didn't like it." R218:277–78. Other times, "he'd grab her hair in his hands and he'd just pull her head back and she'd have to stare straight up at him and he'd look right down at her and he'd just hold her there until he just let her go." *Id.* at 278–79. Through his mother, Johnson learned of the time when KM choked Nicole until she passed out. *Id.*

Just as with Johnson, KM's abuse of Nicole didn't stop as she reached adulthood; he continued his abusive behavior whenever Nicole saw him, even when she was in her twenties. R220:151–52. The only thing she could do to protect herself was to stay away from KM. *Id.* at 152–53. When she had her two daughters, she became concerned about how to protect them from KM. *Id.*

Around 2009, Johnson discovered yet another reason to be concerned about KM. R218:209. Kim asked Johnson, who earned a degree from UW-Madison in computer science, for help with KM's computer. *Id.* She had downloaded a file and couldn't find it on the computer. *Id.* She asked Johnson to look for it. *Id.* In searching through KM's computer, Alan discovered something else: a cache of child pornography. *Id.* at 211. He saw pictures of "nude young girls." *Id.* One depicted "an adult man, he was naked, and he was having sex with a girl who looked like she was in elementary school. They were both naked." *Id.* at 212. He saw "a screen full of thumbnails[,] probably around a dozen," before he quit looking at the computer. *Id.*

Knowledge of what he observed on KM's computer weighed heavily on Johnson, especially when his niece and goddaughter, Nicole's daughter, "was getting to be the age of what the girl was in the picture." *Id.* at 213. He was concerned for his niece's safety. "I knew what he did to me and I knew he'd do it to her and he was—he was that way around Nicole too." *Id.* He felt a responsibility for keeping his niece safe because he "was the only one who knew about it." *Id.* at 214. He "didn't think anyone else would do anything" to protect his niece, just as no one else had protected him from KM when he was a child. *Id.* at 214–15.

As his concern grew, Johnson went to law enforcement for help. He filed a report with the National Center for Missing and Exploited Children (NCMEC) about the child pornography that he found on KM's computer. *Id.* at 227–28. In his report, he warned NCMEC that KM had at least one friend in the local police department; he was concerned that KM would get "tipped off" if local law enforcement became aware of an investigation. *Id.* Eventually, Johnson received a response not from NCMEC but from the Walworth County Sheriff's Office. *Id.* The investigator told Johnson, "there's nothing we

can do and—but if you see anything else let us know." *Id.* at 229. Johnson felt like he was "back to square one." *Id.* at 230.

Johnson next tried to share the information in his NCMEC report with his father, Eric. *Id.* Eric spoke to KM and then told Johnson that KM claimed he had "moved" the child pornography. *Id.* at 232, 236. Over the next several months, Eric talked to KM about getting counseling, but KM never did so. *Id.* at 236-37. "[N]othing changed, nothing happened." *Id.* at 237.

Johnson kept trying to address the situation. He told his father about KM's sexual assault of him as a child. *Id.* at 238. He told his nephew (KM and Kim's son) about the presence of child pornography on KM's computer—but he didn't explain how he knew, because "I felt like if it got back to [KM] he'd go after me." *Id.* at 239. Nothing helped: KM still was not getting therapy or addressing his problem.

Johnson's concern for the safety of his young niece was unabated, so he decided to take another try at involving law enforcement. Because the investigator he had spoken with months earlier said that the evidence of child pornography was "too stale," Johnson decided to search KM's computer for "fresh pictures." *Id.* at 247. He thought that he'd be able to find pictures because his father had told him that KM "still had" the child pornography and had "just moved it." *Id.* at 248. His hope was that if he found such evidence, "they would have what they need and I wouldn't be involved anymore." *Id.* at 247. His plan was to find the child pornography and then "tell the police what I saw." *Id.* at 255.

As soon as Johnson reached the conclusion that he needed new evidence, he took action. He didn't plan in advance, and he didn't think it through. *Id.* at 248. He grabbed a pair of electrical gloves because, as a computer

geek, he knew that static electricity from his bare hands could "fry" the computer equipment, destroying the very evidence that he sought to obtain. *Id.* at 249–50. And he grabbed his father's handgun because "I felt like if I went over there without it I wouldn't be able to go in there. I wouldn't be able to, you know, go looking for his equipment because if he saw me he would know why I was there and he'd go after me." *Id.* at 250, 253–54.

And so Johnson quietly entered his sister's house on the night of October 24, 2016, hoping to make it in and out undetected. *Id.* at 256. He made his way to the small, cramped computer room. *Id.* at 259. The room was only about 10 square feet, and it was "severely cluttered." R214:241–42. The furniture (a sofa and shelving unit, among other things) was "covered in boxes and papers and bike parts." R218:259. Johnson kept the lights off and closed the door behind him. *Id.* at 263–64. The computer was directly in front of him, sitting on a desk pushed against the wall. R215:23–24. It was on. R218:260. Johnson sat down and started looking at the files on the hard drive. *Id.* He searched through hundreds, if not thousands, of thumbnails. *Id.* at 266.

Now it's time for a brief pause in the trial testimony. The Circuit Court didn't allow Johnson to testify about what he found on KM's computer that night. *See* R.211:15–16.[1] But here's what Johnson would have testified to, but for the Circuit Court's ruling:

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[1] "[A]ny evidence of what the defendant saw or did not see, found or did not find on the victim's computer that night, or what the police found or did not find on the victim's computer afterward is not relevant under 904.01. [It] does not make the existence of any fact that is of consequence to this action more or less probable. It doesn't matter, frankly. . . . That assumes that the state doesn't open the door with regard to challenging the defendant's assertion that he saw child pornography five or six years ago. If the state does not open that door then what was actually on that computer absolutely is not relevant. . . . And even if it were, it would fall under 904.03."

> If he had been permitted Alan Johnson would have testified that when he viewed the computer he viewed images of naked underage girls, that there were many, many such images. That, additionally, he saw that there were over 5,000 files of images of neighborhood children, all girls, most of which were girls walking past [KM's house]. Most of the images focused on their back sides, many of the images focused on their crotches. Some of the images were taken from what appeared to be [KM's] automobile and occurred in other parts of town. . . .
>
> Alan Johnson would have testified that he saw that the photographs of neighborhood children were cataloged to include titles such as others, riders, neighbors, blondie, walkers.
>
> He would testify that he recognizes Exhibits 105 through 109 as images that he viewed on the computer that evening or early morning, that is the late morning of October 24th, the early morning of October 25th; that of those exhibits he recognizes many of those images as the ones that he viewed and the others as of the type that he viewed that evening.

