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CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP435-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES TIMOTHY GENOUS,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUES PRESENTED

1. Did police exceed the permissible scope of a protective pat-down by ordering Mr. Genous to remove his shoes and socks?

The circuit court denied Mr. Genous' motion to suppress evidence. The court of appeals affirmed.

2. If police exceed the scope of a pat-down search during a traffic stop, can the defendant suppress evidence later discovered in his vehicle?

The circuit court denied Mr. Genous' motion to suppress evidence. The court of appeals affirmed.

3. Did police have probable cause to search Mr. Genous' car for illegal drugs?

The circuit court denied Mr. Genous' motion to suppress evidence. The court of appeals affirmed.

CRITERIA FOR REVIEW

This case presents three Fourth Amendment issues for this Court's review.

First, the Court is asked to clarify the proper scope of a pat-down search. If police have a reasonable suspicion that the driver of a car *may* have been involved in a drug sale, does *Terry v. Ohio*, 392 U.S. 1 (1968) empower them to order that person out of the car, onto a curb, and demand that they remove their

shoes and socks? Two judges of the court of appeals said yes; a third strenuously disagreed. Based on the plain language of the United States Supreme Court, it seems difficult to justify such an intrusive search for evidence under case law permitting only "a limited patting of the outer clothing […] for concealed objects which might be used as instruments of assault." *Sibron v. New York*, 392 U.S. 40, 65 (1968). This issue matters because the constitutional rights of citizens matter; police ought not to be permitted to use their limited pat-down authority to subject people to invasive, degrading, and undignified intrusions of this nature.

Second, this Court is asked to clarify under what circumstances a constitutional violation will "taint" the discovery of evidence seized during the same coercive encounter. In Mr. Genous' view, once police made the decision to exceed the scope of the Fourth Amendment during this seizure, evidence discovered while he was seated on the curb and officers rummaged through his vehicle must be suppressed. The court of appeals disagreed and declined to even apply an attenuation analysis; instead, in its view, there can be no suppression without a causal "but-for" relationship between the illegal conduct and evidence later collected. *State v. Genous (Genous III)*, Appeal No. 2019AP435-CR, ¶ 22, unpublished slip op., (Wis. Ct. App. November 1, 2022). (App. 14-15). Once again, this holding generated a dissent critical of the majority opinion's holding. *Id*., ¶ 33 (Donald, P.J., *dissenting*). (App. 21).

Finally, this Court should also grant review to determine whether police had probable cause to search Mr. Genous' vehicle. While this issue, standing alone, does not independently merit review, application of settled precedents to this fact pattern can still help to guide circuit courts in addressing commonly-filed Fourth Amendment challenges.

STATEMENT OF FACTS

Circuit Court Proceedings

The State charged Mr. Genous with possession of a firearm by a felon. Mr. Genous filed a motion to suppress the evidence discovered during a traffic stop and search of his vehicle which resulted in the gun at issue. (7).

At the suppression hearing, Officer Adam Stikl testified that he was on patrol in an unmarked squad car in the city of West Allis when he observed a black sedan around 3:30 a.m. (49:6-7; 24). The vehicle was legally parked on the street across from the residence located near 1601 South 65th Street. (49:6-8). At that point, Officer Stikl turned his headlights off and drove his car to a location about half a block behind the black sedan. (49:7). The sedan turned its lights off, but no one got out of the car. (49:7).

Officer Stikl offered the following reason for why he decided to stop and watch the vehicle:

> Based on my training and experience, a lot of these drug cars will come into our city, park in

> front of a house where they are going to sell their drugs to, make the deal inside their vehicle in front of the house and then leave.

(49:8). Officer Stikl also claimed that this area was a "high drug trafficking area." (49:8).

Officer Stikl stated that he watched the black sedan for about one minute. Shortly after the vehicle's lights turned off, a female came out of the residence at 1601 South 65th Street and approached the vehicle. (49:9). According to Officer Stikl, the female matched the general physical description of an individual named Kayla Sienko, a known drug user who lived at address. (49:10-11).

