STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2019AP173-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHAWN A. ANDERSON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE EAU CLAIRE COUNTY CIRCUIT COURT, THE HONORABLE JON M. THEISEN, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

A circuit court has discretion to impose lifetime supervision on certain sex offenders if it determines that such supervision is necessary to protect the public.[1] After engaging in lengthy sentencing remarks emphasizing the strong need to protect the public from Shawn A. Anderson, the court ordered lifetime supervision. Did the court soundly exercise its discretion?

This Court should say, "Yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not seek either. The parties' briefs should adequately set forth the facts and law, and this Court may resolve the issue presented based on established law.

INTRODUCTION

The circuit court soundly exercised its discretion in ordering lifetime supervision for Anderson, based on its determination that his character and actions manifested a significant need for public protection. This Court should affirm.

STATEMENT OF THE CASE

Anderson was in serious legal trouble in his home state of Indiana. His five-year-old daughter had claimed that he sexually assaulted her anally, penetrated her with his fingers, and made her perform oral sex and masturbate him. (R. 15:28.) After police issued a warrant, Anderson fled Indiana to the Eau Claire area, where he contacted a 15-year-old girl whom he had struck up a friendship online a year earlier. (R. 1:3.) He took the victim to Eau Claire motel rooms

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[1] Wis. Stat. § 939.615(2).

on two occasions where he had vaginal, oral, and anal sex with her. (R. 1:2–3.) Anderson also took photographs and videos of the two of them having sex. (R. 1:3, 4.) Police discovered Anderson with the victim in a third motel room in Clark County, where they arrested him. (R. 1:2.)

The State filed charges, including two counts of second-degree sexual assault of a child and two counts of child enticement against Anderson, with notice that the State was seeking lifetime supervision under Wis. Stat. § 939.615. (R. 1; 10.) The case ultimately culminated in Anderson's plea of no contest to one count of second-degree sexual assault of a child, with the remaining counts dismissed and read in. (R. 21:1–2.)

At sentencing, the State argued for a prison sentence and lifetime supervision. The State emphasized that Anderson ran from allegations in Indiana and crossed state and county lines to assault the teenage victim in this case, whom he had groomed and manipulated to engage in sex acts with him. (R. 56:19–20.) After Anderson's counsel argued and Anderson provided his statement, the court made its own detailed sentencing remarks, highlighting the significant need to protect the public from Anderson, who the court opined was a manipulative and dishonest pedophile. (R. 56:57–60.) It agreed with the State's sentencing recommendations and imposed a prison sentence as well as lifetime supervision. (R. 56:65–66.)

Postconviction, Anderson asked the court to vacate the lifetime supervision order, asserting that the court did not explain why lifetime supervision was necessary to protect the public. (R. 26:13–15.) In a written decision and order, the court rejected Anderson's argument. (R. 48.) It explained that its lengthy discussion of the manifest need to protect the victim and the public supported its discretionary decision to order lifetime supervision. (R. 48:4–5.)

Anderson appeals.

STANDARD OF REVIEW

As with other sentencing decisions, whether to order lifetime supervision on a particular offender is within the circuit court's discretion. *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197. This Court's review is limited to whether the circuit court erroneously exercised that discretion. *Id.* "A circuit court properly exercises its discretion if it relies on relevant facts in the record and applies a proper legal standard to reach a reasonable decision." *State v. Thiel*, 2012 WI App 48, ¶ 6, 340 Wis. 2d 654, 813 N.W.2d 709.

Appellate courts have "a consistent and strong policy against interference with the discretion of the trial court in passing sentence." *State v. Stenzel*, 2004 WI App 181, ¶ 7, 276 Wis. 2d 224, 688 N.W.2d 20. That policy is in force "because the circuit court is best suited to consider the relevant factors and demeanor of the convicted defendant." *Gallion*, 270 Wis. 2d 535, ¶ 18 (citation omitted). Accordingly, "[a]ppellate judges should not substitute their preference for a sentence merely because, had they been in the trial judge's position, they would have meted out a different sentence." *McCleary v. State*, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971).

