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STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT II

Case No. 2020AP226-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY L. HINEMAN,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and
Order Denying Postconviction Relief,
Entered in the Racine County Circuit Court,
the Honorable Mark F. Nielsen, Presiding.

BRIEF AND APPENDIX
OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

Jeffrey L. Hineman was charged with and convicted of first-degree sexual assault of a child under the age of 13 for allegedly touching, over clothing, the private parts of six-year-old SJS, some time between October 2014 and March 2015. The investigation into Hineman's criminal conduct was triggered by a March 12, 2015 child protective services (CPS) report that identified Hineman as the alleged maltreater of SJS. Although this report was the basis for the criminal investigation and the investigating officer testified about its contents at trial, this report was not provided to the defense.

1. Was Hineman denied his due process right to all exculpatory impeachment evidence when the state failed to turn over the March 12 CPS report?

   The circuit court answered no.

2. Was Hineman denied effective assistance of counsel when trial counsel:

   A. failed to obtain the March 12 CPS report before trial;

   B. failed to make an opening statement;

   C. failed to object to improper expert testimony; and

   D. conceded guilt during closing arguments.

   The circuit court answered no.

3. Is Hineman is entitled to relief in the interests of justice?

The circuit court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Hineman anticipates the briefs will fully address the issues and therefore does not request oral argument. Publication may be warranted to clarify when the state must turn over CPS reports.

STATEMENT OF THE CASE

Hineman was a family friend of the S. family and a father figure to six-year-old SJS. Hineman had been romantically involved with SJS's mother at the time of SJS's birth and cared for SJS until his mother moved out-of-state when SJS was 14-months old. (78:61-62,129-130). A few years later, SJS returned to Wisconsin, to the custody of his biological father, Frank S.[1] (78:62). Sometime after that, Hineman reached out to SJS's paternal grandmother, Mary S.[2] and reestablished contact with SJS. (78:62, 132).

[1] For ease of reading and to avoid confusion of multiple individuals with the same surname, this brief will refer to Frank S. simply as Dad.

[2] For ease of reading and to avoid confusion of multiple individuals with the same surname, this brief will refer to Mary S. simply as Grandma.

Hineman loved SJS and considered him a step-son. (78:137, 147). He bought him gifts, took him places and cared for him. (78:63, 137-138). Grandma explained that Hineman was "very, very nice to [SJS], to the family. We were glad he was back in [SJS's] life." (78:62-63). Hineman was even the primary caregiver for SJS during a two-week period in the fall of 2014, when Dad was in the hospital. (78:63-64). In the spring of 2015 however, the family abruptly cut off all contact with Hineman. (78:66). Hineman had no idea why. (78:137-138).

Unbeknownst to Hineman, SJS's private therapist had developed a concern that SJS was being sexually abused because he had been exhibiting behavior problems and because he was overheard making a reference to the pleasures of oral sex at school. (48:3). On March 12, 2015, the therapist reported her concerns to CPS. (48:4). The March 12 CPS report cites a series of conversations between the therapist and Dad, SJS's school and SJS in which the therapist concludes that Hineman was the source of SJS's knowledge about oral sex and the CPS report identifies Hineman as the "alleged maltreater." (48:2-3). The specific details of the therapist's conversations however, are not provided in the report. (48:3-4). In any event, the March 12 CPS report was faxed to the Racine County Sherriff's Office and as a result Officer Tracy Hintz began a criminal investigation into Hineman's alleged sexual abuse of SJS. (41:29-31, App. 114-116).

On August 5, 2015, five months after Hineman was identified as the alleged maltreater, SJS participated in a child advocacy center (CAC) forensic interview where, for the first time, he disclosed that Hineman touched him inappropriately. (86). During the interview however, SJS was inconsistent in his statements and did not provide a linear narrative about what happened or when. For example, SJS described an instance in which Hineman touched his private parts over his clothing while they were on the couch, and then Hineman laughed. (86 at 10:07:25-52).[3] SJS stated it had had happened four times, but then stated it had happened six times. (86 at 10:25:08; 10:11:15). When asked to talk about details of one of the other times, SJS said simply, "That was all." (86 at 10:12:20). It was never clarified if SJS was alleging more than one incident. (86 at 10:26:28). When specifically asked if the touching happened around the two-week period in which Hineman stayed with him, SJS said he did not remember. (86 at 10:27:00). There was, however, one consistent remark: SJS repeatedly reported that after Hineman touched him, he immediately told his parents, who were at home, and Hineman was then thrown out of the house. (86 at 10:15:56 10:26:49 10:07:49 10:08:08 10:10:23).

[3] A transcription of the CAC video was not prepared for trial, however Hineman had one prepared postconviction. *See* Exhibits 2 and 3 to the postconviction motion. (41:32-64).

The day after the CAC interview, Hineman was charged with one count of first-degree sexual assault of a child under the age of 13. (1). A trial was held on May 9-11, 2017. The state called four witnesses, but little evidence was presented about how the alleged sexual assault actually happened. As noted by the circuit court, the trial "was a contest of credibility in many ways. [Hineman] against the child.... [T]he verdict could have gone either way." (80:24).

The trial began, as trials usually do, with the state's opening statement previewing the evidence it believed would show Hineman's guilt. (78:16-18). When it was the defense's turn, defense counsel opted not to give an opening statement. (78:18).

Testimony began with forensic interviewer, Heather Jensen, who discussed her background and training and the techniques she used when interviewing SJS at the child advocacy center on August 5, 2015. (78:19-40). Although not noticed as an expert, she also testified about research on the implications of "piecemeal" and "delayed disclosure" and why children do not disclose right away. (78: 27-31; App. 117-121). This expert testimony by a lay witness was not objected to. The jury then watched a video recording of the CAC interview in full.

After the CAC interview was played for the jury, nine-year-old SJS testified about the assault that had allegedly occurred two-and-one-half years prior. SJS's trial testimony, like the information he provided during his forensic interview, lacked details.

Six times SJS answered the question about what had happened with Hineman with "I don't remember." (78:47-50). But he eventually testified that the inappropriate touching happened one time, on one specific day: Hineman touched SJS's penis the day after Halloween in the fall of 2014. (78:49, 53). SJS then reiterated his CAC interview statements that after it happened, he told his dad and grandmother. (78:55).