Officer Stikl testified that the woman entered the passenger side of the black sedan; however, he was not able to see anything that happened inside the car. (49:13). After about ten to fifteen seconds, the woman exited the vehicle and went back inside her house. (49:14). She did not appear to be carrying anything, either when she entered the vehicle or exited. (49:14). Officer Stikl nevertheless suspected that he had witnessed a drug transaction. (49:14).

Within a few seconds, the sedan turned its headlights back on and drove off. (49:15). Officer Stikl followed for approximately three blocks and then initiated a traffic stop. (49:15). He stated that the sole basis for the stop was his observations of the woman entering and exiting the car; no traffic violations had occurred. (49:15). Prior to stopping the vehicle, Officer Stikl ran the car's license plate and discovered that it

was registered to a person who lived in the city of Milwaukee. (49:34-35).

Officer Stikl testified that the driver of the vehicle, who he identified as Mr. Genous, pulled over right away. (49:16). Mr. Genous told Officer Stikl that he had been meeting his mistress; however, she failed to show up. When Officer Stikl told him that he had seen a female enter his car, Mr. Genous agreed that a woman named Kayla had, in fact, entered his car. (49:17-18). He explained that the woman wanted money from him, and when he did not give it to her, she got upset and left his car. (49:18).

Officer Stikl observed multiple cell phones, hand sanitizer, and cigar wrappers in the car. (49:46-47). Regarding the significance of the hand sanitizer, he stated that "[i]t's common knowledge drugs dealers actually conceal narcotics within their anal area. And what they do is they use the hand sanitizer after removing that stuff to clean their hands." (49:46). He also noted that cigar wrappers can be used to smoke marijuana by rolling the marijuana in the wrapper, which is called a "blunt." (49:47).

After running Mr. Genous' license, Officer Stikl returned to question Mr. Genous further. By that point, one of the other officers had directed Mr. Genous to exit the car,[1] and he was sitting on the curb. (49:40-42). Officer Stikl asked Mr. Genous multiple times for

[1] This statement contradicted Officer Stikl's earlier statement that he was the one who told Mr. Genous to exit the car. (*See* 49:18-19).

permission to search the car, and each time Mr. Genous said no. (49:40-41). He also ordered Mr. Genous to take his shoes and socks off so he could search them. (49:41-43). Mr. Genous complied, and nothing illegal was found in his shoes or socks. (49:42-43). While Officer Stikl was searching Mr. Genous' shoes and socks, the other officers were shining their flashlights through the windows of his car. (49:44).

After hearing testimony, the circuit court viewed the dash cam video from Officer's Stikl's squad car and found that what it showed was inconsistent with significant portions of the officers' testimony. (49:64); (App. 24). The court summarized the relevant parts of the video, beginning when the officers returned to Officer's Stikl's squad car after having initially made contact with Mr. Genous. First, the court described the officers' initial attempts to see what was in the car by looking through the windows:

> When the three officers go back to the car, there is a discussion that they've seen the drug stuff[2] on

[2] With respect to the court's reference to the "drug stuff," the video shows that Officer Stikl states that he saw cigar wrappers along with a white plastic bag on the center console, but he could not see if anything was in the bag. He also states that he thought he may have seen marijuana on the passenger-side floor boards. He therefore asks the other officers to go back and look again. After looking three times through the windows, the other officers state that they too saw cigar wrappers, but could not smell any marijuana. They also appear to indicate that they did not see any marijuana either, although the audio is somewhat unclear in this respect. (Squad cam video at 00:02:20

continued

> the floor. And the one officer, I believe it's Stikl, sends the other one back to look for the drug stuff. That officer, who I assume was Molthen but I can't discern who's who based upon the video, that officer goes back with his flashlight and looks into the front of the car from the passenger side on two occasions.
>
> And then he gets the third occasion, and the other officer—another officer is there with him. They're both looking there. It's at that point— Well, it's— It's before that third incident when the defendant is pulled out of the car or told to get out of the car and is seated behind the car. There was no— And the— The audio of the cops was—was pretty clear. There's no discussion of any guns. There is repeated questioning of the defendant. The officers, when they come back after that third look through the windshield, do note that they've seen the cell phones and the sanitizer and the blunt.