ARGUMENT

The circuit court soundly exercised its discretion in ordering lifetime supervision for Anderson.

A review of the sentencing transcript and the postconviction court's written decision demonstrates that the court aptly determined that lifetime supervision of Anderson was necessary to protect the public.

A. A circuit court has broad discretion in imposing sentence.

The overarching objectives of a circuit court in fashioning a sentence include "the protection of the community, the punishment of the defendant, rehabilitation of the defendant, and deterrence to others." *State v. Ziegler*, 2006 WI App 49, ¶ 23, 289 Wis. 2d 594, 712 N.W.2d 76 (citing *Gallion*, 270 Wis. 2d 535, ¶ 40). The court should identify the most important objectives and explain how, given the facts of the particular case, the sentence promotes those objectives. *Id.*

The sentencing court must also identify factors it considered in fashioning the sentence and explain how those factors satisfied the objectives. *Id.* The three primary factors a court must consider are the gravity of the offense, the defendant's character, and the need to protect the public. *Id.*; *see also Gallion*, 270 Wis. 2d 535, ¶ 44. "The weight to be given each factor is still a determination particularly within the wide discretion of the sentencing judge." *Stenzel*, 276 Wis. 2d 224, ¶ 9 (citation omitted). Further, it remains within the circuit court's discretion "to discuss only those factors it believes are relevant." *Id.* ¶ 16 (citation omitted).

To soundly exercise its discretion, a court must employ a "process of reasoning which depends on the facts in the record or reasonably derived by inference from the record that yield a conclusion based on logic and founded on proper legal standards." *State v. Delgado*, 223 Wis. 2d 270, 280, 588 N.W.2d 1 (1999). In addition to reviewing the sentencing transcript, this Court also considers "postconviction orders because a court has an additional opportunity to explain its sentence when challenged by a postconviction motion." *State v. Helmbrecht*, 2017 WI App 5, ¶ 13, 373 Wis. 2d 203, 891 N.W.2d 412. Finally, even if the circuit court fails to set forth the factors it considered in exercising its discretion, this Court

must "search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained." *McCleary*, 49 Wis. 2d at 282.

B. A circuit court has discretion to order lifetime supervision for certain sex offenders.

Wisconsin Stat. § 939.615 provides that "if a person is convicted of a serious sex offense . . . the court may, in addition to sentencing the person . . . place the person on lifetime supervision" by the Department of Corrections. For the court to order such supervision, the defendant must have received notice—through the Complaint or Information—that the prosecution intends to seek lifetime supervision for the defendant, and the court must determine "that lifetime supervision of the person is necessary to protect the public." Wis. Stat. §§ 939.615(2), 973.125(1).

Anderson was convicted of second-degree sexual assault of a child, a serious sex offense as defined by Wis. Stat. § 939.615, and he received notice through the Complaint and Information that the State would seek lifetime supervision. (R. 1; 10.) Accordingly, the only question is whether the court soundly determined that lifetime supervision of Anderson was "necessary to protect the public." Wis. Stat. § 939.615(2).

C. The court soundly determined that lifetime supervision of Anderson was necessary to protect the public.

A review of the sentencing transcript as a whole and the postconviction court's decision overwhelmingly supports its ordering lifetime supervision for Anderson.

1. The State, in advocating for a sentence including lifetime supervision, emphasized that the need to protect the public was the most important factor before the court.

To start, the State's argument in support of its proposed sentence and emphasis that "protection of the public is the number one priority" provides context for the court's sentencing decision. (R. 56:20.)

The State explained that Anderson's choices and efforts to commit these assaults made him particularly dangerous to the public. Anderson, who was 31 at the time of his crimes, groomed the victim "for over a year" after he met her online when she was 14 years old. (R. 56:20.) Anderson lost contact with her and then reinitiated contact with her when she was 15; during that contact, he knew that she was 15 when he asked her for nude photographs and when he sent her images of his erect penis. (R. 56:20–21.)

