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COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT III

STATE OF WISCONSIN,

Plaintiff/Respondent,

APPEAL NO. 2019000491

vs.

DARRIN STINGLE,

Outagamie County Case No. 2017FO001430

Defendant/Appellant.

**BRIEF OF DEFENDANT-APPELLANT
DARRIN STINGLE**

On Appeal from the Circuit Court for Outagamie County
Case No. 2017FO001430
The Hon. Mark J. McGinnis, Presiding

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STATEMENT OF ISSUES PRESENTED

- I. Did the Circuit Court abuse its discretion as a matter of law by finding the areas in question on Stingle’s property constituted wetlands as defined by Wis. Stat. § 281.36(2m), which requires the DNR to comply with the Corps Manual and applicable supplements for wetland delineation purposes?**

Circuit court’s decision: The Circuit Court found the five areas in question on Stingle’s property “constitute a wetland as defined by Wisconsin Statute.” Tr., Doc. 42 [301-302].¹

- II. Did the Circuit Court err in examining the relevant facts and applying proper view of the law when it found sufficient evidence to convict Stingle of violating Wis. Stat. § 281.36(3b)(b)?**

Circuit Court’s decision: The Circuit Court determined there were sufficient facts to find Stingle placed discharge or fill material into five wetlands areas in violation of Wis. Stat. § 281.36(3b)(b). [302-303].

- III. Did the Circuit Court violate Stingle’s due process right to an impartial judge by asking, part way through trial, why Stingle had not removed the fill from the alleged wetland areas and by stating that he had been considering the consequences for Stingle’s actions for 15 minutes prior to actually finding Stingle guilty of the charged offense?**

Circuit Court’s decision: The Circuit Court has not addressed this issue. This Court, however, has the ability to “address[] a due process judicial bias claim on the merits even where the claim was raised for the first time in a postconviction motion.” *State v. Driver*, 2019 WI App 15, ¶¶ 17-18, 386 Wis. 2d 352 (citing *State v. Goodson*, 2009 WI App 107, ¶6, 320 Wis. 2d 166, 771 N.W.2d 385). “Regardless of whether a party must contemporaneously object to preserve a claim of a due process violation based on judicial bias, [this Court] ha[s] the authority to disregard forfeiture arguments and address the claim on the merits.” *Id.*

¹ Citations to the page number of the Transcript, Doc. 42, are in brackets.

STATEMENT ON ORAL ARGUMENT

Oral argument is necessary because there are few appeals in Wisconsin regarding violations of Wis. Stat. § 281.36. This appeal also involves an issue of first impression, of which no case law specifically addresses, regarding whether the circuit court erred in finding the areas in question on Defendant-Appellant Darrin Stingle's property met the statutory definition of a wetland when the Wisconsin Department of Natural Resources admitted it did not follow the proper wetland delineation procedures in the 1987 U.S. Army Corps of Engineers Manual pursuant to Wis. Stat. § 281.36(2m). Oral argument will allow the parties opportunity to address any questions the Court may have and develop the legal theories and authorities presented in the record and the briefs.

STATEMENT ON PUBLICATION

The Court should publish the decision in this matter. Pursuant to the criteria set forth Wis. Stat. § 809.23(1)(a), publication is warranted as there is no case law in Wisconsin specifically addressing the issue on appeal about whether the trial court erred in not holding the Wisconsin Department of Natural Resources to the wetland delineation procedures in the U.S. Army Corps of Engineers Manual pursuant to Wis. Stat. § 281.36(2m). Given the lack of precedent on this, the decision in this case will clarify the law, contribute to the legal literature, and provide guidance to the Wisconsin Department of Natural Resources in its application and enforcement of Wis. Stat. § 281.36.

STATEMENT OF THE CASE

This case involves a forfeiture offense for discharge of dredged or fill material into a wetland without a permit in violation of Wis. Stat. § 281.36(3b)(b). The Wisconsin Department of Natural Resources (“DNR”) first began to regulate water quality for discharges into non-navigable, intrastate wetlands with the enactment of 2001 Wisconsin Act 6 (2001 S.B. 1). This act was extensively revised in 2011 by Wisconsin Act 118 (2011 S.B. 368) to prohibit the discharge of dredged or fill material into a nonfederal wetland without a permit from the DNR.

I. Factual and Procedural Background

The two parcels of land at issue in this case – parcel nos. 040068700 and 040069100 – are owned by Defendant-Appellant Darrin Stingle (“Stingle”) and generally located in the East half of the Northwest Quarter of Section 27, Township 22 North, Range 17 East, in Outagamie County, Wisconsin. Ex. 4. (Travis Stuck Routine Wetland Delineation), Stingle’s property is agricultural farmland that is enrolled in the farm program. Ex. 4, Att. K.

The Food Security Act of 1985, requires producers participating in programs administered by the Farm Service Agency (“FSA”) and the Natural Resources Conservation Service (“NRCS”) to comply with certain environmental conditions in order to receive farm program benefits. *See* Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354 (codified as amended in scattered sections of 7, 16, 19, & 42 U.S.C. (Supp. IV 1986)); 16 U.S.C. §§ 3801-3845 (conservation provisions of the 1985 Food Security Act). Namely, a producer cannot convert wetlands for crop production or plant

crops on converted wetlands. 16 U.S.C. § 3821. Producers can, however, drain, tile, place fill material, and do other work in prior-converted² and non-wetland areas. 16 U.S.C. § 3822.

In preparation for work he wished to do on the property, Stingle submitted an AD-1026 request to Outagamie County FSA in 2014 to have NRCS complete a highly erodible land and wetland conservation determination on the property. Ex. 4, Att. K. NRCS completed the wetland delineation in March 2014. *Id.* NRCS found two wetlands on the property and found the rest of the land to be prior-converted/non-wetland. *Id.* Having received the wetland determination, Stingle completed work in the prior-converted/non-wetland areas on the property in 2015, which involved putting drain tile on the bottom of one ditch and placing fill over the tile, removing stumps from the other ditch, and placing fill in a few other areas on the property. Tr., Doc. 42 [262-264, 266].