Grandma then testified, primarily about the family's relationship with Hineman, her son's illness in the fall of 2014 and SJS's behavior problems. (78:62-67). Grandma did not witness or have any personal knowledge of an assault and she confirmed that SJS never told her, or to her knowledge Dad, about any alleged assault. (78:67).

Next, the jury heard from Officer Hintz, who testified about her significant training and experience investigating child sexual assaults, and then about her interview with Hineman. (78:92-102). Hintz explained Hineman's behavior was concerning to her because he was buying gifts for SJS and doing things for the family, which "in the totality of everything" was "described as grooming." (78:94-95, 91, 92). When the prosecutor began asking Hintz about where she learned about the "concept of grooming" defense counsel objected because this was expert testimony, Hintz had not been noticed as an expert, and the police reports had not said anything about grooming. (78:92). The objection was sustained. (78:92).

Officer Hintz also testified that it was her belief that the March 12 CPS report contained a statement that SJS had reported Hineman had touched SJS inappropriately. (78:107-09; App. 122-124). The March 12 CPS report contains no such statement. (48:2-7). This testimony was not impeached.

Last, Hineman testified. Hineman discussed his relationship with the family and SJS. Hineman unequivocally stated that he never touched SJS on his penis. (78:140).

During closing arguments, for some unknown reason, defense counsel said "I believe the sexual assault happened. It happened the day after trick-or-treating. It happened when his dad wasn't there. It would have had to happen when he was watching SJS during those two weeks." (79:24; App. 127).

Hineman was convicted and sentenced to 25 years in prison, with 17 years of initial confinement followed by 8 years extended supervision.

Hineman brought postconviction motions seeking postconviction discovery and alleging a multitude of constitutional violations. (40, 41, 42, 55). The circuit court ordered the department of health services to provide Hineman with the March 12 CPS report as well as two other related CPS reports but denied all other claims. (47, 62; App. 101-113). This appeal follows.

Other details about the investigation, the trial and the postconviction litigation will be provided below.

ARGUMENT

First-degree sexual assault of a child is among the most serious of crimes, and it carries among the most significant penalties. To protect the interests of both the public and the accused, a conviction for such a grave and harshly punished offense must be the product of a complete investigation and a fair trial.

In this case, the state refused to provide the defense with the child protective services report that identified Hineman as a suspect in sexually abusing a child, and which triggered the criminal investigation leading the charges in this case. As a result, when Hineman's case went to trial, the defense remained unaware of when, where, and to whom the initial disclosure was made; how many times the alleged victim was questioned; and other critical facts. In other words, the defense couldn't assess or challenge the completeness of the investigation and was denied information necessary to render a fair trial possible.

In addition to that, defense counsel made multiple, constitutionally significant errors both before and during trial: she failed to obtain the March 12 CPS report; failed to make an opening statement to the jury; and failed to object to improper

expert testimony elicited by the state at trial. Perhaps most shocking, defense counsel conceded Hineman's guilt in her closing argument.

The state's refusal to grant the defense access to the March 12 CPS report, combined with defense counsel's ineffective representation, deprived Hineman of a number of important constitutional rights. Hineman, who has fervently maintained his innocence from the inception of this case, is thus entitled to a new trial—one in which he has full access to the evidence against him and the effective representation necessary to challenge it.

I. The State's Failure to Turn Over the March 12 CPS Report Was in Violation of Hineman's Due Process Rights and *Brady v. Maryland*, 373 U.S. 83 (1963).

A. The March 12 CPS report.

Law enforcement first identified Hineman as a suspected perpetrator of a child sexual assault in the police report drafted by Officer Hintz on July 14, 2015. (41:29; App. 114). This police report states that on June 5, 2015, the Racine County Sheriff's Office received a faxed copy of the March 12 CPS report concerning six-year-old SJS. (41:30; App. 115). Officer Hintz's report summarizes the allegations contained in the March CPS 12 as follows:

> The [March 12 report] indicates that [SJS] was sucking on a pen at school and told a classmate it feels good to have your privates sucked on. [SJS] said he learned it in a Garfield book but then stated it was from the Garfield 2 movie. The reporter spoke to [Dad] about it and [SJS] indicated that [Hineman] had told him. No specific information was given on if [Hineman] touched [SJS] or forced [SJS] to touch [Hineman].

(41:30; App. 115).

The police report does not identify who the reporter of the incident was, nor does it describe the chronology or contents of the conversations that were had between the reporter, Dad, and SJS. In other words, the police report contains no statement of exactly what was disclosed to whom or why, even if Hineman had made a reference to oral sex in front of SJS, was he suspected of sexually assaulting SJS.

Postconviction, the defense obtained the March 12 CPS report. The report reveals that the reporter was not a teacher, as suggested by Hintz's police report; rather, the reporter was SJS's therapist, Lisa Erickson of Burlington Behavioral Health. (48:2). The March 12 CPS report further reveals that the concerns raised in the report were "due to SJS's recent behaviors." (48:2).

The therapist cited "conversation[s] with [SJS]'s school, [SJS] and [Dad]" as the source of the information she provided to CPS, and the narrative of the report implies Hineman was implicated based on

a report of a private conversation between Dad and SJS, but like Hintz's police report, the March 12 report does not precisely describe details of any of these conversations, including how the conversations were initiated, or the extent to which SJS was questioned. (48:2). The March 12 report does clearly state "no information was given by [SJS] that [Hineman] had touched him or forced SJS to touch [Hineman]." (48:3). And although the March 12 report identifies Hineman as the "alleged maltreater" of SJS, the report repeats in its conclusion that "[t]here has been no disclosure of maltreatment by the child." (48:5, 6).

B. The March 12 report was exculpatory impeachment evidence and the prosecution's failure to turn it over was in violation of Hineman's constitutional rights.

The circuit court determined that "it certainly would been have [sic] preferable if the CPS reports had been obtained by the defendant prior to trial" but the lack of this evidence was not material or prejudicial, and thus no *Brady* violation occurred. (62:6-7; App. 106-07). This ruling is incorrect however, because the March 12 report was exculpatory impeachment evidence that would have been used to impeach Officer Hintz's materially false and prejudicial statements at trial that the March 12 report contained an allegation that Hineman had assaulted SJS. In a case that "could have gone either

way," had this false testimony been impeached, there is a reasonable probability that Hineman would have been acquitted. (80:24).

