STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2019AP982-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

QUAID Q. BELK,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JOSEPH M. DONALD & JANE PROTASIEWICZ, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

Quaid Q. Belk was driving while intoxicated and at a high rate of speed when he "T-boned" another vehicle. He did not seek assistance to help a surviving victim. During a four-day trial, the State put on evidence that included testimony from the surviving victim, officers at the scene, officers at the hospital, a toxicologist, and accident reconstructionists. A jury convicted Belk of six felonies involving this hit and run that left the driver of the other vehicle deceased.

Belk moved for postconviction relief seeking a new trial, or in the alternative, a *Machner* hearing, arguing several claims of ineffective assistance of counsel. (R. 109:7.) Belk also sought resentencing on "new factor" grounds and on grounds that he was sentenced on inaccurate information. (R. 112.) The postconviction court denied all of Belk's ineffective-assistance-of-counsel claims without a *Machner* hearing. (R. 139.) The court also denied Belk's requests for resentencing. Belk appeals, raising two issues.

1. Did Belk's motion allege sufficient facts that entitle him to a *Machner* hearing on any or all claims of ineffective assistance of counsel?

The postconviction court held, No.

This Court should affirm.

2. Is Belk entitled to resentencing on either his "new factor" claim or his inaccurate information claim?

The postconviction court held, No.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication and oral argument are not requested. This case can be decided by applying the facts of the case to well-established case law.

STATEMENT OF THE CASE

The State originally charged Belk with two counts of duty upon striking an occupied vehicle (great bodily harm) and two counts of injury by intoxicated use of a vehicle (great bodily harm) after his car (a Chevrolet Monte Carlo) crashed into another vehicle occupied by two people, Deon Maurice Jenkins and "M.B."[1] After Jenkins died from his injuries, the State filed an amended information. (R. 6; 7; 27.) The third and final information charged Belk with 10 counts: (1) hit and run resulting in death, (2) duty upon striking occupied vehicle, (3) homicide by intoxicated use of a vehicle, (4) injury by intoxicated use of a vehicle, (5) homicide by intoxicated use of a vehicle with a prohibited alcohol concentration, (6) injury by intoxicated use of a vehicle, (7) second-degree reckless homicide, (8) second-degree reckless injury, (9) homicide by intoxicated use of a vehicle, and (10) injury by intoxicated use of a vehicle. (R. 27.)

Two weeks before trial, Belk's attorney (who at this time was Belk's *fifth* attorney) moved to withdraw, noting that communication with Belk "has broken down completely and as a result it has become impossible . . . to continue." (R. 29.) Attached to the motion was a letter from Belk. (R. 29:2.) One reason Belk wanted to fire his counsel was because counsel failed to present the "affirmative defense" of "negligence on the part of the victim." (R. 29:2.) Belk

[1] Pursuant to Wis. Stat. § (Rule) 809.86(4), the State uses a pseudonym for the surviving victim.

acknowledged that he already "had 4 differnt [sic] counsels," but he still wanted the court to "appoint another counsel." (R. 29:3.) The court denied counsel's motion.

A jury trial was held March 13–16, 2017.

Trial testimony

- *Officers at the scene*

The State's first witness was Milwaukee Police Officer Michael Michalski. (R. 158:140.) Michalski testified that he and his partner, Officer Brian Downey, were traveling in a marked squad in the 3700 block of North 27th Street, when he saw a Monte Carlo "traveling at a very, very high rate of speed." (R. 158:140, 141, 148.) Michalski noted that as the Monte Carlo passed his squad, he heard the engine of the Monte Carlo accelerate. (R. 158:141.) He estimated that the Monte Carlo was traveling at 70 mph. (*Id*.)

Michalski continued for no more than "two or three seconds" when he looked in his rearview mirror and saw the Monte Carlo "T-bone" another vehicle. (R. 158:142.) Michalski activated his lights and sirens, conducted a U-turn, and proceeded to the crash scene. (*Id*.) While approaching the crash scene, Michalski observed Belk "[r]ight next to the driver's side door" of the Monte Carlo. (R. 158:145.) Michalski testified about his observations:

> [Belk] makes - - we look right at each other, eye contact. [Belk] then attempts to run. . . .
>
> . . . .
>
> [A]nd I observed him missing a shoe. He attempted to run up on that porch of 3853 North 37th Street. And while he was running, he was looking back at me. . . .
>
> . . . .
>
> He makes it up the stairs, and I thought he was trying to conceal himself behind the railing there. And seconds later, a gentleman and a black dog exit that front door of 3853.

(R. 158:146–47.)

Once Alston exited his residence, Michalski observed Belk "attempt to run off the porch." (R. 158:147.) Michalski commanded Belk to come off the porch and lie on the ground, which Belk did. (*Id*.) Michalski took Belk into custody. (*Id*. at 148.)

At this point, Michalski noted that Belk had a cut on his left leg and scrapes on his face. (R. 158:148.) Additionally, while Belk was sitting in the squad car, Michalski noted that Belk had "glassy eyes" and the "strong odor of an alcoholic beverage on his breath." (R. 158:150.) Michalski concluded that Belk might be impaired or intoxicated. (R. 158:151.)

Belk was transported to the hospital. (R. 158:149.) Once there, Belk asked Michalski *why* Belk was being arrested. (*Id*.) Michalski explained to Belk that he believed Belk was under the influence of an intoxicated beverage. (R. 158:149–50.) Michalski also informed Belk of "the reckless driving and the injury to the person in the other vehicle." (R. 158:150.) Belk responded, "I don't drink and I was going the speed limit." (R. 158:151.) Belk also stated that it was his birthday. (R. 158:156.)

The State then called Michalski's partner, Officer Downey. (R. 159:11.) Downey testified that he observed a "silver Monte Carlo traveling at a high rate of speed." (R. 159:11–12.) He believed that the vehicle was traveling as fast as 70 mph. (R. 159:12.) After he saw the Monte Carlo speed past their squad, Downey heard "a large, a loud crash." (*Id*.) Michalski told Downey that the Monte Carlo had crashed. (*Id*.)