In October 2015, DNR water management specialist Scott Koehnke (“Koehnke”) was on site with Stingle and observed areas that he believed to be wetlands and appeared to have fill placed in them. Ex. 1, Natural Resources Citation. The DNR sent Stingle a notice for alleged violation of Wis. Stat. § 281.36(3b)(b), discharge of dredged or fill material into a wetland without a permit, on September 16, 2016. Ex. 2, Notice of Violation/Enforcement Conference. Following an enforcement conference on September 30, 2016, it was agreed that Steve Frings (“Frings”) would complete a wetland

² “Prior-converted” means “a converted wetland where the conversion occurred prior to December 23, 1985, an agricultural commodity had been produced at least once before December 23, 1985, and as of December 23, 1985, the converted wetland did not support woody vegetation and did not meet the hydrologic criteria for farmed wetland.” 7 C.F.R. § 12.2(8).

delineation report on Stingle's property and submit the report to the DNR. Ex. 3, Enforcement Conference Summary. Frings completed his delineation report and submitted to the DNR on October 13, 2016. Ex. 1. The DNR conducted their own site review of Stingle's property on April 20, 2017 and June 14, 2017. Ex. 1 and Ex. 4 at 3. Following the site visits, the DNR determined it did not concur with Frings's report and served Stingle a citation for violating Wis. Stat. § 281.36(3b)(b) on July 31, 2017. Ex. 1.

Thereafter, Koehnke and Thomas Nedland ("Nedland") told Stingle to have WDNR-professionally assured wetland delineator Travis Stuck ("Stuck") complete a wetland delineation on Stingle's property. Ex. 4 at 3. Stuck conducted onsite evaluations on September 25, September 27, and November 30, 2017. *Id.* Stuck determined there were 12 wetlands on Stingle's property. Ex. 6, Att. J at 4. According to Stuck's report, Stingle placed fill in 5 of the 12 wetlands. *Id.* Stuck identified 2 of the 5 impacted areas as "ditch-wetlands." *Id.*

II. Trial

A one-day bench trial before Judge Mark McGinnis was held on February 27, 2019. Thomas Sturdivant ("Sturdivant"), Kody Hansen ("Hansen"), Nedland, Stuck, and Koehnke testified on behalf of the State. Michael Graham ("Graham") testified on behalf of Stingle, and Stingle testified on behalf of himself.

Thomas Sturdivant

Sturdivant issued the citation, Ex. 1, to Stingle. Tr., Doc. 42 [6]. Sturdivant has no training delineating wetlands. [8]. The extent of his role was to issue the citation based on information he was provided by other DNR employees. *Id.*

Kody Hansen

Hansen had several communications via letter with Stingle, Ex. 2 and 3, regarding the alleged violation and was at the enforcement conference on September 30, 2016. [16, 18]. Hansen does not have any experience or training delineating wetlands. [19]. Hansen admitted the extent of his knowledge of the contents of his letters, Ex. 2 and 3, are from his review of investigation reports as he was not at the site investigation and otherwise did not hear Stingle say anything about what was done on the property. [26-28].

Thomas Nedland

Nedland is a DNR wetland mitigation coordinator. [29]. Nedland verified that the DNR must use the 1987 Army Corps Wetland Delineation Manual (“Corps Manual”) and applicable regional supplements to delineate wetlands. [30, 42-43]. Nedland stated there is a “three-parameter” approach to determining if an area is a wetland – a prevalence of hydrophytic vegetation, hydric soils, and hydrology. [31, 44-46]. Nedland said to meet wetland hydrology there needs to be “ponding or flood or a water table within 12 inches of the soil surface for 14 consecutive days during the growing season in most years.” [52].

Nedland was out at Stingle’s property twice with Koehnke in April and June 2017. [32]. Nedland said he and Koehnke found Frings’s wetland delineation “was not accurate” and “inadequate for us to even make a proper determination.” *Id.* Nedland said, in his opinion, there were wetlands on Stingle’s property that contained fill. [41]. Nedland admitted, however, that he and Koehnke did not delineate wetlands or map physical boundaries of wetlands on Stingle’s property. [42, 47-48]. Rather, they did a

“wetland determination,” which merely “just determin[es] whether wetlands are present at the site.” *Id.*

Nedland admitted he and Koehnke made the determination not based on the three-parameter approach in the Corps Manual, but on just the presence of hydric soils and hydrology indicators. [47]. Nedland said they utilized parts of Frings report and did a “cursory” review of some aerial photos [47, 49]. Although Nedland relied in part on Frings’ report, Nedland maintained Frings report was ultimately inaccurate. [49]. After rejecting the Frings report, Nedland said the DNR then required Stingle to do another report by Stuck. [49-50].

Nedland knew NRCS did a wetland delineation on Stingle’s property. [54]. Nedland was also aware that NRCS is required to follow the Corps Manual and regional supplements to delineate wetlands, same as the DNR. [55]. Despite knowing this, Nedland did not review NRCS’s delineation of Stingle’s property. [54]. Nedland also said he knew there was historical drainage infrastructure – namely, ditches – on Stingle’s property. [56]. Nedland acknowledged that normal farm practices can occur in wetlands. [58]. Nedland also conceded that if “there’s no activity that’s occurring in the wetland, you certainly would not need a permit.” [59].

Scott Koehnke

Koehnke is a water management specialist with the DNR. [153]. Koehnke is not a wetland delineator. [183]. Koehnke said he is aware that the Corps Manual and applicable supplements control the DNR’s wetland delineations and that an area must meet all three criteria in order to be a wetland. [183-184]. Koehnke was at the

enforcement conference on September 30, 2016, which Koehnke described as an opportunity for Stingle to “come to the DNR office and tell us what [he] want[s] us to know. We will tell [him] what we think we know...and let’s get this fixed because the goal at the end of the day is to get the site restored and bring Mr. Stingle back into compliance.” [160-161].

Despite instructing Stingle to hire a DNR-professionally assured delineator, Koehnke stated the DNR has to confirm and ultimately agree with the consultant’s findings regardless. [185]. That was why Koehnke and Nedland conducted their own site visit of Stingle’s property on April 20, 2017 and June 14, 2017 because, according to Koehnke, Frings’ report was “deficient and wasn’t accurate.” [162].