(49:64-65; App. 24-25).

Next, the court summarized the portion of the video that shows that the officers had, in fact, opened the driver's side door before discovering the gun, contrary to their testimony:

> The officers then go back and one of the officers approaches the driver's side and opens the door and at that point looks in and comes running back to the side accusing the defendant of being a felon in possession.

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to 00:06:10). In any event, neither officer testified at the suppression hearing that they actually saw marijuana inside Mr. Genous' car.

(49:65; App. 25). The squad cam video also shows that right before this, the officer says "we're gonna do it" and then walks over to the driver-side door of the car. (Squad cam video at 00:10:00 to 00:10:10). Both attorneys agreed that the court's summary of the video was accurate. (49:65; App. 25).

After hearing additional arguments from the attorneys, the court rendered its decision from the bench, denying Mr. Genous' motion to suppress. First, the court concluded that the initial traffic stop was lawful. In this respect, it stated that the following facts supplied reasonable suspicion for the stop:

1. Mr. Genous had short-term contact with a woman who exited the residence at 1601 South 65th Street and entered his car at 3:30 a.m.

2. Immediately before that contact, Mr. Genous' car "was parked on the street suspiciously running with its lights on and then turns its lights off."[3]

3. The woman matched the general description of Ms. Sienko,[4] who Officer Stikl knew was a drug user who lived at that address.

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[3] The circuit court also stated that Mr. Genous turned the car off, in addition to turning the lights off. (49:49). There was no testimony, however, that Mr. Genous turned the car off; Officer Stikl only stated that he turned the lights off. (*See* 49:9).

[4] The circuit court stated that the officer observed Ms. Sienko exit the residence and enter Mr. Genous' car. Officer Stikl, however, only said that the woman he saw matched the

continued

4. It was a high drug-trafficking area.

(49:89; App. 29).

Regarding the subsequent discovery of the gun, the court acknowledged that Officer's Molthen's "testimony that he saw the gun in plain view just doesn't compute," noting that a "picture is worth more than the testimony." (49:90; App. 30). The court noted that if Officer Molthen had actually seen the gun in plain view, "he would not have gone back there not once but twice but three times." (49:90; App. 30).

The court also noted, however, that Officer Stikl had seen hand sanitizer, multiple cell phones, and cigar wrappers in Mr. Genous car. These items, the court reasoned, were all indicia of drug use or drug dealing based on the officer's training and experience. (49:90; App. 30). The court thus concluded that the observation of these items gave the officers probable cause to search Mr. Genous' car for drugs, stating:

> And I think at that point, they've got the right to go into the car and see whether or not that is, in fact, a blunt. And when they do that, I think that's when they see the gun, which is then in plain view when they open that—that driver's door. And therefore, the seizure of the gun is valid; and therefore, I will deny the motion.

(49:91; App. 30).

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general description of Ms. Sienko; he did not positively identify the woman as Ms. Sienko. (49:10-11, 28-29).

Mr. Genous subsequently pled guilty to felon in possession of a firearm. (52:3).

Appeal

Mr. Genous appealed. After the court of appeals initially reversed due to a lack of reasonable suspicion to justify the initial stop, *State v. Genous* (*Genous I*), Appeal No. 2019AP435-CR, unpublished slip op., (Wis. Ct. App. April 28, 2020),[5] this Court accepted review, held that the initial stop *was* justified, and remanded back to the court of appeals for consideration of the remaining issues. *State v. Genous* (*Genous II*), 2021 WI 50, ¶ 1, 397 Wis. 2d 293, 961 N.W.2d 41. The court of appeals then affirmed. *Genous III*, 2019AP435-CR, ¶ 1. (App. 3).