Michalski turned the squad around, put the lights and sirens on, and proceeded to the crash scene. (R. 159:13–14.) Downey observed Belk standing next to the driver's side door of the Monte Carlo. (R. 159:13.) Downey then saw Belk run/limp from the driver's side of the car to the front porch of

a residence. (R. 159:17–18.) Belk was missing one shoe. (R. 159:17.)

It appeared to Downey that Belk "was trying to get into the residence at first . . . [b]ut looked like he was scared off by a dog." (R. 159:18.) Belk left the porch and "he was going to run northbound," away from the officers. (*Id.*) It looked to Downey that Belk was "trying to get away from that scene." (*Id.*) Downey testified, "we found out [later] that he had a sprained ankle. I think that probably deterred him from getting away from us." (R. 159:18–19.)

Downey found it unlikely, based upon his observations of Belk's actions, that Belk was going to get assistance. (R. 159:30.) Downey based that belief upon the fact that he and Michalski "were right there with our lights and sirens, and if he was looking to get help, we were right there." (R. 159:38.) But instead, Belk ran away from them. (*Id.*)

Downey's attention then turned to the vehicle that Belk struck. (R. 159:21.) He observed the alive victim, M.B., near the vehicle's passenger side. (*Id.*) She was "bleeding from her head," complaining of stomach pain, and asking about the deceased driver, Deon Maurice Jenkins. (R. 159:21–23.) Downey testified that he never saw Belk engage M.B. in any conversation. (R. 159:22.)

- *Victim M.B.*

M.B. testified that she was dating Deon Maurice Jenkins at the time of the crash. (R. 159:42.) Relevant to this appeal, M.B. testified that she tried to get out of Jenkins' car to get help after the crash, but that she "couldn't walk." (R. 159:45, 47.) An officer came over to help M.B. breathe and keep her calm. (*Id.*) M.B. testified that Belk never checked on her, never exchanged information with her, and never told her that he was going to get help. (R. 159:48–49.)

- *Officers at the hospital*

Officer Michael Bachmann, who performed the field sobriety test on Belk, also testified. (R. 159:59–60.) Due to Belk's injuries, Bachmann was only able to perform one field sobriety test—the horizontal gaze nystagmus. (R. 159:61.) During this test, Bachmann observed several indicators of impairment. (R. 159:63, 71, 72.) Bachmann read Belk the informing the accused, and he filled out the paperwork regarding the blood draw from Belk. (R. 159:63–65.)

The State then called Officer Karl Wallich. (R. 159:74.) Wallich witnessed the phlebotomist's blood draw from Belk, and he placed the blood on police inventory. (R. 159:77.)

- *The toxicologist*

Leah Macans, an advanced toxicologist at the Wisconsin State Crime Lab, testified. (R. 159:83.) Macans had worked for the Wisconsin State Crime Lab for over 12 years. (*Id.*) She had examined thousands of items of evidence in her time as a toxicologist, and she had testified as an expert "over 30 times in toxicology." (R. 159:84.)

Macans determined that Belk's blood contained a blood alcohol level of .126 g/ml or .04 over the legal amount of .08 g/ml. (R. 159:89.) Based upon the results, Belk's BAC could have been as low as .119 or as high as .133, both of which are above the legally-allowable limit. (R. 159:90–91.) Testing also revealed that Belk had cocaine in his system. (R. 159:93–96.) Macans determined that all results were to "a reasonable degree of scientific certainty as . . . practice[d] in [the] field of toxicology." (R. 159:100.)

- *Accident Reconstructionists*

Officer Christopher Bruns, who was assigned to the Milwaukee Police Crash Reconstruction Unit, testified next. (R. 159:112.) The Crash Reconstruction Unit "respond[s] to fatal injury and serious injury car crashes and analyze[s]

them for speed dynamics." (*Id.*) Bruns initially took "about 240 hours of training through Northwestern University at their traffic institute." (R. 159:113.) Bruns also received training regarding motorcycle crash investigation reconstruction and pedestrian reconstruction, and he has attended seminars. (*Id.*)

Important on appeal, Bruns' testimony related essentially to three different topic areas. The first area dealt with the chain of custody regarding the transportation of Belk's blood. (R. 159:114–16.) Bruns testified that he took Belk's blood from the property control section and took it to the State Crime Lab. (R. 159:115.)

The second area of testimony related to Bruns' visible inspection of Belk's Monte Carlo. (R. 159:116–19.) Bruns went to the tow lot and observed that Belk's vehicle "had a spider webbing pattern from a bulge that was located in the center of the windshield." (R. 159:117.) Bruns also located several human hairs and skin from the impact area, which "indicate[d] occupant impact in that vehicle." (*Id.*) And, from looking at a photo of Belk at the time of his arrest and observing the injuries to Belk's face, Bruns testified that it appeared that Belk was not wearing a seatbelt. (R. 159:118–19.)

The last area of testimony concerned Bruns' download of the event data recorder in the air bag module of Jenkins' vehicle. (R. 159:119–33.) Bruns testified as to the speed of Jenkin's vehicle just prior to the crash, as well as data consistent with Jenkins' vehicle making a U-turn. (R. 159:126–29.) Bruns stated he was not testifying to the *accuracy* of that equipment. (R. 159:133.) The data from the recorder alone could not affirmatively prove the speed of the victim's vehicle, and the Crash Reconstruction Unit "always like[s] to back up our data that we recover with speed reconstruction." (R. 159:130.)

Officer William Hanney, also assigned to the Crash Reconstruction Unit, testified next. (R. 159:157.) Hanney had received over 400 hours of training. (R. 159:158.) Hanney testified about crash reconstructions:

> [It involves] surveying the scene at the crash site, identifying items of roadway evidence, examination of the vehicles that are involved, various systems within the vehicles, airbags, seat belts. Then all of that is used to conduct some mathematical analysis that can give us speeds of the vehicles that are involved. . . .
>
> . . . .
>
> [W]e can determine the speeds of the vehicles, direction of the vehicles are traveling, and that can be used to extrapolate if a crash would have happened if the vehicles were, say, going the speed limit or something of that nature.