R.220:3–4. In other words, Johnson would have testified that what he found on KM's computer that night confirmed his suspicions that KM continued to possess a trove of child pornography—as well as thousands of other inappropriate pictures of young girls that KM himself had taken. And but for the Circuit Court's ruling, a computer forensic examiner would have testified that the same photographs—Exhibits 105 through 109—were indeed located on KM's hard drive and contained images

that "he suspected were of child pornography." R220:211–12.

Returning to the testimony presented to the jury, as Johnson finished his search of KM's computer, he heard what "sounded like maybe a scuff, like on the carpeting, not from in the room which I was in, it came from somewhere else in the house." R218:268. He quickly closed the windows that he had opened on the computer and grabbed the items that he had brought with him—his gloves and flashlight, and the handgun. *Id.* He turned to the door to leave. *Id.* But suddenly, the door to the small room opened. *Id.* It was KM. *Id.* He was standing in the threshold, shirtless. *Id.* "He looked right at me, and he knew why I was there. I knew that he knew." *Id.* at 270. Johnson believed that KM knew that he had seen the contraband images on the computer and that, as a result, KM would be going to prison. R219:20.

Without saying anything, KM "closed the door right away." R218:269. Johnson "was afraid. I wanted to get out." *Id.* But the only way out of the small, cramped room was through that door. *Id.* Johnson was frozen in fear. KM was "very strong," and Johnson knew that he was no match. *Id.* at 266. "I couldn't [defend myself against KM]. I never had." *Id.* Johnson stood in the room, facing the door, for what "felt like forever." *Id.* at 270–71.

Then, suddenly, "the door flew open and he attacked me. He just came right at me. And I didn't see—I didn't—I think I closed my eyes. I didn't see what happened." *Id.* "He lunged at me. I saw him come at me." *Id.* at 281. Johnson doesn't remember what happened next, but the physical evidence indicates that Johnson shot KM multiple times: in the chest, in the left shoulder, in the head, and in the back. R215:220–98.

Johnson fled in a panic. R218:282–84. He was in a fog about what happened. *Id.* "I knew I had blood on me. I knew something bad happened. I didn't—I just felt

completely out of control. I didn't know what was going on." *Id.* Johnson testified that he hadn't planned to kill KM and had never intended to kill him. *Id.* at 291–92.

When investigators questioned him about KM's death, Johnson initially deflected responsibility. *Id.* at 288. Overwhelmed by his act, he took a knife and began to sharpen it, intending to kill himself. *Id.* at 293–94. But when he thought about the burden that his death would place on his family, he couldn't bring himself to commit suicide. *Id.* Worried that suspicion would incorrectly fall on his nephew (KM's son) Johnson told his father that he killed KM, and soon after he told investigators the same thing: "Arrest me, I killed him." *Id.* at 78, 295.

The Jury Instructions. The Circuit Court instructed the jury on the charged crimes: burglary and first-degree intentional homicide. It also instructed the jury on the lesser-included offense of second-degree intentional homicide (imperfect self-defense) because the State conceded that the jury could find that Johnson actually believed that his use of force was necessary to prevent imminent death or great bodily harm. R221:32. As the Circuit Court explained, "that's obvious." *Id.*

But the Circuit Court refused to instruct on perfect self-defense, despite having previously ruled that Johnson's testimony had established a prima facie case that allowed him to present evidence of self-defense. *See* R218:272–74. It concluded that Johnson had not presented some evidence to support perfect self-defense because "an objective reasonable person would find that [KM] had a lawful right to interfere with" Johnson and because "there is no evidence that [KM] ever threatened to kill [Johnson] or ever used weapons against him." R221:52–53. The Circuit Court explained, "I don't think a jury would conclude that the State had failed to meet its burden to disprove" either element of perfect self-defense. *Id.* at 53.

The Circuit Court also instructed the jury on the lesser-included offense of first-degree reckless homicide. But it refused to instruct on second-degree reckless homicide, because "[b]ringing a loaded gun somewhere, even if you have no intent to use it, if you have it in your hand, in our dominant hand, and someone is coming at you and you shoot them five times . . . definitely shows an utter disregard for human life." *Id.* at 25–36.

The Jury Verdict. The jury acquitted Johnson of burglary. R223:4. It also acquitted him of first-degree intentional homicide and second-degree intentional homicide. *Id.* The jury found Johnson guilty of the least culpable offense on which it had been instructed: first-degree reckless homicide. *Id.* at 3.

The Court of Appeals' Decision. The Court of Appeals reversed and remanded for a new trial.

First, the Court of Appeals agreed with the Circuit Court's "initial conclusion that Johnson had presented enough evidence" through his own testimony to allow him to present evidence of self-defense. *Johnson*, 2020 WI App 50, ¶ 26. The additional *McMorris* evidence "only bolstered the sufficient 'some evidence' that came solely from Johnson's testimony." *Id.* By the end of trial, Johnson had presented evidence sufficient to allow the jury to "determine that Johnson reasonably believed that K.M. was going to kill him to prevent going to prison for having child pornography and that Johnson reasonably believed it necessary to discharge his handgun at K.M. to defend himself from an imminent danger of death or great bodily harm." *Id.* ¶ 27 (cleaned up). Thus, the Circuit Court erroneously refused to instruct the jury on perfect self-defense. *Id.* ¶ 28.

Second, the Court of Appeals concluded that the Circuit Court also erroneously "invaded the province of the jury in refusing to instruct the jury on the lesser-included offense of second-degree reckless homicide." *Id.* ¶ 35.

The evidence viewed in the light most favorable to the defendant "demonstrate[d] a regard for the life, safety, and well-being of others." *Id.* ¶ 40. Thus, "it was within the province of the jury to determine whether Johnson's actions were reckless but devoid of a showing of 'utter disregard for human life.'" *Id.* ¶ 41.

Finally, the Court of Appeals concluded that the Circuit Court erred in excluding testimony that Johnson found child pornography on KM's computer that night. *Id.* ¶ 46. It explained that the evidence was relevant to KM's state of mind and motive for attacking Johnson: "K.M. knew that Johnson had previously found child pornography on his computer years earlier; therefore, when he saw Johnson on his computer that morning K.M. knew what Johnson was looking for. K.M. knew if Johnson reported what he had found to police that he was facing multiple charges for child pornography and a mandatory prison sentence." *Id.* ¶ 47. "[T]he evidence was highly probative to Johnson's theory of defense" and outweighed the risk of unfair prejudice to the State. *Id.* ¶ 50. Thus, the evidence should have been admitted and its exclusion impeded Johnson's constitutional right to present a defense. *Id.* ¶ 51.