With respect to the search of Mr. Genous, the court of appeals concluded that, in essence, Mr. Genous was a suspected drug dealer; because drug dealers keep weapons on their person, it was reasonable to search Mr. Genous' socks and shoes because he could have concealed a small object like a razor blade therein. *Genous III*, Appeal No. 2019AP435-CR, ¶ 14. (App. 10-11). Moreover, even if the search *was* unlawful, the court of appeals concluded that it could have no impact on the legality of the search of Mr. Genous' car, which was where the weapon was ultimately found. *Id*., ¶ 20. (App. 13-14). Finally, the court of appeals also concluded that police had probable cause to conduct that search due to

[5] The earlier unpublished decision is included in the appendix starting at page 32.

numerous pieces of evidence, including for example an observation of hand sanitizer in plain view and Mr. Genous' allegedly "furtive" movements. *Id*., ¶ 25. (App. 17).

This majority opinion generated a dissent, which faulted the majority for authorizing such an invasive search under the limited rubric of a protective pat-down. *Id*., ¶ 32 (Donald, P.J., *dissenting*). (App. 21). In the dissent's view, the logic of the majority opinion "would seemingly obliterate any limitation on the scope of a pat-down search by the police." *Id*. (App. 21). The dissent also faulted the majority for not conducting a sufficient attenuation analysis. *Id*., ¶ 39. (App. 23). In the dissent's view, the handgun should have been suppressed due to the illegal pat-down. *Id*. (App. 23).

This petition follows.

ARGUMENT

I. This Court should accept review and hold that a protective pat-down for weapons does not permit the officers to ask the suspect to remove items of clothing, like their shoes and socks.

Even if the initial stop was constitutional, the gun discovered in Mr. Genous' car should still be suppressed because the police exceeded the lawful scope of the *Terry* stop. The officers' actions of ordering Mr. Genous to take off his shoes and socks constituted

an unlawful search that went beyond the limited bounds of what is permissible during a *Terry* stop. This rendered the detention itself unconstitutional, and the evidence discovered during the ongoing unlawful stop should be suppressed.

During an investigative stop, whether the intrusion is reasonable depends on whether the police conduct is reasonably related to the circumstances justifying the initial police interference. *Terry*, 392 U.S. at 19-20; *State v. Griffith*, 2000 WI 72, ¶26, 236 Wis. 2d 48, 613 N.W.2d 72. Under this approach, an appellate court must determine "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20.

"[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500 (1983). When an investigative stop is extended beyond the time reasonably necessary to complete the mission of the stop, the seizure becomes unreasonable and unconstitutional. *See Rodriguez v. United States*, 575 U.S. 348, 353-354 (2015).

As with the duration of a stop, "[t]he *scope* of the [*Terry* stop] must be carefully tailored to its underlying justification." *Royer*, 460 U.S. at 500 (emphasis added). That is, "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's

suspicion in a short period of time."[6] *Id.* When an officer exceeds the permissible scope of a *Terry* stop, the detention also becomes unlawful. *See id.*; *see also* Amy L. Vazquez, Comment, *"Do You Have Any Drugs, Weapons, or Dead Bodies in Your Car?" What Questions Can a Police Officer ask During a Traffic Stop?*, 76 Tul. L. Rev. 211, 226 (2001) ("By separating scope and duration, the Court here clearly suggested that scope is something more than the length of the detention. A reasonable inference can be made that the 'something more' should be, and is, the type of questioning and investigation.").

The State has "the burden to demonstrate that the seizure it seeks to justify on the basis of reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Royer*, 460 U.S. at 500.

Several investigative techniques are permissible during a *Terry* stop. These include interrogation or inquiry regarding the suspicious conduct, which also

[6] In *Illinois v. Caballes*, 543 U.S. 405, 407 (2005), the Supreme Court reaffirmed the duration/length limitation on *Terry* stops, declaring that a seizure "can become unlawful if it is prolonged beyond the time reasonably required" to serve it lawful purpose. It also reaffirmed the scope/intrusiveness limitation, although it held that an investigative technique does not violate that limitation unless the particular tactic employed "itself infringed [the suspect's] constitutional protected interest in privacy," i.e., was itself a search. *Id.* at 408. As noted below, ordering Mr. Genous to remove his shoes and socks was a search, and an unreasonable one at that.

includes a request for identification or a license. 4 Wayne R. LaFave, *Search and Seizure*, § 9.2(f) (5th ed. Supp. Oct. 2018). It may also include searching the area or a non-search examination of the suspect's person, car, or objects he is carrying. *Id.* And of course, an officer may conduct a limited pat-down of a suspect for weapons, if there are specific and articulable facts that warrant a reasonable belief that the suspect is armed and dangerous. *See Terry*, 392 U.S. at 21, 24.