The suppression by the prosecution of evidence favorable to an accused violates due process when the evidence is material to guilt, irrespective of the good or bad faith of the prosecution. *State v. Harris*, 2004 WI 64, ¶¶12-15, 272 Wis. 2d 80, 680 N.W.2d 737, (citing *Brady*, 373 U.S. at 87). Evidence is favorable to an accused when, "if disclosed and used effectively, it may make the difference between conviction and acquittal." *Id.*, (quoting *United States v. Bagley*, 473 U.S. 667, 676, (1985)). *Brady* evidence encompasses both exculpatory and impeachment evidence. *Id.*

In order to establish a *Brady* violation, the defendant must, in addition to demonstrating that the withheld evidence is favorable to him, prove that the withheld evidence is "material." *Id.*, ¶13. Unlike the almost impossibly high standard applicable when challenging sufficiency of the evidence, evidence is considered material in this context when there is merely a "reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.,* ¶14 (quoting *Bagley*, 473 U.S. at 676). This is the same prejudice test as in an ineffective assistance of counsel claim, articulated in *Strickland v. Washington,* 466 U.S. 668 (1984). *Id.* (*See also infra* Section II). In deciding whether a *Brady* violation

occurred, "[t]he reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response." *Id.* (quoting *Bagley,* 473 U.S. at 683).

On appeal, whether undisputed facts establish a *Brady* violation is reviewed de novo. *See State v. Rockette*, 2006 WI App 103, ¶39, 294 Wis. 2d 611, 718 N.W.2d 269.

1. The state had a duty to provide the CPS report to the defense.

The March 12 report, the report that triggered the investigation and eventually lead to the charges in this case, contained no allegation of sexual abuse by Hineman. The report contained summaries of statements made by Dad and SJS that described what Hineman allegedly said to SJS, however, the report concluded that "[t]here ha[d] been no disclosure of maltreatment by the child." (48:6). The report was therefore unambiguously favorable to the accused.

"The state is charged…with knowledge of material and information in the possession or control of others who have participated in the investigation or evaluation of the case and who … regularly report … to the prosecutor's office." *State v. DeLao*, 2002 WI

49, ¶24, 252 Wis. 2d 289, 643 N.W.2d 480, (citations omitted). The favorable March 12 report was faxed to the sheriff's office and therefore in possession of law enforcement, it was part of Officer Hintz's evaluation and investigation of the case, and Officer Hintz regularly reports to the prosecutor's office: the report was discoverable. *Id.; see also* Wis. Stat. § 971.23(1)(e) and (h).

The state's position pre- and post-trial was that it need not turn over the March 12 CPS report because it was confidential. (82:15). Hineman argued postconviction that he was entitled to the report under the due process clause as well as the discovery statutes and, to the extent it was not automatically discoverable, the circuit court had authority to conduct an *in camera* review under *Pennsylvania v. Ritchie,* 480 U.S. 39 (1987), and order the release of any relevant and material information. (41, 88, 91). The circuit court, however, believed did not have the authority to review or release this document, and therefore directed postconviction counsel to file a motion pursuant to *State v. Bellows,* 218 Wis. 2d 614, 582 N.W. 53 (Ct. App. 1998) in the juvenile court. (87, 88, 89, 91). The defense did so and after hearing on the *Bellows* motion as well as after confidential communications between the juvenile and criminal court judges, the report was released. (46, 47).

The fact that the report is also subject to confidentiality provisions of the Children's Code does not exempt the state from its discovery obligations in a criminal case. The report was and continues to be

confidential to the public. The investigating officer's possession of the document however, shows it was not confidential to the prosecution and it similarly should not have been confidential to Hineman. Further, because the March 12 report identified Hineman as the "alleged maltreater," Hineman was a "subject of the report." (*See* Wis. Stat. § 48.981(1)(h) defining subject of the report as "[a] person who is suspected of abuse or neglect."). Wisconsin Stat. § 48.981's confidentiality provisions do not apply to the subject of the report. *See* Wis. Stat. § 48.981(7)(a)(1) (the reports and records may be disclosed to "the subject of a report"). Confidentiality under the Children's Code is simply not a basis to withhold exculpatory evidence in a criminal prosecution.[4]

Although Hineman successfully obtained the documents through the *Bellows* procedure, Hineman maintains this procedure was unnecessary and inappropriate because the March 12 CPS report was not confidential to him and he had a due process and statutory right to have this report provided to him through discovery.

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[4] *See also* Wisconsin Attorney General Opinions, 77 Op. Atty. Gen. 84 (1988) (under Wis. Stat. § 48.981(7)(a)1. and (c)), a county department of social services has no discretion to refuse to disclose reports and records of child abuse or neglect to the subject of such a report or to the subject's attorney); 81 Wis. Op. Atty. Gen. 66 (1993) (a district attorney may reveal the contents of a report made under Wis. Stat. § 48.981 in the course of a criminal prosecution).

2. The March 12 CPS report was exculpatory impeachment evidence.

The March 12 CPS report was clear exculpatory impeachment evidence that went to an issue at the heart of the dispute – the reliability of when and how SJS disclosed that Hineman had sexually assaulted him. Officer Hintz testified – twice – that it was her belief that the March 12 report, which had triggered her investigation, contained a statement that SJS had alleged he had been inappropriately touched by Hineman: "*I believe in the CPS report, that there was a statement in there that he said Jeff had [touched him]*." (78:107) (emphasis added). When defense counsel attempted to impeach the officer with her police report – "But if you were told that, you would have then put it in your report?" – Hintz replied, "I would think I would have but it's not – I might not put it in there but that's why I would have to look at the report and look at the original CPS. *I believe it does state that he later says that*." (78:108) (emphasis added).

