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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

No. 2020AP878-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

AVAN RONDELL NIMMER,

Defendant-Appellant.

PETITION FOR REVIEW AND APPENDIX

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TABLE OF CONTENTS

Page

ISSUE PRESENTED....1

CRITERIA FOR REVIEW....1

STATEMENT OF THE CASE....2

ARGUMENT....5

Review is warranted to clarify and harmonize inconsistent appellate rulings on the oft-raised question of reasonable suspicion in the context of ShotSpotter and shots-fired reports. 5

A. This Court has not addressed reasonable suspicion in the context of an immediate police response to a ShotSpotter report. 6

1. Reasonable suspicion requires courts to consider all of the circumstances, including the source of the information bringing a defendant to law enforcement's attention. 6

2. The court of appeals failed to apply the totality of the circumstances test when it omitted and isolated relevant facts....8

B. The court of appeals' decision conflicted with its other decisions involving similar police conduct....10

C. That the decision in this case is a per curiam should not deter this Court from granting review....13

CONCLUSION....15

ISSUE PRESENTED

Does law enforcement, within a minute of receiving a ShotSpotter report of shots fired at a residential address, have reasonable suspicion to stop the only person outside the address, where the person reacts to the police by grabbing at his waistband, angling one side of his body away from police, and speeding his pace away from the officers?

The circuit court concluded that police had reasonable suspicion to stop Avan Rondell Nimmer under the totality of those circumstances.

The court of appeals reversed, holding that each of the individual actions that police observed, without more, could not support reasonable suspicion.

This Court should grant review and reverse.

CRITERIA FOR REVIEW

Whether police have reasonable suspicion to conduct a *Terry* stop involves the application of constitutional principles under the Fourth Amendment of the United States Constitution, and article I, section 11 of the Wisconsin Constitution. While the legal standards involving reasonable suspicion are well-settled, the application of those principles to new factual circumstances presents a real and significant constitutional question that warrants this Court's review. *See* Wis. Stat. § (Rule) 809.62(1r)(a).

The court of appeals' decision in this case is in conflict with other decisions it has rendered with regard to reasonable suspicion to stop following a ShotSpotter alert or other shots-fired reports. *See* Wis. Stat. § (Rule) 809.62(1r)(d). In this instance, police responded to the ShotSpotter alert and apprehended Nimmer not only consistently with how they are

trained and how the court of appeals has assessed reasonable suspicion in other instances but also objectively reasonably under the circumstances. The decision in this case, even as a per curiam, will create confusion for law enforcement and subsequent courts assessing reasonable suspicion in the many criminal cases in which this issue arises.

Additionally, the issue of how to assess reasonable suspicion in the context of ShotSpotter alerts is new to this Court and warrants its input. *See* Wis. Stat. § (Rule) 809.62(1r)(c)2. This case provides an opportunity for this Court to address the important function ShotSpotter technology provides for law enforcement and public safety, and how its role in individual police-citizen encounters informs reasonable suspicion. Thus, a decision from this Court will clarify and harmonize the law on novel facts.

STATEMENT OF THE CASE

Nimmer pleaded guilty and was convicted of being a felon in possession of a firearm, based on a *Terry* stop and arrest by Milwaukee police on June 15, 2019. Before Nimmer entered his plea, he filed a motion to suppress the firearm police recovered from him, arguing that law enforcement lacked reasonable suspicion to stop him. The circuit court held a hearing on the motion.

At that hearing, Milwaukee Police Officer Anthony Milone testified that he was on duty on June 15, 2019, with his partner, Officer Chad Boyack. (R. 25:4–6.) Milone and Boyack were traveling in a marked squad when they received a ShotSpotter alert of four rounds fired a few blocks away at 3390 North 21st Street. (R. 25:7.) ShotSpotter is a gunshot location system that uses acoustic sensors to locate gunfire and alert law enforcement to its location. (R. 25:4–5.) Milone had responded to over a thousand such alerts in his nine years as a police officer. (R. 25:6.) When responding to these alerts,

Milone looks for potential victims, suspects, witnesses, or other evidence identifying the source of the shots. (R. 25:6.) When Officer Milone finds individuals at the reported location of the shots, he observes "what their response is upon sight of police, see[s] if they are shot, see[s] if they take off running, see[s] if they start grabbing any part of their clothing, any part of their body." (R. 25:6.)