STANDARDS OF REVIEW

Where, as here, an appeal requires this Court to review the Circuit Court's "decision to exclude proffered evidence and its decision not to submit certain instructions to the jury," the Court must view "the defendant's proffered evidence and trial testimony in the light most favorable to the defendant," even when "this one-sided perspective of events does not represent the full story." *State v. Head*, 2002 WI 99, ¶¶ 9, 42, 255 Wis. 2d 194, 648 N.W.2d 413; *accord, e.g., Johnson v. State*, 85 Wis. 2d 22, 28, 270 N.W.2d 153 (1978).

This Court reviews de novo the decision to instruct on both perfect self-defense and lesser-included offenses. *E.g.*, *Head*, 2002 WI 99, ¶ 44.

This Court also reviews de novo a circuit court's denial of admission of proffered evidence when the denial implicates the defendant's constitutional right to present a defense. *State v. Wilson*, 2015 WI 48, ¶ 47, 362 Wis. 2d 193, 864 N.W.2d 52. This is because "a circuit court may not refuse to admit evidence if doing so would deny the defendant's right to a fair trial." *Id.* ¶ 48 (citing *Crane v. Kentucky*, 476 U.S. 683, 689–90 (1986)).

ARGUMENT

The Court of Appeals correctly concluded that the Circuit Court erred in refusing to allow the jury to hear relevant testimony and refusing to instruct the jury on the applicable law. The Court of Appeals did not finally decide the case. It did not condone Johnson's actions. It did not determine whether he is guilty or innocent. Nor did it pass judgment on KM's actions. It merely identified questions that are for the jury to decide and testimony relevant to those questions that is for the jury to hear.

The State asks this Court to abandon decades of well-established case law in favor of a new policy of judicial fact-finding and, oddly enough, a new policy of absolute privilege for criminals who kill anyone who intrudes into their homes, vehicles, or businesses (a policy that the State would surely argue against as soon as a criminal defendant tries to use it to his advantage). The policy reasons for rejecting the State's arguments are obvious: Limiting the circumstances in which circuit courts may instruct juries on privileges and lesser included offenses runs the risks of impeding on defendants' constitutional rights, increasing the number of appeals focused on jury

instructions, and decreasing the number of cases in which the jury, properly instructed, still finds the defendant guilty of the higher offense, thus avoiding unnecessary appeal. *See State v. Stietz*, 2017 WI 58, ¶¶ 73, 95, 375 Wis. 2d 572, 895 N.W.2d 796 (R. Bradley, J., concurring). Limiting the evidence that defendants may present runs the same risks. *See id.*

But policy reasons aside, the State's arguments must be rejected because it relies on an incomplete and erroneous view of the facts and law. The State recites the facts in its favor—but all three issues on appeal require the Court to view the facts in *Johnson's* favor. *See Head*, 2002 WI 99, ¶¶ 9, 42. And the State ignores the jury's acquittal of Johnson on the more serious offenses—but the Double Jeopardy Clause bars the State from retrying Johnson on those offenses. For example:

- The State describes Johnson as a "vigilante," but the jury found that Johnson *never* intended to kill KM.

- The State writes that Johnson had "no recollection" of the night in question, but Johnson provided detailed testimony about the night in question.

- The State implies that there's reason to doubt whether KM actually sexually assaulted Johnson; but Johnson testified to the sexual assault, the State did not offer evidence to the contrary, and this Court must view the evidence in the light most favorable to Johnson.

- The State writes that there is "no evidence" to support a claim of self-defense; but even the Circuit Court

> concluded that there was some evidence.

What's more, the State repeatedly describes the Court of Appeals' opinion as making grand pronouncements on the law, in particular the castle doctrine, when in fact it is the State that asks this Court to issue a broad legal ruling on the castle doctrine. The Court of Appeals correctly limited its rulings to the questions before it: whether the jury should have been permitted to hear certain evidence and make certain decisions concerning the reasonableness of Johnson's beliefs and his regard for human life. But the State asks this Court to issue a ruling on KM, not Johnson. As the State would have it, a homeowner like KM would always be privileged to kill anyone who enters their home, even when the homeowner is engaged in criminal activity within their home—contrary to WIS. STAT. § 939.48(1m)(b)1.

This Court should reject the State's attempt to drastically change the law concerning jury instructions and self-defense. It should affirm the Court of Appeals on each issue for the reasons stated below.

A. THE CIRCUIT COURT WAS REQUIRED TO INSTRUCT THE JURY ON PERFECT SELF-DEFENSE.

The question whether to instruct the jury on the privilege of self-defense requires a straightforward application of a well-established standard. That standard requires viewing the evidence in the light most favorable to the defendant and focuses on *reasonableness*: whether a reasonable jury could, based on the evidence presented, find that the defendant's beliefs at the time were reasonable.

The Court of Appeals correctly concluded that Johnson presented evidence sufficient to allow the jury, rather than the judge, to consider the privilege of self-defense. It did not rule that Johnson was privileged; it did not rule that KM would not have been privileged; it did not "condone" Johnson's behavior at all; it merely confirmed that the question of reasonableness, under the unique facts of this case, was one for the jury to decide. This Court should affirm the Court of Appeals on this issue for the reasons explained below.

1. *An instruction on perfect self-defense is required when there is some evidence that the defendant reasonably believed that the force used was necessary to prevent or terminate an unlawful interference.*

The standard governing the decision whether to instruct the jury on the privilege of perfect self-defense is well-established. If the defendant produces "some evidence" in support of the privilege, the circuit court must instruct the jury. *E.g.*, *Steitz*, 2017 WI 58, ¶ 16; *Head*, 2002 WI 99, ¶¶ 111–15; *State v. Stortecky*, 273 Wis. 362, 369, 77 N.W.2d 721 (1956). The circuit court is allowed no discretion: due process requires that the jury receive the instruction so long as there is some evidence of the privilege that would allow a reasonable jury to find in the defendant's favor. *Mathews v. United States*, 485 U.S. 58, 63 (1988); *Everette v. Roth*, 37 F.3d 257, 261 (7th Cir. 1994).