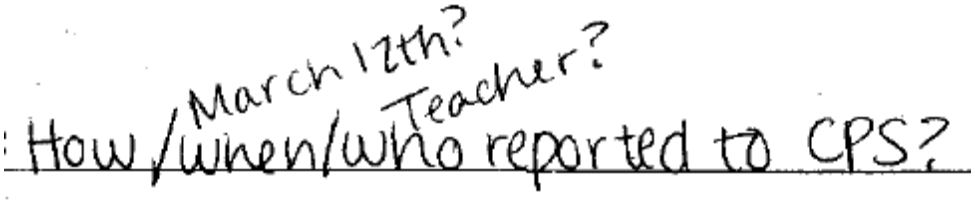
This is a blatant misstatement of fact. The March 12 report contained no statement that SJS had alleged that he had been touched by Hineman. Officer Hintz did not say, "I don't remember what the CPS report said, it might have said that, it might not have said that;" rather, she unequivocally testified, "I believe it does state that he later says that." (78:108). Without having the March 12 report, defense counsel was unable to impeach the officer's

false testimony and the jury was left with the impression that it was reported that SJS had disclosed an assault by Hineman as of March 12.

3. The withheld March 12 report was material to the defense.

This exculpatory impeachment evidence was material to the defense because it could have been used to impeach Officer Hintz's false testimony that the March 12 report contained a statement that SJS had previously reported inappropriate touching. Had this evidence been used to impeach Officer Hintz, there is a reasonable probability the jury would have acquitted.

The record, as evidenced by Jury Question #1 reproduced below, shows the jury was concerned and wanted more information about the circumstances of the disclosure that lead to the March 12 report:



(22).

The significantly delayed disclosure in this case –occurring months after Hineman had become a suspect and nearly a year after it allegedly happened –undermined the reliability of SJS's eventual accusation. Had the impeachment evidence come out

at trial, not only would it have confirmed that there had been no disclosure prior to the August 5 CAC interview, it would have raised questions as to the integrity of the investigation. Officer Hintz either knowingly fabricated this testimony or she was suffering from tunnel vision.[5] Either way, if the jury saw defense counsel impeach the investigating officer, it would have suggested to them that the investigation was in some way tainted. This would have been a severe blow to the state.

Without evidence to the contrary, it is reasonably probable that the jury credited Officer Hintz's false testimony that SJS had previously disclosed inappropriate touching by Hineman and that the disclosure was described in the March 12 report. If the jury believed SJS had been consistently stating that Hineman had inappropriately touched him, it is far more likely that the jury would have concluded that this did in fact happen, despite the inconsistencies as to the specifics of the touching during the CAC interview and trial testimony. In a trial that turned on the reliability and credibility of SJS's statements, the testimony of the investigating officer that it was her belief that SJS had told adults

[5] "Tunnel vision" is where lead actors in the criminal justice system "focus on a suspect, select and filter the evidence that will 'build a case' for conviction, while ignoring or suppressing evidence that points away from guilt." Keith A. Findley & Michael S. Scott, The Multiple Dimensions of Tunnel Vision in Criminal Cases, 2006 WIS. L. REV. 291, 292 (2006).

in his life that he had been assaulted by Hineman as early as March 12 strengthened the reliability–to say the least–of SJS's later accusations.

In a case that "could have gone either way" there can be no confidence in the verdict when the investigating officer made a material misstatement about when SJS first said that Hineman had assaulted him, particularly when the jury asked a question exactly on that point. (80:24). It is more than reasonably probable that had defense counsel possessed the exculpatory CPS report and impeached the officer, the jury would have acquitted. Because counsel did not have this report and could not use it, confidence in the verdict is undermined; vacatur is required.

II. Mr. Hineman Is Entitled to a New Trial Because He Was Denied Effective Assistance of Counsel.

Criminal defendants are guaranteed the right to effective assistance of counsel under both the United States and Wisconsin Constitutions. U.S. CONST. amends. VI and XIV; WIS. CONST, art. I, § 7; *Strickland*, 466 U.S. 668 (1984). In order to prevail on a claim of ineffective assistance of counsel, a defendant must establish that counsel was deficient, and that the deficiency prejudiced the defendant. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged."

Strickland, 466 U.S. at 696. "In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Id*.

In assessing whether counsel performed deficiently, a reviewing court considers whether counsel's actions or omissions, in light of all the circumstances, fell outside the wide range of professionally competent representation. *State v. Pote*, 2003 WI App 31, ¶¶13-16, 659 N.W.2d 82 (citing *Strickland*, 466 U.S. at 690). Strategic trial decisions rationally based on facts and law do not support a claim of ineffective assistance of counsel. *State v. Elm*, 201 Wis. 2d 452, 549 N.W.2d 471 (Ct. App. 1996). When assessing whether a defendant was prejudiced by counsel's deficient performance, a reviewing court considers whether, if not for counsel's errors, there would be a reasonable probability of a different outcome. *Pote*, 60 Wis. 2d 436, ¶¶13-16.

Importantly, "[a] defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. Instead, "a reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694. The Wisconsin Supreme Court has recently reaffirmed this distinction after acknowledging a persistent misinterpretation of the standard: "We reiterate that the *Strickland* prejudice test is distinct from a sufficiency of the evidence test

and we confirm that a defendant need not prove the outcome would 'more likely than not' be different in order to establish prejudice in ineffective assistance cases." *State v. Sholar*, 2018 WI 53, ¶44, 381 Wis. 2d 560, 912 N.W.2d 89.

Notably, in a case such as this one where there are numerous deficiencies, instances of deficient performance may viewed cumulatively in the analysis of whether there is prejudice. *State v. Thiel*, 2003 WI 111, ¶41, 264 Wis. 2d 571, 665 N.W.2d 305. The deficiencies discussed below, viewed cumulatively, and in light of the fact that the state did not have strong evidence of guilt, undermine confidence in the verdict; Hineman is entitled to a new trial.