Anderson then fled Indiana after he was accused of sexually assaulting his five-year-old daughter, who provided "a very graphic and detailed description of an anal sexual assault in five-year-old language." (R. 56:21.) Anderson later claimed to authorities that he was fleeing to Canada, even though his route through Wisconsin was not the shortest route there. (R. 56:20–21.)

Once he was in Wisconsin and near the victim, he contacted her and took her to a Quality Inn where he had vaginal sex with her and took a video and pictures of her. (R. 56:21–22.) The next month, he took her to a Rodeway "where he engaged in vaginal, oral, and anal sex" with her. (R. 56:22.) According to the victim, she did not want the anal sex but was afraid to tell him no. (R. 56:22.) The month after, he took her to a hotel in Clark County and again had oral, anal, and vaginal sex with her; police found video capturing those sex acts. (R. 56:22–23.)

In addition to the sexual assaults, Anderson endangered the victim in other ways. As the State pointed out, Anderson also "tried to engage the victim" in a suicide plan where he would "give her a gun so that she would shoot him." (R. 56:22, 23.) The State also noted that the victim reported that she was "scared for her life" because she did not know "if he will come back to find her" or whether he disseminated or still had videos or photographs of her stored somewhere. (R. 56:25–26.)

Moreover, the prosecutor argued, police obtained information from others that Anderson was contacting two Kentucky girls, ages 10 and 13. (R. 56:23.)

The State summed up that the public needed significant protection from Anderson, who "has every indication that he is of the most predatory type of sex offender that we encounter." (R. 56:28.) "This is an individual who was fleeing allegations in regard to a five-year-old, who came a long was around to seek out somebody he met and he trolled for . . . on the internet." (R. 56:28.) In addition to its recommended sentence of 12 years' initial confinement and 15 years' extended supervision, the State argued that "lifetime supervision is necessary to, not only give [the victim] and her family peace of mind, but to protect . . . the public in general." (R. 56:28.)

2. Anderson's counsel and Anderson argued for less time and no lifetime supervision.

Anderson's counsel agreed that the crime was serious, but he countered many of the claims that the State made in regard to Anderson's grooming the victim. (R. 56:35–36, 46–47.) Counsel advanced Anderson's explanation that he was trying to get to Canada when his car broke down in the Eau Claire area, he did not know that the victim lived near Eau Claire, and he had no prior intent to stop there or contact the

victim. (R. 15:2–3; 56:36.) Counsel also emphasized that while the assaults could not have been consensual based on the victim's age, they were neither violent nor forcible, and the victim did not appear to be frightened of Anderson until after her father found out about the assaults. (R. 56:37–38.) Counsel asked for a sentence of four years' confinement and left extended supervision up to the court; counsel argued against lifetime supervision, telling the court that it was not "needed or necessary because, frankly, when he leaves here, he's going to Indiana." (R. 56:43.)

Anderson also spoke. He claimed that he was "not an emotionally intelligent individual. . . . I mean, half the time I don't even know when women are hitting on me." (R. 56:47–48.) He denied any intent in leaving Indiana to find the victim; rather, he claimed, he decided to go to Canada by way of Wisconsin and Minnesota. (R. 56:48–49.) He told the court that he knew the victim was in Wisconsin but not her specific location. (R. 56:49.) He stated that he had "great remorse" for what happened. (R. 56:49–50.) He told the court that he had no intention of retaliating against the victim and that he just wanted her "to be able to move on with her life." (R. 56:50.) He denied contacting girls in Kentucky or anywhere else. (R. 56:52.)

3. The court determined that protection of the public and Anderson's character were the most important factors guiding its sentence.

The court began its remarks by noting that the crime of second-degree sexual assault was serious (R. 56:56–57), but it quickly focused on the two factors it deemed most important to Anderson's sentencing: his character and the need to protect the public.