(R. 159:158–59.)

Hanney described the downloading of the data recorder from Belk's Monte Carlo. (R. 159:160–63.) Like Officer Bruns, Hanney related the raw data to the jury. (R. 159:164–70.) This raw data provided that Belk's vehicle was traveling at 78 mph five seconds before the crash, at 79 mph four seconds before the crash, and braking down to 58 mph approximately one second before the crash. (R. 159:166–67.) The data recorder also indicated that the driver of the Monte Carlo was not wearing his seatbelt. (R. 159:169.)

After relating the raw data, Hanney testified to the conclusions he drew based upon his training and expertise. (R. 159:170–94.) Using the principle of "conservation of linear momentum," Hanney ascertained that the Monte Carlo was traveling between 53 and 57 mph at the point of the crash. (R. 159:182–84.) Hanney also determined that the speed of the Monte Carolo at the point of its skid marks was between 61–62 mph, while Jenkins' vehicle was estimated at approximately 12 to 13 mph. (R. 159:184–85.)

Once he determined the speeds for the vehicles involved, Hanney determined whether the Monte Carlo would have still impacted Jenkins' vehicle if Belk had been traveling the posted speed limit. (R. 159:186.) Hanney used the process called "time distance analysis":

> [Time distance analysis is] a mathematical analysis of the situation. Once we know what the speed of the vehicles were at impact, at impact, you can then back the data up and figure out how far they would have traveled at say, a constant speed of 79 miles an hour, and then figure out how far they were traveling had they been going 30 miles an hour. Then you subtract the difference. It gives you that if the Monte Carlo is going 30 miles an hour, it would have been approximately 200 to 279 feet away from the Pontiac when their paths crossed.

(*Id*.) Hanney ultimately determined that the crash occurred *because* Belk was traveling at a high rate of speed. (R. 159:187–88.)

Belk's Defense

Belk's defense at trial was that Belk was not the driver of the Monte Carlo. (R. 158:137; 160:61–62, 65.) Belk also argued that the State could not prove each and every element of each crime beyond a reasonable doubt. (R. 158:137–38; 160:61.)

Jury Verdicts and Sentence

The jury found Belk guilty of six counts (R. 84), and the court sentenced Belk as follows:

> **Count One:** Hit and Run Resulting in Death: 25 years in prison (15 years initial confinement, 10 years extended supervision) consecutive to count two and any other sentence, but concurrent with counts 3, 4, 7 and 8.
>
> **Count Two:** Hit and Run Involving Great Bodily Harm: 10 years in prison (5 years initial confinement, 5 years extended supervision) consecutive to count

> one and any other sentence, but concurrent with counts 3, 4, 7 and 8.
>
> **Count Three:** Homicide by Intoxicated Use of Vehicle: 25 years in prison (15 years initial confinement, 10 years extended supervision) consecutive to any other sentence, but concurrent with counts 1, 3, 4, 7 and 8.
>
> **Count Four:** Injury by Intoxicated Use of Vehicle: 10 years in prison (5 years initial confinement, 5 years extended supervision) consecutive to any other sentence but concurrent with counts 1, 2, 3, 7 and 8.
>
> **Count [Seven]:** Second Degree Reckless Homicide: 25 years in prison (15 years initial confinement, 10 years extended supervision) consecutive to any other sentence but concurrent with counts 1, 2, 3, 4, and 8.
>
> **Count [Eight]:** Second Degree Reckless Injury: 10 years in prison (5 years initial confinement, 5 years extended supervision) consecutive to any other sentence but concurrent with counts 1, 2, 3, 4, and 7.

(R. 139:2.)

Postconviction Proceedings

Belk moved for postconviction relief seeking a new trial, or in the alternative, a *Machner* hearing, on several claims of ineffective assistance of counsel. (R. 109:7.) Belk attached to his motion the affidavit of Reginald Alston. (R. 110.) Alston averred that on the night of the accident, he was outside of his house when he saw Belk's Monte Carlo driving at a "high speed." (R. 110:1.) Alston witnessed the collision. (R. 110:1.) Immediately after the crash, he saw Belk speak to M.B. "for about 10 to 15 seconds before Mr. Belk approached my porch." (R. 110:2.) According to Alston, "Belk was not trying to hide," and "I believe Mr. Belk may have been trying to get help." (*Id.*) Alston stated that Belk's attorney "never called me to testify during the trial." (R. 110:3.)

In the alternative, Belk's postconviction motion sought resentencing on "new factor" grounds and on grounds that he was sentenced on inaccurate information. (R. 112.) The postconviction court denied all of Belk's ineffective assistance of counsel claims without a hearing. (R. 139.) It also denied Belk's requests for resentencing. (*Id*.)

Belk appeals. The postconviction court's reasoning for denying Belk's several claims will be discussed below in the State's "Argument" section.

STANDARD OF REVIEW

The first issue on appeal is whether the circuit court erred with it denied Belk's motion without first holding an evidentiary hearing. Whether Belk's postconviction motion alleges sufficient facts to entitle him to a hearing for the relief requested is a mixed standard of review. *State v. Allen,* 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433. First, this Court determines "whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that [this Court] review[s] de novo." *Id*. If Belk's motion raises such facts, the circuit court must hold an evidentiary hearing, unless the record conclusively shows he is not entitled to relief. *Id*. However, if his motion (1) does not raise facts sufficient to entitle him to relief, (2) or presents only conclusory allegations, or (3) "if the record conclusively demonstrates that [he] is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." *Id*. This Court reviews "a circuit court's discretionary decisions under the deferential erroneous exercise of discretion standard." *Id.*