Ineffective assistance claims present mixed questions of fact and law. *Sholar,* 381 Wis. 2d 560, ¶35. The circuit court's factual findings are upheld unless shown to be clearly erroneous, but "[t]he ultimate conclusion as to whether there was ineffective assistance of counsel is a question of law reviewed de novo. *Id.* (quotations omitted). Here, the circuit court determined trial counsel was neither deficient nor did any alleged deficiency prejudice the defendant. The lower court was wrong, however because trial counsel was ineffective in multiple respects:

A. Failure to file a motion to compel the production of the March 12 CPS report

A reasonable, prudent attorney, upon reading Officer Hintz's police report provided in discovery and seeing the sheriff's office was in possession of the March 12 CPS report, would not have gone to trial without first obtaining the report. Defense counsel testified that she did not seek the March 12 CPS report because she did not believe it had anything to with the sexual assault. (82:49). But this is not a reasonable decision. *See State v. Domke,* 2011 WI 95, ¶49, 337 Wis. 2d 268, 805 N.W.2d 364 (strategic trial decisions must be reasonable).

As discussed above, the police report made clear that the March 12 report contained statements made by the complaining witnesses, identified Hineman as a suspect, triggered the investigation into the alleged assault and was likely exculpatory. Hineman has a due process right to challenge the reliability of the investigatory process by which he became a suspect. *See State v. DelReal,* 225 Wis. 2d 565, 571, 593 N.W.2d 461 (1999) (citing *Kyles v. Whitley*, 514 U.S. 419, 444 (1995)). Further, as evidenced by the jury's question during deliberations, any person evaluating Hineman's guilt or innocence – much less his own lawyer – would want to know the circumstances regarding how he became a suspect. (22). It was therefore not reasonable to conclude, as trial counsel did, that the report was not related to the allegations of sexual assault. (82:49). In addition,

defense counsel testified she did seek the disclosure of the document – and when she did, the state refused to provide it, telling her the state "did not have access to the CPS report." (82:15). The fact that she did seek the document undermines her testimony that she did not believe it to be relevant.

Hineman was prejudiced by counsel's failure to obtain this document because, as discussed *supra* in Section I(B)(2 and 3), the investigating officer materially and falsely testified about what the document contained and defense counsel was unable to effectively impeach the false testimony. This reason alone shows prejudice and therefore requires vacatur.

But in addition to this, had counsel obtained the March 12 report prior to trial, the whole trajectory of the defense investigation and strategy would have been altered. The March 12 report reveals the therapist, not the teacher, reported the concerns about SJS to CPS and that her reasons for the concerns were "due to [SJS]'s recent behaviors." (48:4). Thus, the March 12 report reveals not only that the therapist was aware of a concern that SJS was being sexually abused by Hineman, it was the therapist herself who developed the concern while she was treating him. Defense counsel testified that had she known that the therapist was the reporter she would have filed a motion to obtain the treatment

records under *Shiffra/Green*.[6] And this makes sense. It is likely the topic of Hineman's alleged abuse came up in therapy as any therapist who believed she was treating a child who had been sexually abused would therapeutically help the child cope with the effects of abuse. At the very least, the treatment records would have documented the conversations had by the therapist that were cited in the March 12 report. These conversations would shed light on how exactly Hineman became suspected not just of speaking inappropriately to SJS, but also of sexually abusing him.

Further, had counsel filed motions pre-trial to obtain the March 12 CPS report, she likely would have obtained the related April 20 and May 29 CPS reports that were released to the defense in response to Hineman's motion for postconviction discovery. (47, 48). These reports contain significant information that was unknown and uninvestigated by the defense. Had counsel obtained these reports and presented the information contained within at trial, SJS's credibility would have been further undermined.

The subsequent reports repeat the original allegation that Hineman had at some time prior to March 12 made a comment regarding oral sex in front of SJS, and as a result, was suspected of

[6] *State v. Shiffra,* 175 Wis. 2d 600, 605, 499 N.W.2d 719 (Ct. App. 1993); *State v. Green*, 2002 WI 68, ¶34, 253 Wis. 2d 356, 646 N.W.2d 298

abusing SJS. (48:10, 15). But, despite repeating this allegation, the subsequent CPS reports do not contain any other new information suggesting Hineman had done or said anything else that was cause for concern.

The April 20 and May 29 CPS reports both state that the reason each of the subsequent reporters, a nurse practitioner, a schoolteacher and school counselor, were making the report was because SJS's behaviors were continually declining. (48:8, 13). The April 20 report says "that both Dad and Grandma feel that someone must be abusing him since his behavior is getting worse" and the May 29 report states "the concerns today for [SJS] are his continuation of defiant behaviors at school resulting from what is believed to be sexual abuse by a former family friend." (48:10, 15).

The April 20 report states that Grandma and Dad took SJS to be examined by a physician for signs of sexual abuse and that "there [was] nothing from his doctor who examined [SJS] that any type of sexual abuse has taken place." (48:10). This statement constitutes another piece of exculpatory evidence, which had defense counsel known about it, she, like any reasonable prudent attorney, "would have definitely tried to introduce that at trial." (82:18).

The April 20 report also raises questions about, why, if there were concerns that Hineman was abusing SJS, did Grandma take SJS to be examined for signs sexual abuse over a month after the family

had cut off all contact with Hineman. Perhaps it was because, as revealed in the April 20 report, Grandma was also concerned an "autistic son" was sexually abusing SJS. (48:10). In addition to the fact that this information would have undoubtedly triggered a defense investigation into the autistic son, this information also underscores that it was SJS's behaviors, not Hineman's, that led to the concern that SJS was being abused.

The May 29 report indicates that the school teacher, the school counselor, Dad, Grandma and "others involved in the situation for [SJS]" had been communicating about SJS's declining behaviors and Hineman's alleged role in the decline. (48:13, 15). Like the March 12 report, the May 29 report also identifies a conversation with SJS among the sources of information for the report, raising the possibility that SJS was repeatedly questioned about Hineman and inappropriate sexual touching. (48:13). All this should have been investigated. Above all, the May 29 report confirms that the adults in SJS's life were operating under the assumption that Hineman had assaulted SJS long before SJS made any statement to that effect. (48:10, 13, 15-17).

Had counsel obtained these CPS reports before trial, a defense expert[7] could have rebutted the therapist and others' assumption that SJS's unusual behaviors meant that he was being sexually abused. To the extent Hineman became a suspect due to SJS's behavior problems, "there is not a profile of an abused child that could be used to substantiate a history of, or the presence of physical or sexual abuse. Children evidence a number of behaviors for many different reasons." (58:9).