As for Anderson's character, the court credited Anderson for cooperating with the investigation, his lack of

anger, and his intelligence, but it found "manipulative or deceitful character traits." It noted that Anderson's statements to the PSI writer and in court seemed like "justifications, not out-and-out admissions" to the crimes. (R. 56:57–58.) And the court did not "buy" his claim that he was fleeing to Canada via Wisconsin and Minnesota and his car happened to break down in Wisconsin reasonably near a teenager he had previously contacted online. (R. 56:58.) The court took Anderson's version of the story "as justifying, excusing something in your head." (R. 56:58.)

The court further faulted Anderson, if he did not groom the victim, for not avoiding the situation entirely: "[Y]ou need to have the character to stop that, to avoid the situation." (R. 56:58.) And the court noted that the assaults occurred three times over three months, which could only be contributed to premeditation and planning, not a random vehicle breakdown. (R. 56:59.) In all, the court said, "the repetitive instances" of the assaults and "your way of thinking lead me to . . . heighten my need to protect the public." (R. 56:59.)

The court further opined that Anderson was a pedophile: "I think you have sexual attraction to people inappropriately and/or morally younger than you." (R. 56:60.) And "[w]ithout that" inappropriate sexual attraction, Anderson "would have intelligently removed [himself] from the situation." (R. 56:60.) Further, the court explained, Anderson's use of the Internet to communicate with the victim and develop a rapport with her further indicated a strong need to protect the public:

> [T]hrough the course of the internet, a very common tool, you snuck into a 15-year-old's house. And . . . I use the word snuck. It's the thing that people fear, that a 15-year-old girl would start a relationship with a 30-year-old man, but it's behind closed doors. A 30-year-old man knows that he does not start or continue . . . any sort of communications. . . . I think the average

> person would be aware that this is something that, if discovered, it doesn't look good. And there's no need for it. It's an inappropriate relationship for what it's worth.

(R. 56:61–62.)

The court also noted that Anderson was not being punished for the allegations in Indiana, but that his admitted fleeing "does not show strong character." (R. 56:63.) The court referenced the child's description of Anderson's alleged assaults (R. 15:8, 28), and noted that Anderson was abandoning a young daughter who was experiencing a trauma: "If she had that type of vocabulary language, either somebody was feeding her [accusations], or she had been sexually assaulted by someone else or you did. . . . [T]hose are the only three possibilities that I can come up with. . . . [C]ertainly a person of good character would be there to face that traumatic issue with his or her daughter I would contend." (R. 56:63.)

Anderson, in the court's view, also had high rehabilitative needs, despite Anderson's claims that his needs were "low level." (R. 56:64.) To the contrary, the court told Anderson that it believed that he was "extraordinarily dangerous":

> [Y]our intelligence, your demeanor, your character actually make you sort of nefarious and extraordinarily dangerous as a pedophile. Your crossing state lines, your communicating through internet, your hooking up with a stranger you know to be 15 or under 16 at the very least, my assessment, although wholly unscientific, is that you're one of the highest level predators maybe that I've ever seen, but certainly the one that parents, public and citizens of Wisconsin fear the most.

(R. 56:64.) The court framed Anderson's rehabilitative needs in the context of public protection: "in the interest of protecting the public your rehabilitative needs are best

addressed in a confined setting or with heavy supervision." (R. 56:64.)

The court ultimately agreed with and adopted the State's recommendation: "So for . . . all of those [reasons] I'm convinced that the state is correct and will follow the recommendation" of 12 years' initial confinement and 15 years' extended supervision. (R. 56:65–66.) It further stated—again consistent with the State's recommendation—"[o]rder lifetime supervision." (R. 56:66.)

In all, the court returned to same theme throughout its sentencing remarks: Anderson's manipulative and deceitful character, his attraction to young girls, and the many steps he took to complete these crimes in Wisconsin created a tremendous need to protect the public. That determination supported its decision to order lifetime supervision. The court soundly exercised its discretion in ordering it.