Belk also raises two issues on appeal with respect to his sentence. First, Belk argues that a new factor entitles him to "resentencing." (Belk's Br. 42.) "Whether a fact or set of facts presented by the defendant constitutes a 'new factor' is a question of law" that this Court reviews independently. *State*

v. Harbor, 2011 WI 28, ¶ 33, 333 Wis. 2d 53, 797 N.W.2d 828. "The determination of whether that new factor justifies sentence modification is committed to the discretion of the circuit court, and [this Court reviews] such decisions for erroneous exercise of discretion." *Id.*

Second, Belk argues that the court sentenced him on inaccurate information. (Belk's Br. 42.) "A defendant has a constitutionally protected due process right to be sentenced upon accurate information." *State v. Tiepelman*, 2006 WI 66, ¶ 9, 291 Wis. 2d 179, 717 N.W.2d 1. "Whether a defendant has been denied this due process right is a constitutional issue that an appellate court reviews de novo." *Id.*

ARGUMENT

I. The circuit court properly denied Belk's motion without a *Machner* hearing.

Belk argues that he is entitled to a *new trial* because he received ineffective assistance of counsel, or "in the alternative", he is entitled to a *Machner* hearing. (Belk's Br. 17, 20, 40.) But where a postconviction claim of ineffective assistance is denied without a hearing, the remedy is a *Machner* hearing; and Belk is not entitled to one.

A. Legal principles regarding *Machner* hearings and claims of ineffective assistance of counsel

This Court held in *State v. Machner* that "it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel." 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). *See also State v. Curtis*, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998) (providing that a *Machner* hearing was a prerequisite to the defendant's claim that his counsel was ineffective)."The hearing is important not only to give trial counsel a chance to explain his or her actions, but also to allow the trial court,

which is in the best position to judge counsel's performance, to rule on the motion." *Curtis*, 218 Wis. 2d at 554. "This dual purpose renders the hearing essential in every case where a claim of ineffective assistance of counsel is raised." *Id.* at 554–55. Therefore, the proper remedy to seek is not "a new trial" (Belk's Br. 20), but a *Machner* hearing to determine whether defense counsel rendered ineffective assistance. *See State v. Sholar*, 2018 WI 53, ¶ 53, 381 Wis. 2d 560, 912 N.W.2d 89 ("A *Machner* hearing is required before a court may conclude a defendant received ineffective assistance.").

Strickland v. Washington sets forth a two-part test for determining whether an attorney's actions constitute ineffective assistance: deficient performance and prejudice. 466 U.S. 668, 694 (1984). To prove deficient performance, a defendant must identify specific acts or omissions that are "outside the wide range of professionally competent assistance." *Id.* at 690. There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. Courts are to be highly deferential to "avoid the 'distorting effects of hindsight.'" *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted).

To establish prejudice, a defendant must show that there is a reasonable probability that but-for counsel's alleged errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

A defendant's claims of ineffective assistance of counsel in a postconviction motion do not automatically entitle a defendant to a *Machner* hearing. *State v. Phillips* sets forth this principle:

> A motion claiming ineffective assistance of counsel does not automatically trigger a right to a *Machner* testimonial hearing; no hearing is required

> if the defendant fails to allege sufficient facts in his or her motion, if the defendant presents only conclusory allegations or subjective opinions, or *if the record conclusively demonstrates that he or she is not entitled to relief*. . . . If the motion fails to allege sufficient facts, the trial court has the discretion to deny the motion without an evidentiary hearing.

2009 WI App 179, ¶ 17, 322 Wis. 2d 576, 778 N.W.2d 157 (emphasis added).

B. Belk's motion does not allege sufficient facts entitling him to a *Machner* hearing, and the record conclusively shows that he is not entitled to relief.

In Belk's postconviction motion, he argued that trial counsel was ineffective in several respects. Each claim is either meritless or insufficiently pled to entitle him to a hearing.

1. The record conclusively demonstrates that defense counsel was not ineffective for failing to call Alston as a witness.

In Belk's motion, he alleged that counsel was ineffective for failing to call Alston to testify. (R. 116:10.) According to Belk, he told counsel about Alston, yet counsel did not "interview or investigate what Mr. Alston had to say, or call Mr. Alston to testify at trial for the defense." (*Id*.) Belk argued that had Alston testified, his testimony would have contradicted or impeached M.B.'s as well as "the police officers' statements about Mr. Belk's behavior following the accident, upon which the State's case heavily relied." (R. 116:11.)

The postconviction court rejected this claim. It noted that Officers Michalski and Officer Downey saw Belk's Monte Carlo "scream[ ] past at around 70 m.p.h. just moments before the crash" and that "the officers made a U-turn and arrived

at the crash scene in short order."[2] (R. 139:4.) The court noted that Belk ran the opposite direction from the officers and that M.B. testified that Belk never checked on her or told her that he was getting help:

> While approaching the scene, Officer Michalski testified that he saw [Belk] at the driver's side door of the Monte Carlo and that [Belk] looked him in the eye, after which the defendant ran up the stairs to a porch at a house along the street (Alston's house). Officer Downey testified that when they approached the porch, the defendant came off the porch and appeared like he was "going to run northbound." (Tr. 3/15/17, p. 18). As the State posits in its brief, why would [Belk] run away from the officers if he was seeking help for the victims? [M.B.] testified that [Belk] did not talk to her or check on her, exchange any information with her, or tell her that he was going to get medical assistance.

(*Id.*)

The postconviction court opined that M.B. was "a very credible witness during the trial, and her testimony was amply supported by the testimony of two Milwaukee police officers." (R. 139:5.) So while "Alston's testimony *could have* operated to contradict [M.B.'s] testimony somewhat . . . that doesn't mean there is a reasonable probability that the jury would have acquitted him." (R. 139:4.) On the contrary, the court found that there was "not a reasonable probability that Reginald Alston's testimony would have persuaded the jury that [Belk] was running to seek help for the victims based on his particular actions that night -- to which three separate

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[2] While Belk argues that Alston was "the only eye witness to the accident" (Belk's Br. 21), that is simply not true. M.B. witnessed and *experienced* the hit and run, and Officer Michalski testified that he "*saw* the Monte Carlo T-bone the car." (R. 158:142 (emphasis added).) "I *see* the Monte Carlo crash." (*Id.* (emphasis added).)

witnesses testified, including two police officers who arrived on the scene immediately after the crash occurred." (R. 139:5.)