Koehnke admitted that, for the DNR to confirm a wetland delineation report, it merely has to make a determination, not a delineation, based on “professional judgment” and “experience,” not the Corps Manual. [181]. Koehnke admitted the DNR never did a delineation or any formal assessment of Stingle’s property in accordance with the procedures in the Corps Manual. [181, 184-185]. Rather, Koehnke and Nedland did a determination to establish that there were hydric soils on Single’s property. [181]. Koehnke explained: “Based on my professional judgment at the site, there were wetland present and we needed – we weren’t going to qualify those. We determined that wetlands were on site.” [181] Koehnke again averred: “I didn’t do a formal delineation when I was out there. ...Based on my professional judgment and my experience, I was able to determine that there was enough indicators of wetland soils and hydrology to require a delineation and have enough information to go through an enforcement process.” [184].

Koehnke said it would typically be standard practice for the DNR to ask the landowner about any previous ditching or tiling on the property. [170]. Koehnke saw ditching on Stingle's property but said "[w]e weren't walking around, looking for evidence of tile." [172-173]. Koehnke admitted that "[d]itch maintenance doesn't result in a discharge of fill material, is – doesn't require authorization." [186]. Koehnke also conceded the Surface Water Data Viewer map in Stuck's report, Ex. 4 at Att. B, shows hydric soils in only a small, wooded portion in the middle of Stingle's property. [187-188]. Nonetheless, Koehnke averred: "The soil itself is not defined as a hydric soil, but there are areas within that soil that have hydric soils." [188].

Part-way through Attorney Sager's questioning of Koehnke, the Circuit Court interrupted and asked defense counsel why Stingle has not removed the fill material. [168]. Defense counsel replied that it has not been removed because Stingle is contesting whether the areas where fill was placed are wetlands. [168]. The court again pressed: "My question was why doesn't your client just take whatever it is, the fill, and remove it and clean it up the way they want it to be cleaned up? Maybe you have answered it. He's just set on the position he doesn't have to. He doesn't have to comply and it's not a wetland? ...So he's just that stubborn." [168-169].

Travis Stuck

Stuck is a DNR-professionally assured delineator, which means DNR staff has reviewed his wetland reports and determined there were satisfactory. [76-77]. Stuck had previously worked as a private consultant and also worked for the NRCS doing wetland delineations. [78].

Stuck said that, in order for an area to be a wetland, the area must meet three wetland criteria – hydric soils, hydrology, and hydrophytic vegetation. [108]. Stuck agreed the purpose of filling out the wetland determination data forms, Ex. 4 at Att. I, is to ensure that the applicable standards in the Corps Manual are followed when determining whether that area meets the three requisite criteria of a wetland. [107-108]. On the wetland data determination forms, Stuck said either one primary or two secondary hydrology indicators must be present in order for the area to meet the hydrology requirement of a wetland. [118].

After conducting site visits, Stuck determined there were 12 wetlands on Stingle’s property. [68]. Stuck found there was fill in five of the wetlands. [69]. These areas are labeled by Stuck as “impacted wetlands” numbers 5, 7, and 9 and “impacted ditch-wetland” numbers 2 and 3. [70]; Ex. 4, Att. J at 4. Stuck’s findings regarding areas 2, 3, 5, 7, and 9 are summarized as follows:

Number Ex. 4, Att. J at 4.	Aerial Imagery Letter Ex. 4, Att. D at 15.	No. of Wet Signatures / No. of Photos Ex. 4, Att. F	Soil Boring (sb) Ex. 4, Att. J at 3.	Secondary Hydrology Indicators Ex. 4, Att. I.
2	E	6/6	sb7	- Saturation Visible on Aerial Imagery - Geomorphic Position
			sb2	- Saturation Visible on Aerial Imagery - Geomorphic Position
3	K	6/6	sb211	- No wetland determination data form
			sb42	- Saturation Visible on Aerial Imagery - Geomorphic Position
5	D	3/6	sb4	- Saturation Visible on Aerial Imagery - Geomorphic Position
7	I	0/6	sb212	- Surface Soil Cracks - Saturation Visible on Aerial Imagery - Geomorphic Position
9	J	3/6	sb200	- Saturation Visible on Aerial Imagery - Geomorphic Position

Stuck agreed there were prior existing ditches on Stingle’s property, labeled “impacted ditch-wetland” numbers 2 and 3, which functioned to convey water. [83, 86, 88, 130, 131, 136, 144-145]. Stuck admitted it is typically standard practice to consider the effect of ditching and tiling on a site. [145]. Stuck also admitted the Corps Manual and supplements have limitations on how to properly delineated wetlands when there is functioning drainage on site. [89]. Despite knowing this and that there were historic ditches on Stingle’s property, Stuck said he did not take that into consideration when doing his delineation. [88-91]. Stuck also said he did not know whether maintenance of a

drainage ditch was exempt under Wis. Stat. Chapter 281.36, but, regardless, he determined the entire ditches on Stingle property were wetlands and were filled. [94-96].

Regarding the area Stuck identified as wetland no. 7, Stuck admitted that, despite checking the box for the secondary hydrology indicator of “saturation visible on aerial imagery,” he, in fact, did not find any wet signatures on the 6 aerial photos he reviewed. [102, 137-138]; *see* Ex. 6, Att. D at 15 (Area “I”), Att. F at 3 (Area “I”), Att. J at 3 (Wetland 7, sb212), Att. I at 95 (sb212). Stuck said that if one aerial photo shows “one indicator, you should field truth that.” [104]. Despite that and finding no wet signatures on any of the aerial photos for wetland no. 7, Stuck decided to “field truth” that area anyway. [104].

During his field visits to Stingle’s property, Stuck said he excavated holes at least 26 inches down in order to determine if the site met a primary hydrology indicator of saturation being within 12 inches of the surface. [115-116]. Stuck admitted there had been three months of above average antecedent precipitation prior to his site visit. [148]; Ex. 4 at 4. Despite the above normal antecedent precipitation and digging down over twice the requisite 12 inches, Stuck could only find water 29 inches from the surface. [116, 149].