A defense expert also would have been able to introduce the jury to many documented psychological phenomena affecting the reliability of a child's delayed disclosure, including interviewer bias, repeated questioning, negative stereotype induction, source misattribution, therapeutic effects on memory, and other empirical factors that may affect the reliability of a child's statements. (*See* 58:2-5, 9 and 41:91-94 for a discussion of these phenomena). But even without an expert opinion to explain the research and connect the dots, the additional information in the CPS reports establish many factors were present that would cause a lay person to conclude SJS's eventual disclosure was tainted.

[7] Postconviction counsel hired Dr. David Thompson to review the case. Although his review was limited because SJS's treatment records were never released to the defense, he submitted a report describing the scientific research on a variety of factors that may affect the reliability of a child's statements. (58).

In short, the CPS reports offered a host of reasons to support the defense theory that SJS's eventual disclosure was unreliable and not credible. Had counsel obtained the critical information regarding how Hineman became a suspect in this case, the entire trajectory of the defense investigation and strategy would have been altered. There can be no confidence in the outcome when such significant facts were unknown and uninvestigated by the defense. Hineman was prejudiced by counsel's deficiency.

B. Failure to make an opening statement

The trial began with the state's opening statement previewing what it believed the evidence would show – that Hineman sexually assaulted SJS. (78:16-18). In response, the defense said nothing. (78:18).

While it is not *per se* deficient to decline to make an opening statement, there must be a reasonable strategy for not doing so. *Domke*, 2011 WI 95, ¶49. Here, there was not. Trial counsel testified the reason she decided not to make an opening statement was that she did not know what exactly Hineman would say. (82:32). But under the facts of this case, this is not a reasonable strategic explanation.

Trial counsel was aware that Hineman never wavered in his statement that he did not assault SJS. (82:32). Trial counsel was also aware that SJS's

statements in the CAC interview – the centerpiece of the state's evidence against Hineman – were internally inconsistent and therefore, in her view, not credible. (82:32-33). Any reasonable, prudent attorney would have begun with a forceful statement that the evidence would show that Hineman had not assaulted SJS. A reasonable, prudent attorney would have introduced the theory of defense that SJS must not be, for some reason, telling the truth about Hineman assaulting him. At the very least, a reasonable, prudent attorney would have reminded the jury that Hineman had consistently maintained his innocence and it was the state's burden to show, beyond a reasonable doubt, that he was not.

A reasonable, prudent attorney would not say nothing, as defense counsel did. In law, unrefuted claims are deemed conceded. *Charolais Breeding Ranches, Ltd. v. FPC Securities Corp*. 90 Wis. 2d 97, 108–09, 279 N.W.2d 493 (Ct.App. 1979). It is reasonable to conclude that jurors would similarly interpret the defense's non-response to the state's opening as a concession.

Further, criminal defendants have a constitutional right not to testify. U.S. CONST. amends. V. Often the decision to testify or not is not made until the middle of trial. Foregoing an opening statement because you are not sure what your client is going to say, when he has a constitutional right to say nothing at all, is not reasonable strategy. Regardless of what Hineman

was going to say, any reasonable prudent attorney would have used the opening as opportunity to tell the jury he did not do it.

Hineman was prejudiced by counsel's choice to not make an opening statement because the state's evidence in this case was so slim – no third party witnesses to the assault, no DNA or other medical evidence, not even a consistent description about when and where the alleged assault happened. In the words of the circuit court, "the verdict could have gone either way." (80:24). It is reasonably probable that had the jury been introduced to the idea that kids make things up – even things as serious as a sexual assault – before hearing the evidence, they would have been more open to the possibility that SJS's accusation wasn't credible and they would have acquitted. Hineman was prejudiced by defense counsel's failure to make an opening statement.

C. Failure to object to improper expert testimony

After forensic interviewer Heather Jensen testified generally about the child advocacy center and the forensic interview process, the prosecution asked her to explain the concept of "piecemeal disclosure" and "delayed disclosure." (78:27). Jensen then cited "research" and explained why children might not immediately disclose. (78:27-29). There was no objection by defense counsel that this constituted expert testimony.

The state conceded below that Jensen's testimony on delayed and piecemeal disclosure was expert testimony and therefore also conceded that the state violated the discovery statutes by not noticing her as such. (50:11). The question becomes then, was it reasonable for defense counsel not to object to the unnoticed, improper expert testimony?

Defense counsel testified she did not object because "I didn't think this was a case of delayed disclosure." (82:34). Her strategy, she explained, was to deal with Jensen's expert testimony by establishing that it was inapplicable because SJS had immediately disclosed. (82:34). Once again, the defense strategy was not reasonable. *Domke*, 2011 WI 95, ¶49.

The decision not to object to the improper expert testimony in this case is objectively unreasonable. The expert testimony served only to bolster the reliability of SJS's delayed and incomplete statements, exactly what the defense was trying to attack. Jensen's description of delayed and piecemeal disclosure gave the jury a reason, supported by "research," for why it was not necessary to have precise details about what had happened. (78:27-28). Jensen's expert testimony told the jury that despite the long delay and inconsistency in details, SJS's statements were still reliable.

Defense counsel's subjective strategy to counter the improper expert testimony by establishing that SJS had immediately disclosed is also unreasonable.

Had SJS immediately disclosed, it is far more likely that the assault did in fact happen. Further, defense counsel elicited testimony from Grandma and Officer Hintz that SJS had not immediately disclosed the assault, despite SJS's testimony that he had. (78:67, 108). By impeaching SJS's testimony, defense counsel was establishing that SJS's statement of immediate disclosure was not credible; this was, therefore, a case of delayed disclosure. To attack Jensen's improper expert testimony by trying to establish this was a case of immediate disclosure – when it could have been kept out altogether – undermined defense strategy and bolstered SJS's incriminating statements; this strategy was unreasonable.

Hineman was prejudiced by counsel's failure to object because without this testimony, the jury would have been left with only the facts – that SJS never told anybody that he had been inappropriately touched by Hineman prior to the August 5 CAC interview, nearly a year after it allegedly happened, and that he never gave a specific time frame about when it happened until he testified at trial, two and one-half years later. Without Jensen's expert testimony that children may give reliable statements even when they are delayed and incomplete, the jury would have likely concluded that the lack specific details and the significant delay in disclosing must mean the child's statements were unreliable and the assault must not have happened.