Belk argues that Alston's affidavit meets the *Bentley*[3] test of "who, what, where, when, why, and how." (Belk's Br. 22.) But a postconviction court can still deny a *Machner* hearing "if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief." *Allen*, 274 Wis. 2d 568, ¶ 12. And here, the postconviction court concluded that "counsel was not ineffective for failing to call Alston as a witness or obtain information about his statement prior to trial because there is not a reasonable probability the outcome of the trial would have been any different had he been called to testify." (R. 139:5.)

Additionally, as the State argued in its response to Belk's motion, "Alston's testimony would have solidified that [Belk] was the driver of the Monte Carlo and thus guilty of driving while intoxicated, driving with a prohibited BAC, driving while under the influence of cocaine, and 2nd Degree Reckless Homicide/Injury." (R. 137:9.) But Belk's defense was that he was not the driver of the Monte Carlo. (R. 158:137; 160:61–62, 65.) Alston's testimony thus would have hurt Belk's defense. Further, Belk made no claim, nor did he sufficiently allege in his motion, why calling a witness that would have guaranteed convictions to all except two counts was a clearly better strategy than attempting to secure acquittal on all charges.

The record conclusively demonstrates that defense counsel was not ineffective for failing to call Alston as a

[3] *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996).

witness. Belk is not entitled to an evidentiary hearing on this claim.[4]

2. Belk's claim that defense counsel was ineffective for failing to challenge the *Miranda* warnings is conclusory.

Belk next argued that counsel was ineffective when he failed to ensure that Belk received the requisite *Miranda*[5] warnings before police questioned him. (R. 116:12–13.) The procedural history of this claim indicates that on August 4, 2015, Belk's then-attorney Eugene Bykhovsky filed a motion to suppress custodial statements, alleging that Belk did not receive the required *Miranda* warnings while in custody at the hospital following the accident. (R. 8.) Shortly thereafter, Attorney Bykhovsky withdrew as Belk's counsel. (R. 10.)

During a February 5, 2016 hearing regarding a motion to withdraw from Belk's subsequent counsel, Attorney Frederick Klimetz informed the court that Belk wanted him to file a motion to suppress. (R. 150:2.) Klimetz refused Belk's request, informing the court "there are no statements from Mr. Belk that would be the subject of possible suppression." (*Id.*) Belk's final attorney (at issue on appeal) also did not pursue Attorney Bykhovsky's initial motion to suppress.

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[4] Belk conceded in his motion that Alston's testimony would only attack Count 1 (Duty Upon Striking, Resulting in Death) and Count 2 (Duty Upon Striking, Resulting in Great Bodily Harm). (R. 116:11–12.) If the Court were to disagree with the State's argument on appeal that Belk's motion was insufficient to entitle him to a hearing, Alston's affidavit applies only to whether Belk received ineffective assistance as to Count 1 and Count 2. Nothing in Alston's affidavit affects the other counts. Therefore, if the Court were to grant a hearing, it would apply to only those two counts. *See State v. Sholar*, 2018 WI 53, ¶ 58, 381 Wis. 2d 560, 912 N.W.2d 89.

[5] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Belk argued in his postconviction motion that his current attorney's failure to pursue this issue was deficient and prejudicial. (R. 116:12–13.) The postconviction court rejected this argument. It noted that Belk "does not provide *any* factual specifics about his claim in his motion for a new trial." (R. 139:3 (emphasis added).) The court is correct; Belk's motion failed to do so. (*See* R. 116.) Further, the court noted, the initial motion to suppress also did not provide any detail "and merely generalizes the issue." (R. 139:3.) The court therefore found Belk's claim "conclusory at best," and determined that it "does not sufficiently state a claim for relief." (*Id.*)

This Court should affirm. Belk presented only minimal and conclusory allegations in his postconviction motion regarding a possible *Miranda* claim. (*See* R. 116:12–13.) He never informed the court what statements should have been suppressed. (*See id.*) And he never claimed how any statements were obtained in violation of *Miranda*.[6] (*See id.*) The court appropriately denied his postconviction motion without a hearing. *See Phillips,* 322 Wis. 2d 576, ¶ 17.

3. Belk's claims that his counsel was ineffective (1) during cross-examination of the State's witnesses, and (2) for failing to call witnesses are conclusory.

Belk next argued that counsel did not conduct a "vigorous examin[ation]" of the State's witnesses—but instead counsel conducted only minimal cross-examination.

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[6] Contrary to Belk's position, the issue in front of this Court is not whether the *State* has met its burden to "prove proper *Miranda* warnings occurred." (Belk's Br. 27.) Rather, the issue is whether Belk's postconviction motion was sufficiently pled. *See Sholar*, 381 Wis. 2d 560, ¶ 47. It wasn't.

(R. 116:17.) He also argued that counsel was ineffective for failing to call a single witness. (*Id.*)

The postconviction rejected these claims as conclusory: "With respect to his [latter] claim that counsel did not call any witnesses at all at trial in his defense, [Belk] does not show what testimony any other witnesses (other than Alston) would have had to offer." (R. 139:5.) This Court should affirm. With the exception of Alston, which the State addressed above in "Section I. B. 1," Belk did not list a single witness that counsel should have called for the defense, what that witness would have testified to, or how that witness could have altered the trial. (R. 116:17; *see also* Belk's Br. 31–32.) It is a conclusory claim. "When a defendant claims that trial counsel was deficient for failing to present testimony, the defendant must allege with specificity what the particular witness would have said if called to testify." *State v. Arredondo*, 2004 WI App 7, ¶ 40, 269 Wis. 2d 369, 674 N.W.2d 647. Belk's postconviction motion failed to meet that standard. (R. 116:17.)