As Stuck was unable to determine any primary hydrology indicators were present on Stingle’s property, Stuck relied on secondary indicators – namely, aerial sign of saturation and geomorphic position – to determine that hydrology was present. [118]. Stuck admitted, however, that “[y]ou are not supposed to apply that indicator, geomorphic position, if you have clear evidence that the area’s tiled or ditched and is

effectively draining that particular feature.” [120]. Despite knowing this and knowing there were historic ditches on Stingle’s property as well as other areas in question that abutted the ditches [119], Stuck conceded there is nothing in his report that he took into consideration any potential impact the drainage ditches had on removing hydrology. [122]. Stuck did not ask Stingle for any information about drainage on site either. [124].

Finally, Stuck testified he reviewed NRCS’s wetland delineation of Stingle’s property, which is included in his report, Ex. 6 at Att. K. [77], and generally knew NRCS follows the Corps Manual for delineating wetlands. [80]. The far west portion of NRCS’s wetland delineation corresponds to the area Stuck delineated. [81]. Stuck at first said areas NRCS labeled as “PC” or prior-converted means Swampbuster provisions do not apply and the area can be tiled or drained. [86]. Stuck then reversed, saying: “I mean, honestly, if I see one of these [an NRCS wetland delineation] and I see PC, it means there’s probably a wetland there.” [87]. Stuck agreed the areas on NRCS’s determination marked in red and identified as “W” or wetland means those areas cannot be impacted in order to remain eligible for farm program benefits. [86]. Although Stuck was aware that NRCS follows the Corps Manual for delineating wetlands, Stuck stated “it’s really not worth a whole lot to me, honestly, to do a wetland determination following the ’87 manual.” [87].

Michael Graham

Graham is a wetland delineator and has done numerous wetland delineations for government regulatory and permitting matters, including delineations for the DNR and Army Corps of Engineers. [191-192, 195-196]. Graham noticed, when reviewing the data

sheets for the areas Stuck determined are impacted wetlands or ditch-wetlands, that it was improper for Stuck to use geomorphic position as a secondary hydrology indicator. [203].

Graham explained:

“The supplement, the 1987 manual, for that particular secondary hydrology indicator states that it’s not to be used in the presence of a functioning drainage system. So, if I do check that box, which I often do in depressional areas, I will want to verify that there’s no ditch, tile, or other hydrology modification that’s happened that could affect hydrology to that base even if it’s depressional.”

[203-204]. Ex. 5, which is page 110 of the Northcentral and Northeast Region Regional Supplement to the Corps Manual, states geomorphic position “is not applicable in areas with functioning drainage systems.” [204].

Graham said the ditch Stuck identified as impacted ditch-wetland number 2 has been on Stingle’s property at least since 1983, which is the oldest aerial photo in Stuck’s report. [205]. Graham characterized the ditch as “an excavated linear feature...that’s moving water.” [205]. Graham understood that Stingle put a tile in the bottom of the historic ditch and then filled it. [205]. Based on the historic ditch and tile, Graham said that, in accordance with the proper delineation procedures in the Corps Manual, “I would not be able to check the box for geomorphic position.” [206]. Graham likewise said it was improper under the Corps supplement for Stuck to use geomorphic position as a hydrology indicator for the area Stuck identified as impacted ditch wetland no. 3 “because it’s a functioning drainage system.” [217].

Similar to Stuck’s testimony, Graham testified the purpose of the data form is to ensure the Corps Manual delineation procedures are followed and, specifically, to ensure there are sufficient indicators proving an area meets hydrology’s requisite 14 consecutive

days of surface water within 12 inches of the surface during the growing season. [206-207]. Similar to ditch no. 3, Graham said it would not be proper to use geomorphic position as a secondary hydrology indicator in areas identified in Stuck's report as impacted wetland no. 5 and impacted ditch wetland no. 2 because those areas have drainage systems. [207-209]. Because Stuck identified only one other secondary indicator besides geomorphic position in those areas when a minimum of two secondary indicators are needed to show hydrology, Graham testified those areas would not meet the requisite hydrology to be considered a wetland under the Corps Manual. *Id.*

Regarding the area Stuck identified as wetland no. 7, Graham testified the Corps' off-site guidance for reviewing aerial imagery directs that, if less than 30% of the photos indicate wet signatures, then "it's not a wetland; and at that point you are not required to delineate it or...go in to determine whether there are wetlands there or not." [212]. Because Stuck did not find wet signatures in any of the six aerial photos he reviewed for wetland no. 7, *see* Ex. 4, Att. D at 15, Att. F at 3, Graham said "the conclusion should be that that's not a wetland based on the off-site methodology." [232].

Graham also testified that because the boundary of wetland no. 7 abuts drainage ditch no. 3, he would be very cautious about using geomorphic position as a hydrology indicator without further inquiry and evaluation of the impact the ditch had on removing hydrology from the surrounding area. [215-216]. Graham explained:

"If I've got a wetland that immediately abuts a ditch and it's at a higher topographic position on the ditch and slopes towards the ditch, then I would determine most likely that the geomorphic position indicator shouldn't be used [] because it's pretty clearly having some kind of a drainage influence on the wetland."

[216]. Graham testified that it would be similarly improper to use geomorphic position as a hydrology indicator in the area Stuck identified as wetland no. 9 because the area “is directly abutting the ditch.” [218-219]. According to the Corps Manual and its supplements, Graham concluded that “the use of geomorphic position on all five of the wetlands in questions was improperly used.” [232, 243]. Graham enumerated that, based on the data in Stuck’s report and in accordance with the procedures in the Corps Manual, the areas in question “wouldn’t meet hydrology, therefore, should not be determined to be wetlands.” [233, 245].