Because the state's evidence was so slim in this case, anything that strengthened the credibility of the child was prejudicial. Here, not only did the jury hear the improper expert testimony but also the prosecution highlighted it during closing, arguing SJS's accounts were reliable, just incomplete due to the recognized phenomenon of piecemeal disclosure. (79:16) It is therefore likely the jury relied on Jensen's improper expert testimony in concluding SJS was credible. There is a reasonable probability that without it, the jury would have acquitted.

D. Conceding guilt at closing

> *"I believe the sexual assault happened. It happened the day after trick-or-treating. It happened when his dad wasn't there. It would have had to happened when he was watching SJS during those two weeks."*

– Defense counsel, in closing (79:24; App. 127) (emphasis added).

It is not clear what defense counsel was trying to convey in commenting at closing that she believed the assault happened—or if, perhaps, she misspoke or lost her train of thought. What is clear is that the jury heard Hineman's sole advocate say, "I believe the assault happened." No reasonable, prudent defense attorney would ever argue this. Defense counsel performed deficiently by making these statements.

In addition to the obvious fact that there could be no strategic reason for an attorney to make statements such as these, defense counsel testified she had no strategic reasons for making these statements. She testified she was not being facetious, using sarcasm or making a joke; rather, these statements were the result of some sort of mistake. (82:44).

Defense counsel speculated the court reporter must have erred. (82:44). But this was not a typo. It is not a situation where a word was misspelled or transposed. *Cf. State v. Agnello*, 226 Wis. 2d 164, 170 n.6, 593 N.W.2d 427 (1999) (transcript said "relative" but defense attorney must have said "relevant"). Defense counsel said four times that she believed the sexual assault happened, complete with details about when and where and how it happened. And in any event, the circuit court made a finding of fact that defense counsel did make these statements. (62:11).

Despite defense counsel's testimony that she had no strategic reason for making these statements however, the circuit court stated "the court recalls an incredulous tone being taken when those concessions were made, as one takes when one is indicating doubt." (62:11; App. 111) The court determined that in "speaking ironically" defense counsel had made an effective closing argument. (62:12; App. 112). If that had been defense strategy, she would have so testified. Rather defense counsel testified these statements were not made in an attempt to be ironic

– they were a mistake. The circuit court therefore erred when it provided a contrary strategic reason for making these concessions. *State v. Jenkins,* 2014 WI 59, ¶36, 355 Wis. 2d 180, 848 N.W.2d 786 (a circuit court "may not construct strategic decisions which counsel does not offer").

In addition to the fact that a circuit court can't construct a strategic reason, even if defense counsel had made these statements in an ironic spirit, this would be unreasonable. At the very least, such a strategy would necessitate very clear verbal markers that the concession of guilt should not be taken literally. Here, there were none. Conceding Hineman's guilt, regardless of the tone of voice used, was not reasonable.

In this instance, the prejudice argument is easy. It is *per se* prejudicial to concede guilt. *See e.g. United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991); *Haynes v. Cain,* 272 F.3d 757, 762 (5th Cir.2001); *United States v. Simone*, 931 F.2d 1186 (7th Cir.1991); *Francis v. Spraggins,* 720 F.2d 1190, 1193 (11th Cir.1983); *Wiley v. Sowders,* 647 F.2d 642 (6th Cir.1981).

And even if it were not *per se* prejudicial, defense counsel's comments were actually prejudicial. Defense counsel made these statements in the context of telling the jury the evidence is equivocal and contradictory. (79:22-24). Then she said that she, personally, believed the assault did happen, and in fact, she described it happening in a way that

matched the state's theory of guilt. (79:24). She then continued to argue that because there were so many versions of events the state had not met its burden; she did not argue Hineman was innocent. (79:22-26). In this context, defense counsel's statements that she personally believed the assault happened, had to have influenced the jury's decision. It is reasonably possible had she not said she personally believed the assault happened (and instead argued it did not) the jury would not have convicted. It is hard, if not impossible, to have confidence in the outcome of the case when the defense advocate inadvertently concedes guilt.

III. Hineman Is Entitled to a New Trial in the Interests of Justice.

An appellate court may reverse a conviction if it determines the controversy has not been fully tried. *State v. Zdzieblowski*, 2014 WI App 130, ¶24, 359 Wis. 2d 102, 857 N.W.2d 622; *see also* Wis. Stat. § 752.35. (quotation omitted). If a court determines the controversy is not fully tried, it may do so without first concluding that the outcome would be different on retrial. *Id.*

In addition to the *Brady* violation and the multiple instances of ineffective assistance of counsel, other prosecutorial errors prevented this trial from being fully tried. Namely, the state failed to notice the two expert witnesses it intended to call at trial, despite the fact that its theory of guilt was reliant on expert testimony. Further, the post-conviction

discovery shows treatment records contain important information necessary to challenge the state's theory of guilt. Without a review of the record and an opportunity for the defense to use any relevant and material information, this too shows the real controversy in this case has not been not fully tried.

A. Prosecutorial errors prevented a full and fair trial.

The state's theory of the case wasn't rooted in the facts alone but rather, the theory of guilt was based in an application of specialized knowledge of experts. Specifically, the state was relying on Jensen's expert interpretation of the reactive behavior of a victim in the form of delayed and piecemeal disclosure to bolster SJS's statements and on Officer Hintz's specialized knowledge of the grooming behavior of sexual predators to recharacterize Hineman's objectively neutral, if not positive behavior towards SJS, into criminal acts. The fact that the state failed to notice these two witnesses as experts as required by Wis. Stat. § 971.23(e) put the defense at a severe disadvantage. Even if there were strategic reasons for not objecting to improper expert testimony and/or not moving for a mistrial after the jury heard about grooming, the state was able to advance its theory of the case without giving the statutorily required notice. Not only was this fundamentally unfair, it prevented the controversy from being fully tried.