Within a minute of receiving the ShotSpotter alert, Milone and Boyack observed Nimmer at the intersection of 21st and Townsend, which was "basically the exact location where the ShotSpotter came in." (R. 25:7–8, 12.) Nimmer was the only person officers saw. (R. 25:8.) Milone noticed that Nimmer, who had not yet seen the police, had his right hand in his right pants pocket. (R. 25:8.) When Nimmer turned and saw the squad car, he "immediately looked away and began accelerating his walking pace." (R. 25:8.) Milone stated that based on those observations and his experience, he believed Nimmer was possibly trying to flee from them. (R. 25:8–9.)

After Nimmer sped up, he "began digging around his left side with his left hand." (R. 25:9.) At that point, Milone got out of the squad car and approached Nimmer from behind. As he did so, Nimmer turned his left side away from Milone. (R. 25:9.) In the meantime, Officer Boyack drove the squad car past Nimmer, stopped it, and stepped out. When that happened, Nimmer stopped walking. (R. 25:9–10.) Based on the ShotSpotter alert and their observations of Nimmer, the officers conducted a *Terry* stop. (R. 25:10.)

Nimmer complied, and when Milone patted Nimmer down, Nimmer informed Milone that he had a gun. (R. 25:10.) Milone then retrieved a .40 caliber pistol from Nimmer's waistband on his left side. (R. 25:10.) After learning that Nimmer had a felony conviction, the officers arrested him. (R. 25:11.)

The circuit court denied Nimmer's motion to suppress. It found Officer Milone to be credible and made findings consistent with his testimony. (R. 25:35.) It found that the officers encountered only Nimmer at the location of the ShotSpotter alert within a minute of receiving the alert. (R. 25:35.) It found that Nimmer sped up his walking pace in reaction to seeing the officers and bladed his body to conceal his weapon. (R. 25:35–36.) The key, the court found, was the close timing of the officers' observations following the ShotSpotter alert: "[r]eally, anyone that they encountered within a minute or two of receiving the alert should have been investigated if they were within a couple of blocks of the alleged shots being fired." (R. 25:36.) In all, the court determined, the officers were "completely appropriate in their investigation [of] the ShotSpotter complaint." (R. 25:37.)

Nimmer appealed to the court of appeals, arguing that the circuit court's decision on reasonable suspicion was wrong. The court of appeals agreed with Nimmer and reversed. *State v. Avan Rondell Nimmer*, No. 2020AP878-CR (Wis. Ct. App. Dec. 15, 2020) (per curiam) (Pet-App. 101–11). In doing so, the court isolated each of the facts supporting reasonable suspicion and matched them to cases holding that those circumstances, with little more, cannot support reasonable suspicion. To start, it relied on an unpublished case, *State v. Lewis*, No. 2017AP234-CR, 2017 WL 3149755 (Wis. Ct. App. July 25, 2017) (Pet-App. 115–17), in which the State conceded that officers lacked reasonable suspicion to stop a defendant walking with his hand on his waistband in the general area of a shots-fired report. (Pet-App. 106–07.)

It also relied on *State v. Pugh*, 2013 WI App 12, 345 Wis. 2d 832, 826 N.W.2d 418, in which the court of appeals held that an individual's presence in a high-crime area and "blading" a side of his body from police, without more, was not sufficient reasonable suspicion. (Pet-App. 107.) Finally, it

relied on *State v. Washington*, 2005 WI App 123, 284 Wis. 2d 456, 700 N.W.2d 305, where officers investigating a loitering complaint conducted a *Terry* stop based on Washington's presence near the relevant address and where police knew Washington and his history of drug crimes. (Pet-App. 108–09.)

Applying those cases to the facts here, the court discounted each individual fact informing the officers' interaction with Nimmer as insufficient to meet the reasonable-suspicion threshold. Hence, that Nimmer was in an area of suspected criminal activity was not enough. That Nimmer accelerated his pace away from police was not enough. That Nimmer bladed his body from police was not enough. And that Nimmer was "digging around" on his left side was not enough. (Pet-App. 110–11.) Further, the court of appeals interpreted the circuit court's stray remark finding significant that officers made their observations within a minute of the reported shots as that court's having adopted and applied an overly broad reasonable-suspicion standard. (Pet-App. 111.)