The "some evidence" standard places the burden of *production* on the defendant, but "[t]he burden of persuasion, of course, always remains upon the state." *State v. Felton*, 110 Wis. 2d 485, 507, 329 N.W.2d 161 (1983); *accord Head*, 2002 WI 99, ¶ 111. The burden imposed on the defendant is far from demanding; a defendant may meet it by producing evidence that is "weak, insufficient, inconsistent, or of doubtful credibility," so long as the evidence could allow a rational jury to find a reasonable doubt as to whether the state has proven the absence of privilege. *State v.*

Schuman, 226 Wis. 2d 398, 404, 595 N.W.2d 86 (Ct. App. 1999) (quoting *United States v. Sotelo-Murillo*, 887 F.2d 176, 178 (9th Cir. 1989)). This is because our criminal justice system—indeed, our Constitution—delegates to the jury the task of evaluating the weight and credibility of the evidence. *Maichle v. Jonovic*, 69 Wis. 2d 622, 630, 230 N.W.2d 789 (1975); WALTER DICKEY, DAVID SCHULTZ, & JAMES FULLIN, JR., *The Importance of Clarity in the Law of Homicide: The Wisconsin Revision*, 1989 WIS. L. REV. 1323, 1347.

When it comes to the privilege of perfect self-defense, the defendant must produce some evidence of "(1) a reasonable belief in the existence of an unlawful interference; and (2) a reasonable belief that the amount of force the person intentionally used was necessary to prevent or terminate the interference." *Head*, 2002 WI 99, ¶ 84 (citing WIS. STAT. § 939.48(1)). When the force used is likely to cause death or great bodily harm, there must be some evidence of a reasonable belief that the force is "necessary to prevent imminent death or great bodily harm." § 939.48(1). Perfect self-defense focuses on the *reasonableness* of the defendant's beliefs, as determined from the standpoint of the defendant at the time of the defendant's acts. *See Head*, 2002 WI 99, ¶ 87; WIS JI–CRIM 800. Thus, a defendant's belief may be reasonable, even if mistaken. *Maichle*, 69 Wis. 2d at 628.

2. *Johnson presented some evidence that he reasonably believed that KM was unlawfully interfering with his person and that the force he used was necessary to prevent imminent death or great bodily harm.*

This case is not a close call: Johnson presented more than enough evidence to meet the "some evidence" standard, and therefore the Circuit Court was required to instruct the jury on perfect self-defense.

The Circuit Court correctly determined that Johnson's testimony regarding the night in question and KM's

prior abuse of Johnson *alone* was sufficient to meet the "some evidence" standard:

> If the defendant proffers some evidence to support his defense theory and if that evidence viewed most favorably to the defendant would allow a jury to conclude that his theory was not disproved beyond a reasonable doubt, the factual basis for the defense theory has been satisfied and therefore [the defendant must be allowed to introduce] McMorris-type testimony. . . . I am [going to allow the defense to introduce *McMorris* evidence]. I think that the defense has met their burden of proof as outlined here.

R218:273–74.[2] The State has not contested this determination.

Once a circuit court has determined that the defendant meets the "some evidence" standard for the purpose of admitting *McMorris* evidence, it must necessarily instruct the jury on perfect self-defense unless the defendant's claim of self-defense is "so thoroughly discredited by the end of the trial that no reasonable jury could conclude that the state had not disproved it." *Head*, 2002 WI 99, ¶ 115.

Here, Johnson's claim of self-defense was not "thoroughly discredited" after the *McMorris* ruling; to the contrary, it was bolstered. After the "some evidence" determination, Johnson presented *additional* evidence in support of perfect self-defense, including:

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[2] The Circuit Court was required to determine whether Johnson met the "some evidence" standard as a prerequisite to determining whether to admit evidence of the victim's violent character and prior acts of violence, often referred to as *McMorris* evidence. *See Head*, 2002 WI 99, ¶ 24 n.5 (citing *McMorris v. State*, 58 Wis. 2d 144, 150, 205 N.W.2d 559 (1973)).

- Johnson's testimony about witnessing KM's prior abuse of Nicole, *see, e.g.*, R218:277–279.

- Nicole's testimony about KM's prior abuse of her and her concern for her daughters, *see* R220:151–153.

- Christina's testimony about KM's violent nature, Johnson's passive and nonconfrontational nature, and her family's collective fear of KM, *see* R220:104–09.

- A computer forensic examiner's testimony confirming that KM's computer had been searched on the night in question, consistent with Johnson's description of his actions, *see* R220:23–37.

- Johnson's testimony that he hadn't planned to kill KM and had never intended to kill him, *see* R218:291–92.

There was no rational basis for the Circuit Court to rule that by the end of the trial Johnson had not met the "some evidence" standard. He met that standard mid-way through his own testimony, and by the end of trial, he exceeded that standard.[3]

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[3] The State's attempts at impeachment are of no moment. The "some evidence" standard looks to the evidence viewed in the light most favorable to the defendant. *Head*, 2002 WI 99, ¶ 9; *see also State v. Mendoza*, 80 Wis. 2d 122, 152–53, 258 N.W.2d 260 (1977). Questions of credibility and reasonableness are for the jury to decide. *See Schuman*, 226 Wis. 2d at 403–04; *Maichle*, 69 Wis. 2d at 630. What's more, the verdict in this case shows that the jury found Johnson credible: it believed his testimony that he did not intend to kill KM—or, indeed, commit any felonious act—when he entered the house (and therefore did not commit burglary) and that he never intended to kill KM (and therefore did not commit intentional homicide).

And regardless of the Circuit Court's interim "some evidence" determination in connection with its *McMorris* ruling, the evidence presented at trial would allow a reasonable jury to find that the State had not met its burden of proving beyond a reasonable doubt that Johnson did not reasonably believe that the force he used was necessary to prevent or terminate an unlawful interference with his person:

Johnson went to KM's house to gather evidence that KM possessed child pornography so that he could turn it over to the police. R218:247–48, 255. He entered quietly and made every effort to avoid detection. *Id.* at 256–58. His goal was to collect evidence, not to interact with KM and certainly not to kill KM—he knew from prior experience that he had no hope of defending himself against KM in a fight. *Id.* at 266, 291–92.

Johnson heard a noise, and then he saw KM open the door to the cramped computer room and look right at him. He knew that KM knew what he had seen on the computer. *Id.* at 268–70. KM didn't say a word—he simply closed the door. *Id.* Alan was frozen in fear. *Id.* He knew what KM was capable of: choking people until they blacked out, pulling hair and squeezing heads, punching full grown adults with no warning and for no reason. *id.* at 202–204, 278–79; R220:151. This time, KM actually had a reason to attack Johnson: Johnson had found evidence that would send KM to prison—if KM didn't stop him from giving the evidence to the police. R219:20. Suddenly, the door flew open and KM lunged forward, attacking Johnson. R218:271, 281. Johnson had nowhere to hide within the small, cramped room, and the only way out was through the door behind KM. R219:20; R214:241–42. Johnson, terrified that KM would kill him, closed his eyes and shot wildly before fleeing in a panic. R218:271, 282–84; R215:220–98.