Even if the sentencing transcript left any open questions, the court answered them in its postconviction decision denying Anderson's request to vacate the lifetime supervision order. *See State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (stating that postconviction hearing affords court opportunity to clarify its sentencing decision). There, the court reiterated that its decision to order lifetime supervision was driven by its lengthy consideration of Anderson's dangerous character traits, his actions in this case and other cases, and the seriousness of the crime, all of which warranted lifetime supervision to protect the public:

> During allocution, [Anderson] attempted to mitigate the seriousness of his crime. The Court addressed this issue, as well as [Anderson's] character. The Court found [Anderson] to be manipulative and deceitful, and that [Anderson] was even attempting to manipulate the Court by justifying his criminal acts.

(R. 48:4.)

The court also pointed to Anderson's failure to consider the crime serious as a reason that the public needed protection. The court clarified that "while his crime may have been 'non-forcible,'" it was serious—a Class C felony punishable by up to 40 years' imprisonment. (R. 48:4.) The court "rejected the credibility of [Anderson's] version of what had happened," to the extent that Anderson claimed that he had not planned on encountering the victim when he found himself in Eau Claire: "the preparation for the crime had not been the result of impulsive behavior, but rather had been protracted over a period of time." (R. 48:4.) The court stated that it "felt strongly about protecting the public from him" based on those factors, Anderson's conviction with a child victim in Clark County, Anderson's inappropriate "concept of relationships between a 30 year old and a child," and his repetitive efforts to purse those inappropriate relationships. (R. 48:4–5.)

Finally, the court emphasized that Anderson's efforts in crossing state lines to contact the victim and his significant unacknowledged and unmet rehabilitation needs presented a significant danger to the public if he was left unsupervised:

> The Court pointed out that [Anderson's] criminal behavior crossed County lines, State lines, and purportedly intended to cross out of the country. Further, the Court noted that [Anderson] basically admitted leaving Indiana to go to Canada because of an accusation against him in Indiana. The Court pointed out that [Anderson's] use of the Internet and travel to meet strangers made him extraordinarily dangerous. The Court noted that [Anderson's] type of rehabilitative needs were best addressed in a confined setting or with "**heavy supervision**."

(R. 48:4–5.) Given all of that, the court's exercise of discretion in ordering lifetime supervision was sound.

Finally, while it is not necessary for this Court to search the record for reasons supporting the court's decision, the record in this case demonstrates that the "sentence imposed can be sustained." *See McCleary*, 49 Wis. 2d at 282. As discussed above, and as set forth in the criminal complaint and PSI (R. 1; 15), Anderson fled another state's charges for sexually assaulting his five-year-old daughter to take up with a 15-year-old in a different state he had been grooming online; to the PSI writer and sentencing court, he offered an incredible version of events and justifications for his conduct and refused to acknowledge the seriousness of his crime and his serious need for treatment and rehabilitation.

Because the circuit court's decision to order lifetime supervision was backed by a sound determination that there was a high necessity for public protection, the court's exercise of discretion was sound. Anderson is not entitled to relief.

D. Anderson's arguments fail.

Anderson insists that the court simply said, "Order lifetime supervision" without any explanation whether there was a necessity to protect the public. (Anderson's Br. 1, 3, 11.) He asks this Court to hold that sentencing courts, regardless of how significantly it weighed the need to protect the public in applying the *Gallion* factors, must re-apply the *Gallion* factors to the question whether to order lifetime supervision. (Anderson's Br. 8.)

Anderson's request is not sensible, particularly on this record. The court here described at length the danger that Anderson presented to the public. His attraction to young girls, his dishonesty, his willingness to flee charges, his manipulative personality, and his repeated justifications for his actions and his crimes made him a dangerous person. Further, Anderson's actions here—fleeing serious accusations in Indiana to Wisconsin where he assaulted a 15-year-old he

had been grooming, not to mention his videotaping their encounters and discussing a suicide plan with her—demonstrated his danger to the public. All of that supported the court's decision to order lifetime supervision.