But it is the court of appeals, not the circuit court, that applied the wrong standard. It isolated a selection of facts contrary to the requirement that it consider the totality of facts and circumstances in context. The State respectfully asks this Court to grant review and reverse the decision of the court of appeals.

ARGUMENT

Review is warranted to clarify and harmonize inconsistent appellate rulings on the oft-raised question of reasonable suspicion in the context of ShotSpotter and shots-fired reports.

While the overarching legal question in this case is not particularly novel, the circumstances—involving police response to a ShotSpotter report—are both novel to this Court and involve a relatively new and evolving law enforcement tool. Further, the court of appeals' decision, in which it relied in part on an unpublished decision, conflicts with other unpublished decisions involving facts similar to those in Nimmer's case. Finally, the court of appeals' decision is likely to have legal and practical impact beyond Nimmer's case, notwithstanding its nonprecedential nature.

A. This Court has not addressed reasonable suspicion in the context of an immediate police response to a ShotSpotter report.

This case involves a police response to a ShotSpotter report. The most significant fact to the circuit court in holding that police had reasonable suspicion to stop Nimmer, in addition to the other facts available to the officers, was that the officers arrived at the address where ShotSpotter indicated shots were fired within a minute of that report. The court of appeals did not appear to consider the nature or immediacy of the investigation in its analysis. A decision by this Court will guide lower courts on how to factor the circumstances surrounding law enforcement's response to a ShotSpotter report into a reasonable suspicion analysis.

1. Reasonable suspicion requires courts to consider all of the circumstances, including the source of the information bringing a defendant to law enforcement's attention.

Reasonable suspicion means that a police officer "possess[es] specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." *State v. Young*, 2006 WI 98, ¶ 21, 294 Wis. 2d 1, 717 N.W.2d 729

(citation omitted). What constitutes reasonable suspicion is a common-sense, totality-of-the-circumstances test that asks, under all the facts and circumstances present, "[w]hat would a reasonable police officer reasonably suspect in light of his or her training and experience"? *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996) (citing *State v. Anderson*, 155 Wis. 2d 77, 83–84, 454 N.W.2d 763 (1990)). That suspicion must be particularized and articulable: "A mere hunch that a person . . . is . . . involved in criminal activity is insufficient." *Young*, 294 Wis. 2d 1, ¶ 21 (citing *Terry v. Ohio*, 392 U.S. 1, 27 (1968)).

That said, a police officer has reasonable suspicion to stop a person when he or she observes acts that are individually lawful, but when taken together, allow that officer to objectively discern "a reasonable inference of unlawful conduct." *Waldner*, 206 Wis. 2d at 60. Police do not need "to rule out the possibility of innocent behavior before initiating a brief stop." *Id.* at 59 (citing *Anderson*, 155 Wis. 2d at 84). In weighing reasonable suspicion, courts consider the information police receive—i.e., tips or witness reports—directing them to investigate a particular location or person. *See State v. Miller*, 2012 WI 61, ¶ 31, 341 Wis. 2d 307, 815 N.W.2d 349.

This case does not involve a citizen tip, but rather a technological one. ShotSpotter is a sensor-based system that uses acoustic technology to recognize the specific sound of gunfire and pinpoint its location. Based on the locations of the sensors, ShotSpotter can identify within 80 feet, and often closer, of where gunfire discharged. *See* Alexandra S. Gecas, Note, *Gunfire Game Changer or Big Brother's Hidden Ears?: Fourth Amendment and Admissibility Quandaries Relating to ShotSpotter Technology*, 2016 U. Ill. L. Rev. 1073, 1079–80 (2016). Identifying such gunfire "takes about forty seconds," and the system then immediately relays the gunfire's location

to local police. *Id.* at 1080. ShotSpotter serves numerous functions, from pinpointing instances of gunfire quickly to law enforcement and allowing them to efficiently respond to and investigate such reports, to deterring instances of shots fired and promoting community safety and trust. *Id.* at 1083–84. At least one study revealed that "ShotSpotter correctly detected 99.6 percent of 234 gunshots at 23 firing locations" and that it pinpointed over 90 percent of those shots within 40 feet. *Id.* at 1083.