Darrin Stingle

Stingle testified that he started farming the property at issue in approximately 2005 and then purchased it around 2008. [260]. Stingle said the two ditches, which Stuck identified as impacted ditch wetland nos. 2 and 3, previously-existed on the property. [252]. At the time Stingle started farming the property, there was a 10-inch tile line that went from wetland no. 4, ran through wetland no. 5, and outletted into ditch no. 2 [252-254], as well as a tile line going through wetland no. 7 and outletting into ditch no. 3 [257-258]. Stingle said he was always able to crop through the areas Stuck identified as wetlands, even when it was a wet year. [284-285]. When Koehnke, Nedland, and Stuck conducted their site visits, Stingle said he informed them about the historic ditches and tile on the property. [270-271].

Because Stingle’s property is enrolled in the farm program [249], Stingle got a wetland delineation and approval from NRCS prior to doing any work on the property. [267]. Stingle understood that NRCS follows the Corps Manual delineating wetlands,

same as the DNR, and thus he thought he had satisfied what he legally needed to. [267]. Stingle then placed a 12-inch tile line in the bottom of drainage ditch no. 2 and put fill over the tile. [262]. Stingle placed fill in areas 7 and 9 [263-264] and removed stumps in drainage ditch no. 3, but did not place fill in it [266].

When questioned by Judge McGinnis, Stingle explained he knew from NRCS's delineation that there were a couple of wetlands on his property, which is why he only did work in areas that NRCS determined were prior converted/non-wetlands. [290-293; *see also* 295-298]. Stingle again said it was his understanding that NRCS's delineators followed the same criteria for delineating wetlands as the DNR. [293].

The Circuit Court ultimately found Stingle guilty of discharge of a dredged or fill material in a wetland without a permit in violation of Wis. Stat. § 281.36(3b)(b). [303]. The Judgement of Conviction and Sentence was entered on March 1, 2019. *See* case no. 17-FO-001430, Doc. 18. Stingle was sentenced to a forfeiture/fine in the amount of \$1,597.50 with 124 days to pay (due July 1, 2019) and was ordered to remove discharge from wetlands on his property as directed by the DNR by July 1, 2019 as well. *Id.* Stingle filed his Notice of Intent to Pursue Postconviction or Postdisposition Relief with the Circuit Court on March 7, 2019 and Notice of Appeal on March 8, 2019. Doc. 28. Stingle filed a Motion to Stay Execution with the Circuit Court on May 14, 2019, which has not yet been determined by the Circuit Court. Docs. 49 and 50. This appeal follows.

ARGUMENT

I. The Circuit Court Erred by Finding the Areas in Question on Stingle's Property Constituted Wetlands as Defined by Wisconsin Statute.

Wis. Stat. § 281.36(2m) requires the DNR to delineate wetlands according to the Corps Manual and its applicable supplements. At trial, Stuck, Koehnke and Nedland all agreed the procedures in Corps Manual and supplements are applicable to the DNR's wetland delineations for purposes of Wis. Stat. Ch. 281.36, but admitted they did not follow such procedures. It was therefore error and an improper view of the law for the Circuit Court to determine the areas in question on Stingle's property "constitute a wetland as defined by Wisconsin Statute." [301-302].

A. Legal questions are reviewed de novo.

Case law is not entirely clear on the proper standard of review regarding a trial court's view and application of the law – compare, *State v. Schmitt*, 145 Wis.2d 724, 729, 429 N.W.2d 518, 520(Ct.App.1988) (citing *State v. Halverson*, 130 Wis.2d 300, 303, 387 N.W.2d 124, 126 (Ct.App.1986)) ("A trial court abuses its discretion if it relies upon an erroneous view of the law") with *State v. Parnell*, 2000 WI App 143, ¶ 11, 237 Wis. 2d 697, 616 N.W.2d 924 (citing *State v. Keith*, 216 Wis.2d 61, 69, 573 N.W.2d 888 (Ct.App.1997)) ("In considering whether the trial court applied the proper legal standard [] no deference is due"). Nonetheless, the question here involves a question of statutory interpretation of Wis. Stat. § 281.36(2m), which seems to most properly be reviewed de novo. See *State v. Moline*, 229 Wis. 2d 38, 40, 598 N.W.2d 929, 930 (Ct. App. 1999) ("Statutory construction is a question of law which this court decides independently,

without deference to the trial court”); *Schmitt*, 145 Wis.2d at 730, 429 N.W.2d at 520 (citing *E.S. v. Seitz*, 141 Wis.2d 180, 184, 413 N.W.2d 670, 672 (Ct.App.1987)).

B. Wis. Stat. § 281.36(2m) requires the DNR to delineate wetlands according to the 1987 Corps Manual and applicable supplements.

Wis. Stat. § 281.36(2m) clearly and unambiguously requires the DNR to use the Corps Manual and applicable supplements to delineate wetlands for purposes of Wis. Stat. 281.36. “In construing [a] statute, this [C]ourt first looks to the language of the statute. If the language is clear and unambiguous, it is not necessary to resort to any extrinsic aids.” *State v. Moline*, 229 Wis. 2d 38, 40, 598 N.W.2d 929, 930 (Ct. App. 1999) (citing *State v. Denter*, 121 Wis.2d 118, 123, 357 N.W.2d 555, 557 (1984)).

Wis. Stat. § 281.36(2m) provides:

“For purposes of delineating the boundary of a wetland under this section, the procedures contained in the wetlands delineation manual published by the U.S. army corps of engineers *shall* be used. The edition of the manual that shall be used shall be the 1987 edition of the manual and any document that the U.S. army corps of engineers issues interpreting that manual.”

(emphasis added). The language of Wis. Stat. § 281.36(2m) is clear and unambiguous, so the Court does not need to look further than its plain meaning. The use of “shall” in Wis. Stat. § 281.36(2m) directs that the DNR’s use of the Corps Manual and supplements for delineating wetlands is mandatory, not discretionary.

In addition, Wis. Admin. Code §§ NR 352.01-352.03 explicitly provide that the procedures in the Corps Manual and supplements are applicable to the DNR’s delineation of nonfederal wetlands under Wis. Stat. § 281.36. *See also, State v. Harenda Enterprises, Inc.*, 2008 WI 16, 307 Wis. 2d 604, 647 n. 11, 746 N.W.2d 25, 47 n. 11 (noting “Wis. Admin. Code § NR 352.03 incorporat[es] by reference ‘[a]ll of the following federal

manual, memoranda, guidelines, regulatory guidance letters or other provision established by the U.S. Army Corps of Engineers interpreting the 1987 wetlands delineation manual shall be used when delineating nonfederal wetland boundaries.’’).