A reasonable jury could find that's what happened on October 25, 2016, and a reasonable jury could find that, under those circumstances, Johnson reasonably believed that KM meant to kill him, that KM was not legally entitled to kill him, and that it was necessary to discharge his handgun to avoid his own death—just as the Court of Appeals held. *See Johnson*, 2020 WI App 50, ¶¶ 24, 27–28. A reasonable jury could also find otherwise. It was for the jury, not the judge, to consider the issue. The Circuit Court's refusal to instruct the jury on perfect self-defense in spite of the evidentiary support for the defense was contrary to the well-established "some evidence" standard and denied Johnson his right to present a defense.

3. *The State's "no evidence" arguments apply the wrong standard and ignore the facts.*

At various points, the State contends that there is "no evidence" that KM attacked Johnson, that KM attacked him unlawfully, or that the amount of force that Johnson used was necessary. *See* State's Brief at 18–21, 26–28. That is incorrect. As explained above, there is evidence in the record to support each requirement of the self-defense privilege—and the fact that the Circuit Court allowed Johnson to present *McMorris* evidence proves it. To say that there is absolutely no evidence is a step too far. One might be able to reasonably quibble over whether the State has disproven the elements of perfect self-defense beyond a reasonable doubt. As Johnson has always argued, that is a question for the jury. But one cannot say that there is *no* evidence in support of the privilege.

The State's brief at these points reads more like a closing argument to the jury. True, KM didn't have a shirt on. True, there is no evidence that KM was armed. True, there is no evidence that KM injured Johnson before being shot. But the law does not require a weapon and an injury (much less a shirt) before the privilege of self-defense may be invoked. In fact, *State v. Head* says just

the opposite. 2002 WI 99. In *Head*, the defendant testified that her husband would become violent and abusive when he lost his temper. *Id.* ¶ 132. One morning, they argued. *Id.* ¶ 134. He became upset and said, "Maybe I should just take—get—take care of you guys and get on with my life." *Id.* Then he threw aside the bed covers. *Id.* ¶ 135. The defendant took his statement as a threat, so she picked up a gun and pointed it at him. *Id.* He "made like he was going to sit up." *Id.* She thought that he was going to grab the gun and kill her, so she "pulled the trigger," shot him twice, and killed him. *Id.* ¶¶ 135–36. She wasn't injured, and he didn't have a weapon. (It's unclear whether he was wearing a shirt.) Nevertheless, this Court held that the defendant's testimony "established a sufficient factual basis for both perfect and imperfect self-defense." *Id.* ¶ 148.

The State also highlights the fact that Johnson shot KM at "close range." *See, e.g.*, State's Brief at 18. But this fact only adds support to Johnson's claim of perfect self-defense: The computer room was only 10 square feet in size and very cluttered. Johnson was already in the room. KM threw open the door and lunged at Johnson. Of course Johnson would have shot KM at close range—it would be odd if the physical evidence *didn't* suggest that KM was close to Johnson when he was shot.

The State also takes issue with Johnson's testimony that he could not remember actually pulling the trigger or what happened in the immediate moments after doing so. So what? The physical evidence indicates that Johnson shot KM five times, and Johnson has not contested that evidence. It's unclear how testimony from Johnson along the lines of "and then I pulled the trigger" would alter the self-defense analysis. It's the testimony about what happened *before* Johnson pulled the trigger that matters: KM choking, punching, and sexually abusing Johnson and his sister; Johnson discovering KM's child pornography collection; Johnson intending to obtain the necessary evidence so that police could arrest

KM; KM finding Johnson and realizing what Johnson was doing and what it meant for KM; KM lunging forward and attacking Johnson; Johnson's belief that KM would kill him.

The State's arguments concerning what inferences could be drawn from the evidence are, for the most part, valid arguments to be made to the jury—but that's the point. It's for the jury to decide what really happened in that room, and it's for the jury to decide whether Johnson's actions and beliefs that night were reasonable under the circumstances.

This Court's role is different. A long line of precedent establishes that this Court must view the evidence in the light most favorable to the defendant and determine simply whether a reasonable jury could find that the State has not met its burden of disproving the privilege of self-defense beyond a reasonable doubt. The State's arguments miss the mark.

4. *The castle doctrine does not alter the analysis.*

The wrench that the State attempts to throw into this otherwise simple self-defense analysis is the castle doctrine. The State argues that by sneaking into KM's home, Johnson allowed KM to legally attack him and therefore negated Johnson's legal right to claim the privilege of self-defense. *See* State's Brief at 16–17, 21–26.

The State's reliance on the castle doctrine is misplaced for at least three reasons. First, the castle doctrine is inapplicable where, as here, the actor to whom the doctrine would apply has not claimed privilege. Second, even if KM had claimed privilege, a reasonable jury could find that the castle doctrine does not apply to his conduct. Third, even if KM were entitled to a presumption of privilege under the castle doctrine, this case doesn't hinge on his privilege—rather, a separate subsection of the self-defense statute addresses the real

issue here. In sum, the castle doctrine cannot validate the Circuit Court's refusal to instruct the jury on perfect self-defense. Each reason is explained in more detail below.

The castle doctrine is an alternative means of claiming the privilege of self-defense. It comes into play when the person claiming a right to self-defense is in their home (or other location) and uses force against someone who "unlawfully and forcibly enter[ed]" their home. § 939.48(1m)(ar)2. Specifically, the castle doctrine creates a presumption in such a situation that the person claiming self-defense "reasonably believed that the force was necessarily to prevent imminent death or great bodily harm to himself or herself." § 939.48(1m)(ar).

The State argues that under the castle doctrine, KM was unquestionably privileged as a matter of law to attack and kill Johnson. But the plain statutory language of the castle doctrine requires the actor (i.e., KM) to make a claim of self-defense under § 939.48(1) as a prerequisite to application of the doctrine: "[T]he court . . . shall presume that the actor reasonably believes that the force was necessary . . . *if the actor makes such a claim under sub. (1)* . . . ." § 939.48(1m)(ar) (emphasis added).