To be sure, ShotSpotter provides no information on the identity of possible shooters and whether they remained at the scene. Alone, a ShotSpotter report likely will not supply reasonable suspicion for police to stop any individual they see at the reported location. But, particularly in cases where police are able to respond immediately to a ShotSpotter report and observe an individual outside that address, as they did here, that information should weigh significantly into the reasonable suspicion analysis and inform the law enforcement's other observations supporting the stop.

2. The court of appeals failed to apply the totality of the circumstances test when it omitted and isolated relevant facts.

Whether police have reasonable suspicion to conduct a *Terry* stop arises regularly in criminal cases in Wisconsin. With the variety of facts that accompany issues of reasonable suspicion and the frequency with which they come up, this Court has regularly, and appropriately, granted review to provide needed guidance for lower courts, not to mention law enforcement.[1] This Court should likewise grant review in this

[1] *See, e.g.*, *State v. Anderson*, 2019 WI 97, 389 Wis. 2d 106, 935 N.W.2d 285; *State v. Blatterman*, 2015 WI 46, 362 Wis. 2d 138, 864 N.W.2d 26; *State v. Young*, 2006 WI 98, 294 Wis. 2d 1, 717

case, given that the court of appeals' decision neither reflects a correct application of the reasonable-suspicion standard, nor rests consistently with its other decisions in similar cases.

As an initial matter, the court of appeals disregarded the circuit court's findings and conclusion that the officers had reasonable suspicion based on the totality of the circumstances, including the reasons that police came to the address where Nimmer was found and their observations of Nimmer's response to them. The circuit court's side comment that officers could have reasonably stopped anyone in the area in response to a shots-fired report was simply that—a side comment. It did not undercut the circuit court's determination that Officer Milone was credible and that the totality of the circumstances established individualized reasonable suspicion to stop Nimmer in this case.

Moreover, as noted above, the court of appeals did not address facts relevant to the analysis—including the nature of the police investigation (a minute-old ShotSpotter report of shots fired at a particular address) and Nimmer's being the only person present outside the address. Instead, the court seemed to home in on what Officer Milone observed after arriving at the scene. But leaving out that the report of gunshots drew officers to the location, that the gunshots occurred a minute earlier at that location, and that Nimmer was the only person there omits important context informing the officers' subsequent observations.

In addition, the court isolated each of Milone's observations and deemed each to be not enough to support reasonable suspicion. But that is contrary to the totality of the circumstances analysis required in these cases. *See State v.*

N.W.2d 729; State *v. Williams*, 2001 WI 21, 241 Wis. 2d 631, 623 N.W.2d 106; *State v. Richardson*, 156 Wis. 2d 128, 456 N.W.2d 830 (1990).

Anderson, 2019 WI 97, ¶ 33, 389 Wis. 2d 106, 935 N.W.2d 285 (stating that reasonable suspicion "is a fairly low standard to meet" and is based on the totality of the circumstances). And contrary to the court of appeals' reasoning, this wasn't a case where Nimmer was in the location of a suspected crime, without more; or was blading his body, without more; or was grabbing at his waistband, without more; or was walking quickly away from police, without more. Rather, all of those facts, along with the ShotSpotter report, inform each other and the inferences that law enforcement reasonably drew. And taking all of those facts together, the police had reasonable suspicion to stop Nimmer as they did.

B. The court of appeals' decision conflicted with its other decisions involving similar police conduct.

The court of appeals' decision reflects at least two additional problems. First, it relies on an unpublished decision, *Lewis*, that neither party cited as persuasive authority. Had the parties raised it, the State would have distinguished *Lewis* because there, (1) the State conceded error and (2) the "officers stopped Lewis simply based on the fact that he was walking in a high crime area shortly after receiving an alert of 'shots fired' and that Lewis touched his waistband. Lewis was not running, was not looking over his shoulder for police, and did not match the description of the one suspect police had information about." *Lewis*, 2017 WL 3149755, *3 (Pet-App. 116).