With respect to Belk's claim that counsel was deficient in cross-examining witnesses, it is also conclusory. While Belk denied that his claim was conclusory in his postconviction reply brief, arguing that his initial brief "contains nearly four pages of specific instances in which trial counsel failed to meaningfully examine the State's witnesses" (R. 138:7), the postconviction court disagreed (R. 139:5 n.1). It pointed out that *nothing* in Belk's motion "apprises the court with any specificity what particular questions should have been pursued which would have been reasonable probable to obtain a different result at trial." (R. 139:5 n.1.) The same is true on appeal. (*See* Belk's Br. 28–29.) "A defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding." *State v. Prescott*, 2012 WI App 136, ¶ 11, 345

Wis. 2d 313, 825 N.W.2d 515 (citations omitted). Belk has failed to do so.

Belk also alleged in his motion that counsel should have "impeached [M.B.]" and investigated the victims' actions prior to and during the accident, and that his failure to do so prohibited Belk from developing "a possible affirmative defense." (R. 116:14–15; *see also* Belk's Br. 30.) However, Belk made no claim as to *how* trial counsel should have "impeached" M.B. or better cross-examined her. He offered no evidence that M.B. could have been impeached with. His only attempt is that M.B. should have been asked questions about Jenkins' actions before the crash, but he makes no offer what those actions were. As the postconviction court noted, Belk failed to apprise the court "what he would have discovered in that regard or how it would have altered the outcome. This claim is likewise conclusory." (R. 139:6.) Again, the same is true on appeal: Belk provides no impeachment questions that counsel *should* have asked M.B. or how those questions would have affected the trial. (*See* Belk's Br. 29–30.)

Belk's claims of ineffective assistance of counsel for failing to cross-examine witnesses and failing to call witnesses are conclusory; he is not entitled to a *Machner* hearing.

4. Belk's claim that defense counsel was ineffective for failing to object to the experts' testimony is conclusory.

Belk next argued that his attorney was ineffective for failing to object to the State's three experts' testimony. (R. 138:8.) According to Belk, "the State failed to properly qualify the testimony as 'expert,' and trial counsel failed to object to or otherwise challenge the testimony." (*Id.*) The postconviction court rejected these claims as conclusory:

> The first expert was [the] toxicologist . . . whose testimony [Belk] claims trial counsel should have

> objected. On what grounds? It is wholly unknown. That the handling of the blood vials was not "fully developed" is a dead end unless [Belk] can show that it wasn't properly done. The claim is conclusory.
>
> The other two witnesses were crash reconstruction witnesses. . . .[7] [Belk] claims that counsel failed to question the admissibility of their testimony as experts, failed to object to the exhibits that were introduced during their testimony, and failed to introduce any defense to challenge or cast doubt on their opinions. Such as what? The court is left hanging on the threads of speculation. This claim is conclusory and does not set forth an adequate claim for relief.

(R. 139:6.)

This Court should affirm. Belk offered nothing to dispute any of the experts' *conclusions* as erroneous, nor did he offer any contrary evidence that would have undermined any witness's testimony. (R. 116:17–18.) The same remains on appeal. (*See* Belk's Br. 32–35.) Nor did Belk claim in his motion that toxicology or crash reconstruction are not scientific fields. (*See* R. 116:17–18.) The same remains on appeal. (*See id*.) Belk has offered nothing to support his allegations that counsel was ineffective for failing to object to these witnesses; they are conclusory claims, and he is not entitled to a hearing on this claim.

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[7] The State argued that Officer Bruns was not used as an expert witness because his testimony related to the raw data contained within the data recorder. (R. 137:11.) And, that simply relating the recorder data was not testimony that required expert training. (*Id*.) The postconviction court agreed. (R. 139:6, n.2.) Belk does not challenge this decision on appeal. (Belk's Br. 34–35.)

5. Belk's claim that counsel was deficient during closing argument is conclusory.

Belk next argued that counsel was deficient during his closing argument. (R. 116:19–20.) Belk claimed the following statements called into question defense counsel's and Belk's credibility and prejudiced Belk:

> The first job I got out of law school was here in Milwaukee County as assistant district attorney in this office. The reason why I am bringing this up, someone tell you how the DA's office works. It's divided in cells or teams. This man sitting here is probably arguably the most experienced homicide assistant district attorney in the DA's office. He don't make mistakes. He don't forget to test hair with DNA. He doesn't forget to do that blood analysis. He doesn't forget to run that shoe to put that man solely in the car. He didn't do it. You know why he didn't do it? Because he wasn't there. Because I would have put that kid in this car completely unequivocally beyond a reasonable doubt, that DNA would put him in this car.

(R. 116:19, 22 (citing R. 160:65).) Belk claims that defense counsel's references to DNA evidence was deficient because counsel "had not fully developed this line of defense and yet, during closing, he questioned the DNA testing's existence."[8] (Belk's Br. 36.) These comments, according to Belk, show that defense counsel "had no strategy or plan for Mr. Belk's defense," which was prejudicial to the defense. (Belk's Br. 37.)

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[8] While Belk highlights that defense counsel swore at the prosecutor and made "offensive and ill-mannered remarks" during a discussion of whether DNA evidence was completed (Belk's Br. 11, 36), defense counsel did not swear at the prosecutor in the jury's presence during closing argument (R. 160:81). The jury had been excused. (R. 160:78.)

First, the postconviction court rejected this claim, adopting the State's argument that it was conclusory. (R. 139:7.) This Court should affirm. Belk does not provide how a different closing argument would have led to a different result. Second, Belk's defense at trial was that he was not the driver of the Monte Carlo.[9] (R. 158:137; 160:61–62, 65.) Belk did not provide what a *better* closing argument would have included. (*See* R. 116:19–23.) And this likely is because the facts are that Belk was driving intoxicated, with a prohibited blood alcohol level, with cocaine in his system, at high speeds, when he T-boned Jenkins' car, killing Jenkins and seriously injuring M.B. Rather than go towards the police, Belk looked Officer Michalski in the eye and ran in the opposite direction. The evidence as to Belk's guilt was overwhelming.