At trial, Nedland, Stuck and Koehnke all agreed the Corps Manual and supplements apply to the DNR’s delineation of nonfederal wetlands and regulation and enforcement of Wis. Stat. § 281.36. [30-31, 42-46, 107-108, 118, 183-184]. Nedland, Stuck, and Koehnke also all agreed that, pursuant to the Corps Manual, in order for an area to be a wetland it must meet three requisite criteria – hydric soils, hydrology, and prevalence of hydrophytic vegetation. *Id.*

C. The DNR failed to follow the Corps Manual and supplements in its wetland determinations and delineation on Stingle’s property.

Despite agreeing the DNR must follow procedures in the Corps Manual and applicable supplements for delineating wetlands, Nedland, Koehnke, and Stuck admitted they did not follow the procedures set forth in the Corps Manual when identifying wetlands on Stingle’s property. Specifically, Nedland and Koehnke said the DNR merely needed to do a determination on the property, not an actual delineation according to the procedures in the Corps Manual. [42, 47-48, 181, 184-185]. Nedland and Koehnke also testified that even when “confirming” a formal wetland delineation, the DNR only needed to do a determination based on Nedland’s and Koehnke’s “professional judgment,” not the actual procedures in the Corps Manual, to conclude whether DNR agreed or disagreed with the delineation. *Id.*

Regarding hydrology, Stuck did not find any primary indicators of hydrology on Stingle's property, despite above normal antecedent precipitation and boring holes over twice the requisite 12 inches deep to check for saturation. [115-116, 148-149]. The nearest saturation to the surface water Stuck found was 29 inches below the surface. [116, 149]. Moving to secondary hydrology indicators, Stuck admitted that, although he checked the box for the secondary hydrology indicator of "saturation visible on aerial imagery" for wetland no. 7, he, in fact, did not find any wet signatures on the 6 aerial photos he reviewed for the area. [102, 137-138]; Ex. 6, Att. F at 3 (Area I).

In addition, Stuck agreed that geomorphic position should not be utilized as a secondary indicator if there is evidence that an area has been tiled or ditched. [120]. Stuck, Nedland, and Koehnke all testified they knew of and saw prior-existing drainage ditches on Stingle property, and yet conceded they did not consider such drainage when doing their wetland determination and delineation. [56, 83, 86, 88-91, 130, 131, 133, 136, 144-145, 170, 172-173]. Stuck specifically admitted that, although it is typically standard practice to consider historic drainage [145], he did not do so on Stingle's property, nor did he ask Stingle about any other previous drainage on site [122, 124].

Furthermore, Stuck and Nedland were aware that NRCS follows the Corps Manual³ and had completed a wetland delineation on Stingle's property, but said they

³ The Army Corps of Engineers regulates section 404 of the Clean Water Act, which prohibits the discharge of dredged or fill material into waters of the United States. Like section 404 of the Clean Water Act, the Swampbuster provisions of the Food Security Act of 1985 regulate drainage activities in wetlands by imposing economic penalties on the farmers who convert wetlands for agricultural purposes. The definition of "wetlands" in the Food Security Act is essentially identical to the Corps' definition of wetlands for purposes of section 404. Compare, NRCS's definition of wetland, 7 C.F.R. § 12.2 ("Wetland, except when such term is a part of the term 'converted wetland', means land that—(1) Has

either did not review it or did not consider it when doing their wetland determination or delineation. [54-55, 77, 80, 86-87]. Finally, Stuck flatly said at trial that “it’s really not worth a whole lot to me, honestly, to do a wetland determination following the ‘87 manual.” [87].

The testimony from Stuck demonstrates he did not follow the procedures in the Corps Manual appropriately for Stingle’s property, and, admittedly, did not give much, if any, credence to the Corps Manual. Nedland and Koehnke likewise confirmed they merely did a cursory determination of Stingle’s property, not a delineation, that admittedly did not follow the procedures set forth in the Corps Manual and its applicable supplements. The DNR, by law and its own admissions, thus did not follow the applicable procedures in the Corps Manual and supplements, with which it must comply pursuant to Wis. Stat. § 281.36(2m) and Wis. Admin. Code §§ NR 352.01-352.03.

D. The Circuit Court erred in determining the areas in question on Stingle’s property met the statutory definition of wetlands.

Wis. Stat. § 281.36(2m) and Wis. Admin. Code §§ NR 352.01-352.03 are clear that the DNR must follow the procedures set forth in the Corps Manual and applicable supplements for wetland delineation purposes. Here, the DNR admitted to not complying

predominance of hydric soils; (2) Is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and (3) Under normal circumstances does support a prevalence of such vegetation”) with the Corps’ definition of wetlands, 33 C.F.R. § 328.3(c)(4) (“The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”). NRCS uses methods in the 1987 Corps Manual to delineate and identify wetland boundaries. *See* 7 C.F.R. § 12.2 (4), (5); <http://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/technical/?&cid=stelprdb1045954>; <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/water/wetlands/boundaries/>.

with what it is statutorily required to do. The Circuit Court therefore erred in its view and application of the law when it determined the areas found by the DNR on Stingle's property "constitute a wetland as defined by Wisconsin Statute." [301-302]. The Circuit Court's erroneous view of the law is harmful to Stingle because, if the court had properly viewed and applied the law, the areas at issue would not have met the Corps Manual's definition of a wetland and therefore would not have met the statutory definition of a wetland under Wisconsin law.

II. The Circuit Court Erred in Finding Sufficient Evidence to Convict Stingle of Violating Wis. Stat. § 281.36(3b)(b).

If this Court agrees that the Circuit Court erred in its view of law, then acquittal is warranted because there is insufficient evidence that Stingle placed fill in an area that was properly delineated and found to be a wetland in accordance with the procedures in the Corps Manual, which the DNR must comply with when delineating nonfederal wetlands.