Second, the court of appeals' reliance on *Lewis* supported a result inconsistent with other persuasive unpublished decisions, such as *State v. Tally-Clayborne*, No. 2016AP1912-CR, 2017 WL 4676647 (Wis. Ct. App. Oct. 17, 2017), and *State v. Norton*, No. 2019AP1796-CR, 2020 WL 2049123 (Wis. Ct. App. Apr. 14, 2020) (Pet-App. 118–24), both of which were more factually aligned with Nimmer's case.

In *Tally-Clayborne*, the court of appeals held that there was reasonable suspicion supporting a stop where patrol officers heard two gunshots about a block away and responded in the direction of those shots:

> [Officer] Dillman traveled in the direction of the gunshots and within twenty to twenty-five seconds, Dillman saw Tally-Clayborne and two other individuals. Dillman did not see anyone else. Given the potential safety risk, the potential ordinance violation, the time of night the shots were fired, the fact that Tally-Clayborne and his companions were the only individuals visibly present in the area of the shooting, and the fact that Tally-Clayborne attempted to walk away from the officers patting down his companions while reaching for his waistband, Dillman could reasonably suspect that Tally-Clayborne was involved in some sort of criminal activity.

Tally-Clayborne, 2017 WL 4676647, at *2 (Pet-App. 119). The circumstances in *Tally-Clayborne*—officer response within a minute of shots fired, officers saw only three people in the vicinity, Tally-Clayborne attempted to walk away and reached for his waistband—are not sensibly distinguishable from the circumstances here.

So too, in *Norton*, police had reasonable suspicion to stop Norton in a shots-fired investigation when Norton, who was sitting in a car, made furtive movements after police illuminated him with a spotlight:

> In October 2017, Milwaukee police officers responded to a call of shots fired in the area of Locust Street and North Booth Street. Two officers, who were part of the anti-gang unit and on patrol nearby, responded to the call at approximately 11:30 p.m. The caller had reported hearing approximately eight "rapid gunfire shots" in that area. However, there was no description of the shooter, nor did the report

> include information relating to a vehicle that may be involved.
>
> When they got to that area, the officers observed a vehicle legally parked on North Booth Street. The officers utilized their squad spotlight to see into the vehicle, and observed two people inside. According to the officers, the man in the driver's seat—later identified as Norton—became "startled" when the spotlight illuminated the car, and "began moving as if he was . . . placing something, or trying to place something behind his back."

Norton, 2020 WL 2049123, at *1 (Pet-App. 121). The court of appeals in *Norton* held that the combined circumstances, including the shots-fired report, the officers' seeing Norton's car, their shining a light in it, and their observing Norton's reaction and furtive movements, supplied reasonable suspicion for the officers to stop Norton. *Id.* at *3 (Pet-App. 123).

Like with *Tally-Clayborne*, it is not clear why there was reasonable suspicion in *Norton* and not in Nimmer's case. The court of appeals' selective and self-directed reliance on *Lewis* created a conflict with its more factually aligned persuasive cases.

Finally, this decision reflects a conflict in reasoning between decisions of different court of appeals' districts. For example, in *State v. Jimale Alonzo Laws*, No. 2017AP275-CR, 2018 WL 1040207 (Wis. Ct. App. Feb. 22, 2018) (per curiam) (Pet-App. 125–27),[2] the District IV court of appeals upheld the reasonableness of a stop when officers encountered Laws at 3:00 a.m. in a high-crime area with frequent shots-fired and robberies reports, where officers saw Laws react to their

[2] The State cites this per curiam decision in *Laws* not as precedent or persuasive authority but rather to alert this Court of a decisional conflict between court of appeals' districts. *See State v. Higginbotham*, 162 Wis. 2d 978, 997–98, 471 N.W.2d 24 (1991).

presence by placing a hand on his right pocket, blading his right side away from police, tried to make himself look smaller and walking behind a companion to look less conspicuous, and looking left and right as if considering whether to flee. *Id.* at *2–*3 (Pet-App. 126–27). As with the above cases, it is not clear why reasonable suspicion was present in Laws's case but not in Nimmer's. These inconsistent results provide further reason for this Court to take review.

This Court's review is warranted to harmonize and clarify the law and avoid further inconsistent lower court decisions.