Belk offered nothing in his postconviction motion demonstrating that counsel was deficient in his closing argument, or that there is a reasonable probability that a better closing argument would have resulted in a different result. *Strickland*, 466 U.S. at 694. Belk's allegation is conclusory, and he is not entitled to a hearing.

6. The record conclusively demonstrates that counsel's cumulative performance was not ineffective. Zero plus zero equals zero.

Belk finally argued that the cumulative effect of his counsel's deficient performance prejudiced him. (R. 116:23–24; *see also* Belk's Br. 40–42.) The postconviction court dismissed all of his individual ineffectiveness claims; it did not consider his cumulative claim. (R. 139.) This Court should reject it.

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[9] Belk's argument that counsel's closing argument "illustrates that trial counsel had no strategy or plan for Mr. Belk's defense" (R. 116:22; Belk's Br. 37) is therefore inaccurate.

The Wisconsin Supreme Court has articulated how to assess a defendant's cumulative-effect argument: "[I]n most cases errors, even unreasonable errors, will not have a cumulative impact sufficient to undermine confidence in the outcome of the trial, especially if the evidence against the defendant remains compelling." *Thiel*, 264 Wis. 2d 571, ¶ 61. "[E]ach alleged error must be deficient in law—that is, each act or omission must fall below an objective standard of reasonableness—in order to be included in the calculus for prejudice." *Id.* The *Thiel* court noted that "whether the aggregated errors by counsel will be enough to meet the *Strickland* prejudice prong depends upon the totality of the circumstances at trial, not the 'totality of the representation' provided to the defendant." 264 Wis. 2d 571, ¶ 62 (footnote omitted).

In this case, as shown, defense counsel made no actual deficient errors. There is therefore nothing to be included in the calculus for prejudice, and adding the "errors" together yields nothing. "Zero plus zero equals zero." *Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976). In light of the record and the totality of the circumstances at trial, *see Thiel,* 264 Wis. 2d 571*,* ¶ 62, Belk did not show in his postconviction motion that, but for his trial counsel's alleged cumulative errors, a reasonable probability exists that the jury would have found him not guilty.

The postconviction court did not err when it denied Belk's postconviction motion without a *Machner* hearing.

II. Belk is not entitled to sentence modification on Counts 1 and 2 because Alston's opinion is not a new factor. Nor is Belk entitled to resentencing on Counts 1 and 2 because the court did not rely on inaccurate information.

Belk argues that he is entitled to resentencing on Count 1 (hit and run, resulting in death) and Count 2 (hit and run,

resulting in injury) because of Alston's affidavit. (Belk's Br. 42.) According to Belk, Alston's statements in his affidavit are critical to Counts 1 and 2 as it relates to Belk "not fleeing the scene." (Belk's Br. 43.) Although not expressly stated, the State assumes that Belk is referring to Alston's belief (Belk incorrectly calls it "testimony"[10]) in his affidavit that Belk "may have been trying to get help" and "was not trying to hide." (*See* R. 110:2.) But Alston's belief is not a new factor. Nor has Belk shown that the sentencing court imposed a sentence based on inaccurate information because it did not have Alston's affidavit available at sentencing.

A. Legal principles of new factor claims

First, Belk argues that a new factor entitles him to "resentencing." Circuit courts have inherent authority to modify criminal sentences in certain limited circumstances. *Harbor*, 333 Wis. 2d 53, ¶ 35. One such circumstance is when a new factor warrants modification. *Id*. A "new factor" is defined as:

> a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.

Rosado v. State, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). Belk must establish that a new factor exists by clear and convincing evidence. *Harbor*, 333 Wis. 2d 53, ¶¶ 36–37. If he does so, then the circuit court must decide whether the new factor warrants modification of the sentence. *Id*. However, "if the court determines that in the exercise of its discretion, the alleged new factor would not justify sentence modification, the court need not determine whether the facts asserted by

[10] Alston has provided no *testimony*; he's provided opinions and beliefs in a postconviction affidavit. (R. 110.)

the defendant constitute a new factor as a matter of law." *Id.* ¶ 38.

Wisconsin appellate courts recognize a strong public policy against interfering with the trial court's sentencing discretion. *State v. (Denia) Harris*, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). The trial court is in a more advantageous position to consider relevant sentencing factors and the defendant's demeanor. *Id.* at 622.

The trial court is presumed to have acted reasonably in passing sentence, and the defendant has the burden of showing an unreasonable or unjustifiable basis in the record for the sentence. *Elias v. State*, 93 Wis. 2d 278, 281–82, 286 N.W.2d 559 (1980). An appellate court will not substitute its preference for a particular sentence merely because it would have fashioned a different sentence if it had been in the trial court's position. *Cunningham v. State*, 76 Wis. 2d 277, 281, 251 N.W.2d 65 (1977).

B. Legal principles of inaccurate information claims

Second, Belk argues that he is entitled to resentencing because the court relied on inaccurate information when it sentenced him without consideration of Alston's "testimony."[11] (Belk's Br. 42.) "A defendant has a constitutionally protected due process right to be sentenced upon accurate information." *Tiepelman*, 291 Wis. 2d 179, ¶ 9. In *Tiepelman*, the Wisconsin Supreme Court held that a defendant who requests resentencing due to the circuit court's use of inaccurate information must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing. *Tiepelman*, 291 Wis. 2d 179, ¶¶ 2, 26. A defendant's burden of proof, on

[11] *See* note 10, *supra.*

both prongs, is by clear and convincing evidence. *State v. (Landray) Harris*, 2010 WI 79, ¶ 34, 326 Wis. 2d 685, 786 N.W.2d 409.