The only thing missing from the court's reasoning was the word "therefore" connecting lifetime supervision to the many reasons the court deemed Anderson "one of the highest level predators maybe that I've ever seen" and in need of rehabilitation in either confinement or under "heavy supervision." (R. 56:64.) As discussed above, and as the postconviction court held, the transcript clearly supports the court's exercise of discretion. To require the court to have made a more direct statement amounts to requiring "magic words," which is not consistent with *Gallion* or the purpose of sentencing. *See Gallion*, 270 Wis. 2d 535, ¶ 37.

Contrary to Anderson's claim (Anderson's Br. 8–9), *Helmbrecht* does not assist him. In *Helmbrecht*, this Court held that sentencing courts, in assessing whether to grant expungement, must set forth its process of reasoning regarding the requirements in the expungement statute that expungement (1) will benefit the defendant and (2) society will not be harmed as a result. *Helmbrecht*, 373 Wis. 2d 203, ¶¶ 10, 12. This Court held that the lower court, in its postconviction decision, adequately set forth its reasoning and affirmed its decision to reject expungement. *Id.* ¶ 14.

Helmbrecht is unhelpful to Anderson for two reasons. First, unlike the expungement statute, which requires consideration of factors that are not among the three *Gallion* factors that courts must consider, the "necessary to protect the public" factor is identical to the "need to protect the public" factor in *Gallion*. In other words, the lifetime supervision statute does not require sentencing courts to consider different factors beyond those required by *Gallion*; the expungement statute does. Thus, a separate process of re-applying *Gallion*'s need-for-public-protection factor to the

decision to order lifetime supervision—particularly after having already applied that factor in its sentencing remarks—is not warranted.[2]

Second, in *Helmbrecht*, even though this Court held that sentencing courts must employ a separate process of reasoning to an expungement decision, it affirmed because the postconviction court there soundly provided that reasoning. *Helmbrecht*, 373 Wis. 2d 203, ¶ 14. So too here, the postconviction court explained that based on its lengthy reasoning for why it viewed Anderson as a danger to the public, it believed that lifetime supervision was warranted. (R. R. 48:4–5.)

Anderson contends that the postconviction court here needed to "provide . . . additional reasoning to support the imposition of lifetime supervision, instead of merely referring back to its statements at sentencing regarding Mr. Anderson's credibility and the seriousness of the charge." (Anderson's Br. 11–12.) But Anderson disregards that the postconviction court referred back to its statements regarding *the need to protect the victim and the public* in this case, which its discussion of the seriousness of the crime and Anderson's

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[2] For similar reasons, the other cases Anderson invokes (Anderson's Br. 9–10 & n.3) are unhelpful. *See State v. Jackson*, 2012 WI App 76, ¶ 35 & n.5, 343 Wis. 2d 602, 819 N.W.2d 288 (holding that the sentencing court erred as a matter of law that the underlying offense involved sexually motivated conduct, and did not reach whether the court otherwise soundly exercised its discretion in ordering compliance with registry); *State v. Ramel*, 2007 WI App 271, ¶¶ 13–14, 306 Wis. 2d 654, 743 N.W.2d 502 (holding that courts must articulate objectives outside those considered for sentencing to justify ordering a fine, particularly the offender's ability to pay); *see also State v. Cherry*, 2008 WI App 80, ¶¶ 9–10, 312 Wis. 2d 203, 752 N.W.2d 393 (recommending that courts to consider factors specific as to whether to impose a DNA surcharge, such as relevance of DNA to the case, ability to pay, and any past DNA submissions).

character both fed into. Contrary to his contentions (Anderson's Br. 12), it was readily apparent how the court went from its reasoning that Anderson was extremely dangerous and that the need to protect the public from him was paramount to its decision to order lifetime supervision. Anderson is not entitled to relief.

CONCLUSION

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

Dated this 7th day of June 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,374 words.

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SARAH L. BURGUNDY
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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.

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 7th day of June 2019.

_____
SARAH L. BURGUNDY
Assistant Attorney General