C. That the decision in this case is a per curiam should not deter this Court from granting review.

As a final basis for granting review, even though the court of appeals' decision here lacks precedential value, its impact is likely to extend beyond Nimmer's case. To start, nothing prevents the court of appeals from reviewing or borrowing language from its own per curiam decisions when it drafts subsequent decisions. The State is not challenging that practice, which can assist those courts in efficiently resolving appeals and ensuring internal consistency in its decisions. That said, this erroneously reasoned and decided per curiam decision risks fostering inconsistent results in later cases.

Likewise, law enforcement has an interest in making legal stops and arrests, and prosecutors have an interest in obtaining legal convictions. Regardless whether the court of appeals authors an opinion or issues it as a per curiam, police and prosecutors are aware of the court of appeals' criminal law decisions, particularly in Fourth Amendment cases. Thus, even though this decision lacks precedential effect in the courts, it muddies the water for district attorneys, law

enforcement, and their trainers in how to ensure effective community policing within Fourth Amendment constraints. The likelihood of confusion is particularly potent here, given that the officers who stopped Nimmer acted consistently with their training and wholly reasonably under the circumstances.

Finally, allowing this decision to stand without further review undercuts the functionality and benefits of important public safety and law enforcement tools like ShotSpotter. Gunfire anywhere, but particularly in dense urban areas, imperils public safety. ShotSpotter enables police to respond quickly and with precision to shots-fired reports, to timely aid victims, if necessary, and to apprehend shooters. This Court's guidance is warranted to make clear for lower courts, law enforcement, and the practitioners how police officers may make legal stops of individuals when investigating ShotSpotter and similar shots-fired reports.

CONCLUSION

The State respectfully requests that this Court grant this petition for review.

Dated this 14th day of January 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. § 809.62(4) for a petition for review produced with a proportional serif font. The length of this petition is 3922 words.

Dated this 14th day of January 2021.

_____
SARAH L. BURGUNDY
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b)and 809.19(12).

I further certify that:

This electronic petition for review is identical in content and format to the printed form of the petition for review filed as of this date.

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

Dated this 14th day of January 2021.

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SARAH L. BURGUNDY
Assistant Attorney General

Index to the Appendix
State of Wisconsin v. Avan Rondell Nimmer
Case No. 2020AP878-CR

Description of document — Page(s)

State of Wisconsin v. Avan Rondell Nimmer,
Wisconsin Court of Appeals,
Case No. 2020AP878-CR,
Court of Appeals Decision,
dated December 15, 2020 101–111

State of Wisconsin v. Avan Rondell Nimmer,
Milwaukee Co. Circuit Court,
Case No. 2019CF2611,
Excerpt of Transcript, Motion Hearing,
dated August 19, 2019 112–114

State of Wisconsin v. Travail L. Lewis,
No. 2017AP234-CR,
2017 WL 3149755,
Court of Appeals Decision (unpublished),
dated July 25, 2017 115–117

State of Wisconsin v. Marcellous D. Tally-Clayborne,
No. 2016AP1912-CR,
2017 WL 4676647,
Court of Appeals Decision (unpublished),
dated October 17, 2017 118–120

State of Wisconsin v. Larry Alexander Norton,
No. 2019AP1796-CR,
2020 WL 2049123,
Court of Appeals Decision (unpublished),
dated April 14, 2020 121–124

State of Wisconsin v. Jimale Alonzo Laws,
No. 2017AP275-CR,
2018 WL 1040207,
Court of Appeals Decision (unpublished),
dated February 22, 2018 125–127

APPENDIX CERTIFICATION

I hereby certify that filed with this petition for review, either as a separate document or as a part of this petition, is an appendix that complies with Wis. Stat. § 809.62(2)(f) and that contains, at a minimum: (1) a table of contents; (2) the decision and opinion of the court of appeals; (3) the findings or opinion of the circuit court necessary for an understanding of the petition; and (4) portions of the record necessary for an understanding of the petition.

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

Dated this 14th day of January 2021.

_____

SARAH L. BURGUNDY
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(13).

I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

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

Dated this 14th day of January 2021.

_____
SARAH L. BURGUNDY
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