Once actual reliance on inaccurate information is shown, the burden then shifts to the State to prove that the error was harmless. *Tiepelman*, 291 Wis. 2d 179, ¶¶ 3, 26, 31. "An error is harmless if there is no reasonable probability that it contributed to the outcome." *State v. Payette*, 2008 WI App 106, ¶ 46, 313 Wis. 2d 39, 756 N.W.2d 423 (*citing State v. Groth*, 2002 WI App 299, ¶ 22, 258 Wis. 2d 889, 655 N.W.2d 163).[12]

C. Alston is not entitled to sentence modification or resentencing.

As indicated above, a "new factor" claim and an "inaccurate information" claim are separate and distinct legal claims, and it appears that Belk is arguing both. (Belk's Br. 42–43). The following is how the postconviction court rejected both claims:

> The [sentencing] court did not find [Belk's] position credible that he fled the scene to seek help when he could have approached the officers to ask for assistance. Alston has provided an affidavit of what he observed on the night of the accident. In it he opines that the defendant was "not trying to hide." As

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[12]*Groth*'s prejudicial reliance test was abrogated by *Tiepelman*. *See State v. Tiepelman*, 2006 WI 66, ¶¶ 2, 31, 291 Wis.2d 179, 717 N.W.2d 1 (withdrawing prejudicial reliance language in *Groth* and other cases, and replacing it with an actual reliance standard). *Groth*'s other principles, however, are still valid. *See, e.g., State v. (Landray) Harris*, 2010 WI 79, ¶ 34 n.12, 326 Wis. 2d 685, 786 N.W.2d 409 (noting that prejudicial reliance language was withdrawn; but this withdrawal did not affect other language in the inaccurate information cases). Only when a case is overruled does it lose all precedential value. *Id.*

> the court previously indicated . . . the testimony of the two officers and the surviving victim . . . triggered the court's remark. Alston's comments and perceptions would not have caused the court to alter its position on the matter. Alston's comment was merely an opinion, not a fact, and as such, it does not support a showing of inaccurate information, which needs to be predicated on fact.

(R. 139:7.) The court therefore concluded that Belk's sentence was not based on "inaccurate factual information" and it denied his request for resentencing. (*Id.*) It also concluded that Alston's beliefs were not a "new factor for purposes of sentence modification." (*Id.*) This Court should affirm.

1. Belk fails to prove by clear and convincing evidence that Alston's beliefs constitute a new factor.

With respect to his "new factor" claim, Belk argues that Alston's beliefs that Belk was "not trying to hide" and "may have been trying to get help" are highly relevant to the court's sentence. *See Rosado*, 70 Wis. 2d at 288. Belk argues that the sentencing court "explicitly stated that it did not find credible the assertion that Mr. Belk did not flee the scene." (Belk's Br. 43.) And therefore, Alston's beliefs relate to this assertion and are highly relevant to the court's imposition of sentence. (*Id.*) This is what the *sentencing* court stated regarding Belk's fleeing:

> It appears to me, Mr. Belk, that you are a young man who has spent a fair portion of your life just trying to get over, to get away with stuff, to not truly accept responsibility. It seems to me, Mr. Belk, that it's all about what you could get away with. When I take that into account as well, that essentially anyone that in this circumstance would drive at such an excessive rate of speed knowing that they have consumed intoxicants, essentially is acting as an individual in many respects who feels that they have nothing to lose; that the rules of society, a sense of responsibility and decency doesn't apply to them. As long as you are

> out having fun, doing whatever you want, you can do that. And it is that attitude, that belief, in my opinion, which makes you a very dangerous individual. Because you will do anything or say anything to get what you want.
>
> I recall the testimony, at least one of the arguments made in this case that somehow that you were not trying to run from the police, but trying to get help. I found that to be incredible given the circumstances and the facts that were in this case. So when I take all of those factors into account, it is clear to this Court that a sentence to the Wisconsin State Prison System is necessary -- not only to address the extensive treatment needs that you present with, in particular with respect to your substance abuse issues, with a criminal mind set, but also to impose a period of retribution and punishment.

(R. 162:35–36.)

As the postconviction court subsequently determined, "Alston's comments and perceptions would not have caused the [sentencing] court to alter its position." (R. 139:7.) The court found that Alston's comments and perceptions are not *facts*. (*Id*.) Nor are Alston's comments and perceptions "highly relevant." (R. 139:7.) *See Rosado,* 70 Wis. 2d at 288 (providing that a new factor is "a fact or set of facts highly relevant to the imposition of sentence.").

Finally, even if Alston's comments and perceptions *were* a new factor, the postconviction court did not erroneously exercise its discretion in denying Belk relief. Rather, the court's order explains *why* it did not think Alston's beliefs warranted sentence modification: "[T]he testimony of the two officers and the surviving victim, [M.B.], triggered the court's remark [about Belk fleeing the scene]. Alston's comments and perceptions would not have caused the court to alter its position on the matter." (R. 139:7.) Belk is not entitled to sentence modification based on a new factor with respect to Counts 1 or 2.

2. Belk fails to prove by clear and convincing evidence that the sentencing court relied on inaccurate information when it imposed its sentence.

Belk finally argues that the sentencing court relied on inaccurate information when it imposed its sentence without having Alston's "testimony." (Belk's Br. 42–43.) The postconviction court rejected his claim and determined that Belk was not sentenced on inaccurate information. (R. 139:7.)

This Court should affirm. Belk fails to show by clear and convincing evidence that Alston's *belief* is accurate information. *Tiepelman*, 291 Wis. 2d 179, ¶¶ 2, 26. Consequently, Belk also cannot prove that the court actually *relied* on any inaccurate information without having it. *See id*.

Finally, even if actual reliance on inaccurate information is shown, the error was harmless. *See Payette*, 313 Wis. 2d 39, ¶ 46. Here, there is no reasonable probability that the absence of Alston's beliefs contributed to the sentence imposed. As the postconviction court expressly determined, "Alston's comments and perceptions would not have caused the court to alter its position on the matter." (R. 139:7.) Belk is not entitled to resentencing on Count 1 or 2.

CONCLUSION

This Court should affirm Belk's judgment of conviction and the order denying his motion for postconviction relief.

Dated this 18th day of October 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 8,575 words.

Dated this 18th day of October 2019.

_____
SARA LYNN SHAEFFER
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 18th day of October 2019.

_____
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