A. Sufficiency of evidence questions are reviewed de novo.

Although the case law is not entirely clear about the correct standard of review, precedent indicates most strongly that the Court should "review *de novo* whether the evidence before the circuit court was legally sufficient to support its rulings." *Keith*, 216 Wis. 2d at 69, 573 N.W.2d at 893 (citing *State v. Hanna*, 163 Wis.2d 193, 204–06, 471 N.W.2d 238, 244 (Ct.App.1991) and *Vogel v. Grant–Lafayette Elec. Coop.*, 195 Wis.2d 198, 209, 536 N.W.2d 140, 144 (Ct.App.1995) (rev'd on other grounds) (noting that this Court may reverse a discretionary decision which was based on an erroneous view of the law)). The standard for determining if there is sufficient evidence as a matter of law to support a conviction is whether, "after viewing the evidence in the light most favorable to

the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Vega*, 206 Wis. 2d 676, 558 N.W.2d 705 (Ct. App. 1996) “In order for the [C]ourt to reverse, the evidence must be in conflict with ‘fully established or conceded facts.’” *Id.* (citing *State v. Rushing*, 197 Wis.2d 631, 641-42, 541 N.W.2d 155, 159 (Ct.App.1995)).

B. Acquittal is warranted if the Circuit Court erred in its view of law.

Acquittal or, in the alternative, reversal is warranted here if this Court determines the Circuit Court erred in its view of the law when it found the areas in question on Stingle’s property met the statutory definition of wetlands. *See State v. House*, 837 N.W.2d 645, 350 Wis.2d 478 (Wis. App. 2013) (reversing conviction for possession of marijuana after officer unreasonably prolonged traffic stop in order to conduct a dog sniff); *State v. Kiekhefer*, 569 N.W.2d 316, 212 Wis.2d 460 (Wis. App. 1997) (reversing conviction for possession of marijuana based on unwarned and involuntary statements and evidence attained derived from those statements); *State v. Wilke*, 448 N.W.2d 13, 152 Wis.2d 243 (Wis. App. 1989) (reversing revocation order following defendant’s refusal to submit to chemical test on grounds that defendant received inadequate information from arresting officer about consequences of refusing to submit); *State v. Peters*, 2009 WI App 174, 2009 WL 3209304 (Wis. App. 2009) (reversing conviction for operating vehicle while intoxicating and suppressing results of preliminary breath test that was conducted without first offering a field sobriety test).

As discussed, *supra*, Wis. Stat. § 281.36(2m) and Wis. Admin. Code §§ NR 352.01-352.03 require the DNR to delineate wetlands according to the procedures set

forth in the Corps Manual and applicable supplements. Stuck, Nedland, and Koehnke admitted they did not follow such procedures. Notably, Stuck agreed that geomorphic position is improper to use as a secondary hydrology indicator if there is a functioning drainage system. [120]. Although Stuck acknowledged the existence of prior drainage ditches on Stingle's property that admittedly removed some hydrology [83, 86, 88, 130-131, 136, 144-145], Stuck said he did not consider any such drainage systems or their effect on hydrology in his delineation, nor did he ask Stingle whether other drainage systems, like tile, were present [88-91, 122, 124]. Nedland and Koehnke likewise testified that the DNR did not even need to do any sort of formal delineation to confirm whether the agency agreed with Stuck, or any other wetland delineator's findings. [42, 47-48, 181, 184-185]. Rather, all the DNR had to do was a cursory determination that, admittedly, did not follow the procedures in the Corps Manual. *Id.*

Graham's testimony that the DNR did not follow proper procedures and protocols proscribed under the Corps Manual to delineate Stingle's property is consistent with Stuck's, Nedland's, and Koehnke's own concessions. [203-209, 212, 215-217, 232-233, 245]. The Circuit Court did not dispute the substance of Graham's testimony that the DNR did not follow proper procedures either. [302-303].

In sum, there are fully established and conceded facts that the DNR did not follow the procedures in the Corps Manual. Accordingly, if this Court agrees it was erroneous for the Circuit Court to find the areas at issue met the statutory definition of wetlands then, pursuant to Wis. Stat. § 281.36(2m), Wis. Admin. Code §§ NR 352.01-352.03 and the DNR's own admissions, acquittal or, in the least, reversal is warranted because there

is insufficient evidence to find Stingle placed fill material into an area that was properly delineated and found to be a wetland according to the procedures set forth in the Corps Manual and applicable supplements.

III. Judge McGinnis Demonstrated Objective Bias by Prejudging Stingle's Guilt.

Judge McGinnis's statements during trial and at sentencing indicate he prejudged Stingle's guilt and did not act impartially toward Stingle, which, in the least, merits reversal for a new trial before an impartial judge.

A. Questions of a circuit court's partiality are reviewed de novo.

"Whether a circuit court's partiality can be questioned is a matter of law that we review independently." *State v. Goodson*, 2009 WI App 107, ¶ 7, 320 Wis. 2d 166, 172, 771 N.W.2d 385, 388–89 (citing *State v. Rochelt*, 165 Wis.2d 373, 379, 477 N.W.2d 659 (Ct.App.1991)).

B. Judge McGinnis's statements prior to the close of evidence indicate improper bias and unfair prejudgment of guilt.

"The right to an impartial judge is fundamental to our notion of due process." *State v. Goodson*, 2009 WI App 107, ¶ 8, 320 Wis. 2d at 173, 771 N.W.2d 385 at 389 (reversing where judge demonstrated bias by promising he would sentence defendant to the maximum period of time if he violated supervision rules and later giving defendant the maximum sentence upon revocation of extended supervision based on the predicate promise) (citing *Franklin v. McCaughtry*, 398 F.3d 955, 959 (7th Cir.2005); *State v. Washington*, 83 Wis.2d 808, 833, 266 N.W.2d 597 (1978)). There is a rebuttable presumption that a judge has acted without bias. *Id.* (citing *State v.*

Gudgeon, 2006 WI App 143, ¶ 20, 295 Wis.2d 189, 720 N.W.2d 114). “When evaluating whether a defendant has rebutted the presumption in favor of the court's impartiality, we generally apply two tests, one subjective and one objective.” *Id.* (citing *Rochelt*, 165 Wis.2d at 378, 477 N.W.2d 659).