To state the obvious, KM has not claimed the privilege of self-defense because he has not been charged with a crime. And the State cannot claim privilege on KM's behalf because it does not possess sufficient facts: it does not know whether KM attacked Johnson out of fear or rage. The statutory requirement that the castle doctrine presumption come into play only "if the actor makes such a claim under sub. (1)," by its plain language, prohibits the castle doctrine's use by the State here. And even if there were some ambiguity, the wording indicates the legislature's intent that the castle doctrine be used only as a shield—that is, when the actor faces a

criminal charge and therefore claims self-defense—and not as a sword, as the State attempts to use it here.[4]

Second, even if the castle doctrine could be used as a sword by the State to deny the attacked individual the right to claim the privilege of self-defense, a reasonable jury could find that two key requirements of the doctrine are not met here (thus allowing a reasonable jury to find that KM's attack was not privileged):

> (1) The victim (i.e., Johnson) must "unlawfully and forcibly enter[]" the actor's home.[5]
> (2) The actor cannot be "engaged in a criminal activity or . . . using his or her dwelling . . . to further a criminal activity at the time."[6]

A reasonable jury could find that Johnson did not "unlawfully and forcibly enter" KM's home that night. Remember, the jury *acquitted* Johnson of burglary. Johnson had been invited into KM's home many times because it was also the home of Johnson's sister and nephew; in fact, he had lived in KM's home occasionally growing up. *See* R218:204–08. There's no evidence that KM and his wife had withdrawn their consent to Johnson's presence in their home. And even if there were reason to think that Johnson unlawfully entered KM's home, there's no evidence that he did so "forcibly." He

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[4] And the rule of lenity demands this reading. *See, e.g., State v. Kittilstad*, 231 Wis. 2d 245, 266–67, 603 N.W.2d 732 (1999).

[5] § 939.48(1m)(ar)2 ("The person against whom the force was used was in the actor's dwelling . . . after unlawfully and forcibly entering it . . . ."). "Unlawful" is defined as "either tortious or expressly prohibited by criminal law or both." § 939.48(6).

[6] § 939.48(1m)(b)1 ("The presumption described in par. (ar) does not apply if . . . the actor was engaged in a criminal activity or was using his or her dwelling . . . to further a criminal activity at the time.").

simply walked in the back door, as he had done many times before. *See* R218:256–58. Thus, a reasonable jury could find that there was no evidence to support the unlawful-and-forcible entry element of the castle doctrine.

And a reasonable jury could find that at the time of KM's attack, KM was engaged in a criminal activity and using his house to further a criminal activity: specifically, possession of child pornography. Not only that, but KM's attack was meant to prevent law enforcement's discovery of his ongoing criminal activity. Thus, a reasonable jury could find that KM did not qualify for the castle doctrine presumption, and even if the Castle Doctrine were applicable, the issue of self-defense would still be for the jury to decide.

Third, in the end, this Court can avoid interpreting and applying the statutory requirements of the castle doctrine here because *this case is not about the castle doctrine.* The question presented to the Circuit Court, just like the question presented to this Court, asks whether there is some evidence that *Johnson* reasonably believed that KM meant to kill or seriously injure him, that KM was not legally entitled to do so, and that it was necessary to discharge his handgun to avoid his own death. This question must be answered by viewing the evidence in the light most favorable to Johnson, and it must be answered by viewing the circumstances from Johnson's viewpoint at the time of KM's attack. *See Head*, 2002 WI 99, ¶¶ 9, 84. The self-defense issue in this case doesn't ask whether KM was in fact legally entitled to kill Johnson, because a defendant's belief may be reasonable, even if mistaken. *Maichle*, 69 Wis. 2d at 628.

That's not to say that Johnson's conduct and its effect on KM are irrelevant to the analysis. But the self-defense statute already explains how to analyze a situation such as this one in the subsection concerning provocation. It provides,

> A person who engages in unlawful conduct of a type likely to provoke others to attack him or her and thereby does provoke an attack is not entitled to claim the privilege of self-defense against such attack, except when the attack which ensues is of a type causing the person engaging in the unlawful conduct to reasonably believe that he or she is in imminent danger of death or great bodily harm. In such a case, the person engaging in the unlawful conduct is privileged to act in self-defense, but the person is not privileged to resort to the use of force intended or likely to cause death to the person's assailant unless the person reasonably believes he or she has exhausted every other reasonable means to escape from or otherwise avoid death or great bodily harm at the hands of his or her assailant.

§ 939.48(2)(a). To the extent that Johnson's sneaking into KM's house uninvited was "unlawful conduct of a type likely to provoke [an] attack," as the State argues, the provocation limitation would be the correct tool to analyze whether the evidence presented at trial nevertheless was sufficient to raise the privilege of self-defense.

And as explained above, the evidence was sufficient: a reasonable jury could find that Johnson reasonably believed that KM meant to kill him, and a reasonable jury could find that Johnson reasonably believed that he had exhausted every other reasonable means of escape. Thus, the Circuit Court should have instructed the jury on perfect self-defense and, if the State had requested it, on provocation. *See* WIS JI–CRIM 815.

The Court of Appeals didn't hold that the castle doctrine "entirely vanishes" when the intruder believes the homeowner has committed a crime, and it didn't "make[] the castle-doctrine presumption dependent upon an intruder's belief." State's brief at 22, 24. It didn't rule on whether KM would be entitled to claim privilege pursuant to the castle doctrine at all. The Court of Appeals simply held that a reasonable jury could conclude that Johnson reasonably believed that KM was unlawfully interfering with him. *Johnson*, 2020 WI App 50, ¶ 21. That holding is correct, and this Court should affirm it.

B. THE CIRCUIT COURT WAS REQUIRED TO INSTRUCT THE JURY ON SECOND-DEGREE RECKLESS HOMICIDE.

The question whether to instruct the jury on second-degree reckless homicide also requires a straightforward application of a well-established standard. The Court of Appeals correctly concluded that the evidence was sufficient to allow the jury to find that Johnson did not act in utter disregard of human life, and that therefore Johnson had a constitutional right to have the jury decide whether he was guilty of first-degree or second-degree reckless homicide. This Court should affirm the Court of Appeals on this issue for the reasons explained below.

1. *An instruction on second-degree reckless homicide is required when a reasonable jury could find that the defendant did not act with utter disregard for human life.*

A circuit court must instruct the jury on a lesser-included offense "if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *Keeble v. United States*, 412 U.S. 205, 208 (1973). Application of this standard requires the court to view

the evidence in the light most favorable to the defendant. *See, e.g., Mendoza*, 80 Wis. 2d at 152–53. The failure to instruct on a lesser included offense may amount to a fundamental miscarriage of justice. *See United States ex rel. Peery v. Sielaff*, 615 F.2d 402, 403–04 (7th Cir. 1979).