An officer may not, however, conduct a full-blown search of the defendant or his property during a *Terry* stop, absent probable cause that the defendant has committed a crime. *See State v. Secrist*, 224 Wis. 2d 201, 210, 589 N.W.2d 387 (1999). In *Sibron*, the Supreme Court confirmed the limited nature of a *Terry* stop, explicitly stating that the "only goal which might conceivably" justify a search in the context of a *Terry* stop is a limited pat-down search for weapons. *Sibron*, 392 U.S. at 65. In subsequent cases, the Court has unequivocally explained that "[t]he purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence." *Adams v. Williams*, 407 U.S. 143, 146 (1972). This is so, the Court explained in *Minnesota v. Dickerson*, 508 U.S. 366 (1993), because searches that exceed the scope of what is necessary to determine if an individual is armed "amount[] to the sort of evidentiary search that *Terry* expressly refused to authorize" and the Court "condemned" in *Sibron* and *Michigan v. Long*, 463 U.S. 1032. *Dickerson*, 508 U.S. at 378.

Based on these principles, full-blown searches conducted during an otherwise lawful *Terry* stop have been held to be unconstitutional. *See, e.g., Dickerson*, 508 U.S. at 378 (reaching into a suspect's pocket); *United States v. Askew*, 529 F.3d 1119 (D.C. Cir. 2008) (unzipping a suspect's jacket) (plurality opinion).

In this case, even if the officers had reasonable suspicion to stop Mr. Genous' car, they exceeded the permissible scope of that stop by ordering Mr. Genous to take off his shoes and socks. Like reaching into a suspect's pocket or unzipping his jacket, forcing a detainee to take off his shoes and socks to find illegal drugs constitutes a full-blown search that is well beyond the limited scope of a *Terry* stop. Forcing a person to take off their shoes and socks is something that is highly invasive and intrusive to a person's privacy interest. It is also offensive and damaging to their personal dignity.

That type of search cannot be characterized as a limited pat-down for weapons. First, there was no reasonable basis for the officers in this case to believe that Mr. Genous was armed and dangerous, even though they claimed (49:53) to have seen him "dipping his right shoulder." *See State v. Johnson*, 2007 WI 32, ¶36, 299 Wis. 2d 675, 729 N.W.2d 182 (there was insufficient basis for a pat-down during a traffic stop where the defendant made a movement with his head and shoulders while in the vehicle). There is also no evidence that the officers even conducted a pat-down of Mr. Genous. Most importantly, it is highly unlikely that a weapon could be concealed in a shoe, much less

a sock. It certainly could not be concealed in sock in a way that a pat-down of the exterior of the sock would not discover it.

Consequently, the search of Mr. Genous' shoes and socks in this case exceeded the permissible scope of a lawful *Terry* stop. As the dissent cautioned, holding otherwise threatens to transform *Terry* stops into exactly the kind of wide-ranging law enforcement intrusions specifically condemned in binding case law; if *Terry* is to have any meaningful limits, this Court needs to use this case to reaffirm them.

II. This Court should accept review and hold that when police violate the Fourth Amendment during a traffic stop, suppression of evidence obtained during that same stop ought to result.

It is a well-settled principle of Fourth Amendment jurisprudence that "the exclusionary rule requires courts to suppress evidence obtained through the exploitation of an illegal search or seizure." *State v. Carroll*, 2010 WI 8, ¶ 19, 322 Wis. 2d 299, 778 N.W.2d 1. In a case involving evidence uncovered after illegal conduct, it is the State's burden to prove that there has been "sufficient attenuation from the original illegality to dissipate that taint." *Id*.