“Objective bias can exist in two situations.” *Id.* First, “the appearance of partiality constitutes objective bias when a reasonable person could question the court's impartiality based on the court's statements.” *Id.* (citing *Gudgeon*, 295 Wis.2d 189, ¶ 26). “The second form of objective bias occurs where ‘there are objective facts demonstrating...the trial judge in fact treated [the defendant] unfairly.’” *Id.* (quoting *State v. McBride*, 187 Wis.2d 409, 416, 523 N.W.2d 106 (Ct.App.1994)). Both forms of objective bias are present here.

During the State’s presentation of evidence at trial, Judge McGinnis interrupted Attorney Stager’s questioning of Koehnke and asked defense counsel why Stingle had not removed the fill material. [168]. Defense counsel was surprised by this question, but replied that the fill material had not been removed because Stingle is contesting the DNR’s assertion that the areas at issue are wetlands. [168]. Judge McGinnis again pressed:

“My question was why doesn’t your client just take whatever it is, the fill, and remove it and clean it up the way they want it to be cleaned up? Maybe you have answered it. He’s just set on the position he doesn’t have to. He doesn’t have to comply and it’s not a wetland? ...So he’s just that stubborn.”

[168-169]. Defense counsel again attempted to explain that “we’re having our day in court to make that determination in good faith. I don’t believe that these are wetland areas that the DNR has jurisdiction on.” [169].

Judge McGinnis’s questioning about why Stingle had not removed fill material from the areas that Stingle was contesting were wetlands demonstrates he already made up his mind that those areas were, legally and in fact, wetlands that Stingle should have removed fill from a long time ago without opportunity for a day in court to contest the charged offense. Based on Judge McGinnis’s statements, a reasonable person would certainly call into question the court’s impartiality, especially when counsel had earlier discussed with the court, and Judge McGinnis seemed to understand, that the sole issue at trial was whether the areas in question were wetlands. [21-25]. Judge McGinnis also made these statements prior to Stingle even having an opportunity to present evidence and defend himself.

Judge McGinnis also demonstrated bias later when, at approximately 5:25 p.m. and immediately after determining Stingle guilty [303], Judge McGinnis stated: “I have been trying to focus on or think about the last 15 minutes or so, you know, what’s the consequence?” [304] The State had just begun to provide rebuttal testimony from Koehnke at 5:15 p.m. [299], which indicates Judge McGinnis had predetermined Stingle’s guilt and was already contemplating how to sentence Stingle prior to the close of evidence. In the least, this and previous statements from Judge McGinnis would lead a reasonable person to question the court’s impartiality.

Furthermore, during sentencing, Judge McGinnis gave the DNR unfettered authority to determine the extent of restoration to be done on Stingle's property and effectively eliminated Stingle's ability to seek any further judicial relief on the matter.

Judge McGinnis stated:

"So I like to be practical and yet Mr. Stingle doesn't seem to be somebody who is going to respect authority or respect decisions. So I want to create it where that's in mind and we don't have to come back here every day and argue about it, but at a minimum there's going to be a cleanup or a remediation and a compliance with what the DNR is telling him to do." [304-305].

"Yeah. Well, I think what Mr. Stingle needs to do is give it some attention and some focus and priority and understand that we're not playing games. We are not going to. ...It's going to be you meet with the DNR, if you have to, ever day and say what else needs to get done? Is this good? If they say no, you need to do A, then Mr. Stingle is going to do A. We are not going to come back and say he did A and B and doesn't think he needs to do C and D. He needs to get it in compliance in accordance with what the DNR is telling him to do; and he needs to satisfy them." [306].

"I don't want to schedule another hearing because I don't want Mr. Stingle to think that I am going to get involved and mediate it or referee it. It's going to be the DNR making the decision, not me. ...you just get done what they tell you to get done." [307-308].

It is Stingle's constitutional due process right to be tried and sentenced by an impartial and fair judge. Judge McGinnis's statements during trial constitute bias as they indicate he had already determined Stingle was guilty prior to Stingle's presentation of evidence and prior to the close of all evidence. Judge McGinnis's statements at sentencing foreclosing Stingle from seeking additional relief from the court also indicate bias towards the DNR and unfair restriction of Stingle's right to due process. Even if the Court should determine acquittal is not warranted for the above-discussed reasons, the

Court should reverse and order a new trial in front of an impartial judge for the biased statements made by Judge McGinnis.

CONCLUSION

For the reasons discussed herein, Stingle respectfully requests the Court acquit him of the conviction under Wis. Stat. § 281.36(3b)(b). If the Court should find acquittal is not warranted, Stingle requests the Court reverse for the errors discussed herein.

Respectfully Submitted this 3rd day of June, 2019.

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CERTIFICATION OF BRIEF FORM AND LENGTH

I certify that this brief conforms to the rules contained in Wisconsin Statutes section 809.19(8)(b) and (c) for a brief and appendix produced using a proportional serif font. The length of those portions of the brief referred to in sections 809.19(1)(d), (e) and (f) is 7,546 words.

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**CERTIFICATE OF COMPLIANCE WITH
WIS. STATS. § (RULE) 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this Brief of Defendant-Appellant Darrin Stingle which complies with the requirements of Wisconsin Statutes section (Rule) 809.19(12).

I further certify that:

This electronic Brief of Defendant-Appellant Darrin Stingle is identical in content and format to the printed form of the Brief of Defendant-Appellant Darrin Stingle filed with the court and served on all opposing parties.

A copy of this certificate has been served with the paper copies of this Brief of Defendant-Appellant Darrin Stingle filed with the court and served on all opposing parties.

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CERTIFICATION OF MAILING

I certify that this brief was deposited in the United State mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on June 3, 2019.

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CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. §809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under 809.23; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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**DEFENDANT-APPELLANT DARRIN STINGLE’S
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