Although the defense objection to grooming testimony was sustained, it was too late. The jury was informed that the "concept of grooming" [8] existed and that law enforcement was trained on it for the investigation of child sex crimes. (78:92). Although the jury was not informed about the details of what grooming entails, they learned that Officer Hintz determined Hineman's gifts and attention to SJS and his family were not acts of kindness in her view but rather, due to her training, an alarming red flag. (78:91-92). Despite the objection, the jury had been introduced to another, sinister, view of these facts. Without this testimony, it is unlikely a juror would have thought it unusual, or untoward, that a man, who was there for the child's birth and in the role of step-father, would want to continue a relationship with the child.

This testimony on grooming combined with the testimony on delayed and piecemeal disclosure was fatal to the defense. If the state wished to advance its theory of the case through experts, it should have noticed them as such, and given the defense fair opportunity to respond. Defense counsel was forced to deal with the unnoticed expert testimony on her feet

[8] Sexual grooming is a preparatory process in which a perpetrator gradually gains a person's or family's trust with the intent to be sexually abusive. Pollack, David, "Understanding Sexual Grooming in Child Abuse Cases" Nov. 1, 2015 available at: https://www.americanbar.org/groups/child_law/resources/child_law_practiceonline/child_law_practice/vol-34/november-2015/understanding-sexual-grooming-in-child-abuse-cases/

and without preparation. Had the experts been noticed as required by law, it is likely the trial preparation and strategy on how to deal with their proposed testimony would have been more thought through and complete. In other words, the state's theory of guilt would have been subject to adversarial testing in the manner proscribed by law, allowing for the controversy to be fully tried. Because this did not happen, in the interests of justice Hineman is entitled to a new trial.

B. An in camera review of SJS's treatment records is necessary to fully try this controversy.

The information obtained postconviction shows that this case went to trial after an incomplete investigation. While it is arguable that there is a meritorious claim that trial counsel was deficient for not filing a *Shiffra/Green* motion to obtain an in camera review of SJS's treatment records based on the information she had in her possession prior to trial, the fact is that due to her deficiencies as well as the state's failure to disclose the March 12 report, trial counsel was not in possession of information that would have significantly strengthened a *Shiffra/Green* motion. Now that the information is known, the *Shiffra/Green* relevancy standard to obtain an in camera review would be easily met.

Under *Shiffra/Green* a defendant may obtain otherwise confidential or privileged evidence prior to trial if the court conducts an in camera review and

determines the sought after information is relevant and material to the defense. *Shiffra,* 175 Wis. 2d 600; *Green*, 253 Wis. 2d 356; *see also Ritchie*, 480 U.S. 39. A defendant must "set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence and is not merely cumulative to other evidence available to the defendant." *Green*, 253 Wis. 2d 356, ¶34. If a defendant meets the initial relevancy burden under *Shiffra/Green* for in camera review, the court reviews the records in camera to "determine whether the records contain any relevant information that is 'material' to the defense of the accused." *State v. Solberg*, 211 Wis. 2d 372, 386, 564 N.W.2d 775 (1997) (*quoting Ritchie*, 480 U.S. at 58).

There is more than a reasonable likelihood that SJS's records contain additional relevant information necessary to a fair determination of Hineman guilt or innocence. Medical records showing no signs of sexual abuse are clearly helpful to the defense. So too are therapy records. The way in which the therapist or school counselor addressed her concerns about the alleged abuse with SJS is relevant to Hineman's defense. Research shows therapeutic treatments may affect the reliability of memory. See Ex. 4 at 3. Effective therapies can include the regular revisiting, discussion and even reconstruction of the alleged event but as a result these legitimate therapies create false memories. (58:3, 8). Further, therapy discussions about the family relationship with

Hineman would also affect SJS's recollections and event report. (58:8). All discussions with the therapist concerning abuse, "Uncle Jeff," family relationships and sex, are therefore relevant to reliability of SJS's eventual statements during the CAC interview and at trial.

Importantly, the therapy records (from both the school counselor and the private therapist) would also document any conversations between the therapist, Dad, school personnel and SJS. It is currently unknown how exactly Hineman became identified as the source of SJS's knowledge about oral sex practices. It is not clear if SJS spontaneously told Dad Hineman had told him about oral sex or if SJS provided information to Dad in response to questioning after Dad was told about the reporter's concerns. It is also not clear when the reporters spoke with SJS and when they did, whether SJS was asked about Hineman or inappropriate sexual touching. A review of the therapy records is necessary to determine how exactly Hineman was implicated as the source of SJS's information and the extent to which repeated conversations may have made SJS susceptible to suggestion.

Further, if Hineman was implicated on Dad's statement alone, there are reasons to believe Dad had a motive to implicate Hineman. Dad has a criminal history and was charged with two counts of sexual assault of a child in 1997. *See* Racine County case 97CF455. It is reasonably possible that Dad's implication of Hineman was to deflect attention away

from an investigation into his own behavior. This theory is corroborated by Officer Hintz July 14 police report which states Dad was "confused and nervous" when law enforcement first questioned him about the situation. (41:31; App. 114). In addition, when Hineman was interviewed, he reported to law enforcement that he had concerns about parental neglect (including excessive drinking, yelling at and hitting SJS, not laundering SJS's clothes) in the S. home. (41:80). Although these allegations of neglect do not appear to have been investigated, they again show that Dad had a motive for deflecting attention away from his own behaviors.

The defense has a due process right to challenge the way Hineman became a suspect and the therapy records are necessary to do this effectively. Without an in camera review for relevant, material information, this controversy has not been fully tried. Hineman is entitled to a new trial.

* * *

This case involves multiple, significant errors and little evidence of guilt. A conviction that is the result of a multitude of errors not only puts the integrity of the criminal justice system at stake, it also puts the rights of future innocently accused at stake. It is imperative that if Hineman, or anyone else in his shoes, is convicted of this crime, it is the product of all the procedural and substantive protections provided under the Constitution and the

law. Because Hineman did not receive that in his trial, he is entitled to a new one.

CONCLUSION

For the reasons stated, Jeffrey L. Hineman respectfully requests that the court reverse his conviction and remand for a new trial.

Dated and filed by U.S. Mail this 3rd day of July, 2020

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,283 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 and filed by U.S. Mail this 3rd day of July, 2020.

Signed:

FRANCES REYNOLDS COLBERT
Assistant State Public Defender

CERTIFICATION AS TO 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 § 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(3)(a) or (b); 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.

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