Here, the question is whether a reasonable jury could find that the State did not prove beyond a reasonable doubt whether Johnson acted "under circumstances which show utter disregard for human life," as that element is the sole difference between first-degree and second-degree reckless homicide. *Compare* § 940.02(1) *with* § 940.06(1).

Utter disregard for human life cannot be easily defined. It is a "broad standard." *State v. Burris*, 2011 WI 32, ¶ 39, 333 Wis. 2d 87, 797 N.W.2d 430. The law leaves it to the jury to "give the phrase a common sense meaning." *Id.* ¶ 40. Application of the standard requires consideration of "the totality of the circumstances." *Id.* ¶¶ 38–40. Factors to consider include the defendant's motive and the victim's age, vulnerability, and relationship to the defendant. *Id.* ¶ 32. Evidence supporting the privilege of self-defense is relevant to the defendant's motive—that is, "why he was doing it." *Id.*; WIS JI–CRIM 1017 n.25; *see also State v. Miller*, 2009 WI App 111, ¶ 40, 320 Wis. 2d 724, 772 N.W.2d 188.

This fact-intensive analysis requires application of community standards. It should be left to the jury to consider *all* relevant evidence and decide what weight to give to each. *Burris*, 2011 WI 32, ¶ 38.

The State attempts to impose a limitation of the utter-disregard standard that requires the jury to focus solely on the victim. *See* State's Brief at 31–33. The State's proposed limitation conflicts with the plain statutory language of § 940.02(1), which refers to "human life" in general, not the victim's life in particular. The State relies solely on *State v. Edmunds*, 229 Wis. 2d 67, 598 N.W.2d

290 (Ct. App. 1999), in support of its proposed limitation, but this Court has previously cautioned the State against reading *Edmunds* as "an endorsement" of a particular application of the utter-disregard standard in every case. *See Burris*, 2011 WI 32, ¶ 37. *Edmunds* decided a sufficiency-of-the-evidence claim in a case that did not involve potential self-defense or defense of others; the only "human life" at issue was the life of the victim, and therefore the opinion discussed the defendant's regard, or lack thereof, for the victim's life. *Edmunds*' application of the utter-disregard standard to a certain set of facts "does not mean that new legal standards should be grafted onto the fact-finder's initial determination of whether certain conduct demonstrates an utter disregard." *Id.*

Where, as here, there is evidence from which a reasonable jury could conclude that the defendant was acting to protect himself or others, this Court has explained that the jury must be allowed to consider that motive among the totality of the circumstances when deciding whether the defendant acted with utter disregard for human life.[7]

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[7] For example, in *Balistreri v. State*, 83 Wis. 2d 440, 265 N.W.2d 290 (1978), this Court held that there was insufficient evidence of the "depraved mind" element (now "utter disregard") when the defendant turned on his headlights during a high-speed car chase, swerved to avoid hitting *another* car, honked his horn, and braked before hitting the victim's car: "The uncontroverted evidence that the defendant attempted to avoid a collision precludes a finding that his conduct was devoid of concern for *others* or indifferent to the life of *others*." *Id.* at 458 (emphasis added). Also consider the classic trolley problem. One who pulls the switch, sending the trolley hurtling towards the single worker, does so knowing that that worker will almost certainly be killed—and yet a jury would likely conclude that the act nevertheless evinced regard for human life because it saved the lives of other people.

2. *A reasonable jury could find that Johnson did not act with utter disregard for human life.*

The question whether Johnson acted in utter disregard for human life was required to go to the jury. From the beginning, the State and the Circuit Court acknowledged that a reasonable jury could find that Johnson actually believed that the force he used was necessary to defend himself from imminent danger of death or great bodily harm—which is why the Circuit Court instructed the jury on imperfect self-defense and second-degree intentional homicide. *See* R221:39, 49. Johnson's motivation for firing the gun is also relevant to the utter-disregard element, as is evidence of KM's strength and history of violence (which goes to his "vulnerability"), the extent of his injuries, his relationship to Johnson, and Johnson's motivation for coming to his house with a gun in the first place. It was for the jury to weigh the evidence and consider whether, under all the circumstances, Johnson's act evinced an utter disregard for human life.

The evidence viewed in the light most favorable to Johnson shows that he went to KM's house to collect evidence that could be used to prevent KM from further victimizing young children; that he brought a gun with him to protect himself from someone who was older and bigger than he and who had assaulted him and others in the past; that he fired the gun because he was afraid that KM was about to kill him and feared for his own life.

A reasonable jury could find that Johnson did not intend to kill KM but nevertheless fired the gun in KM's direction multiple times because Johnson was afraid of KM and was trying to stop KM from attacking him. (In fact, the jury *did* find that Johnson did not intend to kill KM.) A reasonable jury could find that Johnson's motivation for being at KM's house that night—to protect his niece—and his motivation for firing the gun—to protect himself—were antithetical to the idea of acting in utter disregard of human life. Thus, the Circuit Court

was required to instruct the jury on second-degree reckless homicide.

C. The Circuit Court Was Required to Admit Evidence of the Images Johnson Found on KM's Computer that Night.

The final issue for this Court's review is whether the Circuit Court should have allowed Johnson to present evidence of the child pornography on KM's computer, specifically, Johnson's testimony that he found child pornography on KM's computer shortly before KM attacked him, and expert testimony confirming the presence of those images on KM's computer and confirming that Johnson saw those images on the night in question.

The Court of Appeals correctly concluded that the Circuit Court was required to allow Johnson to present evidence of the images that Johnson found on KM's computer that night. This Court should affirm the Court of Appeals on this issue for the reasons explained below.

1. *A defendant has a constitutional right to present relevant testimony to support his theory of defense.*

This evidentiary question may be the most important issue in the case. The right to testify is secured not only by the Due Process Clause of the Fourteenth Amendment, but also the Compulsory Process Clause of the Sixth Amendment and the Fifth Amendment's guarantee against compelled testimony. *Rock v. Arkansas*, 483 U.S. 44, 51–53 (1987). The right to present relevant and competent evidence is essential to ensuring due process in a criminal trial. *See State v. Johnson*, 118 Wis. 2d 472, 479, 348 N.W.2d 196 (1984). That's why a circuit court may not refuse to admit evidence when doing so would deny the defendant's right to a fair trial. *Wilson*,

2015 WI 48, ¶ 48. And that's why the refusal to admit evidence such as this must be reviewed de novo by this Court. *See id.* ¶ 47.

The link between the erroneous evidentiary ruling and the defendant's constitutional right to present a defense is especially clear in this case because the evidence at issue goes towards Johnson's claim of perfect self-defense and his request for an instruction on second-degree reckless homicide.