Not so apparently in this case. Here, the court of appeals concluded that no attenuation analysis was required because, following *Hudson v. Michigan*, 547 U.S. 586, 591-592 (2006), the search of Mr. Genous' shoes and socks, was not a "but-for" cause of the later

search of his vehicle. *Genous III*, Appeal No. 2019AP435-CR, ¶ 18. (App. 12-13). Because there was probable cause to search the car, the court of appeals held, there could be no plausible connection between the two events. *Id.*, ¶ 20. (App. 13-14). Of course, the dissent strenuously disagreed, finding all of the cited case law easily distinguishable. *Id.*, ¶ 39. (App. 23).

Review is warranted to resolve this important issue of Fourth Amendment law. Here, police arguably grossly exceeded the permissible scope of the Fourth Amendment by conducting a prolonged and overly invasive search of Mr. Genous' person. When that failed to yield evidence of criminality, police then shifted their focus to his car. Under the plain terms of the Fourth Amendment, which prohibits unreasonable law enforcement conduct, this obvious fishing expedition for drug evidence (none was ever found) should not be so easily sanctified under a reading of the Fourth Amendment sensitive to loopholes for unlawful State action, rather than attuned to the essential vindication of sacred constitutional protections.

Accordingly, this Court should accept review and reverse.

III. If this Court accepts review, it should hold that police did not have probable cause to search Mr. Genous' vehicle.

Whether there was reasonable suspicion to seize Mr. Genous at all is a close question, given the 4-3 nature of this Court's recent decision upholding that

law enforcement conduct. Given that law enforcement did not develop additional highly significant facts which would justify even more intrusive law enforcement conduct, this Court must accept review and reverse.

The circuit court found that Officer Molthen did not see the gun in plain view through the car's windshield, as he claimed. Instead, the court found that the squad cam video showed that Officer Molthen opened the car door, and when he did so, it was at that point he observed a gun underneath the driver's seat—a gun that he had been unable to see previously from outside the car. (49:65, 90; App. 25, 30).

Officer Molthen's opening of Mr. Genous' car door constituted an illegal search of the vehicle. Because the gun was fruit of that unlawful search, it should be suppressed for this reason as well.

A search occurs under the Fourth Amendment when "an expectation of privacy society is prepared to consider reasonable is infringed." *Soldal v. Cook County*, 506 U.S. 56, 63 (1992); *see also Kyllo v. United States*, 533 U.S. 27, 32-33 (2001). The Wisconsin Supreme Court has recognized that the driver of a car, even when the driver is not the owner of the car, has a reasonable expectation of privacy in the interior of the car. *State v. Dixon*, 177 Wis. 2d 461, 474, 501 N.W.2d 442 (1993). To search a car during a traffic stop, the police must have probable cause to believe that the car contains contraband or evidence of a crime. *United States v. Ross*, 456 U.S. 798, 824 (1982); *State v.*

Pallone, 2000 WI 77, ¶58, 236 Wis. 2d 162, 613 N.W.2d 568, *overruled on other grounds by State v. Dearborn*, 2010 WI 84, 327 Wis. 2d 252, N.W.2d 97.

Here, Officer Molthen searched Mr. Genous' car when he opened the driver's side door, thereby discovering the gun underneath the seat. By opening the door, Officer Molthen exposed the interior of the car and everything inside of it, including the gun. Mr. Genous had a right to privacy in the interior of the car. As noted above, Officer Molthen did not have probable cause to believe that the car contained evidence of a crime just because he had seen everyday items like hand sanitizer, cell phones, and cigar wrappers. He therefore violated Mr. Genous' Fourth Amendment rights against unreasonable searches when he opened the driver's side door.

CONCLUSION

For the reasons set forth herein, this Court should accept review and reverse.

Dated this 22nd day of November, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 4,561 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 22nd day of November, 2022.

Signed:

CHRISTOPHER P. AUGUST
Assistant State Public Defender