2. *Johnson has a constitutional right to present evidence of the images that he found on KM's computer that night in support of his claim of self-defense.*

Johnson sought to testify that when he sat down at KM's computer that night, he found many images of naked, underage girls. He also found more than 5,000 images of neighborhood girls' back sides and crotches —pictures that KM had apparently taken from his house and car. *See* R220:3–4. Johnson also sought to present testimony from a computer forensic examiner that the images identified by Johnson were indeed located on KM's hard drive and contained images that "he suspected were of child pornography," as well as similar testimony from a detective. *Id.* at 211–13.

This evidence is relevant and highly probative of Johnson's defense. To begin, it's relevant to Johnson's credibility, as proven by the State's closing argument: Having persuaded the trial judge to exclude the evidence by having promised not to argue that Johnson's credibility was lessened by his failure to provide proof of the pornography, *see* R211:15–16, the State broke its promise. In its rebuttal argument to the jury, to which the defense could make no reply, it told the jury that it shouldn't believe Johnson because he'd not produced proof of pornographic images for them to see. R222:186–87.

The evidence is also relevant to several key questions: (1) whether Johnson went to KM's house intending to kill KM or instead intending to seek evidence of KM's child pornography collection; (2) whether KM actually lunged at Johnson; (3) whether Johnson actually believed that KM intended to kill or seriously hurt him; and (4) whether Johnson's belief was reasonable.

The fact that KM actually possessed what appeared to be child pornography and other disturbing images on the night in question suggests that Johnson testified truthfully about finding child pornography on KM's computer years ago, which in turn suggests that Johnson testified truthfully about his motive for coming to KM's house that night. *See State v. Payano*, 2009 WI 86, ¶ 72, 320 Wis. 2d 348, 768 N.W.2d 832 (admitting other acts evidence when "the central dispute at trial was whether [the defendant] acted reasonably in self-defense" and "the jury needed to decide between two competing motives for the shooting"). It also suggests that KM suspected that Johnson had seen the images and was angry at Johnson or worried that Johnson would report the images to the police—both states of mind that provide a motive for KM to attack Johnson and make it more probable that he did so. The fact that Johnson saw the images on KM's computer that night in turn suggests that Johnson testified truthfully about his belief that KM intended to kill or seriously hurt him, and it also suggests that Johnson's belief was reasonable.

And under the State's castle doctrine argument, there's yet another relevant inference that can be drawn from this evidence: the fact that KM possessed child pornography and Johnson knew about it goes to the reasonableness of Johnson's belief that KM's attack was not lawful. Indeed, by arguing that "an intruder's subjective belief that a homeowner has committed a crime" cannot negate the castle doctrine's presumption, the State implies that *objective evidence* that the homeowner is committing a crime *would* negate the

castle doctrine's presumption. State's Brief at 23. The evidence that the circuit court suppressed was *objective evidence* that KM possessed child pornography—that is, that he was committing a crime in his home at the time that he attacked Johnson.

In sum, the evidence was relevant and highly probative and should have been admitted.

3. *The evidentiary rules governing other acts evidence do not overcome Johnson's right to present the evidence.*

As the Court of Appeals correctly concluded, the fact that this evidence could fall within the category of "other acts" evidence does not change the outcome. The evidence implicates the motive and knowledge of both Johnson and KM—both enumerated purposes for the admission of other acts evidence under § 904.04(2). *See Payano*, 2009 WI 86, ¶ 65.

Because of the proper purpose and relevance of the evidence, the Circuit Court was required to admit it unless the State demonstrated that its probative value was "substantially outweighed" by its unfair prejudice to the State. *Id.* ¶ 80 (quoting § 904.03). The Circuit Court held that the evidence would "paint [KM] in a bad light," R211:16, but that is by definition true of any other acts evidence—it cannot be a basis for denying admission of the evidence, or no evidence would ever be admitted under Rule 404. As for the Circuit Court's reference to "undue delay in the trial and . . . misleading the jury," the Circuit Court did not explain its basis for believing that the evidence would lead to those effects. *Id.*

The State now attempts to manufacture a risk of delay and confusion by arguing that *most* of the images at issue were not actually child pornography. *See* State's Brief at 37. But the testimony that Johnson sought to present readily acknowledged that fact. *See* R220:4, 211–13. The State also argues that "Johnson never explained how his

analysist was qualified to offer" the opinion that it would be reasonable for a lay person to interpret a subset of images at issue as child pornography. State's Brief at 37 & n.21. This is a red herring: the State never challenged Johnson's expert's qualifications, and the State's own detective, who conducted a forensic analysis of KM's hard drives, also would have testified that there were such a number of pornographic images in which the subject's age was ambiguous that he sent them to NCMEC—and he would have agreed with Johnson's expert that an ordinary person would reasonably have interpreted the images as child pornography. *See* R220:213.

Johnson was denied the right to present a defense when the Circuit Court excluded credible evidence that demonstrated why Johnson went to KM's home, why KM attacked Johnson, and why Johnson feared that KM would kill him. This error in turn affected the Circuit Court's erroneous refusal to instruct the jury on perfect self-defense. The Court of Appeals correctly recognized these errors and their import, and the Constitution demands that this Court affirm the Court of Appeals.

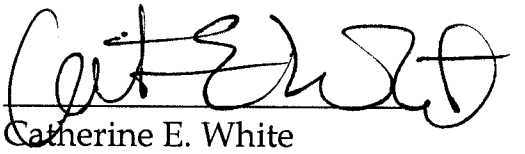
CONCLUSION

For these reasons, Alan Johnson now respectfully requests that this Court **AFFIRM** the Court of Appeals' decision reversing the judgment of conviction.

Dated at Madison, Wisconsin, this 18th day of November, 2020.

Respectfully submitted,

ALAN M. JOHNSON,
Defendant-Appellant



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CERTIFICATION

I certify that this brief conforms with the rules contained in WIS. STAT. §§ 809.19(8)(b) and (c), for a brief produced using proportional serif font. The length of the portions of this brief described in WIS. STAT. § 809.19(1)(d), (e) and (f) is 10,902 words. *See* WIS. STAT. § 809.19(8)(c)1.

Catherine E. White

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 WIS. STAT. § 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.

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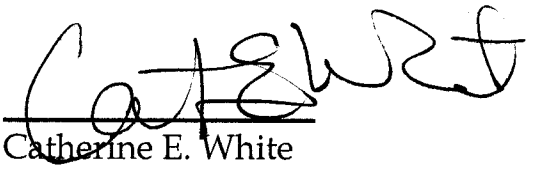

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